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Employment Discrimination

In Reverse Discrimination Case, District Court Does Not Require Showing Of "Background Circumstances Suggesting That Defendant Discriminates Against Whites"

In *Lucibello v. Yale-New Haven Hospital*, U.S.D.C., D. Conn., No. 3:03-CV-0814 (RNC) (March 10, 2005), the Court determined that a white hospital employee who brought a reverse discrimination claim was not required to show "background circumstances suggesting that defendant discriminates against whites" in order to establish a *prima facie* case of discrimination.

Beginning in 2001, Cynthia Lucibello, a secretary in the facilities department at Yale-New Haven Hospital ("YNH"), was involved in an acknowledged personality clash with Brenda Baker-Chapman, a coworker. On May 20, 2002, their longstanding conflict escalated to a shouting match, which created a "major workplace disturbance" and required the intervention of a coworker and supervisor to defuse the conflict.

After an investigation, YNH management determined that both Lucibello and Baker-Chapman had violated YNH's Code of Conduct and its policy against workplace aggression, and should be formally disciplined.

At the time, YNH had a five-step progressive discipline process, ranging from counseling to termination. Lucibello — who is white — was given a final written warning and a three-day suspension for her part in the May 20th incident. Baker-Chapman — who is African-American — received a "formal written warning" and no suspension.

Lucibello brought a lawsuit against YNH pursuant to federal and state law, claiming that she was disciplined more severely than Baker-Chapman because of her race. YNH moved for summary judgment, which was granted.

The Court began its evaluation of Lucibello's claim by considering whether she had established the first element of a *prima facie* case of discrimination — whether, as a white woman, she "belongs to a protected group." The Court acknowledged that "[i]n reverse discrimination cases, most [federal] courts of appeals require the plaintiff to show, as the first element of a *prima facie* case, background circumstances raising an inference that the defendant discriminates against whites." *See, e.g., Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) (plaintiff in reverse discrimination case cannot establish *prima facie* case without showing that "background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority"); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (same); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999) (same); *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992) (same); *Russell v. Principi*, 257 F.3d 815, 818 (D.C. Cir. 2001) (same).

Citing *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001), however, the Court determined that Lucibello was indeed in a protected class, and noted, "I do not believe the Second Circuit would require plaintiff to show, as part of a *prima facie* case, background circumstances suggesting that defendant discriminates against whites."

Although Lucibello successfully established the first three elements of a *prima facie* case — she was in a protected class, performed satisfactorily, and suffered an adverse employment action — YNH's motion for summary judgment ultimately was granted because Lucibello failed to raise any inference of discrimination. Specifically, YNH's failure to suspend Baker-Chapman did not raise a discriminatory inference because Lucibello and Baker-Chapman were not similarly situated — Lucibello had a history of similar misconduct, while Baker-Chapman did not. Further, YNH proffered legitimate nondiscriminatory reasons for disciplining Lucibello

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more severely — namely, her culpability for the May 20th incident and her history of misconduct. Lucibello could not show that YNH's given reasons were pretext for a discriminatory motive, and thus her claims could not survive summary judgment. Although the Second Circuit has yet to rule in this area, employers should expect that in general, reverse discrimination claims will be decided under substantially the same rubric as conventional discrimination claims.

Employment Discrimination

Understanding the "Perception Theory" of Retaliation

Can an employee claim that he is a subject of retaliation even before he engages in a protected activity? In certain instances, the courts have said "yes."

The standard has long been that to establish a claim of illegal retaliation under the anti-discrimination statutes, a plaintiff must show: (1) that he engaged in a protected activity; (2) that he suffered an adverse action by his employer as a result of his protected activity; and (3) that there is a causal connection between the employee's protected activity and the employer's adverse action. Under this analysis, logic and substantial case law have led to the conclusion that any adverse action taken prior to the time that the employee engaged in the protected activity could not be in retaliation for actions that had not yet occurred. Yet this may not always be the case.

In *Grosso v. Queens College, et al.*, 2005 U.S. Dist. LEXIS 4089 (S.D.N.Y. 2005), the Court extended protection against retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") to an employee who alleged that he was subjected to discrimination based upon his employer's "belief" that he had engaged in protected activity. In so holding, the Court denied summary judgment to the employer, based upon the theory that the employer may have "perceived" that the plaintiff was engaging in protected activity, even when he was not, and may have relied on that perception as a reason for taking adverse action.

Plaintiff Joseph Grosso was an employee of Queens College and the Calandra Institute. After working there for several years, two of the plaintiff's coworkers brought a suit claiming discrimination and harassment, in violation of Title VII. Contemporaneously with his coworkers' case being commenced, Grosso was assigned to a position with added responsibilities and was given assurances that he would eventually receive an increase in pay. Before he received the pay raise, however, Grosso was reassigned to another position. In this new position, the prospects of getting a pay raise was unlikely.

