Employment Law Briefing

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Arbitration matters

Supreme Court decision expresses a key preference

State law vs. federal law … which has priority? That was the question in *Nitro-Lift Technologies v. Howard*. In this case, the U.S. Supreme Court decided whether a state court had the authority to declare two particular noncompetes null and void, despite the existence of arbitration clauses in the agreements.

District court

Nitro-Lift Technologies, L.L.C. contracted with operators of oil and gas wells to provide production enhancement services. Two such contractors entered into confidentiality and noncompetition agreements with Nitro-Lift that contained a standard clause requiring all disputes between the two parties to be settled by arbitration rather than litigation.

The two contractors later quit and began working for one of Nitro-Lift's competitors. Nitro-Lift served the pair with a demand for arbitration, claiming that they'd breached their noncompetes. The contractors responded by filing suit in an Oklahoma district court and requesting that the agreements be declared null and void.

Oklahoma Statute Section 15-219A limits the use of noncompetes to situations in which "the former employee directly solicit[s] the sale of goods, services or a combination of goods and services from the established customers of the former employer." The court didn't dispute the contractors' argument that such agreements are generally unenforceable in Oklahoma. Nonetheless, it dismissed the complaint because the court found the arbitration clause used in each was valid. Accordingly, only an arbitrator — not the court — could settle the parties' disagreement.

Oklahoma Supreme Court

The contractors appealed to the Oklahoma Supreme Court, which reversed the lower court's decision. While recognizing the U.S. Supreme Court cases on which Nitro-Lift was basing its argument, the court found that the mere existence of an arbitration clause doesn't prevent a judicial review of the noncompete as a whole.

> *The noncompetition agreements contained a clause requiring disputes to be settled by arbitration rather than litigation.*

Upon that review, the Oklahoma Supreme Court held that Nitro-Lift's agreements were "void and unenforceable as against Oklahoma's public policy."

U.S. Supreme Court

Nitro-Lift then appealed to the U.S. Supreme Court, which cited the Federal Arbitration Act (FAA). This law provides that a written provision in:

> A contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In the past, the Court has held that attacks on the validity of the noncompete, as opposed to attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance — not by a federal or state court.

After setting forth the FAA's clear policy favoring arbitration, the Court compared the FAA with Oklahoma Statute Sec. 15-219A and explained that, where there's a conflict between a state and federal law, the federal law takes precedence. Accordingly, the Supreme Court vacated the Oklahoma Supreme Court's judgment.

Latest in a series

Employers will often include an arbitration clause in their contractual agreements, including noncompetes. *Nitro-Lift* makes it clear that, as long as the clause itself is valid, questions regarding the contract's validity will be heard first by an arbitrator — even if the disputed provision conflicts with state law. Indeed, this decision is the latest in a series of cases in which the U.S. Supreme Court has expressed its preference for resolving cases through arbitration, wherever possible. ♦

Got to get back: An FMLA case

Many employees who take leave under the Family and Medical Leave Act (FMLA) maximize their time off to rest and fully recuperate. The plaintiff in *James v. Hyatt Regency Chicago*, however, sued his employer for not reinstating him *earlier* than the 12 weeks to which he was entitled. The U.S. Court of Appeals for the Seventh Circuit heard the case.

Leave requested

The plaintiff had been an employee of Hyatt Regency Chicago since 1985, working as a banquet steward. In this capacity, he was responsible for maintaining the cleanliness of Hyatt's banquet halls and other food-service areas, as well as transporting food items and equipment.

In March 2007, the plaintiff was involved in an off-duty altercation that resulted in his getting punched in the face. He suffered a retinal detachment in his left eye, prompting corrective surgery in April 2007.

When Hyatt's HR department learned of the surgery, it provided him with FMLA information. On April 24, the plaintiff provided Hyatt with a doctor's note stating that he could return to "light duty" on May 10. He requested FMLA leave the next day, which Hyatt granted and applied retroactively to cover the absences preceding his request.

