FEDERAL AND WISCONSIN EMPLOYMENT LAW UPDATE

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RETALIATION

Burlington Northern & Santa Fe Ry. Co. v. White *(US Sup. Ct.)*

Supreme Court announces broad definition of "retaliation" that will encourage the filing of more retaliation claims and make them more difficult to win, especially at the pretrial stage. Title VII affords broader protection to victims of retaliation than to victims of discrimination.

Facts: White was the first female in Burlington's North Memphis facility when she was hired in June 1997 as a "track laborer." Initially, she was assigned to operate a forklift. In September 1997, she complained to company officials that she was being harassed by her foreman who repeatedly told her that women should not work on a railroad. Burlington disciplined the foreman (10-day suspension and training), and removed White from the forklift duties (in favor of a "more senior man") and assigned more arduous duties that were within her job description.

White filed a charge alleging sex discrimination and retaliation. Three days after White filed a second charge alleging that the boss had place her under surveillance, she was suspended without pay allegedly for insubordination. She filed a grievance and won, and was reinstated with full pay after missing 37 days of work.

Trial Court Disposition: A jury ruled in favor of Burlington and rejected White's sex discrimination claim, but found in White's favor on the retaliation claim and awarded her approximately $46,000 in damages, but no punitive damages. The court also awarded White $55,000 in attorneys fees.

Appellate Court Disposition: Initially, a divided panel (2-1) of the Sixth Circuit Court of Appeals reversed the judgment in favor of White, ruling that she failed to prove retaliation because she did not suffer an adverse employment action (such as firing, demotion, etc.). Then, a full panel of all the Sixth Circuit judges vacated that first ruling, and affirmed the judgment in favor of White.

Supreme Court Disposition: The Supreme Court took the case to reconcile the different standards for retaliation claims applied by the different appellate courts across the country. The Court unanimously ruled in favor of White, concluding that the anti-retaliation provision of Title VII is not confined to actions that affect the terms or status of employment. It sided with what was a minority view that retaliation claims could be based on employer actions that although not traditional adverse employment actions, like firing, demotion, discipline, etc., would deter a reasonable person in the position of the plaintiff from pursuing a claim or other protected activity. It made the following points:

- Employees are not protected from "petty slights" or "minor annoyances" that may take place when discriminatory behavior is reported. However, the employer cannot take any "materially adverse" action against the employee for engaging in protected activity like asserting her rights under the anti-discrimination laws;

- "Context matters." There is no specific list of behaviors that will or will not constitute retaliation – it all depends on the specific circumstances at issue. For example, a change to an employee's schedule may not matter much to many employees, but for a single mother with school age children, this could matter enormously. It depends on what would deter a "reasonable person" in the "position of the plaintiff."

- The anti-retaliation provisions are not confined to the workplace. The employer's treatment of the employee even outside the context of the workplace could be illegal retaliation if it could chill dissent and the reporting of discrimination.

In this case, the Justices noted that reassignment of job duties could be retaliation in some circumstances. Also, simply because White won her grievance and was reinstated with back pay did not insulate the suspension from being considered materially adverse.

Impact: This decision will likely result in more retaliation claims because it put retaliation claims back in the spotlight and it articulated a broader standard for assessing liability than had existed in much of the country. Also, retaliation claims will be more attractive for plaintiff's lawyers because the claims will be more difficult for employers to win at the summary judgment stage. With more claims able to get to trial, employers will be more willing to pay more in settlement.

Note: this broader standard had been articulated by the Seventh Circuit in 2005 (*See Washington v. Ill. Dept. of Rev.)*, but has not always been applied by our courts. Now, *Burlington* makes this the law of the land.

Remember that a retaliation claim can prevail even if the underlying discrimination complaint utterly fails. A retaliation plaintiff need only have a good faith belief that he or she was asserting rights under the anti-discrimination statutes, even if that claim was factually or legally wrong, to be protected from retaliation.

Advice:

- Train supervisors on prohibited retaliation

- Review and maybe revise policies (like anti-harassment) that promise no retaliation

- Be more diligent in follow-up with employees who asserts complaints

- Be more diligent in oversight of supervisors of complaining persons; review all potential changes to complainer's work circumstances before implementing

Isbell v. Allstate Ins. Co., (US Sup. Ct., cert. denied)

The Court declined Isbell's request to review a Seventh Circuit decision which affirmed the dismissal of her retaliation and other discrimination claims against Allstate. Allstate terminated 6000 employee-agents but offered them independent contractor status, conditioned upon the employee signing a release of all claims.

Sylvester v. SOS Children's Villages Illinois, Inc. (7th Circuit)

Retaliation claim can prevail where termination follows (closely in time) a complaint and there is other circumstantial evidence suggesting that the employer was punishing the employee for complaining.

Facts: Defendant operated homes for foster parents and children. Sylvester, along with three other female employees, signed a letter of complaint to the chairman of the board accusing the CEO of abusing them and others by various acts of sexual harassment. The board of directors met nine days later to consider the letter. The board decided that the letter was an attempt by two of the signatories (Elstad and Ryan) to stave off being fired for poor performance. The board decided that both should be fired, and they were. (Both sued along with Sylvester but settled their cases).

The board's chairman met with the CEO and discussed the possibility of firing Sylvester for poor performance as well, even though she had received a positive performance evaluation shortly before. The board chairman decided that Sylvester would not necessarily be terminated, but that a decision would be made by the CEO after he met with her the following day, based in part on her reaction to the terminations of Elstad and Ryan. When Sylvester met with the CEO she accused him of failing to disclose that legal counsel was present in his meeting with the chairman of the board. The CEO affirmed that legal counsel was present and Sylvester said "thank you" and left his office. He immediately fired her for being insubordinate.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment on Sylvester's retaliation claim and dismissed the case.

Appellate Ruling: The Appellate Court reversed the decision and remanded the case for further proceedings on the retaliation claim. It found that there were three categories of circumstantial evidence that supported the retaliation claim and justified a trial: First, the prompt firing of two of the four signatories to the complaint letter. Even if they were fired for poor performance, the court wondered why they were not fired until shortly after they signed the letter accusing the CEO of sexual harassment. Second, because the record showed no current performance issues with Sylvester, the court wondered why her performance was brought up at the meeting at which the chairman of the board and its lawyer decided to fire Elstad and Ryan. Third, the court wondered why the CEO was authorized at the meeting to fire Sylvester not for performing her job badly but for reacting adversely to news of the firing of two of the cosignatories of the letter. The court concluded that putting these items of circumstantial evidence together, a reasonable jury could concluded that the accusations of sexual harassment in the letter signed by Sylvester were a cause of her being fired.

Impact: This case, even before the Supreme Court ruling, further demonstrates the potential for retaliation claims when termination decisions follow closely on the heals of a complaint or other protected activity.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Ash v. Tyson Foods, Inc. ***(US Sup. Ct.)***

Supreme Court rejects 11th Circuit assessment of racial epithets and comparative qualifications evidence to prove pretext. The Court notes that *context matters*.

Facts: Plaintiffs were African-American superintendents at Tyson's plant who sought promotions to an available shift manager positions. Two white males were selected for the jobs instead. Plaintiffs sued for race discrimination under Title VII and 42 U.S.C. §1981.

Trial Court Disposition: A jury found in favor of Plaintiffs and awarded compensatory and punitive damages. The employer made a motion for a new trial and the judge granted the motion.

Appellate Court Disposition: The Eleventh Circuit Court of Appeals reversed in part and affirmed in part.

Supreme Court Ruling: The Supreme Court concluded that the Court of Appeals erred in two aspects of its analysis:

1. The Appellate Court incorrectly concluded that the term "boy" could not be deemed to be evidence of discrimination unless it was modified by an adjective indicating a racial comment, such as "white boy" or "black boy." The Supreme Court said that "Context matters"—the term "boy" standing alone may evidence race bias. The speaker's intent may be depend on a variety of factors, such as context, tone of voice, inflection, local custom and historical usage.

