

Employment Law Briefing



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“Sexual harasser” vs. “retaliation victim”

Court focuses on pretext, timing and connections

The question that confronted the First Circuit in *Bennett v. Saint-Gobain Corp.* was whether a company was justified in firing an employee for sexually harassing a co-worker or whether the firing was in retaliation for the employee’s age-discrimination complaint.

Age-discrimination and harassment alleged

When a patent attorney of British extraction was 62, he and other members of his company filed internal age-discrimination grievances against the deputy general counsel. The human resources vice president met with the complainants, interviewed employees and reviewed relevant documents. At the end of this limited probe, the VP found that a formal investigation was unwarranted and recommended that the company dismiss the grievances as unfounded.

Over the course of the following year, a female employee reported that she had received four unwanted, sexually tinged anonymous poems while at work. A handwriting expert concluded that it was “highly probable” that the patent attorney had written the poems, also noting that several words had a distinctively British spelling.

When the company confronted the attorney, he denied he was the author and denied he had ever composed any poems. But a search of his office found copies of other poems he had written. Following the investigation,

the general counsel fired the attorney. No evidence showed that the deputy general counsel against whom the age-discrimination grievances had been filed was involved in the investigation or was consulted before the firing.

Retaliation alleged

The attorney alleged that the company had fired him in retaliation for bringing the age-discrimination claim against the deputy general counsel. The trial court ruled for the company without a trial on grounds that the facts were undisputed and it was entitled to judgment as a matter of law. The attorney appealed.

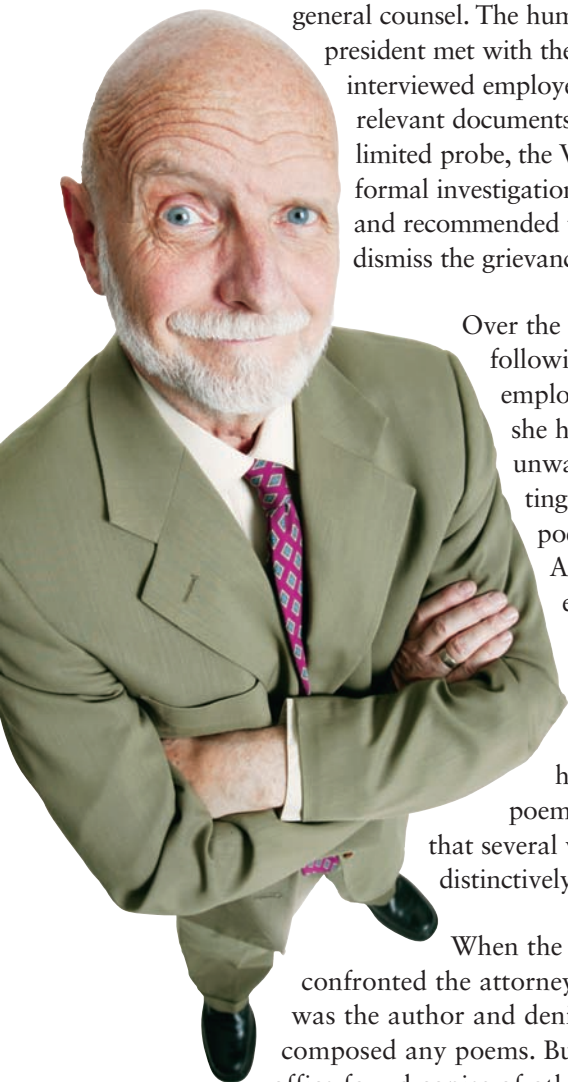
In determining whether pretext exists, courts must focus on the actual decision maker’s motivations and perceptions.

On his age-discrimination claim, the parties agreed that the attorney had stated a prima facie case and that the company had articulated a legitimate nondiscriminatory reason for firing him. Thus, the First Circuit’s review focused on whether the attorney had put forward any significant evidence tending to prove pretext — a motive alleged to cloak the real firing reason.

