Employment Law Briefing

MARCH/APRIL 2012

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What did he say?

ADEA decision centers on employee's alleged repeated verbal abuse

Just how far do pervasive and offensive age-related comments have to go to permit a cause of action for hostile work environment under the Age Discrimination in Employment Act (ADEA)? The U.S. Court of Appeals for the Fifth Circuit provided one answer in its decision in *Dediol v. Best Chevrolet, Inc.*

Name-calling at work

The 65-year-old plaintiff began his employment at Best Chevrolet on June 1, 2007, working under the used car sales manager. On July 3, the plaintiff sought permission to take the next morning off to volunteer at a church event. In denying the plaintiff permission, the manager called him an obscenity and threatened to fire him if he didn't show up for work.

After this incident, the manager allegedly never again referred to the plaintiff by his name. Instead, he would use nicknames such as "old man" and "pops" as well as the same obscenity. From July 3 until the plaintiff's eventual resignation, the manager allegedly directed these nicknames at the plaintiff about a half a dozen times a day. The plaintiff attempted to change departments, but his requests were denied by the manager in question.

In addition to calling the plaintiff names, the manager allegedly provoked fights with him — either through physical intimidation or actual violence. During one office meeting, the manager allegedly threatened to beat up the plaintiff and then literally charged at him.

After this meeting, the plaintiff continued to work the rest of the day and the next, but at a meeting with several managers on Aug. 30 he expressed an inability to work under the given conditions and resigned.

The plaintiff filed a lawsuit alleging that he'd been subjected to a hostile work environment based on age. Best Chevrolet filed a motion for summary judgment, which the district court granted. The plaintiff appealed.

Sharing a purpose

Under Title VII of the Civil Rights Act, it's "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The U.S. Supreme Court has noted that the phrase "terms, conditions, or privileges of employment" allows an individual to bring a hostile work environment claim under the Civil Rights Act. But, because this phrase doesn't appear in the ADEA, and age discrimination isn't protected by Title VII, the Fifth Circuit had never before held that Title VII could be used to address a claim of hostile work environment based on age.

Now adopting the rationale of *Crawford v. Medina General Hospital*, an earlier decision from the U.S. Court of Appeals for the Sixth Circuit, the Fifth Circuit concluded that "the ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" Accordingly, the court held that a "plaintiff's hostile work environment claim based on age discrimination under the ADEA may be advanced in this court."

Satisfying the test

To advance this type of claim, a plaintiff must satisfy a four-pronged test:

1. He or she is over the age of 40.
2. He or she was harassed based on his or her age.

3. The nature of the harassment created an objectively intimidating, hostile or offensive work environment.
4. There exists some basis for liability on the employer's part.

The Fifth Circuit found that the plaintiff in this case clearly met the first two prongs. But, it noted, the third prong is particularly critical.

To determine whether conduct is objectively offensive, the court looks at the totality of the circumstances, including the frequency and/or severity of the discriminatory conduct, whether the conduct was physically threatening or merely an offensive utterance, and whether the conduct interfered with the employee's work performance.

After reflecting upon these factors, the court concluded that the plaintiff met the third prong. Further, because the manager had allegedly steered sales away from the plaintiff and toward younger salesmen, the fourth prong had been met as well. Therefore, the Fifth Circuit reversed the lower court's decision and denied summary judgment.

Covering all bases

Some employers may not pay as much attention to age discrimination as they do to sexual harassment or inappropriate conduct concerning race, national origin or disability. But, as this case shows, age discrimination can be just as costly. Be sure to train supervisors on what constitutes age discrimination to help ensure they won't engage in behavior that could lead to a lawsuit like this one. ♦

A closer look at constructive discharge

Another claim made by the plaintiff in *Dediol v. Best Chevrolet, Inc.* (see main article) was that he was constructively discharged. In other words, he argued that the environment at the auto dealership was so hostile and offensive that he was forced to quit his job to avoid the mistreatment.

To prove constructive discharge, a plaintiff must show that a "reasonable party in [the plaintiff's] shoes would have felt compelled to resign." When analyzing such claims, courts consider the relevancy of events such as:

- **Job demotions,**
- **Reductions in salary or job responsibilities, and**
- **Reassignments to work under a younger supervisor or to perform menial work.**

A court may also look at whether the employer encouraged the employee to resign or made offers of early retirement or less-favorable continued employment.