2. The Appellate Court incorrectly assessed Plaintiffs' comparative qualifications evidence. It said that a disparity in qualifications can support a discrimination claim when the disparity is so great "as virtually to jump off the page and slap you in the face." The Supreme Court rejected this standard, and sent the case back to the Appellate Court to define and articulate a better standard for judging when a disparity in qualifications between the disappointed applicant and the person selected will be evidence of discrimination.

Impact: The Court's emphasis on the context of workplace comments will give employees complaining of harassment a new tool to use in their attempt to present a harassment claim that can survive an employer's motion for summary judgment and get to trial. This is because the Court's emphasis on context in assessing whether a particular comment was "because of" race (or sex or any other protected category) injects more potential for the parties to dispute the facts concerning the context. This decision emphasizes that those fact disputes could be "material" and therefore prevent the judge from ruling on the claim prior to trial.

Ptasznik v. St. Joseph Hospital (7th Circuit)

Off-color comments by supervisor indicating bias made to plaintiff over time does not prove that a termination decision was discriminatory where the comments were not directly related to the termination decision.

AND: Claims of National Origin discrimination can be raised under 42 U.S.C. § 1981 (which has a longer statute of limitations and no damages cap like Title VII).

Facts: Ptasznik was a 51-year-old Polish immigrant employed as a technician in a sleep center. The hospital-employer fired Ptasznik because she failed to document the results of a sleep study every 30-45 minutes as required by hospital protocol, and endangered a patient by failing to call for medical personnel when a sleep-study patient had trouble breathing. Ptasznik sued her former employer claiming that she was discriminated against based on her national origin and her age, and that she was defamed. She claimed that her supervisor had made repeated harassing references to her national origin and age, such as "you're old, you're Polish, and you're stupid." She also claimed that the supervisor told her she would be better suited as a cleaning woman.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. The court made the following points:

- Supervisor comments that Ptasznik was "too Polish" and "too old" were off-color and probably inappropriate for the workplace, but nonetheless did not constitute sufficient evidence that the employer was motivated to terminate her because of her national origin or age. Ptasznik said that the comments occurred approximately five times in the six months before her termination, but could not recall the dates and details of the comments, and therefore did not establish that the comments were related to the discharged decision.

- Because Ptasznik admitted in her deposition that she failed to follow hospital protocol in documenting the sleep study, the employer's stated reason for termination was legitimate and nondiscriminatory.

- The Appellate Court chided the employer but did not overstep its bounds:

> "We are not condoning the alleged actions of Ptasznik's employer. Arguably, the hospital overreacted and unnecessarily fired an employee with an otherwise competent performance record. Nevertheless, it is not our role to determine the competency of or interfere in employment decision simply where we believe an employer has made a poor choice. Federal courts have authority to correct an adverse employment action only where the employer's decision is unlawful, and not merely when the adverse action is unwise or even unfair.

Impact: This case demonstrates that the federal courts continue to respect the limits on their authority. They should not and usually will not disturb termination decisions that may seem unfair unless there is sufficient evidence of discriminatory intent. Off color comments by supervisors, that are not comments directly related to the termination, usually will not be sufficient evidence to allow a discrimination claim to survive for trial.

Bonus Note: In a footnote, the court confirmed that national origin claim can be asserted under 42 U.S.C. § 1981 (which prohibits race discrimination in the making and performing of contracts). This is pertinent because § 1981 unlike Title VII, does not limit the damages that a plaintiff can recover.

Mlynczak v. Bodman (7th Circuit)

Affirmative action policies continue to be challenged by disappointed white males but the court continues to scrutinize these "reverse discrimination" claims with some skepticism.

Facts: Four Department of Energy employees, all of whom were white males at the "GS-13" level, sued the DOE for race and gender discrimination, and claimed that the DOE retaliated against them when they complained. Plaintiffs were middle managers at DOE's Chicago Operations office. Each complained about the DOE's decision to fill three GS-14 positions with women, two of whom were white and one Hispanic. The promotion decisions were made by a male Hispanic manager. Plaintiffs claimed that DOE's affirmative action policy permitted unlawful reversed discrimination.

The DOE's affirmative action plans stressed active recruitment of women and minority candidates, but did not contain quotas or authorize management to give preference to less-qualified female or minority applicants for jobs or promotions. However, the success of managers in achieving EEO goals and objectives was one of 12 factors taken into account in their performance evaluations. "Success" was not limited to hiring or promotion decisions, but also included a wide variety of career development measures. The hiring manager in this case admitted that he takes an individual's race, sex or minority status into consideration, and if he does not see adequate diversity in a job category, he will "look hard" for diversity in the list of qualified applicants.

Trial Court Disposition: The District Court granted the DOE's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal and made the following points:

- The existence of DOE's affirmative action policy alone is not enough to prove that intentional discrimination is the reason why a particular individual was not hired or promoted. A plaintiff must establish a link between the policy and the employment decision.

- The DOE policies at issue were of the type that expand the pool of persons under consideration which is permitted as long as it is not followed by an explicit policy of

preferring the minority candidates in the group. The DOE policies were explicit in the opposite direction: once the pool was created, the policy prohibited managers from basing hiring or promotion decisions on a forbidden characteristic.

- The court also condoned the employer's policy of rewarding managers for improving workplace diversity because the policy focused on a wide variety of measures including things like establishing daycare facilities (which benefit both male and female parents).

- The court also rejected the retaliation claims, saying that being shunned by coworkers was insufficient to make a retaliation claim, and negative performance appraisals alone did not qualify as an adverse employment action. Note, however, this was prior to the Supreme Court ruling on retaliation later in 2006.

Impact: This case continues a trend of cases demonstrating that disappointed white male applicants for jobs or promotions may bring race or sex discrimination claims challenging employers' diversity policies. Our courts continue to treat these claims with some skepticism and scrutiny. This case provides employers some good guidelines for their diversity policies in relation to hiring and promotions.

Davis v. Wisconsin Department of Corrections (7th Circuit)

Consistency in discipline decisions is important, especially where the employer uses a specifically-defined matrix of rules and associated penalties for violations.

Facts: Davis, a black male corrections officer, was demoted following allegations that he harassed a female coworker by instructing her to sit down in a chair, then sitting in a chair facing her, grabbing both arms of her chair, pulling her towards him until their knees were touching and refusing to let her get up. The female coworker also alleged that Davis made inappropriate comments about his reversed vasectomy and asking if she would ever have an affair. After investigation, the employer determined that Davis' conduct was a "category B" violation of the employer's disciplinary rules. The rules called for a written reprimand as the punishment for the first instance of a category B violation of the work rule, but the employer chose to demote Davis.

Trial Court Disposition: The case went to trial and the jury found that the employer demoted Davis because of his race.

Appellate Ruling: The Appellate Court affirmed the decision against the employer. The discrepancy between the punishment prescribed by the disciplinary policy and the more severe sanction the employer imposed on Davis supported the jury conclusion that the stated reason for the demotion was untrue. The court ruled that the jury could rationally conclude that there was a racial motivation based on Davis' evidence that two similarly-situated white males received lighter punishments for category B violations of the same work rule. The employee tried to argue that Davis' conduct was significantly worse than the others, but the fact that it documented his violation as a category B undermined the credibility of that argument.

Impact: Very structured disciplinary policies may be easier to administer, but any inconsistencies in application more easily support a discrimination claim.

Forrester v. Rauland-Borg Corp. (7th Circuit)

Court reiterates and clarifies proper analysis for discrimination claims; the employer wins if its stated reason for the decision is honest, even if wrong or dumb.

Facts: Forrester, a white male, sued his former employer after they fired him on a basis of a complaint of sexual harassment by a female coworker. Forrester claimed that the termination decision was discriminatory and for his supporting evidence argued that the employer's investigation of the harassment complaint was shoddy. He argued that the investigation and its results were simply insufficient to support a legitimate termination decision.

