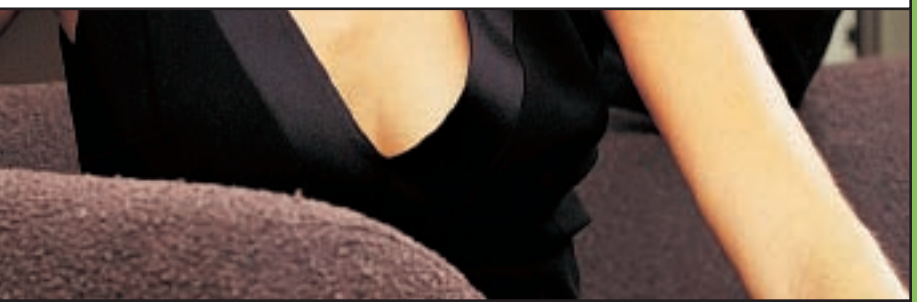
Employment Law Briefing

Insights on Legal Issues in the Workplace



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INSIDE ...

Punitive damages require malice or reckless indifference

Employer's harassment liability when victim fails to follow report procedure

ADA interactive process clarified

Reverse religious discrimination alleged

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Punitive damages require malice or reckless indifference

In *Parker v. General Extrusions*, the Sixth Circuit had to decide whether an employer had acted with the requisite malice or reckless indifference for a sexual harassment victim to be awarded punitive damages.

Employer fails to act

A shop worker alleged that several co-workers subjected her to pervasive sexual harassment. She complained several times to her foreman but received inadequate responses. When she began to describe an incident to the HR manager, he cut her off, stating, "That's hearsay, and I don't want to hear it." When she complained another time, he told her he would keep her complaint as confidential as possible, but then loudly told her about the results of the investigation in a public work area where her co-workers could hear.

On another occasion, the shop worker was so distraught by a problem with a co-worker that she went home. The foreman then punished her for absenteeism. She complained to the HR manager, who investigated her complaint but did nothing to stop the foreman from punishing her. This incident led her to go on sick leave.

When the worker returned from sick leave, a male co-worker once again sexually harassed her. She and the union representative complained in writing to the foreman. He phoned the HR manager, who had already left for the day. The HR manager told the foreman he would return the next day, a Saturday, to investigate. When the HR manager didn't show up the next day, the worker became distraught, ended up going on sick leave again and ultimately quit when her sick leave ended.

Punitive damages set aside

The shop worker sued, alleging Title VII violations. At trial, the jury awarded her $25,000 in compensatory damages and $75,000 in punitive damages. But the trial court set aside the punitive damages, and she appealed.

The Sixth Circuit noted that a Title VII claimant is entitled to recover punitive damages only when she can demonstrate by a preponderance of the evidence that her employer "engaged in a discriminatory practice … with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

A three-part inquiry

To determine whether punitive damages are proper under this standard, the Sixth Circuit relied on the three-part inquiry set by the U.S. Supreme Court in *Kolstad v. American Dental Association*.

First, a plaintiff must show that those perpetrating the discrimination acted with malice or reckless disregard as to whether they were violating federally protected rights.

Second, to impute liability to an employer, common law rules of agency apply. Most relevant here is that an employer is liable only if "the agent was employed in a managerial capacity and was acting in the scope of employment."

Third, even if a plaintiff successfully proves the first two inquiries, an employer can nonetheless avoid liability for punitive damages if it can show that it engaged in good-faith efforts to comply with Title VII.

No good-faith effort

The Sixth Circuit found that the employer here didn't dispute that the HR manager satisfied the "managerial agent standard." And whether he bore malice toward the shop worker was meaningless, because he was clearly recklessly indifferent to her plight. Finally, the testimony of the union rep, a co-worker and the HR manager established that the company had failed to make a good-faith effort to comply with Title VII.

The union rep testified that he didn't remember receiving any sexual-harassment training in his 10 years at the company until the worker's case became prominent. And a co-worker testified that, though she was aware of the sexual-harassment policy, in her experience the company didn't enforce it.

Moreover, the HR manager testified that, in his 21 years as the company's HR manager, he had never disciplined a foreman for failing to report a sexual-harassment incident.

