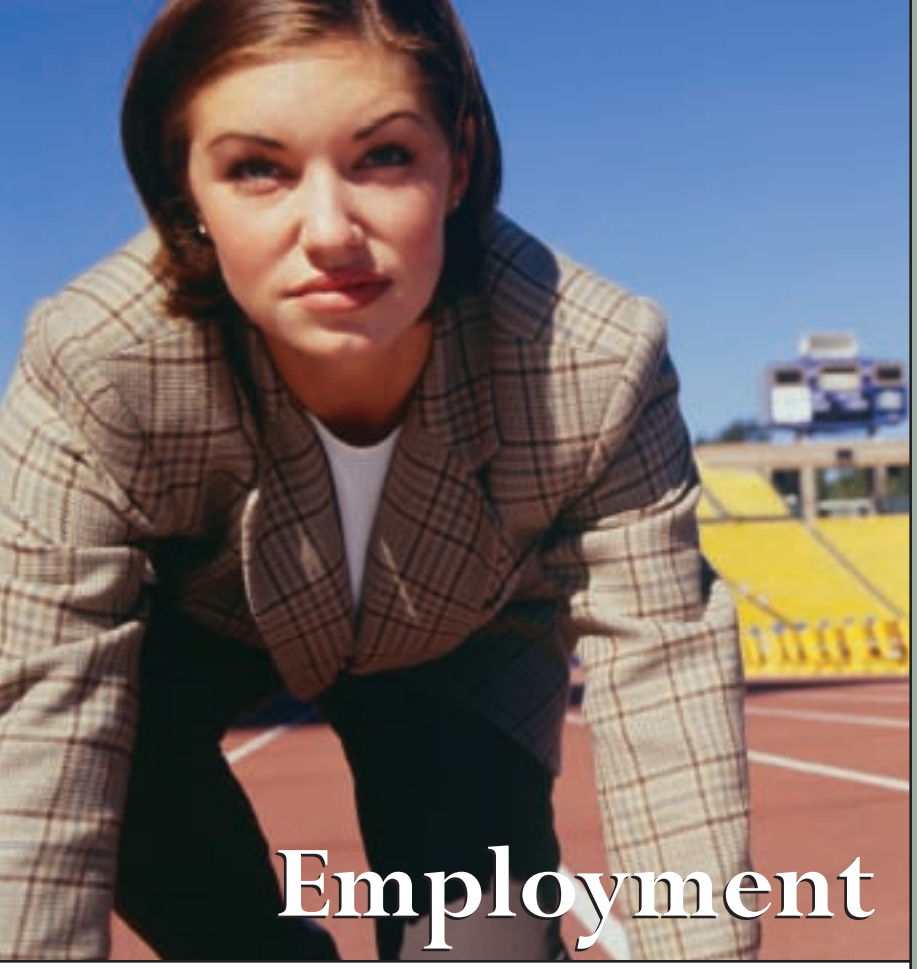
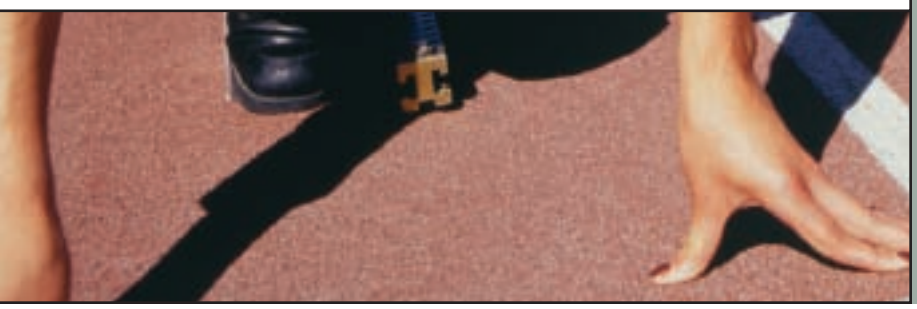


Employment Law Briefing

Insights on Legal Issues in the Workplace



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Sex discrimination and "disparate impact"

Be wary when using tests to screen job applicants

The Eighth Circuit had to decide whether an employer engaged in sex discrimination in violation of Title VII when it used a weight-lifting test that resulted in a substantial drop in female hires. Here's what happened in *EEOC v. Dial Corp*.

Measures to reduce injuries

A sausage factory required entry-level employees to be able to carry about 35 pounds of sausage and lift it to heights between 2 feet and 5 feet above the floor. These employees experienced disproportionately more injuries than the plant's other workers.

