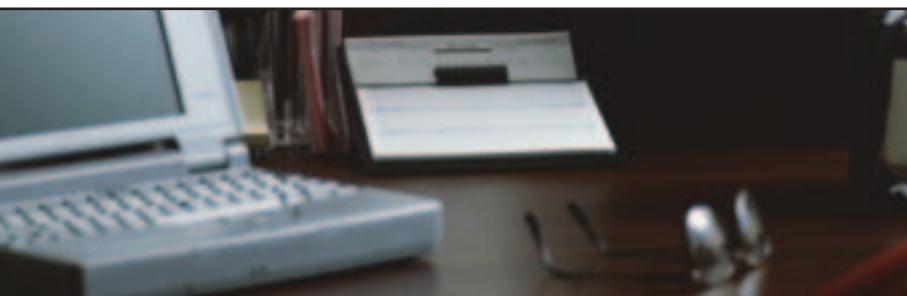




Employment

Law Briefing

Insights on Legal Issues in the Workplace



INSIDE ...

Supervisor's words come back to bite employer

Gambling with appearances

Employer's makeup rule draws sex discrimination suit

Why you must implement
settlement terms promptly

The importance of employer-conducted
background checks

Supervisor's words come back to bite employer

Company management's apathy toward protecting employees' Title VII rights can prove costly. That was demonstrated when the Eighth Circuit upheld a \$1 million sex discrimination award against a company that had a nondiscrimination policy in place. Let's take a look at *MacGregor v. Mallinckrodt Inc.*

Alleging discrimination

A Minnesota company paid the plaintiff — the only female business-segment director (BSD) in its marketing department — significantly less than the other two BSDs who were male. The company justified paying one male more because he produced the most revenue. The other male produced the least revenue of the three, but the company justified paying him more than it paid the female because he had sold his firm to the company in 1995.

In a 1999 reorganization, one of the plaintiff's male peers became her direct supervisor. At his first staff meeting, he commented that "too many women" were at the table. This remark was reported to the director of human resources, who counseled the supervisor to be careful with such comments because they could be taken "out of context." Nevertheless, when a female manager proposed hiring a female candidate in her department, the supervisor objected that "too many women" were in marketing.

The plaintiff's supervisor consolidated the three BSD positions into one marketing director and promoted a male, even though the plaintiff scored higher than the males contesting for the job.

Meanwhile, the plaintiff alleged that her supervisor was discriminating against her and took her complaints to her former supervisor, who was now a national vice president. He ordered the HR director to investigate her complaints. After investigating, the HR director determined that no discrimination had occurred.

Offering a new position

The supervisor then offered the plaintiff a new position (director of marketing development) lacking budgetary or supervisory responsibilities.

During negotiations over her compensation package, the supervisor abruptly announced that the plaintiff was leaving the company. The plaintiff sued, and a jury awarded her \$1 million in compensatory and punitive damages.

The company appealed to the Eighth Circuit. It initially found sufficient evidence for a jury to find the company liable for sex discrimination because:

- The company denied her a promotion to marketing director and instead promoted a less-qualified male,
- The company offered her a position that had previously been discontinued as nonfeasible, and
- The supervisor's two references to "too many women" would support a reasonable inference of discriminatory motive.

In addition, the court found that the company hadn't established that the plaintiff had resigned. Rather, the jury could have reasonably concluded that the company had terminated her employment. In fact, the supervisor admitted at trial that the plaintiff had indicated that the negotiation process was still going on and that she hadn't resigned. The court found that the plaintiff reasonably expected the company to respond with a better offer.



Upholding punitive damages

Next, the company argued that the record didn't support punitive damages. The Eighth Circuit disagreed. It held that an employer can be subject to punitive damages when those serving in a managerial capacity engage in discriminatory acts with "reckless indifference," defined as acting with knowledge that it may be acting in violation of law.

The Eighth Circuit held that an employer can be subject to punitive damages when those serving in a managerial capacity engage in discriminatory acts with "reckless indifference."

The court found that the company could appropriately be held responsible for the supervisor's conduct when — acting in a managerial capacity — he promoted a less-qualified male instead of the plaintiff. Moreover, the HR director acted in a managerial capacity when she failed to adequately respond to the plaintiff's complaints. This behavior sufficiently demonstrated management's apathy toward protecting employee Title VII rights and justified punitive damages.