Trial Court Disposition: The District Court granted summary judgment for the employer and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. It took the opportunity to clarify the proper analysis for a discrimination claim as follows:

- The question in a discrimination case is not whether the employers stated nondiscriminatory ground for the action is correct, but whether it is the true ground of the employers action rather than being a pretext for some other, undisclosed ground.
- If the stated reason is the true ground and not a pretext, the employer wins.
- If it is not the true ground, the employer may still be innocent of discrimination because it may have lied to conceal a reason that was discreditable but not discriminatory. In this case, the case should not be resolved on summary judgment because a jury would be entitled to infer a discrimination motive from the pretextual character of the stated ground, but the employer can still win at trial.
- A pretext is a deliberate falsehood; an honest mistake, however dumb, is not a pretext. Therefore, the only concern in reviewing an employer's reasons for termination is the honesty of the employer's beliefs.

Impact: This case reconfirms, as clearly as possible, that an employer does not lose a discrimination case simply because its stated reason for the employment action was wrong if it honestly believed it to be true. Thus, when it is in the best interest of the business, employers can make discharge decisions based on an "honest belief" of the facts even if it is not conclusive proof (*e.g.*, based on "hearsay" or conflicting evidence in "he said/she said" situations).

Miscellaneous Title VII rulings: (most findable at www.ca7.uscourts.gov)

Arbaugh v. Y&H Corp. (US Sup. Ct.)

Defense that employer is not subject to Title VII because it had fewer than 15 employees was waived because it was not raised timely and properly in the litigation.

-- thus, even employers who are not technically subject to Title VII (or other employment laws) because they lack sufficient employees can still have liability under those statutes if they fail to raise the defense early in the litigation.

-- This decision broadens the reach of the federal employment laws. (Note: FMLA requires 50 employees.)

Tomanovich v. City of Indianapolis (7th Circuit)

White male engineer who was fired by the city of Indianapolis even after filing three EEOC complains alleging discrimination failed to show that his termination constituted retaliation.

Impact: This case provides guidance on terminations of the frequent complainer.

Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC (7th Circuit)

Appellate Court reversed the summary judgment dismissal of national origin discrimination, pregnancy discrimination and retaliation claims because of a variety of off-color remarks by the supervisor.

Impact: This is the flip side of ***Ptasznick*** and shows that the biased comments of a supervisor can be enough to support a discrimination claim.

Randolph v. Indiana Reg. Council of Carpenter and Millwrights (7th Circuit)

Appellate Court reversed the grant of summary judgment dismissing female millwright's sex discrimination claim against the local union because of fact disputes concerning her claim that she had phoned the appropriate union officials on a monthly basis asking for work.

Impact: The plaintiff's testimony alone can defeat the employer's motion for summary judgment and require a trial if that testimony is on a material issue that the employer disputes.

Goodwin v. Board of Trustees of the University of Illinois (7th Circuit)

Appellate Court reversed a summary judgment dismissing claims for race, sex and age discrimination brought by black female who was demoted after displaying an e-mail message on her open computer screen showing three scantily clad women each weighing over 1,000 lbs. because she testified that a supervisor informed her that others didn't like her because she was in a traditionally white male position and was a "strong black female."

Impact: Again, the supervisor's comment referencing an employee's protected characteristics, made in the context of the circumstances that lead to the adverse employment action, can be sufficient evidence of bias to require a trial.

Adams v. City of Chicago (7th Circuit)

Minority plaintiffs challenged promotional exam as having a disparate impact on them.

Impact: Evidence of prior promotional exam is admissible to show that the current exam is admissible to show that current exam had a viable alternative. The broader point is that changing a policy or practice can itself be evidence of a flaw in the policy (*i.e.*, plaintiffs argue that employers only fix what is broke.)

EEOC Policy Guidance:

April Guidance explains standards for evaluating race discrimination claims in recruiting, hiring and promotion. The guidance sets out best practices for employers such as proactive measure to reduce the likelihood of Title VII violations and to address the impediments to equal employment opportunity.

- Of 75,400 charges of discrimination filed in 2005, the largest category was race (35.5%)
- "Race" includes discrimination based ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.
- Discrimination based on race-linked illnesses violates Title VII.
- Employment discrimination based on a belief that the individual is a member of a particular racial group violates Title VII even if that perception is wrong.

On the near horizon:

Ledbetter v. Goodyear Tire and Rubber, Inc. (U.S. Supreme Court)

Supreme Court will decide how far back in time a back pay award in a discrimination case can reach.

Facts: Ledbetter was one of a few female area managers ever employed by Goodyear at its tire production plant in Gadsden, Alabama. She sued for gender discrimination and presented evidence that all of the women who held her position was paid less than their male counterparts, and that the plant manager made comments indicating that he did not want women in the plant.

Trial Court Disposition: The trial judge allowed Ledbetter to present evidence of sex discrimination and paid throughout her entire Goodyear career dating back to 1979. A jury ruled in her favor and awarded $223,776 in back pay, $4,662 in compensatory damages, and $3.3 million in punitive damages (which was reduced by the trial judge who applied Title VII's statutory damages cap).

Appellate Ruling: The 11th Circuit Court of Appeals overturned the verdict. It held that the operative active discrimination would be the decision about what to pay the employee, not the act of issuing paychecks. It looked back at the employer's original decisions not to grant Ledbetter a pay raise in 1997 and 1998, and found no evidence of sex discrimination in those decisions.

Supreme Court Proceedings: The Supreme Court agreed to review the Appellate Court decision. It heard oral arguments in late November 2006 and is expected to issue a ruling within the next several months. The ruling may clarify how far back in time a back pay award for a discriminatory pay practice may reach.

HARASSMENT

Valentine v. City of Chicago (7th Circuit)

Employee complaint to supervisor about co-worker "aggravating her" was sufficient to trigger employer's duty to investigate and remedy workplace harassment.

Facts: Donna Valentine worked in the City of Chicago Department of Transportation as a driver. She was one of 45-50 drivers who were supervised by Mike DiTusa, who in turn reported to Joseph Senese. In March 2002 Senese transferred driver John Tominello to the yard after women at another facility complained he was harassing them. Valentine alleged that Tominello began harassing her as soon as he arrived at the site. She described frequent comments by Tominello referring to her "tits" and "ass" and obscene gestures, including Tominello rubbing his crotch in front of her nearly every work day. She said Tominello

unsuccessfully asked her to dinner 30-40 times and asked her to leave her fiancé for him on about 20 occasions. Valentine alleged that she complained to her supervisor DiTusa approximately 10 times about Tominello's behavior, and with each complaint DiTusa would tell Tominello to leave Valentine alone, but Tominello continued the harassment. Valentine claimed that DiTusa was present in one incident in the break room when Tominello made an obscene gesture as if masturbating and then blew powder sugar onto Valentine's lap. Later that day, Valentine telephoned Senese to complain about Tominello was sexually harassing her. Within a day, Senese transferred Tominello to yet another jobsite and reported the matter to the city's sexual harassment office. When Valentine told DiTusa that she had complained to Senese, DiTusa responded "now you have done it, now you are going to bring heat on all of us." Valentine also reported that DiTusa became furious, yelling "I don't need this shit" and threw his desk chair into a wall. Valentine obtained a transfer to a another location and later was allowed to transfer from the Department of Transportation to another city agency. She filed a lawsuit against the city as well as against the harasser and her supervisors.

Trial Court Disposition: The District Court granted summary judgment against Valentine dismissing all of her claims.

Appellate Ruling: The Appellate Court reversed the dismissal. It concluded that supervisor DiTusa's awareness of Valentine's complaint put the employer on notice about ongoing harassment. DiTusa had the power to transfer employees, and he was apparently was a supervisor whose knowledge about Valentine's complaints was attributable to the city. The court also rejected the defense arguments that Valentine was required to take sexual harassment complaints directly to the city's sexual harassment office, concluding that the policy did not state this unambiguously. Additionally, while Valentine conceded she had not specifically used the term "sexual harassment, Valentine had told DiTusa that Tominello was "aggravating" and "rude." Those terms, combined with her complaint that Tominello put his hands on her, alerted DiTusa to a probability that Valentine was being sexually harassed, particularly where she was one of only a few women working a traditionally male workforce. Finally, the court rejected the employer's arguments that the harassment was not sufficiently severe or pervasive to be illegal or justify a trial. Because the harassment occurred in front of coworkers and cause Valentine to suffer actual anxiety and depression. The court concluded that Valentine presented enough evidence to warrant a trial on the existence of a sexually hostile work environment under Title VII.

