Employment Law Briefing

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One employer or two?

Appeals court determines joint liability in Title VII case

In a Title VII race discrimination action, the U.S. Court of Appeals for the Third Circuit considered whether a temporary worker assigned by a staffing agency to a retail store was a joint employee of the agency and store. As *Faush v. Tuesday Morning, Inc.* shows, the control companies exercise over workers can make all the difference.

Temp accused of theft

The African-American plaintiff was assigned by a staffing company to work at the retail store for 10 days. The plaintiff alleged that, while he was working at the store, the store manager accused him and other temporary African-American workers of stealing. In addition, the store owner's mother allegedly instructed the workers to "work in the back of the store with the garbage" until it was time for them to leave.

When the plaintiff and the other workers tried to complain, a white employee blocked their path and used racial slurs. In response to the workers' complaints, the store manager stated that they weren't permitted to work on the floor because of loss prevention concerns. The plaintiff also claimed that he and the other African-American workers were terminated because of their race.

The agreement between the staffing agency and the store could lead a rational jury to find that the plaintiff was an employee of the store.

The plaintiff brought suit against the store for race discrimination under Title VII. The trial court granted the store's motion for summary judgment, finding that the retailer wasn't the plaintiff's employer pursuant to Title VII. Therefore, the plaintiff couldn't sue the store for employment discrimination. The plaintiff appealed.

Court consults *Darden*

The appeals court partly affirmed and partly vacated the trial court's decision, holding that a rational jury *could* find that the store was the plaintiff's employer. The court applied an employment relationship test laid out by the U.S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, which considers "the hiring party's right to control the manner and means by which the product is accomplished."

Darden provides a list of nonexhaustive factors when determining whether a hired party is an employee, including:

- Skills required of the worker,
- Who provides work instruments and tools,
- Who assigns projects,
- Location of the work,
- Duration of the relationship,

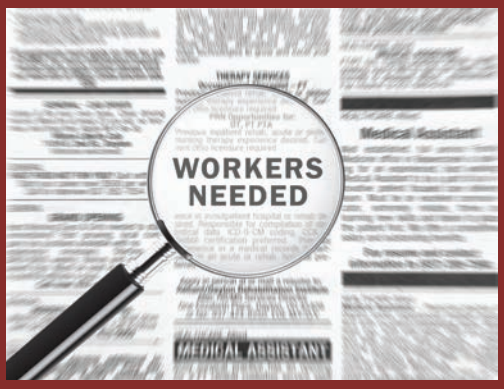
Same issue, different outcome

In *Scott v. UPS Supply Chain Solutions*, the U.S. Court of Appeals for the Third Circuit considered whether a temporary worker assigned by a staffing agency to the defendant was the defendant's employee. Although the case was similar to *Faush v. Tuesday Morning, Inc.* (see main article), the court reached a different conclusion.

The plaintiff accepted temporary work with the defendant. He executed an agreement stating that he was an employee of the staffing agency, not the defendant. He was paid by the staffing agency and reported to the staffing agency's supervisor, who was also in charge of his vacation and sick leave requests. In addition, the plaintiff didn't have access to the defendant's building and could only be admitted by a receptionist after he rang a bell. If he arrived late or needed to leave, he had to advise the staffing agency.

The plaintiff was tardy and failed to show up for assignments on several occasions. Also, the defendant found that he had falsified a time entry. The staffing agency informed the plaintiff that his assignment with the defendant was terminated, but continued to give him other work. The plaintiff believed that his assignment was terminated by the defendant because of his sexual orientation.

The trial court granted summary judgment in the defendant's favor, holding that the temporary worker wasn't the defendant's employee. The appeals court affirmed the trial court's finding that the worker was the staffing agency's employee, not the defendant's employee. It analyzed the facts using the *Darden* factors, specifically looking at the defendant's right to control the manner and means by which the product was accomplished. Because the staffing agency determined the worker's pay rate and monitored his daily attendance and performance evaluations, the court found that the plaintiff wasn't the defendant's employee.



- Extent of the hired party's discretion over work,
- Method of payment, and
- Whether the work is part of the hiring party's regular business.

