Employment Law Briefing

MAY/JUNE 2011

You leave, you pay

Employer tries to recoup training costs from departing staff

Training is an essential part of any job. But is it a violation of the Fair Labor Standards Act (FLSA) to require employees to pay back training costs if they resign their positions within a certain time frame? That was the question before the U.S. Court of Appeals for the Ninth Circuit in *Gordon v. City of Oakland*.

A conditional offer

The collective bargaining agreement between the City and the Oakland Police Officers Association required officers who voluntarily separated from the police department before completing five years of service to repay a prorated share of the $8,000 cost of their training. The agreement further provided that any repayment due would be deducted from the officer's final paycheck.

The plaintiff successfully applied for a position as a Police Officer Trainee. At the time, she was advised that she must sign the "Conditional Offer of Position as a Police Officer Trainee" to complete the hiring process. This conditional offer restated the training repayment schedule established in the collective bargaining agreement but didn't include a statement that the City would withhold part or all of an officer's paycheck(s) to satisfy any repayment owed.

The FLSA requires all covered employers to pay employees at least the federal minimum hourly wage every workweek.

Following successful completion of her training in June 2006, the plaintiff was hired as a police officer. In January 2008, before completing her second year as an officer, she resigned. At that time, the plaintiff was earning about $38 per hour.

Request for amendment

On the same day as her resignation, the City's Fiscal Services Division notified the plaintiff that the City was entitled to recover $6,400 (80% of $8,000) in training costs and that it had withheld, in partial satisfaction of these claims, the paychecks for her accrued unused vacation ($1,295.57) and compensatory time off ($654.77).

Thus, the City's total remaining demand was $4,449.66. This unpaid demand increased to $5,268.03 in March 2008 with the addition of a collection fee.

The plaintiff filed a lawsuit on behalf of herself and others similarly situated, seeking damages under the FLSA. The district court granted the City's motion to dismiss for failure to state a claim. She then paid the City in full and requested permission to file an amended complaint, stating her justifications for doing so.

The district court found that the amended complaint still wouldn't demonstrate that the plaintiff had been paid less than the federal minimum wage during any week. It denied her request for an amendment, and she appealed.

Minimum hourly wage

On appeal, the plaintiff argued that there's no legal difference between deducting a sum from an employee's check and directly demanding the employee surrender a sum after being paid. She maintained that, after subtracting the $6,400 she'd paid to the City for the training program, she had actually paid a negative sum for her last week of work.

The FLSA requires all covered employers to pay their employees at least the federal minimum hourly wage every workweek. The Sixth Circuit noted that employees can't waive their FLSA protections nor may labor organizations negotiate provisions that waive employees' FLSA rights. Thus, the court explained that neither the conditional offer nor the collective bargaining agreement limited the plaintiff's right to receive at least the minimum wage in any workweek.

Not a kickback

The court further explained that the Department of Labor's regulations governing employers' FLSA obligations provide that "'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks back'" the wages to the employer.

But the Sixth Circuit found that the $6,400 wasn't a kickback. It explained that the plaintiff's payment to the City was the repayment cost of a voluntarily accepted loan. Instead of requiring applicants to independently obtain their police training before beginning employment, the City essentially lent the trainees a sum equal to their training costs — and the loan was forgiven if the employee didn't voluntarily resign before serving five years.

Thus, the court concluded that, despite the plaintiff's debt following her resignation, the City had satisfied the FLSA's minimum wage requirements.

No actual deduction

The key distinction between this decision and a more traditional kickback case is that there was no actual deduction from the plaintiff's paycheck. Employers considering similar training-cost arrangements should bear this in mind. ♦

Now *that's* a kickback

The case of *Cao v. Wu Liang Ye Lexington Restaurant, Inc.*, heard by the U.S. District Court for the Southern District of New York, provides an interesting contrast to *Gordon v. City of Oakland* (see main article). Here the court found that money deducted by the defendant employer was a kickback and, therefore, didn't count as wages.

