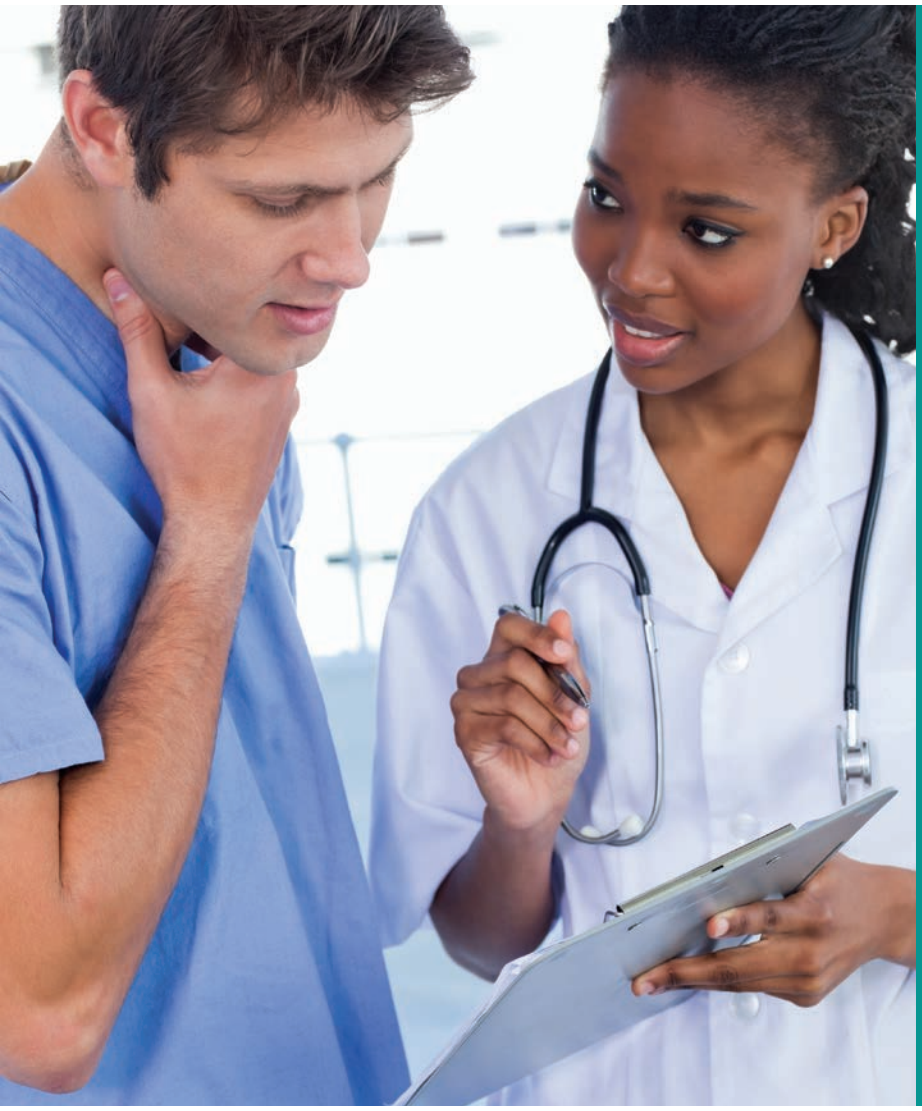
Employment Law
BRIEFING



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Reversal of fortune
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Reversal of fortune

Did race play a role in an RN's termination?

When a Caucasian registered nurse (RN) was terminated from his employment, he claimed constructive discharge due to reverse discrimination. But there was some question over whether he would be able to show that his African-American supervisor's conduct rose to the level that courts have deemed actionable under Title VII of the Civil Rights Act. The Sixth Circuit Court of Appeals reviewed the evidence in *Fletcher v. U.S. Renal Care.*

CONFLICTS ARISE WITH NEW SUPERVISOR

The employee worked for the employer without incident for approximately eight months. Then, his supervisor was replaced by a new supervisor, who was African-American. Within a month, the supervisor told the employee that he could no longer wear black jeans to work, as he had for several months, and would have to put on scrubs. The employee complained to his supervisor's boss, who told him to continue wearing black jeans until the issue was resolved at an upcoming meeting. He also complained to the HR manager and informed her that he felt the supervisor had singled out for harassment only Caucasian personnel.

Shortly thereafter, the supervisor accused the employee of putting a doctor's order on the wrong patient's chart — a potentially dangerous error. The employee stated that he had made no such mistake. On another occasion, the employee cracked a tooth, causing him considerable pain. He asked the supervisor to cover for him for an hour so he could see a dentist. The supervisor said she couldn't authorize the time off. The employee left anyway. He wrote to the HR manager, informing her that the supervisor had become more hostile and that his supervisor's attitude of singling him out had become more frequent and aggressive.