The court found that the store had ultimate control over whether the plaintiff worked at its store and it exercised control over the daily activities of the temporary workers. For example, the store gave the plaintiff assignments, supervised him and provided him with any tools. The store also managed him as it did its nontemporary workers and approved the number of hours he worked — factors that led to an employer-employee relationship.

The court held that, while the staffing agency set the plaintiff's pay rates and withheld required taxes, the store indirectly paid the plaintiff when it paid the staffing agency for each hour worked at the agreed-upon rate. Furthermore, the agreement between the staffing agency and the store could lead a rational jury to find that the plaintiff was an employee of the store. The agreement provided, among other things, for the store's approval of the worker's time cards and characterized the worker as a temporary employee and not an independent contractor. Moreover, pursuant to the agreement, the store agreed to comply with all applicable laws concerning employment — including the hiring and discharge of employees.

Judicial trend

As *Faush* illustrates, companies that use a staffing agency may not be protected from liability for employment discrimination claims. The case reflects a recent trend in which courts and administrative agencies have been more willing to consider staffing agencies and clients to be joint employers. The same may hold true for contractors and subcontractors, and franchisors and franchisees. The extent to which companies control workers is critical to such findings. ♦

Age Discrimination in Employment Act

Coupons fail to save employee from termination

Was an employee's creative sales strategy the reason he was terminated — or was that simply a pretext? In *Ng-A-Mann v. Sears, Roebuck Co.,* the U.S. Court of Appeals for the Fifth Circuit considered whether the plaintiff established that his former employer's action violated the Age Discrimination in Employment Act (ADEA).

Cutting the coupon holder

The plaintiff, a 72-year-old commissioned salesman, withheld coupons that were printed for customers at the time of sale and later used them to induce new customers to make purchases. This violated his employer's coupon policy. A routine audit uncovered the plaintiff's actions and, when interviewed, he admitted to them. The plaintiff was terminated and he subsequently brought an instant action alleging his termination violated the ADEA.

The plaintiff claimed that his employer wanted to downsize and that it targeted him because of his age. He alleged that other employees also violated the coupon policy and none of them were terminated. The trial court granted summary judgment in the employer's favor, finding that the plaintiff had failed to produce material evidence that the company had used his coupon violation as a pretext for age discrimination. The plaintiff appealed.

Shifting the burden

Because the plaintiff relied on circumstantial evidence, the appeals court applied the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green,* under which a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for its action. Next, the plaintiff is given the opportunity to establish by a preponderance of the evidence that the proffered reason wasn't the true reason, but a pretext for discrimination. Generally, pretext is found through evidence of disparate treatment, or by showing that the employer's proffered reason is false or shouldn't be believed.

The trial court had assumed that the plaintiff had established a prima facie case and that the employer offered a

nondiscriminatory reason for the termination — violation of its coupon policy. Thus, the burden shifted back to the plaintiff to prove that the employer's proffered reason was a pretext. As evidence of pretext, the plaintiff argued that other employees used old coupons but weren't terminated. The employer responded that, as a result of the same routine audit, it had terminated eight other employees between the ages of 17 and 24 — one of whom *had* violated the same coupon policy.

Assessing similarity

The plaintiff also alleged disparate treatment because younger employees who used old coupons to induce sales weren't fired. But the court held that the fact that other employees had engaged in similar misconduct and weren't fired wasn't necessarily evidence of disparate treatment. The difference in treatment may be accounted for by a distinction between the plaintiff's actions and the actions of those alleged to be "similarly situated" — that is, employees who have the same position and have committed the same violation, both in terms of seriousness and frequency.

In this case, the plaintiff needed to show that his employer chose *not* to terminate another similarly situated employee who had violated the coupon policy as frequently as he had. As the plaintiff couldn't do so, he didn't establish pretext.

The plaintiff further alleged that comments made by company management about retirement established pretext. On their own, comments regarding eventual retirement don't evidence discriminatory intent. But persistent supervisor comments about retirement, along with other evidence, can lead to a finding of pretext. The plaintiff stated that his managers brought up retirement on multiple occasions. However, the court found that he'd failed to establish that they were anything more than reasonable inquiries into his future plans.