In *Dediol*, the Fifth Circuit relied mainly on the supervisor's allegedly pervasive harassing behavior to conclude that the plaintiff had valid grounds for his constructive discharge claim.

USERRA case addresses commission-based employees

Many companies retain sales staff and others who are paid on commission. If these employees also happen to be members of the U.S. military, their employers should note the decision of the U.S. Court of Appeals for the Second Circuit in *Serricchio v. Wachovia Securities*.

Rocky reinstatement

The plaintiff worked at Wachovia Securities as a financial advisor before he was activated for military duty in the wake of the Sept. 11 terrorist attacks. During the 11 months before his activation, he had earned around $75,000 in commissions.

The plaintiff was honorably discharged in October 2003. On Dec. 1, his attorney sent a letter to Wachovia requesting, among other things, his client's reinstatement. Wachovia didn't respond until nearly two months later.

On March 31, 2004, the plaintiff reported to his former office for work and spoke with an assistant manager, who provided the plaintiff with a list of his remaining accounts. After reviewing the list, the plaintiff quickly determined that these accounts would generate virtually no commissions. He subsequently met with the branch manager and was offered a state-mandated $2,000 monthly draw while he rebuilt his "book of business."

The plaintiff sued Wachovia under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and was awarded $389,453 in back pay and $389,453 in liquidated damages. He was also awarded reinstatement as a financial advisor with a monthly salary of $12,300 for three months and a monthly draw of $12,300 for the following nine months (to be offset against any commissions earned during this period). Wachovia appealed.

Legal requirements

Under USERRA, service members "shall be promptly re-employed" by their former employers "within two weeks of the [service member's] application for re-employment." The service member must send this application for reinstatement "not later than 90 days after the completion of the period of service."

Moreover, USERRA requires employers to offer returning service members "a position of like seniority, status and pay." Because, before deployment, the plaintiff's compensation was entirely based on commission, Wachovia argued that it had complied with this provision by offering him a position and the $2,000 monthly draw.

But, under USERRA, when a service member was previously employed in a commission-based position, the new position must provide the employee with comparable commission-earning opportunities.

A different position

In applying USERRA's requirements, the Second Circuit found that the position Wachovia offered the plaintiff differed greatly from the one he'd left because of his deployment.

USERRA describes what's commonly referred to as the "escalator position," which is the "job position that the [service member] would have attained with reasonable certainty if not for the absence due to uniformed service." Wachovia argued that, because of events outside of Wachovia's control (including the actions of the plaintiff's chosen partners and the realities of the financial markets), it was incorrect to assume that the plaintiff's book of business would have improved.

In striking down this argument, the court concluded that USERRA requires employers to consider what would have happened "but for" the call of duty. Here, but for the plaintiff's absence, his clients might have never left Wachovia and the accounts might not have been transferred to other brokers.

Failure to comply

Wachovia also challenged the award and calculation of damages, asserting that the award of liquidated damages was unwarranted because the violation wasn't willful and the plaintiff, a purely commission-based employee, shouldn't receive a guaranteed salary. USERRA provides that a prevailing party is entitled to a doubling of back pay upon a determination that the "employer's failure to comply with … [USERRA] was willful."

Noting that "Wachovia was a sophisticated company … [with] a team of people responsible for dealing with military-leave issues," the fact that it still didn't comply with properly reinstating the plaintiff was proof of a willful intent not to comply. As to the award of a guaranteed salary, USERRA grants the courts "full equity power … to vindicate fully the rights or benefits" of veterans seeking re-employment.

Accordingly, the court was within its powers when it granted the plaintiff a guaranteed salary — even if his preactivation job was compensated solely based on commissions.

Set to return

Thousands of military members have returned from Iraq and more will be returning from Afghanistan in the near future. So it's important for employers to be prepared. Review your employment policies and consult with an attorney to ensure you're in compliance with USERRA when you respond to reinstatement requests. ♦

Choose words carefully

College administrator's comment spurs ADA lawsuit

Managers need to choose their words carefully when speaking with employees — especially litigious ones. Case in point: *Dickerson v. Board of Trustees of Community College District No. 522*, which was heard by the U.S. Court of Appeals for the Seventh Circuit and spurred by an administrator's comment to an unhappy part-time worker.

