Employment Law Briefing

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Basketball fans or retaliators?

Collegiate athletic symbol prompts lawsuit

In recent years, several sports mascots have come under fire for alleged inappropriateness. In *Leonard v. Eastern Illinois University*, the U.S. Court of Appeals for the Seventh Circuit considered whether the plaintiff had been subject to retaliation in relation to his opposition to a mascot when he was denied a higher level job for which he was interviewing.

An outspoken advocate

The plaintiff, a Native American, was employed by Eastern Illinois University (EIU) as a building services worker. He was an outspoken advocate on Native American issues and a particular critic of "Chief Illiniwek," the image formerly used by the University of Illinois at Urbana-Champaign (U of I) to represent its athletics program.

The plaintiff's opposition to Chief Illiniwek even led to a nationally publicized lawsuit in 2005, when he sued the "Honor the Chief Society" for denying him entry to the showing of a pro-Chief movie. His involvement in the lawsuit received national news coverage.

A tense beginning

In March 2005, the plaintiff interviewed for EIU's building service subforeman position. The interview began tensely when two of the six interviewers removed their jackets to reveal shirts with the Chief Illiniwek logo. The district court, however, noted that the interviewers' shirt selection may have been unremarkable given that the U of I men's basketball team was playing that night in the NCAA tournament, and there were many U of I fans at EIU.

The interview began tensely when two of the six interviewers removed their jackets to reveal shirts with the Chief Illiniwek logo.

Nonetheless, the plaintiff was offended by the shirts and felt that his anger came across during the interview. Although he didn't get the promotion, no one else was promoted to the position at that time.

In April, the plaintiff made a complaint to EIU's Office of Civil Rights about the shirts. A representative from the civil rights office told interviewers not to wear Chief Illiniwek apparel when dealing with the plaintiff, who said he was satisfied with this outcome.

The plaintiff interviewed for the building services subforeman job again in October. The panel consisted of the same six interviewers, none of whom wore any Illini-related apparel. Although the plaintiff thought the interview went well, he still didn't get the promotion.

In response, he filed a lawsuit claiming that the decision not to promote him was retaliation for his earlier civil rights complaint. The district court granted EIU's motion for summary judgment, and the plaintiff appealed.

Too long a lag

To establish a prima facie claim of retaliation, a plaintiff must produce evidence of: 1) a statutorily protected activity, 2) a materially adverse action taken by the employer, and 3) a causal connection between the two. The only issue on appeal was the third.

Under the interview process, the panel asked each candidate a series of standardized, prewritten questions. Each interviewer then gave the candidate a score of one to five points in each of five job-related categories. The interviewers were all consistent in scoring the plaintiff among the bottom 50% of the candidates.

The appeals court found that, given the standardized format and the interviewers' scoring consistency, the plaintiff couldn't show that any interviewer had denied him a promotion in retaliation for his complaint. The court explained that this consistent scoring pattern by the interviewer panel suggested only that the plaintiff was outperformed by other candidates — not that he was the target of retaliation.

The appeals court also found that the six-month lag between his complaint and unsuccessful interview was too long to infer a link between the two. Thus, the appeals court affirmed the summary judgment granted EIU.

A legal boon

Indeed, those two EIU employees showed questionable judgment wearing Chief Illiniwek apparel to a job interview. But, as this case shows, a prompt investigation and resolution of a complaint — as well as a sound and standardized interview process — can be a legal boon to employers. ♦

Long lapse didn't stop retaliation case

In *Leonard v. Eastern Illinois University* (see main article), the U.S. Court of Appeals for the Seventh Circuit found a six-month lag between the plaintiff's civil rights complaint and a second, unsuccessful job interview too long to infer a retaliatory link between the two. But in *Harrison v. Metropolitan Government of Nashville*, the Sixth Circuit viewed an even longer lag differently.

In that case, an African-American rabies control officer was suspended without pay after he'd encouraged another rabies control officer to: 1) leave his assigned territory, and 2) help him capture stray cats — both of which were violations of the employer's policy. The officer subsequently filed a discrimination charge with the EEOC. (The Sixth Circuit didn't address the EEOC's finding.)