Staying out of court

Ultimately, the appeals court in this case affirmed the trial court's decision of summary judgment in the employer's favor. Yet, like most employers, you'd no doubt prefer to avoid court altogether. When terminating employees, ensure that you're taking or have taken similar adverse actions against similarly situated workers. ♦

When the dots don't connect in a retaliation action

When an African-American employee was terminated, he cried foul. His claims included retaliation and violations of 42 U.S. Code Section 1981 and Title VII of the Civil Rights Act of 1964. The case, *Mitchell v. Mercedes Benz U.S. International, Inc.*, was eventually heard by the U.S. Court of Appeals for the Eleventh Circuit. The court's decision hinged on whether the plaintiff could make a causal connection between his former employer's actions and certain adverse outcomes.

History of charges

The plaintiff began working for Mercedes-Benz U.S. International, Inc. (MBUSI) in 1997. In 2008, MBUSI found that the plaintiff had falsified his time sheets and violated company policy by leaving work early, thereby receiving pay for work he didn't perform. The plaintiff was put on final warning. A few months later, he was terminated for failure to report to work — a violation of MBUSI's attendance policy.

The plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) against MBUSI, alleging race discrimination and retaliation. He then filed a federal lawsuit, which was dismissed in 2010 pursuant to the plaintiff's and MBUSI's joint stipulation.

After applying for jobs in 2012, the plaintiff received conditional offers of employment. However, the offers were rescinded, allegedly after MBUSI gave negative references. In September 2012, the plaintiff brought another EEOC charge against MBUSI alleging that the company had made negative references to prospective employers in retaliation for his earlier charge and lawsuit.

A fresh start … or not

In May 2013, the plaintiff began employment with TW Fitting, NA, LLC (TWF). The following month, he asked permission to use the company credit card to buy supplies, and the request was approved. However, in addition to buying supplies, the plaintiff used the card to buy lunch.

In July, TWF terminated the plaintiff, citing his unauthorized use of the company credit card. The plaintiff alleged that, before his termination from TWF, he saw two MBUSI employees visiting TWF. One of the employees asked him how his lawsuit against MBUSI was going

and he replied that it was settled. The two employees also spoke with the plaintiff's supervisor privately. The plaintiff believed that the MBUSI employees pressured TWF to terminate his employment.

The plaintiff filed a complaint against MBUSI and TWF, alleging among other things that TWF had terminated his employment at MBUSI's request. MBUSI purportedly retaliated against the plaintiff by pressuring TWF, as well as by providing negative employment references to other potential employers. The trial court granted the defendant's motion for summary judgment on all claims. The plaintiff appealed as to the retaliation claims.

Making the case

The appeals court affirmed that the plaintiff couldn't establish a prima facie case of retaliation because he'd failed to provide sufficient evidence of a causal connection between his EEOC charges and the adverse actions. To establish a prima facie case for retaliation under Title VII and Sec. 1981, a plaintiff must show that:

1. He or she engaged in a protected activity,
2. He or she suffered an adverse action, and
3. There was a causal connection between participation in the protected activity and the adverse action.

The appeals court held that merely showing the alleged adverse action occurred sometime after the protected activity doesn't prove causation. The plaintiff must establish that the employer was actually aware of the protected activity when the adverse action was taken.

The court also found that the plaintiff's claim was speculative and that he'd relied on circumstantial evidence. There was no evidence that the two MBUSI employees had actually told TWF of the plaintiff's EEOC charges and lawsuit, only that they may have mentioned it. That possibility is insufficient for a reasonable jury to find that TWF was aware of the plaintiff's protected activity when he was terminated.

As for his claim against MBUSI, the court decided that, while a negative reference could be an adverse action, the plaintiff's allegations failed to establish a cause of action. He didn't present any evidence that the MBUSI employees who provided negative references to prospective employers had knowledge of the plaintiff's protected activities. Therefore, there was no causal connection between the protected activities and the adverse action. In the end, the appeals court upheld the trial court's grant of summary judgment.