The company further argued that having corporate antidiscrimination policies in place justified vacating the punitive damages. Under the law, a corporation may avoid punitive damages by showing that it made good-faith efforts to comply with Title VII. But when discriminating in contravention of its own policies, the existence of those policies doesn't allow the employer to escape punitive damages. The HR director's failure to reprimand the supervisor for his "too many women at the table" comment showed that the company didn't diligently enforce its own policies. Rather, the HR director's response that the supervisor should be aware that such comments could be taken out of context — without any reprimand — effectively allowed managers to continue to make discriminatory remarks.

Thus, the Eighth Circuit affirmed that the company had engaged in sex discrimination when it fired the plaintiff, and this misconduct justified punitive damages.

Empowering executives

This case demonstrates the importance of empowering HR executives with independent authority to investigate discrimination complaints and to take appropriate action. Those charged with this function can't be afraid to antagonize anyone whose conduct may expose the company to liability. Having an antidiscrimination policy isn't enough — a company must also be committed to enforcing it. 🏢

Gambling with appearances

Employer's makeup rule draws sex discrimination suit

Did a casino engage in illegal sex discrimination when it required its female — but not its male — beverage servers to wear makeup? That was the question before the Ninth Circuit in *Jespersen v. Harrah's Operating Co.*

The company adopts new policies

The plaintiff had worked as a bartender for Harrah's Casino in Reno, Nev., for nearly 20 years. Throughout the 1980s and 1990s, Harrah's encouraged but didn't require female beverage servers to wear makeup. The plaintiff tried wearing makeup for

a few weeks in the 1980s but stopped because she felt it harmed her dignity and her effectiveness as a bartender. Harrah's didn't object, and she continued to work and receive positive performance reviews for more than a decade.

But in early 2000, Harrah's implemented a "Beverage Department Image Transformation" program at 20 locations including its Reno casino. The program set specific "appearance standards" requiring both sexes to be "well groomed, appealing to the eye, firm and body-toned, and comfortable with maintaining this look while wearing the specified uniform."



In addition to these general appearance standards, Harrah's set gender-specific standards for both male and female beverage servers. The standards required females to wear hosiery and colored nail polish and to tease, curl or style their hair. The standards required males to maintain short haircuts and neatly trimmed nails and barred them from wearing makeup or colored nail polish.

Later, Harrah's amended the standards to require female beverage servers to wear makeup, and the plaintiff refused

to comply. Harrah's gave her 30 days to apply for a position not requiring makeup. When she didn't, Harrah's fired her.

The bartender sues

The bartender alleged sex discrimination under Title VII. Harrah's asked the trial court to throw out her suit on grounds that the facts were undisputed and it was entitled to judgment as a matter of law. The court granted the motion, and the plaintiff appealed.

First, the Ninth Circuit noted that, though employers may adopt different appearance standards for each sex, those standards can't impose a greater burden on one sex than on the other. The court cited several of its previous rulings on what constitutes sex discrimination.

In one opinion, the Ninth Circuit rejected an airline's argument that it could set different weight standards for male and female flight attendants. The court held that the airline couldn't require females to adhere to a "medium" build weight standard while it permitted males to adhere to a "large" build weight standard.

Appearance standards and religious discrimination

The First Circuit considered an unusual challenge to a company's appearance standards based on *religious* discrimination in *Cloutier v. Costco Wholesale Corp.*

The plaintiff alleged that Costco's "no facial jewelry" dress code conflicted with her religious practices as a member of the Church of Body Modification and constituted religious discrimination in violation of Title VII. The trial court ruled for Costco without a trial because Costco had reasonably accommodated the plaintiff by allowing her to continue to work if she either covered her facial piercing with a band-aid or replaced it with a clear retainer.

The First Circuit affirmed. It held that Costco didn't even have a duty to accommodate the plaintiff's religious beliefs because it couldn't do so without undue hardship. The court didn't question the sincerity of the plaintiff's religious beliefs. The Church of Body Modification was established in 1999 and has about 1,000 members who practice body piercing, tattooing, branding, cutting and manipulation. The church's mission statement urges members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching and displaying body modification."

