Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management June 2003

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Supreme Court Decision in "Mixed Motive" Case Makes it Easier to Prove Employment Discrimination

When a person brings a lawsuit for sex discrimination under Title VII of the Civil Rights Act of 1964, it is often possible that the employer's decision was motivated by both legitimate and illegitimate reasons. This is known as a "mixed motive" case. Generally speaking, the law is that if the employer's treatment of the plaintiff was motivated both by gender and by lawful reasons, the plaintiff is entitled to damages unless the employer proves that it would have made the same employment decision even if gender had played no role in the decision. In a recent case, the U.S. Supreme Court held that a plaintiff does not have to present "direct evidence" of discrimination in order for this rule to apply. A plaintiff can present direct and/or indirect or "circumstantial evidence," as long as she proves her case "by a preponderance of the evidence". *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 91 FEP Cases 1569 (June 9, 2003).

In this case, Catherine Costa was terminated from her job ostensibly because she got into a fight with a co-worker. And certainly, fighting would be a "legitimate reason" for terminating her employment. Costa, however, claimed in her subsequent lawsuit against the company that there was another "illegitimate reason" for her termination, namely sex discrimination. She claimed that her firing was the culmination of years of unfair treatment, characterized by more stringent discipline imposed on her (i.e., rebukes and suspensions) than those imposed on her male co-workers. However, Costa had no "direct evidence" of this discrimination, such as comments, memoranda, tape recordings, etc. from her supervisors indicating that they made employment decisions based on improper stereotyping of women.

The bottom line is ...

If a plaintiff presents convincing circumstantial evidence that discrimination was one of many factors that led to an employment decision, a jury could find that the employer engaged in unlawful discrimination.

The trial judge in the case instructed the jury that even though Costa did not provide direct evidence of sex discrimination, if she presented convincing circumstantial evidence that it was one of many factors that led to her firing, they could find that her employer engaged in unlawful discrimination. The employer's attorney objected to this instruction citing a number of lower federal court decisions which required plaintiffs to produce "direct evidence" to get such a "mixed-motive" jury instruction.

The U.S. Supreme Court disagreed and held that:

> In order to obtain a [mixed-motive jury instruction], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."

A "preponderance of the evidence" simply refers to proof which leads a judge or jury (whichever determines the facts in a case) that a particular fact is more probable than not.

If you have any questions about this case, please call Mike Dodd at 315-437-7600.

The Important Difference Between the ADA and State Disability Discrimination Laws

Did you know that even if an employee is not "disabled" – and therefore, not protected – under the Americans with Disabilities ("ADA"), he/she may still be considered "disabled" and protected under state anti-discrimination laws? This occurs because the definition of the term "disability" under the two laws may differ.

In New York, for example, the definition of "disability" is much broader than the ADA definition. Under the ADA, an employee must suffer from a "physical or mental impairment" that "substantially limits a major life activity." Under New York State Executive Law, "disability" is defined as "a physical, mental or medical impairment ... which prevents the exercise of a normal bodily function **or is demonstrable by medically accepted clinical or laboratory diagnostic techniques** ..." New York's highest court has explained the breadth of New York's definition as follows:

> The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive Law §§ 292[20] [now 21]).
>
> Fairly read, the statute covers a range of conditions ***varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future.*** Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects.

State Division of Human Rights v. Xerox Corp., 65 N.Y.2d 213 at 218-19 (1985) (emphasis added).

For employers, one of the more troublesome results of this definition discrepancy is the treatment of employees' temporary disabilities. Under the ADA, an employee with a broken leg is not considered disabled because the impairment is of a temporary duration and the condition is most likely not severe. That same broken leg would be considered a "disability" under New York Executive Law (also known as the "Human Rights Law"). The regulations which interpret and implement the Law provide that:

> A current employee experiencing a temporary disability is protected by the Human Rights Law where the individual will be able to satisfactorily perform the duties of the job after a reasonable accommodation in the form of a reasonable time for recovery.

This means that the Human Rights Law requires employers to accommodate temporary disabilities in the areas of modified work schedules, reassignment to an available position or available light duty, or adjustments to work schedules for recovery. The employer's past practice, pre-existing policies regarding leave time and/or light duty, specific workplace needs, the size and flexibility of the relevant workforce, and the employee's overall attendance record will be important factors in determining what is a "reasonable accommodation" in this context.

The bottom line is ...

State disability discrimination laws are often broader than the ADA, thereby requiring employers to make reasonable accommodations for medical conditions which are not covered by the ADA.

New Ways to Check Work Authorization Application Status

If you would like to check the status of a non-U.S. citizen employee's or applicant's application for work authorization, the Bureau of Citizenship and Immigration Services ("BCIS" formerly the Immigration and Naturalization Service or "INS") has two new methods available: a new website and a new 800 number. BCIS recently announced the opening of its "Case Status Online" website (https://egov.immigration.gov/graphics/cris/jsps/index.jsp?textFlag=N) which allows you to check the status of a pending case over the internet. BCIS also recently established a toll-free telephone number (1-800-375-5283) for the same purpose. Even if the website is used to get case status, however, it is recommended that the applicant call the toll-free number if he/she moves while the application is pending, or if they do not hear from BCIS within the processing time projected on their receipt notice.