In *Cao*, the restaurant-employer had a policy of deducting from delivery workers' and wait staff's paychecks 10% of all tips these workers received on credit cards. In addition, the employer required these workers to remit another 12% to 15% of all their tips to be either kept by the restaurant or used for the bus staff's wages.

The court held that the employer could deduct from credit card tips only the processing fee charged by the credit card company. Anything further was a kickback, not wages. The court also held that tips remitted for bus staff also constituted a kickback. As a result, the restaurant had to repay these amounts.

A salute to USERRA

Military service law offers employees broad protection

The Uniformed Services Employment and Reemployment Rights Act (USERRA) was signed into law to encourage noncareer military service, minimize service-related disruptions and prevent discrimination against service members. In *Vega-Colón v. Wyeth Pharmaceuticals*, the U.S. Court of Appeals for the First Circuit considered whether the employer in question had violated the act in its treatment of an employee who was also a U.S. Army Reservist.

Selected to serve

Wyeth hired the plaintiff as a "packaging equipment supervisor" in 2002. Two years later, he went on inactive military status.

In February 2006, the plaintiff informed his supervisor that he'd be returning to active status because he'd been selected for the position of Army captain on the condition that he return to duty. In April, the plaintiff and several other internal candidates applied for a promotion, but Wyeth hired an outside candidate.

In February 2007, the plaintiff returned to active status. That same month, he was given a rating of 2 ("needs improvement") on his performance evaluation for 2006. From 2003 through 2005, the plaintiff had been rated a 3 ("solid performer").

Following the plaintiff's return from leave in July 2007, he was placed on a performance improvement plan (PIP) that established objectives to be completed within 90 days. The plaintiff met these objectives.

In November 2007, the plaintiff's Army unit was mobilized. However, he was informed that, though he'd met the PIP's objectives, it would be extended because he had:

- Sent an e-mail in which he disrespectfully described a supervisor,
- Improperly solicited his co-workers to sign a letter attesting to his job performance, and
- Gone on military leave.

The plaintiff filed a lawsuit in district court alleging that Wyeth had violated USERRA. The district court granted Wyeth's motion for summary judgment and the plaintiff appealed.

Protection granted

The First Circuit first examined whether the plaintiff qualified for USERRA protection as of: 1) February 2006, when he notified Wyeth of his intent to return to activity, or 2) February 2007, when he actually returned to active duty.

The court found that to deny an employee USERRA protection until his or her application for service was actually signed and delivered would be contrary to the law's stated purposes. Thus, the plaintiff was protected as of February 2006.

Mixed findings

Next, the appeals court addressed whether he was discriminated against when Wyeth passed him over for promotion. It found that the plaintiff was unable to put forth any evidence supporting that allegation. Thus, the First Circuit affirmed summary judgment on this claim.

The plaintiff also cited his poor performance review as discrimination. He maintained that he'd never been disciplined before his review, had received a higher rating the year previous and had recently informed his supervisor about his military leave.

To deny an employee USERRA protection until his or her application for service was actually signed and delivered would be contrary to the law's stated purposes.

The appeals court rejected these arguments. First, it noted that the plaintiff had presented no evidence that a disciplinary action must precede a low performance rating. Nor had he demonstrated that employee ratings cannot change from year to year. And though the court acknowledged the proximity in time between the supervisor's knowledge of the plaintiff's military leave and his review, it held that the proximity alone didn't sufficiently show that the poor review was discriminatory.

In regard to the PIP

Finally, the appeals court examined the extended PIP. Although the e-mail and letter may have been sufficient grounds to extend the PIP, the First Circuit noted, the key inquiry was whether such action would have been taken in the absence of the plaintiff's military service. Here the court pointed out that the plaintiff had testified, and Wyeth didn't dispute, that a supervisor had told him that the PIP was extended partly because of his military leave.

The appeals court also explained that the fact that Wyeth may have treated other absences similarly didn't supersede the fact that it may have based its treatment of the plaintiff at least partly on his military absences. Therefore, the court found that the district court had erred in granting summary judgment on this issue.