Impact: This case again shows the need for good training of front-line supervisors on harassment issues. Supervisors must understand that the employer's duty to take effective steps to remedy workplace harassment can be triggered by general complaints, and that steps that do not work the first time must be changed. Also, policy must be very clear about how/where workplace harassment complaints should be made.

Patton v. Keystone RV Co. (7th Circuit)

Touching under another's clothing supports a sexual harassment claim.

Facts: Keystone Manufacturer's High-End Recreational Vehicles. Brenda Patton began her employment with Keystone in April 2001 at its Elkhart, Indiana location. Rod Ramey was the manufacturing manager who oversaw a number of Keystone's plants, including those in Elkhart and Goshen. Beginning in October 2002, Ramey would tell Patton "did you know that we are f_ _ _ _ing according to the rumor over in Goshen? Patton also felt that Ramey was monitoring her work excessively leering at her, staring at her body as she knelt, crouched and bent over while working in the RVs. An assistant plant manager corroborated that Ramey spent an unusual amount of time around Patton and seemed obsessed with her. Ramey also touched Patton inappropriately. Once, when she was wearing shorts and crouching in the doorway of a nearly finished RV, Ramey slid his hand under Patton's shorts up her inner thigh while commenting that her legs were smooth. His hand went as far as her underwear, at which point Patton fell backwards to break the contact. On another occasion, Patton was on her knees cleaning the floor of an RV and was working backward toward the door to the outside. Ramey was standing right outside the RV and he put his hand on her calf as she reached the doorway. In yet another incident, Ramey put his arm on Patton's back with his hand near her neck, placed his face quite close to her ear and told her to meet him for a drink. Patton declined and squirmed away. After the first instance of physical contact, Patton began to have panic attacks. She became very nervous when Ramey was around and was worried all the time at work that Ramey would sneak up and touch her.

In November 2002, Patton was told that Ramey wanted her to transfer to the Goshen facility. On her first morning of work there, Ramey was waiting at the door to greet her. He put his arm around her waist letting his hand fall down toward her buttocks, and guided her while saying "you sure brighten up the place." Other employees were not happy to see Patton and an angry confrontation ensued in which employees claiming that Patton was being favored because of a sexual relationship with Ramey. Patton never returned to work at Keystone, but brought a claim of sexual harassment.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court reversed the decision and remanded the case for trial. The court analyzed whether Patton was subjected to a "hostile work environment," and if so, whether the environment was sufficiently egregious so as to justify a finding of constructive discharge. The court analyzed the conduct at issue in the case against the legal standards to determine whether it was sufficiently severe or pervasive to alter the conditions of Patton's employment and create an abusive working environment. The court emphasized that the circumstances in nuances of a physical touching can determine whether it constitute sexual harassment. "Direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment." Because Ramey's hand was under Patton's shorts on her inner thigh and very near intimate body parts, it was sufficient along with the other allegations of misbehavior to constitute a hostile work environment.

The court also concluded that the facts presented could meet the standard for a constructive discharge. A jury could agree with Patton's fear that her supervisor was an obsessed man who was capable of and desirous of physically assaulting her in a serious way. Because a jury could find that Patton should have quit immediately to protect herself, the court concluded that the constructive discharge claim merited a full trial.

Impact: This case provides an excellent overview of sexual harassment law and shows the court struggling with the analysis of what constitutes sufficiently severe pervasiveness misconduct to justify a sexual harassment claim.

FMLA

Phillips v. Quebecor World RAI, Inc. (7th Circuit)

Reported illness simply too vague to trigger FMLA obligations; court reluctant to hold employers to a higher standard for identifying possible FMLA coverage.

Facts: Phillips was employed for more than three years at Quebecor Brookfield, Wisconsin printing plant. She was discharged after she had exceeded the number of absences permitted by the company's attendance policy. On October 15, 2003, Phillips had reported to work as scheduled, but told her supervisor that she did not feel well, and left early for the day. Phillips supplied the company with a medical office form later that day confirming that she had been seen by a physician, and that she would be off work until October 19. Phillips was charged three chargeable absence days as a result of the October absence, and was later fired when subsequent occurrences took her over the permitted limit. Phillips sued and contended that the October 2003 episode was protected FMLA leave, arguing that she had properly notified Quebecor that she was receiving "continuing treatment." She argued that she expressly told Quebecor that her illness would cause an absence of more than three days, the "period of incapacity" required under the DOL regulations.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. Because Phillips had given Quebecor information about only one treatment visit, not two, she had not notified Quebecor of an FMLA-qualifying absence, the court said. She had not told anyone at Quebecor that her October 2003 absence involved an ongoing regimen of care. The court noted that the FMLA regulations requiring an employee needed FMLA leave to inform the employer within one or two working days of learning of the need, except in "extraordinary circumstances," which the court did not believe existed in this case. Ultimately, the court reasoned that requiring management officials to determine whether the FMLA applied "every time an employee was absence because of sickness" would place an unreasonably burden on employers.

Impact: Because the employee had not given notification suggesting even a "probable basis" for FMLA coverage, the vague information she provided did not require the employer to excuse her absence or inquire further about it. This obviously is an employer-friendly decision which requires that employees share some of the burden of communicating specifically enough about the need for FMLA leave.

Burnett v. LFW, Inc. (7th Circuit)

Where information provided by an employee is sufficient to show that FMLA may apply, the employer has a duty to investigate further before

Facts: Burnett worked as a "detailer" for the property company, responsible for verifying that apartment equipment and furnishings were in working order before the arrival of a new tenant. Sometimes he was required to lift heavy objects, such as appliances. In October 2003, Burnett informed his supervisor (Polo) that he was having health problems that required medical attention. Later than month, he turned down a transfer to a position that would have restricted his restroom access, telling Polo that due to his "weak bladder," he did not want the job. In December 2003, after a week-long absence, Burnett presented Polo with a copy of a doctor's order for blood work to justify some of the time off. He explained that during the week he learned he had two serious problems, a high prostate-specific antigen count and high cholesterol. He also told Polo of upcoming doctor's appointments. During a later meeting with Polo and other company officials, Burnett said that he had been "feeling sick." He compared his situation to that of a family member who had been diagnosed with prostate cancer.

In early January (2004) Burnett requested leave to undergo a biopsy. The request documentation was given to a different manager, and Polo said he never received it. Over the next week or so, Polo issued Burnett several reprimands for substandard work and disruptive behavior. Burnett filed a union grievance and on advice of the union did not return to work until the day of the grievance meeting, January 26. His absences resulting in yet more reprimands from Polo and a three-day suspension without pay. At the meeting, Burnett informed Polo and others that the biopsy was scheduled for the next day. He said that if he were diagnosed with cancer, he would likely kill himself because he lived alone and had no means for caring for himself.

On January 29, Burnett requested time off for the first week of February because he had not been given a light duty assignment in compliance with his post biopsy restrictions. At a meeting later in the day with Polo, Burnett said that he felt sick and wanted to go home. After arguing with Polo, he left. Burnett was fired effective January 30 for insubordination. He was diagnose with cancer February 10. Burnett sued alleging FMLA violations.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed Burnett's FMLA claim, concluding that he could not show that he provided the employer with evidence that he had a serious health condition protected by the FMLA.

Appellate Ruling: The Appellate Court reversed the decision, saying that an "employee's notice obligation is satisfied so long as he provides information sufficient to show that he likely has an FMLA-qualifying condition." The court noted that an employee's bare assertion that he is 'sick' is insufficient." However, the court concluded that in the overall context of the factual circumstances in this case, which included information over the prior four months about his prostate problems which constituted a serious health condition, Burnett gave enough information to show that the FMLA might apply and therefore triggered the employer's duty to request more information.