In determining whether pretext exists, courts must focus on the actual decision maker’s motivations and perceptions. Statements made by those not involved in the decision process “normally are insufficient — standing alone — to establish either pretext or the requisite discriminatory animus.”

Conjecture not enough

The attorney attributed a discriminatory animus to the deputy general counsel but failed to present any evidence showing that he had had anything to do with the firing decision or that the actual decision maker shared his





sentiments. The attorney speculated that the deputy had influenced the general counsel, but the First Circuit noted that conjecture can't take the place of proof in a situation like this.

The First Circuit also found that the evidence failed to support the attorney's claim that he'd been retaliated against. The gap between the filing of the grievance and his ouster was 16 months. The court found that this temporal gap — without some corroborative evidence — was too long to support an inferred notion of a causal connection between the two.

Moreover, any suggestion of a connection between the grievance and the ouster was undermined by the fact that the attorney had received a more favorable performance review in the year *after* he filed the grievance than in the year before, and he also received a raise. The court noted that these positive developments cut against any plausible inference of retaliation. So the court rejected his retaliation claim.

Caution is the watchword

Failing to fire the attorney could have subjected the company to the claim that it had failed to adequately protect the harassed co-worker. Instead, it faced a claim of retaliation from the harasser.

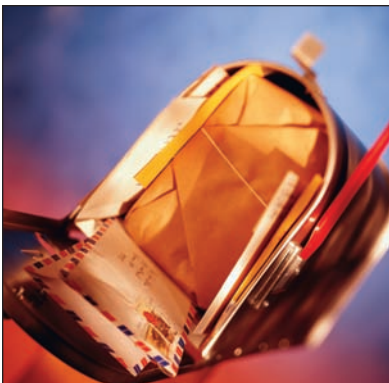
Retaliation claims may be viable even if the underlying discrimination complaint has no merit, as in this case. So wise employers proceed with caution when dealing with disciplinary issues regarding employees who have complained of discrimination. ♦

Employer didn't violate duty to accommodate Sabbath observer

In *Tepper v. Potter*, the Sixth Circuit held that loss of pay couldn't be considered discipline for an employee's failure to comply with an employment requirement that conflicted with his religious beliefs.

Accommodation granted

After a full-time letter carrier became a Messianic Jew observing Sabbath on Saturdays, the postal service accommodated his request to have Saturdays off. The national union agreement required all full-time carriers to work a five-day week, with Sundays off and the other day off to be either fixed or rotating, as determined locally.



After budget constraints caused staffing cuts, accommodating the carrier's Saturdays-off request became more

difficult. Management asked the other carriers to voluntarily work on the Saturdays they were scheduled to have off, assigned carriers to work on Saturdays more often than the rotating schedule provided, and divided the carrier's route among other carriers, requiring them to cover his route after completing their own.

Accommodation terminated

At a union meeting for all members working at that facility — which the carrier didn't attend — the members voted unanimously to recommend terminating the carrier's religious accommodation. The local postmaster agreed because the accommodation had become a hardship. He cited union pressure and overtime costs attributed to the accommodation of \$8,769 in 2000 and \$7,015 in 2001.

For Saturday absences, the postmaster encouraged the carrier to use:

1. Vacation days,

2. Annual leave,
3. Leave without pay, and
4. Exchanged days off with other carriers.

Records showed that he hadn't been required to work on 48% of Saturdays in 2003, 73% in 2004, and at least 50% in 2005, in contrast to having had 92.3% of Saturdays off in 2002.

The carrier sued, alleging that removal of his accommodation violated Title VII. The postal service moved to dismiss, the trial court granted the motion, and the carrier appealed.

The Sixth Circuit weighs in

To establish a prima facie discrimination case, the carrier had to show that he:

1. Held a sincere religious belief that conflicted with an employment requirement,
2. Had informed the employer about the conflicts, and
3. Had been discharged or disciplined for failing to comply with the conflicting employment requirement.

