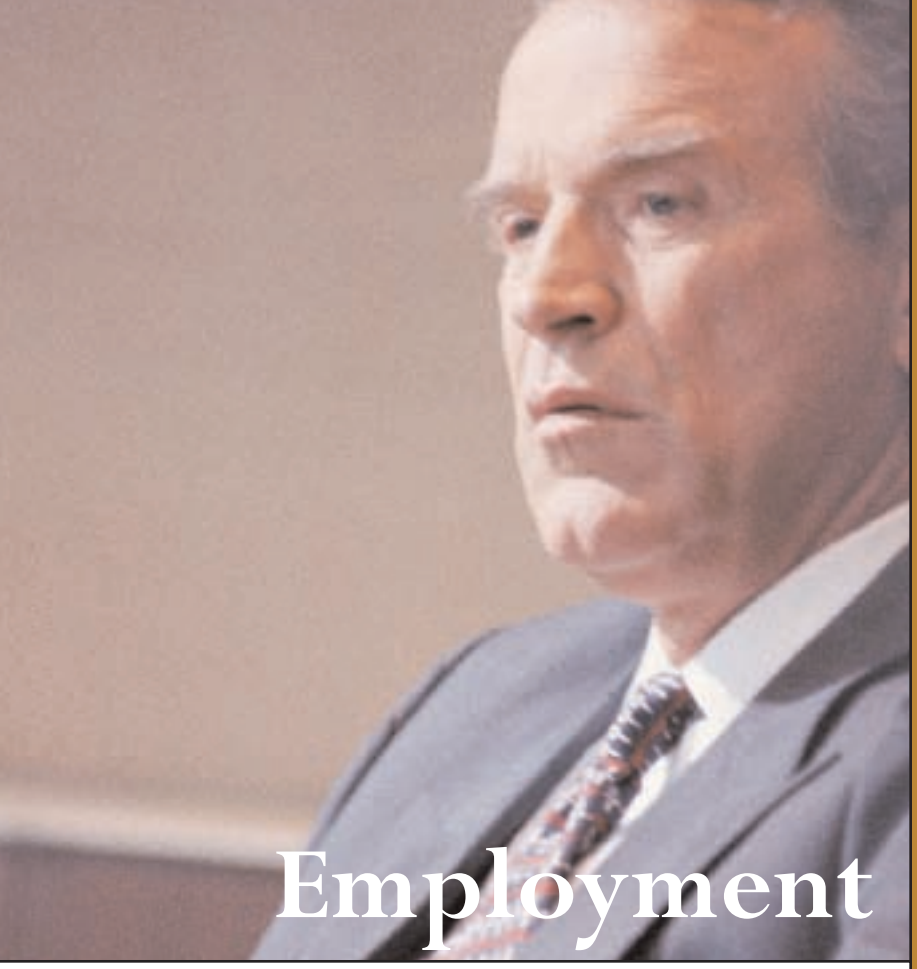
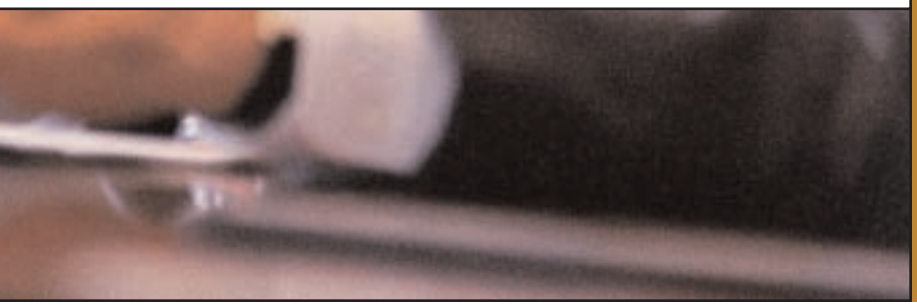


Employment Law Briefing

Insights on Legal Issues in the Workplace



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INSIDE ...

Same-actor defense creates higher evidentiary burden for plaintiffs

The employer in this case involving national-origin discrimination was saved by the same-actor defense. Let's take a look at what that is and how the Ninth Circuit decided *Coghlan v. American Seafoods*.

Hired as master

A fishing company was a subsidiary of a Norwegian corporation that operated fishing vessels in Pacific Northwest and Alaskan waters. The subsidiary became American-owned in 1998 as required by the American Fisheries Act, but mainly native Norwegians continued to manage it.

The company hired the American-born plaintiff and assigned him as master (top position) of the *Victoria Ann* fishing boat. A year later, the company took the boat out of service and laid off many masters, mates (second positions) and other crewmembers but retained the plaintiff and made him master of the *Katie Ann*. The Norwegian-born vice president of operations (VPO) made this decision despite the availability of at least one Norwegian candidate for the post.

