



EMPLOYMENT LAW *Briefing*

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From the Editor



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I am pleased to bring you this first of many client advisories to be presented by the Modrall Sperling Employment

Law Practice Group. This Group is comprised of attorneys with expertise in a variety of legal specialties that regularly service employers in many different industries.

Please email comments to: grm@modrall.com or call me at (505) 848-1866.

Thank you.



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No age discrimination when replacement not substantially younger

The Eighth Circuit had to decide whether a university dean could establish a prima facie case of age discrimination when his replacement was younger by only two-and-a-half years.

Retirement rumors

In *Lewis v. St. Cloud University*, a history professor was promoted to dean of the college at age 62. Three years later, when he returned to work after suffering a mild heart attack, his supervisor told him the university had heard rumors that he wanted to retire and had developed a plan to replace him.

The dean denied the rumors in writing to the president, stating that he found them "profoundly disturbing" and that the president was clearly "trying to force" him to resign and was creating "a hostile work environment" that constituted "blatant age discrimination."

Suit thrown out

About a year later, the provost told the dean to plan to retire from the deanship and asked him to propose an exit strategy by the following week. The dean and his lawyer worked with the provost on an exit, but reached no agreement. Five months later, the university terminated the dean's appointment. He alleged violation of the Age Discrimination in Employment Act (ADEA). The trial court threw out the suit without a trial.

The university, when it terminated the dean's deanship, temporarily replaced him with the associate dean, who was six-and-a-half years younger than the dean. Eight months later, the university appointed a permanent replacement who was just two-and-a-half years younger than the dean. The university stressed

that it chose the dean's permanent replacement after conducting a nationwide eight-month search.

Eighth Circuit weighs in

To prove age discrimination, the dean had to show that:

1. He was at least 40 years old,
2. He had suffered an adverse employment action,
3. He was meeting his employer's reasonable expectations when the adverse employment action occurred, and
4. His replacement was substantially younger.

The university conceded that he met the first three requirements but didn't meet the last because his permanent replacement wasn't substantially younger.

The trial court had determined that the dean had met his burden because the university had also temporarily filled the position with the associate dean, who was six-and-a-half years younger. But the Eighth Circuit held that the important factor was the age of the dean's permanent replacement. So the court concluded that the dean had failed to establish a case of age discrimination because his permanent replacement was only two-and-a-half years younger.

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Be wary when dealing with perceived disabilities

The Americans with Disabilities Act (ADA) bars employers from discriminating against employees who are perceived to have a disability. In *EEOC v. Heartway Corp.*, the Tenth Circuit considered whether a nursing home perceived a cook as disabled and fired her because of that disability.

Hired, then fired

An applicant for a job in a nursing home's kitchen was asked on the application: "To protect our residents from disease, please indicate if you are under a doctor's care or taking medications now." Despite being regularly monitored for hepatitis C, she checked the "no" box because none had been detected in her blood for nearly two years, though her doctor told her she would always have chronic hepatitis. The nursing home hired her and she became a cook.

Eight months later, the cook accidentally cut her hand at work, and the nursing home learned that she had hepatitis. She was told she couldn't return to work without a doctor's note, but she was fired before she could turn it in.

When the cook asked the facility's administrator to reinstate her, he allegedly said she couldn't "work in our kitchen" with hepatitis. She asked if she was being fired because of her hepatitis; he said, "No, I'm firing you because you falsified information on your application."

The EEOC takes her case

The cook filed a discrimination charge with the EEOC. During its investigation, the administrator asked the investigator: "How would you like to eat food containing her blood, if she ever cut her finger?" He also warned of "a mass exodus from the nursing home" if this "got out." The EEOC filed a complaint, alleging that firing the cook violated the ADA's Title I "because it regarded her as disabled."

At trial, the EEOC – to prove that the employer had violated the ADA by firing the cook – had to prove that she had a disability. The ADA broadly defines "disability" as:

1. A physical or mental impairment that substantially limits one or more of a person's major life activities,
2. A record of such an impairment, or
3. Being regarded as having such an impairment.

The EEOC argued only that the home regarded the cook as having a substantially limiting impairment. EEOC rules specified that the "regarded as" standard may be met when a person has "a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation."

The nursing home didn't dispute that her hepatitis was a physical impairment that didn't substantially limit her major life activities. Thus, the question was whether the home nonetheless treated her hepatitis as "substantially limiting" one or more of her "major life activities."

To prevail on its "regarded as" claim, the EEOC had to prove that the home treated her disease as significantly restricting her ability to perform both:

1. The job for which she was disqualified, and

2. Either:

- a. "jobs using similar training, knowledge, skills or abilities" within her geographical area, or
- b. a broad range of "jobs not using similar training, knowledge, skills or abilities" within the geographical area.

Because the administrator had decided to fire the cook, the relevant inquiry centered on his beliefs regarding her hepatitis. The jury rejected the home's argument that it had fired her for falsifying her employment application by not disclosing her hepatitis. The jury found that the home had discriminated against the cook because of perceived disability.