Approximately a year later, the employer issued a memorandum stressing the importance of properly filling out receipts. Three months after that, the officer was terminated for consistently failing to properly fill out receipts, and he subsequently filed suit for retaliation.

The appeals court noted that the evidence showed that three employees feared retaliation because they'd testified at the district court trial on the officer's retaliation claim, and that the plaintiff's supervisor had repeatedly commented that he wouldn't hesitate to run employees out of his department. The court decided that the 15-month time lapse wasn't too long to keep this evidence from establishing a prima facie case of retaliation.

Standing PAT

Employer's physical fitness test plays role in discrimination suit

For physically demanding positions, many employers use a physical fitness test to vet job candidates. But these tests must be applied carefully to pass legal muster. In *Merritt v. Old Dominion Freight Line*, the U.S. Court of Appeals for the Fourth Circuit looked into whether such a test, as well as an employer's conduct, constituted discrimination based on the plaintiff's sex.

Different types of drivers

Old Dominion is a nationwide trucking company that employs "line haul" drivers and "pickup and delivery" drivers. Line haul drivers often drive long distances across state lines, spending some nights and weekends away from home. Pickup and delivery drivers work more locally, rarely working nights and weekends.

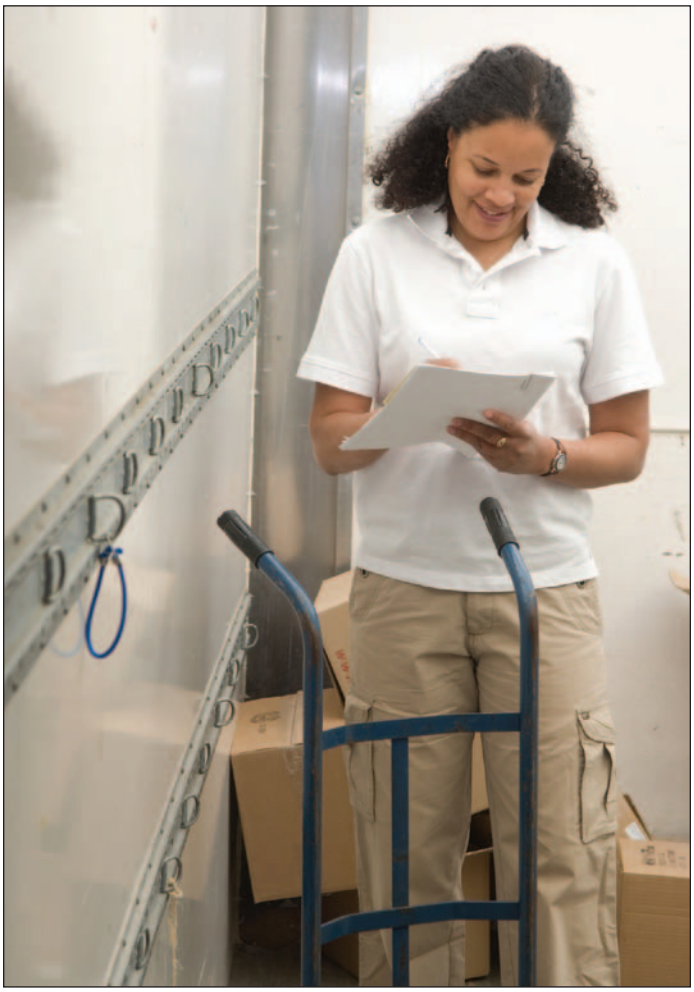
Also, because pickup and delivery drivers pick up and unload freight, the job requires more lifting and is more physically demanding than the position of line haul driver. Of Old Dominion's approximately 3,100 pickup and delivery drivers, only a few are female.

The plaintiff in this case was employed as a line haul driver. In the spring of 2002 and the spring of 2003, she applied for a transfer to pickup and delivery driver so she could work more regular hours and spend nights and weekends at home. Both times, the plaintiff was passed over for a less experienced male driver.

