Employment Law Briefing

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Chain reaction

Sexual harassment charges lead to age discrimination lawsuit

In the workplace, one problem can often lead to another. Such was the case in *Jackson v. Cal-Western Packaging Corporation*, where the U.S. District Court for the Fifth Circuit had to rule on whether a 69-year-old man terminated because of sexual harassment claims was the victim of age discrimination.

Investigating the complaints

The plaintiff was employed by Cal-Western Packaging in various managerial positions from 1999 until June 2007. In May 2007, one of the manager's female co-workers e-mailed the company's controller asserting that the plaintiff had engaged in behavior that made her "uncomfortable."

She stated that the manager had "on many occasions" made inappropriate statements or comments in front of her and her female co-workers. In addition, she told her supervisor that, every time she saw the plaintiff, he tried to touch her and that he'd once cornered her and asked her to raise her shirt.

Cal-Western's Chief Operating Officer (COO) began an internal investigation and interviewed several employees who corroborated the allegations. To confirm the findings, the COO hired an attorney to conduct an external investigation into the manager's behavior. Her interviews also confirmed the harassment allegations. In addition, when the attorney interviewed the plaintiff, he admitted that he was "vindictive" and would try "legally" to get back at those making allegations against him.

In June, the COO terminated the manager for his noncompliance with the company's sexual harassment policy. The plaintiff was 69 years old when he was terminated and his replacement was 42.

Demonstrating a case

The manager brought suit against Cal-Western for age discrimination. The district court granted Cal-Western's motion for summary judgment, and the plaintiff appealed.

Under the McDonnell Douglas approach, a plaintiff must first demonstrate a prima facie case of age discrimination. The defendant then has the burden of articulating a legitimate, nondiscriminatory reason for terminating the plaintiff. If the defendant meets this burden, the plaintiff then has the ultimate burden of proving that either:

- The defendant's reason was pretextual, or
- The defendant's reason was only one cause of the conduct and another motivating factor was the plaintiff's protected characteristic.

The only question before the appeals court was whether the manager had shown that there was a genuine issue of material fact as to whether Cal-Western's reason for terminating him was pretextual or whether age was otherwise a factor in his termination. The plaintiff argued that pretext was shown by his contention that he hadn't made sexually harassing comments as well as by the COO purportedly saying that the manager was an "old, gray-haired fart."

But the appeals court found that the manager's self-serving statements that he hadn't engaged in sexual harassment were insufficient to create a triable issue of fact as to whether Cal-Western's explanation was false. The court

explained that the issue was not the truth or falsity of the allegation but "whether the employer reasonably believed the employee's allegation and acted on it in good faith."

The court noted that Cal-Western had a plethora of evidence that the plaintiff was violating the company's sexual harassment policy. Meanwhile, the manager failed to present evidence that the company's reliance on the evidence against him was in bad faith.

The issue was not the truth or falsity of the sexual harassment allegation but "whether the employer reasonably believed the employee's allegation and acted on it in good faith."

Parsing his comments

Finally, the appeals court turned to the COO's alleged comment. The court explained that comments are only evidence of discrimination under four circumstances — that is, if they are:

1. Related to the protected class of persons of which the plaintiff is a member,
2. Proximate in time to the complained-of adverse employment decision,
3. Made by an individual with authority over the employment decision at issue, and
4. Related to the employment decision at issue.

Comments that don't meet these criteria are considered "stray remarks" and, standing alone, are insufficient to defeat summary judgment.

The appeals court found that, though the COO's alleged comment met the first and third criteria, it was allegedly uttered at least a year before the manager's June 2007 termination. Thus, the court found that the comment wasn't proximate in time to the plaintiff's firing or related to the employment decision at issue. Therefore, the appeals court affirmed the summary judgment.

