

# Employment Law Briefing



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# Location, location, location

*In discrimination cases, where a promotion is offered can make a difference*

The issue before the Seventh Circuit in *Simple v. Walgreen Co.* was whether an employer racially discriminated against a black assistant manager when it offered to promote him to manage stores in black areas but not in predominantly white ones. The court found that it had discriminated.

## Promotion declined

Walgreen promoted a black employee to be assistant store manager four years after he was hired. Two years later, he declined the district manager's offer to manage a store in a "socioeconomically challenged" area that had a high "shrink" — a shoplifting-caused gap between expected and actual profits. Walgreen bases store managers' bonuses on their stores' profits.

The assistant manager later turned down jobs in other areas that Walgreen's demographic tracking records showed had:

1. "Low" average annual customer incomes (defined as less than \$40,000), and
2. More than 40% black customers.

Two years later, the district manager — without telling the assistant manager of the opening — hired a white woman to manage a store with more than 80% white customers with an average income of \$40,000 to \$60,000 and less shrinkage.

## Racial discrimination alleged

The rejected assistant manager and the woman who got the job were equally qualified — except he had been an assistant store manager twice as long as she had, and Walgreen had never offered to let her manage predominantly black or low-income stores. But the district manager justified his decision by claiming that a store manager who'd supervised both assistant managers at their respective stores supported it.

The rejected assistant manager sued for racial discrimination, and the trial court ruled for Walgreen without a trial.

## Pretext suggested

The Seventh Circuit noted that Walgreen was unable to give coherent, consistent reasons for promoting the white woman rather than the black plaintiff. Inconsistent promotion explanations suggested pretext (a motive alleged to cloak the real hiring reason) and thus constituted evidence of discrimination.

Furthermore, no evidence supported the contention that the white woman was more qualified to manage the store than the black plaintiff who had twice as much experience. But she was white, and the store was in a predominantly white neighborhood. And the plaintiff was black and was twice offered a "black" store but ignored for the manager vacancy at the "white" store.



## Further evidence

Shortly after promoting the white woman, the plaintiff's store manager had a conversation with him regarding race. She testified in her deposition that she may have stated that the town where the store was located "was possibly not ready to have a black manager," that "some of the smaller, outlying towns" are well known "to have some very racist tendencies," and she was simply trying to make the plaintiff feel better because "he might not have been very happy working there."

The Seventh Circuit noted that the significance of the manager's remark about that town's racism lies in the fact that, as an experienced Walgreen store manager, she was undoubtedly aware of what the district manager was looking for to manage a store in that town. One interpretation of her remark is that the district manager wouldn't consider the plaintiff for the job because of his race.

So the Seventh Circuit reversed the trial court's judgment and sent the case back for trial.

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## Legitimate business reasons required

The significance of this case is that employers must not base employment decisions on their customers' or workers' racism or other biases. Rather, to pass court scrutiny, base employment decisions on legitimate business reasons. ♦

# Is depression covered by the ADA and FMLA?

In *Rask v. Fresenius Medical Care*, the court had to decide whether firing an employee who suffered from depression violated the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).

## A history of depression

A patient-care technician at a kidney-dialysis clinic had a long history of depression and of disciplinary and attendance problems. The clinic fired her for failing to show up one day.

She alleged that depression constituted a disability under the ADA and a chronic health condition under the FMLA, so firing her violated both. The trial court ruled for the clinic without a trial.

## Depression and the ADA

On appeal, the Eighth Circuit found that it needn't address whether the technician's depression was a disability under the ADA because, even if it were, the employer had no accommodation duty because the technician failed to meet other ADA requirements.

Employers must reasonably accommodate qualified applicants' or employees' *known* disabilities unless the accommodation imposes an "undue hardship" on operating the



business. What constitutes an undue hardship is determined case-by-case, but some factors considered include the accommodation's cost, extensiveness and disruptiveness and whether it fundamentally alters the business's nature or operation.

