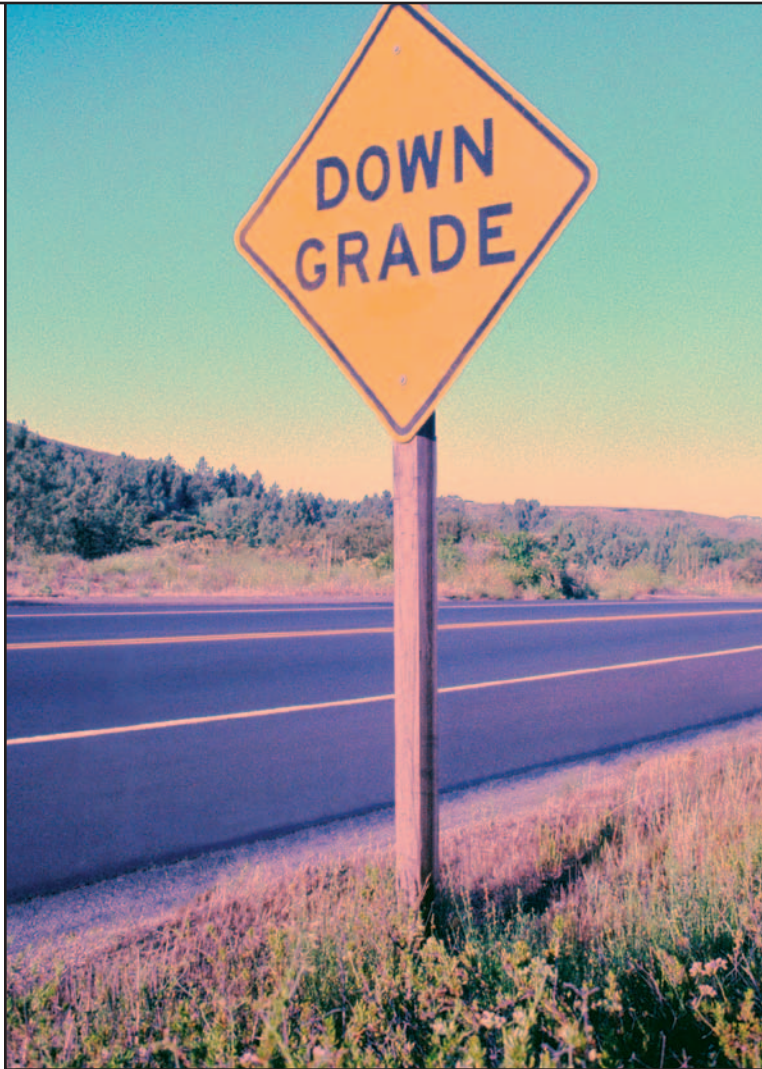


Employment Law Briefing



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Please demote me

Employer bucks policy, prompting reverse discrimination case

Most employees don't ask to be demoted. But when an employer's policy is to demote problematic workers rather than terminate them, submitting a demotion request makes a little more sense.

If the employer chooses to buck that policy, however, legal troubles may ensue. Such were the circumstances behind *Good v. University of Chicago Medical Center*, a reverse discrimination case heard by the U.S. Court of Appeals for the Seventh Circuit.

That's a possibility

The plaintiff worked in the University of Chicago Medical Center's (UCMC's) Radiology Department as a lead technologist in the computerized tomography (CT) department. UCMC conducted annual performance evaluations, performed by each department manager, evaluating employees' performances in several categories on a scale of 1 (worst) to 5 (best).

Any employee whose overall score was less than 3 was placed on a performance improvement plan (PIP) with consequences if the worker failed to improve in 30, 60 or 90 days. In situations whereby UCMC felt an employee's skills didn't match the applicable job requirements, its policy was to demote, rather than terminate, the worker.

