Employment Law Briefing

Insights on Legal Issues in the Workplace

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Retaliation claim survives motion to dismiss

Without being sued for retaliatory discharge, can an employer fire an employee who reported that a supervisor sexually harassed a co-worker? That was the question recently before the Ninth Circuit in *Hernandez v. Spacelabs Medical Inc.*

Fear of firing

A female employee confided in a technician that their mutual supervisor was sexually harassing her. She was afraid to report the harassment for fear of being fired. The supervisor saw the two talking and told the technician to go elsewhere. After that, the supervisor became hostile to the technician, wanted to know why he was always talking to the co-worker and angrily told him he was spending too much time talking to her.

The next day, the human-resources manager told the technician that the supervisor was "unhappy" with him. This prompted the technician to report the supervisor's harassment and inform another supervisor of what he had told the HR manager. When he told another co-worker of the situation, a good friend of the supervisor overheard the discussion.

A thickening plot

The HR manager investigated the technician's harassment allegations and confronted the supervisor with them, without revealing to him that the technician was the complaint's source. The company fired the technician three weeks later on the supervisor's recommendation. The discharge letter cited four recent "serious" mistakes that the technician allegedly made, two occurring after the technician complained to the manager. He denied making the errors. Moreover, he showed that even if he had done those things, the company hadn't previously considered such errors to be discharge grounds.

The technician filed suit, alleging retaliation as one of his claims. The trial court dismissed the suit without a trial on the ground that the technician had failed to show that his supervisor knew he had engaged in protected activity.

A pointed finger

The Ninth Circuit disagreed, finding sufficient evidence for a jury to conclude that the supervisor knew that the technician had made the complaint. The court cited evidence that the supervisor saw the technician and the victim frequently talking and that he seemed upset by their conversations. He also could have learned from co-workers the technician had confided in — one of whom was the supervisor's close friend — that the technician was the person who reported the harassment.

Thus, the Ninth Circuit held that the technician could establish a prima facie retaliation case. The court concluded that a jury could find the company's discharge explanation to be pretextual, based on evidence showing:

- *The suspicious timing of the technician's firing,*
- *The supervisor's hostility toward him, and*
- *The insufficiency of the discharge grounds in view of previous company practices.*

Accordingly, the Ninth Circuit reinstated the suit and sent it back to the trial court for trial.

Protected status

This case instructs employers what *not* to do when an employee complains of harassment. Employees achieve protected status when they complain of harassment on behalf of another employee. Discharge of a protected employee must be able to withstand strict scrutiny. Here the company failed to:

- *Apply progressive and consistent discipline to the technician,*
- *Write him up for the two infractions allegedly occurring before he complained about the supervisor,*
- *Warn him contemporaneously regarding the two later alleged mistakes when they occurred, but rather presented them in one fell swoop at his firing,*
- *Prove the technician had clearly committed the mistakes, and*
- *Adopt a consistent disciplinary pattern for employees committing these infractions.*

So the Ninth Circuit reinstated his suit.

What went wrong

The suspicious timing of a long-time employee's discharge — together with his good record, history of promotions and other circumstances — indicated that the supervisor tried to retaliate against the technician. HR also failed at its job, rubber stamping the firing without questioning its timing, the allegations' accuracy or the consistency of the penalty compared to past company practices. HR also failed to raise a warning regarding possible exposure resulting from the firing. At the least, HR should have asked the company's labor and employment attorney to assess the situation.

> ***Employees achieve protected status when they complain of harassment on behalf of another employee.***

Employers need to remember that to avoid and minimize exposure to employment-discrimination litigation, they must engage in progressive discipline with written documentation applied consistently to all employees and not just those targeted by supervisors for discharge.

Act quickly or risk FMLA exposure

Sometimes the exact date that an employee becomes eligible for protection under the Family and Medical Leave Act (FMLA) is critical to the outcome of litigation. That was the case in *Babcock v. BellSouth Advertising*. Let's see how the Fourth Circuit dealt with this issue.