Unexpectedly, after he had held the new position for a few months, Grosso heard that the reason that he had been reassigned was because of the employer's belief that he was supplying information to the coworkers who were engaged in litigation. Prior to that time, Grosso had no idea that anyone in management held that view, and he denied ever supplying any information to his former coworkers. Grosso never received a pay raise, and claimed that his reassignment was actually a demotion.

As a result, Grosso filed his own action claiming, amongst other things, that his employers retaliated against him because they believed that he had engaged in a protected action. He admitted that he did not actually engage in a protected activity until after he was reassigned, and after he heard that there were rumors of his cooperation with the other lawsuit.

Despite the fact that Grosso's actual protected activity did not cause or even precede the alleged demotion, the Court permitted this case to go to trial. It stated, "we believe plaintiff states a claim for retaliatory discrimination based on culpable behavior by defendants before plaintiff engaged in protected activity to the extent that the behavior was motivated by their belief that plaintiff had already done so."

This theory is unusual, but it is not new. The Third Circuit has applied the same "perception theory" to retaliation claims under the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir. 2002), both plaintiff and his father were long-time employees of Mercy Hospital. In 1993, the father was forced out of his job, and he sued alleging age discrimination. Three years after his father was terminated and his case was settled, plaintiff was also fired. Plaintiff claimed that he was fired because of a perception that he had helped his father with his lawsuit. Accepting plaintiff's perception theory of illegal retaliation, the Court stated that because "the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct" and that, "so long as the employer's specific intent was discriminatory, the retaliation is actionable."

As such theories emerge and develop, they create even more reason for employers to clearly articulate and document the reasons for taking adverse employment action against any employee. Certainly, the risk of litigation should not shield employees who are friendly with or related to anyone that has filed a suit from being held to the same work performance standards and conduct requirements as other employees. Nonetheless, employers should not only be careful to avoid retaliation for actual protected activity by employees, but also should be mindful of the possibility that the perception theory of retaliation might be used to challenge an employment-related action.

Pregnancy Discrimination

Nurse's Aide faced with a Hobson's choice — sacrifice her job or endanger her unborn child — was wrongfully terminated.

In a recent decision, *Davis v. Manchester Health Ctr. Inc.*, 88 Conn. App.60, 867 A.2d 87 (2005) the Connecticut Court of Appeals upheld a jury verdict in favor of an employee who was terminated after she walked off the job because she reasonably believed that had she remained, she would have exposed herself and her unborn child to a health risk.

The plaintiff brought suit under Connecticut state law. Connecticut General Statutes § 46a-60 provides, among other things, that "(a) [i]t shall be a discriminatory practice …(7) [f]or an employer….: (A) to terminate a woman's employment because of her pregnancy…. (E) to fail or refuse to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which an employee gives written notice of her pregnancy to her employer and the employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus … or (G) to fail or refuse to inform employees…that they must give written notice of their pregnancy in order to be eligible for transfer to a temporary position."

In or around October 1998, Davis, a nurse's aide at a rehabilitation center, orally informed her employer that she was pregnant. The rehabilitation center was divided into four wings — with two of the four wings (Wings One and Three) dedicated to long-term care patients who required considerable assistance due to their physical limitations. As a nurse's aide, Davis was required to engage in frequent physical exertion, such as carrying, bending, squatting, lifting and pulling with the entire body.

In November 1998, Ms. Davis was scheduled to work in the less rigorous Wing Two. However, upon her arrival, her supervisor informed her that she was being reassigned to Wing One to replace another aide who had called out sick. Concerned with the more physical rigors associated with Wing One (evidence indicated that the patients in Wing One were heavier, more limited physically, and more combative than the other wings), Davis informed her supervisor that she had experienced cramps while working the previous day and that she could not tolerate working in Wing One. In addition, Davis informed her supervisor that both the Assistant Director of Nursing and the Director of Nursing had previously told her that she did not have to work in Wing One. Davis — who expressed concern for her own health as well as that of her unborn child — offered to work that evening in any other wing. The supervisor refused to reassign Davis — even after another nurse's aide offered to work Wing One in Davis's place. In a loud and sarcastic tone, the supervisor told Davis to "deal with it" or leave and never return. Davis left the premises and was subsequently informed that her employment had been terminated.

At the time of Davis's termination, the rehabilitation center had a policy permitting employees to "call out" from a scheduled shift on account of illness, or to leave their shift if they became ill during the course of the shift, without being discharged.