The plaintiff was hired as a lead technologist in 1994 but, after a three-month sabbatical in 1999, was rehired as a staff technologist. In 2004, she was promoted back to the position of lead technologist. The plaintiff's direct supervisor was the CT manager, who in turn worked under the Assistant Director of Specialty Imaging Services (ADSIS). All three individuals are Caucasian.

In July 2007, the CT manager performed the annual evaluation, and the plaintiff received an overall rating of 2.65. Because the score was less than 3, she was placed on a PIP. In response, the plaintiff told the CT manager and ADSIS that she "would be

happy to step down to a staff technologist position." The ADSIS replied, "That's a possibility."

Thinking about it

After failing to sufficiently improve over the next 90 days, the plaintiff received a final warning on Oct. 12, was placed on another PIP and transferred to another shift. At that point she again asked about being demoted, and the ADSIS stated that UCMC was "thinking about it." When the plaintiff repeated her request in late October or early November, the ADSIS told her that UCMC had changed its policy about demotions in lieu of terminations. The plaintiff would later learn this was untrue.

On Nov. 27, pursuant to instructions from the Director of Radiology, the plaintiff was terminated and replaced with a white female. Alleging reverse discrimination in violation of Title VII, the plaintiff sued. The district court granted UCMC's motion for summary judgment, and the plaintiff appealed.

Direct and indirect

As evidence of her disparate treatment, the plaintiff cited three similarly situated UCMC employees of different races who were allowed to take demotions. She also noted the



Something's fishy: A contrasting case

As discussed in *Good v. University of Chicago Medical Center* (see main article), plaintiffs alleging reverse discrimination must show either direct or indirect evidence to support their claims. In the case of indirect evidence, they must show something was “fishy” about the employment action in dispute. Another Seventh Circuit case, *Hague v. Thompson Distribution Co.*, provides an example.

The plaintiff's grandfather was the founder of Mutual Pipe & Supply Co., and the plaintiff had worked there for 32 years. After losing one of its largest customers, Mutual Pipe went out of business and an African-American male bought its assets through Thompson Distribution Co., a company the buyer had created in anticipation of the Mutual Pipe purchase.

When Thompson began operations, it hired about 13 employees — 12 of whom had previously worked for Mutual Pipe. Of these 13, seven were white and six were African-American. Within 90 days, the buyer fired the plaintiff, his wife and three other former Mutual Pipe employees, all of whom were white, and replaced them with African-American employees. The plaintiff and other terminated workers sued Thompson for, among other things, race discrimination. The district court granted the employer's motion for summary judgment, and the plaintiffs appealed.

In contrast to its finding in *Good*, the Seventh Circuit found that the “background circumstances” in this case were fishy enough to allow the pursuit of a reverse discrimination claim. The plaintiffs were all white; they were fired by their African-American boss; and they were replaced with African-American employees.



inconsistent reasons she was given as to why she wasn't offered this option. The Seventh Circuit rejected both theories for the same reason.

To support discrimination claims, plaintiffs can use either direct or indirect evidence. Direct evidence must lead directly to the conclusion that the employer was illegally motivated — without reliance on speculation.

To support discrimination claims, plaintiffs can use either direct or indirect evidence.

Regarding her “similarly situated employees” argument, the court stated that, even if UCMC treated these employees differently, the plaintiff failed to show how this treatment was illegally motivated. And the only way to establish that connection would be via speculation.

Similarly, the Seventh Circuit agreed with the district court that the inconsistent statements of the ADSIS weren't direct proof of discrimination because the plaintiff failed to show that UCMC had refused to demote her because of her race. This policy was highly discretionary, and the mere fact that UCMC deviated from it didn't demonstrate improper motivation.

The court also found that the plaintiff failed to show indirect evidence of discrimination, which would be accomplished primarily by establishing that there was something “fishy” about her termination.

She failed to improve under her PIPs and was replaced by a *white* employee, which supported UCMC's position that the plaintiff wasn't treated differently based on race.