Equal treatment not enough

This case shows that, for employers, it's not enough to treat a USERRA-protected employee the same as employees who are on leave for other reasons. Rather, the law guarantees that employees on military leave must be treated as if they hadn't gone on leave at all. ♦

Employee decries company response in harassment lawsuit

When it comes to employment matters, inaction can be just as dangerous as action. The employer in *Alvarez v. Des Moines Bolt Supply, Inc.*, a case heard by the U.S. Court of Appeals for the Eighth Circuit, faced a lawsuit charging that it hadn't adequately responded to an employee's repeated complaints of sexual harassment.

Offensive conduct

The plaintiff was employed in the kit department of Des Moines Bolt Supply (DMB) from Feb. 19, 2001, until her resignation on May 2, 2006.

Beginning in September 2005, the plaintiff kept a journal to record incidents of offensive conduct directed at her by nonsupervisory co-workers. Her first complaint, which she made to a receptionist with HR responsibilities, regarded a co-worker comment on her breasts. The receptionist took no action in response.

Then, in November 2005, the plaintiff complained to her supervisor that the same male co-worker had made sexual comments to her. In response, the supervisor warned him not to say anything "sexually inappropriate."

The plaintiff later complained to the supervisor that the same male co-worker again had made inappropriate sexual comments. The supervisor repeated the warning not to do so.

Investigation launched

On Jan. 10, 2006, the plaintiff complained to the supervisor that the troublesome male co-worker had touched her inappropriately. When the supervisor spoke to him, he denied the conduct but another co-worker corroborated the plaintiff's complaint. The supervisor also notified DMB's management.

On Jan. 20, the plaintiff filed a written complaint that the male co-worker continued to touch her inappropriately and make sexual slurs. The next business day, DMB launched an investigation that included interviewing and taking statements from other employees in the kit department and elsewhere in the company.

The accused male co-worker also submitted a statement in which he alleged that he and the plaintiff had made

"random sexual coments [sic] and gestures" to each other for two years before the complaint. He also stated that the inappropriate touching had been initiated by the plaintiff and that she often told him about her sex life.

Following its investigation, DMB suspended both the plaintiff and the accused for five days beginning on Jan. 31. After the suspension, the male co-worker was transferred to another department. He didn't bother the plaintiff again.

Nonetheless, the plaintiff filed a lawsuit alleging that she'd been subjected to sexual harassment. The district court granted DMB's motion for summary judgment, and the plaintiff appealed.

Immediate and appropriate

The Eighth Circuit explained that DMB could be directly liable for employee actions that violate Title VII if it knew or should have known of the conduct — unless the company could show that it took immediate and appropriate corrective action.

The plaintiff first argued that DMB should be held liable for the male co-worker's sexual harassment, as well as that of others, that occurred before her Jan. 10 complaint. The appeals court explained that, for harassment to be actionable under Title VII, the plaintiff must demonstrate that the harassment "was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment."

But, the appeals court noted, Title VII doesn't allow the court to impose a general civility code. And the Eighth Circuit found that the sexually oriented remarks by the plaintiff's co-workers of which DMB had notice before her complaint on Jan. 10 — notably the sexually inappropriate comments of the male co-worker and others — wasn't severe and pervasive enough to establish a sexually hostile environment.

Totality of actions

The plaintiff next argued that she was subject to a hostile environment in the form of physical touching and sexual comments by the noted male co-worker, and that DMB should be liable for this harassment.

The Eighth Circuit agreed that the totality of the male co-worker's actions — verbal and physical — could amount to actionable harassment. But, if an employer responds to harassment with prompt remedial action calculated to end it, then that employer generally isn't liable for the harassment. The court listed some factors in assessing the reasonableness of remedial measures, including:

- The amount of time that elapsed between the notice and remedial action,
- The options available to the employer, and
- Whether or not the measures ended the harassment.

