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The Employment Law AUTHORITY

Today's Hot Topics in Labor & Employment Law | July/August 2015

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Single Encounter May Equal Sexual Harassment

Court Finds Conduct May Have Created Hostile Environment

A federal appellate court recently reinstated a lawsuit brought by a dining services employee who claimed that she was sexually harassed by a male coworker. According to the Sixth Circuit Court of Appeals, a reasonable jury could find that the alleged assault was "sufficiently severe by itself that it created a hostile work environment." The Sixth Circuit, however, upheld the lower court's decision to dismiss claims brought by two other female workers who alleged that the same male coworker had made sexually offensive and inappropriate comments. ***Ault v. Oberlin College,*** *No. 14-3967, Sixth Circuit Court of Appeals (July 24, 2015).*

Factual Background

Sharon Ault, Kathy Fenderson, and Carol Altenburger worked in the dining services department of Oberlin College in Ohio. They were hired by the college and their employment was governed by a collective bargaining agreement between Oberlin College and Local 2192 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

Bon Appetit Management Company, a private contractor, operates the college's dining facilities. The company provides a management team to oversee the "production and quality of work of the Oberlin College food service employees." However, Bon Appetit and its employees have "no authority to hire or fire Oberlin College employees; modify or transfer their work assignments; affect their rates of pay; or otherwise affect the terms and conditions of their employment."

Dean Holliday, an employee of Bon

Please see "HARASSMENT" on page 6

2015 Corporate Counsel Exclusive Heads to Phoenix

Program Provides Sophisticated Topics and Networking for In-House Lawyers

Ogletree Deakins will host its third annual Corporate Labor and Employment Counsel Exclusive on November 12-14, 2015, at the fabulous Arizona Biltmore. This multi-day seminar is designed specifically for in-house labor and employment counsel and features more than 80 experienced speakers from Ogletree Deakins and a variety of companies across the country, along with other special guests.

The combination of plenary and breakout sessions focuses on the key labor and employment law issues facing today's in-house counsel—from the Affordable Care Act to ambush elections to managing complex leaves of absence, and more. Networking opportunities include a welcome reception, a group dinner on Thursday evening, a reception in the beautiful Aztec Room on Friday evening, and roundtable discussions on Saturday. EEOC General Counsel David Lopez will also address the group on Saturday morning, providing his insights on the agency's enforcement initiatives and the Supreme Court's recent rulings involving the EEOC.

According to program moderator and former in-house counsel Jim McGrew, "This program will focus on the key challenges faced by in-house counsel in today's workplace and provide strategies for managing and responding to them." To maintain the interactive experience of this event, attendance is limited—so make your reservations soon. For more information or to register, visit our website at www.ogletreedeakins.com or email molly.daly@ogletreedeakins.com. ■

OSHA Proposes New Rule to "Clarify" Recordkeeping Obligations

by John F. Martin (Washington, D.C.)

On July 29, 2015, the federal Occupational Safety and Health Administration (OSHA) published in the *Federal Register* a proposed rule to "clarify" employers' recordkeeping obligations under 29 C.F.R. Part 1904. Comments are due by September 28.

The agency has long maintained that employers must keep accurate recordkeeping logs for the entire five-year retention period imposed by its regulations. In other words, a failure to properly record a recordable incident that occurred in 2011 would still be grounds for a violation today should OSHA discover the omission during an inspection.

Some employers, however, maintain that OSHA's position conflicts with the six-month statute of limitations imposed by the Occupational Safety and Health Act of 1970 (OSH Act). A failure to properly record a recordable incident can only be cited if OSHA discovers the omission within six months of the date the employer was obligated to record the incident.

The D.C. Circuit Court of Appeals addressed this issue in 2012. In *AKM, LLC, dba Volks Constructors v. Secretary of Labor*, a three-judge panel vacated the citations based on its unambiguous reading of 29 U.S.C. § 658(c), the OSH Act's statute of limitations. The court reasoned that a recordkeeping failure becomes a violation when the employer fails to properly record the injury within seven days of learning of such injury. "If an injury is reported on May 1, OSHA can cite an employer for the failure to create a record beginning on May 8, and a citation issued within the following six months, and only the following six months, would be valid," Judge Janice Rogers Brown wrote for the panel.

