Employment Law Issues

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ADA

Employer’s Policy Against Rehiring Former Employees Terminated for Violation of Misconduct Rules Was Legitimate Reason Not Based on Disability

In Raytheon Co. v. Hernandez, 124 S. Ct. 513 (2003), the respondent Joel Hernandez worked for Hughes Missile Systems for 25 years. On July 11, 1991, the respondent was given a company-administered drug test and tested positive for cocaine. Because the respondent’s behavior violated the petitioner’s workplace conduct rules, the respondent had to resign. The respondent’s separation papers indicated the reason was “discharge for personal conduct.”

More than two years later, the respondent applied to be rehired by the petitioner. The respondent stated on his application the petitioner had employed him previously. The company rejected the respondent’s application because it had a policy against rehiring employees terminated for workplace misconduct.

The respondent filed suit alleging a violation of the Americans With Disabilities Act (ADA). The respondent proceeded through discovery on the theory the company rejected his application because of his record of drug addiction and/or because he was regarded as being a drug addict. In response to the petitioner’s motion for summary judgment, the respondent for the first time argued even if the company did apply a neutral no-rehire policy in his case, the petitioner still violated the ADA because such a policy had a disparate impact. The district court granted the petitioner’s motion for summary judgment with respect to the respondent’s disparate-treatment claim. However, the district court refused to consider the respondent’s disparate-impact claim because the respondent had failed to plead or raise the theory in a timely manner.

The Court of Appeals for the Ninth Circuit agreed with the district court that the respondent had failed to raise his disparate-impact claim in a timely manner. In addressing the respondent’s disparate-treatment claim, the court of appeals proceeded under the burden-shifting approach adopted in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). The Ninth Circuit found with respect to the respondent’s prima facie case of discrimination, there were genuine issues of material fact regarding whether the respondent was qualified for the position for which he sought to be rehired, and whether the reason for the petitioner’s refusal to rehire him was his past record of drug addiction.

In shifting the burden to the petitioner to provide a legitimate, nondiscriminatory reason for its employment action, the petitioner contended it applied a neutral policy against rehiring employees previously terminated for violating workplace conduct rules. The Ninth Circuit found although the no-rehire rule was lawful on its face, the policy was unlawful as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. The Ninth Circuit found the neutral no-rehire policy could never suffice where the employee was terminated for illegal drug use, because such a policy had a disparate impact on recovering drug addicts.
The Supreme Court found the Ninth Circuit improperly applied a disparate-impact analysis to the respondent’s disparate-treatment claim. The Supreme Court held that had the Ninth Circuit correctly applied the disparate-treatment framework, it would have been obliged to conclude a neutral no-rehire policy was, by definition, a legitimate, nondiscriminatory reason under the ADA. As such, the only remaining question would have been whether the respondent could produce sufficient evidence from which a jury could conclude the petitioner’s stated reason for the respondent’s rejection was in fact pretext.

The Supreme Court noted there was a distinction between claims of discrimination based on disparate-treatment and claims of discrimination based on disparate impact. In a disparate-treatment claim, the employer simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic. Liability in a disparate-treatment case depends on whether the protected trait actually motivated the employer’s decision. By contrast, disparate-impact claims involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity. Under a disparate-impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer’s subjective intent to discriminate, which would otherwise be required in a disparate-treatment case.

In this matter, the Supreme Court determined the respondent did not pursue a timely disparate-impact claim, and was limited to a disparate-treatment theory that the petitioner refused to rehire him because it regarded him as being disabled and/or because of his record of a disability. Consequently, the Supreme Court vacated the Ninth Circuit’s judgment to the extent it strayed from applying a disparate-treatment analysis to the respondent’s claim, and remanded the case for further proceedings.

RACE AND ADEA

Plaintiffs Failed to Establish Discrimination Claims Under Either Direct or Indirect Method

In Cerutti v. BASF Corp., 349 F.3d 1055 (7th Cir. 2003), the defendant BASF Corporation decided to restructure its styrenics operation unit during February 2000. As part of the restructuring process, BASF terminated 23 employees at its styrenics manufacturing plant in Joliet, Illinois. Ten of those employees filed suit against BASF, alleging the company fired and declined to rehire them on the basis of age, race or national origin in violation of the Age Discrimination in Employment Act (ADEA) and Title VII.