The plaintiff complained to her supervisor on Jan. 10, and he immediately notified management. Ten days later, the plaintiff filed another complaint. DMB immediately launched an investigation, culminating in the suspension and transfer of the problematic male co-worker, which ended his harassing behavior.

The appeals court concluded that the plaintiff was required to tolerate some delay while DMB investigated the complaint and formulated a remedy. And, because the company's response effectively ended the harassment within a reasonable time, the court affirmed summary judgment in DMB's favor.

Wisdom and execution

If DMB hadn't acted as quickly as it did, it might have found itself liable for the male co-worker's harassment. Thus, this case demonstrates the importance of timely executing anti-discrimination policies and complaint procedures. ♦

Resignation or constructive discharge?

An employee resignation may seem a simple thing. But, in *Ross v. City of Perry*, the U.S. Court of Appeals for the Eleventh Circuit looked into whether the plaintiff's resignation was actually a "constructive discharge" because it occurred immediately following a disciplinary hearing.

Caught in a lie

The plaintiff was a male firefighter for the City of Perry, Ga. When a male supervisor wore a shirt to work that a female co-worker found offensive, the female co-worker asked the plaintiff to review her written grievance about the shirt. The plaintiff proofread the grievance and even put the envelope containing the document under the door of the Deputy Chief's office.

Upon receipt of the grievance, the Deputy Chief notified the Public Safety Chief, who ordered an internal affairs investigation into the matter. When the investigators interviewed the plaintiff, he initially told them that he hadn't read the grievance but later admitted that he had proofread it.

After the investigation was completed, it was determined that the plaintiff had lied under questioning. The Public Safety Chief informed the plaintiff in a memorandum that the proposed response for his behavior was termination and that a hearing would be conducted during which he could present or discuss evidence pertinent to the charges.

Filing a complaint

At the hearing, the plaintiff presented no evidence, and the Public Safety Chief gave him the choice between resigning voluntarily and being terminated. He resigned immediately following the hearing.

The plaintiff initially told investigators that he hadn't read the grievance but later admitted that he had proofread it.

The plaintiff then filed a racial discrimination and retaliation complaint in district court. To establish a prima facie case, he had to show that he'd been subjected to an adverse employment action.

So the plaintiff contended that his resignation was really a constructive discharge — a circumstance in which intolerable working conditions essentially amount to a firing, despite the lack of a formal termination. The district court disagreed, holding that the resignation was voluntary, and the plaintiff appealed.

Given advance notice

The Eleventh Circuit explained that an employee's resignation is deemed involuntary whereby the employer forces the resignation by coercion or duress, or obtains the resignation by deception or the misrepresentation of a material fact.

Here the court found that the plaintiff wasn't coerced into resigning. It explained that he was given advance notice of the hearing and was informed of the violations, the proposed act of termination and his opportunity to defend against the accusations.

Thus, the appeals court found that, though the Public Safety Chief told the plaintiff to sign a resignation letter at the hearing, the advance notice had given the plaintiff reasonable time to consider his alternatives and strategies in response to a possible termination. Yet he presented no arguments or explanations at his hearing.

Understanding his choices

The appeals court also found no evidence that the plaintiff had failed to understand the nature of his choices. Although he might have believed he had no choice but to resign, he could have refused to resign and later appealed the termination to the city manager. Therefore, the Eleventh Circuit affirmed the grant of summary judgment on the plaintiff's discrimination claim.

The court also rejected his retaliation claim. To establish a claim of this sort, a plaintiff must show that he or she suffered an adverse employment action for having engaged in a protected activity. In this case, the plaintiff engaged in no such activity. His role in the matter was only to proofread and deliver a co-worker's grievance. Thereby, the appeals court affirmed the grant of summary judgment on the retaliation claim as well.

Establishing a process

An employee caught in a lie is bound to raise a contentious situation. This case demonstrates that an employer that establishes a thorough, formal investigation process may be able to withstand a subsequent lawsuit. ♦