OSHA argued that employers had an obligation to maintain records for five years. The court rejected this contention, reasoning that the five-year retention regulation constituted a separate requirement. If an employer loses or destroys a record before the end of that five-year time period, then "that too is a violation." In other words, the obligation to record the incident and the obligation to maintain the records are two distinct obligations.

OSHA did not appeal this decision. Instead, OSHA decided to amend its recordkeeping rules to "clarify" its position and effectively overturn the *Volks* decision.

OSHA proposes to amend the recordkeeping rules as follows:

- Amend 29 C.F.R. §1904.29(b)(3) to state that failing to properly record a recordable incident within seven days "does not extinguish your continuing obligation to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses in accordance with the requirements of this part. This obligation continues throughout the entire [five-year] record retention period described in Sec. 1904.33."
- Amend 29 C.F.R. §1904.32 to impose an annual duty on employers to review and verify 300 logs for accuracy before they post the 300A Annual Summary.
- Amend 29 C.F.R. §1904.33 to mandate that if there are omissions in a recordkeeping log, employers "are under a continuing obligation to record the case on the Log and/or Incident Report during the five-year retention period for that Log and/or Incident Report[.]"
- Amend 29 C.F.R. §§1904.35 and 1904.40 to require that employers provide "accurate" recordkeeping logs to union representatives and OSHA officials, when requested.

One problem with OSHA's proposed rule is that the "continuing violation" doctrine does not readily apply to recordkeeping violations. The Occupational Safety and Health Review Commission and several federal courts have recognized that the agency can cite employers for "continuing violations" when an employer leaves a hazardous condition unabated for years. But the failure to record a recordable incident does not present a hazard. Employees are not exposed to any risk of injury by an employer's failure to record an incident; it is an exercise in paperwork.

A second problem is that a majority of the panel in *Volks* rejected the contention that a recordkeeping violation can be a continuing violation. The court effectively held that a failure to record is an inaction—it only happens once. It is not a continuing violation.

Finally, OSHA's proposed rule disregards the *Volks* panel's main rationale for its decision—the OSH Act itself. The panel held that the statute is unambiguous, and Congress made its intentions clear when it established a six-month statute of limitations.

Should OSHA issue a final rule substantially similar to the proposed rule, employers can expect OSHA to carefully review OSHA 300 recordkeeping logs kept for the past five years and to issue citations for any omissions or inaccuracies in the logs. A challenge to OSHA's "clarified rules" seems likely, however. ■

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Ogletree Deakins State Round-Up

California*

Governor Jerry Brown recently signed amendments to the paid sick leave law that went into effect on July 1, 2015. The law now provides that an employer may use a different accrual method, other than providing 1 hour per every 30 hours worked, provided that the accrual is on a regular basis so that an employee has no fewer than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment, each calendar year, or each 12-month period.

Connecticut*

Governor Dannel Malloy signed into law Public Act No. 15-196, entitled An Act Concerning Pay Equity and Fairness. The new law went into effect on July 1, and limits an employer's ability to discourage employees from having open discussions about their wages.

Illinois*

Effective July 1, the City of Chicago increased the minimum wage within its city limits to $10.00 per hour for non-tipped employees and $5.45 per hour for tipped employees. The minimum wage in Chicago will continue to increase every July 1, through 2019.

Indiana*

Two significant changes to Indiana's wage laws went into effect on July 1. First, liquidated damages will no longer be mandatory when an employer violates Indiana's Wage Payment or Wage Claims statutes. Instead, a court must find that the employer was not acting in good faith to award such damages. Second, as long as certain requirements are met, employers now will be allowed to make wage deductions for the purchase price of uniforms and equipment, reimbursements for education, and payroll or vacation pay advances.

Michigan

On June 30, Governor Rick Snyder signed legislation that would prohibit local governments from enacting ordinances requiring employers to provide workers with paid sick leave, prevailing wages, and other benefits. According to the governor, HB 4052 "continues work to bolster the state's job creation climate by ensuring that regulations regarding employment matters are uniform statewide, rather than a patchwork of varying local ordinances employers must navigate."

Missouri*

The Missouri Court of Appeals recently refused to compel an employee to arbitrate his discrimination claim. The court held that the arbitration agreement was unenforceable because it contained a clause that allowed the employer to modify the agreement unilaterally and retroactively. *Bowers v. Asbury St. Louis Lex, LLC*, No. ED102229 (July 7, 2015).