Power of evidence

Employers should follow their stated policies as consistently as possible. But, in the event of a reverse discrimination suit like this one, it's important to know the power of direct and indirect evidence. ♦

Parting words: Severance package sparks lawsuit

Can an employer's offer of a severance package constitute an adverse employment action? That was the question in *Gerner v. County of Chesterfield*, a case heard by the U.S. Court of Appeals for the Fourth Circuit. Here the plaintiff sued her employer for gender discrimination under Title VII of the Civil Rights Act of 1964, claiming she'd been offered a less favorable severance package than similarly situated male employees.

Position eliminated

The plaintiff began working for the County of Chesterfield in 1983 and, by 1997, she was the County's Director of Human Resources Management. Throughout her tenure, the plaintiff consistently received positive performance evaluations. Nonetheless, on Dec. 15, 2009, County officials informed the plaintiff that her position was being eliminated because of a reorganization.



She was offered a severance package consisting of three months' pay and health benefits. In exchange, her employer asked for the plaintiff's voluntary resignation and a waiver of any cause of action against the County. After several days, she declined the offer and was terminated effective Dec. 15.

The plaintiff filed an action in federal district court alleging that the County hadn't offered her the same "sweetheart" severance package it offered to her male counterparts.

Specifically, she claimed that previous male department directors were either kept on the payroll with benefits for up to six months or were transferred to positions with less responsibility while being allowed to continue receiving the same salary and benefits.

The district court dismissed the plaintiff's complaint, finding that "the terms and conditions of the severance package do not constitute an actionable adverse employment action under Title VII." The plaintiff appealed.

Rejected rationales

In dismissing her complaint, the district court held that:

1. Severance benefits must be a "contractual entitlement" to provide a basis of an adverse employment action under Title VII, and
2. There was no adverse action because the offer of the severance package was made after the plaintiff had been terminated.

The Fourth Circuit rejected both of these rationales. It noted that the district court's first ("contractual entitlements") argument was contrary to U.S. Supreme Court precedent.

Specifically, in *Hishon v. King & Spalding*, the Court found that "benefits that [an employer] is under no obligation to furnish by any express or implied contract ... may qualify as a privileg[e] of employment under Title VII." Indeed, in situations whereby the employee didn't volunteer for a change in employment benefits or retain his or her job in lieu of a new benefit, the discriminatory denial of a noncontractual employment benefit constitutes an adverse employment action.

The Fourth Circuit also found defects regarding the second rationale. Courts must accept as true all well-pleaded allegations in the nonmoving party's complaint when reviewing a motion to dismiss. In her complaint, the plaintiff alleged that the County had permitted her to consider the offer until Dec. 21, and she was fired when she rejected the offer on the 21st. Therefore, according to

her complaint, the plaintiff was still an employee when she was given the offer. The lower court, therefore, erred by ignoring these allegations.

The court further pointed out that Title VII protects both current *and* former employees. It noted that Title VII makes it an unlawful employment practice for an employer “to discriminate against any individual” on the basis of membership in a protected class. This broad language has been held to apply to prospective, current and previous employees. Therefore, even if the plaintiff weren’t a County employee, she was still a protected individual under Title VII.

Ultimately, the Fourth Circuit reversed the district court’s decision and remanded the case for further proceedings.

No obligation

The lesson of *Gerner* is fairly clear: Severance packages can lead to trouble if handled inconsistently. When offering different severance packages to similarly situated workers, employers must be prepared to present legitimate business reasons for the differences. And, of course, no employer is obligated to offer any severance at all. ♦

No good deed goes unpunished

Retroactive FMLA leave plays key role in lawsuit

They say no good deed goes unpunished. This expression likely rings true to one of the parties to *Lovland v. Employers Mutual Casualty Company*, a case that went before the U.S. Court of Appeals for the Eighth Circuit. In question was whether an employee’s discharge was motivated by her taking retroactive leave under the Family and Medical Leave Act (FMLA).