Expecting some payback

It's not unusual for the accused perpetrator of sexually harassing conduct, when terminated for that conduct, to turn around and accuse his or her employer of discrimination. This demonstrates the importance of conducting a thorough investigation and documenting your findings in these circumstances. ♦

Courts' views of comments aren't constant

Courts don't always view comments as stray remarks, as they did in *Jackson v. Cal-Western Packaging Corporation*. (See main article.) One example can be found in *Wharton v. Gorman-Rupp Co.*, a case heard by the U.S. Court of Appeals for the Sixth Circuit.

When a 58-year-old female Gorman-Rupp employee applied for a promotion, she interviewed with a committee of executive officers, including the V.P. of Human Resources. Approximately two months later, the V.P. told the applicant that, though her interview went well, Gorman-Rupp didn't select her for the position because "[w]e were looking down the road, we wanted longevity."

When the applicant asked what the V.P. meant by "longevity," he asked how old she was and how much longer she had to work before she retired. The V.P. also remarked that she would be retiring "before too long" and that the company "went with a younger person."

Gorman-Rupp contended that the V.P. wasn't a "decision maker" and, therefore, his comments were "stray remarks." The appeals court explained that, regardless of whether he was a decision maker, he'd witnessed all of the hiring process and had implicated all members of the committee when he explained the committee's decision using the first-person plural "we." Thus, the court concluded that the V.P.'s comments were direct evidence of age discrimination.

Temp agency caught in religious conundrum

Federal law prohibits discrimination based on religious beliefs. But, in *EEOC v. Kelly Services, Incorporated*, the U.S. Court of Appeals for the Eighth Circuit had to consider whether a temporary employment agency had failed to accommodate the plaintiff's religious beliefs when it didn't refer her to a job that prohibited headwear in the workplace for safety reasons.

Not a good fit

Nahan, a commercial printing company, engaged Kelly to place temporary workers at one of its industrial plants as machine operators.

Nahan's dress policy, which applied to both permanent and temporary workers, prohibited headwear and loose-fitting clothing. The purpose of the policy was to prevent loose apparel from getting caught in the machinery's moving parts and injuring workers. Nahan strictly and uniformly enforced its dress policy with all employees.

In July 2004, a Muslim woman applied at Kelly for temporary employment. As a part of her Muslim faith, the applicant wore a khimar — a traditional garment worn by Muslim women that covers the hair, forehead, sides of the head, neck, shoulders and chest, and sometimes extends down to the waist.

In August, the applicant met with a Kelly staffing supervisor, who informed her, "You will have to take your scarf off — you cannot cover your hair." The applicant replied that she couldn't remove the khimar because her religion required her to wear it at all times.

The supervisor didn't consult with anyone else before concluding that the applicant "[wasn't a] candidate for employment at Nahan Printing." This was because Nahan's employee relations leader had previously told Kelly that anything covering the head was prohibited at the plant. Kelly did, however, subsequently offer to place the applicant in at least seven different jobs, all of which she declined.

Enter the EEOC

The applicant filed a charge of discrimination with the EEOC, alleging that Kelly had discriminated against her by refusing to refer her to Nahan.

An investigator from the Minnesota Department of Human Rights, which was working in conjunction with the EEOC, contacted Nahan and spoke to a stitcher operator who was filling in for the supervisor that day. The stitcher operator stated that there was a female Muslim employee working that day, but that he hadn't asked her to remove her headgear. Instead, he moved her to another position where it wasn't a safety hazard.

The EEOC then filed suit against Kelly, and Kelly moved for summary judgment. The district court granted Kelly's motion for summary judgment, and the EEOC appealed.

The issue at hand

To establish a prima facie case of religious discrimination, a plaintiff must show he or she:

- Has a bona fide religious belief that conflicts with an employment requirement,
- Has informed the employer of such conflict, and
- Has suffered an adverse employment action.

If the plaintiff establishes these elements, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. Thereafter, the burden shifts back to the plaintiff to show the reason offered by the employer is pretextual.

The only issue regarding the applicant's ability to establish a prima facie case was whether an employment agency's failure to refer her constituted an "adverse employment action." The appeals court found that it wasn't an adverse employment action because the EEOC had failed to produce evidence that Nahan had an available position to which Kelly could have referred the applicant when she applied for available temporary work through Kelly.