New York*

On July 22, the New York State Department of Labor's Fast Food Wage Board announced their recommendation to increase the minimum wage in the fast food industry up to $15.00 per hour. The Wage Board justified its recommendation by finding that the wages of fast food workers were insufficient to provide for the maintenance, health, and lifestyle of such workers.

Oregon*

Effective January 1, 2016, Oregon employers with 10 or more employees statewide (or only 6 employees if operating in Portland) must implement a paid sick time policy allowing every employee to accrue and use up to 40 hours of paid leave per year for a broad list of statutorily defined reasons. Smaller employers must comply with the ordinance, but may provide unpaid sick time.

Rhode Island*

On July 10, the Rhode Island General Assembly sent Governor Gina Raimondo a compromise measure that would allow Rhode Island employers—for the first time in the state's history—to pay wages via electronic pay cards. The measure became law on July 15, without the governor's signature.

Texas*

The Texas Supreme Court recently rejected a retaliation suit brought by a former executive. The court held that the law does not protect the employee from retaliation for opposing a colleague's unwelcome lunch invitations made to *other* employees because, the court found, extending a limited number of lunch invitations could not reasonably be considered unlawful harassment. *San Antonio Water System v. Nicholas*, No. 12-0966 (2015).

Washington, D.C.

The D.C. Circuit recently dismissed a wrongful termination suit brought by an employee who suffered from multiple sclerosis. The court refused to find that the employer terminated the worker to reduce its health care costs. The court wrote, "no reasonable jury could conclude the real reason for her discharge was that [her employer] believed her medical expenses were driving up the insurance premium." *Giles v. Transit Employees Federal Credit Union*, No. 14-7055 (July 14, 2015).

Wisconsin*

Under state law, employers must provide a consecutive 24-hour rest period every 7 days for employees in factory and mercantile workplaces. As a result of the budget bill signed by the governor, Wisconsin employers will no longer be required to obtain permission from the state to be exempt from this requirement. Workers will now be allowed to voluntarily opt out of the one day of rest.

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com/our-insights.*

Lessons From Deflategate: Five Ways to Avoid Workplace Investigation Fumbles

*by Patti C. Perez and Michael Clarkson**

Over the years, the topic of workplace investigations has gained increasing importance in the HR and employment law world. Now, with investigations routinely making headlines, they have become a part of our popular culture as well. Most recently, the investigation conducted and conclusions reached on issues related to "Deflategate" have triggered national attention and controversy. Tom Brady's four-game suspension was upheld in late July. In addition to the intrigue surrounding one of the country's most well-known athletes, the issues raised in this story also provide great lessons for HR professionals who routinely conduct investigations.

1. Unconscious (or Perhaps Conscious) Bias

The public outcry over the results of the "Deflategate" investigation tends to focus on one's deep-seated love of or hatred towards Tom Brady (or the New England Patriots). As unbiased, independent investigators, we cannot be swayed by personal feelings unrelated to the investigation. If you are tasked with performing a workplace investigation and you know that you have a bias against (or favoritism toward) any party involved, you should recuse yourself. Remember that during an investigation (and as you implement resulting corrective measures, if necessary), the perception of fairness is just as important as actual fairness.

2. Standard of Proof

Is it sufficient—for purposes of a standard of proof—that the investigator found that it was only "more probable than not" that Patriots personnel deflated footballs and that Brady had at least a general understanding that this was taking place? Yes. The first few pages of the report show that this standard of proof is taken straight from National Football League (NFL) policies. "More probable than not" also happens to be the accepted standard of proof in workplace investigations. While this standard of proof may leave fans dissatisfied, it is the standard mandated by the relevant policies here.

3. Use of Experts

The Deflategate investigation team not only relied on witness testimony, review of text messages, site visits, and video footage, it also utilized experts to analyze whether environmental factors might have led to the deflation of the footballs in question. Each investigation is unique. While all investigators should have a standard protocol (including checklists and forms that track the path of the investigation, for example), each new case necessitates the use of judgment. Who should be interviewed? In what order? Where should the interviews of the witnesses be conducted? What documents need to be reviewed? Who else needs to be involved? (In a traditional workplace investigation, the IT, Security, Legal, and HR departments will often be involved.) The path each investigator follows should depend on the scope of the investigation. If an arcane issue (like the Deflategate investigation's "Ideal Gas Law") arises, a qualified expert may be necessary.

