

# Employment Law Briefing



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# When falsehoods are filed

*Retaliation case arises from employer's investigation, response*

**E**mployers have an obligation to fully investigate employee conflicts within their workplaces. But the information gathered and actions taken from such investigations can lead to further legal complications. Case in point: *Cox v. Onondaga County Sheriff's Dept.*

## Interviews held

The plaintiffs were white officers of a sheriff's department who had shaved their heads in solidarity with a co-worker (and plaintiff) who was undergoing chemotherapy. Later, they claimed that they were victims of rumors that they were "skinheads." The plaintiffs alleged that these rumors were started by an African-American officer who had approached them and asked them why their heads were shaved.



The plaintiffs filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming the rumors constituted racial harassment. In the EEOC complaint, it was stated that an African-American officer had accused them of being skinheads in a hostile, face-to-face confrontation.

Thereafter, interviews were conducted by the employer's Professional Standards Unit (PSU). During the interviews, none of the plaintiffs claimed to have been called a skinhead to their face by another officer.

They said, however, that there had been rumors to that effect and some officers had made nonhostile inquiries as to why they'd shaved their heads. Thus, the plaintiffs were informed that disciplinary actions against them were being considered based on the falsity of the EEOC filing.

## Another claim filed

The plaintiffs then filed another EEOC claim against the department, alleging that, when they were threatened with discipline for having made false complaints, they were being retaliated against for having complained of racial harassment. The district court entered summary judgment in the employer's favor, finding there was no evidence that the plaintiffs had suffered any adverse employment action.

The plaintiffs appealed, arguing that several aspects of the PSU's investigation amounted to an adverse employment action. Thus, they contended, the fact that they were informed that they could be brought up on criminal and administrative charges constituted retaliation.

## Appeal considered

On that appeal, the U.S. Court of Appeals for the Second Circuit affirmed the district court's decision. The appellate court held that an employer's investigation of an EEOC complaint alleging racial harassment, without resulting in adverse job consequences for the complainant, cannot sustain a retaliation complaint because employers have a right to investigate in order to answer an EEOC complaint. If employers didn't investigate such allegations, it could be viewed as indifference or acquiescence to racial discrimination.

## Reviewing an important precedent

An important precedent to *Cox v. Onondaga County Sheriff's Dept.* (see main article) is the 2000 case of *E.E.O.C. v. Total System Services*. Here, the female plaintiff participated in her employer's investigation into complaints that a male supervisor was sexually harassing female employees. During an interview, the plaintiff made false statements about witnessing the alleged harassment. For this, she was terminated.

The Equal Employment Opportunity Commission (EEOC) later brought an action on the plaintiff's behalf, alleging retaliation in violation of Title VII. The district court granted summary judgment in the employer's favor. The EEOC appealed, alleging that the plaintiff was fired for participating in the employer's investigation and opposing what she believed was an unlawful employment practice (sexual harassment).

The U.S. Court of Appeals for the Eleventh Circuit held that the plaintiff's participation in the investigation wasn't protected under the participation clause of Title VII's retaliation provision. Even if false statements made in the context of an EEOC charge cannot be grounds for dismissal or discipline, the court found that this level of protection isn't afforded to false statements made *outside* of that context — such as an internal investigation conducted apart from a formal EEOC charge.

Additionally, the Eleventh Circuit held that the plaintiff could be discharged based on her employer's good faith belief that she'd lied during an internal investigation. In other words, the employer offered a legitimate, nondiscriminatory reason for the termination.

Regarding the plaintiffs' claim that their interviews were more confrontational than that of the African-American officer they accused, the Second Circuit stated that there was good reason for the African-American officer's interview to be nonconfrontational. That is, his interview was conducted after the plaintiffs' interviews in which they revealed that no one had heard him make any comments about the plaintiffs being skinheads. Thus, the interviews weren't considered to be adverse employment actions.