Impact: HR Professionals should read and compare/contrast this case with *Phillips v. Quebecor* to understand what the courts expect of employers in terms of the duty to determine when FMLA may apply.

Anders v. Waste Management of Wisconsin (7th Circuit)

Courts declines to second-guess employer's decision to terminate threatening employee; mental conditions will generally not excuse threatened violence.

Facts: Anders was a driver employed by Waste Management and was responsible for making stops at customer locations that would be listed for him on a daily route slip provided by his supervisor. On November 12, 2002, Anders reported for work and receive a route slip. He later claimed that he was told by a coworker that the stops shown on the slip had been serviced the day before. Anders, claiming to believe that his assigned stops did not really require service, told his supervisor that he felt sleepy and shaky, had a headache and was going home. After he left the facility, however, a coworker reported to the supervisor that Anders was overheard saying that he was not going home, but instead was going to drive 30 miles to the company's regional offices where he intended to "get" his regional manager, and then he would return to the local office and "get" another manager. Sure enough Anders showed up at the regional office and wanted to speak with the regional manager. As Anders waited for the regional manager inside the office, he began to shake, and went outside to his car. There, Anders was observed lying on top of his car and pounding his fists on the car and smashing his cell phone into the ground. As others tried to help, Anders clinched his fists, lowered his shoulder into an aggressive stance and charged at a manager. Witnesses said that Anders appeared enraged or aggressive. The regional manager ultimately made a decision to fire Anders based on that conduct, including some information that earlier in the month Anders had told a manager that "if things did not improve at Waste Management someone was going to get hurt." Anders sued his former employer alleging that he had a panic disorder and should have been given FMLA leave to address the problem (and that his termination violated the ADA and was race discrimination).

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. It concluded that Anders did not prove that his claimed anxiety disorder rendered him unable to perform the duties

of his position prior to November 12, 2002. In one prior incident, a confrontation with a supervisor, Anders' behavior stemmed from being penalized for tardiness. Other than that incident, the facts showed that he appeared for work on a regular basis and without incident. The court agreed that the employer terminated him for an deliberate and aggressive act, not his panic disorder.

> The FMLA was designed to help working men and women balance the conflicting demands of work and personal life, it was not intended to excuse violence in the workplace.

Impact: The court demonstrated that it was especially reluctant to second guess employment decisions in situations involving workplace violence or potential violence. In fact, it stated that it "declined to place the defendant employer on the razor's edge: 'In jeopardy of violating the [law] if it fired such an employee, yet in jeopardy of being negligent if it retained him and he hurt someone.'" Employers should not be afraid to make marginally more aggressive termination decisions where employees threaten workplace violence.

Crouch v. Whirlpool Corp. (7th Circuit)

Employer's honest belief that employee misused leave request justified discharge and defeated FMLA claim.

Facts: Being the junior person on a seniority list, Crouch was able to secure vacation leave for only one of five of his desired weeks over the summers of 2002 and 2003. His fiancé, also worked at Whirlpool and had greater seniority which permitted her to reserve choice vacation weeks in June and July in both 2002 and 2003. In summer 2002, after failing to coordinate his vacation weeks with those of his girlfriend, Crouch gave his supervisor a doctor's note claiming a knee injury from yard work. He was given two weeks of disability for the same time period. Under Whirlpool policy, an employee on disability automatically qualified for FMLA leave and the two leave periods ran concurrently. In 2002, Crouch took disability leave from June 27 to July 21. The following summer, Crouch and his fiancé again failed to obtain the same vacation weeks, and Crouch again presented a doctor's note claiming the same knee injury. The company approved Crouch's request based on the doctor's note without waiting for Crouch to submit the official A&S claim form. Crouch filed that form on June 30 although his leave had already begun. Crouch's supervisor noticed that his disability leave dates were the same as his rejected vacation dates, and noticed similarities to the 2002 vacation request and disability leave dates. The company hired a private investigator who produced a videotape of Crouch working in his yard for 48 minutes on July 12. Crouch was suspended upon his return to work July 16 and fired after a July 21 meeting in which he admitted vacationing in Las Vegas with his girlfriend while on disability leave. Crouch sued Whirlpool under both the FMLA and ERISA.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. It ruled that the employer was justified in firing Crouch because of its "honest belief" that Crouch fraudulently obtained disability leave contrary to company policy. The employer is not obligated by FMLA to reinstate an employee who misuses disability leave, the court said.

> An employer's honest suspicion that the employee was not using his medical leave for its intended purpose is enough to defeat the employee's substantive rights FMLA claim.

Impact: This case is a good tool for employers who suspect an employee accessing disability leaves is misusing those leaves.

Hull v. Stoughton Trailers LLC (7th Circuit)

Plaintiffs still struggle to provide sufficient and compelling evidence of similarly-situated coworkers; thus employers can treat differently situated employees differently.

Facts: Hull was employed by Stoughton as an assembly line supervisor. In the fall of 2003, he suffered a flair-up of a back problem and began taking valium and other medication. The medications could cause drowsiness, and at higher doses, confusion and delirium. Hull normally took his medications approximately 90 minutes before his shift began. On November 3, Hull met with the HR manager, reported that he had a ruptured disk and requested that the company begin the paperwork in case he needed to take FMLA leave. Hull also discussed his medication regime with the company nurse. One week later, a coworker noticed that Hull looked impaired. His speech was allegedly slurred and he appeared confused and drowsy. Management did not administer a drug test (which normally was required under company policy) but instead as told to leave work. That day, Hull's physician placed him on a one-week medical leave, and thereafter his doctor suggested extending the leave for two additional weeks. Hull's supervisor and the company's general manager then decided to fire Hull on November 20, saying that his failure to comply with the drug policy was enough to terminate his employment, and that his prior performance problems aggravated the situation. Hull filed a lawsuit alleging that Stoughton retaliated and discriminated against him for taking FMLA leave.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case, concluding that Hull did not establish that the decision maker knew that Hull had taken FMLA leave prior to the decision to terminate him.

Appellate Ruling: The Appellate Court affirmed the summary dismissal, but on different grounds. The Appellate Court concluded that Hull failed to prove that a similarly-situated employee, who did not take FMLA leave, was treated more favorably than him. The court restated its familiar and high standard for proof of "similarly situated" as follows:

To determine whether two employees are directly comparable, a court looks at all the relevant factors, which most often include whether the employees:

(i) have the same job description,

(ii) were subject to the same standards,

(iii) were subordinate to the same supervisor, and

(iv) had comparable experience, education and other qualifications -- provided the employer considered these latter factors in making the personnel decision.

Because Hull failed to present evidence that would allow a meaningful comparison between the circumstances of his discharge and those surrounding the discipline meted out to his would-be comparators, that case was properly dismissed.

Impact: This case continues a trend of decisions from the Seventh Circuit of Appeals disposing of all forms of discrimination claims in situations where the plaintiff fails to come forward with evidence of situations involving similarly-situated employees who were both outside of the protected class at issue in the case and were treated more favorably by the employer. This of course reemphasizes the need for consistent application of policies and procedures in the context of disciplinary decisions, but also reminds employers that they need not fear making different decisions as to different employees in different circumstances where that is in the interest of the business.

Johnson v. Vintage Pharmaceuticals, Inc. (11th Circuit)

Employer's miscalculation of employee's available FMLA time did not expand the 12 weeks of protection provided by law; because employee was actually out of leave time at time of request, she could not maintain an FMLA claim based on employer's denial of her request.

