

Employment Law

BRIEFING



JULY / AUGUST 2017

Let the jury decide

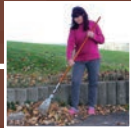
Court supports emotional distress damages in FLSA case

Conflict of interest dooms FMLA discrimination claim

Crime doesn't pay — even when the perpetrator is injured

Essential truths

Reasonable accommodation doesn't always satisfy ADA claims



**HALL
RENDER**
KILLIAN HEATH & LYMAN

Anchorage | Annapolis | Dallas | Denver | Detroit | Indianapolis | Louisville | Milwaukee | Philadelphia | Raleigh | Seattle | Washington, D.C.

HallRender.com

Let the jury decide

Court supports emotional distress damages in FLSA case

Many courts have considered whether the Fair Labor Standards Act (FLSA) allows a retaliation victim to recover damages for emotional distress. But the Fifth Circuit Court of Appeals had the additional task of determining whether the FLSA protects a nonemployee spouse from employer backlash.

ESCALATING TENSIONS

The employee in *Pineda v. JTCH Apartments* was an apartment complex maintenance worker when he brought an action against his employer for unpaid overtime. The employee and his wife lived in the same apartment complex and received a discount on rent as part of his compensation.

After filing his claim, the employee received notice that he was to vacate the apartment for nonpayment of rent. The nonpayment equaled the discount he had received as an employee.

The employee then amended his complaint against the employer, adding a claim for retaliation. At that point, his wife also joined the suit. But the wife's retaliation claim was dismissed as a matter of law by the trial court. At trial, the employee sought a jury instruction on emotional distress damages for his retaliation claim; however, it was denied. The employee and his wife appealed.

LOOKING FOR PRECEDENTS

The FLSA provides as remedies for retaliation claims “legal or equitable relief as may be appropriate . . . including without limitation employment, reinstatement, promotion, and the payment of wages.” When considering this case, the Fifth Circuit looked to the decisions of other circuits — including the First, Sixth, Seventh, Eighth and Ninth — which have all held that this language allows an employee to recover damages for emotional injuries.



But the appeals court noted that lower courts in its own circuit have held differently. This is because case law within the Fifth Circuit provides that the FLSA and the Age Discrimination in Employment Act (ADEA) should be interpreted similarly. Because emotional damages aren't available pursuant to the ADEA, they shouldn't be available pursuant to the FLSA.

The employee sought a jury instruction on emotional distress damages for his retaliation claim; however, it was denied.

However, in this case, the court found that, even though the ADEA incorporates portions of the FLSA, the FLSA doesn't incorporate the ADEA. Therefore, an employee could recover compensation for emotional injuries suffered as a result of retaliation pursuant to the FLSA — even if he or she couldn't under the ADEA.

The employee had testified that he experienced sleeplessness, marital issues and anxiety as a result of his employer's demand for him to vacate the apartment. Thus, the appeals court ruled, the jury could have found that he experienced emotional distress and should have been instructed accordingly.

CONCERNING THE SPOUSE

The appeals court also addressed the employee's wife's retaliation claim. She had asserted that she had standing to file a claim because she was within the zone of interests intended to be protected or included by the law.

However, the court looked to the language of the FLSA, which states that it's unlawful to "discriminate against

any employee because such employee has filed any complaint." It held that the language was clear and that it protected only employees. Therefore, the wife didn't have a valid claim.

PREVENTING MORE CLAIMS

The appeals court concluded that the trial court should have instructed the jury that the employee could receive damages for emotional distress resulting from retaliation. This result and similar decisions could make FLSA retaliation claims more common due to the additional recovery of emotional distress damages. Employers should keep this in mind before taking any adverse actions against employees when they file a claim. ■

DOES THE EVIDENCE SUPPORT THE AWARD?

In *Travers v. Flight Services & Systems, Inc.*, the First Circuit Court of Appeals determined whether the trial court had abused its discretion when awarding an employee emotional distress damages pursuant to the Fair Labor Standards Act (FLSA). A worker brought an action against his former employer, alleging he'd been terminated in retaliation for filing an FLSA claim.

After the trial court granted summary judgment for the employer, the employee appealed. On remand, the trial court entered judgment upon a jury verdict for the employee, and awarded damages of \$50,000 for emotional distress. The employer appealed, arguing that the evidence didn't support this award.

The appeals court found that the trial court hadn't abused its discretion by awarding the employee emotional distress damages. Factors considered when awarding emotional distress damages include:

1. The nature of the alleged harm,
2. The length and severity of the harm, and
3. Whether the employee tried to reduce or mitigate the harm.

