Employment Law Briefing

JANUARY/FEBRUARY 2011

Doctor's orders

Company disputes physician's assessment of pregnant welder

In most instances, a doctor's orders are the last word in whether an employee is fit to perform his or her job. In *Spees v. James Marine, Inc.*, the U.S. Court of Appeals for the Sixth Circuit weighed in on whether an employer engaged in discrimination when it disallowed a pregnant employee from resuming her work as a welder — even though a physician had cleared her to do so.

A conflict is sparked

James Marine Inc. (JMI) owns and operates a construction and repair facility for inland waterway vessels. In May 2007, JMI hired the plaintiff as a welder. Of JMI's 935 nonoffice employees, she was one of only four women.

Shortly after starting at JMI, the plaintiff became pregnant. On hearing the news, the welder's foreman expressed "concerns about her being around the chemicals, the welding smoke, [and] climbing around on some of the jobs" while pregnant. He told her to see a doctor to "find out exactly what she did or didn't need to be doing or be around."

On June 19, the plaintiff saw her doctor. He told her that "there was no problem" with resuming her work, though he recommended that she wear a respirator while welding. The doctor also gave her a note that didn't list any restrictions on her ability to weld.

On her way back to work, the plaintiff called her foreman and read him the doctor's note. The foreman was unconvinced. He insisted the plaintiff get a second doctor's note that mentioned "toxic fumes" and limited her to "light duty," explaining that such a note would help her get a transfer to a position in JMI's tool room during her pregnancy.

So, the plaintiff returned to her doctor's office and relayed her foreman's persistent concerns — though, interestingly, she didn't inform the physician that a second note had been requested. Nonetheless, the doctor wrote a second note that same day limiting her to light duties.

On June 20, the plaintiff began working in JMI's tool room. But, soon thereafter, she filed a discrimination suit in the U.S. District Court for the Western District of Kentucky. The court granted JMI's motion for summary judgment, and the plaintiff appealed.

The mixed-motive standard

The Sixth Circuit examined the discrimination claim under the "mixed-motive" standard, which is applied "where both legitimate and illegitimate reasons motivated the employer's decision." A plaintiff asserting a mixed-motive claim need produce evidence sufficient to convince a jury that:

- The defendant took an adverse employment action against the plaintiff, and
- Race, color, religion, sex or national origin was a motivating factor for the defendant's adverse employment action.

The court first found that the transfer constituted an adverse action based on the plaintiff's testimony that she found the tool room "more boring" than welding. Also, the plaintiff had been required to complete a 30-day training course to become a welder. But no such training was required to work in the tool room.

Considerable evidence

The court next found that the plaintiff presented considerable evidence demonstrating that her pregnancy was at least a motivating factor.

The foreman testified that, when he'd first learned of the pregnancy, he had "concerns" that the plaintiff wouldn't be able to weld. And when she read him the first doctor's note, the foreman said "there was some question about her being pregnant and being able to safely perform the job that she was required to do." He based these concerns on his perception of "common sense."

JMI defended its action by pointing to the second note, limiting the plaintiff to light duty. The company maintained that, when the doctor wrote that note, he wasn't aware JMI had requested it. The court rejected this argument, noting that the foreman had expressed a desire to transfer the plaintiff before the second note and that he had, in fact, requested the second note.

The Sixth Circuit concluded that there was sufficient evidence to raise a genuine issue of material fact as to whether, instead of objectively evaluating the plaintiff's ability to perform her job while pregnant, JMI subjectively determined that her pregnancy made her unable to weld. Therefore, a reasonable jury could find that JMI's decision to transfer the plaintiff was made out of concern for her pregnancy and the well-being of her unborn child rather than because she was unable to fulfill her welding duties.

The court explained that, though such concerns are laudatory, they don't justify an adverse employment action. The court vacated the district court's summary judgment in favor of JMI.

Get a second opinion

If an employee, supported by his or her physician, believes he or she is able to do the job, be aware that interfering could cause you to be on the losing end of a discrimination lawsuit. If you believe working would be unsafe for the employee, send the employee to a doctor of your choice for a second opinion. ♦

When company policies go wrong …

Nursing home's practice leads to Title VII case

The working environment in nursing homes can be challenging, to say the least. In *Chaney v. Plainfield Healthcare Center*, the U.S. Court of Appeals for the Seventh Circuit had to decide whether a district court had erred in granting summary judgment to such a facility after an employee filed a complaint alleging the existence of a racially motivated hostile work environment.

A continuing problem

Plainfield Healthcare Center hired the plaintiff, an African-American, as a certified nursing assistant (CNA). Plainfield detailed her daily shift duties on an assignment sheet that she and other employees received on arriving at work.

Plainfield's policy was to honor the racial preferences of its residents in assigning CNAs. But this practice had a downside: The assignments were sometimes accompanied by racially tinged comments and epithets from co-workers.

The plaintiff reported such comments to her supervisor, who promised to address them. Although the epithets

ceased, one co-worker continued to remind the plaintiff that certain residents were off-limits because she was black. The plaintiff reported these comments to her supervisor, which again put an end to the conduct.