The Sixth Circuit held that the carrier couldn't satisfy the third prong. He argued that he'd been forced to take days

off from work without pay to avoid Saturday work, reducing his annual pay and eventual pension.

But the Sixth Circuit found that more than loss of pay is required to demonstrate discipline or discharge. The Supreme Court has ruled that "the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect on either employment opportunities or job status."

So the Sixth Circuit concluded that the carrier had simply not been paid for the time he didn't work — he hadn't been disciplined or discharged. Because he couldn't make out a prima facie case, his religious-accommodation claim failed.

An undue hardship?

Note that the postal service didn't seek to discipline or fire the carrier for failing to adhere to his schedule. Had that been the case, the court would have had to resolve whether the service had to accommodate his religious observance or whether accommodation would have constituted an undue hardship.

But based on the facts here and case law, the Sixth Circuit likely would have found that accommodating the carrier would have been an undue hardship. ♦

Conduct trumps beliefs

In *Grossman v. South Shore Public School District*, shortly after a public school district hired a guidance counselor on a three-year probationary contract, she threw out literature designed to show students how to use condoms and substituted literature advocating abstinence. She also twice engaged in prayer with students.

When her probation ended, the district elected not to renew her contract. The teacher sued, alleging that the decision was based on hostility to her religious beliefs. The trial court ruled for the school district without a trial.

On appeal, the Seventh Circuit affirmed, noting that the district had failed to renew the plaintiff's contract because of her conduct — not because of her beliefs. The majority of the district was Christian, like the plaintiff. But the court noted that six teenage pregnancies among the small number of students who had the plaintiff as a counselor was enough for administrators to think it imprudent to retain a guidance counselor who threw out pamphlets instructing students in condom use.

Furthermore, the U.S. Department of Education's guidelines state that the Constitution's establishment clause bars teachers "from encouraging or discouraging prayer and from actively participating in such activity with students."

Thus, the Seventh Circuit held that teachers and other public school employees have no right to make the promotion of religion part of their job descriptions.

Is direct notice required for FMLA leave?

Sometimes an employee's behavior can be enough to trigger an employer's obligations under the Family and Medical Leave Act (FMLA). That was the case in *Stevenson v. Hyre Electric Co.*

Bizarre and erratic behavior

When a stray dog entered her workspace, an employee immediately experienced extreme physical symptoms, including headache, blood rushing to her head, and tightening of her neck and back. According to her supervisor, the employee began yelling, cursing and screaming that "animals shouldn't be in the workplace." Two hours later, she told the accounting manager that she needed to go home because she was ill.

The employee's behavior on three occasions was so unusual as to constitute constructive notice of her need for FMLA leave.

When the employee returned to work two days later, she met with the company president. He said she aggressively charged into his office and profanely yelled that it was wrong for her to be subjected to dogs "running by her desk and threatening her, and that management needed to do something about it."

Anxiety and stress

Later that day, the employee went to the emergency room, complaining of three days of headaches, insomnia, anxiety and loss of appetite following an "emotionally stressful incident at work" and was diagnosed with "anxiety and stress."

When the employee returned to work after six days, she was upset to find that her supervisor had moved the contents of her desk to another room to accommodate her fear of stray animals. She stayed at work for a few hours but was still agitated. She called the police because she believed she was being harassed. She then told the supervisor that she wasn't feeling well and, after putting the hospital's report of her emergency room visit on

the accounting manager's desk, left work. After she left, the company president had the locks changed on the company's doors.

The company fired the employee, and she sued, alleging that the firing violated her rights under the FMLA. The trial court disagreed and ruled for the company without a trial.

Key inquiry

The Seventh Circuit found that the key inquiry was whether the employee had given the company notice of her need for FMLA leave. If she hadn't, then the company had no duty to grant leave. The FMLA places the notice burden on the employee as "the quid pro quo for the employer's partial surrender of control over his workforce."