The Tenth Circuit weighs in

The Tenth Circuit found that a reasonable jury could view the administrator's comments to the cook and the EEOC as evidence that he thought allowing her to cook for the facility would be unsafe or unsanitary, and thus he had treated her as limited in her "ability to perform" her job. Similarly, his concern about a "mass exodus" showed that he thought she couldn't properly perform her job because of how others might react to her perceived disability.

Also, the Tenth Circuit found sufficient evidence for the jury to conclude that the administrator had treated the cook as significantly restricted in her ability to perform other jobs within the same class of jobs. Specifically, a jury could have concluded that the administrator

Employer's failure to act on a complaint leads to Title VII liability

Was a corrections department liable under Title VII when a prison inmate raped an employee? That was the question before the Seventh Circuit in *Erickson v. Wisconsin Department of Corrections*.

A clerk worked for a corrections system's payroll department in an office located in the same building as a minimum-security prison. Some inmates performed janitorial services in the building.

A scary encounter

As the clerk worked late one night before joining her supervisors at an after-work party, she noticed an inmate-janitor staring at her in a way that made her uncomfortable. She promptly left to meet her supervisors.

Upon arriving at the party, the clerk immediately told five supervisors about the incident: the warden, the assistant prison superintendent, two sector chiefs and the human resources director. She told them she was "really freaked out" to find the inmate in her work area. The warden expressed regret and told her that they would make sure it didn't happen again.

Employer fails to act

But when the clerk returned to work a week later, the department had failed to take any action. The next day, while she was alone in the office after hours, the inmate attacked and raped her.

The clerk sued under Title VII, alleging the department had discriminated against her on the basis of sex by failing to prevent the sexual assault and had thus created a hostile work environment. A jury found for her, and the department appealed.

The Seventh Circuit noted that establishing a hostile work environment requires evidence from which juries can reasonably conclude that plaintiffs were:

1. Subjected to unwelcome sexual conduct, advances or requests,
2. Because of their sex,
3. That was severe or pervasive enough to create a hostile work environment, and
4. That a basis for employer liability exists.

Was the inmate an employee?

The department didn't dispute that the rape met the first three requirements for a claim of hostile work environment. Rather, it argued that, because the inmate wasn't its employee, no reasonable jury could have found it liable for the rape.

The department argued that employer liability for negligence can arise in a Title VII case only if an employer has notice of actual previous acts of sexual harassment. The department maintained that the clerk would have had to notify her supervisors of past, unreported sexual harassment to trigger its obligation to prevent future sexual harassment.

Unpersuaded, the Seventh Circuit held that adopting this argument would be contrary to Title VII's primary objective, which was "not to provide redress but to avoid harm." Employers need to take "all steps necessary to prevent sexual harassment from occurring." The greater the potential harm to the employee, the more vigilant the employer must be.

The court found that an employee's effort to bring a threat of potential sexual harassment to an employer's attention can be enough to give rise to liability.

The nature of the threat

In evaluating the department's failure to prevent the harassment, the Seventh Circuit considered the nature of the threat that the clerk relayed to her supervisors. She had never before been alone with an inmate and was unarmed. Her job didn't require her to deal with men in custody or be alone with them after hours. Further, when she told her supervisors about her encounter, they exhibited concern, and the assistant superintendent admitted at trial that he would have acted had he remembered his conversation with her before the rape.

The clerk's supervisors also knew of the high risk that male inmates might sexually harass female employees. And the inmate had recently been classified as high risk.

The Seventh Circuit concluded that a reasonable jury could find that, after the clerk's discussion with her supervisors, the department had "enough information to make a reasonable employer think" that the clerk was probably being sexually harassed, yet failed to take any remedial action as Title VII obliged it to do.

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Employer's failure to act on a complaint leads to Title VII liability

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Negligence

Clearly, the department was negligent in failing to act on a complaint. It had a full eight days to remedy the situation that it should have recognized as urgent in light of the inmate's high-risk status. Even though the complaint was made verbally in a nonwork setting, the employer was obliged to take responsive action to avoid the foreseeable conduct.



No age discrimination when replacement not substantially younger

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The burden shifts

But even if the dean had met his burden, the university produced three legitimate nondiscriminatory reasons for removing him as dean:

1. He created a divisive environment between the faculty and the administration.
2. He handled interpersonal faculty conflicts ineffectively.
3. He engaged in favoritism and bias in some of his personnel evaluations.

This shifted the burden back to the dean to show that the proffered reasons were a mere pretext for discrimination.

So the dean cited the “retirement rumors” and being told to start planning his “retirement from the deanship” as evidence that “age was a determinative factor in the adverse employment decision.” Specifically, the dean argued that the word “retirement” connotes age. But the Eighth Circuit relied on its previous decision in *Sprenger v. Federal Home Loan Bank*. That opinion held that “reasonable inquiries into an employee’s retirement plans do not permit an inference of [age] discrimination.”

Raising an inference?

