

Employment Law

BRIEFING



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Disabled employee bails from rental car agency after bumpy ride

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Buckle up

Disabled employee bails from rental car agency after bumpy ride

A former manager for a rental car agency alleged that her employer and supervisor had created a hostile work environment due to disability discrimination. According to the employee, such discrimination led to constructive discharge in violation of the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and the New York State Human Rights Law. The Second Circuit Court of Appeals would have to determine whether there was sufficient evidence to decide in her favor.

MANAGER DRIVEN FROM JOB

The employee in *Lawson v. Homenuk* alleged that she'd endured insults about her mental health on a daily basis for a period of approximately a year. She claimed that co-workers and subordinates constantly made fun of her mental disorder and mocked her by saying she was unstable and "cuckoo for Cocoa Puffs." She also alleged that her supervisor regularly locked her out of the agency's office, which kept her from performing her managerial duties and forced her to work at the front counter alongside nonmanagerial employees.



The employer responded by stating that the only times the door to the office was locked was when the manager's supervisor was on the phone. Whenever she found the door locked, the manager didn't attempt to gain access to the office. She only attempted to enter it when the supervisor left for the day. Additionally, the manager was never asked or required to work at the counter with nonmanagerial employees. She did so without being requested.

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The employee resigned from her job and filed suit against the employer and supervisor. But the trial court found that the employee had failed to establish sufficient evidence of a hostile work environment or constructive discharge. Also, the employee made some contradictory statements while testifying at her deposition. The court sided with the employer, and the employee appealed the ruling.

COURT DEFLATES ARGUMENTS

An adverse employment action typically involves:

- ❑ Discharge,
- ❑ Refusal to hire,
- ❑ Refusal to promote,
- ❑ Demotion,
- ❑ Reduction in pay, and
- ❑ Reprimand.

To support a discrimination claim, the adverse action must be materially adverse with respect to the terms and conditions of employment and more disruptive than a mere inconvenience or change of job responsibilities. In this case, the appeals court found that the manager had failed to provide sufficient evidence of an adverse employment action because she was never demoted, suffered no change in her job title or position, and continued to have supervisory responsibilities.

To establish a hostile work environment, an employee must show that her workplace was so severely permeated with discriminatory intimidation, ridicule and insult that the terms and conditions of her employment were thereby altered. An isolated incident usually won't suffice to establish a hostile work environment — unless the incident is extraordinarily severe. Although the employee claimed in her deposition that she was constantly ridiculed by co-workers, she testified that she could recall only one instance of

such ridicule. The court held that the isolated incident wasn't severe enough to establish a hostile work environment.

Finally, to establish a constructive discharge claim, the court stated that the employee had to provide evidence that her employer had intentionally created a work atmosphere so intolerable that she was forced to quit involuntarily. But she was unable to show that the environment was severe enough to establish a hostile work environment claim. Accordingly, the court also ruled against her on the constructive discharge claim.

TAKE SAFETY PRECAUTIONS

The employer prevailed in this case. But employers should remember to be proactive. Although nothing can prevent an employee from alleging discrimination and a hostile work environment, employers can effectively fight back if they have sound employment policies and practices. ■

WAS AN EMPLOYEE PERSECUTED FOR HER RELIGION?

Employers don't always win discrimination and hostile work environment suits. When the employee in *EEOC v. University of Chicago Hospitals* alleged religious discrimination and constructive discharge in violation of Title VII of the Civil Rights Act, the Seventh Circuit Court of Appeals was notably sympathetic to the employee.

The employee was a recruiter for a hospital's personnel department. Her supervisor told her that she had to remove some religious items from her office because they were "too religious." The employee was also told that she shouldn't recruit friends or people from her church. Further, a co-worker told the employee that the supervisor wanted to get rid of her. Apparently, the supervisor was going to make the employee's life very difficult because she was a "Bible thumper."



When the employee returned from a vacation, the materials from her office had been packed and the office was being used as storage.

The employee submitted her resignation letter and filed a complaint with the Equal Employment Opportunity Commission. The trial court found for the employer and the employee appealed.

On appeal, the employee was told she needed to show a discriminatory work environment even more egregious than the typically high standard for a hostile work environment. To demonstrate constructive discharge, an employee must show that she was forced to resign because her working conditions, from the standpoint of a "reasonable" employee, had become unbearable. Constructive discharge can also be shown with evidence that an employer acted in a manner that communicated to an employee that she would be terminated — and the employee resigned as a result.

The court found in the employee's favor. It decided that the employer was hostile toward her religious beliefs and that a reasonable person in her position would have believed that, if she didn't resign, she would be terminated.