None of the actions the employee complained about rose to the level of "badgering, harassment or humiliation" that the court had deemed actionable as constructive discharge.

At approximately the same time, the supervisor reported the employee's alleged charting errors, which triggered an investigation. The investigation revealed that the employee's written orders were inadequate. He was placed on final warning — a standard practice whenever a patient safety issue required discipline. Even though the supervisor took no part in the decision to discipline the employee, she presented him with the written counseling form. This form included the employee's charting errors, continued wearing of black jeans and his abrupt departure to see a dentist.

The employee resigned and filed a suit alleging constructive discharge in violation of Title VII because of his race and retaliation for complaining about discrimination. The trial court ruled in favor of the employer. When the employee appealed, he met a second defeat.

ACCUSATIONS FALL SHORT

The employee only presented evidence that African-American employees were occasionally treated more leniently by their African-American supervisors. The court found that none of the actions the employee complained about rose to the level of "badgering, harassment or humiliation" that the court had deemed actionable as constructive discharge. All criticisms received by the RN concerned the manner in which the employer supervised him and assigned him duties. Generally, such actions are insufficient to establish a constructive discharge as a matter of law.

As for the retaliation claim, the employee stated that he was disciplined shortly after he complained about his supervisor's discriminatory conduct. Although temporal proximity can support a causal connection for a retaliation claim, an "intervening legitimate business reason to discipline" can defeat an inference of retaliation. The employer's discipline for the employee's charting errors constituted such a legitimate reason. In sum, the court sided with the employer because the employee had failed to provide any direct evidence of racial animus.

ISSUE A WARNING

Employers need to warn supervisors against retaliating when an employee complains of discriminatory conduct. In *Fletcher*, the employer was successful because it had a legitimate business reason for issuing the RN a written warning. Otherwise, the court may have found the timing of the warning as an inference of retaliation. ■

JOB REASSIGNMENT RECOGNIZED AS DEMEANING

In another Title VII action (see main article), a Caucasian employee charged an African-American majority school board with race discrimination and constructive discharge. The Eighth Circuit Court of Appeals assumed a different stance on these claims than the Sixth Circuit did in *Fletcher v. U.S. Renal Care*.

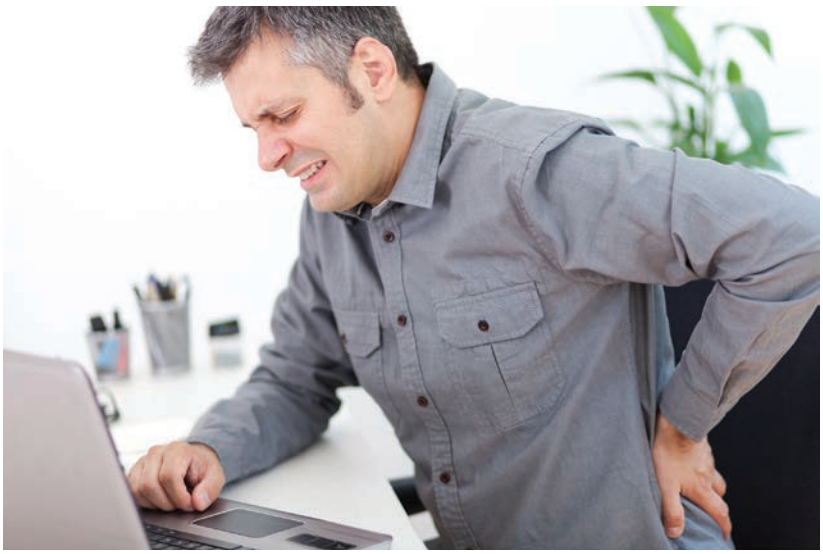
Sanders v. Lee County School Dist. No. 1 involved an employee who was a finance coordinator. Her job duties included presenting financial reports to the school board at its monthly meetings. At some point, the predominantly African-American board reassigned the employee to a position as food services assistant. In that position, she would have worked in the school's cafeteria.

After being reassigned, the employee took sick leave. She requested a description of her new duties and a new contract from the school board for several months, but didn't receive either. She remained on sick leave for approximately ten months. The school district's superintendent eventually informed her that her job was being terminated due to her extended absence. She replied by providing a doctor's note releasing her to return to work. After receiving the note, the school board informed her that she could return, but didn't provide her with the requested contract or job description. The employee resigned and filed suit against the school board.

