Pair of Appellate Decisions Show Protected-Class Employees Aren't Term-Proof

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We often receive calls from employers struggling to performance-manage employees who belong to one or more protected classes or who have engaged in protected activity. To be sure, given the broad scope of anti-retaliation laws, holding these protected employees accountable for their violations of performance and conduct expectations, while trying to avoid a retaliation complaint, can feel like navigating between Scylla and Charybdis. A recent pair of decisions from the Iowa Court of Appeals, however, reminds us that engaging in protected activity does not immunize employees from discipline or discharge.

In *Fitzgerald v. Hy-Vee, Inc.*, longtime employee Tim Fitzgerald suffered from various medical issues, including a knee injury, ensuing opioid addiction, and later, alcoholism. Fitzgerald had used FMLA and butted heads with his superiors about his work restrictions. The situation came to a head when Fitzgerald, while chatting with a coworker, called a female coworker a "c*nt," in her presence and loud enough for her to hear. There was evidence he had previously called this same woman a "bitch," which added to her outrage.

Hy-Vee, after investigating the incident, terminated Fitzgerald's employment for violating the anti-harassment policy. During the termination meeting, Fitzgerald broke down and disclosed he was addicted to pain medication and alcohol and said he needed treatment. Hy-Vee did not process Fitzgerald's termination paperwork for a couple of days, and during this time, Fitzgerald sought medical help for his addictions and presented Hy-Vee with a new FMLA request. The termination stood, and Fitzgerald sued for disability discrimination and retaliation.

The district court granted Hy-Vee's motion for summary judgment, and the Iowa Court of Appeals affirmed, holding no reasonable jury could find that Hy-Vee's articulated reason for termination (calling a female coworker a "c*nt") "was merely a pretext for intentional discrimination based on his claimed disabilities." Stay tuned, however; Fitzgerald has applied for further review of the decision by the Iowa Supreme Court.

The mere fact that this case continues in litigation nearly *five years* after Hy-Vee terminated Fitzgerald serves as a reminder to employers to thoroughly document the basis for terminating employees (especially "high risk" terminations) and ideally, to vet and pressure-test the decision with legal counsel.

In *McCrea v. City of Dubuque*, Vicki McCrea, a longtime City employee, began to have (documented) performance issues around the time she got divorced and lost her mother to cancer. She took FMLA leave, and other leave to tend to her mother's estate (for which McCrea was the executor). She soon thereafter began to report that her manager was chilly toward

her. McCrea made an internal complaint to HR, and her manager "became angry," and began closely documenting McCrea's comings and goings, personal cell phone use, personal use of the City's copier and fax machine, etc.

Tension began to mount, as McCrea's manager sought, and was denied, permission to terminate McRae. Ultimately, McRae presented a doctor's note to the City saying her relationship with her manager was increasing her stress and anxiety, and that "a negative work environment could impact the performance of any employee. [McCrea] is quite capable of performing every essential function outlined in her job description as she has done for the past 22 years with the city as long as she is not in this type of working environment." Nevertheless, McCrea continued working for this same manager, and while still employed, she filed two complaints with the Iowa Civil Rights Commission claiming discrimination based on sex, disability, and retaliation for her internal complaint (and in the second ICRC complaint, for her first ICRC complaint), as well as a lawsuit, and due to the stress of the environment, a request for FMLA leave (which the City did approve).

McCrea came in one day (the day her FMLA request was approved) and found several memos form her manager on her desk documenting various performance concerns. She then confronted her manager, visibly upset, and said in a raised voice: "This is harassment. You need to back off or else. Leave me alone. You've been trying to get rid of me for five years, just do it. Do you know what blood pressure is? … This is killing me." She then said she was leaving for the day due to her anxiety. *A month later*, the City summoned McCrea into the office and terminated her under the workplace violence policy for threatening her manager (i.e., saying "or else.").

McCrea's lawsuit proceeded to a bench trial, and the district judge found against her. The Iowa Court of Appeals affirmed, finding: (1) McCrea failed to prove her anxiety was severe enough to constitute a disability under the Iowa Civil Rights Act, and (2) McCrea failed to prove a causal connection between her complaints and her termination. On the first point, the Court explained: "McCrea has not named any major life activities—other than her specific workplace—that were affected by her anxiety." Citing a pre-ADAAA federal case, the Court said "'an individual does not suffer a disability under the ADA if [their] disability does not prevent [them] from performing "a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities."'" [Note this is arguably contrary to the EEOC's current guidance that mental illnesses substantially limit brain function and thus almost always constitute a disability, as well as the Iowa Supreme Court's direction to construe the Iowa Civil Rights Act broadly.]

On the no-causation conclusion, the Court relied heavily on the gap in time between McCrea's *first* complaint and her termination: "She filed complaints on September 11, 2013 and January 17, 2014, however, she was not fired until June 5, 2014—almost nine months after her first complaint." Acknowledging there was ongoing conflict between McCrea and her manager between these dates, the Court added:

Much of McCrea's complaints about how she was being treated at the office—things she invariably described as "retaliation"—involved the enforcement of rules, though she maintains they were only enforced against her. "The antiretaliation provisions of Title VII and the ICRA

do not … insulate an employee from discipline for insubordination or ongoing violation of the employer's policies just because they occur after the plaintiff engages in protected activity. (The argument about the rules only being enforced against McCrea was not discussed in the Court's opinion.)

Of note, McCrea has (like Fitzgerald) applied for further review. We will await the Iowa Supreme Court's decision on these matters and update you as appropriate. Follow WorkplaceWise to stay abreast of these and other developments.

In conclusion, while neither protected-class membership, nor engaging in protected activity, immunizes an employee from discipline or discharge, neither does having a valid reason for termination immunize an employer from litigation. It is always advisable in these situations to consult legal counsel and weigh the likelihood and cost of litigation against the business cost of keeping a problematic employee in the workplace. BrownWinick's Employment and Labor Law attorneys stand by; ready to help you troubleshoot these matters.

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