Following the second incident, the driver asked her manager why she had been passed over. The manager told her, "It was decided that they could not let a woman have that position." On another occasion, the manager told the plaintiff that Old Dominion's Regional Vice President "was afraid [a female] would get hurt." The Regional Vice President denied these allegations.

Transfer, injury and dismissal

In March 2004, Old Dominion did transfer the plaintiff to pickup and delivery driver. From March to September, she performed her pickup and delivery duties satisfactorily. But, on Sept. 29, the plaintiff suffered an ankle injury while moving boxes on the job. Her doctor recommended she perform only light-duty work until her next appointment with him on Dec. 27.



On Dec. 22, Old Dominion's vice president of safety and personnel (VPSP) booked an appointment for the plaintiff to take a physical ability test (PAT) on Dec. 28. The PAT was created for Old Dominion by an independent company in 2001 "to be used in the hiring process." Consistent with this purpose, Old Dominion used the PAT primarily in a pre-employment context to evaluate potential hires but, as the VPSP himself testified, only on a "very variable" basis.

On Dec. 27, the driver was examined by her doctor. He found that "there was nothing about [her] medical condition which would have prevented her from performing her job duties as a pickup and delivery driver for Old Dominion as of Dec. 27, 2004." The next day the plaintiff took the PAT, which she failed. Shortly thereafter, the VPSP fired her.

The driver filed a lawsuit alleging she had been discriminated against on the basis of her sex. The district court granted Old Dominion's motion for summary judgment, and the plaintiff appealed.

Unworthy of credence

The appeals court found that the driver had produced ample evidence that Old Dominion's proffered reason — failing the PAT — was "unworthy of credence."

The court noted that the plaintiff's ankle injury had healed at the time of her termination and explained that, according to an expert on trucking industry standards, Old Dominion's use of the PAT in this case was atypical, because:

- The PAT "was not specific to [the plaintiff's] foot sprain," and
- The expert was unaware of a motor carrier that "had either established a policy for or had tested injured employees on portions of their bodies which were not affected by an injury."

In fact, the driver's difficulties with the PAT appeared to have nothing to do with her ankle.

In addition, the court found the plaintiff had provided evidence of discriminatory intent. Specifically, she'd set forth evidence that Old Dominion used the PAT selectively, excusing injured male employees from taking it.

In addition, she'd showed that the employee responsible for requiring the PAT and firing her — the VPSP — harbored discriminatory animus toward women. For

instance, he was responsible for selectively employing the PAT and was part and parcel of Old Dominion's widespread resistance to hiring women as pickup and delivery drivers.

Based on this evidence, the appeals court found that a fact finder could find in favor of the plaintiff on the ultimate question of intentional discrimination. It reversed the summary judgment finding.

The test's relevance

In using any physical fitness test to screen employees, an employer must be able to establish the test's relevance to the job in question. In this case, the PAT's validity was undermined by the fact that, before taking it, the plaintiff had been able to perform the job satisfactorily. This, plus the test's selective application and a history of discriminatory comments, could allow a jury to find discrimination. ♦

Rolling trouble: Runaway truck leads to ADEA case

Many lawsuits spring from alleged unlawful termination. But, in *Medlock v. United Parcel Service Depot*, the U.S. Court of Appeals for the Tenth Circuit considered whether an employer had violated the Age Discrimination in Employment Act (ADEA) when it wouldn't *reinstate* a driver.

Crashing the gate

It all began when the plaintiff, a 56-year-old United Parcel Service (UPS) driver, went to make a delivery to a gated location. While waiting for the gate to open, the driver went to the back of the truck to prepare the packages. As he stood there, the truck rolled forward and crashed into the gate.

Although the plaintiff insisted he had set the parking brake, UPS investigated and found the truck's parking brake and transmission assembly were in good working order. As a result, the company terminated the driver under the terms of a collective bargaining agreement.

The driver filed a lawsuit alleging age discrimination, and the district court granted a motion by UPS for summary judgment. The plaintiff appealed.