To reduce injuries, the plant implemented several measures, and injuries trended downward. Four years later, the plant started screening potential hires with a test that required lifting a 35-pound bar from a frame and carrying it to and placing it on another frame. The frames were about 2 feet and 5 feet high. An occupational therapist recorded how many lifts applicants completed working at their own pace in seven minutes and commented on each applicant's performance.

The test's impact?

After the test was implemented, the decline in workers' strength-related and overall injuries, which had begun after the implementation of the initial measures, continued. But only 15% of new hires were women — down from 46%. Adding the test was the only change in the plant's hiring practices.

An applicant who wasn't hired even though she had passed the test filed a discrimination complaint with the EEOC. It sued the plant on her behalf and on behalf of 53 other women who were denied employment after taking the test, 24 of whom had been unable to complete it.

At trial, the jury found that the plant had engaged in a pattern or practice of intentional discrimination. The trial court held that:

- The test had a discriminatory effect,
- The plant had failed to demonstrate that the test was a business necessity or to show either content or criterion validity, and
- The plant had failed to effectively control for other variables that may have caused injuries to decrease, including other previously implemented safety measures.

The plant appealed.

Intentional discrimination?

The Eighth Circuit noted that plaintiffs alleging a pattern or practice of intentional sex discrimination must prove "regular and purposeful" discrimination by a preponderance of the evidence. This requires more than the mere occurrence of an isolated discriminatory act. Rather, plaintiffs must show that discrimination was the employer's standard operating procedure.

The Eighth Circuit rejected the plant's argument that the EEOC had failed to establish a pattern or practice of intentional sex discrimination. The court found that women and men had worked the same job for many years before the test was instituted, but that the percentage of women hired

A slippery slope at Slippery Rock

In *Scheidemantle v. Slippery Rock University State System*, a woman who worked as a labor foreman at a college applied — along with three men — to be promoted to a posted locksmith job that required two years' locksmithing experience. None of the applicants had the requisite experience.

But the college ultimately hired one of the male applicants anyway, and a year later the job opened up again when he was promoted. This time the job posting required three years' locksmithing experience. The woman applied again, but the college gave the job to a man with even less experience than the previous jobholder had had when hired.

The woman alleged gender discrimination for both rejections. The trial court ruled that she wasn't qualified for the locksmith position according to the posted objective criteria.

But the Third Circuit disagreed. It held that, because the college had placed similarly "unqualified" men in the locksmith position, it could no longer point to the job posting's objective qualifications as a valid reason for refusing to promote the woman applicant.

So the court held that — by departing from the objective requirements in its hiring decision — the college had established different qualifications, by which the woman applicant was qualified. Thus, as a protected applicant who suffered an adverse employment decision, she could establish a prima facie discrimination case.

vastly decreased after the test. Despite this, the plant continued to use the test, and the percentage of women who passed it declined with each use.

Also, other evidence showed that, while women and men received similar comments on their test forms, the plant offered to hire only the men. So the court held that a reasonable jury could have found a pattern and practice of intentional discrimination against women.

Business necessity?

The plant also disputed the trial court's findings of disparate impact and the conclusion that the plant had failed to prove the test was necessary to establish effective, safe job performance.

The Eighth Circuit noted that, after a disparate-impact plaintiff establishes a prima facie case, the burden shifts to the employer to show that the challenged practice is "related to safe and efficient job performance and is consistent with business necessity." To use the business-necessity defense, an employer must prove that the practice was related to the specific job and its required skills.

The plant contended that the test was valid, and its physiology expert testified that the test highly represented job-required actions. But the trial court was persuaded by the EEOC's industrial-organization expert, who testified that a crucial test aspect was "more difficult than the sausage-making jobs themselves" and that the average applicant had to perform four times as many lifts with no rest breaks as current employees performed on the job.

The plant also argued that the test was valid because both overall and strength-related injuries decreased dramatically after it was implemented. The plant claimed that injuries decreased because the test predicted which applicants could safely handle the strenuous job.

But the Eighth Circuit noted that the injury rate started to decline before the test was implemented. Moreover, fewer women than men employees were injured in two of the three pretest years. So the Eighth Circuit concluded that the plant had failed to demonstrate that the test was a business necessity.

Check for disparate impact

Before implementing any test to screen job applicants, prudent employers will check for any disparate impact. They also will keep in mind that they may be hauled into court some day to justify a test's business necessity.

Sexual harassment not limited to male against female

In *Kampmier v. Emeritus Corp.*, the Seventh Circuit considered the case of a licensed practical nurse who claimed that her openly lesbian supervisor sexually harassed her.

Case thrown out

An assisted-living facility hired a nurse but fired her after six months for failing to show up. Nearly a year later, she alleged that the facility's executive director had sexually harassed her. The nurse alleged that the director, a lesbian, frequently made offensive, explicit and sexually perverse comments to her and to other women, joked about being gay, and engaged in unwanted physical contact.