The employee had testified that he was embarrassed after he'd lost his job, didn't want to get out of bed and was depressed. He further testified that the termination placed a strain on his relationship with his family and his girlfriend. The employee's girlfriend testified that the employee had been depressed for a couple of months. The court found that this was enough evidence to prove emotional distress as a result of the retaliatory firing. The court noted that, even though the evidence wasn't strong, it wasn't "so lacking" that the emotional distress award shocked the conscience. Thus, the appeals court affirmed the trial court's award.



Conflict of interest dooms FMLA discrimination claim

At first glance, the termination of an employee on leave under the Family and Medical Leave Act (FMLA) might seem discriminatory. But a different picture emerged as the Tenth Circuit Court of Appeals investigated the facts in one case.

UNDER INVESTIGATION

The employee in *Gaige v. SAIA Motor Freight Line, LLC*, worked for the defendant when he was injured while playing soccer. His supervisor suggested that the employee take FMLA leave. The company approved his leave.

More than two months before the employee was approved for leave, the employer had received an anonymous tip that he was using company contacts to generate business for another entity registered in his wife's name. The employer began an investigation of this anonymous tip (before the employee was injured) but didn't notify the employee or his supervisor of the investigation. It continued while the employee was on leave.

The investigators eventually determined that, even though the other entity was in the employee's wife's name, it interfered with the company's operations and created a conflict of interest for the employee. Therefore, he was in violation of his employer's conflict of interest policy. As a result, the employer terminated him while he was on FMLA leave.

DISCRIMINATION EVIDENCE EXCLUDED

The employee brought suit against the employer, alleging interference with his rights under the FMLA.

The employer argued that the plaintiff was terminated because he'd violated its conflict of interest policy. Pursuant to the Federal Rules of Evidence, evidence of past discrimination by the employer wasn't allowed to be introduced by the employee at trial.

The jury found in favor of the employer. On appeal, the employee claimed that the trial court's evidence rulings were an abuse of discretion.

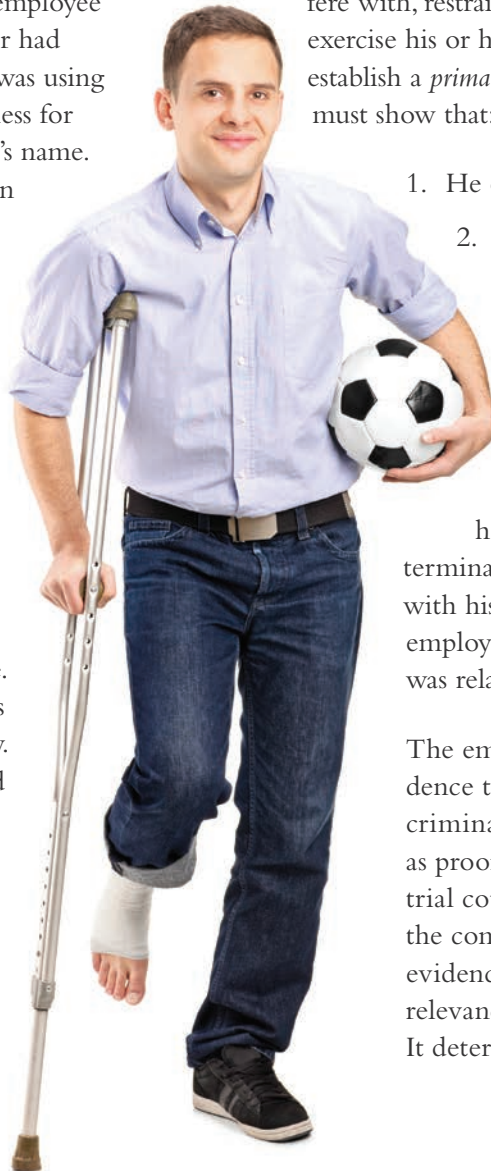
THIRD PRONG THE ISSUE

The FMLA makes it unlawful for an employer to interfere with, restrain or deny an employee's attempt to exercise his or her right to take leave under the act. To establish a *prima facie* claim of interference, the employee must show that:

1. He or she was entitled to FMLA leave,
2. The employer took an adverse action against the employee that interfered with taking FMLA leave, and
3. The adverse action was related to the employee's taking FMLA leave.

The employee in this case was able to establish the first two prongs — that he was entitled to take leave and he was terminated while on leave (which interfered with his leave). The issue then was whether the employee had established that his termination was related to his taking leave.

The employee attempted to introduce evidence that the company had in the past discriminated against employees for taking leave as proof that they had done so in his case. The trial court judge had found that the prejudice the company would suffer as a result of this evidence being introduced outweighed any relevance, and the appeals court agreed. It determined that evidence of past



discrimination was older, involved different supervisors and didn't clearly establish a company policy of discrimination. What's more, the employee had failed to introduce any other evidence that his termination was a result of his taking leave, not his conflict of interest.