FMLA requirements

Under the FMLA, eligible employees may take up to 12 workweeks of leave each year "because of a serious health condition that makes the employee unable to perform the functions of the position." The statute defines "eligible employee" as an employee who has been employed:

1. *For at least 12 months by the employer, and*
2. *For at least 1,250 hours during the previous 12 months.*

The employer must determine whether an employee has been employed for at least 12 months "as of the date leave commences." This seems clear cut, but *Babcock* presented the court with an unusual fact pattern.

The facts

BellSouth hired an outside sales representative to sell Yellow Pages ads. She began work on June 1, 1999. In April 2000,

Key provisions of the FMLA

The Family and Medical Leave Act (FMLA) applies to employers with 50 or more employees for each working day during each of 20 work weeks in the current or preceding calendar year. Eligible under the act are employees who have been employed for at least 12 months and have worked at least 1,250 hours during the 12 months before requesting leave. Not eligible are employees working at a work site where the employer has fewer than 50 employees and employs fewer than 50 employees within 75 miles of that work site.

The FMLA requires covered employers to grant eligible employees up to 12 weeks of unpaid leave during any 12-month period for these reasons:

- **Birth or adoption of a child or placement of a foster child,**
- **Care of a spouse, child or parent with a serious health condition, or**
- **An employee's own serious health condition that prevents performing the job's functions.**

The act defines a "serious health condition" as an illness, injury, impairment or physical or mental condition that involves 1) inpatient care in a medical institution, or 2) continuous treatment by a health-care provider. Employers may require employees to provide medical certifications of their or a family member's serious health conditions.

When leave is foreseeable, employees must give at least 30 days' notice of their intentions to take leave. When not foreseeable, employees must give as much notice as practical. An employer may require an employee to use accrued vacation, personal, family or sick leave for any part of the 12-week leave period.

An employer may refuse to grant intermittent or reduced leave when requested for birth or placement of a child for adoption or foster care. But an employer must allow an employee intermittent leave or a reduced work schedule when requested to care for a sick family member or for the employee's own serious health condition.

Finally, employers must restore employees who take FMLA leave to their old jobs or to equivalent positions with equivalent pay, benefits, and other employment terms and conditions.

she began to experience various health problems, including headaches, dizziness, sinus trouble, exhaustion and depression. In mid-May, her doctor diagnosed early stages of cancer, and, in light of these medical problems, suggested she take some time off.

Finding she was unable to resume her duties, the sales rep decided on May 18 to take time off. She told a benefits-case manager that she was ill and needed to go on short-term disability. The manager told the sales rep to have her doctor complete and return the required paperwork. The sales rep left work later that day. Four days later, she informed her supervisor that her doctor recommended six weeks of leave. Four days after that, the manager called the sales rep to determine the status of the doctor's paperwork. The doctor submitted the medical certification on May 30, stating that the

sales rep should be able to return to work in six weeks. Thinking that she had been approved for six weeks of leave, the sales rep left town on May 30.

When the sales rep returned home on June 9, she found letters from the manager dated June 2 and 4 stating that BellSouth had approved her leave only until May 27 and that she should return to work no later than June 9 or be subject to discipline, including possible discharge. She called the manager and asked for additional time off, but the manager said she could approve leave only through May 27, based on the information provided by the doctor. The sales rep didn't return to work, and BellSouth, believing that her leave started on May 18 and that she was ineligible for FMLA leave because she hadn't worked for the company for the required 12 months, fired her on June 14. She sued, alleging her firing violated the FMLA. The trial court denied BellSouth's motion for judgment without a trial, and a jury awarded the sales rep $91,913 in lost wages and benefits.

The appeal

On appeal, the Fourth Circuit upheld the trial court's motion denial, finding that the sales rep's leave began on June 9 — after her one-year anniversary with BellSouth — when she asked for unpaid medical leave and didn't return to work. Because BellSouth gave her until June 9 to return, she remained an employee until that date.