*Where the plaintiff has proffered sufficient evidence that a threat of discipline was triggered by a “good faith” claim of discrimination, a prima facie case of retaliation is established.*

### Standard applied

Finally, in addressing the threat of false report charges, the Second Circuit applied a “good faith standard.” The court held that, where the plaintiff has proffered sufficient evidence that a threat of discipline was triggered by a

“good faith” claim of discrimination, a prima facie case of retaliation is established.

But, in this particular case, the court found that the employer's statements about disciplinary charges were reasonable. After all, the plaintiffs had intentionally given *false statements* to the EEOC, which led to a misconduct complaint being filed against them.

The Second Circuit also held that informing the plaintiffs of the possible results of the investigation of their misconduct was fair and necessary. Moreover, the false charges against the African-American officer could be viewed as racial harassment against him, which the department would have had to investigate.

### Cautious discipline

As an employer, bear in mind that, if you attempt to discipline an employee who has filed a falsified claim of discrimination, you'll risk a retaliation claim like this one. An employee needs to show only a good faith basis for having made the charge — however untrue. The fact that a discrimination claim is later dismissed doesn't necessarily give you license to discipline the employee for having filed a false charge. ♦

# “Strange behavior” or racial discrimination?

**A**s the cliché goes, there are two sides to every story. In *Nichols v. Michigan City Plant Planning Dept.*, the plaintiff filed a complaint alleging that his former employer had violated Title VII by requiring him to work in a hostile work environment and then firing him because of his race. The employer told a different tale.

## Conflicting accounts

The plaintiff was an African-American male who had been hired as a temporary, substitute janitor in an elementary school. He claimed that a female co-worker had:

- Made racial slurs toward him,
- Acted scared of him by raising a towel and waving her hand, and
- Conspired with other employees to bait him into stealing items from an unattended purse.

He also alleged that, when he asked other co-workers for help, they wouldn't assist him and would talk to him in a mocking manner. He claimed they stared at him during lunch and, after he'd taken out the trash, one of his co-workers put more garbage on the floor.

A month after he was hired, the female co-worker in question filed a complaint against him, alleging that he'd attempted to take photos of her. The principal of the school met with the plaintiff regarding the report. The plaintiff confirmed that he had taken photos, but that he had done so to catch his co-worker mistreating him.

Later, the principal met with the plaintiff's supervisors and told them that she and his co-worker felt threatened by the plaintiff's "strange behavior." The supervisors decided to remove the plaintiff from his assignment at the school, telling him he'd receive a phone call if they needed him. The plaintiff alleged that they never called him and he was terminated because of his race.

The district court granted the employer's motion for summary judgment, finding that the employer's conduct didn't give rise to Title VII liability. The plaintiff appealed.



## Lacking evidence

The U.S. Court of Appeals for the Seventh Circuit affirmed. The appellate court found that the employee's hostile work environment claim failed because he didn't provide sufficient evidence for a reasonable juror to conclude that he was subjected to harassing conduct that was severe or pervasive.

The employee argued that his co-worker's alleged racial slurs constituted severe harassment. The Seventh Circuit explained that, when determining whether conduct is sufficiently severe or pervasive, it looks at the totality of circumstances. This includes the frequency of the discriminatory conduct, as well as whether it's:

- Reasonably offensive,
- Physically threatening as opposed to verbal abuse,
- Certain to unreasonably interfere with the plaintiff's work performance, and
- Directed at the plaintiff.

The court stated that, "while referring to colleagues with such disrespectful language is deplorable and has no place in the workforce, one utterance of [a notorious racial slur] has not generally been held to be severe enough to rise to the level of establishing liability."

## Examining context

Although there were six alleged instances of harassment over a two and one-half week period, it wasn't clear whether all of the comments were directed at the plaintiff or offensive enough in nature to constitute actionable conduct.

