



Employment

Law Briefing

Insights on Legal Issues in the Workplace



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Employer must base reduction in force on reasonable criteria

The issue before the Second Circuit in *Meacham v. Knolls Atomic Power Laboratory* was whether an employer's criteria for reducing its workforce was a reasonable means to reach its legitimate goals.

Flexibility and criticality

The U.S. government funded a private laboratory and set its annual staffing limits. When the government tightened staffing levels for 1996, the lab adopted an involuntary reduction in force (IRIF). Managers of departments that were over budget selected employees to be laid off by:

- Listing all employees in their groups,
- Ranking them between zero and 10 for performance (based on an average of most recent performance appraisals), flexibility and skills criticality, and
- Awarding up to 10 points for company service.

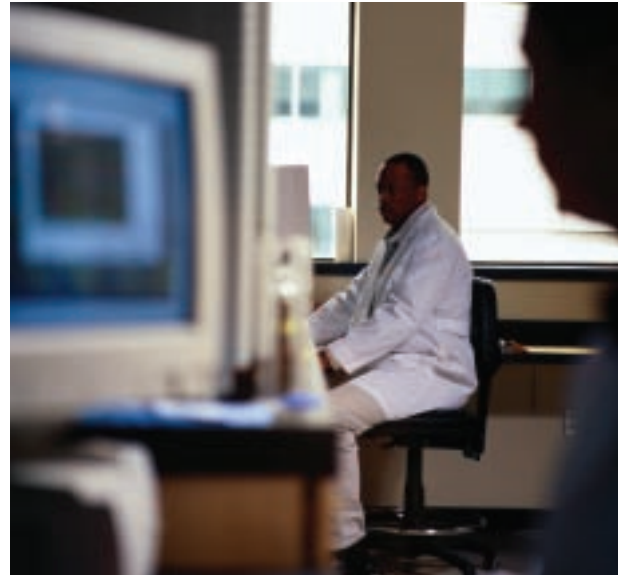
The tests for determining “flexibility” were whether:

1. The lab could use an employee's documented skills in other assignments that would add value to current or future lab work, and
2. An employee could be retrained for other lab assignments.

“Critical skills” were those essential to continuing the lab's work as a whole. And managers had to consider whether a skill was a key technical resource for the program and whether it was readily accessible within the lab or generally available externally.

Disparate treatment?

Managers selected the lowest-ranking employees and determined whether the layoffs disparately affected a protected class of employees. Then a review board assessed the selections “to assure adherence to downsizing principles and minimal impact on the business and employees.” Finally, the lab's general manager and general counsel reviewed the IRIF selections and the impact analyses.



Of the 32 employees selected for layoff, all but two were age 40 or over. They alleged disparate treatment under the Age Discrimination in Employment Act (ADEA) and the New York Human Rights Law.

Business-necessity test

The trial court found that the lab had a legitimate business justification for the IRIF: to reduce its workforce while retaining employees with skills critical to perform the lab's functions. But the court held that the employees had demonstrated that the lab's justification failed the “business necessity” test on two grounds:

1. Heavy reliance on subjective assessments of “criticality” and “flexibility” affected older workers disparately.
2. Despite the lab's having shown a legitimate business justification, alternative means would have achieved the same result at a comparable cost, without disparately affecting older workers.

The Second Circuit affirmed, but the U.S. Supreme Court vacated the decision and sent the suit back to the Second Circuit.

Reasonableness test

The Supreme Court held that an employer sued under the ADEA doesn't have to show a business necessity for its actions. The Court relied on the *Smith v. City of Jackson* ruling that the "business necessity" test doesn't apply in the ADEA context.

The appropriate test is for "reasonableness," under which an employer isn't ADEA liable as long as the challenged employment action that relied on specific nonage factors constituted a reasonable means to legitimate goals.

On remand from the Supreme Court, the Second Circuit held that the lab had a business justification for relying on subjective assessments of criticality and flexibility because these factors ensured that a shrinking workforce could continue the lab's operations. Furthermore, personnel decision-making systems routinely use criticality and flexibility, and they were particularly appropriate here.

In contrast to its decision under the business-necessity test, the Second Circuit held that, while the lab could have achieved its goals through other reasonable ways, the one selected was not unreasonable.

What it all means

The fact that the IRIF resulted in a skewed age distribution of laid-off employees didn't necessarily prove that the lab's business justification for particular IRIF features was not "reasonable." In fact, the court noted that age is often highly correlated with legitimate employment needs.