As part of the restructuring process, prior to terminating the employees in the styrenics unit, BASF offered a Voluntary Special Early Retirement Program to all employees aged 53 or over who had 10 or more years of service with the company as of December 2000. In the second phase of restructuring, BASF assessed employees who wished to continue their employment to determine whether they possessed the competencies the company believed necessary to effectively restructure the unit. Employees who lacked these competencies would be discharged. BASF retained the services of Development Dimensions International (DDI), a leader in the behavioral assessment field, to assist with the assessment process.

BASF began the restructuring process by categorizing all employees into job families. Nine of the plaintiffs were placed in the “operators” job family designated for hourly plant or lab workers. The remaining plaintiff was placed in the “individual contributor” job family, which was designated for salaried, nonsupervisory employees. Shortly thereafter, DDI assessed 83 operators and 13 individual contributors at the Joliet plant with identical standard assessment techniques such as problem-solving exercises, role-playing and targeted interviewing. DDI performed the assessments via telephone and did not know the age, race or national origin of the employees it evaluated. DDI then forwarded its results to BASF for further consideration by the company’s selection panels.
BASF’s selection panels then reviewed DDI’s scores and integrated them with the panels’ collective knowledge of each employee’s workplace behavior and performance. The panels also evaluated additional competencies of each employee not considered by DDI. BASF’s legal department then reviewed the panels’ initial findings for possible adverse impact. Upon being advised the tentative results of the assessment processes employed by the company did not have a statistically significant impact on any protected group, BASF finalized the decision and informed the 23 employees of their discharge. Subsequently, the 10 plaintiffs bought suit against BASF. The district court granted defendant’s motion for summary judgment, and the plaintiffs appealed.

The Seventh Circuit affirmed the lower court’s holding. The court noted under both the ADEA and Title VII, a plaintiff could prove employment discrimination using either the “direct method” or “indirect method.” Under the direct method, a plaintiff may show by way of direct or circumstantial evidence an impermissible purpose, such as race, national origin or age motivated the employer’s decision to take an adverse job action against him or her.

If a plaintiff cannot prevail under the direct method of proof, he must proceed under the indirect method, i.e., the familiar McDonnell Douglas framework. Adams, 324 F.3d at 939. In the context of a large-scale workplace restructuring or reorganization (i.e., where the employer is “cleaning house” and essentially no one’s job is safe), a plaintiff proceeding under the indirect method must, as an initial matter, show that: (1) he is a member of a protected class (e.g., race, national origin, age); (2) he was qualified to be retained or rehired; (3) he was discharged, not rehired, not promoted, or the like, as a result of the workplace restructuring or reorganization; and (4) similarly situated employees outside of his protected class were treated more favorably by the employer. Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 889-90 (7th Cir. 1997); see also Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1011-12 (7th Cir. 2000). If the plaintiff establishes a prima facie case of age, race, or national origin discrimination, the employer, to avoid liability, must then produce a legitimate, nondiscriminatory reason for the adverse employment decision. Peele, 288 F.3d at 326. If the employer offers a legitimate, nondiscriminatory explanation for its decision, the plaintiff must then “rebut that explanation by presenting evidence sufficient to enable a trier of fact to find that the employer’s proffered explanation is pretextual [i.e., a lie].” Id. A plaintiff does not reach the pretext stage, however, unless he first establishes a prima facie case of discrimination under the indirect method. Id. Cerutti v. BASF Corp., 349 F.3d 1055 at *11-12.

All 10 of the plaintiffs in this matter alleged they were terminated and not rehired by BASF because of age discrimination. The plaintiffs maintained they provided evidence sufficient to proceed under the direct method. The plaintiffs argued BASF’s retirement offer was discriminatory and not truly voluntary. They also argued BASF’s management had made ageist remarks such as “out with the old, and in with the new” and, “How is the old man doing today?” The Seventh Circuit found the plaintiffs’ arguments insufficient to allow them to maintain claims under the direct method.

