Employment Law Briefing

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Against the clock

Proximity of harassment complaints to firing is key in retaliation case

Could a plaintiff who had complained of sexual harassment two months before being fired succeed in bringing a retaliation claim? Or was two months too long to support an inference of a causal connection? That was the issue before the Eighth Circuit in *Van Horn v. Best Buy Stores*.

Inappropriate conduct

Best Buy hired a sales-manager-in-training and initially assigned her to "shadow" the store's sales manager. A month later, when she asked him about wearing a skirt to work, he replied that it was OK as long as he could see a certain part of her anatomy, which he used a slang term for. She reported this comment, and the company ultimately disciplined the sales manager.

Best Buy assigned the employee to a new store as inventory manager. About six months later, she informed the human resources manager that employees had told her that the sales manager was engaging in inappropriate conduct, such as bragging about having "hot women" working for him, making inappropriate comments to employees, and offering to waive a charge for a customer who was a massage therapist in return for a massage. She also gave the information to the store manager and told him that she had notified the HR manager.

Confidentiality breached

Soon after, when the sales manager confronted the employee in the store manager's presence, the employee stated that only two people had known she had called the HR manager, and they had "better not have told you because it was supposed to be confidential."

The employee alleged that the store manager could have moved her to another job, and that he fired her because she had reported sexual harassment by both stores' sales managers.

Two months later, while the company was going through a reorganization that eliminated her inventory-manager position, the store manager fired her. The employee alleged that the store manager could have moved her to another position, and that he fired her because she had reported sexual harassment by both stores' sales managers.

The trial court ruled that the facts were undisputed and that Best Buy was entitled to judgment as a matter of law without a trial.

One issue

The Eighth Circuit affirmed, finding that the sole issue before the court was whether the employee's reporting the sexual harassment was causally connected to her firing. She conceded that the store manager had additional firing reasons, but contended that she had to show only that her reports were a "motivating factor" in the firing decision.

But the Eighth Circuit held that, to sustain a retaliation claim, a plaintiff must show that the protected conduct was a "determinative — not merely motivating — factor" in an adverse-employment decision. The court concluded that she had failed to produce sufficient evidence to support a finding that her reports were a determinative firing factor.

A look at the evidence

The court found that she was fired eight months after she last reported the misconduct of the sales manager at the first store and that he wasn't involved in the second store manager's decision to fire her.

Additionally, the court held that the employee reported complaints about the second store's sales manager two months before she was fired and that was too long to support an inference of a causal connection.

The court conceded that her evidence supported an inference that the store manager had told the sales manager about her report to HR. But it found that didn't support an inference that her report was a determinative factor in the firing decision.

The employee also alleged that she had spoken to the store manager about his having ignored rules other employees had to follow. Thereafter, he made comments such as "HR" and "game off" when she entered a room and "game on" when she left, and often told her she needed "more edge."

She also claimed that he envied her because he had been at Best Buy for three years before being promoted to general manager, while she was considered for that promotion after less than four months. The court found that, even if these allegations were true, they did little to strengthen an inference that he fired her for protected activity. Instead, they supported an inference that he may have disliked her for entirely different reasons.

Employers, beware

Regardless of the outcome in this case, employers need to be cautious when taking adverse action against employees who have complained of workplace discrimination. Retaliation claims can prove successful even when an underlying claim lacks merit. ♦

FBI agent says PTSD interfered with the major life activity of sleeping

The District of Columbia Circuit had to decide, in *Desmond v. Mukasey*, whether the FBI had discriminated against an employee who suffered from post-traumatic stress disorder (PTSD) and whether PTSD substantially interfered with the major life activity of sleeping.

The case arises

About two years before the plaintiff started training as an FBI special agent, an armed intruder broke into his home and threatened to kill him and to return to rape his mother, who wasn't at home at the time. He escaped and ultimately assisted authorities in apprehending the intruder.