Nevertheless, the First Circuit concluded that the plaintiff's facial jewelry influenced Costco's public image and that to exempt the plaintiff from the company's appearance standards would constitute an undue hardship on the company.

Another Ninth Circuit ruling held that an employer discriminated against female employees on the basis of sex when it required them to wear uniforms while permitting male employees to wear “appropriate business attire” of their own choosing.

The court assesses actual impact

So here, in evaluating the relative burdens of Harrah’s appearance standards, the Ninth Circuit assessed the standards’ actual impact on both male and female employees by weighing the cost and time necessary for employees of each sex to comply. The plaintiff argued that the makeup requirement imposed “innumerable” tangible burdens on women that men did not share, because cosmetics can cost hundreds of dollars annually and putting on makeup requires significant time.

But the court noted the plaintiff had offered no evidence to support her contention. Moreover, she hadn’t shown that female bartenders’ burdens putting on makeup exceeded male bartenders’ burdens in complying with the appearance standards. So the Ninth Circuit upheld throwing out the case.

The lesson for employers

The court might have conceivably ruled for the plaintiff had she offered detailed evidence to demonstrate that the burdens of putting on makeup exceeded the male bartenders’ burdens in complying with the company’s code. Savvy employers are well advised to carefully review their dress codes and appearance standards to see whether they unequally burden the sexes. 

Why you must implement settlement terms promptly

A recent court case demonstrates what can happen when an employer settles an employee’s dispute but fails to timely correct personnel records as the settlement requires. Employers can learn an important lesson from the Ninth Circuit’s decision in *Pardi v. Kaiser Permanente Hospital*.

Hired and fired

When a licensed respiratory-care practitioner who suffered from depression began working at a hospital, it agreed to accommodate his disability under the Americans with Disabilities Act (ADA). During the next two years, he filed several grievances through his union and charges with the EEOC. He alleged, among other things, that his department head refused to comply with the agreed-upon accommodations.

During the same period, physicians and patients complained that the practitioner acted unprofessionally and made inappropriate comments. Two years after he was hired, the hospital terminated his employment and reported it to the Respiratory Care Board (RCB) as required by state law.

Discrimination and harassment

Meanwhile, a union arbitration panel heard the practitioner’s discrimination and harassment grievances and ruled in his favor. The hospital paid five figures to settle his grievances.

When adverse employment decisions closely follow discrimination complaints, courts may infer retaliatory intent.

After he was fired, he challenged his firing through another grievance proceeding through his union. Six months later, the hospital, the practitioner and the union settled his case. The hospital agreed to accept his resignation, remove termination documents from his personnel file and pay him \$130,000. He agreed to withdraw pending EEOC complaints and to release the hospital from all past and future claims.

But the hospital failed to promptly change his records from “termination for cause” to “voluntary resignation.”

Shortly after the settlement agreement, the RCB investigated the previously submitted employment-termination report and reviewed his nonupdated personnel file. The hospital never told the investigator it had agreed to change its records. The RCB temporarily suspended the practitioner's certification to practice, and then the HR department belatedly updated his file.

During this time, the practitioner was unable to obtain a letter from the hospital verifying his employment. Nor did the hospital respond to inquiries about his employment from prospective employers. At least one gave up trying to get information and decided not to hire him.

Round 1 to the employer

The practitioner sued the hospital in federal court, alleging:

1. Violation of the ADA,
2. Intentional infliction of emotional distress,
3. Interference with prospective economic advantage, and
4. Breach of contract.

The hospital asked the court to rule in its favor without a trial. The court agreed on the ground that the settlement agreement barred his claims, and the practitioner appealed.

The Ninth Circuit found that the practitioner had failed to establish that the settlement agreement was procured by fraud, duress, failure of informed consent or on any other basis that would invalidate it. The Ninth Circuit agreed with the trial court's decision to 1) enforce the settlement agreement against the practitioner, and 2) throw out the ADA claims relating to acts that took place before the agreement.

Round 2 to the employee

But the Ninth Circuit reinstated the breach-of-contract claim for trial, because the hospital hadn't promptly removed termination documents from his personnel file. He had settled his grievances in the belief the hospital wouldn't represent to third parties that he had been fired.