If you have any questions or need help with an employee's petition, please contact Donald Budmen at 315-437-7600.

Remedial Action to Take When Workplace Harassment is Discovered

Excerpted from "Preventing Workplace Harassment." A book available on the firm's website www.ferrarafirm.com.

"Remedial Action" is a term referring to an employer's legal obligation to not only stop harassing conduct, but to take reasonable steps to correct the damage such conduct causes. Even when a complaint of sexual harassment can only be partially substantiated, corrective action is appropriate. Factors determining the level of remedial action necessary include:

- The severity;
- Frequency and pervasiveness of the alleged conduct;
- Prior complaints by the employee; and
- Prior complaints against the alleged harasser.

Remedial action can include some or all of the following:

- Reminding the employees of an employer's anti-harassment policy;
- Redistributing a written copy of the policy;
- Holding seminars to re-educate employees and supervisors;
- Continued monitoring of situations complained of;
- Counseling employees;
- Suspending, discharging or transferring employees;
- Reversing personnel decisions tainted by harassment; and
- Any other appropriate action.

Employers must be careful that any remedial action taken does not somehow compound the effect of discrimination on the victim, or appear as retaliation for their registering the complaint.

Even if a claim of discrimination cannot be substantiated, corrective action should be taken for any "questionable" conduct uncovered. This will evidence the employer's concern and desire to treat all complaints of harassment seriously. The alleged victim of discrimination should also be given the opportunity (but not compelled) to transfer to another position.

The employer should continue to monitor any situation complained of for further developments, and contact the parties involved so as to uncover and respond quickly to any further complaints of harassment.

As a preventive measure, the employer should provide periodic instruction for all supervisory personnel on the subject of sexual harassment. This instruction should provide a detailed explanation of prohibited forms of sexual harassment, instruction on the appropriate response in the event of employee complaints, and instruction on the necessity of properly documenting and reporting all complaints of harassment, no matter how trivial.

Remember to Avoid Reprisal

All individuals have a right to report sexual harassment or discrimination without fear of reprisal. In fact, retaliation of any sort for complaining about sexual harassment or participating in the investigation or prosecution of such a case, is considered a form of unlawful harassment as well. Acts of reprisal should be reported *immediately.*

Reprisal occurs if someone threatens you or your career because you filed a complaint or pursued an issue with management and/or a governmental agency. It could include negative performance ratings, letters of counseling, or reprimand.

Sometimes reprisal is difficult to recognize. It could include withholding training, denying opportunities to compete for awards and recognition, or job assignments designed to limit career progression; for example, "diluting" an individual's performance report, or not considering them for promotion.

Remember that acts of reprisal are illegal. It not only affects the recipient, but can spread rapidly throughout the Company. Reprisal or retaliation against an individual for complaining destroys faith in management and can damage the human relations climate. Reprisal also jeopardizes Company effectiveness, morale, and cohesion.

Actions such as co-workers making jokes or comments, ostracizing recipients or alleged offenders, or posting anonymous notes on the bulletin boards, negatively impact the Company. Management and supervisors must observe behavior, actions, and moods within the unit to be aware of reprisal, and act quickly if it (whether real or perceived) occurs.

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Dealing with Employee Personal Hygiene Problems

Managers are sometimes placed in the difficult position of having to talk to an employee about his/her personal hygiene at work. Problems like body odor, inappropriate personal appearance, etc., can lead to co-worker and customer complaints, and can damage the image and reputation of the company. When addressing these delicate issues with employees, managers should focus on the job-related consequences of the employee's hygiene problems, and avoid making unnecessary references to possible medical or cultural reasons for the problems. A recent case illustrates the proper approach to this situation. *Hannoon v. Fawn Engineering Corp.*, __ F.3d__, (8th Cir., April 14, 2003).

In *Hannoon*, an employee of Middle Eastern descent (Said Hannoon) was confronted by his supervisor about his body odor. The supervisor stated that he had noticed the problem himself and that co-workers had complained. He also stressed that good interpersonal communication was important to Hannoon's position. Sometime later, Hannoon was terminated based on his poor performance. He then sued company alleging race, national origin and disability discrimination (as well as other claims). Hannoon's attorney argued that the supervisor's comments regarding his body odor and the company's failure to refer him to the medical assistance program "represent[ed] deviations from standard company policy and support an inference of discrimination."

The federal appellate court disagreed, noting that "because the comments regarding body odor did not suggest any reference to race or national origin, we are unwilling to hold such comments reasonably capable of supporting an inference of discriminatory intent." The court further noted that there was "no evidence that Hannoon's body odor problem was a medical issue rather than merely an issue of personal hygiene." Hannoon also failed to rebut the company's detailed, and well-documented account of his poor performance. Accordingly, the court upheld the dismissal of his discrimination claims.

This case illustrates the importance of focusing on the job-related impact of the employee's poor hygiene as well as maintaining solid documentation as to the employee's performance. ***One word of caution, however; if in the process of discussing personal hygiene problems with an employee, the employee offers a medical or cultural reason for the problem, please contact legal counsel before taking any action with respect to that employee.***

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