4. Determination of Credibility and Motive

Most investigations will hinge to a large or small degree on whether the investigator found a witness to be credible. Relevant to this determination may be, for example, whether there are reasons for a witness to lie or exaggerate, whether there are reasons for a witness to hide evidence, and whether one witness is more credible than another.

Regardless of the public's assessment of Brady's credibility, both the investigator and the NFL Commissioner, Roger Goodell, put substantial weight on how Brady handled his cell phone, finding that his actions negatively impacted his credibility. Commissioner Goodell's decision states, "Mr. Brady willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cell phone knowing that it contained potentially relevant information that had been requested by investigators."

As independent investigators, our job is to take the evidence collected and determine whether the allegations are supported by credible evidence; making credibility determinations will therefore be a key part of that job.

5. Corrective Measures

A substantial source of the outcry related to this issue is a public perception that the corrective/disciplinary measure imposed on Brady and the Patriots is too harsh, particularly in comparison to the discipline that has been imposed on other players (most notably, the discipline imposed on other NFL players related to allegations of domestic violence). A key role of a workplace investigator is to assist in the design and implementation of appropriate remedial measures if the investigation uncovers wrongful behavior. Generally, the remedial or disciplinary measure taken should be commensurate to the wrongdoing and just harsh enough to discourage future inappropriate behavior. Additionally, employers should look to past practices and understand that the remedial measure implemented will likely create a precedent (perhaps even serving as a benchmark against which subsequent disciplinary measures are judged).

"Most investigations will hinge . . . on whether the investigator found a witness to be credible."

Conclusion

This story has created incredible interest for football fans and non-fans alike, primarily because it involves a high-profile athlete playing the country's most popular professional sport on a team that is both beloved and hated by many. It has created heated debate in the public sphere, but for those of us who conduct workplace investigations, it also provides a fascinating glimpse into the DOs and DON'Ts of investigations. ■

* Patti Perez is a shareholder in the San Diego office of Ogletree Deakins. Michael Clarkson is a shareholder in the firm's Boston office. Both attorneys represent management in labor and employment-related matters.

Keep Your "But" Out of Your Apology–Apply the MIDAS Touch

by Jathan Janove, Ogletree Deakins Learning Solutions

We don't apologize enough, and when we do, we often screw it up by letting our "but" get in the way. When you hear that three-letter word follow an apology, you can be sure you won't like what comes next: justifications, excuses, rationalizations, or counterattacks.

To keep your "but" out, apply the MIDAS Touch by saying "I made a Mistake. It caused you Injury. I will do things Differently. Let me make Amends." Then Stop talking!

The first element in the MIDAS Touch admits wrongdoing—you screwed up. The second element acknowledges that you caused damage—don't qualify it with an "if." The third element shows that you are sincere, and not simply apologizing out of sense of obligation. The fourth element means you truly care about restoring the relationship. And the fifth element, often the most difficult of all, means resisting the temptation to explain yourself; hit the self-mute button.

Many years ago, I served as the president of a nonprofit organization. At a social event, I pleasantly conversed over wine and cheese with several members of the organization until "Donald" joined us. Out of nowhere, he announced, "Jathan, your presidency has been a failure." Stunned, I said nothing. The other members looked down nervously at their plates and glasses. Then Donald added, "I just thought you'd like to know," and wandered off.

I went home that night and told my wife what Donald said. Since she was friendly with Donald's wife, that produced a phone call from Donald. "I understand you're upset with my comment," he acknowledged, "Let's have lunch and talk about it."

The following week we met at a restaurant. After ordering, Donald said, "I'm sorry if my comment offended you." After a slight pause, he continued, "but you misunderstood. You see, I wasn't saying that you were a *personal* failure only that your presidency was. I was simply pointing out that in an organization as screwed up as that one is, any president would fail."

I thanked Donald for his clarification although the look on my face should have told him that my gratitude was not sincere.

The waiter placed the check on the table. I stared at it. So did Donald.

"I'll get it," I said, and reached for the check . . . slowly.

"Let's split it," Donald said.

I shook my head. "No, I insist. This experience has been worth it."

Thereafter, I kept my distance from Donald.