The court found it was unreasonable to infer the retirement program offered by BASF was discriminatory or involuntary merely because some of the employees who accepted the company’s offer did so out of fear they would not make the grade after being assessed. The court further found nothing inherently discriminatory about the colloquialism “out with the old, and in with the new.” Moreover, the plaintiffs could not offer any evidence the phrase was used in a discriminatory manner. The court also found the stray workplace remarks such as, “How is the old man doing today?” did not support claims of age discrimination. Although the stray comments were attributable to two members of the deciding panel, the evidence was only relevant if there also was evidence from which a reasonable jury could infer those individuals’ animus influenced the selection panels’ deliberations enough to result in the plaintiffs’ terminations. The court found the plaintiffs presented no evidence of
a causal link between the prejudicial views expressed by two members and the committee’s decision to discharge them.

The Seventh Circuit also found that under the indirect method, the plaintiffs failed to establish a prima facie case. The court disagreed with the plaintiffs’ assertions they were qualified to be retained or rehired and BASF treated similarly situated younger employees more favorably. The court found because BASF did not rely on prior performance evaluations in the restructuring process to ascertain whether its current employees were qualified to be retained, the plaintiffs could not use those evaluations to argue the company applied its legitimate workplace expectations in a discriminatory manner. The court noted each of the 10 plaintiffs met BASF’s threshold for discharge, which was finding of six or more developmental needs. Further, the evidence revealed BASF discharged every employee under the age of 40 with six or more developmental needs.

In regard to the race and national origin claims, the plaintiffs maintained two members of the selection panels had made numerous racial statements. The court again noted the two members’ animus, without more, did not establish the circumstantial evidence needed for the plaintiffs to prevail under the direct method. To do so, the plaintiffs needed to present evidence from which a reasonable jury could infer the two members’ prejudicial views influenced their fellow panel members to such a degree it resulted in the plaintiffs’ discharge.

The court further held the plaintiffs could not prevail on their race and national origin claims under the indirect method because, as with the age claims, the evidence shows they were not qualified to be retained or rehired by BASF. *Cerutti v. BASF Corp.*, 349 F.3d 1055 (7th Cir. 2003).

### SEXUAL HARASSMENT/ HOSTILE WORK ENVIRONMENT

**Constructive Discharge May Constitute Tangible Employment Action**

In *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), the plaintiff Melissa Robinson was hired as a judicial secretary to Judge Warren Sappington of the Sixth Judicial Circuit in Macon County, Illinois, on March 28, 1994, and later was reclassified as a judicial clerk. In July 1996, Judge Sappington began inquiring frequently about the plaintiff’s personal life, specifically her relationship with her husband. After the plaintiff informed Judge Sappington she and her husband were seeking a divorce, Judge Sappington began telling the plaintiff she was beautiful on a daily basis. Judge Sappington also began referring to the plaintiff as a “blond Demi Moore” and a golden goddess.

For a period of several weeks in August 1996, Judge Sappington shook the plaintiff’s hand on a daily basis when he would arrive for work in the morning and in the evening when he left. When asked by the plaintiff why he was doing this, Judge Sappington stated he would no longer shake her hand because he realized he was doing it for physical contact with her, which was inappropriate. Also in August 1996, Judge Sappington told the plaintiff he did not like her talking to the attorneys in the courtroom because she was “a very beautiful young woman” and the attorneys talked to her because she had worn a thin bra they could see through. This conversation brought the plaintiff to tears and she rushed home to change clothes.

Additionally, in August 1996, Judge Sappington called the plaintiff into his office and went into a tirade because he believed she was romantically involved with an attorney who frequently came to the courthouse. When the plaintiff questioned Judge Sappington as to why he felt he had a right to inquire about the men she saw, Judge Sappington replied he could not stand the thought of her with any other man.

By September 1996, a courthouse rumor started that the relationship between Judge Sappington and the plaintiff was more than professional. Judge Sappington told the plaintiff he wanted to kiss her in
front of courthouse staff in response to the rumors. The plaintiff expressed her disgust at the remark and told Judge Sappington he should seek forgiveness. On September 9, 1996, after returning to chambers from a court proceeding, Judge Sappington grabbed the plaintiff by her face and told her to look into his eyes so she could fully understand what he was saying. He then told her if he ever found out she was “shacking up” with anybody, he would kill her. Two weeks later, Judge Sappington relayed a conversation to the plaintiff he had had with another judge, in which he told the other judge he wanted to engage in a sexual encounter with the plaintiff.

During the months of August and September, Judge Sappington closely monitored the plaintiff’s actions and company. He took note of where the plaintiff parked her car, and also would watch her from his window when the plaintiff took lunch with another co-worker. Judge Sappington, a private pilot, flew over the plaintiff’s mother’s home several times one weekend he knew the plaintiff to be visiting there.