A month before his graduation from the training academy, the plaintiff discussed his concerns about his mother's health and safety with his supervisor. The plaintiff met with the FBI's Employee Assistance Program (EAP) counselor, who told the plaintiff that he was showing signs of PTSD and suggested that he write letters as a way to vent his feelings and work through his stress.

Following a confrontation with his supervisor four days before graduation, the plaintiff submitted a formal resignation letter to take effect on graduation day. When the supervisor got the letter, he confronted the plaintiff, who explained that he had no real intention of resigning and — following the EAP counselor's advice — had written the letter merely "to vent his anger." He then submitted a retraction letter as recommended by his supervisor.

Three days later, the plaintiff's supervisor and higher management decided the plaintiff would not graduate with

his class. The supervisor then conducted a "suitability investigation" into the plaintiff's behavior and concluded that he lacked the appropriate levels of cooperativeness and emotional maturity required of a special agent. The FBI dismissed him.

Rehabilitation Act follows ADA

The plaintiff sued, alleging disability discrimination. The Rehabilitation Act bars federal agencies from discriminating against employees with disabilities. In assessing claims under the act, courts adopt the same standards used to determine liability under the Americans with Disabilities Act (ADA).

To establish a prima facie discrimination case under the ADA, plaintiffs must show that:

1. Their employers are subject to the ADA,

2. They are — or their employers perceive them to be — disabled within the meaning of the ADA,

3. They are otherwise qualified to perform essential job functions with or without reasonable accommodation, and

4. They suffered adverse employment actions because of their disabilities.

The trial court ruled for the FBI on a motion for summary judgment without a trial, finding that he wasn't disabled, and he appealed.

The ADA defines "disability" as "a physical or mental impairment" that "substantially limits one or more … major life activities."

The only issue on appeal was whether the plaintiff was disabled. So to withstand summary judgment on his disability-discrimination claim, the plaintiff had to produce enough evidence to allow a reasonable jury to conclude that he had a disability.

The ADA defines "disability" as "a physical or mental impairment" that "substantially limits one or more … major life activities." The plaintiff argued that his PTSD substantially limited his ability to sleep. The D.C. Circuit

found that every court addressing this issue had concluded that sleep is a major life activity, and the government all but conceded this point. Thus, the only issue as to the existence of a disability was whether the plaintiff had presented enough evidence to persuade a reasonable jury that his PTSD *substantially* limited his ability to sleep.

Substantial limitation defined

In determining whether a limitation is substantial, courts consider three factors — the impairment's:

1. Nature and severity,

2. Duration or expected duration, and

3. Permanent (or expected permanent) long-term impact.

In addition, the court found that other circuits have held that plaintiffs must show that their limitations are substantial as compared to the average person's limitations.

The plaintiff's evidence showed that he suffered from long-standing sleeplessness dating back to the intruder incident, that the problem became progressively worse over time, and that his sleeplessness continued even when he was in another city on leave during training. Moreover, he testified that during training he slept only two to four hours nightly as compared to a study that showed that 71% of adults get five to eight hours of sleep nightly.

The D.C. Circuit held that the plaintiff had presented sufficient evidence for a jury to conclude that receiving two to

four hours of sleep nightly for five months significantly restricted his ability to sleep as compared to both his own and the general public's ordinary average experience, and hence constituted a substantial limitation under the Rehabilitation Act.

So the court reversed the grant of summary judgment and permitted the case to go to trial.