Let's apply the MIDAS Touch to Donald's apology. Did he admit a "*m*istake"? I certainly didn't hear it. What about acknowledging that he caused an "*i*njury"? Recall the word "if." If I was offended? Did he think I was faking it? How about "*d*ifferently"? Did anything suggest Donald wouldn't repeat his behavior in similar future circumstances? How about "*a*mends"? Come on, Donald, pick up the check! Finally, instead of "*s*topping," Donald lectured me on the distinction between individual and collective failure. Gee, thanks for the education!

Don't make the same mistake as Donald. The next time you have an opportunity to solve a problem and heal a relationship, apply the MIDAS Touch instead. You won't be sorry. ■

Background Checks Come Under Scrutiny

Wave of Employment Class Actions Place Employers at Risk

For most employers, implementing a compliant background check process involves the interplay of state and federal statutes, including the federal Fair Credit Reporting Act (FCRA), state mini-FCRAs, Title VII of the Civil Rights Act (particularly, the April 2012 EEOC Guidance), state workplace discrimination laws, and state and municipal "ban the box" (and related) statutes. A new wave of plaintiffs' filings against employers alleging violations under the FCRA makes compliance even more important.

The FCRA requires that employers provide applicants and employees with specific disclosures *prior* to obtaining a consumer report from a consumer reporting agency. These disclosures must be "clear and conspicuous" and "in a document that consists solely of" those disclosures. These requirements are at the heart of the recent lawsuit filings. Damages for violations can vary from between $100 and $1,000 for each background check performed in violation of this requirement. As a result, employers must ensure that their background check forms are compliant under this and other legal requirements.

For help in complying with the various, ever-evolving federal and state requirements, Ogletree Deakins has developed *O-D Comply: Background Checks*, an innovative subscription that provides employers with plain-English, legally-compliant background check forms, letters, and standards during the life of the subscription. For questions, additional details, or subscription information, contact the Ogletree Deakins attorney with whom you normally work or the Ogletree Deakins Background Check Advice team at backgroundcheckadvice@ogletreedeakins.com. ■

Top Firm for African-American Attorneys

Ogletree Deakins has been named the top firm for African-American attorneys on *The American Lawyer's* 2015 Diversity Scorecard, an annual ranking of large U.S. law firms based on their percentage of minority attorneys and partners in U.S. offices. This is the second consecutive year that Ogletree Deakins has earned this ranking.

"Ogletree Deakins is proud to be named the No. 1 law firm for African-American attorneys for the second consecutive year," said Kim Ebert, managing shareholder of Ogletree Deakins. "We have a focus on recruiting talented lawyers and making sure that we are representative of the clients we serve and their expectations with respect to diversity. This strategy is critical to our success."

New to the Firm

Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Amy Jensen and Sherry Nielsen (Atlanta); Tara Kumpf and Chad Li (Austin); Jean Kim (Charleston); Joseph Brennan (Cleveland); Kara Grevey (Columbia); Jayde Ashford Brown (Dallas); Anna Angel and Stephen Rotter (Denver); Thomas Paxton (Detroit (Metro)); Ann Louise Brown (Greenville); Shelley McCoy (Indianapolis); Blythe Lollar (Jackson); Shelley Murray and Molly Rezac (Las Vegas); Alexander Chemers and Paul Mata (Los Angeles); Ashley Wenger-Slaba (Minneapolis); Katherine Pizzini (New Orleans); Regina Worley Calabro and Brodie Erwin (Raleigh); Charles Gonzalez (San Antonio); Lauren Ball, Carolyn Knox, and Michael Thomas (San Francisco); Tracy Elzemeyer (St. Louis); William Ruggiero (Stamford); and James Lastowka (Washington, D.C.). Ogletree Deakins has 750 attorneys in 47 offices across the United States, in Europe, and in Mexico.

"HARASSMENT"

continued from page 1

Appetit, worked as the executive chef at Oberlin College from September 2008 to September 2011. During this period, Ault, Fenderson, and Altenburger claimed that Holliday engaged in inappropriate behavior.

Altenburger alleged six instances of alleged harassment by Holliday. For example, she claimed, Holliday asked her if she wanted to "ride [another employee's] balls." On another occasion, he asked Altenburger if she was "going down" in the elevator (which she viewed as sexual in tone and offensive).