Lawsuit filed

On May 9, 2007, the plaintiff provided Hyatt and its short-term disability provider with paperwork indicating that he was unable to work in any capacity. Two days later, the plaintiff submitted a request for continued FMLA leave because of his inability to work. Included in

this request was a doctor's note stating that the plaintiff's condition could possibly incapacitate him permanently.

The plaintiff's 12-week FMLA leave ended on July 13, 2007. But the collective bargaining agreement between his union and Hyatt entitled him to remain on job-protected leave for up to one year from his original absence. The plaintiff didn't return to work until Feb. 17, 2008, at which time he was returned to the same position, shift and seniority level as he'd held before his leave of absence.

In a suit filed in 2009, the plaintiff alleged claims of retaliation and interference with his rights under the FMLA. The district court granted Hyatt's motion for summary judgment, and the plaintiff appealed.

Court's decision

As opposed to "typical" FMLA claims, the plaintiff's argument was that, because he wasn't put back in his previous position *immediately* after submitting the April 24 doctor's note, he was granted *too much* FMLA leave and Hyatt had failed to *promptly* return him to work. He contended that the FMLA requires an employer to restore an employee to the position he'd held at the time FMLA leave began or to an equivalent position.

But the FMLA doesn't require employers to restore employees to their former positions if the employee cannot perform an essential function of the job. The Seventh Circuit noted that the plaintiff had never provided Hyatt with a doctor's certification stating that he could return to work in a capacity other than "light duty."

In fact, several doctor's notes specifically stated that the plaintiff *couldn't* perform several activities that were essential to his job. The court pointed out how there's no such thing as "FMLA light duty" and, because the plaintiff couldn't perform an essential job function, Hyatt's failure to restore him to his position before Feb. 17, 2008, wasn't a violation of the FMLA.

Important lesson

Although Hyatt won its case, *James* holds an important lesson for employers: If the plaintiff had submitted a doctor's note stating that he was fit to return without restrictions — or that he could perform the essential functions of his job with or without a reasonable accommodation — Hyatt's failure to restore him promptly would have almost certainly constituted a violation of both the FMLA and antidisability statutes. ♦

Beware of the office romance

Messy breakup prompts sexual harassment case

Employers — and employees — are often warned about the dangers of office romances. A good example of why can be found in *Gerald v. University of Puerto Rico*, a recent decision handed down by the U.S. Court of Appeals for the First Circuit.

3 allegations

The female plaintiff was hired in 2001 by the University of Puerto Rico as a scientist. On Aug. 3, 2007, she lodged an administrative sexual harassment complaint against her male supervisor. The complaint included three allegations, all of which occurred that year.

First, she alleged that, in April 2007, he sexually propositioned her after she'd driven him back to his hotel following a dinner party the two had attended. The plaintiff said she'd declined.

Second, the plaintiff alleged that her supervisor had groped her and made sexually suggestive noises following a meeting in his office in late May. The plaintiff said she was disgusted but had said nothing for fear of losing her job.

Third, she alleged that the supervisor had asked what it would take for her to sleep with him, using vulgar language, during a meeting in early June to discuss an upcoming conference. He'd made the remarks after the plaintiff had mentioned that she'd be busy during the evenings of the conference because she would have a friend accompanying her.

Attorney's investigation

After hearing the complaint and finding the plaintiff credible, the university hired an attorney to investigate. The attorney learned that the plaintiff and supervisor had engaged in a week-long sexual affair while the two were away at a conference in 2005. Allegedly, the supervisor had wanted to continue the relationship upon their return, but the plaintiff had rebuffed him.

When the attorney interviewed the supervisor, he adamantly denied the plaintiff's first two allegations and claimed that his meeting comment was a joke in response to her own off-color remark. The supervisor also denied that his joke was as vulgar as alleged.

Interviews from co-workers corroborated the supervisor's side of the story. A common theme: He and the plaintiff appeared very close and often interacted with bawdy remarks and ribald jokes. One co-worker, who had attended the June meeting, revealed that the plaintiff had approached her before the attorney interview and told her to say that she'd heard the supervisor use a certain curse word and that it was offensive. The co-worker told the plaintiff that she hadn't heard that word and would tell the truth.

