

# Employment Law

## BRIEFING



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# Quick! Act fast when sexual harassment is alleged

**W**hen a retailer learned that one of its store managers had sexually harassed three employees, it acted prudently and terminated the manager. But did it act quickly enough to avoid violating the employees' rights under Title VII of the Civil Rights Act (Title VII)? In *EEOC v. Autozone, Inc.*, the Sixth Circuit Court of Appeals considered this question.

## MANAGER BEHAVES BADLY

The store manager had been given the authority by his employer to hire new hourly employees, write them up for misconduct and initiate the disciplinary process by recommendation. But he couldn't fire, demote, promote or transfer employees. His supervisor, the district manager, visited the store on a weekly basis and actively participated in its management. The district manager had the authority to fire, promote and transfer.

Approximately three months after the manager began working at that store, he started making lewd and obscene sexual comments to three employees. He also touched them inappropriately on several occasions and showed them pornography on his mobile phone.

After a month, one employee complained about the manager's sexual harassment to a co-worker. But the co-worker didn't report it or take any action because he said that the employee didn't seem to be too upset by the harassment. Eventually, the employee reported the harassment to the district manager. The district manager questioned other employees in the store and they confirmed the employee's allegations. The district manager immediately informed the regional human resources manager that the store manager was harassing several employees. The human resources manager visited the store and questioned the employees as well. Shortly thereafter, the employer terminated the store manager.

## TANGIBLE EMPLOYMENT ACTIONS

The Equal Employment Opportunity Commission (EEOC) filed a complaint on behalf of the three employees, alleging that the employer had subjected employees to sexual harassment. But the employer argued that the store manager wasn't a supervisor and didn't have the power to take significant action against the employees. The trial court agreed. According to the verdict, even if the manager were a supervisor, the employer was eligible for an affirmative defense to liability. The EEOC appealed.

Under Title VII, an employee is a supervisor if he or she is empowered to take "tangible employment actions." These are actions that affect a significant change in employment status, such as hiring, firing, failing to promote, reassigning with significantly less responsibilities or causing a significant change in benefits. The appeals court found that, although the store manager could hire and recommend discipline for employees, the power to fire, demote, promote or transfer employees belonged to the district manager.



## TAKING REASONABLE CARE

The court also held that, even if the store manager were a supervisor, the employer had established both elements required for an affirmative defense to liability:

1. That the employer exercised reasonable care to prevent and correct any sexually harassing behavior, and
2. That the harassed employees unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The court decided that the employer had taken reasonable care to prevent harassment because it terminated the store manager when it learned of his behavior. It also determined that the employees had failed to take advantage of the employer's preventive procedures. The employees acknowledged that it was their responsibility to read the employee handbook, which included the employer's sexual harassment policy. On several occasions, the employer had asked employees to sign

documents indicating that they had read the handbook. All three employees had acknowledged receipt.

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## POSITIVE RESPONSE, POSITIVE OUTCOME

The Sixth Circuit found in favor of the employer in this case — in part, because the employer acted swiftly. To avoid potential harassment claims under Title VII, take action as soon as one of your employees reports sexual harassment. Having a sexual harassment policy and ensuring that employees receive and acknowledge receipt of this policy also helps reduce liability risk. ■

## DEFINING “SUPERVISOR” IN A LIABILITY CONTEXT

An employee claimed that she was sexually harassed by a co-worker and filed suit against her employer under Title VII of the Civil Rights Act (Title VII). Yet the co-worker didn't appear to have supervisory authority over the employee — not on first glance, anyway. The court for the Eastern District of New York considered whether her case had merit.

The employee worked as a secretary for a family-owned business six months without incident. Then a co-worker with close familial ties to the employer made a lewd and obscene sexual comment to her. This co-worker wasn't the employee's direct supervisor and the two rarely interacted. However, because the co-worker had familial ties to the employer, the employee considered him to be her superior. The employee complained to another co-worker, who told her that she had experienced a similar encounter with the harassing individual. But the co-worker had never complained because she was afraid she would be fired. The employee eventually filed a formal complaint with her employer and she was terminated a few days later.