Why the Rehabilitation Act encourages active accommodation

The Rehabilitation Act prevents federal government agencies and contractors from discriminating against disabled individuals. When an Alabama equipment operator claimed constructive discharge and denial of reasonable accommodations under the Rehabilitation Act following an on-the-job injury, the Eleventh Circuit Court of Appeals reviewed the matter. At issue was whether the employer had provided a reasonable accommodation for the disabled employee.

FALSE FOREMAN

The employee in *Boyle v. Pell City* worked as a heavy equipment operator for a municipality's Street Department. A few months into his employment, he suffered an on-the-job injury that caused him to develop spinal stenosis, chronic nerve pain and other related conditions. After the injury, he could no longer perform the duties of a heavy equipment operator. The Street Department's superintendent initially accommodated the employee by allowing him to do office work.

A few years later, the employee was allowed to perform the duties of a foreman, while the actual foreman voluntarily worked as a mechanic. Although he was working as a foreman, the employee received the wage rate of a heavy equipment operator, which was approximately \$8 less per hour than the foreman's rate. This arrangement went on for a period of approximately seven years. Then, the superintendent retired and was replaced. The employee heard a rumor that the new superintendent intended to fire him. The employee decided to apply for disability retirement. His application was denied.

Soon after the new superintendent assumed his position, he removed the employee from the foreman job and assigned him to work inventory. The employee told the new superintendent that the physical activities involved in conducting inventory made the job hard for him, but the superintendent ignored his complaints. The employee asked to be returned to performing foreman's duties. The superintendent denied his



request, explaining that the actual foreman was being paid foreman's wages and should therefore perform those duties.

The employee filed a second application for disability retirement, and this time his application was approved. He then filed a complaint to assert violations of the Rehabilitation Act. Although the trial court found for the employer, the employee appealed and the case was taken up by the Eleventh Circuit.

LAW REVIEW

The Rehabilitation Act prohibits entities receiving federal funds from discriminating against otherwise qualified individuals with disabilities. A disability, for purposes of the act, is a physical or mental impairment that substantially limits one or more major life activities. An employer unlawfully discriminates against an otherwise qualified person with a disability when it fails to provide a reasonable accommodation for the disability, unless doing so would impose an undue hardship on the employer.

The employee in such circumstances bears the burden of identifying an accommodation and showing that the accommodation would allow him or her to perform the essential functions of the job in question. Employers aren't required to hire an employee for a nonexistent job or create a light-duty position for a disabled employee.

In *Boyle*, the appeals court found that the employee had failed to meet his burden of identifying a reasonable accommodation that the employer could have made. There was no vacant position for the employee and the City wasn't required to create one for him. As for the constructive discharge claim, the court found that the employee had filed for retirement before being reassigned by the new superintendent.

COSTLY MISTAKE

If your entity is subject to the Rehabilitation Act, know that you're under no obligation to create a new position for a disabled employee. However, to ignore or disregard a disabled employee's complaints about a disability at work could be a costly mistake. Work with employees to make an accommodation whenever possible. ■

Fair Labor Standards Act

DOL targets employer that uses volunteer workers

Did a company using volunteer workers violate the Fair Labor Standards Act (FLSA)? That was the determination that initiated D.C. District Court case *Rhea Lana, Inc. v. U.S. Dep't of Labor*. After receiving a letter from the U.S. Department of Labor (DOL) about its violation, the consignment sales company sought declaratory and injunctive relief against the government.

VOLUNTEER WORK

The employer is a for-profit business that hosts semiannual consignment sales of used children's clothing and merchandise. It relies on the labor of its consignor volunteers to help organize and run these events. For each consignment sale, the company is responsible for:

- ▣ Leasing space,
- ▣ Providing display racks and tables,
- ▣ Advertising, and
- ▣ Performing administrative tasks related to the week-long sales.

The operations are carried out by managers who are paid by the company and consignors who volunteer for five-hour shifts. After

it's set up, the sale opens to early shoppers — a group made up of the volunteers. After the regular sale concludes, the volunteers sort any leftover items and return them to the appropriate consignor.

2 GROUNDS

In 2013, the DOL investigated whether the sale volunteers qualified as employees under the FLSA. It sent the company a final determination letter informing it that its failure to pay salespeople violated the law. The letter constituted official notice of the company's noncompliance, and the company was instructed that it would be subject to willfulness penalties for any further violations.

The DOL justified its determination on two independent grounds:

1. The facts showed that the volunteers expected early access shopping benefits for their work, the company received a benefit from their work and the nature of the work was consistent with an employer-employee relationship, and
2. The DOL had a longstanding interpretation of the FLSA as prohibiting for-profit, private-sector entities from using volunteer workers.



The company filed a claim against the DOL. When the DOL filed a motion to dismiss, the trial court granted it. However, the appeals court reversed the decision and sent the case back to the trial court for reconsideration.