The university's attorney submitted a 17-page report concluding that the plaintiff wasn't credible and it was unlikely her first two allegations occurred. Even if the events did occur, the attorney found, neither appeared to affect the plaintiff's job. As for the third allegation, the attorney noted how off-color comments were common between the two. She again concluded that the plaintiff's account wasn't credible, and that the supervisor's remarks in the meeting weren't as vulgar as alleged.

EEOC response

Armed with the attorney's report, the university dismissed the plaintiff's sexual harassment complaint and instigated proceedings against her to determine whether she'd violated regulations by filing a false grievance. In response, the plaintiff filed a sexual harassment complaint with the Equal Employment Opportunity Commission (EEOC).

In deciding whether conduct is severe or pervasive, courts look to severity, frequency, and whether it impeded job performance.

The EEOC found no evidence of discrimination but, on June 23, 2008, notified the plaintiff of her right to file a lawsuit. She voluntarily resigned three days later and commenced this lawsuit several months after her resignation, maintaining her allegations of sexual harassment in violation of Title VII. The district court granted the university's motion for summary judgment, and the plaintiff appealed.

Severe or pervasive conduct

To prevail on a hostile work environment sexual harassment claim, a plaintiff must:

- Establish membership in a protected class and that unwelcome sexual harassment occurred,

- Demonstrate that the harassment was based on sex, sufficiently severe or pervasive, and objectively and subjectively offensive, and
- Show some basis for employer liability.

The district court found that the plaintiff raised a question of fact with almost all of the prerequisite elements. Nonetheless, the court dismissed the claim because the plaintiff couldn't show that the alleged conduct was severe or pervasive. This became the main issue on appeal.

In deciding whether conduct is severe or pervasive, courts look to several factors (none of which is individually determinative), including severity, frequency, and whether it was physically threatening and impeded the victim's job performance.

The First Circuit found that the alleged conduct, which included sexual propositioning and uninvited touching, could reasonably be viewed by a jury as severe. The court then rejected the university's argument that, because the plaintiff alleged only three incidents, she couldn't establish "frequency." The First Circuit noted that "a single act of harassment may, if egregious enough, suffice to evince a hostile work environment."

Finally, the court pointed out that the plaintiff's still managing to get her work done despite the harassment isn't fatal to a hostile work environment claim. Accordingly, the First Circuit held that the district court had erred in granting the university's motion for summary judgment.

Specific guidelines

A single unchecked interoffice relationship led this employer into a turbulent investigation and substantial legal expenses. To guard against these dangers, work with your attorney to develop specific guidelines to deal with such situations. ♦

Rogue managers can lead to retaliation claims

If managers, inadvertently or otherwise, make employees feel like they can't complain about discrimination, the legal implications can be huge. Case in point: *Maron v. Virginia Polytechnic Institute and State University*.

Making a complaint

The plaintiff worked for Virginia Polytechnic Institute and State University (Virginia Tech) from March 2006 through October 2008. She was first hired as an Assistant Director of Development for Fine and Performing Arts, and then later as a fundraiser for the College of Engineering.

After leaving Virginia Tech, the plaintiff and two other former female employees commenced a lawsuit alleging that Virginia Tech had paid them less than male employees who performed the same work. She also raised an individual claim of retaliation in violation of Title VII.

During the trial, the plaintiff testified how, in 2007, she'd expressed an interest in leaving her fundraising position for an open job with another department. During conversations with this other department's supervisor, the plaintiff was allegedly told hiring her would be a "liability" because she was "young, newly married" and in her "child-bearing years." The plaintiff reported this conversation to the HR department and complained of gender discrimination.

Receiving a memo

Soon after filing the HR report, the plaintiff received a disciplinary memorandum from her supervisor regarding e-mails of a personal nature. They had been sent to Virginia Tech's Vice President for University Development and University Relations.