Demoted to mate

Two years later, the VPO transferred the plaintiff to another vessel, the *American Dynasty*, and demoted him to mate under the ship's Iceland-born master. But the plaintiff welcomed the demotion because the job allowed him to make more money.

Twice in 2001, when the *Dynasty*'s master was temporarily absent, the VPO selected a Norwegian rather than the plaintiff as relief master, based on the recommendation of the fleet operations manager, who was a native-born American of Filipino ancestry. Later that year, the VPO was dissatisfied with the *Dynasty*'s low production levels and high equipment-replacement expenses for that size boat. The company president, an American, instructed the VPO to get a new master and not to appoint the plaintiff.

After consulting with the fleet operations manager and the H.R. vice president — an American of non-Nordic heritage — the VPO removed the plaintiff from the *Dynasty* and demoted the relief master to the position of mate. The manager's recommendation carried special weight because he had day-to-day contact with the ships and had previously served as the *Dynasty*'s master. The VPO first offered the master position to an American of non-Norwegian descent who declined. The VPO then appointed a man of Norwegian descent to the position and also replaced two other American masters with Norwegian-born men.

At the start of the 2002 fishing season, the VPO offered the plaintiff the position of mate on the *Katie Ann*. He objected because he had previously been the *Katie Ann*'s master and felt he should be reappointed to that position. When the VPO appointed someone else, the plaintiff declined the offer of the mate position and sued in federal court, alleging national-origin discrimination. The trial court granted the company's motion to throw out the suit without a trial because its adverse employment actions were motivated by legitimate nondiscriminatory reasons.

The Ninth Circuit weighs in

First, the Ninth Circuit noted that it had previously held that, when the same actor both hires and fires an employee who alleges unlawful discrimination within a short time, a strong inference arises that no discriminatory action occurred. This is because the employer's initial willingness to hire the employee constitutes strong evidence that the employer was not biased against the protected class to which the employee belongs.

The Ninth Circuit court found that the plaintiff hadn't presented sufficient evidence to overcome the strong inference presented by the same-actor defense.

The court thought its previous holding was relevant to this case, because the VPO who made all the challenged employment decisions was the same man who:

- Appointed the plaintiff as master of the *Katie Ann* in 1998, over at least one viable Norwegian-descended candidate, and
- Selected the plaintiff for the position of mate on the *Dynasty* in 2000, a position that the plaintiff desired and viewed as positive.

Although its previous ruling was phrased in terms of hiring and firing, the court held that its logic also applied to cases such as this, in which the plaintiff was not actually fired but merely offered a less-desirable job. The court found that the plaintiff hadn't presented sufficient evidence to overcome the strong inference presented by the same-actor defense. The VPO had offered him the desirable position of mate on the *Dynasty* only a year before his denial of promotion and had originally offered to replace the plaintiff on the *Dynasty* with another American. The court held that the company had articulated a legitimate reason for its actions, and the plaintiff was unable to show that this reason was a pretext for national-origin discrimination.

So the Ninth Circuit held that a heightened showing is necessary for an employee to prevail against an employer's motion to dismiss without a trial a national-origin discrimination case, because the person who demoted him (the alleged act of discrimination) had previously appointed and promoted him.

What it all means

The plaintiff here may have thought that he had a good case based on the fact that a Norwegian ultimately replaced him, and Norwegians replaced two other Americans around the same time. But the court considered this sample statistically insignificant. This case demonstrates the importance of considering all the facts of a case to determine its viability, rather than just one aspect of it.

Obtaining attorneys' fees for frivolous claims

Employees who win discrimination suits under Title VII, the Age Discrimination in Employment Act or the Americans with Disabilities Act are entitled to collect attorneys' fees. But when employers win these suits, courts are much more hesitant to award attorneys' fees and do so only when the employees' claims are deemed to be frivolous. Courts enforce this higher standard against employers because they believe employers are better able to absorb litigation costs.

Yet when some employee claims prove to be frivolous but others aren't, courts have had difficulty in determining whether to grant attorneys' fees to the employer. Here's how the Eleventh Circuit addressed this issue in *Quintana v. Jenne*.

Filing counterclaims may backfire

Employers sued for employment discrimination often have a strong desire not only to defend against it but also to take the offensive against the plaintiff. Seeking attorneys' fees against plaintiffs for filing frivolous complaints is one way to do this. Another way is to file counterclaims against the plaintiff. But counterclaims may backfire by leading to the additional allegation that the employer unlawfully retaliated.

A case in point is *Harper v. Realmark Corp*. There the plaintiff sued her former employer in federal court in Indiana, alleging sexual harassment under Title VII. The company responded by filing four counterclaims against the plaintiff arising from her employment. The plaintiff then asked the court to allow her to amend her complaint to allege that the counterclaims constituted unlawful retaliation against her for having filed the Title VII complaint.

