ANDREWS AND BEARD

EMPLOYMENT LAW CLIENT ALERT

An E-Newsletter prepared for our EMPLOYMENT LAW clients presenting recent changes in the law.

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Articles

Court Upholds Claim for Man Harassed for Not Being Manly

In a significant decision, a Federal Court has upheld gender stereotyping evidence as supporting a claim for sex harassment between two men. The Fifth Circuit Court of Appeals in the case of *EEOC v. Boh Brothers Construction,* found that a supervisor harassed another employee because he did not see the employee as being "sufficiently manly." In this case the supervisor regularly called the employee names such as "princess" and "faggot." He also made sexual motions toward the employee on a regular basis.

The Employer found that the supervisor engaged in unprofessional behavior but not sexual harassment. The supervisor never received any discipline for his treatment of the employee.

Importantly, the Court found that gender stereotyping evidence could establish a same-sex harassment claim. The Court found that the Supreme Court had previously held that discrimination can be found even if the Plaintiff and Defendant are of the same sex through gender stereotyping evidence. In this case, the actions taken by the supervisor toward the employee that he was not masculine enough were severe and pervasive to constitute a harassment claim.

In addition, the Employer was found liable because it failed to adequately prevent and correct the harassment. The Federal Court found that the Non-Discrimination Policy of the Employer was insufficient because it did not contain specific guidance on sexual harassment and only contained "generic statements" on discrimination.

Further, the Court found as basis for liability the fact that the employee who was the victim of the sexual harassment never received the Harassment Policy when he was hired, and other employees noted that they never even read the notice of harassment.

Also, the Court determined that the Company's policy did not give employees instructions on how to make harassment complaints, and it did not tell supervisors how to investigate, document, or resolve such complaints.

In addition, the Court emphasized that the Employer had not done any sexual harassment training, and that the employees were unaware of their rights under law to file sexual harassment complaints.

This decision upheld a verdict of several hundred thousand dollars against the Employer and is a good lesson for employers to make sure that their sexual harassment policy is adequate, and that Employers have done training on sexual harassment to all employees.

This case also illustrates that "gutter talk" between employees of the same sex is also prohibited as an example of sexual harassment.

Failure to Accommodate Disability Leads to ADA Claim Against School District

A Federal Court has found that a School District's failure to engage in the "interactive process" when an employee requests accommodation for a disability constitutes a violation of the Americans With Disabilities Act.

In the case of *Huiner v. Arlington School District*, the South Dakota Federal Court decided that the simple act of requesting accommodations under the ADA requires an Employer to initiate an interactive process with the employee to determine the appropriate reasonable accommodation. In this particular case, a teacher presented a medical report from her physician that contained significant work modifications, including allowing a 10-minute break regularly and going to a place where the teacher could use relaxation techniques, limiting observations of the teacher in the classroom, and a flexible work environment to allow modified breaks and time to leave for counseling, as well as allowing the teacher to play soothing music using a computer or music player. Subsequent to this report of the doctor asking for these work modifications, the School District had placed the teacher on a plan of assistance because of what the District found to be insufficient work performance.

The District did write two letters to respond to the various accommodations requested, noting which accommodations the District would agree to and which they would reject.

However, most importantly, the Court ruled that the letter requesting job modifications required the District to initiate an interactive process with the employee for the purpose of identifying any possible job accommodations. The Court stressed that the Employer's failure to meet "face to face" with the employee to discuss her disability and possible accommodations demonstrated a lack of good faith, particularly in light of her plan of assistance. The Court also noted that the Employer's efforts to engage in the interactive process were merely forwarding two letters to the employee addressing the proposed job modifications.

The ruling in this case regarding the "interactive process" is consistent with the rulings of the Pennsylvania Federal Courts.

Employers must meet personally with employees to engage in the "interactive process" to discuss possible job accommodations when the Employer knows of a disability. In this particular case, the Court noted that the employee had a disability under the ADA of "anxiety." Once an Employer knows of a potential ADA covered disability, the Employer should take immediate steps to schedule a "face to face" meeting with the employee to discuss possible accommodations, and the Employer should document the results of this meeting. In addition, the Employer should follow up with a letter to the employee noting the results of the interactive process meeting.

Court Finds Retaliation Claim for Complaints Over Breast Pump Location

Four employees of a District Attorney's Office in Kansas who were fired after making complaints over the Employer's failure to provide a location to breast feed or use a breast pump were found to have a retaliation claim under Title VII of the Civil Rights Act. In the case of *Boxum-Debolt v. Office of the District Attorney,* the Federal Court in Kansas has found that employees could proceed on a retaliation claim under Title VII of the Civil Rights Act as well as a retaliation claim under the Fair Labor Standards Act for complaining of unpaid overtime and other wage violations.