Ault claimed that Holliday engaged in offensive behavior on at least three occasions. For example, when Ault bent down to reach for something, Holliday allegedly told her to "bend over and . . . pick that up again." Holliday also allegedly looked at her backside and remarked "it looks pretty good back there."

Fenderson made only one allegation. In June 2010, Fenderson claimed that Holliday followed her into a walk-in cooler, cornered her against a rack, and placed "his penis up against [her] butt." He also allegedly placed his chin on her shoulder and forced her into a position where she could not move. She repeatedly told him to "get up" and "back up" to no avail. According to Fenderson, Holliday eventually moved when two other workers appeared and then "walked away with his little smirk."

Under Oberlin College's policy, employees were instructed to report any incidents of sexual harassment to Camille Hamlin Allen, the college's Special Assistant for Equity Concerns. The policy also required that the harassment be reported no later than one year after the last incident.

The three women first complained about the alleged harassment in April 2011. However, they contacted Yeworkwha Belachew, the ombudsperson for Oberlin College. On two occasions, the women met with Belachew, who in turn scheduled for them to meet with Allen. The women cancelled their meeting with Allen and did not discuss their complaints any further with anyone at the college.

On September 20, 2011, the President's Office of Oberlin College received a letter outlining the specific allegations against Holliday. One day later, the college asked Bon Appetit to "remove Holliday from campus." Following an internal investigation, the college determined that the claims could not be substantiated, and Holliday was asked to return to work (although he declined the offer).

In December 2012, the women filed suit alleging sexual harassment (among other claims). The trial judge granted summary judgment in favor of the defendants on all claims. The women appealed this ruling to the Sixth Circuit Court of Appeals.

Legal Analysis

The Sixth Circuit first noted that to be actionable, the harassing conduct must be "sufficiently severe or pervasive to affect the terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." To survive summary judgment, the Sixth Circuit continued, courts must look at "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Applying this standard to the allegations brought by Altenburger and Ault, the Sixth Circuit found that the offensive comments—although vulgar and unprofessional—were not sufficiently severe or pervasive to support a claim. To support this finding, the court noted, "Neither plaintiff alleged that the incidents were physical in nature or that they perceived a threat of physical contact." Likewise, the comments did not occur on a frequent basis. Thus, their claims were properly dismissed by the trial judge.

The Sixth Circuit next considered whether Holliday's behavior toward Fenderson was sufficiently severe or pervasive to create a hostile work environment. The court found that Holliday's behavior in the walk-in cooler was not only physically humiliating but "perhaps even physically threatening." According to Fenderson, Holliday stood directly against her so that she could feel his penis. She felt trapped and he refused to move despite her repeated requests. All of these aspects made the incident severe, the court held. Therefore, Oberlin College was not entitled to summary judgment on Fenderson's claim.

Practical Impact

According to Rebecca Bennett, a shareholder in the Cleveland office of Ogletree Deakins, "The practical impact for employers is that a sexual harassment claim may survive summary judgment even if it based on a single encounter, especially if the encounter involved physical contact. It may be significant that there were two witnesses to at least part of the conduct in this case. In most cases, a single encounter involving sexual harassment is often 'he said, she said,' such that there are no witnesses." ■

Court Finds Employer Reasonably Accommodated Police Officer's Disability

Disabled Workers Are Not Entitled to Accommodation of Their Choice

A federal appellate court recently affirmed a trial judge's grant of summary judgment in favor of an employer on a former employee's Americans with Disabilities Act (ADA) claim that the employer had failed to reasonably accommodate his disability after he suffered two strokes. The Seventh Circuit Court of Appeals found that the employer had properly accommodated the employee's disability, as the "ADA does not entitle a disabled employee to the accommodation of his choice." ***Swanson v. Village of Flossmoor,*** *No. 14-3309, Seventh Circuit Court of Appeals (July 24, 2015).*

Factual Background

On July 31, 2009, Mark Swanson, a detective and nine-year veteran of the police department of the Village of Flossmoor, Illinois, suffered a stroke. He took a leave of absence pursuant to the Family and Medical Leave Act (FMLA) until August 19, 2009, and returned to work with a note from his doctor recommending that he work part-time. The department followed the doctor's recommendation, and allowed Swanson to work three days a week and use two days of accrued medical leave, a schedule that allowed him to work part-time and continue to receive a full paycheck.