PROPER FOCUS

Had the employee in *Gaige* been able to introduce evidence of past discrimination, the jury could have found in his favor. However, the appeals court ruled that the trial court had properly focused on the case at hand rather than cause old cases to be relitigated. ■

Crime doesn't pay – even when the perpetrator is injured

In *Koziara v. BNSF Railway Co.*, the Seventh Circuit Court of Appeals decided whether an employee had been terminated in violation of the Federal Railroad Safety Act (FRSA). But confusion over “cause” vs. “proximate cause” at the trial court level, and the employee's attempt to assert certain claims on appeal that he hadn't asserted earlier, made for a surprising conclusion.

EMPLOYEE GETS HURT

The employee worked for a railroad company as the foreman of a crew. He was hurt when his leg was hit by a plank pried loose by a crewmember under his supervision. He filed an injury report and the employer accepted the report and paid his medical bills. Thereafter, the employee was terminated.

The employee claimed that he was terminated for reporting his injury. The employer argued that the employee was terminated because his injury was the result of his own carelessness and because he had taken company property without permission.

EMPLOYER RE-CREATES INCIDENT

The employer investigated all reported injuries by re-creating specific incidents so that it might ascertain how injuries occurred. After re-creating the accident in question, the employer found that the employee had been careless by walking on the railroad track while his crewmember was attempting to remove a plank. The

employer's policy required that employees “be careful to prevent injuring themselves.”

After the re-creation, another crewmember informed the employee's supervisor that the employee may have been injured ten days before the reported accident. At that time, the employee was removing railroad ties from the employer's property. The employer conducted an investigation and found that the employee had removed the railroad ties, which was considered theft. It was the employer's policy that any theft was grounds for dismissal. The employee was then discharged.

After re-creating the accident, the employer found that the employee had been careless by walking on the railroad track.

The employee filed suit, claiming that he'd been terminated in retaliation for filing the injury report. The employee argued that his supervisor had given him permission to take the railroad ties and that other employees had taken them in the past. His supervisor denied this allegation because authorizing removal would have violated the U.S. Environmental Protection Agency laws. (The ties were coated with a chemical.)



The trial court entered judgment on a jury verdict in the employee's favor. The employer appealed.

COURT EXPLAINS PROXIMATE CAUSE

To succeed on his retaliation claim, the employee had to establish that filing an injury report was a “contributing factor” in his being terminated. The appeals court found that the employee had *not* established this connection.

The court also found that the trial court judge had improperly narrowed questions for the jury because the judge had misunderstood the difference between cause and proximate cause. Proximate cause has legal

significance while other causes do not. As an example, the court stated several facts: The employee had been born and had worked at the railroad company. These, the court argued, were causes of his termination, yet they had no legal significance. Therefore, they weren't *proximate* causes.

In addition, the court noted that the employee hadn't originally argued pretext for his termination. His claims that theft wasn't the real reason for his termination — as evidenced by others not being terminated for the same acts and by his supervisor's approving the removal of ties — couldn't be considered on appeal. The court reversed the trial court's ruling, finding that the employee's injury report filing wasn't the proximate cause of his being terminated.

WRONGDOING ISN'T PROTECTED

The appeals court's ruling in *Koziara* reinforces the idea that engaging in a protected activity doesn't shield an employee who has broken the law or violated an employer's policies. Indeed, if an employer learns about an employee's wrongful act during an investigation or while he or she is engaged in a protected activity, an adverse action against the employee may well be justified. ■

Essential truths

Reasonable accommodation doesn't always satisfy ADA claims

In a recent Americans with Disabilities Act (ADA) case, the Eleventh Circuit Court of Appeals considered whether an employee had failed to set forth a *prima facie* case of disability discrimination. The employee in *Bagwell v. Morgan County Commission* hadn't established that she could perform the essential functions of her position, with or without a reasonable accommodation.

STEPPING CAREFULLY

The employee, who worked as a groundskeeper, had an injury that made it difficult for her to walk on uneven

and wet surfaces. She also was unable to walk or stand for more than one-third of the work day. The employer believed that, as a result of the employee's injury, she could no longer perform the duties of her groundskeeper position and it terminated her employment. The employee sued the employer, alleging that it had failed to accommodate her disability in violation of the ADA.

To prove a *prima facie* claim for failure to accommodate, the employee had to show that she was a qualified individual with a disability and that the employer's failure to provide a reasonable accommodation was discriminatory. This means the employee had to establish that

she could have performed the essential functions of the position she desired, with or without a reasonable accommodation.

The employer argued that the employee could *not* have performed the essential functions of her job — even with an accommodation. Therefore, she wasn't a qualified individual with a disability and couldn't set forth a *prima facie* case for failure to accommodate.