So the Sixth Circuit reinstated the punitive-damages award.

Penny-wise and pound-foolish

Employers can reduce the possibility of punitive damages in discrimination cases by:

1. Adopting antiharassment and antidiscrimination policies,
2. Conducting regular training programs for supervisors and staff, and
3. Appropriately investigating employee complaints.

Punitive damages can vastly exceed all other damages in a discrimination case. Employers that save a few dollars by skipping sexual-harassment training may end up being penny-wise and pound-foolish.

Employer's harassment liability when victim fails to follow report procedure

Can an employer be held liable for sexual harassment when it knew of a victim's complaint, even though she hadn't followed the company's complaint procedure? That was the question before the Seventh Circuit in *Bombaci v. Journal Community Publishing Group*.

The harassment begins

Soon after the plaintiff was hired to work in a printing plant, two male co-workers began to sexually harass her. About three years later, she complained to a co-worker who she thought was a supervisor who told her she had reported the harassment to the plant manager.

Yet, when the plant later held an employees-only meeting at which no supervisors were present, the plaintiff was surprised to see the co-worker there. A few days later, the plaintiff complained about the harassment to a new HR employee, who immediately began an investigation that resulted in the two harassers being fired.

But the plaintiff felt her co-workers ostracized her after the firings, and she resigned a few months later.

Employee sues

The plaintiff filed suit for sexual harassment. The trial court threw out the case without a trial, finding that the facts were undisputed and the company was entitled to judgment as a matter of law.

On appeal, the Seventh Circuit noted that it had previously held that, if a co-worker creates a hostile work environment, an employer can be held liable only if it was negligent in discovering or remedying the harassment. A plaintiff alleging co-worker harassment must offer evidence that either:

- She notified the employer about the harassment, or
- The harassment was so pervasive that a jury could infer that the employer knew about it.

Sometimes the notice may come from someone other than the victim.

Reporting procedure

In this case, the company gave all new employees a handbook containing the company's sexual-harassment policy. The handbook stated:

> If you believe you have been harassed, you are encouraged to come forward without fear of reprisal by telling your supervisor/manager; … telling a supervisor/manager not in your work area; … telling the human resources manager; or … telling the president.

New employees also watch a video that identifies persons to whom employees should report sexual harassment. The plaintiff testified that she had received the handbook and watched the video but didn't read the sexual-harassment policy.

The plaintiff also testified that she had believed that she was reporting harassment to a supervisor when she discussed the problem with her co-worker. She thought the co-worker was a supervisor because she had trained her when she started her job, assigned work to her, and approved sick and vacation leave.

Co-worker not a supervisor

But none of the co-worker's duties suggest that she could affect the terms of another worker's employment in a way that could remedy sexual harassment. The court concluded that — though the plaintiff stated that she had believed that the co-worker was a supervisor — the plaintiff offered no evidence that this belief was reasonable in light of the co-worker's duties.

The plaintiff also alleged that the company had been negligent in remedying the harassment because the co-worker had reported it to the plant manager. The plaintiff testified that the co-worker had told her that she'd told the manager "the guys were harassing" the plaintiff and that the manager told the co-worker to "go up front, to say something up front."

The plaintiff said she had understood the manager's response to mean that the co-worker should take the complaint to the company's vice president, though neither the co-worker nor the plaintiff ever did so.

Credible complaint

The Seventh Circuit held that a jury could reasonably find that the company's response to the co-worker's complaint was negligent. The plant manager was one of several persons employees were instructed to take sexual-harassment complaints to. The court believed a jury could conclude that the plant manager had a duty to contact the plaintiff or at least make sure that another supervisor did so.

The Seventh Circuit had previously held that an employer can reasonably expect a sexual-harassment victim to make some minimal effort to follow up on an initial complaint when the employer requests her to do so. But the court had never held that an employer acts reasonably when a supervisor receives a credible sexual-harassment complaint and makes no effort to contact the alleged victim.

So the court reinstated the suit, concluding that a jury could reasonably find that the company had acted negligently.

What can we learn?