A temp agency's role

The court also noted that, even if the EEOC had established a prima facie case of religious discrimination by Kelly, the temp agency would still have been entitled to summary judgment.

Although the EEOC placed a great deal of emphasis on the stitcher operator's testimony that he'd accommodated another Muslim woman, which might have been relevant in a failure-to-accommodate lawsuit against Nahan, the court found that it had no bearing on a lawsuit against Kelly. This was because Title VII doesn't require an "employment agency" to demonstrate that the employer to which it would be referring a temporary worker would suffer an undue hardship if it had to accommodate that worker.

The appeals court went on to find that Kelly's legitimate, nondiscriminatory reason for not referring the applicant to Nahan was the printer's neutral, safety-driven dress policy prohibiting all employees — permanent and temporary — from wearing loose clothing or headwear of any kind. Thus, even if Kelly had asked whether Nahan could accommodate the applicant by allowing her to wear the khimar, the printer's employee relations leader said that the answer would have been "no."

Finally, the appeals court found that there was no evidence that Nahan's safety-driven dress policy was a pretext for discriminating against employees requiring religious accommodation — or that Kelly had knowledge of such pretext. The court stressed that nothing in Title VII suggests that an employment agency should be held liable unless the agency has reason to believe that "the employer's claim of [a] bona fide occupation's qualification is without substance." Therefore, the appeals court affirmed the summary judgment.

Always be present

For employers, this case demonstrates the importance of properly managing your participation in the investigative process. In the event of a lawsuit, your attorney or HR director should always be present to make sure that the investigator gets the complete story. ♦

Racism vs. reorganization

Sixth Circuit draws legal distinction in discrimination case

Many companies opt to reorganize to cut employment costs and operate more efficiently. In *Thompson v. UHHS Richmond Heights Hospital*, the U.S. Court of Appeals for the Sixth Circuit considered whether racism or reorganization was behind one plaintiff's job loss.

Something's cooking

The plaintiff was hired by UHHS Richmond Heights Hospital in April 1982 as a Production Cook in the Nutritional Services Department. In 2001, she was promoted to Food Production Supervisor (FPS).

In 2005, third-party food service contractor Sodexho began managing the hospital's Nutritional Services Department and, a couple of months after taking over, recommended creating a new position, "Chef 1," to replace the FPS position. Sodexho posted the Chef 1 position on its Web site, but the plaintiff didn't apply because she was unaware of both the new position and her position's elimination.

In October 2005, Sodexho hired a white male for the Chef 1 position and, shortly thereafter, informed the FPS that her position had been eliminated. In response, the plaintiff filed a lawsuit against the hospital, Sodexho and the hospital's Executive Chef. The district court granted summary judgment to all three defendants, and the FPS appealed.

A question of fact

Under the burden-shifting analysis requirement, the plaintiff first had to establish a prima facie case by showing, among other things, that she was replaced by a person outside her protected class.

The district court had found that she hadn't been replaced, but the appeals court disagreed. It noted that, though not all of the plaintiff's duties were transferred to her replacement, most were. In addition, the positions occupied the same hierarchal structure and included managing the same people and reporting to the same people.

Thus, the appeals court found that a question of fact existed regarding whether the two positions were substantially similar and that a jury could conclude the Chef 1 had replaced the plaintiff.

Legit business reason

The burden then shifted to the defendants to articulate a legitimate business reason. The court accepted restructuring as such, noting that — before contracting with the hospital — Sodexho had contemplated the elimination of the FPS position. The restructuring was first proposed in May 2004 by a Sodexho staffer who'd never seen the plaintiff and was unaware of her race.

So the burden shifted back to the FPS to show that this reason was pretextual. She argued that the May 2004 restructuring proposal was merely a guideline and many other proposals from that memo weren't followed. The plaintiff also pointed out that the defendants could have placed her in the Chef 1 position — or at least informed her of its existence.