Neutral stance is safest

If your company provides negative references for former employees to prospective employers, know that you could potentially face retaliation claims. To contain such liability, be sure to give only neutral references limited to employment dates and job titles. ♦

Litigation Rx: Document your termination decisions

Employers can defend themselves against claims made under the Americans with Disabilities Act (ADA). But they must follow their stated employment policies and document everything that happens along the way. The U.S. Court of Appeals for the Seventh Circuit recently affirmed this approach in *Hooper v. Proctor Health Care Inc.*

Doctor as patient

The plaintiff, a physician with bipolar disorder, was hired to work at an outpatient clinic that provided urgent and primary care. A year later, the plaintiff met with the clinic's Director of Human Resources because he thought that he needed time off from work following an incident in his personal life.

During the meeting, the plaintiff revealed to the Director that he had bipolar disorder. The two discussed the possibility of a medical leave of absence. The plaintiff alleged that, during the meeting, the Director mentioned that she had a contentious relationship with her bipolar mother-in-law. Later, after discussing the situation with the clinic's Vice President of Human

Resources, the Director and Vice President of HR decided to place the plaintiff on paid medical leave of absence.

The plaintiff met with his psychiatrist, who agreed that he should be placed on leave and wrote a note excusing him from work. When the plaintiff met with his psychiatrist again a month later, the psychiatrist decided that he could return to work and wrote another note.

Second opinion

The clinic requested a second, independent medical confirmation. The second psychiatrist also determined that the plaintiff could return to work and suggested certain accommodations to reduce the plaintiff's stress. This psychiatrist verbally informed the clinic of the evaluation's results and issued a written report two weeks later.

After receiving the verbal report, the clinic contacted the plaintiff on several occasions, leaving him voicemail messages to return to work. But the plaintiff didn't return to work or respond to the messages. The clinic eventually sent the plaintiff a letter stating that he'd been cleared to return to work and that it had been trying to contact him. If he didn't respond by the end of the week, the letter stated, the plaintiff's employment would be terminated. And that's what happened.

Missed opportunities

The plaintiff filed a claim alleging that he was terminated because of his disability. He alleged that he didn't see his former employer's letter in time to respond to it because his mother had died and he'd been out of town. Two months after his termination, the plaintiff asked his former employer to review its decision. The request was denied because it wasn't made according to the clinic's policy — within seven days of termination.

The employer moved for summary judgment dismissing the plaintiff's claims. In response, the plaintiff argued that the clinic had failed to reasonably accommodate his disability by not discussing the psychiatrist's recommendations. However, the trial court granted summary judgment in the employer's favor, finding that the plaintiff hadn't even asserted a failure-to-accommodate claim in his complaint. Thus, he couldn't assert such a claim in opposition to the clinic's motion for summary judgment, and there was no genuine issue of fact on which to base his disability discrimination claim.

The plaintiff appealed, arguing that the trial court should have considered his failure-to-accommodate claim on its merits. As to his discrimination claim, he asserted that the court had ignored disputed facts in evidence.

Appeals court affirms

The appeals court affirmed the trial court's finding, holding that the plaintiff's complaint failed to mention any facts to put the employer on notice that he was pursuing a failure-to-accommodate claim. The court also found that the claim would fail on its merits because the plaintiff didn't require an accommodation. The accommodation was only a suggestion.

Regarding his discrimination claim, the appeals court found that summary judgment was proper because the plaintiff had failed to create an issue of fact to raise an inference of disability discrimination. In fact, the plaintiff hadn't presented any evidence to undermine the fact that the clinic had believed he could return to work and had terminated him because he'd failed to both return to work and respond to attempts at communication. The court further stated that it isn't a "super personnel department" with the ability to speculate about the reasons for the employer's actions. In any case, speculation was insufficient to create a question of fact as to whether the clinic's proffered reason for termination, the plaintiff's failure to return to work, was pretextual.

Finally, the court decided that the Director's remark about her mother-in-law wasn't evidence of bias. It was just a stray remark with no causal connection to the plaintiff's termination.

Write it down

Hooper should remind employers that documentation is critical. When an employee is on leave, record all of your efforts to remain in contact with the employee and clearly inform the individual about decisions related to his or her ability to return to work by a certain date. The employer in this case was able to dismiss the action based on its documentary evidence. ♦