This case demonstrates the importance of an employer taking action when it has knowledge of discrimination — even when the alleged victim hasn't complained. Knowledge may be derived from observing an incident, overhearing a conversation, or fielding complaints from other employees. Regardless of the source of information, a wise employer acts as if the employee had made the complaint.

ADA interactive process clarified

The Americans with Disabilities Act (ADA) requires an interactive process between an employer and an employee who requests an accommodation because of a disability. In *EEOC v. Convergys Customer Management Group*, the Eighth Circuit described the process in detail.

The facts

A call center hired a worker who was confined to a wheelchair. To consistently man its call stations, company policy required punctuality, allowing only 14 tardies annually.

During the first year of his employment, the employee reported late for work 37 times and was late returning from lunch 65 times. He explained that the parking lot had only two van-accessible spaces and suggested several potential accommodations, including allowing him a few extra minutes to get to a workstation.

The call center denied his requested accommodations and terminated his employment.

The suit

The employee filed a timely claim with the EEOC alleging ADA violations, and it brought suit. A jury awarded $14,265 in lost wages and $100,000 in compensatory damages.

The company appealed the trial court's denial of its motion for judgment as a matter of law, claiming that it couldn't be held liable for failure to accommodate the employee because he hadn't requested a specific reasonable accommodation and that the accommodation he proposed was unreasonable.

Different facts, different outcome

Another accommodation suit before the Eighth Circuit, *Huber v. Wal-Mart*, involved whether the Americans with Disabilities Act (ADA) requires employers to reassign qualified disabled employees to vacant positions even if they're not the most qualified applicants.

While working on the job, a Wal-Mart order filler permanently injured her right arm and hand. She could no longer perform the essential functions of the job and sought accommodation in the form of reassignment to a vacant router position. But Wal-Mart filled the job with a more qualified abled applicant in accordance with its established policy of filling vacant positions with the most qualified applicants.

The employee alleged that Wal-Mart — as a reasonable accommodation — should have automatically reassigned her to the vacant router position without requiring her to compete with other applicants.

But the Eighth Circuit held that the ADA isn't an affirmative-action statute. So it doesn't require an employer to reassign a qualified disabled employee to a vacant position if that would violate an employer's legitimate nondiscriminatory policy to hire the most qualified candidate.

The Eighth Circuit noted that its decision was bolstered by the Supreme Court's decision in *U.S. Airways Inc. v. Barnett*. There the Court held that employers aren't ordinarily required to give disabled employees a higher seniority status to enable them to retain their jobs when another qualified employee invokes an entitlement to those positions conferred by the employer's seniority system.

Reasonable effort

The Eighth Circuit noted that, to prevail on an ADA discrimination claim, plaintiffs must prove that they were qualified to perform their jobs' essential functions with or without accommodation.

To determine whether a disabled employee is qualified to perform an essential job function requires a twofold inquiry:

1. Does the employee meet the job's necessary prerequisites?
2. Can the employee perform the essential job functions with or without reasonable accommodation?

The Eighth Circuit had previously held that disabled employees must initiate the accommodation-seeking process by informing their employers of their legitimate accommodation needs. Then an employer must "make a reasonable effort to determine the appropriate accommodation."

This means first analyzing the relevant job and the specific limitations imposed by the disability and then — in consultation with the employee — identifying potential effective accommodations. The court concluded that this division of responsibility was "only logical" because employees typically will know their limitations and abilities, and employers typically will know possible available alternative duties or positions.

Jury verdict upheld

The Eighth Circuit held that the employee had met his initial burden when he testified that he requested an accommodation. But the call center hadn't fulfilled its obligation to explore possible accommodations.

In fact, the evidence showed that the employee had taken on the company's responsibility by offering several potential accommodations. Thus he had exceeded what disabled employees must do at the interactive process's initial stage. So the court concluded that he wasn't required to more specifically request accommodation.

Finally, the court found sufficient evidence to support the jury's conclusion that the employee's proposed accommodations were reasonable. The court explained that the employer offered no evidence showing that extending the employee's lunch break by 15 minutes would eliminate its punctuality requirement.