The trial court allowed the plaintiff to amend her complaint, because she had alleged that the company's counterclaims were frivolous and were "manufactured, designed and filed for the sole purpose of dissuading" her from pursuing her claims. The court reasoned that defending against the counterclaims could cause the plaintiff to incur significant expense and risks and could dissuade her from pursuing her suit.

Discrimination and retaliation

After a Hispanic deputy sheriff in Florida became eligible for promotion, the county suspended him for 10 days because of a citizen complaint that he had used a racial epithet. He was later suspended for 12 days for filing a false log report. Still later, he was convicted of the misdemeanor of recklessly displaying his weapon while on duty. The county then terminated his employment.

The Eleventh Circuit reasoned that allowing employees to assert frivolous claims without any consequences solely because they had also asserted a nonfrivolous claim would undermine Congressional intent.

The employee sued the county, alleging that it had discriminated against him based on his race when it passed over him for promotion to sergeant, despite his having passed a civil-service exam and having been deemed eligible for promotion. He also alleged that the county had retaliated against him for having complained about racial discrimination when he was denied promotion.

Reason not pretextual

The trial court dismissed both claims without a trial. It held that the employee *had not* established a prima facie case of *retaliation* because he hadn't established that he had complained to his employer. The court acknowledged that he *had* established a prima facie case of *discrimination* by alleging he was Hispanic and demonstrating that he had been discharged for reasons that gave rise to an inference of discrimination.

But he had failed to sufficiently show that the employer's legitimate nondiscriminatory reasons for failing to promote him were pretextual. The court granted attorneys' fees to the employer for having to defend against both claims.

Fees for retaliation claim only

On appeal, the Eleventh Circuit modified the lower court's decision and held that the employer was entitled to attorneys' fees only for defending against the retaliation claim. The court ruled that employers are entitled to attorneys' fees only when an employee's claim is deemed frivolous, based on whether:

1. The plaintiff established a prima facie case,
2. The defendant offered to settle, and
3. The trial court dismissed the case before trial or held a full-blown trial on the merits.

The Eleventh Circuit explained that here, the employee's retaliation claim was frivolous because he had failed to establish a prima facie case, the case had been dismissed before trial, and evidence was insufficient as to whether the employer had offered to settle during court-ordered

mediation. But the Eleventh Circuit held that the lower court had improperly granted attorneys' fees for defending against his discrimination claim, because he *had* established a prima facie case of discrimination.

Each claim distinct

The Eleventh Circuit then addressed whether an employer should be entitled to attorneys' fees even though one claim had not been deemed frivolous. The court noted that, in previous decisions with similar facts, courts have held that if both claims were "related" the employer wouldn't be entitled to any attorneys' fees.

But here, the court reasoned that allowing employees to assert frivolous claims without any consequences solely because they had also asserted a nonfrivolous claim would undermine Congressional intent. Although some facts here were common to both claims, each claim had a distinct legal basis. So the Eleventh Circuit sent the case back to the trial court to determine the amount of attorneys' fees incurred by the employer in defending against the retaliation claim.

Beware of unsupported claims

This is an important ruling for employers because it clarifies when they can seek attorneys' fees because an employee has asserted a frivolous claim. Often attorneys for employees assert multiple claims in an effort to intimidate the employer. But with plaintiffs potentially liable for the employer's attorneys' fees, plaintiffs' attorneys may think twice before adding unsupported claims to their complaints.

Does Title VII apply to noncitizens employed by U.S. companies abroad?

That was the question before the D.C. Circuit recently in *Shekoyan v. Sibley International*. The plaintiff was an Armenian who had been granted lawful-permanent-resident status in 1996. A consulting firm headquartered in Washington, D.C., contracted with the U.S. Agency for International Development (USAID) to assist foreign governments in implementing accounting reforms. The firm hired the plaintiff as a training advisor on an accounting-reform project in Tbilisi, Republic of Georgia. The employment contract provided for 21 months of employment with the "hope that this will be the beginning of a longer association." The contract noted

his eligibility for USAID benefits for long-term personnel living in Georgia.

The hoped-for longer association didn't happen, and the firm discharged the plaintiff when its USAID contract expired, citing "a change in staffing requirements." Although he held a Ph.D. in Finance and Economics from the University of Moscow and had worked for Armenia's Ministry of Economics and for the World Bank, the firm didn't consider him for a new position under a new USAID contract because he didn't have a public-accounting degree. The plaintiff sued the firm in federal district court, alleging national-origin discrimination in violation of Title VII.

