Employment Law Briefing

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Avoid the inappropriate

Supervisor's dicey decisions drive harassment lawsuit

Every supervisor is trained to avoid inappropriate behavior. Those that fail to do so can lead an employer down a long road of litigation and attorneys' fees. Prime example: *Ponte v. Steelcase, Inc.*

Rides to the hotel

The plaintiff was hired by Steelcase Inc. in June 2010 as an Area Manager based in New England. Her direct supervisor, the company's Regional Manager for Eastern Healthcare Sales, oversaw the hiring.

The company's sales of office furnishings are primarily conducted through dealers. On July 15, the plaintiff's supervisor received an e-mail from a key dealer informing him that the plaintiff had failed to attend a scheduled meeting. The e-mail went on to outline various other problems during her first three weeks on the job.

Shortly after the supervisor received the e-mail, he and the plaintiff attended a training seminar at Steelcase's headquarters. Following a dinner after the seminar, the supervisor offered to drive the plaintiff back to her hotel. During the roughly 15-minute drive, he allegedly put his hand on the plaintiff's right shoulder and left it there for about a minute. The plaintiff also claimed that the supervisor told her that he'd done a lot to get her the job and that she owed it to him to do "the right thing by him."

The plaintiff told two other trainees about the car ride. Both testified that the plaintiff had said that she "had an interesting car ride back to the hotel," and that she'd said "something like [the supervisor] hit on her."

On a subsequent night during the same training, the plaintiff alleged that the supervisor again offered to drive her to her hotel. During this ride, he allegedly put his hand on her shoulder once again — this time for most of the 15-minute ride. The plaintiff didn't mention the incident to her peers, nor did she report either incident to anyone at Steelcase.

Pair of phone calls

Several days after the training, the plaintiff called the head of Steelcase's HR department and expressed concerns about losing her job because she was late and unprepared for a recent meeting she'd had with one of

her dealers. The HR head offered to accompany the plaintiff to a meeting with the supervisor to discuss the issue. The plaintiff declined, not mentioning the two questionable car rides or alleging any improper conduct.

Months later, around February or March 2011, the plaintiff called the HR head again. This time she expressed concerns about a perceived lack of support from her supervisor. The plaintiff also "thought a lot of it was related to something that happened in July." She didn't go into details, however, and didn't characterize the "something" as sexual harassment.

To proceed, the plaintiff needed to show that the harassing conduct alleged was "sufficiently severe or pervasive," as well as both objectively and subjectively offensive.

Between March and May, the supervisor received several more complaints from dealers regarding the plaintiff's job performance. Around mid-May, the supervisor went to New England and met with her. His notes from the meeting indicate that he thought the plaintiff's ability to "lead the sales effort [was] questionable." The supervisor later

testified that the May visit was when he began seriously considering terminating the plaintiff.

This termination ultimately happened on May 27. Soon after, the plaintiff filed suit, alleging claims of sexual harassment and retaliation. The district court granted Steelcase's motion for summary judgment, and the plaintiff appealed.

Several claims

To proceed under her sexual harassment claims, the plaintiff needed to show that the harassing conduct alleged was "sufficiently severe or pervasive," as well as both objectively and subjectively offensive. In her complaint, she alleged the two car rides demonstrated sufficient severity. But the U.S. Court of Appeals for the First Circuit found that these two incidents, despite being inappropriate, weren't egregious enough to evince a hostile work environment. Indeed, the plaintiff herself didn't even refer to them as "sexual harassment" when she spoke with the HR head.

The plaintiff's second claim was that her termination was, rather than a result of poor performance, a retaliatory response to her complaints about her supervisor.

Regarding such Title VII retaliation claims, the court noted that the U.S. Supreme Court recently held that a plaintiff must now establish that her protected activity was a "but for" cause of the alleged adverse action.

Here, the plaintiff alleged that her protected activity was the February or March phone call complaining about a lack of support from her supervisor. But the call, which came several months after the incidents, was far from a clear complaint about harassment.

