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Employment Law Briefing

Insights on Legal Issues in the Workplace

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Sex discrimination and stereotypical remarks

Could school administrators' stereotypical remarks about working women with children constitute sex discrimination? That was the question before the Second Circuit in *Back v. Hastings on Hudson Union Free School District*.

Employee starts on tenure track

An elementary school district hired a school psychologist in 1998 on a three-year tenure track. She reported directly to the principal and the personnel director. They consistently gave her excellent evaluations in her first two years. The school superintendent also evaluated her performance, noting she had efficiently and professionally managed a meeting.

When the psychologist returned from three months' maternity leave during her second year and her tenure review neared, she claimed that the personnel director asked how she planned to space her offspring and suggested she not get pregnant again until her first child was in kindergarten and the director had retired.

The director then told her that she was expected to work until 4:30 every day, saying, "What's the big deal? You have a nanny. This is what you have to do to get tenure." The psychologist replied that she *did* work those hours. The director reportedly reassured her that no one was concerned about her job performance but that the principal expected her to work those hours. The director suggested that she should "maybe reconsider" whether she could be a mother and do her job and expressed concern that she would work only until 3:15 if given tenure.

Evaluations jeopardize tenure

A few days later, the personnel director mentioned for the first time that she might not support tenure for the psychologist because she made errors in a report. The psychologist characterized the errors as minor. Then the principal accused her of working from only 8:15 to 3:15 and never working during lunch. When she disputed this, the principal expressed doubt that the psychologist could do her job with little ones at home and that if her family were her priority, perhaps this was not the job for her.

A week later, both the personnel director and the principal reportedly told the psychologist that this was perhaps not the job or the school district for her if she had young children and that it was "not possible for her to be a good mother and have the job." They said that firing her would be harder if she had tenure and wondered whether her apparent commitment to her job was just an act until she got tenure. They stated that once she obtained tenure, she wouldn't show the same level of commitment she had shown previously because she had young children at home. They expressed concerns about her child-care arrangements, though these had never conflicted with school assignments.

Repeating the same concerns a month later, they said they would recommend against granting tenure, the superintendent would follow their recommendations and they wanted another year to assess her child-care situation. In response, the psychologist retained counsel and informed the superintendent in writing of the comments and of her fear that they reflected attitudes that would improperly affect her tenure review. The principal and the director then formally told the superintendent they couldn't recommend the psychologist for tenure because:

- Although their formal reports had been positive, their informal interactions with her had been less positive,
- "Far too many" parents and teachers had serious issues with her and didn't wish to work with her, and
- Despite warnings, she still had persistent difficulties in planning and organizing her work and in filing accurate reports.

The principal and director then filed the first negative written evaluation of the psychologist, charging her with

filing inaccurate reports and with being inconsistent, defensive, difficult to supervise, and the source of parental complaints. Their evaluation — which they submitted to the superintendent — concluded that the board should deny tenure.

Board denies tenure

At the superintendent's urging, several parents complained in writing that she was defensive, immature and unprofessional and had misdiagnosed children. The superintendent, two teachers and an administrator recommended that the board deny tenure and fire her, and the board complied.

The psychologist sued the school district, superintendent, principal and personnel director, alleging gender discrimination in violation of the equal-protection clause and violations of New York state's Executive Law. The trial court ruled for the defendants without a trial. On appeal to the Second Circuit, the psychologist argued that an adverse-employment consequence imposed because of stereotypes about motherhood constituted a form of gender discrimination and contravened the equal-protection clause.

Second Circuit reinstates

The Second Circuit reinstated the case for trial. It first noted that to establish this claim, plaintiffs must prove they suffered purposeful or intentional discrimination based on gender. If proven, this discrimination can be tolerated only if the state provides an exceedingly persuasive justification for the rule or practice. The court found that the defendants here had offered no justification, so the court considered only whether discrimination had occurred.

The psychologist argued that comments made about a woman's inability to combine work and motherhood constituted direct evidence of sex discrimination. The Second Circuit relied on *Price Waterhouse v. Hopkins*, a Supreme Court opinion in which a woman alleged she was denied a partnership because the accounting firm where she worked had given credence and effect to stereotyped images of women. She had been called, among other things, "macho" and "masculine," was told she needed "a course at charm school," and was instructed to walk, talk and dress "more femininely, wear makeup, have her hair styled, and wear jewelry" if she wanted to make partner. The Supreme Court ruled that these comments established gender discrimination.

So the Second Circuit here saw *Price Waterhouse* as saying that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse-employment decision. Furthermore, the *Price Waterhouse* principle would apply as much to the supposition that a woman will conform to a gender stereotype as to the supposition that a woman is unqualified for a position because she doesn't conform to a gender stereotype.

The defendants maintained that stereotypes about pregnant women or mothers aren't based on gender but rather on gender plus parenthood, thereby implying that these stereotypes can't be presumed to be on the basis of sex without comparative evidence of what was said about fathers.