Thus, when she asked for additional time off on June 9, she was an eligible employee, having worked for BellSouth for more than 12 months. She was entitled to take 12 weeks of leave each year for her serious health condition. The FMLA barred BellSouth from firing her for taking time off within the statute's limits.

The lesson

Ironically, if BellSouth had fired the sales rep on May 27, instead of giving her until after June 1 to return to work, she would have lacked recourse under the FMLA. In fact, under the FMLA, BellSouth didn't have to allow her to take any time off before June 1.

In this respect, this case falls in the "no good deed goes unpunished" category. It demonstrates the importance of familiarity with the FMLA's technical details in dealing with chronically ill employees. Before firing these employees, closely examine compliance with the FMLA as well as the Americans with Disabilities Act and other relevant statutes, such as workers' compensation statutes.

Ignorance is bliss in age-discrimination suit

Suppose an employer fires an employee without knowing his or her age. Can the employer be held liable for age discrimination? In *Woodman v. WWOR-TV Inc.*, a federal trial court dismissed an employee's age-discrimination suit without a trial because the employer didn't know her age when it decided to fire her.

Was the employee's age a secret?

As the result of a merger, a New York City television station eliminated redundant positions. Management discharged the station's 61-year-old general sales manager without knowing her age and assigned her duties to a sales manager who was 20 years

younger. To receive a $340,953 severance package, she signed a release waiving any employment claims. But she wasn't prevented from alleging age discrimination under the Age Discrimination in Employment Act (ADEA).

The sales manager hadn't kept her age a secret, but those making the decision had never met or spoken to her. Because they weren't aware of her age, the employer asked the court to grant summary judgment — that is, to dismiss her suit without a trial because the material facts were undisputed and the employer was entitled to judgment as a matter of law.

Was knowledge of age essential?

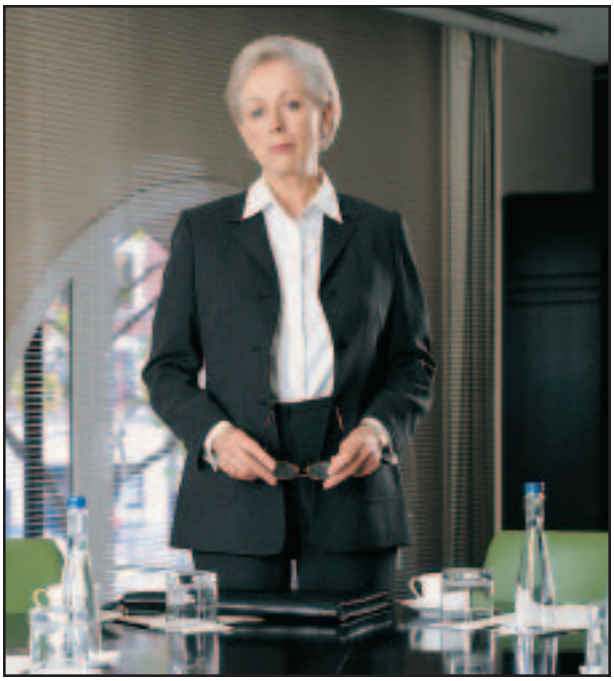
The trial court granted the motion. It noted that in most discrimination cases, an employer's knowledge of protected status can be assumed, based on personal contact or review of personnel records. Nevertheless, a prima facie case is impossible unless an employer knew an employee was protected by the ADEA. Thus, courts have dismissed discrimination suits when plaintiffs failed to show that their employers knew that the plaintiffs were protected by virtue of pregnancy, religion or disabilities.

In one case, a trial court dismissed an age-discrimination suit because the plaintiff had subtracted 10 years from her age when hired. She was 46 instead of 36 when let go. Because of her lie, she couldn't establish that her employer knew of her protected-age status.

The court found that to defeat a summary-judgment motion, a plaintiff must provide affirmative evidence of the employer's knowledge when discharging.

Did conclusory statements suffice?