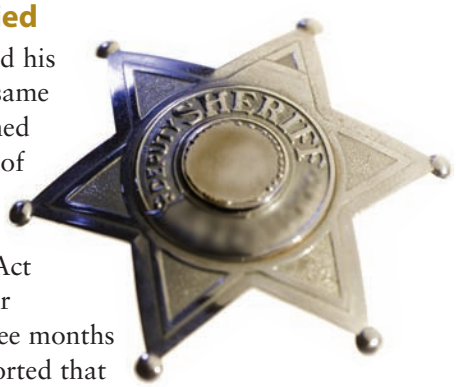
Accommodation requires an interactive process

This opinion may appear to open the door to the less-than-desirable possibility of having a sleep-deprived FBI agent in the field. But discrimination laws apply to all employers, including the FBI. Before firing the plaintiff, the FBI was obliged to engage in an interactive process with him to determine what — if any — accommodation was possible. ♦

Husband alleges retaliation after wife settles FMLA suit

The question before the Fifth Circuit in *Elsensohn v. St. Tammany Parish Sheriff's Office* was whether the husband of an employee who had settled a lawsuit against their mutual employer could sue for retaliation after he was denied several promotions. The husband's only involvement in his wife's complaint had been his willingness to testify if her suit went to trial and to offer moral support.

Promotions denied



A sheriff's officer and his wife worked in the same office, but she resigned after she settled out of court a complaint under the Family and Medical Leave Act (FMLA) against their employer. About three months later, the officer reported that the warden had harassed him in retaliation for his wife's lawsuit. After an investigation, the officer was assured that he would have no more problems. He received excellent job reviews during this time, and beginning about a year later, he applied for several promotions. All were denied.

When the officer spoke to his supervisor about the denials, he was told that he would receive no promotions of any kind, that he could do "nothing" to put himself in a better position for a promotion, and further discussions were "closed off." The officer was then involuntarily placed on a less-favorable night shift, resulting in lost holiday and overtime pay and inability to seek secondary and supplemental employment.

Retaliation alleged

The officer sued, alleging interference with and denial of his rights under the FMLA. He further alleged that his employer acted "with discriminatory and retaliatory intent" against him as a result of his association with his wife's complaint against the employer's "unlawful practices related to the FMLA." The trial court dismissed his suit, and he appealed.

The Fifth Circuit found that FMLA Section 2615(b) bars employers from discharging "or in any other manner" discriminating against anyone because they:

1. Filed any charge or instituted or caused to be instituted any proceeding under or related to this subchapter,

2. Gave or were about to give any information in connection with any inquiry or proceeding relating to any right provided under this subchapter, or

3. Testified or were about to testify in any inquiry or proceeding relating to any right provided under this subchapter.

The officer argued that he had stated a cause of action under Sec. 2615(b)(2) and Sec. 2615(b)(3) because he had

given, or was about to give, information in connection with an inquiry into his wife's FMLA suit, and — but for the fact that she had settled her suit — he would have testified supporting her claims.

Information, testimony not given

The Fifth Circuit upheld the trial court's dismissal of his suit. The court found that Sec. 2615(b)(2) didn't apply because he hadn't alleged that he ever provided any information — formally or informally — connected to any inquiry or proceeding relating to his wife's claim. Rather, he had tried not to involve himself in her suit except to give "moral support." In fact, the defendants had never even questioned him about his wife's suit.

The court found that Sec. 2615(b)(3) also didn't apply because the officer hadn't alleged that he was discriminated against as a result of testimony he gave or was about to give. In fact, he had never testified in any proceeding relating to his wife's claim, because she settled before trial.

Protections kept narrow

The officer also argued that other courts have provided broader protections to employees based on their familial relationships to an employee seeking to oppose an unlawful or discriminatory action under other antiretaliation statutes.

Rejecting this argument, the Fifth Circuit explained that other courts have refused to broaden antiretaliation statutes' protections through judicial interpretation.

The court also noted that it had been unwilling to expand antiretaliation provisions in an Age Discrimination in Employment Act (ADEA) case. In *Holt v. JTM Industries*, the Fifth Circuit held that a plaintiff couldn't bring a retaliation claim against his employer based merely on his wife's protected activities. So, based on *Holt* (even though it wasn't binding here) and the court's concern about setting aside the statute's plain meaning, the court rejected the officer's argument.