Here, the technician had failed to show that she was qualified to perform (with or without accommodation) an essential job function: regular and reliable attendance. Confronted with her history of unpredictable absences, she admitted that she was unable to come to work regularly

## Similar facts, different outcome

In *Battle v. United Parcel Service*, a UPS manager's new boss began imposing demands on him and berating him when he couldn't meet them, causing him to become depressed. When he returned from a leave of absence, the manager asked UPS to accommodate his depression-caused disability.

When UPS refused, the manager sued for disability discrimination under the Americans with Disabilities Act (ADA). The jury found for the manager, and UPS appealed.

The key issue on appeal was whether the manager's depression constituted a disability under the ADA. He claimed that his depression substantially limited his ability to think and concentrate.

The Eighth Circuit agreed that these were major life activities, but UPS argued that the manager was not *substantially* impaired in these activities. The court found that a "substantial limitation" is an inability or significant restriction on the ability to perform a major life activity that the average person in the general population can perform.

The manager's doctor had testified at trial that the manager's depression and anxiety substantially limited his ability to think and concentrate as compared to the average person. The doctor also explained that the manager thought and concentrated laboriously, had to spend significant extra time working on projects, and couldn't think and concentrate about matters unrelated to work.

The Eighth Circuit explained that the credibility of the manager's doctor's testimony constituted a question of fact that was properly before the jury to determine. The jury had heard the doctor's testimony and found it credible, so the Eighth Circuit upheld the jury's finding and ruled that the manager's depression constituted a disability under the ADA.

and reliably when she told her supervisors, "I'm having problems with my medication, and I might miss a day here and there because of it."

## ADA notice of need

The technician had also failed to provide sufficient notice of her need. The court had previously held that, when a "disability, resulting limitations, and necessary reasonable accommodations" aren't "open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily" on employees to specifically identify their disabilities and resulting limitations and "to suggest reasonable accommodations."

So the Eighth Circuit held that, even if "having problems with medication" were a specifically identified disability, and even if "I might miss a day here and there" suggested what a reasonable accommodation might be, no reasonable person could find that the technician had "specifically" identified her "resulting limitations."

## Depression and FMLA

Eligible employees are entitled to FMLA leave when they have "a serious health condition" that prevents them from performing their job functions. The court held that a mental illness or condition qualifies as a serious health condition if it continues over an extended period and requires periodic doctor's visits because of — or to prevent — episodes during which the employee can't perform regular daily activities.

The Eighth Circuit explained that, while this was a broad definition, no medical evidence in the record here indicated that all forms of diagnosed depression — even if left untreated — would result in incapacity. Employees must sufficiently inform employers when a "health condition could be serious."

To hold otherwise, the court noted, would unreasonably burden employers by requiring them to investigate virtually every absence to ensure that it didn't qualify for FMLA leave.

## FMLA notice of need

The FMLA doesn't specify what kind of notice employees must give when they intend to take unforeseeable FMLA leave. But the relevant rules provide considerable guidance and are generous to employees. They must give notice "as soon as practicable," but they needn't "explicitly assert rights under the FMLA or even mention the FMLA" to require their employers to determine leave eligibility.

The Eighth Circuit concluded that the technician could point to no evidence in the record that gave

her supervisors sufficient details about her depression — such as its severity or any resulting incapacity — to indicate that it was serious, as opposed to being caused by medication side effects.

### Put procedures in place

Although the employer here had no duty to accommodate under the ADA, in other cases where a disability was, or should have been, apparent to the employer, employers often have been deemed to have received “constructive

notice,” meaning they should have acted as if they’d been notified. So in such situations, employers need to be proactive in discussing with employees their limitations and reasonable accommodations.