The Second Circuit conceded that the lab used IRIF factors that could have been better drawn and that it could have better scrutinized the process to guard against skewing the layoff distribution. Nevertheless, the lab set standards for managers to follow when selecting employees for layoff and then monitored implementation.

What's more, the IRIF restricted individual managers' arbitrary decision-making and instituted substantial — though not foolproof — measures to ensure that layoffs satisfied the lab's business needs. Any system that bases employment decisions partly on subjective grounds such as flexibility and criticality may result in outcomes that disproportionately affect older workers.

*Of the 32 employees selected for layoff,
all but two were age 40 or over.*

But at least to the extent that managers in day-to-day supervisory relationships with their employees make the decisions, a system such as this advances business objectives that are usually reasonable.

Use defined criteria

This decision demonstrates the importance of both using defined criteria when laying off employees and analyzing the impact on members of a protected class. Failure to spend the time and effort necessary to make this analysis may result in illusory savings from a reduction in force. [🏠](#)



Court upholds workplace restrictions on religious expression

In *Berry v. Department of Social Services*, the Ninth Circuit considered a social worker's claim that his employer violated Title VII by barring him from discussing religion with his clients, displaying religious items and using a conference room for prayer meetings.

Discussing religion

A county social-services department hired a self-described evangelical Christian whose sincere religious beliefs required him "to share his faith, when appropriate, and to pray with other Christians." He transferred to the employment-services division, where he helped clients transition out of welfare. The division forbade him to discuss religion with clients.

The employee started holding voluntary prayer meetings for employees in a conference room at lunchtime. When denied use of the room, he held the meetings anyway. He just stopped officially scheduling them. Six months later, the director again forbade using the room, saying they could pray in the break room during regular lunch hours or pray outside.

Displaying religious items

Employees were forbidden to display religious items in any area visible to clients. Nevertheless, in December, he placed a Spanish-language Bible on his desk and put up a "Happy Birthday Jesus" sign. When reprimanded, he removed the Bible and sign.

The employee alleged that, when the division barred him from discussing religion with clients and displaying religious items in his cubicle, it failed to accommodate his religious beliefs and thus subjected him to religious discrimination under Title VII. He also claimed that the division's refusal to allow him to use a conference room for prayer meetings amounted to disparate treatment.

Failure to accommodate

To establish his failure-to-accommodate claim, the employee had to show that:

1. He had a bona fide religious belief, the practice of which conflicted with an employment duty,

2. He informed his employer of the belief and conflict, and
3. The employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement.

The court found that the employee met this burden because:

- 1) He was an evangelical Christian who believed in sharing his faith with others, and he was reprimanded when he communicated with clients about religion, 2) He informed the division of his beliefs and the conflict, and 3) The division — at least implicitly — threatened some adverse action by formally instructing him not to pray with or proselytize clients.

But the court found that the division couldn't — without undue hardship — accommodate either his desire to discuss religion with clients (which would risk violating the First Amendment's religion-establishment clause) or his preference for displaying religious items (which would create an inference of division sponsorship).

Disparate treatment

The court also rejected the employee's claim that denying him use of a conference room amounted to disparate treatment. To establish a claim of disparate treatment, he had to show that:

1. He was a member of a protected class,
2. He was qualified for his position,
3. He experienced an adverse employment action, and
4. Similarly situated persons outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action gave rise to an inference of discrimination.

The court found no evidence that similarly situated employees were treated differently. While the division allowed the conference room to be used for business-related social functions (such as employee birthdays), it disallowed nonbusiness-related activities.

Another social organization had held its first meeting in the room, but when the division determined that the group's

activities weren't related to business, it barred the group from using the room — just as it barred the plaintiff's group.

Furthermore, the division's desire to prevent the room from being converted from a nonpublic forum to a public forum was a legitimate, nondiscriminatory reason for barring him from using the room.

Private employers exempt

The Establishment Clause doesn't apply to private employers, and they can't rely on *Berry*. But even employees who satisfy their burden in a failure-to-accommodate case will likely lose if their private employers offered reasonable accommodations — regardless of whether an alternative would pose an undue burden on the employer.

When considering a request for a reasonable accommodation, an employer must carefully balance an employee's right to be

accommodated with clients' and other employees' rights not to be proselytized. An employer that can't show that it offered a reasonable accommodation must prove that accommodation would unduly burden the employer's business interest.

Courts will address, case by case, what constitutes an undue hardship. But they have consistently held that bearing more than a de minimis cost to accommodate will constitute an undue hardship.