Reviewing attendance

In January 2009, the plaintiff’s supervisor and President of Employers Mutual Casualty Company’s (EMC’s) Risk Services division reviewed the 2008 attendance records for all Risk Services employees. From this review, she saw that the plaintiff had an unacceptably high number of absences.

Knowing that the plaintiff had actually missed some time in 2008 because of a back injury, the supervisor asked her whether she wanted to retroactively apply any FMLA days to her 2008 absences. After the plaintiff submitted the necessary information, the supervisor applied a total of 18 hours in retroactive leave and created a new 2008 attendance record.

But, even after incorporating the plaintiff’s FMLA leave into the report, her unscheduled paid time off (PTO) still came out to 103.75 hours. That amount far exceeded an acceptable number under EMC’s (or, presumably, any employer’s) attendance policies. The supervisor then looked at the plaintiff’s 2007 and 2006 records; they revealed similar totals of unscheduled PTO.

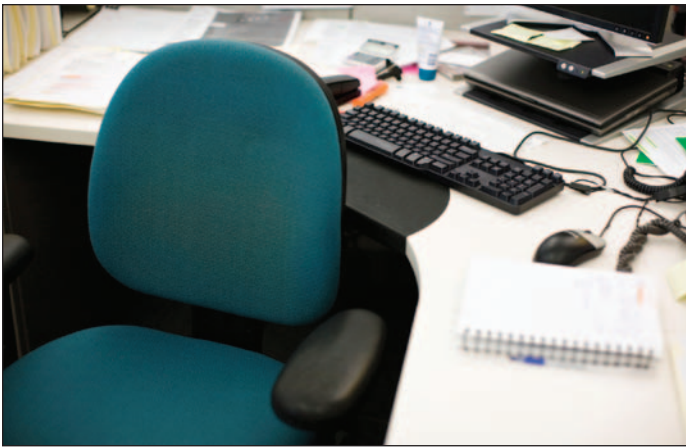
On Feb. 23, the supervisor delivered a corrective action notice to the plaintiff. It stated, among other things, that unscheduled PTO must be minimized and leave without pay wouldn’t be tolerated unless it was FMLA-related or involved an emergency situation.

Missing more time

Around May 12, the plaintiff received the death certificate for her recently deceased father in the mail. The following morning, she left a message on the supervisor’s voice mail saying she’d be late for work.

The plaintiff’s amount of unscheduled paid time off far exceeded an acceptable number under EMC’s (or, presumably, any employer’s) attendance policies.

But the plaintiff didn’t show up for work that day. The next day, instead of calling the supervisor, the plaintiff phoned a co-worker to report that she wouldn’t be in that day either. The plaintiff didn’t leave a message on her supervisor’s voice mail, nor did she instruct her co-worker to inform a superior.



According to the EMC employee handbook, staff members must notify their supervisors of any absences immediately after the office opens. If an employee has two consecutive “no call, no shows,” it would be considered a voluntary resignation. When the supervisor, who had been traveling, returned to the office, she learned of the two no-call, no-shows. After consulting with HR, the supervisor terminated the plaintiff for violating the company’s attendance policy and violating her corrective action notice.

Soon after, the plaintiff brought an FMLA action for interference. To prevail, she had to prove that her employer denied a benefit to which she was entitled under the act. Noting that EMC had essentially bent over backwards to accommodate the plaintiff by providing her with

retroactive FMLA leave, the district court granted EMC’s summary judgment motion. The plaintiff appealed.

Convincing the court

On appeal, the plaintiff argued that, because EMC admitted the corrective action notice was a negative factor in her termination, and because the retroactive FMLA leave was a component of the notice, she had a valid interference claim.

The Eighth Circuit was unconvinced. It noted that, even if the plaintiff’s use of FMLA leave was a negative factor in the plaintiff’s termination, summary judgment would have still been appropriate because her discharge was unrelated to use of FMLA leave. Indeed, the corrective action notice explicitly disclaimed the retroactive leave.

Ultimately, it was clear EMC would have terminated the plaintiff whether she received retroactive leave or not. Thus, the Eighth Circuit affirmed the lower court’s decision.