The First Circuit further held that, even if the HR call could be characterized as a clear complaint, the plaintiff couldn't show that her poor performance reviews (which came from others besides the supervisor) played no part in her termination. Accordingly, the court affirmed the lower court's decision.

Years of litigation

This case shows how critical it is to properly train *and* regularly remind supervisors to avoid inappropriate situations with subordinates. In less than a year of employment, the plaintiff amassed a large number of complaints from multiple parties. Yet, despite this paper trail, years of litigation ensued because of her supervisor's dicey decisions. ♦

Once can be more than enough

In *Ponte v. Steelcase, Inc.* (see main article), the U.S. Court of Appeals for the First Circuit held in favor of the employer in large part because the plaintiff alleged only two relatively isolated incidents of harassment. The court did note, however, that isolated incidents may sufficiently evince a hostile work environment if they're sufficiently egregious.

The case of *Ayissi-Etoh v. Fannie Mae*, heard by the U.S. Court of Appeals for the District of Columbia, provides an example. Here the plaintiff, an African-American male recently promoted to a leadership role, got into a heated disagreement with his supervisor over the extent of his job duties. The argument culminated with the supervisor allegedly ordering the plaintiff out of his office — punctuating the remark with a racial epithet.

Although the supervisor was eventually terminated following an independent investigation, the plaintiff sued his employer for, among other things, a hostile work environment. The district court held that a single utterance couldn't support a hostile work environment claim. But the appellate court reasoned that "perhaps no single act can more quickly alter the conditions of employment than the use of an unambiguously racial epithet such as [the one used by the] supervisor." Accordingly, the court reversed the district court's ruling.

From ADA to ADAAA

Disability case demonstrates broadened definition of "disability"

The Americans with Disabilities Act (ADA) has evolved over the years. For example, in September 2008, Congress significantly broadened the definition of "disability" by enacting the ADA Amendments Act (ADAAA). A recent case, *Summers v. Altarum Institute*, demonstrates the impact of this important change.

No follow-up

The plaintiff began working for the Altarum Institute, a government contractor, in July 2011. His job required travel to the offices of Altarum's client, the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury (DCoE). Altarum policy authorized employees to work remotely if the client approved. The DCoE preferred contractors to work on-site during business hours, but it permitted them to work remotely when putting in extra time.

The plaintiff injured himself in October while exiting a commuter train on his way to the DCoE. He sustained serious injuries to both legs, and doctors prohibited him from putting any weight on the legs for six weeks. They further estimated that he wouldn't be able to walk normally for seven months at the earliest.

While hospitalized, the plaintiff contacted Altarum about obtaining short-term disability benefits and working from home as he recovered. Altarum never followed up with him. Further, the company neither suggested any reasonable alternative accommodation nor engaged in any interactive process with the plaintiff. Instead, on Nov. 30, Altarum terminated him effective Dec. 1, 2011.

District court denial

The plaintiff filed suit in September 2012, alleging ADA violations. Specifically, he alleged that Altarum had discriminated against him by terminating his employment on account of his disability, and by failing to accommodate his disability.

Altarum responded by filing a motion to dismiss the complaint, arguing that the plaintiff failed to state a valid cause of action. The district court agreed with the employer, finding that the plaintiff wasn't "disabled" because a "temporary condition" isn't covered by the ADA.

The lower court further noted that the plaintiff's "failure to accommodate" claim was unsuccessful because he didn't allege that he'd requested a reasonable accommodation. And the plaintiff's proposal to work temporarily from home was unreasonable, the district court reasoned, because it sought to eliminate a significant function of the job. The plaintiff appealed.

Especially relevant

On that appeal, the plaintiff challenged only the district court's dismissal of his wrongful-discharge claim. As a threshold matter, plaintiffs alleging an ADA violation must show that they're disabled. Under the law, a "disability" is either:

- A physical or mental impairment that substantially limits one or more major life activities,
- A record of such an impairment, or
- Being regarded as having such an impairment.