The appeals court found that, because the change in the employee's position was a demotion with a diminution in title and significantly decreased responsibilities, a reasonable employee would have found the reassignment demeaning. The school board's failure to respond to the employee's repeated requests for a job description only supported her claim of constructive discharge.

Medical leave extension leads to more pain than relief

Does an extended medical leave qualify as a reasonable accommodation under the Americans with Disabilities Act (ADA)? A former employee brought an action alleging that his former employer had failed to accommodate him after his Family and Medical Leave Act (FMLA) leave had expired. The Seventh Circuit Court of Appeals considered the validity of his complaint in *Severson v. Heartland Woodcraft, Inc.*



A WRENCHING CONDITION

The employee had suffered from back pain for years and ultimately was diagnosed with back myelopathy. The employer acknowledged his disability. The employee's back condition didn't hamper his ability to work, but occasionally it made it difficult for him to walk, bend, lift, sit, stand and make other movements.

One day, the employee wrenched his back at home, aggravating his pre-existing condition. He requested and was granted FMLA leave. Throughout the summer he was on leave he remained in regular contact with the employer and submitted periodic notes from his doctor. On the last day of his leave, he underwent back surgery, which required that he remain away from work for another two to three months. The employee asked to continue his medical leave, but his employer denied the request and terminated his employment.

The employee sued the employer, claiming that it had discriminated against him in violation of the ADA because it failed to grant him a two-month leave of absence. When the trial court sided with the employer, the employee appealed.

NOT AN ENTITLEMENT

The appeals court held that the ADA is an antidiscrimination statute, not a medical leave entitlement. Under the ADA, a reasonable accommodation may include making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. Other possible accommodations include:

- Job restructuring,
- Changing work schedules,
- Reassigning to vacant positions,
- Modifying equipment,
- Adjusting examinations, training materials or policies, and
- Providing qualified readers or interpreters.

The concept of a reasonable accommodation is flexible. But the baseline requirement is firm: A reasonable accommodation allows the disabled employee to perform the essential functions of the employment position. If the proposed accommodation doesn't make it possible for the employee to perform his or her job, the employee isn't a qualified individual under the ADA.

As such, the court held that a long-term leave of absence can't be a reasonable accommodation because it doesn't give a disabled individual the means to work. In this case, it only excused the employee from not working. If he wasn't able to perform the job's essential tasks, the employee wasn't qualified under the ADA and, therefore, the employer wasn't required to excuse his inability. The court noted, however, that a brief

period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances. For example, time off may be an appropriate accommodation for intermittent medical conditions, such as arthritis or lupus. Someone with a condition like these may be able to do a given job even if the person must stay home occasionally due to pain and swelling.

NO EXCUSES

Severson should remind employers that, while they're required to provide reasonable accommodations to disabled employees, such accommodations are meant to facilitate work. They shouldn't excuse the absence of a worker who can't perform the job's essential functions. ■

Title VII discrimination

When love is in the air — and a supervisor denies it

An employer questioned one of its managers about a personal relationship she was having with a subordinate. Was this line of questioning sexual harassment under Title VII of the Civil Rights Act? The Seventh Circuit Court of Appeals would have to answer this question in *Owens v. Old Wisconsin Sausage Company, Inc.*

AN UNDISCLOSED RELATIONSHIP

The employee worked as a human resources manager for the employer — the only female department manager in the company. During her tenure, an individual applied for a position as a supervisor. The HR manager was present, along with another manager, during the applicant's first interview. But she didn't disclose that she and the applicant were involved in a romantic relationship. She wasn't present during the second interview of the applicant, but she did participate in the decision to hire him.

She was then assigned supervisory responsibility over the store where the new hire would be working as a supervisor — which placed him directly under her authority. The HR manager still didn't reveal the relationship to her employer. Within a month, three employees complained to the plant manager that the HR manager and the newly hired supervisor were in a relationship. The employees claimed that there was a conflict of interest because the HR manager had been involved in hiring him and she was also his current supervisor.

COMPANY POLICY IS SILENT

The employer had no policy prohibiting workplace dating, but it did have an informal policy of questioning supervisors in relationships with subordinates to avoid conflicts of interest. The employer asked the HR manager about the existence of the relationship. She denied it and claimed that the questioning constituted sexual harassment. A month later, the employer informed the HR manager that several employees had expressed concerns about the new supervisor's performance and her objectivity in addressing those performance issues. Once again, the HR manager denied knowing the supervisor outside of work.

Shortly thereafter, the employer determined that she wasn't a good fit for the position because she lacked essential knowledge of human resources and safety issues and because her "rough" personality made employees hesitant to approach her with problems. The employer terminated the HR manager and produced a memo that indicated she had been terminated for, among other things, making false or misleading statements related to practices and relationships that may have influenced her hiring decisions.