As for the FMLA, employers subject to it must analyze absences case-by-case to determine FMLA eligibility. Leave may be covered even if an employee doesn’t ask for it. Savvy employers put in place procedures to determine when leaves or absences are covered and when they aren’t. ♦

# A professor’s alleged in-office pornography leads to multiple claims

Three questions confronted the Second Circuit in *Patane v. Clark*. First, did a professor discriminate against his secretary on the basis of gender? Second, did his leaving pornography on her computer subject her to a hostile work environment? Third, did she suffer an adverse employment action constituting retaliation when he reduced her duties, after she’d complained about the hostile work environment?

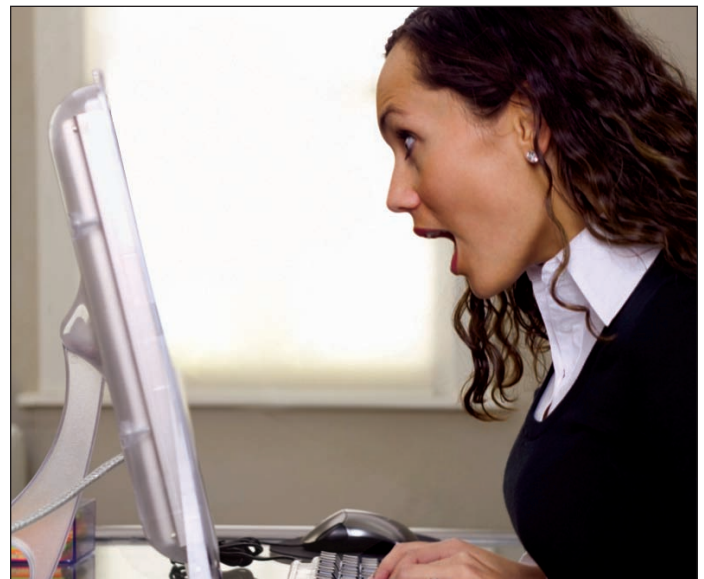
### The case begins

According to a university professor’s secretary, the professor:

- Spent one to two hours daily watching “hard-core pornographic” videotapes in his office,
- Watched “hard core pornographic” Web sites on her computer in her absence, and
- Regularly had “masochism and sadism” videotapes shipped to his office that she, as his secretary, was responsible for opening and delivering to his mailbox.

The secretary showed a tape to higher authorities, but they took no remedial action. She continued to report the behavior, and her supervisor allegedly began to retaliate against her. He “removed virtually all of her secretarial functions, kept her entirely out of the departmental information ‘loop,’” and refused to speak to her, communicating only by e-mail.

The secretary sued, alleging gender-based discrimination, hostile work environment and retaliation. The trial court granted the defendants’ motion to dismiss all three claims, and she appealed.



### Gender discrimination

The Second Circuit noted that, to establish gender-based discrimination under Title VII, plaintiffs must show that the discrimination was *because of their gender*. The court held that the secretary had failed “to plead any facts that would create an inference” that any defendant “had taken any action” against her based on her gender.

## What constitutes retaliation?

In ruling on the secretary's retaliation claim in *Patane v. Clark* (see main article), the Second Circuit relied heavily on the Supreme Court's opinion in *Burlington Northern & Santa Fe Railway v. White*.

A forklift operator was the only woman employed in Burlington's maintenance department. She complained that her supervisor repeatedly told her that women shouldn't be working in that department, and he made insulting and inappropriate remarks to her in front of her male colleagues.

Burlington suspended the supervisor for 10 days and ordered him to attend a sexual-harassment training session. At the same time, Burlington reassigned the operator to a more strenuous and dirtier job in response to co-workers' complaints that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.

The issue before the Supreme Court was whether to apply the same standard to retaliation claims and substantive discrimination offenses. Previously, the circuit courts of appeal had split on whether a challenged action had to be employment- or workplace-related and the action's level of harm necessary to constitute retaliation.

The Supreme Court resolved the split in the circuits by holding that Title VII's antiretaliation provision is broader than its discriminatory-action provision, and that any action that "could well dissuade a reasonable worker from making or supporting" a discrimination charge could constitute retaliation.

