



Employment Law Briefing

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Court refuses to dismiss white male's discrimination suit

Just because employees aren't members of a protected class doesn't mean they lack standing to sue for discrimination under Title VII. This was illustrated recently in *Kauffman v. Maxim Healthcare Services*. The question before the court was whether to dismiss an employee's claim that his employer violated Title VII when it fired him for failing to comply with the company's policy of not hiring women or nonwhites.

Promoted and urged to discriminate

A company that provides health care employees hired a recruiter and soon promoted him to account manager and asked him to open and run a new office on Long Island, N.Y. He was awarded a performance-based bonus of stock options and a trip to Cancun, Mexico.

Despite the account manager's exemplary performance, when he hired a woman, two regional managers chastised him and urged him to fire her. They also reminded him of a previous admonition that the company was a "white-male-driven

company." The account manager refused to fire the woman and even recommended promoting her.

The company transferred the account manager 13 months later — without explanation — to its Connecticut office that was an hour-and-a-half from his Long Island home. When he hired another woman, he was again chastised and repeatedly told to fire her. He refused, and she left voluntarily for health reasons. To replace her, he hired an African-American male, whom a regional manager admitted having characterized as "too ghetto." Later, at a third regional manager's insistence, the account manager fired the African-American on trumped-up charges.

Rewarded, then fired

Despite the account manager's refusal to follow the company's illegal hiring practices, two years after his transfer to the Connecticut office, the company rewarded him and his colleagues for good financial performance with a dinner at a resort and casino. But just four months later, the company fired him for poor performance.

The account manager filed a charge with the EEOC, claiming that his firing constituted unlawful discrimination and retaliation because he had hired qualified female and minority applicants. The EEOC found sufficient proof that he was fired in retaliation for his hiring practices, but insufficient evidence of race and sex discrimination. The account manager sued the company, and it moved to dismiss.

The standing question

The court first decided that the white male account manager had standing to sue under Title VII. The court relied on case law holding that to preclude these claims would be inconsistent with the "express Congressional intent behind Title VII."



The court cited *Johnson v. University of Cincinnati*. There, the Sixth Circuit held that “the plaintiff himself need not be a member of a recognized protected class; he need only allege that he was discriminated [against] on the basis of his association with a member of a recognized protected class.”

The court held that a reasonable jury could find that his firing constituted unlawful discrimination.

The retaliation claim

Turning to the retaliation claim, the court noted that, to establish a cause of action for retaliation, the account manager had to demonstrate that:

1. He was engaged in a protected activity,
2. His employer knew about his involvement in the protected activity,
3. His employer took adverse action against him, and
4. His participation in the protected activity was causally connected to his employer’s adverse action.

Agreeing with the EEOC’s determination, the court found sufficient evidence for a reasonable jury to find that the employer had retaliated against the account manager for hiring qualified female and minority applicants. The first reason the court gave was that his hiring of two women and a nonwhite man in contravention of his employer’s unlawful hiring practices — as well as his complaints to his superiors about these unlawful practices — sufficiently established that he was engaged in a protected activity.

The court’s second reason was that, though the employer disputed that the account manager ever complained, the employer was at the very least aware of his hiring practices.

And the court’s final reason was that, before he hired any women, the employer had promoted him twice and rewarded him with stock options and a vacation. But after he hired a woman, the company transferred him to an office far from his home. And after he hired another woman and



a nonwhite, the employer fired him. Given this chain of events, a reasonable jury could find his hiring of minorities was causally connected to his being fired.

The discrimination claim

The court found that, to establish a claim for discrimination, the account manager had to demonstrate that:

1. He was a member of a protected class,
2. He performed his job satisfactorily,
3. He suffered an adverse employment action, and
4. The adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent.

On this claim, the court disagreed with the EEOC, holding that a reasonable jury could find that his firing constituted unlawful discrimination.

A pretext

The employer contended that the account manager’s unsatisfactory performance was the firing reason. But he presented evidence showing that, though his office wasn’t meeting the employer’s performance goals, few, if any, offices consistently met them. In fact, the company hadn’t fired or even disciplined the many other managers whose offices were performing far worse than his.

Furthermore, the company had replaced the account manager with an employee who performed far worse. More important, the court found that the company’s failure to follow its own progressive-discipline policy of notifying him that his performance was inadequate weighed strongly for his argument that the proffered firing reason was simply a pretext for unlawful discrimination and retaliation.