In October 1996, two incidents occurred that caused the plaintiff to take formal action against Judge Sappington. On October 3, 1996, Judge Sappington requested the plaintiff and an assistant state’s attorney meet in his courtroom to recount the facts of a grisly murder in which a woman was shot, dismembered and decapitated. After the state’s attorney left the room, the plaintiff tearfully asked why she had been included in the meeting. Judge Sappington responded the plaintiff was beautiful and naïve and would face a fate like the victim faced.

After this incident, the plaintiff spoke to Janice Shonkwiler, the administrative assistant to the presiding judge for Macon County Circuit Court, whom the plaintiff had been told to report to after her reclassification as a judicial clerk. The plaintiff informed Shonkwiler of Judge Sappington’s more explicit behavior and that she had become afraid of him. Shonkwiler did not advise the plaintiff what to do, nor did she tell the plaintiff she would investigate the complaints.

On October 11, 1996, the attorney whom Judge Sappington accused the plaintiff of being romantically involved with entered the courtroom during a hearing to speak with the plaintiff regarding scheduling. The plaintiff left the courtroom and explained to the attorney Judge Sappington would be on a different rotation for cases at the time the attorney wanted to reschedule. Immediately after the plaintiff left the courtroom, Judge Sappington became visibly upset and pounded his gavel so hard a piece flew off and hit a witness. Judge Sappington stormed out of the courtroom and started yelling at the attorney to get to Judge Sappington’s chambers.

After this incident, the plaintiff called the presiding judge at his home and relayed what had happened in the courtroom. She also informed the presiding judge of other occurrences involving Judge Sappington’s behavior. The presiding judge informed the plaintiff he would speak to Judge Sappington the following day. The plaintiff then was told to take a week’s administrative leave because she was distraught and concerned about her safety.

When the plaintiff returned from leave, she worked for Judge Diamond for one week. The plaintiff was then transferred back to Judge Sappington. Although the plaintiff did not want to return to Judge Sappington, she was not given any other alternative. After a few weeks, the presiding judge informed the plaintiff she was being transferred to Judge Francis because the only way he could protect both Judge Sappington and her was for her to no longer be in the building. The presiding judge told the plaintiff the first six months of working for Judge Francis would probably be “hell” but things would settle down after that. He also indicated it was in the plaintiff’s best interest to resign.

After the plaintiff’s conversation with the presiding judge, Judge Sappington continued to monitor her actions. Judge Sappington also left a message on the plaintiff’s answering machine asking if she would like to meet him somewhere for a drink. In November 1996, the plaintiff determined after enduring the difficulties with Judge Sappington she did not want to endure “hell” for six months with Judge Francis. She resigned in November 1996. The plaintiff subsequently filed suit against Judge Sappington, in his official and individual capacities, for hostile work environment sexual harassment...
in violation of Title VII. The plaintiff also filed suit against Macon County for *quid pro quo* sexual harassment.

The district court dismissed the plaintiff’s complaint against Judge Sappington in his individual capacity because it determined Judge Sappington could not be held individually liable for violations of Title VII. At the close of discovery, the defendants moved for summary judgment. Macon County argued it had taken reasonable steps to prevent sexual harassment from occurring, it had taken prompt remedial action in response to the plaintiff’s complaints, and the plaintiff had not suffered a tangible employment action. The district court granted the defendants’ motion for summary judgment.

On appeal, the plaintiff argued the facts established a prima facie case of hostile work environment sexual harassment. To establish such a case, she had to demonstrate: (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the sexual harassment had the effect of unreasonably interfering with the plaintiff’s work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (4) there was a basis for employer liability.

The Seventh Circuit noted the district court found there was unwelcomed sexual harassment, the harassment occurred on account of the plaintiff’s sex, and the harassment created a subjectively hostile work environment. However, the district court concluded there was not sufficient support to find an objectively hostile environment. The Seventh Circuit disagreed.