An employee has to give the employer only enough information to establish probable cause to believe that he or she is entitled to FMLA leave. Then the burden shifts to the employer "to request such additional information from the employee's doctor or some other reputable source as may be necessary to confirm the employee's entitlement."

Direct notice

But direct notice from the employee to the employer isn't always necessary. An employee's case may proceed if he or she has constructively notified the employer of the need for FMLA leave. The Seventh Circuit noted that either an employee's inability to communicate her illness to her employer or clear





abnormalities in the employee's behavior may constitute constructive notice of a serious health condition.

Under the FMLA, "if the employer knows of the employee's need for leave, the employee need not mention the statute or demand its benefits."

The Seventh Circuit held that a trier of fact could conclude that the employee's behavior on three occasions was so unusual as to constitute constructive notice of her need for FMLA leave. Lengthy encounters of yelling and swearing at one's superiors so severe that a company locks out — for safety concerns — an employee with a previously unblemished record, coupled with her calling the police because her belongings have been moved to another desk, are undeniably unusual.

And a fact trier could view this behavior as unusual enough to constitute notice to an employer of a serious mental health condition. So the Seventh Circuit reversed the trial court's ruling and sent the case back for trial.

Employers, beware

This case demonstrates the importance of reviewing with counsel in advance the merits of a decision to fire an employee. The laws governing employment are numerous and nuanced. Savvy employers discuss employment termination decisions with counsel to determine any possible exposure. ♦

Congress expands FMLA

In January 2008, President Bush signed into law the first expansion of the Family and Medical Leave Act (FMLA) since it was enacted in 1993.

The National Defense Authorization Act amended the FMLA to require employers to provide 12 weeks of FMLA leave during a 12-month period to the spouses, children or parents of members of the armed forces called to active duty.

Additionally, the FMLA expansion allows employees 26 weeks of leave to care for a spouse, child or parent who sustained injuries during military service that resulted in their being unable to perform their duties.

But employees are entitled to no more than 26 weeks of total FMLA leave in any 12-month period, even if they otherwise would be entitled to leave for another FMLA qualifying event, such as:

- The birth or adoption of a child,
- A parent's, child's or spouse's serious health condition,
- The employee's own serious health condition, or
- The employee's parent, child or spouse being called to active duty in the armed forces.

For example, an employee can't take 26 weeks of leave to care for a spouse injured in military service and then less than six months later take additional FMLA leave to care for a parent with a serious health condition.

All FMLA leave may be taken intermittently or on a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday.

Handbooks must be clear to average employee

The issue in *EEOC v. V & J Foods Inc.* was whether a teenage employee's sexual-harassment case could proceed even if she hadn't followed the employee handbook's harassment reporting procedure. The Seventh Circuit held that it could, because the handbook was written so as not to be clear to the average teenager.

The harassment begins



Burger King hired a 16-year-old high-school student to work part time. The restaurant's 35-year-old general manager — who had had sexual relations with several of his female employees — began to make suggestive comments to her, rubbing up against her and trying to kiss her.

The manager told her he wanted “a young girl” and offered her \$600 to go to a hotel with him. When she said she wasn't interested and had a boyfriend, he told her that “he was tired of doing things” for her, and he wasn't “going to do anything else” for her because she was “giving her body away for free” when he “was trying to pay” her. Then he turned hostile to her.

After the student's mother complained to a shift supervisor about the harassment, the manager fired the employee on the ground that she had involved her mother rather than handling it “like a lady.”

The employee filed a sexual harassment charge with the EEOC, and it sued Burger King on her behalf. Without ruling on whether the employee had been harassed, the trial court dismissed the suit for failing to follow the harassment-complaint procedure.

The EEOC appeals

Under Title VII, an employer can avoid harassment liability by showing that it had in place a reasonable mechanism by which harassment victims could complain and get relief. The complaint mechanism's reasonableness depends on the

“employment circumstances” and the capabilities of the class of employees.

