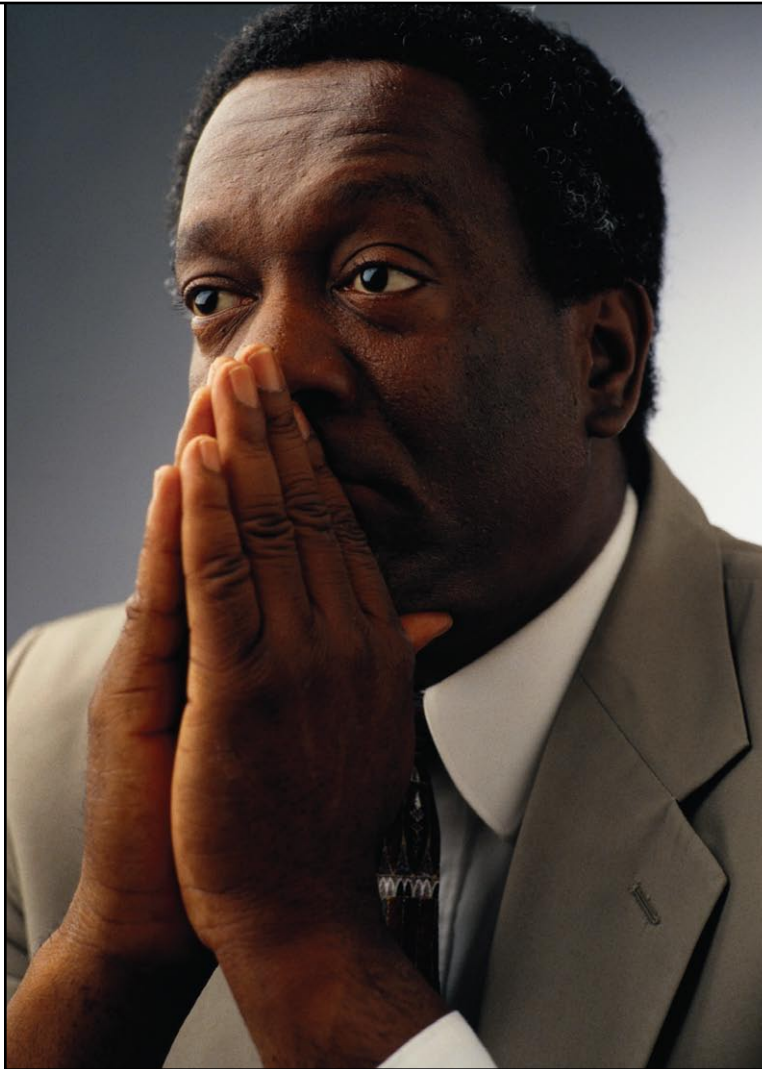


Employment Law Briefing



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Silence is costly

Plaintiff's inaction key in racial discrimination case

The Civil Rights Act is a comprehensive U.S. law intended to end discrimination. A major part of the law, Title VII, was applied in *Porter v. Erie Foods International*, a case heard by the U.S. Court of Appeals for the Seventh Circuit.

Responding to an incident

On July 19, 2004, the plaintiff was placed at Erie Foods' production facility as a temporary worker on the third shift. He was the only African-American on that shift.

On Aug. 12, the worker found a noose hanging on a piece of machinery in the production area. He complained to his third-shift supervisor, who instructed a co-worker to take the noose down. She then asked the co-worker if he had hung the noose; he denied doing so. The supervisor told the worker that she'd speak to human resources (HR) and notify the first- and second-shift supervisors.

On the morning of Aug. 13, the supervisor informed her supervisor and the first-shift supervisor of the incident. She then informed an HR rep. That evening, the HR rep held a 15-minute meeting with the worker, his supervisor and the other third-shift employees to discuss harassment and try to ascertain who was responsible for the noose. The HR rep told the workers that workplace harassment wouldn't be tolerated and mentioned the company's anti-discrimination policy.

A plaintiff must show that the employer has been negligent either in discovering or remedying harassment.

The HR rep later spoke privately with nine of the 15 third-shift workers. He also met individually with the worker, who refused to say who'd made or showed him the noose because he didn't want anyone to be fired. The HR representative concluded the meeting by handing the worker his business card and telling him that, if he ever wanted to talk, he could call him.

On Aug. 15, while the worker was in the break room, two co-workers entered, singing, "I wish you would die,"



and laughed. The worker didn't report this conduct. Also around this time, another co-worker showed the worker a noose in front of other employees and later gave him the noose. The worker didn't report this conduct either.

On Aug. 19, the worker quit and, shortly thereafter, filed a lawsuit in the U.S. District Court for the Northern District of Illinois, alleging that he'd been subjected to a racially hostile work environment and constructively discharged. The court granted Erie's motion for summary judgment, and the worker appealed.

Hearing the appeal

To survive summary judgment, an employee alleging a hostile work environment must show four things:

1. He or she was subject to unwelcome harassment,
2. The harassment was based on his race,
3. The harassment was severe or pervasive so as to alter the conditions of the employee's work environment by creating a hostile or abusive situation, and
4. There's a basis for employer liability.

The key issue on appeal was whether there was a basis for employer liability. The appeals court explained that, when a plaintiff "claims co-workers alone were responsible for creating a hostile work environment, he must show that his employer has been negligent either in discovering or remedying the harassment."