Facts: As a result of complications in her pregnancy, Johnson took sporadic days off work from September through November 2002. At the end of November 2002, Johnson was diagnosed with placenta previa and did not return to work. Johnson provided Vintage with doctors notes substantiating her need for leave through February 4, 2003, but she failed to submit a FMLA leave form or doctor's certification. Vintage informed Johnson on several occasions that she was required to return the FMLA leave form to continue her leave and if she did not her employment would be terminated. Johnson claimed that on February 5, 2003, she left with Vintage security guards the FMLA leave form and a doctor's note substantiating her need for leave through the end of her pregnancy because of "lower back pain." Vintage claimed it never received these documents, and Johnson was terminated on February 10, 2003. The stated reason for her termination was her failure to return the FMLA leave form. It was undisputed that by the time of her termination, Johnson had already taken more than 12 weeks of FMLA leave in the past 12 month period. Nonetheless, Johnson claimed she was still eligible for FMLA leave through March 18, 2003 because of Vintage's representation to that affect.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. It concluded that at the time of her termination, Johnson was ineligible for FMLA leave. She had already used 12 weeks in the prior 12 months, and any additional leave provided to her would have been voluntary on the part of Vintage. Accordingly, Vintage was entitled to require Johnson to return the FMLA leave form to obtain this voluntary leave, and when she did not do so, it was permissible for Vintage to deny the leave and terminate Johnson's employment.

Impact: Consistent with the Supreme Court decision in *Ragsdale v. Wolverine* (2002), this case reconfirms that an employee will not be entitled to more than 12 weeks of FMLA leave in a 12-month period. Here, the employer apparently miscalculated the amount of FMLA leave available to the employee, but even this did not create additional statutory rights. Twelve weeks is 12 weeks, even if miscounted.

Yashenko v. Harrah's NC Casino Co. (4th Circuit)

FMLA does not give employee who takes protected leave an absolute right to be restored to the same position employee held when leave commenced.

Facts: Yashenko was employed in a management position in Harrah's Casino North Carolina Casino operations. In 2003, Yashenko sought and Harrah's approved more than 11 weeks of FMLA leave relating to heart surgery. During Yashenko's absence, the company informed him that his job was being eliminated in a company reorganization. The company invited Yashenko to apply for the new position being created and sent a job description to him, but Yashenko did not do so. When Yashenko completed his leave, Harrah's fired him. Yashenko sued alleging FMLA violations.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The court pointed out that an employee of FMLA leave has no greater right to reinstatement or the other benefits and conditions of employment than if the employee had been continuously employed during the same period. Thus, an employer can avoid FMLA liability if it can demonstrate that it would not have retained an employee even if he had not been on FMLA leave.

Impact: This case demonstrates that an employee on FMLA leave does not have an absolute entitlement to be returned to his or her job. If that employee would have been terminated, and/or that job would have been eliminated, even absent the leave, the employer can still proceed accordingly.

Other FMLA Decisions:

Harrell v. U.S. Postal Service (7th Circuit)

A collective bargaining agreement may impose stricter return-to-work requirements than the FMLA.

DISABILITY DISCRIMINATION

EEOC v. Watkins Motor Lines (6th Circuit)

Self-imposed morbid obesity is not a protected disability.

Facts: Stephen Grindle, a 400 lb. dock worker, suffered a workplace injury resulting in a lengthy leave of absence. When he sought to return to work, the company's doctor refused to release him, claiming he was too obese to safely perform his job. Ultimately, he was terminated for failure to return to work within the timeframe provided for in the company policy. Grindle filed a charge on the ADA, claiming that the company took action against him because he was regarded as disabled on account of his obesity. The EEOC brought suit on his behalf.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. The court made the following points:

- Obesity must be "related to a physiological disorder" in order to fall within the protections of the ADA. A condition caused by behavior only therefore would not be covered by the ADA.

- The court noted that the ADA does not cover "all abnormal physical characteristics," using examples such as individuals who are "extremely tall" or "grossly short."

Impact: The decision could be reviewed as an effort to inject issues of personal responsibility in the ADA mix by suggesting that morbidly obese individuals who cause their condition by overeating are not afforded the same protections as others whose condition is caused by some underlying physiological problem.

Yindee v. CCH, Inc. (7th Circuit)

Use of performance improvement plan does not require the employer to continue the poor performer's employment during the entire time designated for the PIP.

A plaintiff's disability will only support an ADA claim where it has some connection to the challenged employment action.

Facts: Yindee was terminated from her three-year employment as a programmer analyst. During a considerable part of her tenure, she was out of work on leave because of cancer and other ailments. Yindee had endometrial carcinoma which led to a hysterectomy. She also suffered from vertigo and related problems such as frequent headaches. The employer claimed that it tried to accommodate Yindee and that the discharge decision stemmed from a decline in her work performance. It placed Yindee on a performance improvement plan, but terminated her prior to the end of the designated PIP period. Yindee sued under the ADA.

Trial Court Disposition: The District judge granted summary judgment for the employer and dismissed the case.

Appellate Ruling: The Appellate Court concluded that the trial court analysis was incorrect on two grounds, but it affirmed the summary dismissal anyway. The Appellate Court made the following points:

- The price of curing Yindee's cancer was sterility resulting from the hysterectomy and sterility is a disability under the ADA. However, even though infertility is a disability, there was no evidence in the record that the employer held it against her. The hysterectomy was performed in 2000, and the events complained of did not begin until 2002. Yindee did not ask for any time off or any other accommodation so that she could adopt children or otherwise address her sterility.

- The court held that there was no evidence to support a finding that her vertigo is an aspect of a genuine disability, and the court concluded that the vertigo was just a symptom without a known cause.

- As to the retaliation theory, the court applied *Burlington* but affirmed the dismissal because the employer's explanation of its decision -- Yindee's poor work performance, -- stood uncontradicted.

- The termination prior to the end of the PIP period did not support a claim of discrimination or retaliation.

Impact: This case demonstrates that cured cancer and vertigo are not ADA-protected disabilities, but sterility is. Also, even after *Burlington*, employers can successfully defend retaliation claims by continuing to show that the stated reasons for discharge are not false. In this case, Yindee was permitted to telecommute but was terminated prior to the end of her performance improvement plan which was implemented to address her declining performance. Also, the court noted that the law does not give employees a right to serve out a minimum time on probation.

Timmons v. General Motors (7th Circuit)

Text-book example of accommodating a disability yet protecting the employer's business interests and dealing with underperformance.

Facts: Dock Timmons was hired by GM in 1974 and diagnosed with multiple sclerosis in 1992. GM promoted Timmons in 1999 to Customer Activities Manager, a job that required extensive driving and travel. By 2002, Timmons' MS had begun to hamper his ability to walk. GM accommodated him by providing him with a motorized scooter, home office equipment, and taking other measures. Additionally, on several occasions in 2002 and 2003, Timmons' declined GM's offers of other jobs of equal stature and pay that required less travel than his customer activities manager position. Accordingly to GM, Timmons' performance continued to deteriorate. GM managers and other field employees expressed uncertainty about Timmons' ability to drive safely, a concern that was heighten when Timmons lost control of a scooter and crashed it in the parking lot. Employees also reported that Timmons missed several dealer meetings and failed to return phone calls, and Timmons' supervisor learned that Timmons had an assistant drive him to an out-of-state business meeting. The supervisor suggested that Timmons take a disability retirement. GM arranged for Timmons to be examined by an occupational physician, and the physician informed GM that Timmons had vision problems as well as limited use of his left arm, limited ability to turn his neck and poor insight into the physically limiting effects of his condition. Deciding that it had no positions it could offer Timmons that did not involve driving and travel, GM placed him on disability leave. Timmons received disability payments equal to this salary and remained employed by GM but was not allowed to return to work. He filed a lawsuit against GM alleging that the company's action placing him on leave violated the ADA.

Trial Court Disposition: The District Court granted summary judgment to GM and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. The court agreed with Timmons that he was in fact placed on disability leave because of his disability, but ruled that this fact alone does not establish an ADA violation (otherwise employers who offer disability benefits would be liable every time an employee goes on disability leave). The court rejected GM's arguments that being placed on disability leave with full pay could not be "an adverse employment action," commenting that "money is not the exclusive measure of adverse employment actions." However, the court affirmed the dismissal of the case because Timmons failed to produce evidence that GM placed him on leave for discriminatory reasons rather than because of job-related concerns. The court stated that GM had business concerns about the manager's driving ability that justified GM's requirement that Timmons be examined by an occupational specialist, and GM's reliance on the physician's recommendation that Timmons could not safely drive a car was nondiscriminatory.