The trial court agreed, granting summary judgment in favor of the employer. The employee appealed, claiming that the trial court had erred because her groundskeeper position involved fewer essential functions than the employer claimed and that she could have performed the functions she thought were essential with an accommodation.

DEFINING “ESSENTIAL”

To determine whether a job duty is essential, courts look at several factors, including:

1. The employer's judgment on what is essential,
2. What's contained in the written job description,
3. The amount of time spent performing the job duty, and
4. The effect of the employee not performing the job duty.

In this case, the appeals court applied considerable credence to the first factor — the employer's judgment as to what functions were essential.

But the employee argued that some of the job duties in the employer's written job description weren't essential because they were infrequently performed. She stated that her main duties were cleaning bathrooms and removing trash. Although the employer didn't dispute that some functions were infrequently performed, it was undisputed that the groundskeeper position existed to maintain a park.

CONSISTING OF MANY FUNCTIONS

The court found that maintenance of the park could consist of many functions, including all of those listed in the written job description. Furthermore, the court decided that the “nature of the groundskeeper position required the employee's duties to shift based on [the employer's] specific needs.” Therefore, the court agreed with the trial court that the essential functions of the employee's job as a groundskeeper included



the functions listed in the employer's written job description.

The court further upheld the trial court's finding that the employee was unable to perform the essential functions of the job, even with the accommodations she suggested. The employee didn't dispute that her knee issues would limit her ability to perform her main duties and that accommodation in the form of an all-terrain vehicle wouldn't resolve the issues. What's more, maintenance issues could arise that the employee wouldn't be able to perform. In that event, the employer would have to hire another groundskeeper or an outside vendor to complete the work.

According to the court, hiring another person was an unreasonable accommodation because the groundskeeper position existed to perform all maintenance work. Such an action “would undermine the reason for the position's existence.” The court further stated that an employer could be required to restructure the position sought by the employee by changing some minor functions. However, the employer isn't obliged to alter or eliminate essential functions of the position, thereby creating another position for the employee.

SEARCHING FOR SOLUTIONS

Employers are required to accommodate employees with disabilities so that they can perform the essential functions of the job. As this case makes clear, in certain circumstances a reasonable accommodation may not exist. Nevertheless, employers should try to find an accommodation if at all possible. ■

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 ...”



Steve Lyman
(317) 977-1422
slyman@HallRender.com



Bruce Bagdady
(248) 457-7839
bbagdady@HallRender.com



John Ryan
(317) 977-1423
jryan@HallRender.com



Michael Kim
(317) 977-1418
mkin@HallRender.com



Jon Bumgarner
(317) 977-1474
jbumgarn@HallRender.com



Kevin Stella
(317) 977-1426
kastella@HallRender.com



Jon Rabin
(248) 457-7835
jrabin@HallRender.com



Robin Sheridan
(414) 721-0469
rsheridan@HallRender.com



Dana Stutzman
(317) 977-1425
dstutzma@HallRender.com



Larry Jensen
(248) 457-7850
ljensen@HallRender.com



Melvin Sabey
(303) 801-3535
melsabay@HallRender.com



Mark Sabey
(303) 801-3538
marksabay@HallRender.com



Sevilla Rhoads
(206) 795-6878
srhoads@HallRender.com



Jennifer Gonzalez
(248) 457-7840
jgonzalez@HallRender.com



Jarrod Malone
(317) 977-1494
jmalone@HallRender.com



Mary Kate Liffriq
(317) 977-1455
mliffriq@HallRender.com



Bradley Taormina
(248) 457-7895
btaormina@HallRender.com



Charlotte Fillenwarth
(317) 977-1476
cfillenwarth@HallRender.com



Nicholas Johnston
(317) 429-3618
njohnston@HallRender.com



Lindsay Ramsey
(317) 429-3637
lramsey@HallRender.com



Fred Bachmann
(317) 977-1408
bachmann@HallRender.com



Bill Roberts
(502) 568-9364
ebplans@HallRender.com



Calvin Chambers
(317) 977-1459
chambers@HallRender.com



Barbra Nault
(907) 258-2588
bnault@HallRender.com



Grace Shelton
(317) 429-3620
gshelton@HallRender.com



Brian Sabey
(720) 282-2025
briansabay@HallRender.com

Our Professional Client Services

- On-site management training
- Policy development & review
- Litigation and appeals
- EEOC representation
- Recruitment & hiring guidance
- Immigration
- Arbitration
- Mediation
- Union avoidance
- Employment contracts
- Wage & Hour
- Collective bargaining
- Discipline counseling
- Reduction in force counseling
- Severance agreements
- Workplace harassment
- Pensions & Benefits
- ADA, FMLA, ADEA, WARN, ERISA
- OSHA, NLRB, FCRA, USERRA, COBRA