The manager filed a lawsuit against her employer, alleging unlawful discrimination in violation of Title VII. The trial court sided with the employer, and the manager appealed.

MANAGERS IN SIMILAR SITUATIONS

The "similarly situated" prong of Title VII requires a discrimination claimant to identify at least one co-worker who was treated more favorably under nearly identical circumstances. The HR manager alleged that she'd received different treatment than male managers did. But the court found that she'd presented no evidence of a male supervisor who was in an undisclosed relationship with a subordinate and wasn't questioned about it. And in fact, the employer presented evidence that two male managers had been questioned regarding relationships with subordinates.

Ultimately, the court decided that the employer hadn't discriminated against the HR manager because of her sex. Rather than demonstrating that similarly situated individuals were treated differently, the evidence indicated that the employer treated its male and female managers the same.

EQUAL TREATMENT LOWERS RISK

The employer in this case prevailed because it administered its policies equally. If it had shown preferential treatment to different employees in identical circumstances, the outcome could have been different. ■

Note to employers: Handle accommodation requests with care

Recently, the Eleventh Circuit Court of Appeals reviewed a case in which an employer rejected a note from an employee's chiropractor requesting a reduced schedule. The employer told the employee that she needed to submit a physician's note. The employee in *Holton v. First Coast Service Options, Inc.*, claimed that her employer had failed to accommodate her in violation of the Americans with Disabilities Act (ADA).

MISSED COMMUNICATIONS

The employee suffered from a back injury stemming from a motor vehicle accident a few years earlier. She asked her employer for leave and was granted it under the Family and Medical Leave Act (FMLA). When she returned to work, she gave her employer a note from her chiropractor stating that for a few weeks she would be limited to working four hours per day. The employer informed her that she couldn't return to work on the reduced schedule without a letter from a physician. If she returned to work, she would be expected to meet all the requirements of her job.

The employee contacted the U.S. Department of Labor (DOL), which administers the FMLA. The DOL told her that a chiropractor's letter should allow her to return to work and it contacted the employer. The employer told the DOL that it would notify the employee that she could return to the job. It attempted to contact the employee via a phone call and a letter. But the employee claimed that she'd never received

any communication from her employer. The letter (which was returned as undeliverable) stated that, by failing to return to work, the employee was in violation of the employer's policy. According to this communication, she needed to report to work by a certain date and would be considered to have resigned if she didn't comply. The employee didn't return to work and was terminated. She claimed that she'd learned about the termination when she received a letter about continuing her health care benefits.

The letter stated that, by failing to return to work, the employee was in violation of the employer's policy.

The employee filed a lawsuit against the employer, alleging that she was qualified as disabled under the ADA because she suffered back pain that substantially limited her ability to walk, bend and sit. She also alleged that the employer refused to allow her to return to work, interfering with and retaliating against her for exercising her rights under the FMLA. The trial court ruled in the employer's favor. The employee appealed.

3 THINGS

The ADA prohibits discrimination by an employer against "a qualified individual on the basis of a disability" in any of the terms, conditions or privileges of employment. Such discrimination includes an employer's failure to reasonably accommodate a qualified employee's disability. To prove a discrimination claim, employees must show three things:

1. They're disabled.
2. They qualify under the ADA.
3. They've been discriminated against because their employer failed to provide a reasonable accommodation.

An individual is disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment or is regarded as having such an impairment. The employee in this case claimed she was disabled due to her back injury because it substantially limited her ability to walk, bend and sit.

But the court held that making such statements without sufficient evidence isn't enough to establish a disability. The letter from the employee's chiropractor was deemed insufficient evidence because it didn't explain how the employee's back pain substantially limited any of her major life activities. The court decided that a letter from her physician could have demonstrated her disability, but the chiropractor's didn't.

The court also sided with the employer on the FMLA claim. To establish an FMLA interference claim, an employee must show that she was entitled to a benefit that was denied by her employer. The FMLA guarantees an employee returning from leave the right to return either to the same position held when the leave began or to an equivalent position with equivalent terms and conditions. Here, the employee sought to return to work on a reduced schedule. The employer refused to allow her to return on her requested terms, but offered her the opportunity to return to work on a full-time basis. Therefore, the court determined that the employer hadn't interfered with her FMLA rights.

EXERCISE CAUTION

In this case, the appeals court handed a victory to the employer because the employee had failed to establish that she was disabled under the ADA. But employers need to exercise caution when denying an injured employee's request for accommodation. In such cases, discuss the matter with your legal counsel before making any significant decisions. ■