And even if punctuality were an essential job function, extending his break didn't eliminate the punctuality requirement but merely gave him a different time to return from his break.

An interactive process

The importance of engaging in an interactive process in determining how to reasonably accommodate a disabled employee can't be overrated. An employer shouldn't unilaterally reject an employee's request on the basis that it's unreasonable or vague. Rather, employers should attempt to explore what options are available and whether they will work.

Reverse religious discrimination alleged

The question before the Ninth Circuit in *Noyes v. Kelly Services* was whether a plaintiff could maintain her claim of reverse religious discrimination for her employer's failure to promote her.

The case arises

Many employees and managers at Kelly Services belonged to the Fellowship of Friends, a religious organization, as did the top-level staffer in charge of filling an open management position. He considered three employees for the promotion.

His first choice turned it down. He then promoted an applicant who was also a Fellowship member, even though she had six years' less experience than the plaintiff and — unlike the plaintiff — lacked an MBA.

During the selection process, the decision-maker received input from other employees. He told at least two of them — including another manager — that the plaintiff wasn't interested in the promotion.

Case thrown out

The plaintiff alleged employment discrimination based on religion. The trial court found that the facts were undisputed and the employer was entitled to judgment as a matter of law without a trial. The plaintiff appealed.

In failure-to-promote cases, the Ninth Circuit had previously ruled that, to establish a prima facie case, plaintiffs must show that:

1. They belonged to a protected class,
2. They were performing according to their employers' legitimate expectations,
3. They suffered an adverse employment action, and
4. Other plaintiffs with similar qualifications were treated more favorably.

Here, the Ninth Circuit noted that the "protected class" element was not comparable because the plaintiff didn't claim she was part of a protected class — that is, that she adhered to a particular religion. Rather, she claimed that her lack of adherence to the religious beliefs promoted by management was the genesis of the discrimination. The court stressed the importance of tailoring the elements of a prima facie showing to each case's particular circumstances.

The burden shifts

The Ninth Circuit held that the plaintiff had established a prima facie case, so the burden then shifted to the employer to articulate a legitimate nondiscriminatory reason for its adverse employment decision.

The employer argued that the decision-maker first offered the position to a non-Fellowship member, who declined it. Then a non-Fellowship member recommended promoting the Fellowship-member applicant. The decision-maker testified that the promotion decision was made through the "consensus" of the "management group." The Ninth Circuit found that this was sufficient to shift the burden back to the plaintiff to show that the proffered reason was pretextual.

2 ways to show pretext

The Ninth Circuit had previously held, in *Godwin v. Hunt Wesson Inc.*, that a plaintiff can prove pretext in two ways:

1. *Indirectly*, by showing that the employer's proffered explanation is "unworthy of credence" because it's internally inconsistent or otherwise not believable, or
2. *Directly*, by showing that unlawful discrimination more likely motivated the employer.

When pretextual evidence is circumstantial — rather than direct — the plaintiff must present "specific" and "substantial" facts showing that a genuine issue exists for trial.

The plaintiff presented evidence that she was more qualified for the job than the promoted person and that the decision-maker's actions deprived the plaintiff of fair and full consideration for the promotion. Specifically, she offered evidence showing that the decision-maker's telling other employees that the plaintiff wasn't interested in the promotion tainted the promoted person's selection. So she wasn't fully considered for the promotion.

Furthermore, although the decision-maker claimed that the promoted person was chosen based on management "consensus," two of the other managers the decision-maker claimed were part of the "consensus" didn't recall reaching a management "consensus" on the decision to promote her. One testified that the decision-maker made the ultimate decision. The plaintiff also showed that the decision-maker had favored the promoted person in previous employment decisions.

The Ninth Circuit concluded that a reasonable fact-finder could find that the plaintiff's evidence made the company's proffered reasons "unworthy of credence," because the decision-maker's actions preempted full consideration of the plaintiff despite her desire for the job and her superior qualifications.

Employers, beware

This opinion demonstrates the importance of making sure that the reasons for an employment decision can withstand scrutiny. If articulated reasons can't withstand scrutiny, a jury or court can infer that the true reason for the action was unlawful.

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

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