Following a trial, the jury returned a verdict in Davis's favor on her claim for wrongful termination in violation of General Statutes § 46a-60 (a) (7) (A), (E), and (G), as well as on her claim for negligent infliction of emotional distress. The Connecticut Court of Appeals upheld the jury verdict, holding that Davis had satisfied the statutory requirements as to her claim that she was unlawfully terminated because of her pregnancy. Specifically, the Court found that there was reasonable evidence to conclude that Davis was terminated because she chose **"to leave her shift rather than to remain in an assignment she reasonably believed posed a risk to her health and that of her unborn child."**

On appeal, the employer argued that subsection (A), which forbids employment termination because of pregnancy, could not serve as the basis for liability where the more specific subsections of § 46a-60(a)(7) appeared to dispose of Davis's claims. In particular, the employer pointed to subsections 7(E) (requiring reasonable effort by employer to transfer pregnant employee upon written notice of pregnancy) or 7(G) (requiring employer to inform pregnant employee of written notice requirement to obtain temporary transfer). Because Davis did not provide written notice of her pregnancy, reasoned the employer, she was not eligible for a temporary transfer, and was therefore terminated not because of her pregnancy, but because she had walked off the job. The employer further argued that Davis's claim under subsection (A) could not stand absent evidence independent of what was offered in connection with her claim of violations under subsections (E) or (G).

However, the Court of Appeals rejected the employer's arguments, holding that the claim under subsection (A) "does not fail merely because the evidence offered to prove the defendant's violation ... arose out of an incident that is also arguably within the purview of another subparagraph under the same statutory subdivision."

Turning to the sufficiency of the evidence, the Court of Appeals noted that the jury could have reasonably concluded that the workload associated with Wing One was significantly more than that of the other wings, and that Davis informed her supervisor of her concerns not only for her own well-being, but for that of her unborn child. The supervisor's refusal to allow Davis to switch assignments with a colleague — despite the fact that the rehabilitation center's own policy permitted Davis to leave on account of illness without being terminated — and her instruction to Davis that she simply "deal with it" or not return to work, occurred only after Davis had voiced her concerns. Accordingly, the jury could have reasonably rejected the rehabilitation center's argument that Davis's employment was terminated because of her willful misconduct, and concluded that a direct nexus existed between Davis's pregnancy and the rehabilitation center's decision to terminate her employment.

In addition, the Court of Appeals upheld the jury's verdict of negligent infliction of emotional distress, holding that Davis was directed to work in the wing with the heaviest workload — thereby increasing the risk of cramping — or to leave the work premises and be terminated. This "Hobson's choice" was really no choice at all, ruled the Court, because Davis had "no real alternative other than to sacrifice her job rather than endanger her pregnancy." The Court of Appeals concluded that such a choice, especially in light of the circumstances presented in this case, was "patently unreasonable" and that this was not a case in which the rehabilitation center's employees "were merely rude during the termination process," but rather was a case in which Davis "reasonably believed that she would suffer physical harm if she worked on the wing on which her supervisor insisted she work."

The *Davis* case highlights the need for employers not only to be familiar with their own employment policies, but to practically and reasonably apply them in a manner that complies with applicable anti-discrimination laws. While Davis was not "ill" per se, the rehabilitation center's policy permitting its employees to leave work on account of illness — without any repercussions — rendered the supervisor's decision denying Davis's requested shift change all the more unreasonable, especially when a seemingly acceptable accommodation was readily available.

In Brief

Federal Court Decisions Concerning Oral Settlement Agreements

Two recent cases coming out of New York demonstrate a willingness by our federal courts to hold litigants to their oral settlement commitments. In *Role v. Eureka Lodge, et al.*, 402 F.3d 314 (2005), the United States Court of Appeals for the Second Circuit held that a settlement agreement placed on the record by the parties at a settlement conference before the assigned magistrate judge was enforceable. The court found dispositive the fact that the plaintiff had taken the stand, had been sworn and had expressed his understanding of both the terms of the settlement agreement and the fact that it would resolve all claims against the defendants. Moreover, in a question of first impression, the court held that the oral stipulation of dismissal that was agreed to by the parties on the record was also enforceable, despite the plaintiff's subsequent refusal to enter into a formal written stipulation.

In an employment related case captioned *Salerno, et al. v. City University of New York, et al.*, 2005 U.S. Dist. LEXIS 3825 (S.D.N.Y. March 8, 2005), the parties had agreed to the basic terms of settlement on the record seven days into a bench trial, but subsequently were unable to resolve certain remaining issues that had not been explicitly discussed. Upon request by the parties, the court readily decided these issues and entered a settlement judgment. Most significantly, the court agreed with the defendants in holding that, though it had not been discussed on the record, it was "fairly implied by their agreement" that the plaintiffs would not apply for or accept employment with the university in the future.

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