The FPS's deposition testimony, as well as the affidavits of three other African-American employees, asserted that black employees were required to perform "dirtier" jobs and subjected to higher scrutiny. In addition, the Chef 1 testified that the Executive Chef had told him to "get rid of" certain African-American employees (including the FPS), whom the Executive Chef called "troublemakers."

Better qualifications

Finally, the plaintiff offered evidence that she was more qualified for the Chef 1 position than her replacement, who:

- Lacked formal culinary certification,
- Had fewer years of experience, and
- Couldn't perform writing tasks (because of a learning disability).

The appeals court found that the corroborated accusations of patterns of discriminatory behavior, the Chef 1's comments, and the evidence that the FPS was more qualified than her replacement created a reasonable inference that Sodexho's original memo was used to provide an excuse to get rid of the plaintiff for racially motivated, discriminatory reasons.

The plaintiff didn't apply for the "Chef 1" job because she was unaware of both the new position and her position's elimination.

Therefore, the appeals court reversed the summary judgment finding as it pertained to Sodexho and the Executive Chef. The court, however, affirmed summary judgment as to the hospital because the FPS hadn't connected its actions to any racial motivations for her termination.

Mere invocation

Although restructuring can be a defense in a discrimination case, the mere invocation of the word isn't enough. Employers must be prepared to justify the decisions made and explain why they didn't choose alternative means. ♦

Could a medication's side effects trigger ADA protection?

Most cases involving the Americans with Disabilities Act (ADA) center on a bodily disability. But, in the event a worker's medical condition doesn't qualify as a disability, could harsh side effects from his or her medication still trigger ADA protection? That was the question faced by the U.S. Court of Appeals for the Third Circuit in *Sulima v. Tobyhanna Army Depot*.

Long, frequent breaks

The plaintiff was a morbidly obese male who suffered from sleep apnea. In January 2005, while employed by Defense Support Services LLC ("DS2"), he began working at Tobyhanna Army Depot as an "Electronics Technician II," a position created through a U.S. Air Force contract with DS2.

In the later months of that year, the medication that the technician began taking for obesity and sleep apnea started causing gastrointestinal problems that required him to use the restroom frequently. A DS2 team leader observed the plaintiff leaving his work station several times and spending a total of about two hours during his shift in the restroom.

When the technician explained the reason for the long breaks, the team leader asked him to bring in a doctor's note, which he did. But, after the plaintiff continued to frequently take long breaks, a Tobyhanna supervisor asked DS2 to transfer the technician to a different work area.

Soon after the plaintiff learned of the transfer request, he brought DS2 a doctor's note indicating that his medication had been changed and he was now able to work without long, frequent breaks. DS2, nonetheless, decided to transfer the technician but, because there were no other suitable positions open at that time, the plaintiff was laid off.

The technician filed a complaint against both DS2 and Tobyhanna alleging that he had been assigned for transfer and subsequently laid off because he was disabled. The district court granted the defendants' motion for summary judgment, and the plaintiff appealed.

Equally efficacious

The appeals court noted that the technician hadn't presented any evidence to show that either his obesity or sleep apnea directly or substantially limited a major life activity, as required under the ADA. Instead, the plaintiff's claim was that his medication for those conditions created the disability.

The appeals court explained that a medical treatment's side effects can constitute a disability as long as the plaintiff can show that the treatment is:

- Required "in the prudent judgment of the medical profession,"
- Not just an "attractive option," and
- Isn't required solely in anticipation of an impairment resulting from the plaintiff's voluntary choices.

The court noted, however, that the term "disability" connotes an involuntary condition and, if one can alter or remove the impairment through an equally efficacious treatment, it shouldn't be considered "disabling."

With this caveat in mind, the court found no evidence showing that the medication causing the technician's side effects was, in the judgment of a medical professional, the *only* efficacious one available. In fact, the court noted, after being confronted by his employer about his breaks, the technician contacted his doctor and *changed* his medication. Therefore, the appeals court affirmed the summary judgment in favor of the defendants.

Many forms

Disabilities come in many forms. But, under the ADA, an employee can't "create" a disability by voluntarily taking a medication that isn't medically necessary. ♦