In September, Swanson began to experience headaches and lightheadedness, which led him to ask his supervisors if he could be placed on "desk duty." His request was denied, as the department did not have a mandatory light duty policy. Swanson thus continued to use his accrued medical leave and maintained his reduced schedule in accordance with his doctor's recommendation. On September 30, Swanson suffered a second stroke.

According to the court, "Swanson's second stroke rendered him unable to work as a detective or patrol officer, and so Swanson's doctor excused him from work until further notice." On November 17, Swanson sought retroactive FMLA leave, which the department granted, and he continued to use his paid medical leave to cover his absence. On December 10, the police chief sent Swanson a letter informing him that his FMLA leave had expired and that his paid medical leave would expire on December 18. The letter reminded Swanson that he could request an unpaid leave of absence, and informed him that he would "most likely" be reassigned to the patrol division upon his return to work.

On December 16, Swanson's doctor released him to work without restriction, but Swanson suffered another medical setback, which prompted the doctor to rescind his prior release and prohibit Swanson from returning to work. Sometime in February of 2010, at the expiration of his unpaid leave, Swanson resigned.

On June 29, 2011, Swanson sued the Village of Flossmoor alleging that it had failed to reasonably accommodate his disability by not offering him light duty (or desk duty) work. The trial judge granted summary judgment to the Village of Flossmoor and this decision was appealed to the Seventh Circuit Court of Appeals.

> *"The law entitles him to a reasonable accommodation in view of his limitations and his employer's needs."*

Legal Analysis

The Seventh Circuit found that Swanson had not raised a triable issue under the ADA. First, with respect to the employer's alleged failure to offer "light duty" work following Swanson's first stroke, the court noted that the Village of Flossmoor's personnel manual "makes clear that the decision to offer an employee 'light duty' work is at the discretion of the department in which the disabled employee works." The manual, the court found, also states that a request for light duty work is considered only when an employee submits an acceptable physician's report specifying the employee's limitations so that the department head can assess whether a suitable light duty arrangement can be made. "Swanson's doctor's note did not recommend 'light duty'; it suggested that he work 'part-time,'" the court wrote. "And Swanson did just that."

The court also found that the Village of Flossmoor's treatment of Swanson was reasonable. In accordance with his doctor's instructions, the employer permitted Swanson to work a part-time schedule after his first stroke, and had granted his requests to extend his leave and remain on the health plan following his second stroke. In seeking "light duty" work, Swanson had sought a preferred—not required—accommodation, the court reasoned. "The ADA does not entitle a disabled employee to the accommodation of his choice," the court wrote. "Rather, the law entitles him to a *reasonable* accommodation in view of his limitations and his employer's needs. Accordingly, permitting an employee to use paid leave can constitute a reasonable accommodation."

Swanson also argued that the Village of Flossmoor had violated the ADA by failing to offer a "light duty" option after his second stroke. The court rejected that argument, too: "The ADA only requires employers to reasonably accommodate a disabled employee who can 'perform the essential functions of the job, with or without a reasonable accommodation.'"

Because his second stroke rendered him unable to resume the responsibilities of a police officer, the court held, Swanson could not perform the essential functions of his job as required by the ADA. Thus, his ADA claim was properly dismissed.

Practical Impact

According to Timothy Wolfe, a shareholder in the Chicago office of Ogletree Deakins: "This case demonstrates the importance of an employer acting reasonably to accommodate the medical needs of an employee based upon the restrictions identified by the physician. The court makes it clear, however, that this does not mean that the employer needs to provide the employee with the accommodation that the employee wants when the requested accommodation is at odds with the health care provider's recommendation. *Swanson* also reiterates that an accommodation is only required when the employee can perform the essential functions of the job, with or without a reasonable accommodation. If an employee is completely unable to work, there is no need to engage in a futile interactive process." ■

The FMLA Is No Excuse for Underperforming

Court Finds Worker's Firing Was for Poor Performance, Not Protected Leave

A federal appellate court recently rejected a lawsuit brought by an employee who claimed that she was discriminated against for exercising her rights under the Family and Medical Leave Act (FMLA). The Eighth Circuit Court of Appeals held that firing an employee for poor performance during intermittent FMLA leave does not on its own create an FMLA discrimination claim. ***Burciaga v. Ravago Americas LLC,*** *No. 14-3020, Eighth Circuit Court of Appeals (July 2, 2015).*

Factual Background

Elizabeth Burciaga began working as a customer service representative (CSR) for Ravago Americas LLC in 2007.