In the case, four employees in the District Attorney's Office complained that the office was discriminating against female employees by not providing an appropriate location to either breast pump or breast feed. The supervisors at the District Attorney's Office allegedly responded by ridiculing the women and stating that they must not have enough work to do if they were taking time to make these complaints.

In addition, the employees also claimed that they were improperly treated as "exempt" employees under the Fair Labor Standards Act, in that they regularly worked more than 40 hours per week without overtime pay and they did not meet the requirements to qualify for the "executive, administrative, or professional" exemption under the Fair Labor Standards Act.

Subsequently, these employees were fired and they proceeded to file retaliation claims. The Federal Court did not make a specific finding on whether failure to provide breast feeding accommodations violates Title VII per se, but it did note that complaints of this nature were protected from retaliation under the Civil Rights Act. In addition, the Court also supported the employees in their complaints under the Fair Labor Standards Act in finding that the complaints over overtime were also a basis for their termination of employment.

This case demonstrates the relative ease that employees can bring retaliation claims either under Title VII of the Civil Rights Act or under the Fair Labor Standards Act. Employers must be careful when employees complain of possible discrimination or possible Wage and Hour violations to refrain from taking action that might appear to be retaliation. Employers must be able to show a separate legitimate reason for a termination of employment that is not in any way related to employees' complaints about either sex discrimination or Wage and Hour laws.

Hiring New Employees for Same Position Held by Fired Worker Leads to Age Discrimination Claim

"Suspicious timing" of an Employer hiring two sales people shortly after firing a 56-year old salesman gave rise to an age discrimination claim according the U.S. Court of Appeals for the Seventh Circuit in the case of *Mullin v. Temco Machine.*

The legal concept of “temporal proximity” which essentially means timing is everything under the law, was applicable to this case when the Court found that firing an experienced worker in his 50’s and replacing him with two inexperienced younger workers was characterized as “puzzling” by the Federal Court and made a claim for age bias.

The Court explained that although companies must be able to fire and hire employees, when a highly experienced and relatively successful salesman was fired at precisely the time the Company hired two very inexperienced men who had never been in sales gives a prima facie case of age discrimination.

In that particular case, the Plaintiff, Mullin, worked for 19 years and had been named a Salesman of the Year. However, the Company took the position that his performance had declined in recent years and that the Company was paying him too much for his sales. The Company had also taken the position that the employee had refused to make cold calls and maintain in-person visits with existing clients.

However, the Court concentrated on the suspicious timing in this case and found that the reasons given by the Employer for its termination appeared to be pretextual. The Court explained that although the Employer described the firing as a financial decision, it was certainly unusual to hire two people with no experience for nearly the same compensation as a reigning Salesman of the Year.

Further, the Court found that there were some ambiguous statements about age made by officers of the Company that also gave rise to the age discrimination claim.

This decision demonstrates the need of Employers to be careful whenever doing any reduction in force. Any hirings done at the same time or close in time to a reduction in force can give potential rise to an age discrimination claim.

Court Finds Constructive Discharge Claim After Notice of Pregnancy and FMLA Leave

Despite the fact that the employee resigned, the Federal Court in Colorado found that a claim could be made for “constructive discharge” after an employee was given several adverse employment actions following notice of pregnancy and the need for FMLA leave.

In the case of *Martin v. Canon Business Solutions*, the Federal District Court emphasized that the employee had received no complaints about her performance prior to the time she notified her supervisors about her pregnancy and the request for FMLA leave. In fact, a few days after giving notice of the pregnancy and the need for leave, Ms. Martin received an email reprimanding her about her sales quota numbers. Also, she received another written reprimand a few months later about her sales quota.

Martin did go on FMLA leave, but was barred from receiving her work emails during her FMLA leave and was prohibited from contacting clients during her FMLA leave, resulting in her losing sales deals.

When Martin returned to her office she requested to use the facility to express breast milk, but her supervisor told her to use the restroom. Martin declined because of sanitary reasons and the lack of an electrical outlet for her breast pump machine. Martin resorted to expressing milk in her car twice a day during work hours and then she contracted mastitis, a breast infection, and missed work as a result. After Martin did not receive a sales bonus, she resigned her position.

The Court found that a valid claim existed for FMLA interference as well as pregnancy discrimination. Regarding the FMLA claim, the Court found that there was interference with the FMLA rights of Martin even though the Employer did not deny her FMLA leave request. The Court said that the FMLA and its regulations define interference as including not only leave denials, but acts that discourage an employee from using FMLA leave. This decision cited several other Federal Appeals Court decisions which stated that "an employer who provides a strong disincentive for taking FMLA leave has interfered with the employee's FMLA rights.