The employee filed suit, alleging a hostile work environment in violation of Title VII. The employer argued that the co-worker wasn't her supervisor. The trial court disagreed, holding that the co-worker arguably possessed and exercised supervisory power over the employee. The evidence showed that he had close familial ties to the employer, could take tangible employment actions against employees, controlled the delivery of paychecks and expected employees to obey his job-related requests.

The lesson? Even when an individual doesn't directly supervise an employee, courts often look at the totality of the circumstances to determine whether that person is a supervisor for liability purposes.



# The sequence of events can be a key factor in Title VII cases

In *Alkhalwaldeh v. Dow Chemical Co.*, the Fifth Circuit Court of Appeals considered whether an employer had discriminated and retaliated against its employee because of race in violation of Title VII of the Civil Rights Act of 1964 (Title VII). The timing of events played an important role in the court's ultimate decision.

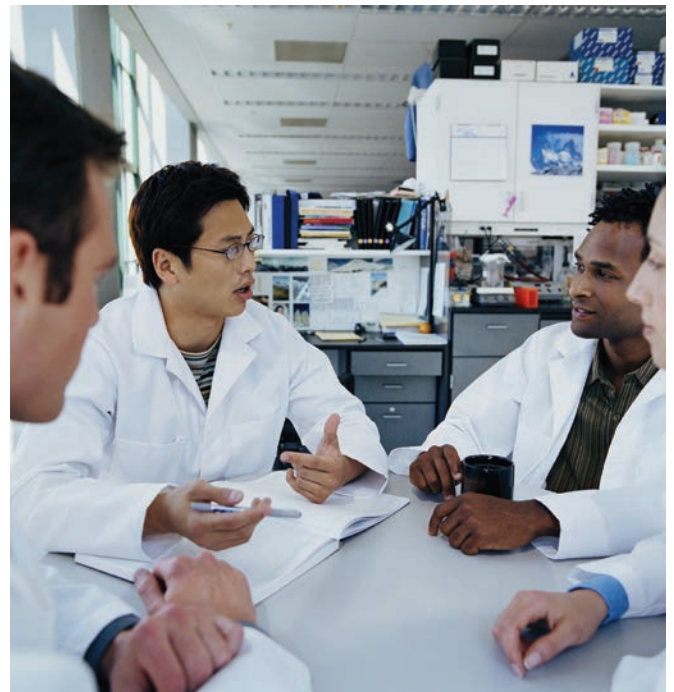
## EMPLOYEE ALLEGES INSENSITIVE COMMENTS

The employee worked as a functional scientist in the employer's research and development group. The employer evaluated its employees annually. When the employee's supervisor gave him a rating of "1" — the lowest possible rating — the employee was placed on an improvement plan to help determine whether rehabilitation was possible. The employee vigorously protested the rating and his placement on the improvement plan, but to no avail.

A month after receiving the poor rating and being placed on the plan, the employee complained to his supervisor that two co-workers had made what he perceived to be racially insensitive comments. The first comment was made after the employee had won a briefcase in a company raffle. A co-worker told the employee that he could fill it with cash, drugs or an assault rifle, which the employee took to be an insult to his Muslim heritage.

A second comment occurred after the employee arrived late to a postlunch meeting. The employee told a different co-worker that, due to his religious dietary restrictions, he couldn't eat the lunch provided by the employer as part of the lunch meeting and had to go out to eat lunch. The co-worker responded that it wasn't his problem that the employee, as a Muslim, couldn't eat the provided lunch. When the employee informed his supervisor about the two comments, the supervisor told him that there was a perception about the people "from the part of the world that [the employee] came from" and that "perception was reality."

The employee was kept on the improvement plan for the next seven months. Frustrated with his supervisor,



the employee eventually bypassed corporate channels and sent an email to the Chairman and CEO of the company. In his email, the employee claimed that his supervisor was keeping him on the improvement plan due to his "racist agenda" and in retaliation for complaining about his two co-workers' racially insensitive comments. The employee was transferred to work under a different supervisor. His new supervisor evaluated him for approximately two months before concluding that the employee was an underperformer. The employer ultimately terminated the employee.