So the court — concluding that a reasonable jury could find that the manager was the victim of unlawful discrimination — denied the motion to dismiss.

What employers can learn

This case demonstrates why employers should carefully vet firing reasons offered as legitimate nondiscriminatory reasons. If these reasons are in fact pretextual, a jury or other fact finder can conclude that unlawful discrimination was the real firing motive. Here, the explanation of poor performance didn’t withstand scrutiny, because the company hadn’t acted against even worse performers and had failed to follow its own progressive-discipline procedures. 🏢

Epileptic heavy-equipment operator entitled to trial on ADA claim

The Americans with Disabilities Act (ADA) requires employers to engage in an interactive process to accommodate workers' disabilities. If an employer doesn't, it can find itself in the same position as the employer in *Dark v. Curry County Road Dept.* The Ninth Circuit recently ruled on the appeal of an employee who was fired after suffering an epileptic seizure while driving a truck on the job.

Endangering others?

The county hired a laborer to operate heavy equipment. He suffered from epilepsy but was generally able to control it with medication and always had warning that a seizure might occur because it was preceded by an "aura."

After 17 years on the job without incident, the worker experienced an aura before leaving for work but told no one. While driving a truck later, he suffered a seizure and briefly fell unconscious. No one was hurt, and an employee in the passenger seat safely stopped the truck.

The county sent the worker to a neurologist, who concluded that his condition could endanger himself or others. The county fired him, based on his inability to perform his essential job functions and because his continued employment threatened others' safety.

The Ninth Circuit found that inconsistent firing explanations can lead to a conclusion that the explanations are a pretext for discrimination.

A nondiscriminatory reason?

The worker sued, alleging that the county's firing him without reasonably accommodating his disability violated the ADA. The trial court dismissed his suit, and he appealed to the Ninth



Circuit. It found that the county first said it fired him for his alleged lack of job fitness but later cited his misconduct in driving a truck knowing he might suffer a seizure. The county contended that the second explanation was the true reason for firing him and was legitimate and nondiscriminatory justification.

The Ninth Circuit found that inconsistent firing explanations can lead to a conclusion that the explanations are a pretext for discrimination. Because the county hadn't disciplined him or other workers involved in other accidents, the court concluded that a jury could find that the reason for his firing was impermissible.

A reasonable accommodation?

Next, the Ninth Circuit considered whether the worker could perform the job's essential function with or without reasonable accommodation. The county contended he operated heavy equipment about 65% of the time. He had to show only that a reasonable accommodation (on its face) would have enabled him to perform his essential job functions.

But the county was affirmatively obliged to engage in an interactive process with him to identify a possible reasonable accommodation that would permit him to retain his job. Because the county admittedly had not, the court had to deny the motion to dismiss unless a reasonable fact finder concluded no reasonable accommodation was available.

The record revealed that the worker had requested accommodation through:

1. A temporary duties change,
2. Reassignment to a new position, or
3. Using accumulated or unpaid sick leave.

The Ninth Circuit held that the first option wasn't viable because the ADA doesn't require an employer to exempt a worker from performing essential functions or to reassign them to other employees. So the county wasn't required to exempt him from the essential duty of operating heavy machinery.

Siding with the worker

But the Ninth Circuit looked more favorably on the second and third options. The county argued that he wasn't qualified for any other positions that were vacant when he was fired. The worker countered that he was qualified for several positions that had opened up after he was fired. Siding with the worker, the court held that, in considering reassignment

as a reasonable accommodation, an employer must consider not only currently available positions but also those that will become available within a reasonable time. So a jury could conclude that this would have been a reasonable accommodation.

Finally, the court held that using accumulated or unpaid sick leave could also constitute a reasonable accommodation if it didn't unduly burden the county. The worker argued that a medication change caused his seizure, and that enough transition time would have enabled him to again perform all his job functions. So the Ninth Circuit held that the county was obliged to consider this option.