Consider all options

This case demonstrates the fine line employers must walk when dealing with the conflict between the desire of employees to express their religious beliefs in the workplace and the rights of other workers or clients not to be proselytized. Employers must carefully consider their options before deciding. [🏠](#)

Prorating FMLA leave

The Third Circuit had to decide whether an employer's bonus program unlawfully interfered with the Family and Medical Leave Act (FMLA).

The bonus program prorated an employee's bonus for time missed from work while on FMLA leave. Here's how the court decided *Sommer v. Vanguard Group*.

Bonus requirements

The employer's bonus program was intended to recognize and reward employees who had contributed to the company's growth and success. To qualify for a bonus, employees had to be employed on:

1. The last calendar day of the year,
2. The date that the bonuses were distributed, and
3. All days in between.

The amount of a qualified employee's bonus depended on job level, length of service and number of hours worked. The company prorated bonuses of employees who worked less than the annual goal of 1,950 hours and excluded time spent on leave.



An employee took an eight-week short-term disability leave under the FMLA. Because of this absence, the company prorated his bonus, reducing it by \$1,788. He alleged that prorating constituted interference with his FMLA rights. The trial court disagreed, because the program was a production bonus for which proration is allowed.

Absence of an occurrence?

The Third Circuit rejected the employee's argument that the program rewarded the absence of an occurrence (such as safety or perfect attendance) that couldn't be prorated. The court found that the program was closer to a bonus program that rewards employee production.

The court explained that production bonuses require employees to exert some positive effort, as distinguished from a bonus for the absence of an occurrence, such as merely complying with the rules. The company intended the program to provide an incentive for employees to contribute to the company's performance.

The company clearly communicated this intention by basing bonuses on hours worked and prorating payouts for every hour under the annual goal. The bonus program explicitly stated that payment was always prorated for leave time — no matter how short. The only exceptions were for vacation and sick time.

Interference with rights?

The employee argued that, even if the program was a production bonus, proration still interfered with his FMLA rights, because the company prorated the bonuses of those who took unpaid forms of FMLA leave, not the bonuses of those who took specified paid leave, such as vacation or sick time.

He contended that this disparate treatment violated the FMLA's mandate that employees taking FMLA leave be afforded "the same consideration" as those who go "on paid or unpaid leave."

But the Third Circuit was unpersuaded. It held that requiring employers to calculate the production bonuses of employees

who took unpaid FMLA leave the same as for those who took paid leave would actually violate the FMLA. The act provides that employees taking leave aren't entitled to "the accrual of any seniority or employment benefits during any period of leave."

Furthermore, the court explained that adopting the employee's interpretation would effectively put FMLA leave on a par with vacation and sick leave, which are almost always treated differently from other forms of leave, such as short- and long-term disability leave.

Employers would then have to choose between paying full production bonuses to employees who took up to 12 weeks off in a 12-month period and prorating the production bonuses of all employees who took accumulated vacation or sick leave. The court reasoned that Congress didn't intend for employers to have to make this choice.

Small stakes into large stakes?

One interesting aspect of this case is that prorating reduced the employee's bonus by only \$1,788. But if he had prevailed, he would have won not only that amount but also much more in attorneys' fees and liquidated damages. The availability of attorneys' fees can transform a small-stakes case into a large-stakes case. [🏠](#)

Hostile work environment found

But does that entitle a victim to damages?

That was the question before the First Circuit in *Azimi v. Jordan's Meats Inc.* The court had to decide whether to uphold a jury's denial of damages even though it had found that the employee had suffered from a hostile work environment due to his race, religion and national origin.

Finding against the employer

Supervisors and co-workers at a meat plant repeatedly abused, harassed and discriminated against an employee who was a Muslim immigrant from Afghanistan. He alleged that this racial, religious and ethnic abuse created a hostile work environment



in violation of Title VII of the 1964 Civil Rights Act and sought compensatory damages (for pain and suffering).

The jury denied compensatory damages, even though it found that he had been subjected to a hostile work environment that

his employer knew or should have known about but failed effectively to stop.

The testimony

The only compensatory-damages testimony was offered by him, his wife and a close friend from his mosque. He testified that the workplace abuse caused him to become “stressed emotionally,” to lose sleep and appetite, and to withdraw socially from his then fiancée (now wife), son and friends.

His wife testified that the hurtful harassment caused sleep problems, stressed their marriage and made him withdraw. His friend testified that he became distressed and sad and didn’t want to do anything.

None of these witnesses testified that he sought medical treatment or counseling, that he suffered any out-of-pocket costs, or that he lost any wages or work time as a result of the harassment. The jury found that he hadn’t suffered any compensable harm.