The Ninth Circuit ruled that a fact-finder could reasonably 1) find that the settlement agreement required the hospital to correct his personnel records by the settlement date, and 2) conclude that the hospital's failure to promptly change the termination to a resignation resulted in the RCB investigator's unfavorable determination. Thus, a fact-finder could find that the hospital — by depriving him of a material benefit

of the settlement agreement — breached its obligation under the agreement.

Malicious reporting and retaliation

The practitioner alleged that the hospital:

- Discriminated against him in violation of the ADA by maliciously reporting to the RCB an employment termination based on false charges, and
- Retaliated against him by disclosing to the RCB other non-termination-related complaints against him.

The Ninth Circuit agreed that the settlement released the hospital from liability for retaliation claims for acts that occurred before it took effect but not for any post-execution claims. In addition, the court held that the practitioner had demonstrated a prima facie case of retaliation. It concluded that the hospital's acts were reasonably likely to deter employees from engaging in protected activity and to amount to actionable retaliation.



Significantly, the court noted that, when adverse employment decisions closely follow discrimination complaints, courts may infer retaliatory intent. Here, the temporal proximity between the practitioner's protected activities and the hospital's adverse acts sufficiently raised an inference of a causal link.

Prompt compliance is essential

After reaching settlement agreements, employers must act promptly to comply with settlement terms and must avoid actions that can be construed as retaliation against an employee for having sued. These actions can result not only in breach-of-contract or retaliation claims, but also in defamation claims. 🏠

The importance of employer-conducted background checks

The case of *Blair v. Defender Services Inc.* involved a contractor's liability for an employee's brutal assault. The Fourth Circuit had to decide whether the employee was acting within the scope of his employment when the attack took place and whether the contractor was negligent in hiring and retaining the employee.

Physical assault

The contractor performed janitorial services for a Virginia college. One of its janitors brutally beat a freshman in a campus restroom and left her unconscious on the floor. Her face was so swollen from broken facial bones that she could see out of only one eye, and she required neck surgery.

Despite a contractual obligation, the contractor had failed to check the assailant's criminal record at hiring. A check would have disclosed that a protective order and criminal complaint had previously been issued against the assailant for physical assault.

Case thrown out

The student alleged that the contractor was liable for the attack based on:

1. Respondent superior (an employer is responsible for its employees' wrongful acts), and
2. Negligent hiring and negligent retention.

The trial court dismissed all the claims, and the victim appealed.

The Fourth Circuit found that, to sustain the respondent superior claim, a plaintiff must establish that an employee's wrongful act fell within the scope of employment. The court found that the assailant's actions had nothing to do with performing his janitorial services.

An employee's being at a particular location at a specific time as a result of employment doesn't suffice to impose respondent superior liability on an employer. Rather, the test is whether "the

service itself, in which the tortious act was done, was within the ordinary course of the employer's business." Because the assailant acted independently when he attacked the victim, he clearly acted outside the scope of his employment. So the Fourth Circuit upheld dismissal of the first claim.

Claims reinstated

But the Fourth Circuit reinstated for trial the victim's negligent hiring and retention claims. Under Virginia law, a company must exercise "reasonable care" in hiring and retaining employees. The victim had to show that the contractor knew or should have known of the janitor's criminal problems at hiring. Because a background check could have disclosed the existence of the protective order, the court found a trial was necessary to determine whether the contractor should have known of the janitor's violent conduct.

Similarly, the Fourth Circuit found that an employer is guilty of negligent retention when it retains an employee it knew or should have known was dangerous. Because the contractor was contractually obligated to check its employees' backgrounds — which it failed to do on three occasions — sufficient grounds existed for taking the case to a jury.

Best practice

This case raises this question for employers: When is it necessary to conduct background checks on employees? They're not normally required, though state or local law sometimes dictates checks for some professions. Here, the contractor would have escaped liability but for the contractual obligation to conduct background checks.

Nevertheless, employers whose employees enter the homes of private citizens or who work with children may be well advised to obtain background checks even when not locally required. Although this opinion involves an interpretation of Virginia law, most states have similar jurisprudence. 🏠