## ADMINISTRATIVE REMEDIES EXHAUSTED

The employee filed charges with the Equal Employment Opportunity Commission (EEOC). The employer responded to the complaint, informing the EEOC that it had fired the employee due to poor performance and failure to complete the improvement plan. The employee stated that he *had* completed the improvement plan, but the employer reasserted that it had fired him before he completed it.

After exhausting all administrative remedies, the employee filed suit against the employer, alleging

discrimination and retaliation in violation of Title VII. The trial court ruled in favor of the employer, and the employee appealed.

### APPEALS COURT WEIGHS IN

To successfully prove a Title VII claim, a claimant must identify at least one co-worker who was treated more favorably by the employer under nearly identical circumstances. But the appeals court found that the employee had failed to satisfy this “similarly situated” requirement. He hadn’t produced evidence of anyone outside of his protected class who had received the same low rating from the employer and had completed the improvement plan but wasn’t terminated, as he was.

The court also ruled against the employee on the retaliation claim. Title VII requires an employee to produce evidence that:

1. The employee participated in a protected activity,
2. The employer took an adverse employment action against him or her, and

3. There was a causal connection between the adverse employment action and the protected activity.

But the court held that, even if the employee’s allegations regarding his supervisor’s response to his complaint were true, he received the low rating *before* he engaged in protected activity. Therefore, no reasonable fact finder could conclude that his poor rating and subsequent termination was causally connected with his complaint.

### DON’T IGNORE COMPLAINTS

Employers that ignore complaints about racially insensitive or other offensive comments made by employees to their co-workers may be doing so at their own peril. In this particular case, the employee was given a poor performance review and placed on an improvement plan before co-workers made insensitive comments and before he complained about them. But if the sequence of events had been different, the court might have ruled for the complainant. ■

## Americans with Disabilities Act

# When can employers require physical examinations?

**A** prospective full-time employee was required to take a physical examination by an employer. When he didn’t pass the exam, the job offer was revoked and his temporary position was terminated. Were these actions a violation of the Americans with Disabilities Act (ADA)? The Tenth Circuit Court of Appeals considered the question. Its decision hinged on whether the exam related to the position’s essential job functions.

### FROM TEMP JOB TO TRIAL

The employee in *Iselin v. Bama Companies, Inc.* worked for a temporary employment agency, but the employer that he was assigned to set his wages, assigned his work and paid his salary. The employer was aware that the employee was

disabled due to an unspecified back problem. The employee had worked as a temporary employee for approximately six months when the employer offered him a permanent position and a raise. However, the employee first had to pass a physical examination. When the employee *didn’t* pass the examination, his employment was terminated.

The employee filed suit against the employer under the ADA, alleging:

1. Discriminatory termination,
2. Discriminatory failure to hire,
3. Failure to accommodate, and
4. Misuse of employment testing.



The court stated that it was possible that the employee hadn't passed the employer's examination for reasons that were unrelated to essential job functions. Although it might ultimately be shown that the employee *couldn't* perform essential job functions, it had been inappropriate for the trial court to resolve such factual discrepancies at the pleading stage.

The trial court dismissed the first three for failure to state a claim because the employee hadn't passed the employer's physical examination. The court also dismissed the fourth claim because the ADA allows an employer to offer new employment on the condition that the prospective employee pass a medical exam. The court determined that the employer was essentially offering the employee a new job.

### ON APPEAL

But the appeals court took a different view. It reversed the trial court's dismissal of the employee's first three claims for two reasons.

The first is that the ADA requires employers to make reasonable accommodations to qualified individuals — that is, individuals who can perform the essential functions of the position that they hold or want to hold. Evidence that a particular function is essential may include the:

- ❑ Employer's judgment as to which functions are essential,
- ❑ Written job descriptions prepared before advertising a position or interviewing applicants for the position,
- ❑ Amount of time spent performing the function,
- ❑ Consequences of not requiring the employee to perform the function,
- ❑ Work experience of past employees in the position, and
- ❑ Work experience of employees currently in a similar position.