To buttress his case, the dean also pointed to his positive annual performance reviews. While favorable reviews could provide pretext evidence, the court found that past positive reviews – by themselves – don’t necessarily raise an inference of age discrimination. The court found that the dean’s reviews, the last of which his previous supervisor had prepared about a year before he was removed, hadn’t created an inference because the university based its proffered removal reasons on incidents that the dean didn’t dispute, some of which occurred after his last evaluation.

So the Eighth Circuit, affirming the trial court’s decision, concluded that a reasonable jury couldn’t have found that the dean’s deanship was terminated because of age discrimination.

Avoid assumptions

This case demonstrates the importance of relying on performance criteria when making adverse employment decisions rather than making assumptions about someone’s capabilities simply because of age. The employer here was prepared to prove it had legitimate performance-related reasons for removal and didn’t have to rely on the fact that the replacement wasn’t substantially younger.

Be wary when dealing with perceived disabilities

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believed she was restricted in her ability to do any kitchen job or any job where she might bleed and thereby transmit hepatitis.

Fired because of disability

To prove that the home had violated the ADA, the EEOC had to prove that the facility fired the cook because of her disability. The Tenth Circuit reasoned that a jury could have reasonably interpreted the administrator's statement to mean she was fired because she had hepatitis and was therefore (in his mind) unable to perform her job or other

jobs in the same class. Similarly, his expression of concern of a "mass exodus" if clients discovered the cook had hepatitis supported a finding that she was fired because she had that disease and was thus restricted in her ability to perform her job and other jobs in the same class.

Even assuming both that the cook had lied on her application and that this would have provided a valid legitimate reason for firing her, the court concluded that a reasonable jury could have nonetheless found that she was actually fired because of her disability. So the Tenth Circuit upheld the jury's verdict because a

legally sufficient basis existed for concluding that she had a disability and that she was fired because of it.

Never assume

This case provides another example of an employer basing an employment decision on its assumptions about an employee's medical condition rather than on performance or medical evidence. To sustain firing a worker based on a medical condition, an employer must be able to prove that an employee was unable to perform the position's essential functions or that the medical condition presented a danger to those in the workplace.

Is closeness in time enough to establish retaliation?

That was the question in *Thompson v. Bi-State Development Agency*. The Eighth Circuit considered whether an employee's previous discrimination lawsuits and his employer's disciplining him were close enough in time to constitute retaliation.

Suspension and retraining

A bus driver had an accident, his second within 12 months. While on sick leave for six months, he sued the bus line for racial discrimination and retaliation (his second suit against the bus line within the previous two-and-a-half years), and then returned to work with doctor approval.

In accordance with its employee guidelines, the bus line suspended the driver for five days and required three days' retraining, standard discipline for having had two accidents in 12 months. He declined the option of probation instead of suspension, told the union president he was tired of being harassed, and retired.

Five months later, the driver sued the bus line for racial discrimination and retaliation. He alleged that the discipline constituted retaliation against him for having filed two previous racial-discrimination and retaliation lawsuits. The court threw out the suit without a trial.

Shifting the burden

The Eighth Circuit noted that Title VII bars retaliation against an employee who files discrimination charges. To establish retaliation, plaintiffs must prove that they engaged in Title VII-protected activity; their employers took adverse employment actions against them, and, the two actions were causally connected.

The Eighth Circuit found that the driver's lawsuits and the discipline were connected only by time—and the connection was weak. The court held that a mere coincidence of timing can rarely suffice to establish a submissible retaliation case.

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Is closeness in time enough to establish retaliation?

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A waste of time

The court noted that the driver's return to work was the first opportunity to discipline him for his accident. Doing that before he returned would have been a waste of time. The bus line followed its employee guidelines, and it would have disciplined him immediately after the accident had he not been out sick.

Furthermore, the court found no evidence that the discipline resulted from the filing of his second lawsuit while he was on sick leave. The court found it hard to imagine that the bus line would have bothered to reinstate him just so it could retaliate against him for having filed suit. The court concluded that the driver failed to establish a causal connection between the lawsuit filings and the discipline.

Employers, beware

Despite this ruling, savvy employers should proceed with caution when disciplining or discharging employees soon after they engage in protected activity. Other courts have held that closeness in time can suffice to establish a causal connection.

Sidebar: Similar situation – different outcome

In contrast to Thompson, the Eighth Circuit found that a temporal connection was enough to establish a case of retaliatory discharge.

In *Peterson v. Scott County*, an interim correctional officer started working in a county jail. Her supervisor and co-workers repeatedly subjected her to disparaging age- and sex-related comments. Four months after being hired, and again a month later, she complained to the jail administrator, who told her "maybe you should be somewhere else" and marked his calendar to dismiss her in two weeks, which he did.

The officer alleged discrimination and retaliation. The trial court threw out her suit but the Eighth Circuit held that the officer had established a retaliation case by showing that she had engaged in protected conduct (complaining about discrimination) and that she had suffered an adverse employment action (being fired). The court held that the timing of her dismissal – two weeks after the protected activity – was close enough to establish causation.

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