Dealing in hypotheticals

The appeals court explained that this case was unusual in that it wasn't really about the driver's termination, which both parties agreed was based on a legitimate disciplinary policy. Rather, the case focused on the allegedly discriminatory refusal to reinstate the plaintiff as other, younger

employees had been after being fired for the same or similar conduct. Thus, to defeat summary judgment by creating a triable issue of pretext, the driver had to show weaknesses, implausibilities or inconsistencies in his employer's explanation for not reinstating him.

The manager who denied the plaintiff's application for reinstatement testified that he had reinstated other, younger drivers because they had admitted and expressed remorse for the infraction. Conversely, the driver in this case deflected responsibility and insisted on mechanical failure — even after the investigation showed otherwise.

But, when asked if, hypothetically, he would have reinstated the plaintiff if the driver *had* shown remorse, the

manager testified, "I can't sit here and say yes, for sure … chances are I would have." The appeals court saw this as an acknowledgment that the stated reason for reinstating the other employees but not the plaintiff wasn't necessarily the only reason for treating the employees differently.

The court explained, however, that it's not the employer's burden to negate any possible contributory role played by age. Instead, it's the employee's burden to show that age was the "but for" cause of the action.

According to the court, the manager's hypothetical qualification that, had the driver admitted fault, something else might have led management not to grant reinstatement wasn't determinative. That hypothetical qualification didn't eliminate the plaintiff's refusal to admit fault as the "but for" cause of the manager's refusal — much less substitute age as the "but for" cause. Instead, the manager merely acknowledged that some other, unspecified consideration(s) could count against reinstatement.

Looking at other claims

The appeals court next examined the plaintiff's other claims of pretext. The driver first attempted to show pretext based on his being repeatedly admonished for not working fast enough. But the plaintiff's suggestion that his employer's concern over subpar work pace or productivity was a mask for age discrimination was deemed untenable by the court.

The driver next noted that, shortly after his truck was put back in action, it required repairs to the parking brake and clutch. But the court countered that, because this information wasn't available to the decision makers when they denied his reinstatement request, it didn't show discrimination.

Finally, the plaintiff argued that, when he had told his supervisor that he wanted to work until he was 80, the supervisor said, "We can't have that." The appeals court stated that such an exchange wouldn't be enough to survive summary judgment. Moreover, in this instance, the supervisor played no role in the decision to terminate the driver or to refuse reinstatement.

Thus, the appeals court upheld the summary judgment in UPS's favor.

Applying uniform discipline

This case illustrates the importance of employers applying their disciplinary — and hiring and reinstatement — policies uniformly without relying on extraneous factors. Failure to do so could result in liability if a plaintiff can show that the extraneous factor was the real reason for the adverse action and not the nondiscriminatory company policy. ♦

Compensation strategy runs into FLSA turbulence

Employment costs are a tricky issue for many organizations. But if an employer goes too far in trying to control these expenses, it can get itself into legal hot water. Such was the case in *Gagnon v. United Technisource, Inc.*, wherein the U.S. Court of Appeals for the Fifth Circuit examined whether an employer had violated the Fair Labor Standards Act (FLSA).

Painted into a corner

United Technisource Inc. (UTI) hired the plaintiff to paint aircrafts. When he began working, he executed a contract in which the employer agreed to pay him $5.50 per hour for "straight time" and $20 per hour for overtime. UTI agreed to pay the plaintiff an additional $12.50 for every hour he worked up to 40 hours per week or a maximum of $500. The contract referred to this additional hourly pay as "per diem."

About a year later, the plaintiff received a memo that notified him of a "raise in all pay." But his straight-time rate didn't increase. Rather, he received a dollar raise in his hourly per diem for all hours worked under 40 each week and another dollar increase in his overtime rate.

Eventually, the plaintiff filed a lawsuit alleging that UTI had failed to properly pay him overtime under the FLSA. The district court ruled in his favor, awarding him:

- Back pay of $4,266.82,
- Liquidated damages of $4,266.82,
- Costs of $3,568.57, and
- Attorneys' fees of $55,908.00.