The plaintiff discussed the memorandum with the vice president, who said that the plaintiff had "shown very poor judgment" and that she needed to stop pursuing things that could publicly ruin her career. According to the plaintiff, she was further warned that, if she wished to keep her job, she "needed to become invisible" and "stay off the radar for the next six months at a minimum." After this meeting, the supervisor informed the plaintiff that she had greatly irritated the vice president, who was now likely bearing a grudge against her.

The plaintiff testified about two additional incidents that occurred after she had complained of sex discrimination. One involved the "spontaneous" changing of her fundraising benchmark so that she'd be unable to achieve it and lose out on a promotion. In the other, the plaintiff alleged that her supervisors had tried to replace her while she was absent under the Family and Medical Leave Act.

At the district court trial, the jury returned verdicts in favor of the employees on the wage claims and the plaintiff on her retaliation claim. But, in response to several posttrial motions filed by Virginia Tech, the court set aside the verdicts; entered judgment as a matter of law in favor of the defendant, Virginia Tech, on the plaintiff's retaliation claim; and granted a new trial on the employees' wage claims. The new jury returned verdicts in favor of Virginia Tech, and the plaintiff and her co-plaintiffs appealed.

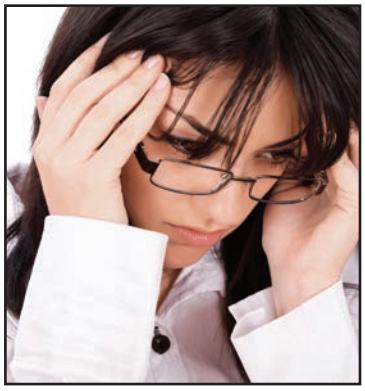
Dissuading an employee

To establish a claim of retaliation, a plaintiff must show that he or she engaged in protected activity and suffered

an adverse employment action, and that a connection exists between the protected activity and adverse action. On appeal, Virginia Tech didn't dispute that the plaintiff's gender discrimination complaint constituted protected activity. The only issues were whether an adverse action had occurred and, if so, whether it was causally connected to her complaint.

"Petty slights, minor annoyances, and simple lack of good manners" don't qualify as adverse actions.

An adverse action must be "materially" adverse, meaning that it's capable of dissuading a reasonable employee from complaining about discrimination. Although "petty slights, minor annoyances, and simple lack of good manners" don't qualify as adverse actions, materially adverse actions aren't limited to those that affect only terms or conditions of employment.



Virginia Tech argued that, at most, the plaintiff experienced "petty slights." In any event, these actions had no connection to her discrimination complaint. The U.S. Court of Appeals for the Fourth Circuit disagreed, holding that the three incidents alleged in the plaintiff's testimony could all be found by a jury as dissuading a reasonable employee from filing discrimination complaints. The court further held that these actions were causally connected to her gender discrimination complaint and reversed the district court's determinations.

Responding appropriately

This case demonstrates the importance of properly training managers on how to avoid committing acts of retaliation against employees who engage in protected activity. When an adverse employment action occurs shortly after an employee engages in protected activity, it creates an inference of a retaliatory motive. In these situations, managers must not "go rogue" but immediately consult with HR and legal counsel on an appropriate response. ♦

A mere mention: Fifth Circuit hears similar case

As shown in *Maron v. Virginia Polytechnic Institute and State University* (see main article), whether a plaintiff has a valid retaliation claim largely depends on whether he or she suffered a materially adverse employment action.

A similar case with a notably contrasting outcome is *Hernandez v. Johnson*, which eventually went before the U.S. Court of Appeals for the Fifth Circuit. Here the plaintiff alleged that he was retaliated against after he'd filed several Equal Employment Opportunity (EEO) claims against his two former supervisors. His complaint set forth five employment decisions that he alleged constituted materially adverse actions, one of which was a home phone call from a supervisor. The plaintiff claimed that, during the call, the supervisor harassed him and threateningly warned him not to file an EEO claim against her.

As did the court in *Maron*, the Fifth Circuit analyzed the complaint by asking whether the supervisor's actions would "dissuade a reasonable worker from making or supporting a charge of discrimination." But in this case the court held that a supervisor's mere mention — or even criticism — of an employee's EEO complaint didn't, by itself, constitute "material adversity."