Impact: This case reaffirms that employers may require employees to submit to fitness for duty examinations where the employers have a legitimate concern about whether the employee can

safely perform required aspects of the job. If an occupational medical specialist confirms that an employee cannot perform the job safely, the employer may be able to justify removing the employee from that position and perhaps placing the employee on leave.

Stoughton Trailers, Inc. v. Labor and Ind. Review Comm. (Wis. App. Court)

"Clemency and forbearance" from strict application of an attendance police may be required as a reasonable accommodation that must be considered prior to termination.

Facts: Stoughton Trailers employed Douglas Geen for approximately eight years until Stoughton fired Geen in January, 1997 for exceeding the allowed number of absences under its self described "no fault" attendance policy. The policy is a point-based system under which the employees are assigned "occurrences" for absences, subject to limited exceptions including "absences meeting state and federal family and medical leave laws." At the time he was fired, by Stoughton's count Geen had accrued 6.5 occurrences. The occurrence that raised his point tally from 5.5 to 6.5, putting him over the allowed limit, was related to the period of time from January 24 (a Friday) through January 28, 1997 (a Tuesday), when Geen was absent due to migraine headaches. When Geen returned to work on January 29, Stoughton's HR administrator gave Geen a standard letter reminding Geen that he was required to bring a release-for-work slip; that to have his absence qualify as a medical leave, Geen needed to provide medical documentation from his physician detailing a reason for his absence and an expected date of return; and that to qualify for FMLA leave, he needed to complete a Department of Labor Medical Certification form. The letter instructed Geen to submit the documentation within 15 calendar days of the letter's date, the minimum time the FMLA requires employers to give employees to submit medical certification.

On January 30, Geen gave Stoughton a note from the physician who treated him stating that he was being evaluated for migraines. Stoughton reminded Geen that he needed an additional note from the doctor stating that he could return to work without restrictions. Geen returned on January 31 with a note indicating he was released for work without restrictions. The release also indicated Geen had been unable to work on January 27 and 28. However, the note did not address Geen's absence or work capabilities on January 24. Stoughton informed Geen that he was fired because his medical condition did not excuse him for January 24, causing him to accrue an occurrence for that date and putting his total occurrences at 6.5. At the time he was fired, Geen indicated that his doctor needed additional time to evaluate him before he could bring in more medical documentation.

Department of Workforce Development proceeding: Geen filed a discrimination complaint with DWD. The administrative law judge ruled that Geen had a disability as defined by the WFEA, that Geen's employment was terminated in part because of that disability, and that Stoughton Trailers failed to reasonably accommodate Geen's disability. LIRC reversed the

decision and Geen appealed to the Circuit Court, which reversed LIRC. Stoughton appealed to the Appellate Court which remanded the case to LIRC for further findings.

On remand, LIRC concluded that Stoughton fired Geen in part because of his absences caused by his disability and violation of the WFEA. LIRC also concluded that Stoughton failed to reasonably accommodate Geen's disability by failing to give him the time required by the FMLA to certify and document his medical condition before it fired him. LIRC ordered Stoughton to offer Geen reinstatement with back benefits and awarded him back pay and reasonable and actual attorneys' fees. The Circuit Court affirmed the decision and Stoughton appealed.

Appellate Ruling: The Appellate Court affirmed LIRC's decision. It made the following points:

- An employer may continue to apply its no-fault attendance policy as long as the policy does not result in an adverse employment action taken because of an employee's disability and as long as the policy is otherwise in compliance with the law."

- Because Geen was terminated in part because of absences due to his disability (migraine headaches) and in part because of other absences, the mix motive test was applied and the conclusion that the complainant would not have terminated but for absences related to the migraine upholds LIRC's determination that the employee violated the WFEA.

- "Clemency and forbearance" as a possible reasonably accommodation must be considered prior to termination, especially when the employer knows that the employee is receiving medical treatment for his/her disability.

- Stoughton should have extended Geen the reasonable accommodation of "clemency and forbearance" temporarily tolerating the absences which were caused by his disability, while a medical intervention which had already begun was allowed to take its course and to potentially resolve the problem of those absences."

Impact: The decision is likely to make it more difficult for Wisconsin employers to control employee absences if those absences are caused by or related to an employee's disability. Employers have to consider whether clemency and forbearance should be applied rather than a straightforward application of a no-fault attendance policy.

AGE DISCRIMINATION

Meacham v. Knolls Atomic Power Lab (2nd Circuit)

Employers have more flexibility in RIF decisions under the "reasonableness" test, including the use of subjective decision-making factors.

Facts: Twenty-two former employees of a company (Knolls) that managed and operated a research and development facility owned by the United States under contract with the Department of Energy brought suit under the ADEA against Knolls after they lost their jobs as part of an involuntary reduction in force.

Trial Court Disposition: The case went to trial and the 22 plaintiffs were awarded over $5 million in damages.

Appellate Court Proceedings: In 2004, the Appellate Court affirmed the judgment. It concluded that the employees met their burden of showing that the employer's reliance on subjective assessments in deciding which workers to cut in the RIF was not a "business necessity" and that a suitable alternative having a less adverse affect on age-protected workers was available. The United States Supreme Court remanded the case for further consideration in light of its decision in *Smith v. Jackson, Mississippi* (2005).

Appellate Ruling: On remand, the Appellate Court determined that the "business necessity" test is no longer part of the equation in ADEA disparate impact cases. Rather, the appropriate test is for "reasonableness," such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." Plaintiffs are required to carry the burden to prove that an employer's proffer business justification for its challenged policy was not "reasonable." The court stated:

> Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.

Impact: This decision provides a road map for reduction-in-force criteria and demonstrates that subjective grounds can be legitimate and nondiscriminatory where they are reasonably related to the business objectives.

Minor v. Centocor, Inc. (7th Circuit)

Evidence of more work requirements imposed on plaintiff not sufficient to show discrimination (in the absence of appropriate comparisons to similarly-situated co-workers outside of the protected class who get more favorable treatment).

Facts: Minor was a sales representative for Centocor, a company that sold medical devices. Before Siciliano became her supervisor, Minor spent between 50-55 hours weekly visiting her customer accounts. Siciliano required her to visit all of her accounts twice per month and this lead to 70-90 work weeks, much of which was driving time (Minor chose not to take flights). Minor also claimed that she was bombarded by email messages from Siciliano and subjected to criticism and close supervision. After two months of this supervision, Minor experienced atrial fibrillation and depression and stopped working in October 2001. She claimed that her medical problems stem from her supervisor's demands, and that those demands were the result of both age and sex discrimination.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal. It determined that extra work can be a material difference in the terms and conditions of employment and therefore potentially support a discrimination claim, but also concluded that Minor failed to show that the employer required women or older workers to work longer hours than men or younger workers in order to receive the same pay. Minor's complaint about her work requirements became irrelevant in the absence of any evidence showing that similarly-situated employees were not subjected to the same work requirements.

Impact: This is another case in which the court demonstrates its respect for the scope of its jurisdiction and employers' discretion in running their own businesses. "Employers may run (or ruin) their businesses as they please, provided that they avoid discrimination on grounds forbidden by federal law."

Merillat v. Metal Spinners, Inc. (7th Circuit)

Familiar discrimination case: Plaintiff loses for lack of proof that the employer's reasons for discharge were false, and for inability to identify a truly "similarly-situated" person who was outside of plaintiff's protected class and received more favorable treatment.

Facts: Merillat, 49, was a purchasing manager in MSI's materials department. The company created a new VP Procurement position, and hired a 38-year old, who was to supervise Merillat but was trained, in part, by Merillat. Soon thereafter, MSI eliminated Merillat's position in a RIF, but retained the VP. Merillat sued for age discrimination.