After the enactment of the ADAAA, an impairment lasting or expected to last fewer than six months could be substantially limiting for the purposes of proving a disability. This was especially relevant to *Summers*, because the plaintiff argued that his injured legs (the impairment) substantially limited his ability to walk (the major life activity).

In overturning the lower court, the U.S. Court of Appeals for the Fourth Circuit noted that "[the plaintiff] has

unquestionably alleged a 'disability' under the ADAAA." The court concluded that the text and purpose of the ADAAA, as well as its implementing regulations, clearly provide that impairments such as those suffered by the plaintiff can constitute a disability — particularly for the purposes of surviving a motion to dismiss.

Engagement is critical

Since the passage of the ADAAA, many more plaintiffs have been able to successfully overcome the hurdle of whether or not they're disabled. For employers, it's now critical to engage in an interactive process with any employee who makes an accommodation request — even an unreasonable one. ♦

Unpacking USERRA's equal treatment standard

The Uniformed Services Employment and Reemployment Rights Act (USERRA) was designed to protect the employment rights of on-duty military personnel. Employers need to be aware of its provisions and standards. In *Dorris v. TXD Services*, the U.S. Court of Appeals for the Eighth Circuit considered the equal treatment standard.

Mobilization orders

The plaintiff began working for TXD Services in early 2007. In April 2007, as a member of the Arkansas Army National Guard, he received notice that he'd be mobilized within six months for Operation Iraqi Freedom. After receiving definite mobilization orders in early September, the plaintiff spoke with TXD's managing partner about whether the company would make up the difference in his salary while he was deployed. The managing partner replied, "If you're not working for me, I can't be paying you."

The plaintiff reported for training on Oct. 1. Later that month, he received a letter at home from TXD's benefits administrator advising that he was eligible for continuation coverage under COBRA. The plaintiff's wife called and told him he'd been fired. The plaintiff then called TXD's HR department and was told that he was "terminated for not showing up to work." The plaintiff requested that the managing partner contact him but he never did.

Company sale

The plaintiff served on active duty in Iraq for about 12 months, beginning in January 2008. In February of that year, TXD sold substantially all of its assets to Foxxe Energy Holdings, LLC. The sale contract included as an exhibit "a listing of all personnel currently employed by TXD to operate the Equipment, their job titles and descriptions, and current salaries."

TXD failed to include the plaintiff's name in this exhibit. He returned home on temporary leave in August 2008 and, after speaking with friends, he learned that Foxxe had hired all of TXD's employees. No unemployment claims were asserted against the company following the sale. The plaintiff returned to the United States and was ready to resume work on Dec. 15, 2008. Foxxe hired him to the same position he had held at TXD in April 2009.

The plaintiff sued TXD in November 2010 alleging that the company had violated USERRA by firing him while he was deployed. Specifically, the plaintiff argued that TXD had violated the law by not placing his name on the exhibit of current employees. The district court

granted the company's motion for summary judgment, noting that, though the plaintiff was on active long-term military duty, TXD wouldn't have considered him an active or current employee. Therefore, the court held, the plaintiff wouldn't have made the list provided to Foxxe and no USERRA violation occurred. The plaintiff appealed.

When it comes to rights and benefits not determined by seniority, the law requires employers to treat employees taking military leave equally, though not preferentially.

Period of service

The Eighth Circuit reversed the district court's judgment and held that TXD *had* violated its USERRA obligations to the plaintiff while he was on leave. Relying on a specific USERRA provision, the court noted that, when an employee is on leave to perform military service, his guaranteed right to benefits not determined by seniority isn't "dependent on how the employer characterizes the employee's status during a period of service." When it comes to rights and benefits not determined by seniority, the law requires employers to treat employees taking military leave equally, though not preferentially.

Applying this equal-treatment standard, the Eighth Circuit first asked whether being placed on the list TXD provided to Foxxe was a benefit not determined by seniority. The court again looked to the statute and found that it defined "benefits" broadly. Combined with the remedial nature of USERRA and the fact that most, if not all, active TXD employees were hired by Foxxe, the Eighth Circuit concluded that a reasonable jury could find that being named on the list *was* a benefit not determined by seniority.