The Second Circuit disagreed. It found that at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work and that work and motherhood are incompatible are themselves properly considered to be gender based. The court also found sufficient evidence for a trial, because a jury could find that the psychologist's alleged deficiencies were unimportant to the defendants until they became concerned about granting her tenure while her children were young.

Words have power

The lesson to be drawn from this case is that supervisors need to be careful what they say. Employers must train supervisors to understand that *everything* they say might some day be repeated in a courtroom and to refrain from saying anything that they would not want to hear repeated.

Did she resign or didn't she?

Employer documentation key in FMLA case

Relying on inferences and assumptions isn't sufficient in handling employment matters. Documentation can make a critical difference if a dispute turns into a lawsuit. Let's take a look at what happened in *Arminio v. United States Tennis Association*.

Taking FMLA leave

A year after being hired, an executive assistant told her boss that she was pregnant and wanted to take 12 weeks of unpaid leave under the Family and Medical Leave Act (FMLA). She said she intended to then return to her position, and her boss told her he was open to part-time work.

Management got the impression — from conversations and the fact that she got a real-estate license just before beginning her leave — that she wouldn't return unless offered part-time work. But nothing was put in writing. Before she began her leave, her boss — without telling her — decided that a part-time position wasn't feasible.

A month after starting her leave, the employee spoke to the human-resources director about a possible part-time schedule. He claimed that she stated she wasn't returning full time, so he replaced her without telling her.

Meanwhile, concluding that part-time work wasn't feasible, the employee told management that she had arranged full-time child care so she could return to her original position when her leave ended. Management then told her it had replaced her. The employee's attorney sent a letter demanding her reinstatement when her FMLA leave expired. Management refused on the ground that she had resigned. But the employee applied for and received unemployment-insurance benefits that she wouldn't have been eligible for if her employer had told the state unemployment office that she had resigned. The employer stated on her COBRA form that her employment terminated when her leave expired.

The employee filed suit, alleging interference with her FMLA rights and retaliation for exercising her FMLA rights. The court denied the employer's motion for summary judgment.

Alleging interference

On the interference claim, the court held that she had established a prima facie case by showing that:

1. She was eligible for FMLA leave because she had worked the requisite period of time,
2. She was entitled to take FMLA leave to care for a newborn, and
3. She had provided sufficient notice of her intention to take leave.

The employer's defense was that she had resigned.

The court held that a trial was necessary to resolve whether she had resigned, noting that she had never notified her employer orally or in writing that she was resigning.

Then the employer argued that even if she hadn't resigned, she wasn't entitled to recovery because the employer reasonably believed she had resigned. The court rejected this

argument because even when an employer inadvertently denies a benefit to which a worker is entitled under the FMLA, the employer is nonetheless liable for interference.

The court noted that if an employer can demonstrate that its denial was in good faith and that it had reasonable grounds for believing its actions were lawful, the court may reduce or eliminate an award of liquidated damages (which under the FMLA is an amount equal to the actual damages). But the plaintiff is entitled to compensatory (actual) damages.

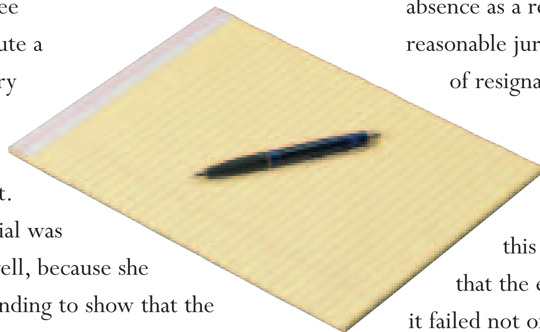
Alleging retaliation

To establish prima facie retaliation cases, employees must establish that:

1. They exercised FMLA-protected rights,
2. They were qualified for their positions, and
3. They suffered adverse employment actions that occurred under circumstances giving rise to retaliatory-intent inferences.

Here, the employer conceded that the employee had established a prima facie case of retaliation. The burden then shifted to the employer to articulate a legitimate nondiscriminatory reason for its action. If the employer succeeded in doing that, the burden would shift back to the employee to show that the proffered reason was merely a pretext for discrimination.

Under this standard, management's reasonable conclusion that the employee had resigned would constitute a legitimate nondiscriminatory reason for denying reinstatement, even if its conclusion was incorrect. But the court held that a trial was necessary on this issue as well, because she had introduced evidence tending to show that the proffered reason was pretextual and that discrimination was the real reason.



The court reached this conclusion because the employee testified that she had never told management she would work only part time when she returned. And management never told her that she could not work part time or that she could return only to her original job. Management admitted that it couldn't document either her resignation or that she had said she would resign if not offered part-time work. Moreover, management's documents didn't show that it had treated her absence as a resignation. Under these circumstances, a reasonable jury could conclude that the proffered reason of resignation was pretextual.

FMLA requirements

Eligible employees who take leave under the Family and Medical Leave Act must be restored to their old jobs — or to equivalent positions with equivalent pay, benefits, and other terms and conditions of employment — if they return by the required date. An equivalent position is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities entailing substantially equivalent skill, effort, responsibility and authority.