Plainfield's racial preference policy, however, remained in place and continued to surface in conversations with other employees. Eventually, the plaintiff filed a complaint with the U.S. District Court for the Southern District of Indiana, alleging she had been subjected to a racially hostile work environment. The court granted Plainfield's motion for summary judgment, and the plaintiff appealed.

4 factors in liability

In order to impose Title VII liability for a racially hostile workplace, a plaintiff must show four distinct factors:

- The work environment was both subjectively and objectively offensive,
- The harassment was based on membership in a protected class,
- The conduct was severe or pervasive, and
- There was a basis for employer liability.

The only issue on appeal was whether there was a basis for employer liability.

Plainfield argued there was no basis for employer liability because its response to the racial epithets was adequate in stopping the harassment, and any subsequent comments were mere reminders of a particular resident's preference and not racially offensive.

The Seventh Circuit explained that a company's desire to cater to the perceived racial preferences of its customers wasn't a defense under Title VII for treating employees differently based on race. Plainfield argued that this reading of Title VII didn't or shouldn't apply in a long-term care setting. It maintained that facilities such as nursing homes have obligations to their customers that placed them in a different position from most other employers.

After all, Plainfield argued, it was both a medical provider and a permanent home for its hundreds of residents. The rights of those residents are secured by federal and state laws as well as a vast network of regulations that, according to the employer, it must honor before considering its Title VII obligations to employees.

Gender-focused case had different result

In *Veleanu v. Beth Israel Medical Center*, the U.S. District Court for the Southern District of New York heard a case involving issues similar to those that the Seventh Circuit faced in *Chaney v. Plainfield Healthcare Center*. (See main article.) But *Veleanu* focused on gender preferences rather than racial ones.

The *Veleanu* case arose when a male physician specializing in obstetrics and gynecology (OB/GYN) at Beth Israel Medical Center filed a lawsuit alleging that he had been subjected to gender discrimination because the hospital allowed patients to request a female OB/GYN doctor.

The court explained that the fact that a medical entity may seek to respond to some medical treatment requests of its female patients — an expression of preference particular to the health care field — doesn't, of itself, indicate that it discriminates against male doctors.

Because health care implicates a patient's privacy rights, personal dignity and self-respect, it presents, in the court's view, unique circumstances that may justify reasonable efforts to accommodate a patient's gender preference regarding his or her doctor. In particular, female patients may have a legitimate privacy interest in seeking to have female doctors perform their gynecological examinations.

Thus, the court found that such an accommodation was appropriate and proper, because it involved more than a mere impermissible customer preference.

Not the same thing

To specifically support its position, Plainfield cited rulings that protected the privacy of patients who had to undress in front of a doctor or nurse of the opposite sex, where gender was a bona fide occupation criterion for accommodating patients' privacy interests.

The court rejected this argument, explaining that the privacy interest in play when one undresses in front of a doctor or nurse of the opposite sex doesn't apply to race. Just as, to accommodate privacy needs, the law tolerates same-sex restrooms or dressing rooms, Title VII allows an employer to respect a preference for a same-sex health provider. (See "Gender-focused case had different result" on page 4.) But the law doesn't tolerate "whites only" bathrooms or dressing rooms, nor does it tolerate same-race health care providers.

The court concluded that patients' privacy interests didn't excuse disparate treatment of employees based on race. Therefore, it found that there was a basis for employer liability and reversed the summary judgment finding.

Do not accede

The outcome of *Chaney* refutes the old adage that "the customer is always right." Even if it means losing a patron, an employer can't accede to a customer's prejudices in treating its own employees. (This includes customers who engage in sexual harassment of workers.) You must take prompt remedial action in these situations to avoid liability. ♦

"Minor annoyances" or sex-based discrimination?

In *Pucino v. Verizon Communications Inc.*, the U.S. Court of Appeals for the Second Circuit considered whether a district court had erred in finding a plaintiff's complaints to be "minor annoyances" rather than sex-based discrimination.

Working in the field

The plaintiff began working for Verizon's predecessor company in 1982. From 1991 to 2002, she worked as a field technician, installing and repairing telecommunications cables. Beginning in 1995, the plaintiff reported to two specific company foremen.

The foremen frequently assigned her to work alone in unsafe neighborhoods, where men were never assigned to work alone, and they often denied her requests for assistance with phrases such as "get lost" and "go kill yourself." The foremen routinely granted similar requests from male technicians.

In addition, the foremen regularly changed the plaintiff's work location even though it was common practice to allow technicians to work continuously in one area of the city so that they could become familiar with it. On at least 10 occasions, one of the foremen skipped over the plaintiff when it was her turn to receive overtime work.

Filing suit

The foremen's questionable behavior didn't end there. According to the plaintiff, they would grant male technicians access to tools after they had told her that the tools were unavailable. And they regularly denied the plaintiff access to bucket trucks, which are safer, easier to use and reach much higher than vans with large ladders.

Finally, the plaintiff stated that the foremen subjected her to harsher, more public, profanity-laced criticism than

her male co-workers. While male workers were usually criticized privately for their mistakes, the plaintiff claimed that the foremen had repeatedly singled her out for intense and often open admonishment.