The Seventh Circuit pointed out that the context of the comments is important. For example, an employee saying “where that boy at” in an elementary school filled with boys isn't necessarily evidence of racial discrimination. The court also stated that, just because someone left a purse behind, it couldn't reasonably hold that this action was intended to entice the plaintiff into thievery.

Moreover, the plaintiff never alleged that he was physically threatened, and the alleged harassment didn't interfere with his work performance. Therefore, the Seventh Circuit found that, taking into account the totality of circumstances, a reasonable trier of fact couldn't find that the alleged instances created a hostile work environment.

## Providing proof

Regarding the plaintiff's claim that he was terminated because of his race, the Seventh Circuit also affirmed the district court's decision.

The appellate court found that the employer provided sufficient evidence that the plaintiff was terminated because co-workers reported that he was acting strangely on the day of his termination and they were scared. As a result of the staff's concerns, the principal spoke to the plaintiff's supervisors, who decided it was best to remove the plaintiff from his position.

The employer also provided sufficient proof that the plaintiff was going to be terminated the next week — regardless of job performance — because the school had hired a permanent employee for his position and a temporary worker was no longer needed. Finally, the Seventh Circuit held that the plaintiff had failed to present evidence of a comparative co-worker who had been treated more favorably than he had been to show disparate treatment in his termination from the temporary position.

## Fending off a claim

Should your organization ever find itself fending off a racial discrimination lawsuit, this case illustrates some key weaknesses to look for in a plaintiff's claim. A plaintiff who relies on speculation, assumptions — and a distinct lack of actual evidence — will not likely see his or her claim withstand your motion for summary judgment. ♦

# Powerful words

## *COO's statements leave employer in the legal lurch*

**W**ords have power. Nowhere is this truer than in the legal sphere, where just a few words from a supervisor or manager can later have major repercussions for an employer. A prime example is the recent case of *Wilson v. Cox*, in which the remarks of a chief operating officer (COO) had a major impact on a subsequent lawsuit alleging a violation of the Age Discrimination in Employment Act (ADEA).

## Making a statement

The plaintiff was a 71-year-old military retiree, who was employed as a security guard for the U.S. Armed Forces retirement home where he also resided.

At the time he was hired, however, the plaintiff was 69 and didn't reside at the home. A year later, he took

residence there — partly because he could continue his employment pursuant to the facility's resident employee program. But, that same year, the home's COO decided to end the resident employee program and, thereby, also terminate the plaintiff's employment.

The COO met with residents regarding this decision. He said that they didn't come to the home to work, but rather to retire. He also told an Equal Employment Opportunity Commission counselor that the older guards at the facility weren't doing their jobs and would often be found asleep, which wasn't safe for the government agency in light of 9/11.

The COO later testified that he decided to eliminate the program to save costs and assure a better trained workforce.



The plaintiff then filed a claim against the home and the COO. The district court granted summary judgment in the defendants' favor, holding that they had a nondiscriminatory reason for the plaintiff's termination: The position was eliminated for economic reasons. Also, the age-biased comments made couldn't be taken as a discriminatory motive based on age, as they were really just criticisms of the plaintiff's performance.

The plaintiff appealed, stating that the district court had erred in granting summary judgment before he had any opportunity to conduct discovery.

### **Reversing the decision**

The U.S. Circuit Court for the District of Columbia reversed the district court's decision and returned the case to the lower court for reconsideration.

The appellate court held that, if a plaintiff offers direct evidence of discriminatory intent, the plaintiff will

generally be entitled to a trial. In this case, the plaintiff had presented two statements made by the offending party. If these two statements were proven to have been made, the court stated, a reasonable juror could conclude that a discriminatory intent motivated the decision to end the program and terminate the plaintiff's employment.

The D.C. Circuit further found that the COO's statements indicated the sort of "inaccurate and stigmatizing stereotypes that led Congress to enact the ADEA." It held that age discrimination is established when an older employee is fired because the employer believes that productivity will decline with old age, and the statements tended to reinforce that stereotype — showing a discriminatory intent.