Lesson learned

This opinion demonstrates the importance of engaging in an interactive process to determine whether to grant a requested accommodation. Employers can't just reject a request as impractical or too expensive. Rather, employers must suggest possible practical or affordable alternatives. A give and take is essential. 🏢

When different treatment is justified

Reverse-discrimination claim doesn't survive motion to dismiss

In *Yeager v. City Water & Light Plant*, the Eighth Circuit dealt with a male worker's claims that he was the victim of reverse-gender discrimination when he was fired for sexually harassing a female co-worker. He claimed that the co-worker was never disciplined when she engaged in similar behavior. The court's decision hinged on whether the employees were similarly situated.

Inappropriate behavior

While a male city worker was stopped at a stoplight, a female co-worker pulled up behind him. He walked to her car, reached inside her window and pinched her breast. She promptly complained to his boss.



Proving reverse discrimination

The general standard for establishing a Title VII race discrimination claim was originally set forth in *McDonnell Douglas Corp. v. Green*. Under this standard, plaintiffs who allege racial discrimination must show that:

1. They belong to a racial minority,
2. They applied for and were qualified for jobs that employers were seeking to fill,
3. They were rejected despite their qualifications, and
4. After their rejections, the positions remained open, and the employers continued to seek to hire persons with the plaintiffs' qualifications.

In reverse-discrimination cases, the first criterion is changed to the existence of a racially discriminatory environment for the nonminority employee. In these cases, a nonminority employee is allowed to establish a prima facie discrimination case when allegations are made which show that the defendant is the unusual employer who discriminates against the majority.

In *Plannells v. Howard University* and *Turgeon v. Howard University*, the U.S. District Court for the District of Columbia applied this standard to two white professors who successfully argued that the historically black university fired them because of their race. In *Plannells*, the court rejected the university's argument that it was subject to a different legal standard in determining whether it discriminated under Title VII. The court held that the legal standard didn't differ and that Howard University couldn't give preference to blacks in faculty recruitment and retention.

When confronted, the worker smiled and admitted having "accidentally" pinched her breast. The city fired him for violating its policy forbidding sexual harassment. He sued for reverse-gender discrimination, alleging that, when the female co-worker was accused of similar misconduct, the city treated her more leniently.

The trial court ruled for the city on grounds that the facts were undisputed and the city was entitled to judgment as a matter of law.

More lenient treatment?

On appeal to the Eighth Circuit, the male worker argued that the city had "meted out more lenient treatment" to a similarly situated employee. Affidavits from his colleagues claimed that the co-worker had frequently and openly engaged in improper conduct that violated the policy for which she was never disciplined or even reprimanded. Yet the city fired him for a single incident.

The Eighth Circuit rejected his argument on the ground that the worker and the co-worker were not similarly situated. She had promptly filed her complaint, and he had admitted his misconduct. But no one had complained that her actions were

sexually offensive (which she denied) until other employees protested his firing.

The court held that an employer who adopts a policy forbidding sexual harassment may reasonably distinguish between:

1. Sexually oriented conduct that elicits a complaint from an offended co-worker, and
2. Arguably comparable conduct that co-workers nonetheless tolerate without complaint.

The court found that the absence of contemporaneous complaints against the female — and the fact that he had admitted his misconduct — justified the city's treating them as not similarly situated in complying with its policy. So the Eighth Circuit upheld dismissal of his suit.

Creative claims

This case is an example of the creative claims employees think up to challenge firings. The employer may have felt immune to exposure because it promptly and properly disposed of the complaint. Nevertheless, the offender was able to find an attorney willing to handle his case and even take it to the Eighth Circuit. As a result, the employer incurred attorneys' fees to get the case dismissed. 🏠

Can circumstantial evidence sustain a retaliation suit?

That was the question before the Seventh Circuit in *Sylvester v. SOS Children's Villages Illinois*. The court had to decide whether a reasonable jury could find for a plaintiff who claimed she was retaliated against for having complained of sexual harassment — despite the lack of direct evidence.

Sexual harassment alleged

The plaintiff and three other female employees of a company that operated foster-children homes complained in a letter to the board chairman that the CEO had called them “bitches” or a “narcissistic bitch” or had commented on their “sexuality.”

The board of directors decided that the letter was an attempt by two of the signers to stave off being fired for poor performance. The board then fired both women for poor performance.

Later, the chairman, the CEO and a lawyer board member discussed also firing the plaintiff for poor performance — despite a recent positive evaluation. The chairman decided that the CEO would determine whether to fire her based in part on how she reacted when told they had fired the other women.