Repeatedly denied

The plaintiff was a mentally disabled, part-time janitor who had worked for the defendant, a community college, since 1999. Before 2008, he'd received three warning notices from his employer, for:

1. Refusing to perform a work assignment (December 2005),
2. Failing to secure job-related equipment, resulting in a financial loss of $459 for the college (July 2006), and
3. Leaving a work site without his supervisor's permission (April 2007).

The plaintiff also applied for a full-time position three times, with his application repeatedly being denied. On Oct. 17, 2007, he attended a Board of Directors meeting and complained that he was being discriminated against because of his disability.

In a written evaluation two months later, the plaintiff's overall job performance was rated "unsatisfactory." He then filed a grievance with his union in January 2008, alleging that the school was discriminating against him by failing to promote him, this time because of his union activities. The following month, he filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the school's failure to promote him was because of his mental disability.

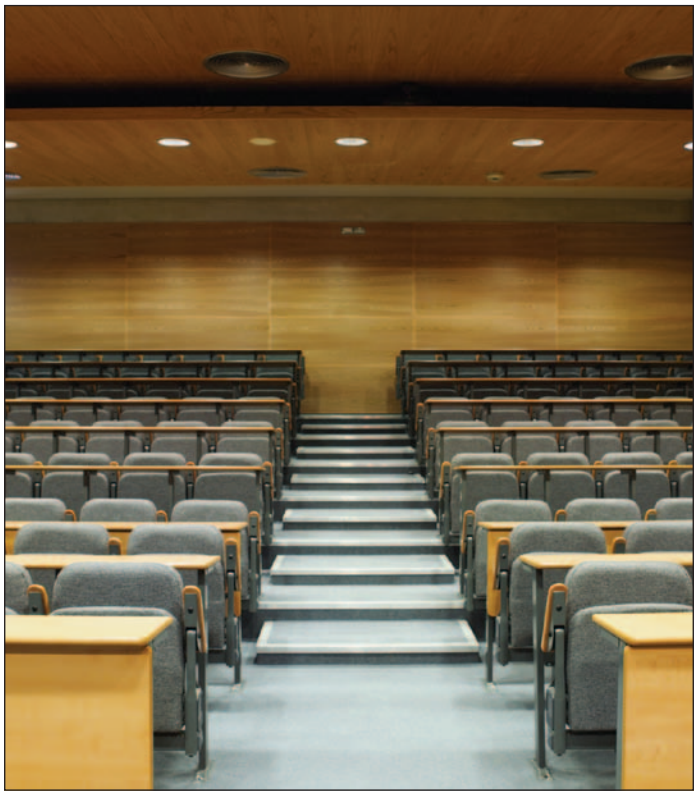
Several months later, the plaintiff asked the school's Vice President of Human Resources what he should be doing differently to be promoted to a full-time position. The vice president responded with something along the lines of: "You should not be suing your employer."

Following another performance evaluation conducted on July 18, 2008, in which it was noted that the plaintiff had made insufficient progress in correcting his earlier documented problems, he was terminated, effective Sept. 10, 2008. The plaintiff brought a lawsuit against the college in federal court alleging discrimination and retaliation under the Americans with Disabilities Act (ADA). In response, the school filed a summary judgment motion, which the district court granted. The plaintiff appealed.

The ADA prohibits employers from retaliating against any employees who exercise their rights under the act, regardless of whether the claim has merit.

Argument unsuccessful

The ADA prohibits employers from discriminating against disabled employees because of a disability. And the Seventh Circuit concluded that the plaintiff's mental handicap did qualify him for ADA protection.



The issue then became whether the college had discriminated against him because of his disability. To succeed on this claim, the plaintiff had to establish a prima facie case of discrimination, showing:

- He was disabled under the ADA,
- He was meeting his employer's legitimate employment expectations,
- He'd suffered an adverse employment action, and
- Similarly situated employees without a disability were treated more favorably.

The ADA also prohibits employers from retaliating against any employees who exercise their rights under the act, regardless of whether the claim has merit. To prove retaliation, the plaintiff needed to show that he'd engaged in a protected activity and suffered an adverse employment action — and that there was a causal connection between the two.