The Court also found a viable claim for pregnancy discrimination. The Employer in this case disputed that the claim regarding the opportunity to express breast milk did not fall within the Pregnancy Discrimination Act. However, the Court disagreed and found that discriminating against a woman who is lactating or expressing breast milk violates Title VII of the Civil Right Act and the Pregnancy Discrimination Act. The Court specifically stated that "because human physiology is such that one only lactates as a by-product of pregnancy, the Court has little difficulty concluding that accommodation of the need to express breast milk readily fits into a reasonable definition of pregnancy, child birth, or related medical conditions."

Furthermore, the Court again pointed to the "suspicious timing" of the Employer's actions. The Court explained that prior to announcing the pregnancy, Martin had received multiple sales awards and only received reprimands after she announced her pregnancy.

This case demonstrates that Employers need to be very wary of any type of disciplinary action that may be given after the announcement of a need to take leave or the use of leave related to pregnancy or the FMLA.

Nurse Completing Drug Abuse Treatment Lacked FMLA Claim, but Possible ADA Claim

A nurse who was terminated after completing treatment for drug abuse was held not to have a valid claim to job restoration under the Family and Medical Leave Act, but was given a possible claim for disability discrimination. In a recent Federal Court case of *Clark v. Jackson*

Hospital, the Federal District Court in Alabama found that no FMLA claim was established because when the employee went out on a drug rehabilitation twelve-week treatment program, she was told she would need to submit a Certification of Ability to Resume Work at the conclusion of her FMLA leave. The Court explained that an Employer is entitled to require an employee returning from an FMLA covered leave to submit a Certification of Ability to Resume Work, provided that the Employer gives notice of such a policy when it approves the employee's leave. Further, the Court noted that when the employee fails to provide a Certification upon conclusion of the leave, she may be terminated under the FMLA absent proof that the Employer did not uniformly enforce this policy. In this particular case, there was no evidence that the Employer did not uniformly enforce his policy of requiring a Certification of Ability to Resume Work at the conclusion of an FMLA leave.

However, the Court found that there was a possible claim under the Americans With Disabilities Act. Section 12114(b) of the ADA provides for a safe harbor provision for an individual who has begun or completed a supervised rehabilitation program. The ADA does not protect an employee or applicant who is currently engaging in the illegal use of drugs. In this case, however, the Court found that the employee may have a claim based on the fact that she had completed a supervised drug rehabilitation program.

As noted in this case, the employee is not protected under the ADA who is currently engaged in the use of drugs, but the employee may receive protection as a result of involvement in a rehabilitation program.

Third Circuit Upholds $265,000 Verdict for Perceived Disability

A recent Third Circuit decision decided October 17, 2013, upheld a jury verdict of $265,000 for a work force reduction that was considered to be a "perceived disability" by the Employer. Prior to being terminated, the employee in question had requested a golf cart after knee surgery. Further, the employee requested a closer parking space, which was also denied. The Court found that the jury verdict could be proper based upon intentional discrimination against the employee because of his knee injury, his accommodation requests, and his requests for FMLA leave.

The Third Circuit Court found that the Employer "perceiving" the employee to be disabled gave a basis that the work force reduction was merely a pretext for discrimination.

In addition, the Court noted as a basis for the discrimination that the second in command at the place of employment had made a stray remark that the employee in question was experiencing more medical issues than older employees in the workforce.

This decision shows that Employers must train their supervisors in being careful about any remarks regarding an employee's disability or even the possibility of a disability.

Congress Proceeds on Bill to Outlaw Discrimination on Sexual Orientation

The United States Senate has proceeded on a measure that would outlaw workplace discrimination based upon sexual orientation and gender identity. The Senate voted to begin debate on this law on November 4, which would extend Federal non-discrimination protections to gay, lesbian, and bi-sexual individuals. It is also the first time that either House of Congress has voted on a non-discrimination bill that would include transgender people. Seven Republican Senators crossed party lines to support having the Bill proceed, and one of the Republican Senators was Senator Pat Toomey of Pennsylvania.

Currently the Federal discrimination laws do not protect individuals because they are gay, lesbian, bi-sexual or transgender. However, 21 States and the District of Columbia offer such protections.

Despite passing this test in the Senate, the fate of the Bill remains uncertain. This legislation may have a difficult time proceeding in the Republican-controlled House of Representatives. The Speaker of the House, John Boehner, has already stated that this legislation "would increase frivolous litigation and cost American jobs, especially small business jobs."

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