Discrimination alleged

The plaintiff claimed that his immediate supervisor had mocked his accent, made derogatory comments about people from the former Soviet states and said he wasn't a "real American." The plaintiff alleged that his working relationship with his supervisor deteriorated as a result of the supervisor's discrimination against him based on national origin.

The firm moved to dismiss the claim on the ground that Title VII doesn't apply to non-U.S. citizens working abroad. The trial court granted the motion to dismiss, finding that the plaintiff fell outside the scope of Title VII's protection because he was a permanent resident alien employed extraterritorially.

Protections don't extend

On appeal, the D.C. Circuit found that Title VII protects U.S. citizens working overseas but not aliens working abroad. The plaintiff argued that his status as a lawful permanent resident made him a U.S. national, placing him in statutory limbo between a protected citizen and an excluded alien. He relied on the Immigration and Nationality Act's definition of "alien" to include "any person not a citizen or national of the United States" to support his interpretation that a national shouldn't fall within Title VII's "alien" exclusion for overseas employees.

But the D.C. Circuit found that even if the plaintiff could establish that his lawful-permanent-resident status qualified him as a U.S. national — which was dubious — he still had to overcome the hurdle that Title VII does more than merely exclude from protection an alien employed overseas. Title VII also affirmatively grants protection only to a "citizen of the United States."

Narrow interpretations

The D.C. Circuit noted that Congress is under no obligation to extend the protection of its laws extraterritorially to every person to whom it could do so, and courts have read Title VII's extraterritorial provisions narrowly. So the D.C. Circuit concluded that Title VII didn't extend extraterritorially to any person who was not an American citizen.

The plaintiff also argued that he was not employed "in a foreign country" because the firm had hired and trained him in the United States, made many decisions in the U.S. related to his employment and mailed his termination letter to his Washington residence. But the D.C. Circuit rejected this argument because his employment contract stated his place of employment was "Tbilisi, Republic of Georgia," and classified him as "long-term personnel living in Georgia," and because he lived and worked in Georgia throughout his employment with the firm.

Analyze and determine

This case demonstrates the importance of analyzing a complaint and determining whether it meets the filing conditions. For example, before filing a Title VII suit, a plaintiff must first receive an EEOC right-to-sue letter, and the employer must have at least 15 employees to establish jurisdiction. Sometimes — as in this case — plaintiffs fail to meet these conditions, and an employer can get a suit dismissed at the outset. This case also demonstrates how employment contracts can give an employer an advantage in case of litigation.

Sick-leave policies and the FMLA

Many employers are concerned about employee abuse of sick leave. The City of Philadelphia created a policy to address this issue, and an employee who'd taken leave under the Family and Medical Leave Act (FMLA) sued the city in *Callison v. City of Philadelphia*.

Penalties for violations

The city placed employees suspected of abusing sick leave on a Sick Abuse List. Employees on the list had to obtain medical certification for all sick days taken and were subjected to progressive penalties for later violations. And all employees home on sick leave had to notify the city when they planned to leave home during normal working hours.

An employee took so many sick days owing to anxiety and stress that the city placed him on the list. While he was on normal sick leave, a city investigator called and discovered he wasn't at home. Later, while he was on FMLA leave, the city learned that he wasn't at home on two occasions. When he returned to work, the city suspended him for four days for failing to notify the city that he was not at home on those three occasions.

The Third Circuit further held that an employer has a right to ensure that its employees aren't abusing sick leave.

Interference with rights

The employee sued, alleging that the city interfered with his right to take FMLA leave and that he had a right to be "left alone" while on FMLA leave. The trial court ruled for the city, holding that the FMLA didn't give employees a right to be "left alone" while on leave.

The Third Circuit affirmed, finding no FMLA violation. It found that the employee hadn't disputed that he had been given FMLA leave, and — because he was allowed to return to work after his FMLA leave ended — he hadn't shown that the city retaliated against him for having taken leave. The court found that his failure to notify the city before leaving his house caused his suspension, not having taken FMLA leave.

The Third Circuit further held that an employer has a right to ensure that its employees aren't abusing sick leave. The court held that the city's policy didn't prevent or discourage employees from taking FMLA leave but rather was designed to prevent employees from abusing sick leave. Also, the city applied the policy evenly to those on FMLA leave and those on regular sick leave.

Get it in writing

Thus, an employer may be permitted to enforce provisions of its sick-leave policy while an employee is on FMLA leave. But to be enforceable, employers must put it in writing and make it known to employees before they take FMLA leave.

Furthermore, if a policy violates the FMLA by either reducing the time an employee is entitled to take or adding onerous requirements contrary to the FMLA, the employer will be deemed to have violated the FMLA. So employers are well advised to scrutinize sick-leave policies to make sure they don't conflict with FMLA provisions before implementing a policy against an employee on leave.