In *Woodman*, all executives who participated in the decision said they had no knowledge of the sales manager's age when they discharged her. She countered that her age was "well-known in the market and industry." But the court held that such conclusory statements were insufficient to defeat a summary-judgment motion. She argued that both her replacement and the general counsel were aware of her age, but



neither participated in the discharge decision or told participants her age.

The court also rejected her arguments that her personnel files gave her age and that the station's database established that the executives knew her age. Finally, the court rejected her argument that trial was justified because the human-resources head had erroneously testified that the FCC barred review of personnel information before the merger. The court found that to defeat a summary-judgment motion, a plaintiff may not respond with general attacks on a witness' credibility, but rather must provide affirmative evidence of the employer's knowledge when discharging. The human-resources head's error didn't establish that she had reviewed the sales manager's personnel file and knew her age before the discharge.

Could the lawsuit have been avoided?

The court noted that this was an unusual case because the decision makers hadn't previously met the employee and thus didn't know her protected status. This demonstrates the importance of forcing a plaintiff to establish each element of a prima facie case.

Why didn't someone have her sign a valid age-discrimination release? That would have avoided the lawsuit altogether. In a footnote, the judge revealed the answer: Tax attorneys had recommended that the employer offer severance unconditionally so it could realize substantial tax savings.

Legally searching employees' e-mail

The Electronic Communications Privacy Act (ECPA) is probably best known for barring the unauthorized wiretapping of telephone conversations. But Title I also bars intercepting e-mail messages, defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication." Title II of the ECPA creates civil liability for anyone who "intentionally:

1. *Accesses without authorization a facility through which an electronic communication service is provided, or*
2. *Exceeds an authorization to access that facility and thereby obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."*

In *Fraser v. Nationwide Mutual Insurance*, the Third Circuit held that an insurer didn't violate the act when it searched its main file server for an agent's e-mail.

Wrongful termination

Nationwide required its agents to sell its policies exclusively as independent contractors, terminable at will. When the insurer fired the agent, he alleged wrongful termination. He claimed the insurer had fired him in retaliation for blowing the whistle on the insurer's alleged illegal conduct. The insurer argued that it fired the agent for asking two competing companies whether they would be interested in acquiring his and other independent Nationwide insurance agents' policyholders.

The agent claimed he had only drafted — not sent — the letters to get the insurer's attention. When it learned of these letters, it feared that the agent might also be revealing company secrets to its competitors. It searched its main file server to determine if any e-mails to or from the agent showed improper conduct. The agent claimed that this search violated both Title I and Title II of the ECPA.

The insurer argued that an "intercept" barred by Title I can occur only contemporaneously with transmission and that it didn't violate the act because it didn't access the agent's e-mail at the initial transmission time. The trial court dismissed.

Contemporaneous transmission

The Third Circuit affirmed dismissal. The court found that every circuit that has considered the issue has held that an intercept under the ECPA must occur contemporaneously with transmission. In particular, the court relied on a Fifth Circuit decision that found that under the act, the definition of "wire communications" included electronic storage, but the definition of "electronic communication" didn't include storage. Thus, an e-mail in storage is not — by definition — an "electronic communication" under the ECPA.

In affirming dismissal of the Title II claim, the Third Circuit relied on an exception that permits seizure of e-mail authorized "by the person or entity providing a wire or electronic communications service." The court cited precedent holding that Reno, Nev., police could retrieve pager text messages stored on the department's computer system without violating Title II, because the department as the service provider was entitled to access electronically stored communications.

No privacy rights

This case demonstrates the creativity that plaintiffs' lawyers use to find causes of action when they can't make more typical discrimination claims. It also shows the importance of electronic-communications policies that require employees (and independent contractors) to acknowledge they enjoy no privacy rights when using company computers.

The ECPA is a technical statute, and a case's outcome can depend on precise definitions. Employers can easily obtain in advance an employee's written consent to any conduct that the ECPA might otherwise bar absent consent.