Final issue

The final issue then was whether TXD had violated USERRA by denying the plaintiff a benefit not determined by seniority. TXD submitted an affidavit from the district manager reciting that no employee absent because of long-term military leave was on the list.

But the affidavit never addressed whether TXD also excluded from the list employees who were then on long-term leave for reasons other than military service. The district court improperly determined that it was the plaintiff's burden to offer evidence that the company allowed employees on nonmilitary leave of absence to remain on any list of active or current employees.

The Eighth Circuit concluded that, because the plaintiff alleged his military service was a "motivating factor" in his not being on the list, the burden instead shifted to TXD. The company had to show that the same action would have been taken in the absence of military service.

Careful decisions

USERRA's provisions are very specific. Employers must ascertain precisely what's required under the law before making any employment decisions about someone who is or has been out on military leave. ♦

What happened in Vegas: An FMLA case

A famous tourism slogan tells us, "What happens in Vegas stays in Vegas." But a trip to Nevada's largest city was much discussed in *Ballard v. Chicago Park District*. Here, the U.S. Court of Appeals for the Seventh Circuit decided whether an employer had violated an employee's rights under the Family and Medical Leave Act (FMLA).

End-of-life goal

The female plaintiff was a Chicago Park District (CPD) employee. In April 2006, her mother was diagnosed with end-stage congestive heart failure and began receiving hospice care. The plaintiff lived with her mother, acting as her primary caregiver.

One of the plaintiff's mother's end-of-life goals was to visit Las Vegas. The plaintiff requested unpaid leave from the CPD so that she could accompany her mother on the trip, which occurred in January 2008. During their time together in Las Vegas, the plaintiff continued to serve as her mother's primary caregiver while the two participated in tourist activities. For example, the plaintiff drove her mother to a hospital when a fire unexpectedly prevented them from reaching their hotel room where her mother's medicine was located.

Several months later, the CPD terminated the plaintiff for the unauthorized absences that accumulated during the Las Vegas trip.

Treatment vs. care

The plaintiff filed suit alleging FMLA violations. The CPD moved for summary judgment, arguing that she didn't "care for" her mother in Las Vegas because she was already providing home care and the trip wasn't related to medical treatment. The district court denied the motion, explaining that, as long as the employee provides care to the family member, "where the care takes place has no bearing on whether the employee receives FMLA protections." The CPD appealed.

The FMLA's text doesn't restrict care to a particular place or geographic location. The only limitation is that the family member cared for must have a serious health condition.

Under the FMLA, eligible employees are entitled to leave to care for family members with serious health conditions. On appeal, the CPD asked the Seventh Circuit to read the FMLA as limiting "care," at least in the context of an away-from-home trip, only to services provided in connection with ongoing medical treatment. But the court noted that one problem with the CPD's argument is that the section of the FMLA in question refers to "care," not "treatment."

A second problem was that the FMLA's text doesn't restrict care to a particular place or geographic location. Indeed, the only limitation placed on care is that the family member cared for must have a serious health condition.

Rejected argument

The Seventh Circuit admitted that the FMLA doesn't define "care," and there was room for disagreement regarding whether the plaintiff truly "cared for" her mother while in Las Vegas. So the court looked at a closely related Department of Labor regulation and found that there, too, "care" is defined expansively to include "physical and psychological care" — again without any geographic limitation.

The CPD also argued that, if the plaintiff's FMLA interpretation were accepted, employees would help themselves to FMLA leave to take personal vacations simply by bringing along seriously ill family members. The Seventh Circuit rejected this argument by noting that, "even if we credit [this] concern … what we may consider a more sensible result cannot justify a judicial rewrite of the FMLA."

Verifying documentation

If an employer receives an FMLA leave request like the plaintiff's, it's advisable to require the applicant to obtain a health care provider's certification of his or her family member's serious health condition. At minimum, this will provide some verifying documentation. ♦

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