The Seventh Circuit determined Judge Sappington had made several overtly sexual comments to the plaintiff, twice-repeated his comment he wanted to engage in a sexual act with the plaintiff, and took an inappropriate interest in the plaintiff’s relationship with men to the point he expressed outrage of the possibility of her romantic involvement with anyone else. The Seventh Circuit further found much of Judge Sappington’s conduct reasonably could be construed as intimidating and threatening. Further, Judge Sappington’s innocuous comments such as calling the plaintiff a golden goddess, beautiful, or a “blonde Demi Moore” on a daily basis, when put into a larger context, served as constant reminders of Judge Sappington’s interest in the plaintiff.

The Seventh Circuit found a jury could conclude Judge Sappington’s conduct toward the plaintiff was objectively hostile. The court further found within the context of a close working situation, such as the plaintiff had with Judge Sappington, a reasonable person would conclude these actions were hostile and intimidating and would interfere with the work performance of a reasonable person. Turning to whether there was a basis for employer liability, the court looked at whether the plaintiff had suffered a tangible employment action. In a case of first impression, the court determined whether a constructive discharge is a tangible employment action within the meaning of *Ellerth/Faragher*. The court determined in circumstances where official actions by the supervisor make employment intolerable, a constructive discharge may be considered a tangible employment action. In this case, the Seventh Circuit determined a jury could conclude the plaintiff suffered a constructive discharge since after her return to work Judge Sappington continued to monitor her actions and exhibit romantic interest in her. The court further found the presiding judge’s transfer of the plaintiff could be seen as furthering the plaintiff’s constructive discharge, as the only alternative offered to the plaintiff constituted an equally cruel working situation. Consequently, the Seventh Circuit reversed the district court’s ruling and remanded the matter for further proceedings.

**Plaintiff Fails to Establish Hostile Work Environment or Retaliation**

In *Santiago v. Orland Park Motor Cars, Inc.*, 2003 WL 22765057, 2003 U.S. Dist. LEXIS 20998 (N.D. Ill. November 20, 2003), the defendant, Orland Park Motor Cars, hired the plaintiff, Michele Santiago, to work as a cashier at its BMW dealership during 1999. Shortly after the plaintiff began working, she was transferred to the defendant’s Mercedes Benz store. In July 2000, the plaintiff was
transferred to a sales position at her request. The plaintiff worked a total of 16 months at the Mercedes Benz store before her discharge on February 17, 2001. The defendant maintained it discharged the plaintiff because of low sales, poor attendance and an incidence of insubordination.

Neither party disputed the plaintiff had performance problems and did not meet her sales quotas in the three months immediately preceding her termination. The plaintiff further conceded she had missed six days of work in a six-month period and she was late two or three times. The plaintiff also conceded in the two months prior to her discharge she had missed work twice without giving notice. The plaintiff also attended an auto show against express instructions of her immediate supervisor. The plaintiff was discharged the day following the auto show.

On December 26, 2000, two months before her termination, the plaintiff filed a sexual harassment complaint against a co-worker. The plaintiff, while working as a cashier, also filed a complaint against another co-worker. These two instances were the only formal sexual harassment complaints ever filed by the plaintiff with her employer. The plaintiff did not dispute the defendant disciplined the co-worker after she complained and she expressed satisfaction with the defendant’s handling of the matter. Nonetheless, the plaintiff brought suit against the defendant claiming the defendant violated Title VII by engaging in sexual harassment and failing to adequately address hostile and discriminatory behavior. The plaintiff further maintained her discharge happened in retaliation for making a complaint of sexual harassment.

Under Title VII, an employer may be liable for discrimination if an employee is subject to a hostile work environment based on her protected characteristic, which in this case is the plaintiff’s gender. To recover, the plaintiff must show: (1) she was “subject to unwelcome harassment;” (2) the harassment was based on her gender; (3) the harassment was severe and pervasive so as to alter the conditions of her environment and create a hostile or abusive working environment; and (4) the employer was negligent either in discovering or remediying the harassment propounded on the plaintiff by her co-workers. The parties agreed the plaintiff was a member of a protected class, and she claimed harassment based on her membership in that class. However, the parties disputed whether the alleged harassment was severe and pervasive enough to create a hostile work environment, and whether the defendant was negligent in discovering or remedying the alleged harassment.

The court found the plaintiff did not point to any incident where she felt physically threatened by the alleged harassing discriminatory conduct. The plaintiff merely pointed to a single incident of an offensive comment by her co-worker. The plaintiff also noted several instances where male salesmen asked her to leave the sales floor for several minutes because they did not want to offend her. The court found these incidents did not amount to the level of hostility sufficient to survive the defendant’s motion for summary judgment.