ECONOMIC REALITY

The FLSA defines an employee as an individual employed by an employer. The term “employee” doesn’t include volunteers who work without promise or expectation of compensation, but solely for their personal purpose or pleasure. Such volunteers are different from those who expect to receive benefits in exchange for their services. Those who expect to receive a benefit are employees and are entitled to statutorily mandated wages, regardless of whether they view themselves as volunteers. The test to determine whether an individual is an employee under the FLSA is one of economic reality, not technical concepts.

Courts typically look at the totality of the circumstances to determine if an individual is an employee.

The DOL’s letter to this company discussed the volunteers’ expectation of receiving a benefit for their work and looked at the extent to which the services the volunteers rendered were an integral part of the business. The trial court therefore determined that the DOL applied the correct legal test for deciding employee status and it upheld the DOL’s determination.

BROAD INTERPRETATION

Congress intended the FLSA’s protections to be interpreted broadly in favor of workers’ rights. The DOL and courts usually look at all circumstances and the economic reality of the situation, regardless of what employees believe themselves to be. Keep this in mind if your organization works with volunteers. ■

When do racist comments rise to the level of harassment?

In *Cooper Tire & Rubber Company v. NLRB*, the Eighth Circuit Court of Appeals was tasked with weighing the rights of an employee under the National Labor Relations Act (NLRA) and the obligations of an employer under Title VII of the Civil Rights Act. At issue was an employee who made crude and racist comments while participating in a picket line and an employer who failed to reinstate him when the strike was over.

COMMENTS HAVE CONSEQUENCES

A tire-manufacturing plant with approximately 1,000 employees locked out the workers after management and labor failed to reach a new collective bargaining agreement (CBA). During the lockout, union workers picketed outside the employer’s plant. The employer hired replacement workers during the lockout. These replacement workers crossed the picket

line, arriving and leaving the facility in vans owned by the employer. Many of the replacement workers were African-American.

One of the locked-out employees, while participating in the picket line, yelled, “Hey, did you bring enough KFC for everybody?” and “Hey, anybody smell that? I smell fried chicken and watermelon.” The comments were directed at the African-American replacement workers who had just crossed the picket line in the company’s vans. While yelling, the employee made no overt physical gestures or movement, and there was no evidence that the replacement workers heard the employee’s statements.

A month later, the employer began recalling the locked-out employees to return to work. It didn’t recall the employee who had made the racist comments. In fact, the employer terminated his employment for

the statements he'd made while picketing. The union representing the worker filed a grievance alleging that the employer had violated the CBA by discharging the employee. The arbitrator found just cause under the CBA to fire the employee. The union then submitted the case to an NLRB Administrative Law Judge who concluded that the employer had violated the NLRA. The NLRB ordered that the employee be reinstated with back pay. The employer petitioned the appeals court for review.

YET MISCONDUCT IS PROTECTED

Section 7 of the NLRA guarantees employees the right to assist labor organizations and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It also gives locked-out employees the right to picket. The NLRA prohibits employers from interfering with, restraining, coercing or discriminating against employees in the exercise of their Section 7 rights.

The appeals court stated that impulsive behavior on the picket line should be expected — especially when directed against nonstriking employees or strike breakers. A firing for picket-line misconduct is an unfair labor practice unless the alleged misconduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the NLRA. The court held that there was substantial evidence to support the NLRB's decision that the employee's statements weren't violent in character, nor did they contain any overt or implied threats to replacement workers or their property.

However, the employer argued that reinstating the employee would conflict with its obligations under Title VII, because the employee's comments created a hostile work environment. The employee's comments alone wouldn't entitle the African-American workers to a judgment against the employer for a hostile work environment. But the employer asserted that it had a legal obligation under Title VII to apply its lawful policy prohibiting harassment to racist statements, even on the picket line.



The court countered that harassment is actionable under Title VII if it's severe and pervasive enough to alter the conditions of the victim's employment and create an abusive working environment. Offhand comments and isolated incidents, unless extremely serious, won't amount to discriminatory changes in the terms and conditions of employment. So, the court upheld the NLRB's decision to reinstate the employee with back pay because the employee's comments — even if they had been made in the workplace instead of on the picket line — didn't create a hostile work environment. Furthermore, the court held that the employer had no legal obligation to fire the employee. Title VII doesn't mandate the termination of a harasser. Rather, what an employer must do is take prompt remedial action reasonably calculated to end the harassment. The court held that the employer's obligations under Title VII didn't conflict with the employee's reinstatement.

FOLLOWING NLRB RULES

Employers need to remember that workers have the right to engage in protected concerted activities for the purpose of collective bargaining and other mutual aid or protection. It's also important to know that courts generally uphold decisions of the NLRB if it has correctly applied the law and its factual findings are supported by substantial evidence on the record. This is true even if the court might otherwise have reached a different decision. ■