Making it clear

Employers must ensure that, when employees have taken FMLA leave, any subsequent adverse actions taken against those workers are distinctly separated from that leave. Fortunately for EMC, it was abundantly clear that its adverse actions toward the plaintiff weren’t connected to her taking protected leave. But for this clarity, the company could have lost its motion for summary judgment, and the matter would have proceeded to trial. ♦

Is good attendance an essential job function?

Accommodations under the Americans with Disabilities Act (ADA) can call into question even the most fundamental employment policies. Case in point: *Samper v. Providence St. Vincent Medical Center*, which was heard by the U.S. Court of Appeals for the Ninth Circuit.

Here the question was whether the employer had failed to accommodate a disabled employee who had requested exemption from the employer’s attendance policy. In making this determination, the court had to answer the question: Is good attendance an essential job function?

Recurrent issues

The plaintiff had worked part-time as a neonatal intensive care unit (NICU) nurse at Providence St. Vincent Medical Center for about 11 years. Since 2005, she’d suffered from fibromyalgia, which caused chronic pain and sleep loss.

During her time at Providence, the plaintiff and her co-workers were allowed to take five unplanned absences during a rolling 12-month period, with each absence — regardless of duration — counting as only one occurrence. Despite this policy, the plaintiff regularly exceeded the number of unplanned absences permitted even for full-time

employees. From 2000 through 2004, she surpassed the allotted limit and received negative attendance reviews almost every year.

In August 2005, the plaintiff met with her manager to discuss her recurrent attendance issues. The two came to an agreement whereby the plaintiff was allowed to call in when she wasn't feeling well and move her shift to another day in the week. But, by July 2006, she'd yet again exceeded the attendance limit and received another negative evaluation.

The plaintiff met with her manager in August 2006 and requested that she be deemed exempt from the attendance policy altogether. Providence denied this request.

Corrective action

By March 2008, the plaintiff received a corrective action notice for seven unplanned absences over the previous 12 months. Around this time, she was informed that her part-time position was being eliminated and she could either transfer to another position or be terminated. The plaintiff responded by making inappropriate comments in front of patients, and she received another corrective action notice.

After two more unplanned absences in April, the plaintiff was scheduled to meet with management for a third time to discuss her attendance. She missed this meeting because of an absence.

Shortly after the missed meeting, the plaintiff was terminated. She then filed suit in district court alleging that Providence had violated the ADA by failing to accommodate her. The district court granted Providence's motion for summary judgment, finding that the requested accommodation was unreasonable. The plaintiff appealed.

2 primary questions

To win a failure-to-accommodate case under the ADA, one of the elements a plaintiff must prove is that he or she was qualified to perform the "essential functions of the job with or without reasonable accommodation." Accordingly, the two primary questions on appeal in this case were whether:

1. Regular attendance is an essential function of the NICU nurse position, and
2. The plaintiff's attendance exemption request was reasonable.



The Ninth Circuit sided with Providence, calling it a "rather common-sense idea" that on-site regular attendance is an essential job function in the context of a NICU nurse. Describing teamwork, face-to-face interactions with patients and their families, and the need to work with medical equipment as the "trinity of requirements that make regular on-site presence necessary for regular performance," the appellate court agreed with the district court's decision.

Making quick work of the reasonable accommodation question, the Ninth Circuit noted that the plaintiff never quantified the number of additional unplanned absences she was looking for. Thus, the only conclusion to be drawn was that she'd be satisfied with only an open-ended schedule allowing her to come and go as she pleased. According to the court, forcing Providence to accommodate her in this manner "could, quite literally, be fatal."

There are limits

Employers should make every reasonable effort, in consultation with their attorneys, to accommodate disabled employees. But, as this case shows, accommodations have their limits. ♦

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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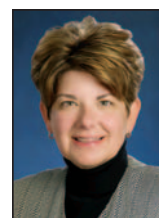
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