Fired for insubordination

After the CEO announced the firing, the plaintiff asked, “What guarantee do I have from you that you will stop talking about me in a profane, derogatory and untrue manner?” The CEO denied her allegations and fired her for insubordination.

The plaintiff sued for sexual harassment and retaliation, and the court threw out her suit on grounds that the facts were undisputed and the company was entitled to judgment as a matter of law.

On appeal, the Seventh Circuit found that, if the CEO had indeed fired the plaintiff for being insubordinate, she couldn't claim retaliation for filing a complaint, and no direct evidence showed retaliation. No company officer ever admitted that their firing motive was to retaliate against her.

Circumstantial evidence

Nevertheless, the Seventh Circuit found sufficient circumstantial evidence for a reasonable jury to find retaliation for complaining of sexual harassment. The court questioned:

1. Why the company waited to fire the two undisputedly underperforming women until shortly after they accused the CEO of sexual harassment,



2. Why the meeting attendees brought up the plaintiff's performance despite having no current performance issues with her, and
3. Why the attendees authorized the CEO to fire her — not for poor job performance but for reacting adversely to the firing of two of the CEO's accusers.

In view of this, the court found that a reasonable jury could find that the plaintiff was being set up: The meeting attendees knew that the firings would upset her, and they invited the CEO to interpret her predictable reaction as insubordination.

Based on these three pieces of circumstantial evidence, the Seventh Circuit concluded that a reasonable jury could find that she was fired in retaliation for accusing the CEO of sexual harassment. So the court reinstated her suit.

Avoiding retaliation charges

This case shows that, even if the underlying complaint has no merit, a retaliation charge could be valid. Employers must react carefully to discrimination complaints to avoid being liable for retaliation. 🏠



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DHS Proposed Guidance In Response To SSA "Mismatch" Letters

Since 2002, the Social Security Administration ("SSA") has stepped up its employer notification procedures where the Social Security Number ("SSN") and the employee's name do not match. Receipt of such SSA "mismatch letters" places an employer in a quandary in reconciling such discrepancies without violating any of the prohibited national origin or immigration related inquiries or anti-discrimination provisions. While in many instances individuals that are subject to a mismatch letter in fact do not have valid work authorization, the SSA notice reiterates that employers are not permitted to assume that the individual is either in the country illegally or otherwise lacks work authorization.

Recently, the Department of Homeland Security ("DHS"), which is the Federal Agency now responsible for enforcing all immigration issues, has published a proposed regulation outlining what actions an employer must take after receipt of a mismatch SSA letter. Initially, the employer is required to review its personnel records within 14 days after receipt of the SSA mismatch letter in order to determine whether or not the mismatch was due to a clerical or transcription error. If the employer correctly reported the SSN to SSA, the employer must notify the employee of the discrepancy and instruct the employee that they must resolve the discrepancy with SSA. If the employee is unable to resolve the discrepancy within 60 days, a new I-9 form will have to be completed.

During the 60-day review period, the employee may continue to work (unless they are otherwise informed that the person is not authorized to work in the U.S). If the employee is unable to submit different documentation establishing current work authorization, the employer is required to terminate the individual. Failure to do so would be viewed as "constructive knowledge" that the individual is not authorized to work in the U.S. and would subject the employer and, potentially, any individuals involved in the I-9 process, to both civil and criminal penalties.

SPvG News . . .

Kenneth W. Bean, G. Keith Phoenix, Jonathan Ries and Peter von Gontard have been selected for the 2007 edition of *The Best Lawyers in America*. These lawyers were selected for inclusion in this new edition of *Best Lawyers* based on an exhaustive and rigorous peer-review survey. In addition, *Best Lawyers* also conducted thousands of extensive telephone interviews with leading attorneys throughout its balloting process. **Jeffrey L. Dunn** was selected as one of Missouri's Up and Coming Lawyers for 2006 by *Missouri Lawyers Weekly*. **Teresa D. Bartosiak, Kenneth W. Bean, Michael E. Bub, Warren W. Davis, Michael W. Forster, Scott A. Greenberg, Kevin P. Krueger, Mary Anne Mellow, G. Keith Phoenix, John S. Sandberg, Stephen M. Strum and Reed W. Sugg** have all been named Missouri and Kansas Super Lawyers for 2006.

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