The court also held that she hadn't alleged that any male employees were given preferential treatment compared to her. The only specific employment action that might qualify as "materially adverse" (being stripped of secretarial functions) she characterized as retaliatory and not gender-based. So, the Second Circuit upheld dismissal of her discrimination claim.

But her two other claims were a different matter.

### Hostile work environment

To state a claim for hostile work environment in violation of Title VII, a plaintiff must plead facts tending to show that the complained-of conduct:

1. Was objectively severe or pervasive enough to create an environment that "a reasonable person would find hostile or abusive,"
2. Created an environment subjectively perceived by the plaintiff "as hostile or abusive," and
3. Created this environment "because of the plaintiff's sex."

The Second Circuit explained that the mere presence of pornography in a workplace can alter the "status" of women therein and is relevant to assessing the environment's objective hostility. Furthermore, sexually charged conduct in the workplace may create a hostile environment for women despite the fact that men also experience it.

The Second Circuit held that — given the scope of the secretary's allegations and the university's failure to take any action despite her many complaints — she had pled sufficient facts to establish a hostile work environment. So the court returned this claim to the trial court for trial.

### Retaliation

To establish this Title VII claim, plaintiffs must plead facts tending to show that:

1. They participated in a protected activity known to the defendants,
2. The defendants took an employment action disadvantaging the plaintiffs, and
3. The protected activity and the adverse action were causally connected.

The court concluded that reducing the secretary's material responsibilities was an adverse employment action and therefore constituted retaliation, so the court reinstated the adverse employment action and retaliation claim for trial.

### Equal standing under the law

The lesson for employers here is the importance of investigating all discrimination complaints. Just because a complaint is made against a professor (or any other highly educated professional) doesn't mean that the complaint lacks merit. Under discrimination law, professors and secretaries have equal standing. ♦

# WARN Act doesn't require double payment of wages

**L**ong v. Dunlop Sports Group Americas involved laid-off employees who claimed their ex-employer owed them wages under the Worker Adjustment and Retraining Notification Act (WARN) even though they had begun to work for a successor company.

## Plant shuts down

Dunlop shut down a golf-ball plant on Oct. 31, 2005, telling workers they wouldn't be required to report for work. But the company said that, through Dec. 31, 2005, or until the employees began working for the successor company (whichever came first), Dunlop would continue to employ them, pay wages for 40 hours a week, and maintain their eligibility for health and other benefits.

In late November, the successor company hired 22 Dunlop employees full time. In early December, Dunlop ceased paying wages and benefits to these employees because the successor company now employed them.

## Ex-employees sue

The employees alleged that Dunlop violated the WARN Act by not paying them wages and benefits for the entire 60-day notice period, regardless of their employment during that time with the successor company.

Dunlop argued that it incurred no WARN-related liability because it had given the required 60 days' notice before any employment loss resulting from closing the plant. The trial court ruled for the employer without a trial.

## An employment loss?

On appeal, the Fourth Circuit rejected the employees' claim that they had suffered an employment loss on the day the plant shut down. WARN requires employers to provide 60 days' notice of the date of *employment loss* resulting from a shutdown, not 60 days' notice of the date of the *shutdown itself*. "Employment loss" is "an employment termination, other than a discharge for cause, voluntary departure, or retirement."

Furthermore, the court pointed out that the ordinary meaning of "employment termination" doesn't include situations in which an employer continues to pay full wages and benefits.

The Fourth Circuit noted that Congressional intent in passing WARN was to protect employees' expectation of wages and benefits — *not* their expectation of performing work. So Dunlop's decision to pay all benefits and wages for 60 days without requiring work accorded entirely with WARN's language, purpose and structure.

## A constructive discharge?

The employees also argued that they hadn't voluntarily departed the company in early December, but rather Dunlop had constructively discharged them and thus caused them an "employment loss" at that time. The Fourth Circuit agreed that an "employment termination" occurred at this point, but found that no "employment loss" occurred because the termination resulted from a voluntary departure.