But an employer may deny job restoration to some highly compensated employees if necessary to prevent substantial and grievous economic injury to the employer's operations, provided the employer notifies the employee of its intent to deny restoration when the employer first determines economic injury would occur. In addition, the employee must have the option of deciding whether to cut short the leave and return to work.

Looking before leaping

The employer made many mistakes in handling this case. First, it failed to put in writing its claim that the employee had given them an ultimatum. Second, it failed not onlyto document its claim that it couldn't grant her request but also failed to issue its own written ultimatum that she return to her original job or not at all.

Finally, the employer jumped the gun by concluding that the employee had resigned when it had nothing in writing saying she was resigning. The facts of this case make success for management unlikely in a jury trial that will probably result in game, set and match for the plaintiff.

No one is immune to discrimination claims

Sometimes even people who presumably know better — such as judges — engage in blatant discrimination in the workplace. Here's a case in point: *Feingold v. New York*.

Feingold, a Jewish gay male administrative law judge (ALJ), was assigned to a Manhattan traffic court where all but two of the other ALJs were black Christian heterosexual females. The other two ALJs were white: a non-Jewish heterosexual male and a Christian heterosexual female who supervised the office. The overall supervisor for ALJs hearing traffic cases was a white Jewish male in a neighboring office.

Hostility and antagonism

Feingold alleged that, from his hiring, his African-American co-workers were hostile to him, failed to give him the training they gave other new ALJs, and were unhelpful and even antagonistic when he sought advice. In particular, when he asked a question of the ALJ assigned to train him, she snapped, "I ain't nobody's teacher."

As a result, he was given cases to hear on his first week on the job though he was not sufficiently trained — in stark contrast to an African-American female hired later who was given better training before starting to hear cases. Feingold alleged that the office assigned heavier caseloads to him and the only other white male than it assigned to the African-Americans who routinely arrived late, took long lunches and left early without being reprimanded.

Feingold also alleged that the office was permeated with anti-Semitic hostility. The other ALJs — rather than addressing him by his own name (Feingold) — called him "Feinstein," "Goldstein," "Goldman," "Silverman" or "Feinberg." One ALJ constantly referred to his religion and routinely referred to customers as either Jewish or non-Jewish. Another ALJ referred to food she ate at a work-related conference as "Jewish pig food."

Similarly, Feingold alleged that hostility toward homosexuals pervaded the office, and his co-workers referred to him as "that faggot judge." He complained to the overall supervisor

who told him that he also had experienced anti-Semitism in that office and that he should "sit tight" until a transfer could be arranged.

After Feingold dismissed two cases against motorists because the charging police officer left the hearing room without permission, the department fired Feingold on the office supervisor's and the overall supervisor's recommendations.

Feingold sued the city in federal court, alleging:

1. Disparate treatment and a hostile work environment based on race and religion,
2. Discrimination based on sexual orientation in violation of state and municipal law, and
3. Retaliation for complaining about the discrimination.

The trial court granted the city's motion to throw out the case without a trial, but the Second Circuit reversed and reinstated it.

Hostile work environment

The Second Circuit found that Feingold had offered sufficient proof on the hostile-environment claim to allow a jury to conclude he had experienced pervasive discriminatory intimidation, ridicule and insult because he was Jewish.

The court also found he hadn't sufficiently established a hostile-environment claim based solely on race or sexual orientation. But a jury could consider those allegations in evaluating his religion-based claim, because one type of hostility can exacerbate the effect of another. Furthermore, the city could be held liable for the co-workers' objectionable conduct — because Feingold's supervisors knew of it and failed to act.

Disparate treatment and retaliation

Next, the Second Circuit found that Feingold had established a prima facie case of disparate treatment based on his discriminatory-workload and discharge claims. Although the city articulated a legitimate nondiscriminatory discharge reason, his evidence was sufficient to permit a jury to conclude that the reason was pretextual. His evidence showed that other judges weren't disciplined for dismissing cases under similar circumstances. The court also found that he had established a prima facie retaliation claim based on his complaint filing's proximity to his dismissal.

The court rejected the city's argument that because the supervisors had hired him, the court had to infer that they lacked discriminatory discharging motives. (This is known as the "same actor" defense.) The court found that his discrimination complaints changed him from being a white Jew to being a white Jew who wouldn't tolerate a discriminatory office culture.

> ***The Second Circuit found that Feingold had established a prima facie case of disparate treatment based on his discriminatory-workload and discharge claims.***

The court also rejected the city's defense that the overall supervisor couldn't have had a discriminatory-firing motive because he was also Jewish. The court cited cases showing the folly of presuming as a matter of law that human beings of one definable group won't discriminate against other members of their group.

No immunity

This case shows that even judges aren't immune from the mandates of the discrimination laws and are capable of engaging in the kind of behavior that they're frequently required to adjudicate. If even judges aren't immune, are you?

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