The take-away

While the Fifth Circuit here narrowly interpreted the protection granted under the FMLA and the ADEA, other circuits could conceivably rule differently. For example, in *EEOC v. Ohio Edison Co.*, the Sixth Circuit held that, when an employer retaliates against a relative of a person engaging in protected activity, the relative may bring a claim under Title VII of the Civil Rights Act, even though the relative isn't the person engaging in the protected activity.

What employers can learn from this opinion is that — until the law is better settled — they are well advised to avoid taking actions against family members who might make legal claims against them if that conduct could be considered to be retaliatory. ♦

For ADA protection, must an employee request accommodation?

In *Brady v. Wal-Mart Stores*, the Second Circuit considered whether an employer's failure to accommodate an employee's disability had violated the Americans with Disabilities Act (ADA), even though he hadn't asked for a specific accommodation.

The reassignments

The plaintiff had cerebral palsy and had worked without incident for about two years in a local pharmacy, receiving prescriptions and dispensing prescription drugs. Wal-Mart hired him as an assistant in its pharmacy department, but after just three days reassigned him to the job of collecting shopping carts and garbage in the parking lot.

When the employee's father complained, the assistant store manager admitted that he thought the employee hadn't been given "a fair chance at this job," that he should have been given more time to learn it, and that he hadn't been afforded the 90-day probationary period and training that new employees generally got.

But instead of giving the employee the option of returning to the pharmacy, the assistant store manager transferred

him to the job of stocking food shelves. The store then gave him a work schedule for the following week that conflicted with the community-college schedule that he had noted on Wal-Mart's availability forms. Frustrated, he called the store the next day and quit.

Discrimination found

The employee sued Wal-Mart for discrimination under the ADA. The jury found for the employee.

Wal-Mart filed a motion for judgment as a matter of law, the trial court denied the motion, and Wal-Mart appealed to the Second Circuit. It upheld the trial court's ruling.

The Second Circuit weighs in

To establish a prima facie discrimination case under the ADA, plaintiffs must show that:

1. Their employers are subject to the ADA,

2. They are — or their employers perceive them to be — disabled within the meaning of the ADA,

3. They are otherwise qualified to perform essential job functions with or without reasonable accommodation, and

4. They suffered adverse employment actions because of their disabilities.

The Second Circuit found sufficient evidence to permit the jury to find that the plaintiff was in fact disabled under the ADA. Moreover, his pharmacy supervisor testified that she regarded him to be slow and that she "knew there was something wrong" with him.

The court also found sufficient evidence for the jury to conclude that transferring him from the pharmacy to the parking lot constituted an adverse employment action. Although it didn't affect his wages or benefits, it resulted in a "less distinguished title" and "significantly diminished material responsibilities."

In addition, though he spent only one day in the parking lot, Wal-Mart didn't transfer him back to the pharmacy but rather to the food department. The court found that, though this was perhaps preferable to the parking lot, a jury could still rationally find it was worse than the pharmacy.

On the failure-to-accommodate claim, the court noted that generally a disabled person has the responsibility to inform the employer of the need for an accommodation. The plaintiff here never asked for an accommodation. But the court found that the ADA's statutory and regulatory language requires accommodation of "known" disabilities — not just disabilities that accommodation has been requested for.

A supervisor of the plaintiff testified that she regarded him to be slow and that she "knew there was something wrong" with him.

So the court held that an employer has a duty to reasonably accommodate an employee's disability when the disability is obvious — that is, when the employer knew or reasonably should have known that the employee was disabled. Based on the pharmacy manager's comments that she knew something was wrong with the employee, Wal-Mart failed to meet this burden.

Looking before leaping

This case demonstrates the importance of requiring managers to check with human resources before taking any action that could lead to a lawsuit. Savvy employers train managers to recognize these situations and consult with appropriate higher-ups before taking action. ♦

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.

"Above all, we are at your service …"

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