The court also found the hostile workplace claim fell short because the plaintiff did not point to evidence that would allow a jury to reasonably conclude the defendant had adequate notice about the harassment, and had failed to take reasonable steps to remedy the situation. The court noted the failure to report harassment thwarted the basic purpose of requiring a charge, which is to give the employer some warning of the complained-of conduct.

The court also found the hostile workplace claim fell short because the plaintiff did not point to evidence that would allow a jury to reasonably conclude the defendant had adequate notice about the harassment, and had failed to take reasonable steps to remedy the situation. The court noted the failure to report harassment thwarted the basic purpose of requiring a charge, which is to give the employer some warning of the complained-of conduct.

The court determined the plaintiff knew the defendant had a sexual harassment policy and a reporting mechanism. Further, the plaintiff had clear access to her supervisor and had numerous opportunities to discuss her concerns about co-worker treatment. However, the plaintiff never reported any complaints concerning treatment by co-workers other than the one episode. Moreover, the plaintiff admitted she was content with management’s response to her complaint about her co-worker. Thus, the court found the evidence insufficient to allow a jury to reasonably conclude the defendant knew the plaintiff was being subjected to a hostile work environment and was negligent in remediying the situation.
In reviewing the plaintiff’s retaliation claim, the court noted to establish a prima facie claim for retaliation the plaintiff had to establish: (1) she was engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal relationship between the two. The court determined the plaintiff could not establish a prima facie case because she could not identify a protected activity that was retaliated against, since the defendant had promptly and effectively responded to the plaintiff’s complaints. The court found because the plaintiff had failed to report any harassment problems after her December 2000 complaint, the defendant could not have retaliated against her for engaging in protected activity, because there was nothing to retaliate against. The court, therefore, granted summary judgment to the defendant. *Santiago v. Orland Park Motor Cars, Inc.*, 2003 WL 22765057, 2003 U.S. Dist. LEXIS 20988 (N.D. Ill. November 20, 2003).

FMLA

**Defendants Denied Summary Judgment on Plaintiff’s Retaliation Claim**

In *Smith v. Univ. of Chi. Hosps.*, 2003 WL 22757754, 2003 U.S. Dist. LEXIS 20965 (N.D. Ill. November 24, 2003), the plaintiff, JoElla Smith, was hired by the defendant, University of Chicago Hospitals (UCH), in January 1981, as a radiation therapist. In September 1987, the plaintiff was promoted to chief therapist and became supervisor of Radiation Oncology. In early 1999, the plaintiff developed symptoms of depression associated with menopause, which caused frequent absences from work. In September 1999, UCH removed the plaintiff from staff supervision and reassigned those duties to another member of the UCH staff. UCH announced the change in duties at a staff meeting in November 1999. After the staff meeting, the plaintiff requested to go home. UCH recommended the plaintiff talk to the benefits department of human resources and take FMLA leave.


When the plaintiff returned to work on January 13, 2000, Wyman prevented her from treating patients and instructed her to check medical charts and payroll, which were part of her duties as chief therapist. In early 2000, UCH determined a multimillion-dollar budget shortfall loomed for fiscal years 2000 and onward, necessitating a reduction in force (RIF). The Department of Radiation Oncology needed to cut personnel costs of approximately $100,000 per fiscal year. UCH management suggested that Wyman eliminate the chief therapist position because it was not involved in direct patient care.

Wyman initially determined no therapist position, including chief therapist, should be cut. However, UCH and Wyman eventually determined they could eliminate the position of chief therapist without sacrificing patient care or revenue. Consequently, the plaintiff was discharged on June 5, 2000. Shortly after the plaintiff’s termination, therapist Milton Marshall announced at a staff meeting he was the new chief therapist. The 2001-2002 University of Chicago Directory listed Marshall as the chief radiation therapist.

The plaintiff alleged UCH and Wyman deprived her of her substantive statutory rights under the FMLA by not returning her to the position she held prior to taking FMLA leave or to an equivalent position. The plaintiff also alleged the defendants retaliated against her for exercising her rights under the FMLA by terminating her because she took FMLA leave.