Argument for damages

On appeal to the First Circuit, the employee argued that the jury was required to award compensatory damages because inherent in a finding of a hostile work environment is a finding that the claimant suffered damages. He based his argument on the fact that, to establish a case of hostile work environment under Title VII, a plaintiff must demonstrate that:

1. The work environment was both objectively and subjectively offensive,
2. A reasonable person would find it hostile or abusive, and
3. The plaintiff in fact perceived it to be offensive.

The employee argued that, because the jury had found his workplace was both objectively and subjectively offensive, a reasonable person would have found it hostile or abusive, and that he himself perceived it to be offensive, so — by inference — the experience injured him.

Injury must be proven

The First Circuit relied on *Carey v. Phipus*, in which the Supreme Court ruled that an injury in civil rights actions shouldn’t be presumed from the violation of a constitutional

Similar facts — different outcome

In *Trivedi v. Cooper*, the jury found that an East-Asian employee’s supervisor had created a hostile work environment by harassing him because of his race or national origin.

To prove emotional distress, the plaintiff introduced no evidence of psychological counseling, physical distress manifestations or other actions consistent with emotional distress. Instead, his only evidence was his testimony that he felt deprived of professional growth, like a woman would feel if her child were lost, and insulted, indignant, unhappy and emotionally upset.

Despite this scant evidence of emotional harm — and based solely on his testimony describing his injuries — the jury awarded him an astonishing \$700,000 in compensatory damages.

The court ultimately reduced the damages to \$50,000. Nevertheless, this case provides a cautionary tale to employers that a jury may award huge compensatory damages even when a plaintiff presents only conclusory statements as evidence of emotional damage.

right, and compensatory damages shouldn’t be awarded for the deprivation of a constitutional right unless an injury was proven.

Based on *Carey*, the First Circuit ruled that a plaintiff claiming injuries allegedly caused by a Title VII violation must prove them to the fact finder, which may reasonably find harassment that didn’t injure the plaintiff in any compensable way.

So the court concluded that, although a reasonable jury could have awarded damages based on the evidence, no plausible argument could be made on these facts that a reasonable jury was *compelled* to award compensatory damages.

Lesson to be learned

Although the employer here was able to avoid paying damages, the lesson for employers is that the jury *could* have awarded compensatory damages even though all the damages testimony came from the plaintiff, his wife and a friend — not from any professional expert witnesses. 🏠



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DOL SOLICITS EMPLOYER INPUT ON FMLA

The Family and Medical Leave Act ("FMLA"), which was passed in 1993 continues to be the source of frustration and confusion by employers. In part, this is driven by the Regulations which were issued by the Department of Labor ("DOL") in 1995. A number of courts, including the U.S. Supreme Court, have refused to enforce several aspects of the DOL Regulations. Nevertheless, the DOL has not, to date, revised the 1995 Regulations, despite repeated suggestions that this was part of the regulatory initiatives during the Bush Administration.

On December 1, 2006, the DOL formally announced that it will solicit comments from the public through February 2, 2007. While soliciting all comments, the DOL specifically identified twelve (12) areas of specific consideration. The most significant issues that the DOL intends to explore include the definition of an "eligible" employee, what constitutes a worksite for coverage considerations, the ability of employers to require the substitution of paid leaves, and the ability of employers to enforce attendance policies. More importantly, the DOL has indicated that it will solicit comments regarding the present regulatory definition of a "serious health condition" as well as employer rights and obligations in determining whether or not a qualifying event has occurred and challenging the employee submitted medical certification. Finally, the DOL has also solicited information concerning the financial impact on employers in general, including the impact of intermittent leave.

Presumably the DOL will use the comments it receives in order to draft proposed regulations to the existing 1995 regulations. Because the present regulations are certainly written from a pro-employee perspective, employers should take advantage of this opportunity to at least comment on issues of concerns from the perspective of an employer attempting to administer and apply the FMLA rights and obligations. Written comments may be mailed or faxed to the DOL in Washington D.C. or may be submitted electronically to whdcomments@dol.gov.

SPvG News . . .

Sandberg, Phoenix & von Gontard, P.C. is pleased to announce that the following members have become shareholders at the firm: **Jonathan T. Barton, Timothy P. Dugan, Jeffrey L. Dunn, Russell L. Makepeace, Sara J. McAvoy, Mark A. Prost, and Todd C. Stanton.**

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- Employment agreements and contracts
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- Lie detectors, cameras and searches
- Discipline and termination of employees; accommodation of disabilities

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