UTI appealed.

Artificial measure

UTI argued that the plaintiff's per diem reasonably approximated his reimbursable expenses and should be excluded from his regular rate when calculating overtime pay. UTI maintained that its payment scheme didn't violate the FLSA, because the law requires employers to pay overtime at a rate of time and one-half, and UTI paid the plaintiff overtime at a rate of more than three times his base pay.

The FLSA requires that nonexempt employees who work more than 40 hours in a workweek be paid one and one-half times their "regular rate" of pay. The FLSA broadly defines "regular rate" as the hourly rate actually paid the employee for "all remuneration for employment."

The appeals court explained that UTI had tried to avoid paying Gagnon a higher "regular rate" by artificially designating a portion of Gagnon's wages as "straight time" and a portion as "per diem." But the appeals court noted that the Department of Labor has recognized that when, as here, the amount of per diem varies with the amount of hours worked, the per diem payments are part of the regular rate in their entirety.

Remuneration for employment

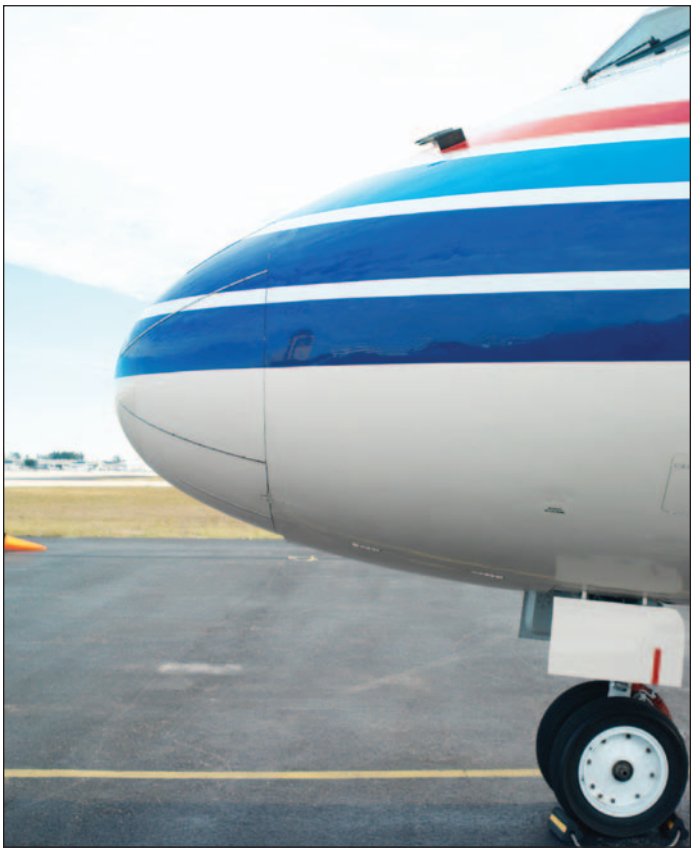
The appeals court also found that this case was analogous to other cases in which employers had sought to artificially lower an employee's regular rate by mischaracterizing a portion of it as a bonus or by paying low "straight rates" for the first hour or two worked — usually set around minimum wage — and then paying one and one-half times the straight rate for subsequent hours, consequently paying no premium for actual overtime work.

Thus, the appeals court held that Gagnon's hourly per diem allowances of $12.50 and later $13.50 were part of his hourly "remuneration for employment" and had to be considered in determining his regular rate for calculating overtime pay under FLSA rules. Accordingly, the appeals court affirmed the district court's determination that UTI had violated the FLSA by not including Gagnon's per diem in their calculation of his regular rate.

The FLSA broadly defines "regular rate" as the hourly rate actually paid the employee for "all remuneration for employment."

A transparent attempt

In this case, the employer's attempt to characterize the additional hourly compensation as "per diem" was a transparent attempt to minimize overtime pay. All employers should bear in mind this harsh lesson when determining overtime rates. ♦



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