The Seventh Circuit found that, in this case, the employees who needed to activate the complaint procedure were teenagers. Burger King — knowing it had many teenage employees — was obligated to adapt its procedures to the average teenager's understanding. Instead, Burger King adopted a harassment complaint procedure that the Seventh Circuit found was confusing even to adults.

The employee handbook's brief harassment section directed employees to lodge complaints with the “district manager” without giving that manager's name or how to communicate with the manager. The list of corporate officers and managers at the beginning of the handbook didn't list a “district manager” — or for that matter a “general manager” — but instead listed a “restaurant manager.”

And evidence showed that employees confused “district manager” with “restaurant [or general] manager,” who would be — in this case — the harasser himself. Moreover, if an employee complained to a shift supervisor or assistant manager, that person was supposed to forward the complaint to the general manager (here, the harasser) even if the complaint was about the general manager. After receiving a complaint, the general manager was supposed to “turn himself in,” which of course the general manager here didn't do.

So the Seventh Circuit concluded that an antiharassment policy that includes no assurance of bypassing a harassing supervisor in the complaint process is unreasonable as a matter of law. The court reinstated the suit for trial.

One size doesn't fit all

This case demonstrates the importance of adopting employment policies and procedures that are tailored to an individual company. Carefully review and revise “boiler-plate” policies to be sure they apply to your company.

Burger King had adopted a harassment complaint procedure that the Seventh Circuit found was confusing even to adults. ♦

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FMLA UPDATE

Military Family Leave

On January 28, 2008, President Bush signed the National Defense Authorization Act for FY 2008, which expanded the FMLA to cover family members of military service personnel. Two new types of FMLA leave to the relatives of military personnel have been adopted:

- Eligible employees are entitled to up to 12 weeks of leave because of “any qualifying exigency” arising out of the fact that the employee’s spouse, parent, or child is on active duty in the Armed Forces, or has been notified of an impending call to active duty status, in support of a contingency operation. The U.S. Department of Labor (DOL) will be issuing regulations defining “any qualifying exigency,” but employers are encouraged to make good faith efforts to provide this type of leave to qualifying employees until such regulations are issued.
- An eligible employee who is the spouse, parent, child, or next of kin of a service member who is recovering from a serious injury or illness sustained in the line of duty on active duty in the Armed Forces is entitled to up to 26 weeks of leave in a single 12-month period to care for the servicemember.

Proposed Amendments to Traditional FMLA Leave

In February 2008, the DOL issued proposed amended regulations concerning traditional FMLA leave, in an attempt to address some of the most common criticisms employers have about the previously issued final FMLA regulations.

The proposed regulations:

- fine-tune procedures regarding required FMLA notices (eg, medical and fitness-for-duty certifications, and designation of leave);
- clarify the eligibility requirements for jointly employed employees;

- clarify when an employee’s inability to work overtime exhausts FMLA leave;
- establish that light duty does not exhaust FMLA leave;
- allow employers to deny certain employee bonuses (e.g., perfect attendance or hours-worked awards) as a result of an employee’s FMLA leave;
- permit employers to require employees to comply with the terms and conditions of their paid leave policies to substitute paid leave for FMLA leave;
- permit employees and employers to voluntarily settle claims of past FMLA violations;
- provide some clarification of the definition of a “serious health condition;” and
- permit an employer to deduct FMLA-qualifying absences from an employee’s FMLA leave allotment even if they fail to designate the absences as falling under the FMLA in a timely manner, i.e., retroactive application of FMLA leave to employee’s absences.

The proposed, revised regulations — while modest in the broad scheme of things — offer employers a degree of certainty and uniformity that was previously lacking because of the fact that courts across the country had reached different conclusions on many of the issues addressed.

Abbott Nicholson, P.C. is experienced in representing employers in all aspects of labor and employment matters. If you have any questions concerning the new military leave requirements or the proposed changes to the FMLA regulations, please contact Michael R. Blum or Sean A. Fraser at (313) 566-2500.

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