The second reason the appeals court rejected the trial court's dismissal of the first three claims was because the employee's allegations supported the inference that he *could* perform the essential functions of the job. He had performed those functions as a temporary employee for approximately six months.

### COURTS AGREE ON ONE POINT

As for the employee's fourth claim on misuse of employment testing, the appeals court affirmed the trial court's dismissal. The ADA generally prohibits an employer from using medical exams to determine the existence, nature or severity of a disability. However, exams are permitted under certain conditions depending on whether the employer is examining a job applicant or a current employee.

Employers may require job applicants to submit to an exam as long as all applicants, regardless of disability, are subjected to the same exam. With current employees, an employer may require an exam if it's job related and consistent with business necessity. The appeals court held that the employee's claim in this case lacked allegations that would support a misuse claim under either characterization.

### DETERMINE JOB FUNCTIONS

How can employers avoid court and unfavorable legal outcomes? Be sure to determine and document the essential job functions for every job position. Also, if you require employees to take examinations, make sure they accurately reflect each position's essential job functions. ■

# Know the difference between a hostile and merely unhappy work environment

**A** supervisor made rude remarks related to an employee's hearing difficulties. Was it enough for the employee to establish a hostile work environment in violation of the Americans with Disabilities Act (ADA)? The Third Circuit Court of Appeals evaluated all of the circumstances in *Cassandra Ballard-Carter v. The Vanguard Group* to come to its surprising conclusion.

## EXCESSIVE CRITICISM OR POOR PERFORMANCE?

When the employee began working for the employer in 1996, the employer was aware that she suffered from hearing difficulties and self-diagnosed dyslexia. She worked for her employer approximately nine years without incident, and then was promoted to a new position, where she worked for four years without incident. After that, the employee began reporting to a new supervisor. The relationship between her and her supervisor was strained from the beginning because, according to the employee, her new supervisor was overly petty and critical of her work product.

However, there was evidence that the employee's supervisor wasn't the only one who was dissatisfied with her work. On one occasion, a client complained to the employee's supervisor that she wasn't returning his calls, didn't answer questions correctly and wrote in a way that made it difficult for him to understand what she was trying to communicate. The supervisor removed the employee from that account at the client's request.

During this period, the supervisor's criticism of the employee intensified. The employee alleged that her supervisor had made four comments about her hearing difficulty and dyslexia. She claimed that she'd become ill as a result of the escalating hostility. Eventually, the employee went on medical leave and never returned.

## IMPOLITE BUT NOT SEVERE

The employee filed a suit against her employer, claiming a hostile work environment in violation of the ADA, on the basis of her hearing difficulty and perceived dyslexia.

At trial, the employer argued that the supervisor's comments hadn't created a hostile work environment — and the trial court agreed. The employee appealed.

She argued to the appeals court that the trial court had focused only on the four comments made by the supervisor and hadn't considered all the other instances of harassment. But the appeals court disagreed with the employee. During the hearing held before the original trial, the employee had conceded that the basis of her hostile work environment claim was the four comments about her hearing difficulty.

For there to be a hostile work environment, the harassment must be severe and pervasive. The ADA doesn't require a "happy" or even a "civil" workplace. It only prohibits harassment so severe or pervasive as to alter the conditions of employment and create an abusive work environment. To determine if the harassment meets the "severe or pervasive" standard, courts look at all of the circumstances, including:

- ❑ The frequency of the discriminatory conduct,
- ❑ Its severity,
- ❑ Whether the conduct is physically threatening or humiliating — or merely offensive, and
- ❑ Whether it unreasonably interferes with the employee's work performance.

The appeals court held that four comments over the course of three years, while impolite, couldn't be considered pervasive.

## MATTER OF INTERPRETATION

Although employers aren't required to maintain a happy and civil workplace to comply with the ADA, they should try to make their employees feel comfortable. This means providing employees with constructive criticism without being insulting or demeaning. Although the Third Circuit found that the supervisor's conduct in *Ballard-Carter* didn't rise to the level of severe or pervasive hostility, other courts could have interpreted the situation differently. ■