To prevail on either her substantive or her retaliation claim, the plaintiff had to prove: (1) she was an eligible employee under the FMLA; (2) the defendants were employers covered by the FMLA; and
(3) she was entitled to leave under the FMLA. Defendant Wyman argued she was entitled to summary judgment because, as an individual, she could not be held liable as an “employer” under the FMLA. The district court disagreed, finding there was no reason to conclude Congress intended to exempt individuals from the FMLA’s coverage. In the court’s view, as the plaintiff’s supervisor Wyman fell within the FMLA’s definition of “employer.”

The plaintiff also moved for summary judgment, arguing she was entitled to leave under the FMLA. The court agreed, finding UC H did not contest the plaintiff’s entitlement to FMLA leave by questioning the validity of plaintiff’s condition and sending her for a second and third opinion, as provided under the FMLA. The court found UCH designated the plaintiff’s leave of absence as FMLA leave and did not contest the validity of her condition at the time she sought leave.

Turning to the plaintiff’s claim the defendants violated her substantive rights under the FMLA by not returning her to her pre-leave position or an equivalent position after she returned from FMLA leave, the defendants argued when the plaintiff returned from her leave she was given the same duties she had in September 1999. The defendants further argued any changes in the plaintiff’s duties after she returned were de minimis changes. The court granted summary judgment to the defendants, finding the plaintiff had been removed from direct patient care and staff supervision in September 1999, and when she returned she was not allowed to treat patients or given any staff supervisory duties.

In response to the plaintiff’s retaliation claim, the defendants claimed they eliminated the plaintiff’s position as part of a legitimate RIF. When a plaintiff alleges a retaliatory discharge under the FMLA, the plaintiff must establish the employer engaged in intentional discrimination either through direct or indirect evidence.

The plaintiff argued direct evidence of retaliation existed because Wyman stated while the plaintiff was on FMLA leave, “this family medical leave is too much. This is just too much work. This is bordering on job abandonment. [The plaintiff] needs to be here. She needs to do her job. If she wants her job, if she cares about her job, she would be here.” Further, other UCH staff testified Wyman made numerous similar comments while the plaintiff was on leave. The court found a reasonable jury could find Wyman’s comments, even though made over four months before the plaintiff’s discharge, direct evidence of retaliation. However, the court noted unless Wyman played a role in the decision to terminate the plaintiff, evidence of her discriminatory animus was irrelevant. The court found a reasonable jury could find Wyman’s discriminatory animus tainted the decision to terminate the plaintiff since Wyman provided UCH with input as to eliminating the chief therapist position.

The court further found the plaintiff could establish indirect evidence of retaliatory discharge by showing: (1) she engaged in a statutorily protected activity; (2) she was subjected to an adverse employment action; (3) she was performing her job in a satisfactory manner; and (4) she was treated in a less favorably than any other similarly situated employees who did not engage in such protected activity. The defendants did not dispute the plaintiff had established a prima facie case. However, they maintained the plaintiff was discharged as part of a legitimate RIF. The court found the defendants satisfied their burden of proffering a reasonable and nondiscriminatory explanation for its actions.

Once a defendant has rebutted a plaintiff’s prima facie case, the plaintiff bears the burden of persuasion to demonstrate the employer’s stated reason was pretextual. In an RIF case, a plaintiff can show pretext either by establishing the RIF itself was pretextual or by showing the employer’s reason for including the plaintiff in the RIF was pretextual. The court found a reasonable trier of fact could find the defendants retaliated against the plaintiff for taking FMLA leave because the plaintiff presented several facts that called into question the defendants’ proffered reason for including her in the RIF. The court found Wyman’s deposition testimony that a chief therapist would spend one-half his or her time treating patients, one-fourth on quality improvement and one-fourth on administrative duties, directly contradicted UCH’s proffered reasons for eliminating the position. Further, after the
plaintiff was discharged, Marshall became chief therapist. The court found these facts directly contradicted the defendants’ assertion they had eliminated the position of chief therapist.

Consequently, the court granted partial summary judgment to the plaintiff as to her entitlement to leave under the FMLA. The court also granted partial summary judgment to the defendants on the plaintiff’s substantive claim, but denied the defendants’ motion as to the plaintiff’s retaliation claim. *Smith v. Univ. of Chi. Hosps.*, 2003 WL 22757754, 2003 U.S. Dist. LEXIS 20965 (N.D. Ill., November 24, 2003).

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