Trial Court Disposition: The District Court granted the employer's motion for summary judgment and dismissed the case.

Appellate Ruling: The Appellate Court affirmed the summary dismissal, concluding that Merillat failed to produce evidence showing that the employer's stated reason for her termination—a new computer system that could perform many of her duties, and the greater education and experience of the younger, male employee who was retained—were pretextual.

Impact: Continuing a theme in discrimination cases dating back several years, this case demonstrates the challenge presented to a plaintiff to identify a "similarly-situated" employee who received more favorable treatment.

Burlison v. McDonalds Corp. (11th Circuit)

OWPBA notice requirements in a RIF determined by the structure of the RIF—employers need only provide data relating to those in the universe within which the particular person was considered.

Facts: Five employees of McDonalds whose employment was terminated in conjunction with a nation-wide restructuring at McDonalds each was over 40 years old and most had worked for McDonalds for over 15 years. McDonalds offered severance packages to terminated employees who signed releases waiving any claims that they might have against the company. Each of the plaintiffs signed the releases, but about two years later filed an age discrimination lawsuit. They conceded that they had signed the releases but argued that the releases failed to comply with the OWBPA's information or requirements and were therefore void.

McDonalds had reduced the number of its U.S. divisions from five to three, its U.S. regions from 38 to 21, and its U.S. workforce by about 500 employees, all as part of a nation-wide restructuring. For example, the Atlanta, Nashville and Greenville regions were merged into one larger Atlanta region. The new regional manager and other senior managers in the Atlanta region eventually discharged 66 of the 208 employees in that region, including the plaintiffs. Each employee was offered a severance package in exchange for signing a release. McDonalds provided region-specific information with the releases, including the job titles and ages of the 208 employees in those 3 former regions, the identify of the employees selected for discharge, and the identify of employees not selected for discharge. Plaintiffs argued that the releases they signed were void because McDonalds provided information only for the 208 regional employees considered for discharge, not for all discharged employees nationwide.

Trial Court Disposition: The District Court agreed with the plaintiffs and ruled that the releases were insufficient, and that plaintiffs were permitted to sue for age discrimination.

Appellate Ruling: The Appellate Court reversed the decision. It concluded that, since the plaintiffs were chosen for termination from among the 208 employees in the Atlanta, Nashville and Greenville regions, and they were considered for retained employment only in the new Atlanta region, those 208 employees constituted the appropriate decision unit for purposes of the OWBPA disclosures.

Impact: The decision does not mean that data on terminated employees nationwide will never be required from employers—but such data will only be required when the decisions at issue regarding discharge or retention were truly national and scope. This case provides some blueprint for national employers who implement reductions in force.

FAIR LABOR STANDARDS ACT

Sehie v. City of Aurora (7th Circuit)

Time spent in therapy sessions (and traveling to and from session) was compensable as "hours worked" because the therapy was required by the employer.

Facts: Kari Sehie was an emergency dispatcher for the City of Aurora. She became very angry when required to work a second shift to cover for an absent coworker and abruptly left work. She spoke with her therapist and took medication for stress, and reported the absence as a work-related injury. Aurora required Sehie to submit to a fitness for duty evaluation as a result of her leaving work. The physician recommended as a condition of her continued employment that she attend weekly psychotherapy sessions for six months. Sehie requested to see her own therapist, but the City refused the request between February 2001 and June 2001, Sehie attended 16 therapy sessions with the therapist required by the City, spending an hour at each session and two hours traveling back and forth by car to each session. Sehie subsequently sue Aurora under the FLSA, claiming that Aurora should have paid for the times she spent attending and commuting back and forth to the mandatory counseling sessions, and seeking overtime pay because this time was beyond her normal 40 hour work week.

Trial Court Disposition: The District Court granted Sehie's motion for summary judgment and held the employer liable for back wages.

Appellate Ruling: The Appellate Court affirmed the ruling in favor of Sehie. It concluded that the counseling sessions were necessarily and primarily for the benefit of the employer. It noted that his followed from the general rule that an employee must be paid for all time spent in physical or mental exertion, whether burdensome or not, controlled and required by the employer, and pursued necessarily and primarily for the benefit of the employer or his business. The court rejected the city's arguments that the medical treatment it mandated was primarily and necessarily for the benefit of the employee, mainly because the city made attendance at the sessions a mandatory condition of Sehie's continued employment. Furthermore, the purpose of the required counseling sessions was to enable Sehie to perform her job duties and relate to coworkers more effectively.

Impact: Any activity required by the employer as a condition of employment will almost always be compensable time, even if it does not specifically involve work duties and seems to have a

benefit for the employee. Remember that all hours that an employee is required to give his or her employer are "hours worked," even if they are spent in idleness.

ERISA

Sereboff v. Mid Atlantic Medical Services, Inc. (U.S. Supreme Court)

Health plan's claim against plan participant to enforce subrogation clause was permissible as a claim for "equitable" relief. So, an ERISA plan can enforce its reimbursement provisions.

Cooper v. IBM Personal Pension Plan (7th Circuit)

IBM's amendment of its traditional defined benefit pension plan to a cash balance plan did not discriminate against older workers because the terms of the cash balance plan were age-neutral, even if it permitted younger workers to enjoy "the time value of money."

Northcott v. GM Hourly-Rate Employees Pension Plan (7th Circuit)

GM pension plan was permitted to enforce its provision allowing it to reduce benefits paid to a plan participant who received social security disability benefits, and requiring a participant to repay the plan for any overpaid benefits in this regard.

Note: Employers should consider including extra-judicial self-help remedies for recouping overpayments in their ERISA plans. Those who do will have means for recovering overpayments without needing to resort to litigation, without the risk of an uncollectible judgment at the end of litigation.

NATIONAL LABOR RELATIONS ACT

Oakwood Healthcare (NLRB)

After remand from the US Supreme Court, NLRB defined guidelines for determining who is a supervisor under the NLRA and therefore is excluded from the bargaining unit.

Board Ruling: The analysis of the 12 factors set forth in the NLRA for determining supervisor status is a fact-intensive one. The Board's decision explained and refined the analysis required of those 12 factors. For example, with respect to the exercise of "independent judgment," the Board said that to be a supervisor the employee's independent judgment must satisfy a two-

pronged test: 1) it must not be effectively controlled by another authority; and 2) must rise about routine or clerical matters.

Impact: The biggest impact will be felt in the healthcare industry because the case dealt specifically with an analysis of the supervisory status of charge nurses. But the "supervisor" analysis will impact all employers, especially those who face organizing drives or who already are required to bargain with a union, because the decision provides the guidelines for determining who is outside of the bargaining unit (because of status as a supervisor).

Starcon International, Inc. v. NLRB (7th Circuit)

Court affirms that a company that illegally refused to hire union organizers ("salts") (due to their union affiliation) is not required to pay back pay to the salts unless they can prove that they would have in fact accepted and performed the jobs sought if offered.

Endicott Interconnet Technologies, Inc. v. NLRB (D.C. Circuit)

NLRA does not prevent an employer from firing an employee for making public, disparaging comments about the employer and its layoff decisions when those comments are made in circumstances in which it is reasonably likely to cause harm to the company's reputation and reduce its income.

International Brotherhood of Teamsters, Local 492 (UPS) (NLRB)

Board found that the Teamsters committed various unfair labor practices by disciplining certain members who crossed the picket line. It clarified the following rules:

- Employees are not required to be union members, in any state.
- Unions must give a "*Beck*" notice advising employees they can decline to be a union member and may only pay a portion of the overall dues (and they have a right to information identifying expenditures unrelated to collective bargaining).
- Once a member resigns from membership, the union may not discipline or fine the employee. Also, the union cannot discipline or fine members who cross the picket line if the Union failed to provide the "*Beck*" notice.
- A Union cannot require employees to pay dues during periods when there is no collective bargaining agreement in place.