A constructive discharge occurs when "an employer deliberately makes working conditions intolerable in an effort to induce an employee to quit." If this termination notice would make workplace conditions "intolerable," then every employer that adhered to WARN notice requirements would constructively discharge its employees at the moment of notice and so violate WARN.

Concluding that this clearly wasn't what Congress intended, the Fourth Circuit also rejected the employees' constructive-discharge contention. Moreover, the court cited Department of Labor rules that the DOL "does not ... agree that a worker who, after the announcement of a plant closing or mass layoff, decides to leave early has necessarily been constructively discharged or quit 'involuntarily.'"

## Compliance pitfalls

Employers should be aware of WARN's specific definitions and the rules that interpret the act. A careful review is required before taking any action under WARN. ♦

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# Immigration Law: Handling the Receipt of a No-Match Letter

The Immigration Reform and Control Act of 1986 mandates that all employers ask new hires for documentation verifying a worker's identity and the authority for that worker to work in the U.S. The employer must then complete Form I-9 (Employment Eligibility Verification form) within 3 days of the date of hire verifying that the employee is authorized to work in the United States.

The dilemma that many employers face is that many undocumented workers purchase false drivers' licenses and Social Security cards to present to employers for this verification practice. Employers generally become aware of this problem when they receive a no-match letter from the Social Security Administration (SSA) stating that the social security number provided for an employee does not match the information in the SSA's database. Although receipt of a no-match letter in the past has not been deemed to put an employer on constructive notice of a worker's unauthorized work status, a new regulation issued by Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS), has included the receipt of the no-match letter as *constructive knowledge* of the worker's unauthorized status.

On August 15, 2007, ICE issued a new regulation that finds employers that receive a no-match letter to have *constructive knowledge* of the employee's unauthorized work status. (Note: this regulation has been temporarily put on hold by a Temporary Restraining Order due to litigation commenced by several labor organizations.). However, a safe-harbor provision under the new regulation finds that an employer will not be deemed to have *constructive knowledge* if the employer takes reasonable steps to resolve the no-match situation. Reasonable steps outlined in the new regulation include:

- An employer checking its records to determine whether the discrepancy in the completion of the I-9 form resulted from clerical errors;
- If the discrepancy did not result from a clerical error, the employer should confirm the accuracy of the employee's documentation by requesting the employee to verify his/her name and social security number;

- If the employee confirms that the employer's records are correct, the employer should request that the employee resolve the issue his/herself with the SSA directly;
- If the employee confirms that the information is correct, but the employer is unable to verify with the SSA within 90 days of receipt of the no-match letter that the employee's information matches the SSA's records, then the employer will have an additional 3 days from the end of the 90 days to verify the employee's work authorization and complete a new I-9 form. However, the employer cannot accept from the employee any document containing a social security number and the employee must provide a document that contains a photograph in order to establish identity or both identity and authorization to work.

Accordingly, the employer has 93 days from receipt of the no-match letter to take reasonable steps to resolve the discrepancy involving the employee's work authorization if the employee had provided a social security card as one of the documents used in the I-9 process. If the discrepancy is not resolved by the end of the 93 day period the employer must terminate the employee or face possible criminal charges for knowingly employing an unauthorized/undocumented alien.

Although the courts have put a temporary hold on the new regulation, employers should be aware of this regulation to minimize their exposure to civil and criminal penalties imposed by DHS. Effective March 27, 2008, the new civil penalties ranges from \$50–5,000 per violation.

Abbott Nicholson, P.C. is experienced in representing employers in all aspects of immigration, labor and employment matters. If you have any questions concerning compliance with the new regulation or receipt of a no-match letter or any other labor or employment matter, please do not hesitate to contact a member of the Labor and Dispute Resolution Section of Abbott Nicholson, P.C., at (313) 566-2500.

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