During her employment, Burciaga took FMLA leave "on two separate occasions . . . for the births of her children." Burciaga continued to have a mutually beneficial working relationship with Ravago after taking FMLA leave and even received annual raises.

Following her second FMLA leave in 2011, Burciaga began to have performance problems. She took an extended lunch break without permission and made a shipping error, which resulted in a verbal warning from her supervisor. He also told Burciaga that if the errors continued, she may be terminated.

The following year, Burciaga took intermittent FMLA leave to care for her son. During this time, she committed a string of shipping errors in a 17-day span that "a CSR with five years of experience should not be making."

On September 28, 2012, Burciaga's employment was terminated as a result of her performance errors. Her supervisor explained that Burciaga was being fired for repeatedly making shipping errors and never mentioned her FMLA leave.

Burciaga sued her former employer, alleging that Ravago violated her rights under the FMLA. The trial judge granted summary judgment to Ravago, finding that Burciaga failed to establish a casual connection between her FMLA leave and her firing. Burciaga appealed this decision to the Eighth Circuit Court of Appeals.

Legal Analysis

To establish a prima facie case of discrimination under the FMLA, an employee must show that (1) he or she engaged in protected activity, (2) he or she suffered a materially adverse employment action, and (3) a causal connection exists between the protected activity and adverse action. If the employee succeeds, the burden shifts to the employer to "articulate a legitimate, nondiscriminatory reason for its challenged actions." The burden then shifts back to the employee to demonstrate that the employer's stated reason is pretextual.

The Eighth Circuit held that even if Burciaga were able to establish a prima facie case, she could not demonstrate that Ravago's stated reason for her discharge (i.e., repeated shipping errors) was a pretext for discrimination.

To show pretext, Burciaga argued that other employees had made errors and were not discharged. However, the court found that no other employees could be compared to Burciaga because they were not "similarly situated"—the violations were not as serious, the other employees were not as experienced, and mistakes were not made in such a short time span.

One critical point raised by the court was that the company's explanation for Burciaga's firing remained constant throughout the process. According to the court, "When an employer does not waver from its explanation, the circumstances militate against a finding of pretext." Because the company documented the performance issues and remained constant in its assertion of those issues as the basis for Burciaga's firing, it was able to overcome her pretext argument.

Practical Impact

According to Jim Paul, a shareholder in the St. Louis office of Ogletree Deakins, "The Eighth Circuit confirmed through its decision the necessity of a consistent explanation for a discharge or other adverse action. One of the main reasons for dismissing the former employee's FMLA discrimination claim in this case was the employer's unchanging reason for her discharge. The employer's previous approval of two other FMLA leaves also helped to demonstrate that no discriminatory motive existed."

Paul continued, "The practical takeaways from this case are that employers should fully and accurately convey the reasons for an employee's discharge at the time of the discharge and at every point thereafter. Doing so requires planning on the part of the employer, including conducting a proper investigation, formulating the terminology to be used during the discharge meeting with the employee, and consistently describing the reasons for the discharge in any subsequent written or electronic communications. If these reasons differ or become more detailed at a later point, the employer may have difficulty defending any FMLA discrimination claims pursued by the former employee." ■

Ogletree Deakins News

Most Recommended Law Firms. Ogletree Deakins has been named in The BTI Consulting Group's Most Recommended Law Firms report for the fifth year in a row. According to the report, more than half of corporate counsel surveyed said they make law firm recommendations based on superior client service. Ogletree Deakins is one of only 25 firms that have been recognized on the list five consecutive times. "BTI's report is another affirmation of our model and approach to client service," said Kim Ebert, managing shareholder of Ogletree Deakins.

WILEF Gold Standard Certification. Ogletree Deakins has earned a 2015 Gold Standard Certification from the Women in Law Empowerment Forum (WILEF). Law firms with 300 or more practicing lawyers in the United States are eligible for WILEF Gold Standard Certification if they successfully demonstrate that women represent a meaningful percentage of their equity partners, highest leadership positions, governance and compensation committees, and most highly compensated partners.