In addition, the court found that, because the COO's statements were direct evidence of discrimination entitling plaintiff to trial, it didn't need to review the district court's decision that the defendants had offered nondiscriminatory reasons for plaintiff's termination. This matter would be dealt with at trial. The D.C. Circuit also stated that the defendants could present their arguments defending their motives for canceling the program and terminating plaintiff at trial.

### **Training and reminding**

In this case, the statements made by the COO led to a reversal of summary judgment. Every employer is subject to this risk. Make sure your managers and supervisors are well trained and reminded to avoid making comments that could be construed as evidence of bias based on age, as well as race, gender, sexual orientation and religion. ♦

## **Contentious overtime calculation adds up to FLSA lawsuit**

**F**lexible or nontraditional work schedules are hardly unusual in today's workplaces. But their impact on overtime pay requirements under the Fair Labor Standards Act (FLSA) can lead to trouble for employers.

In *Johnson v. Heckmann Water Resources*, the U.S. Court of Appeals for the Fifth Circuit considered whether using a Monday through Sunday workweek to calculate overtime violated the FLSA when the employees in question worked Thursday through Wednesday.

## 12-hour shifts

The two nonexempt plaintiffs worked 12-hour shifts for seven straight days beginning every other Thursday. The employer calculated overtime based on a Monday through Sunday workweek and paid its employees biweekly.

The employees sued, arguing that the workweek for overtime purposes should have reflected the Thursday through Wednesday schedule that they regularly worked. If their employer had applied this schedule, both employees would have been entitled to 44 hours of overtime every other week when they worked the 12-hour shifts.

Instead, because of the Monday through Sunday workweek for payroll, they only received four or eight hours of overtime per pay period, depending on whether the employees worked the day shift or night shift. The district court entered summary judgment in the employer's favor, and the plaintiffs appealed.

## Plaintiffs' argument

The plaintiffs argued that Department of Labor (DOL) regulations state:

...different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule...

Thus, they contended, a Monday through Sunday workweek violated the FLSA because they'd always worked Thursday through Wednesday.



The Fifth Circuit, however, affirmed the district court's decision. It pointed out that the regulation uses the word "may" and, therefore, using different workweeks isn't mandatory. The court also held that the plaintiffs couldn't cite any authority requiring employers to establish a workweek that reflected their actual work schedule.

In addition, the Fifth Circuit stated that the FLSA doesn't define the term "workweek" and the act's regulations don't require a workweek to coincide with a calendar workweek or employees' schedules.

## Eighth Circuit precedent

On the questions of whether employers have a right to establish a workweek and whether they're obligated to begin a workweek on any certain day, the Fifth Circuit agreed with the reasoning of the U.S. Court of Appeals for the Eighth Circuit in *Abshire v. Redland Energy Services, LLC*.

In that case, which was nearly identical to *Johnson*, the Eighth Circuit held that a payroll schedule in which an employee's actual work schedule is split between two workweeks doesn't violate the law just because, under a consistently designated workweek, its employees earn fewer hours of overtime than they would if the workweek reflected their actual schedules.

Finding the Eighth Circuit's reasoning persuasive, the Fifth Circuit explained that, just because an employer's workweek doesn't maximize an employee's overtime compensation, the employer doesn't, "standing alone," violate the FLSA. The Fifth Circuit held that the employer's payroll workweeks complied with the FLSA because, as DOL regulations require, they were fixed and consisted of 168-hour periods, and employees were paid for any hours they worked over forty in that specific period.

## Two-way street

This case is a good example of an employer benefiting from a technical analysis of the FLSA's language. Bear in mind, however, that reliance on the statute's wording is a two-way street.

For instance, if you're relying on an exemption from paying someone overtime, the exemption must comply with all applicable FLSA requirements. Check regularly with your attorney to ensure all technical aspects of your overtime and exemption arrangements are in compliance with the law. ♦

# 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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