The plaintiff's main argument for his discrimination claim was that the vice president's comment was direct evidence of discriminatory intent and, because of his position as vice president, this intent should be attributed to the school. Yet, because the vice president made this statement *after* the plaintiff had filed his first EEOC claim, the court dismissed the notion that this was evidence of discriminatory motive.

The Seventh Circuit, however, did note that the vice president's comment supported the plaintiff's retaliation claim, as did the timing of his evaluations. But these facts didn't overcome the evidence provided by the school that the plaintiff's unsatisfactory work performance triggered his termination, not his claim filing. Without this causal connection, the plaintiff's argument couldn't succeed, so the court upheld the district court's decision.

Close call

The Seventh Circuit viewed the vice president's comment as evidence of a retaliatory motive and, but for the plaintiff's allegedly abysmal work product, it could have very well ruled in his favor. Therein lies the lesson for employers: Train supervisors to stick to clear, formal language when meeting with troubled employees. ♦

The inherent risks of a lack of accountability

Just about every organization must do what it takes to retain its key employees. But if an employer fails to hold every staff member accountable for his or her behavior, regardless of job title, negative consequences may follow. Such was the case in *Tuli v. Brigham & Women's Hospital*, heard by the U.S. Court of Appeals for the First Circuit.

Under review

The plaintiff began working as an associate surgeon in the Department of Neurosurgery in 2002. That year and the next, she was made the department's professionalism officer and representative to the hospital's Quality Assurance and Risk Management Committee (QARM), a position that required her to investigate and, if need be, report on other doctors' case complications.

As QARM representative, the plaintiff investigated three of the residency director's cases, all of which wound up being reported to the state's Board of Registration of Medicine. The plaintiff also made several allegations that the residency director's behavior toward her and other women was consistently inappropriate and demeaning. The plaintiff reported all of these complaints to the hospital's chief medical officer.

In October 2007, the plaintiff's medical staff credentials were up for review by the hospital's credentials committee. The residency director, who was also vice chairman of the department, presented her case to the committee.

During his presentation, the residency director stated that the plaintiff had mood swings, that 20 to 30 staff

members didn't want to work with her, and that she should attend anger management training. Relying on this review, the committee conditioned the plaintiff's reappointment on obtaining an evaluation within four months by an outside agency.

But after questions were raised about the lack of specificity of the residency director's presentation, the committee had the chief medical officer re-present the plaintiff's case two months later. Although his presentation was slightly more balanced than the residency director's, the chief medical officer still put forth the same questions raised by the residency director.

Moreover, the chief medical officer didn't tell the committee about the plaintiff's allegations against the residency director. The committee affirmed its decision, and the plaintiff filed a lawsuit alleging, among other things, a hostile work environment and retaliation. In district court, a jury ruled in her favor, awarding the plaintiff $1.62 million in damages. The hospital appealed.

Not typical

To prevail on a hostile work environment claim based on gender, a plaintiff must establish that:

1. He or she is a member of a protected class,
2. He or she was subjected to unwelcome gender-based harassment,
3. The harassment was sufficiently severe or pervasive that it altered the conditions of his or her employment,
4. The offending conduct was both objectively and subjectively offensive, and
5. Some basis exists for the employer's liability.

Because the record established that there were several instances in which the residency director questioned whether the plaintiff could handle spinal surgery because she was "just a little girl" and that another doctor had made many sexual advances toward her, the court agreed that the plaintiff had been subjected to a hostile work environment.

To prove retaliation, however, she needed to show that she'd engaged in protected activity, that she'd suffered an adverse employment action and that there was a causal connection between the two. Here, the hospital conceded that the plaintiff's actions were protected but questioned whether she'd suffered an adverse action and, if so, whether there was a connection.

To prove retaliation, the plaintiff needed to show that she'd engaged in protected activity, that she'd suffered an adverse employment action and that there was a causal connection between the two.

The First Circuit noted that, while "not a typical adverse action," the counseling ordered by the hospital had enough consequences associated with it to qualify as such. Also important was the chief medical officer's failure to disclose the fact that the plaintiff had previously filed negative reports on the residency director's handling of patient cases, information which two committee members testified would have been important.

Above the law

High-ranking professionals, such as the doctors in this case, may grow accustomed to getting their own way and not having their decisions questioned. But, as demonstrated by this decision, employers must establish that no one is above 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.

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