The trial court threw out the case without a trial on grounds that the material facts were undisputed and the facility was entitled to judgment as a matter of law.

The nurse appealed to the Seventh Circuit. It noted that, to establish a prima facie case for sexual harassment, plaintiffs must show that:

1. They were subjected to unwelcome harassment,
2. The harassment was based on their sex,
3. The harassment was sufficiently severe or pervasive so as to alter employment conditions and create a hostile or abusive atmosphere, and
4. A basis existed for employer liability.

The court examined each of these issues.

Unwelcome harassment

The nurse testified that the director's obscene comments and constant physical contact made her uncomfortable and that she had complained about the behavior on three occasions to higher management. Her direct supervisor confirmed this.

The facility countered that the nurse had engaged in sexual banter herself. But it submitted no evidence that she had in any way encouraged or welcomed the alleged behavior. So the

Seventh Circuit concluded that the nurse had raised a genuine issue of material fact as to whether she was subjected to unwelcome harassment and was entitled to a trial.

Based on sex

The facility next argued that the director's harassment wasn't because of the nurse's sex, because the director harassed both sexes — making her an "equal opportunity harasser." But the Seventh Circuit found that the alleged harassment was far more severe and prevalent than what the male employees endured.

Because the nurse alleged that the director constantly referred to female employees, made comments about their "boobs," and told the women that she could turn any woman gay, the court held that, at the very least, the nurse had raised a genuine issue of material fact as to whether the alleged harassment was because of her sex.

An abusive atmosphere

To prove that her work environment was hostile, the nurse had to demonstrate that it was both *objectively* and *subjectively* offensive. She estimated that, during her employment, the director hugged her 50 to 60 times, jumped in her lap 10 times and touched her buttocks 30 times. Based on the sustained physical contact — combined with the sexually explicit remarks — the

court held that a jury could reasonably find that the comments and physical contact were *objectively* offensive.

The issue of whether the nurse *subjectively* found the conduct offensive was more closely contested. She had allowed the director's lover to baby-sit her daughter in the director's home, she had visited the director in the hospital after she had surgery and had given her a card, and she had at least once medically assisted the director's mother.

The Seventh Circuit found that this evidence seemed to belie the nurse's claim that she felt harassed by the director. Nonetheless, the court held that her repeated complaints and objections regarding the harassment were sufficient to raise a genuine issue of material fact.

Basis for employer liability

Finally, the nurse had to prove that a basis for employer liability existed. An employer may be vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. This defense consists of two necessary elements:

1. The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
2. The employee unreasonably failed to take advantage of any employer-provided preventive or corrective opportunities or to otherwise avoid harm.

Here, because the nurse was fired for failure to show up and didn't allege that her firing was connected to the harassment, the facility was allowed to raise an affirmative defense that it had exercised reasonable care to prevent and correct the sexually harassing behavior. But the nurse testified that, despite her complaints about the harassment to three different managers, the facility didn't discipline the director. And the nurse's supervisor testified that the director's actions "negatively impacted the workplace," but the regional operations director said she "did not want to hear about it."

The court held that this evidence was sufficient to create a genuine issue of material fact as to whether the facility had exercised reasonable care to prevent and correct the director's behavior. So the court concluded that the nurse had presented enough evidence for a jury to decide her sexual harassment claim.

Importance of training supervisors

This case demonstrates that sexual harassment is not limited to males against females. Savvy employers will train supervisors to understand that sexual harassment can take other forms, such as female against female.

Adverse employment action and close proximity key in retaliation case

Did an employer's written reprimand of a black male employee constitute retaliation against him for having filed an EEOC complaint seven months previously? That was the question before the Eleventh Circuit in *Wallace v. Georgia Department*.

Racial discrimination alleged

After the Georgia transportation department investigated employee misuse of its computer equipment, it reprimanded a black male employee in writing. He alleged that he was treated worse — because of his race — than other employees who had engaged in similar or worse conduct. He also alleged the reprimand was in retaliation for having filed an EEOC claim seven months before.

The trial court ruled for the department without a trial on both his disparate-treatment and retaliation claims, and the employee appealed.

Disparate-treatment claim

First, the Eleventh Circuit noted that, to establish racial discrimination, plaintiffs must show that they suffered an adverse employment action. But the court cited its previous opinion, in *Davis v. Town of Lake Park*, that held that:

1. Not all employer conduct that negatively affects an employee "constitutes adverse employment action," and
2. To prove an adverse employment action, an employee "must show a serious and material change" in employment terms or privileges.