In March 2001, the plaintiff filed Equal Employment Opportunity Commission charges against Verizon and, in July 2003, she filed a lawsuit in the Southern District of New York alleging that her employer had subjected her to a hostile work environment. The district court granted Verizon's motion for summary judgment on the basis that the complained-of conduct amounted to nothing more than minor annoyances and inconveniences. The plaintiff appealed.

Considering the evidence

The Second Circuit explained that a hostile work environment claim required sufficient evidence to allow a trier of fact to find disparate treatment based on gender, resulting in a hostile working environment that was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." A plaintiff may rely on incidents of sex-based abuse to show that other, ostensibly sex-neutral conduct was, in fact, sex-based.

The appeals court found that the plaintiff had offered ample evidence showing disparate treatment. What's more, it found that Verizon had proffered no evidence suggesting a legitimate nondiscriminatory explanation for the foremen's conduct.

The plaintiff and the EEOC argued that one of the words regularly used by the foremen, "b----," is such an intensely degrading sexual epithet that its use implies, as a matter of law, hostility toward women. The court refused to say that use of this word always and in every context has that meaning or that its usage need not be viewed in context. But the Second Circuit noted that the "constant" use of the word over several years was sex-based and reflected hostility to women.

The court further found that the combination of disparate treatment and gender-based verbal abuse here could support a further inference that the other complained of instances of abuse involving the two foremen were, in fact, gender-based — even if such incidents didn't directly amount to disparate treatment when considered alone. Thus, the Second Circuit concluded that the plaintiff did provide sufficient evidence to show gender-based discrimination.

Avoiding liability

Although Title VII of the Civil Rights Act of 1964 wasn't created with the intent of creating a "code of civility" in the workplace, severe or pervasive conduct could very well be held to create a hostile work environment in a court of law. The proper training of supervisors and managers in this regard can be an important step toward avoiding liability. ♦

Employee sues over fitness-for-duty exam

Ushering an insubordinate employee back into the workforce is typically a sensitive undertaking. In *Brownfield v. City of Yakima*, the U.S. Court of Appeals for the Ninth Circuit considered whether an employer had violated the Americans with Disabilities Act (ADA) by requiring an emotionally volatile employee to take a fitness-for-duty exam before returning to work.

A bad meeting

In November 1999, the plaintiff was hired as a police officer in the Yakima Police Department (YPD). About a year later, he suffered a head injury in an off-duty car accident. After missing nearly a year, the officer returned to work.

In May 2005, the plaintiff met with two superior officers regarding complaints he had made about his direct supervisor. During the meeting, the plaintiff used an expletive in stating that he needed to talk to a union representative. Then, despite an order from one of his superiors to remain in the room, the plaintiff left.

When one of the superior officers followed, the plaintiff swore at him. As a result, the plaintiff was temporarily suspended for insubordination.

4 more incidents

In September 2005, four more incidents occurred. First, the plaintiff argued disruptively with another officer. And when he learned that the YPD was investigating him but not the other officer, the plaintiff became visibly upset, swearing and "just not really speaking full sentences."

Second, the plaintiff reported that, during a traffic stop, he felt himself "losing control" to the point that his legs began shaking and he "wasn't sure what he was going to do." The officer calmed down when backup arrived.

Third, the YPD received a domestic violence call from the plaintiff's estranged wife. But no charges were filed. Finally, the plaintiff made comments such as "It's not important anyway," "I'm not sure if it's worth it," and "It doesn't matter how this ends."

An employer that turns a blind eye toward an employee's erratic behavior could subject itself to liability for negligent hiring or retention.

Immediately thereafter, the YPD placed the plaintiff on administrative leave and ordered him to undergo a fitness-for-duty exam. The officer filed suit in the U.S. District Court for the Eastern District of Washington, alleging the YPD had violated the ADA. The district court granted the YPD's motion for summary judgment, and the plaintiff appealed.

Dangerous work

Under the ADA, an employer may not require a medical exam to determine whether an employee is disabled "unless such examination or inquiry is shown to be job-related and consistent with business necessity." The plaintiff argued that the YPD couldn't meet the business necessity standard without showing that his job performance had suffered because of health problems.

The appeals court disagreed, explaining that an employer that turns a blind eye toward an employee's erratic behavior could subject itself to liability for negligent hiring or retention. The court held that the business necessity standard may be met even before an employee's work performance declines if the employer can show that a reasonable person would inquire into whether an employee is still capable of performing his or her job.

The court further explained that an employee's behavior can't be merely annoying or inefficient to justify an exam. Rather, there must be genuine reason to doubt whether that employee can perform job-related functions.

Given the plaintiff's multiple emotionally charged incidents, including four occurring in one month immediately before his referral, the court found the YPD could have objectively and legitimately doubted his ability to perform his duties. It also noted that the fitness-for-duty exam's legitimacy in this case was heavily colored by the dangerous nature of police work. Thus, the court upheld summary judgment in the YPD's favor.

An important reminder

Although this case went in the employer's favor, it still serves as an important reminder. Employers may not require applicants to take medical exams until after an offer of employment is made. And, even then, the exam must be job-related and defensible as a business necessity. ♦