Moreover, an employee's subjective view of the significance and adversity of an employer's action does not control. "The employment action must be materially adverse as viewed by a reasonable person in the circumstances."

The court held that the written reprimand didn't constitute an adverse employment action, because it didn't lead to any tangible harm, such as lost pay or benefits or denial of a promotion.

Retaliation claim

The court also noted that, to establish a case of retaliation under Title VII, plaintiffs must show that:

1. They engaged in statutorily protected expression,
2. They suffered an adverse employment action, and
3. The two events were causally connected.

Here, the employee had engaged in the statutorily protected expression of filing a discrimination claim with the EEOC. So the court focused on the second and third factors.

First Supreme Court precedent

In examining the employee's retaliation claim, the Eleventh Circuit relied on two previous Supreme Court opinions.

In the first, *Burlington Northern v. White*, the Court defined an adverse employment action in the context of a retaliation claim as one that is harmful to the point that it could well dissuade a reasonable employee from making or supporting a discrimination charge.

So, in light of this precedent, the Eleventh Circuit held that the written reprimand here didn't constitute an adverse employment action because it didn't lead to any tangible harm in the form of lost pay or benefits or job promotions.

> *To establish a case of retaliation, plaintiffs must show that they engaged in statutorily protected expression and suffered an adverse employment action, and the two events were causally connected.*

Second Supreme Court precedent

In the second Supreme Court opinion, *Clark County School District v. Breeden*, the Court held that, to show a causal connection in a Title VII retaliation case, "mere temporal proximity between" the employer's knowledge of protected activity and an adverse action must be "very close."

The employee here alleged that the written reprimand was in retaliation for his EEOC filing. But the employer didn't issue the written reprimand until seven months after he had filed the complaint. Absent additional evidence showing causation, the Eleventh Circuit concluded that seven months was too long to show the requisite causal connection needed to establish a retaliation case.

Caution is advised

Here, the court affirmed judgment to the employer. But taking an action against an employee that could constitute an adverse employment action is risky — especially if it's soon after the employee has engaged in protected activity, because temporal closeness can establish a causal connection.

Incidentally, this employee wasn't represented by an attorney. Employers should take cases filed by plaintiffs unrepresented by attorneys just as seriously as they take any other lawsuit filed against them.

Court clarifies employees' FMLA rights

The issue before the Fourth Circuit in *Csicsmann v. Sallada* was whether an employer had retaliated against an employee who had taken leave under the Family and Medical Leave Act by eliminating his position while he was on leave, restoring him to a different position when he returned and later eliminating that position as well.

Case arises

While a manager in a company's information technology (IT) department was on FMLA leave for hip surgery, the company eliminated his position. On his return, he was assigned to different IT duties with the same salary, title, bonus eligibility, and retirement and health care benefits as before.

After a merger the following month, the company eliminated his new position and discharged him. He alleged that, because he had taken FMLA leave, the employer retaliated and discriminated against him by failing to restore him to an equivalent position.

The trial court rejected all his claims without a trial, ruling that the facts were undisputed and the employer was entitled to judgment as a matter of law.

Intangible vs. measurable differences

On appeal, the Fourth Circuit first noted that the FMLA allows two options when employees return from qualifying leave: Give them back their previous positions or give them "equivalent" positions with "equivalent employment benefits, pay, and other" employment terms. In other words, employees returning from FMLA leave aren't absolutely entitled to be restored to their previous positions.

Here, no one disputed that the manager's salary, title, bonus eligibility, health care and retirement benefits remained the same. And he continued to work the same schedule in the same physical office. So the court held that both positions' concrete and measurable aspects were exactly the same.

But the manager argued that his new position wasn't equivalent to the one eliminated while he was on leave because it was less prestigious and less visible. The Fourth Circuit rejected this argument, noting that an equivalency determination excludes a position's intangible aspects. Federal rules clarify that the requirement of equivalent employment terms "does not extend to de minimis or intangible, unmeasurable" job aspects. The court held that his positions' concrete and measurable aspects were exactly the same.

Finally, the manager argued that the new position was ultimately slated for layoff while his previous position wasn't. The court rejected this argument because the company had eliminated his previous position before he returned from leave, and eventually closed the entire department after the merger. He presented no evidence that his previous position would have survived.

So the Fourth Circuit concluded that the trial court had appropriately thrown out the manager's claims.

Jobs can legitimately be eliminated

This case demonstrates that the FMLA doesn't provide employees who take leave under it with an absolute right to return to their exact same positions. The act permits reinstatements to equivalent positions. Moreover, an employer may make legitimate business decisions that can result in eliminating an employee's job altogether.

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