Thus, an employer can avoid liability for co-worker harassment “if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring.” The appeals court noted that the key inquiry isn’t whether the perpetrators were punished or whether the conduct ceased, but whether the employer took reasonable steps to prevent future harm.

Would a reasonable employee have given his employer a further chance to remedy the harassment?

The appeals court found that the steps taken by the supervisor and HR rep after the discovery of the noose showed that they had taken the harassment seriously and had taken appropriate steps to bring the harassment to an end. It also found that the worker hadn’t been constructively discharged. The appeals court explained that, despite Erie’s

efforts both to root out the offenders and to shield the worker from the offending behavior, the worker hadn’t:

- Reported additional harassment by co-workers,
- Identified the other harasser, or
- Availed himself of the opportunity to change shifts.

The appeals court concluded that, given the efforts that Erie had made to address the harassment, a reasonable employee would have given his employer a further chance to remedy the workplace harassment.

Reviewing your policies

An employee cannot keep silent about harassment from fellow employees and expect to succeed in a discrimination case. Still, the employer must have adequate antidiscrimination policies and procedures in place and properly apply them. If you’re unsure about your company’s policies and procedures, don’t hesitate to review them with an employment law attorney. ♦

Similar harassment, different outcome

The decision of the U.S. Court of Appeals for the Eleventh Circuit in *Mack v. ST Mobile Aero. Eng’g, Inc.* differed greatly from the Seventh Circuit’s finding in *Porter v. Erie Foods International*. (See main article.)

The plaintiff and five co-workers at ST Mobile Aerospace Engineering alleged that their co-workers had:

- Hung nooses throughout the workplace,
- Made racially derogatory comments,
- Been responsible for racial graffiti, and
- Displayed the Confederate flag.

The plaintiff and his colleagues made a number of complaints to their supervisors about this conduct.

The appeals court found that there was considerable evidence that the complaint procedure was “defective” and “dysfunctional.” On two occasions, the supervisor failed to respond to the plaintiffs’ complaints. On another, the supervisor investigated a complaint but failed to inform the complainant of the investigation’s outcome. In addition, on at least five occasions, midlevel managers failed to report complaints to their manager, in violation of ST’s policy and procedure manual.

Because there were inherent defects in the company’s complaint procedures, the appeals court concluded that the plaintiffs raised a genuine issue as to whether ST had failed to exercise reasonable care to prevent and promptly correct harassment. Thus, the court denied ST’s motion for summary judgment.

How does state of mind affect giving FMLA notice?

To invoke the protection of the Family and Medical Leave Act (FMLA), an employee must give his or her employer sufficient and proper notice. In *Scobey v. Nucor Steel*, the U.S. Court of Appeals for the Eighth Circuit examined how an employee's alleged state of mind affects that invocation.

The problem begins

On April 9, 2005, a ladle man at Nucor Steel left a message for his supervisor asking that he call him back. Later that day, the worker called another supervisor, advising him that his father-in-law had passed away and requesting time off to attend the funeral.

That supervisor told him to arrange a swap with another employee. The next day, April 10, the worker didn't come to work. That day he called the supervisor he'd spoken with the previous day. The worker was intoxicated and emotional, telling the supervisor that he was "through and done" with Nucor. The supervisor admitted that he was concerned about the worker's state of mind.

On April 11, the worker told his direct supervisor he'd suffered a nervous breakdown. The supervisor, however, observed that the worker's speech was slurred and believed he was intoxicated and making unacceptable excuses for missing work. The worker then called a shift manager and told him that, because of his father-in-law's death and other personal problems, he'd be unable to work for a while.

Treatment is arranged

On April 12, the worker didn't come to work, nor did he call anyone at Nucor. He also missed work on April 13 — his fourth consecutive day — though he did leave a message for Nucor's human resources (HR) manager.

On April 14, the worker called the other supervisor and told him that he couldn't recall anything from the previous four days, and that he wanted some help. He then met with the HR manager and was assigned to Nucor's Employee Assistance Program (EAP). The EAP program referred him to Lakeside Behavioral Health System for inpatient treatment of alcoholism and depression. After a week at Lakeside, he was diagnosed with alcohol dependence, alcohol withdrawal, depression, post-traumatic



stress disorder, hypertension and job/family impairment. He was then discharged to outpatient care.

A few weeks later, he met with Nucor's plant manager, who reminded him that Nucor's absenteeism policy permitted termination after four consecutive, unexcused absences. He agreed to give the worker a second chance, but suspended him for three days and demoted him to an entry-level position, which resulted in a 40% to 50% pay cut. After just a few weeks in this new position, the worker stopped coming to work.

Soon after, he sued Nucor, asserting that Nucor had interfered with his rights under the FMLA. The court granted Nucor's motion to dismiss, and he appealed.

The appeal is heard

To state a claim for interference under the FMLA, a plaintiff must have given notice of his or her need for FMLA leave. The employee need not explicitly assert rights under the FMLA or even mention the law to require the employer to determine whether leave would be covered. But, to trigger

FMLA protection, the worker must do more than merely call in sick. He or she needs to provide information that suggests a serious health condition.

The key issue on appeal was whether the worker had put Nucor on notice that he might be entitled to leave under the FMLA. He contended that he'd provided Nucor with sufficient and timely notice that he had a serious health condition requiring FMLA leave during the four unexcused absences from April 10 to 13. The appeals court disagreed.

The worker had initially requested a day off to attend a funeral, which is not protected by the FMLA. He then called in while intoxicated and stated that he wanted to terminate his employment at Nucor. This was not notice that he needed time off from work. The appeals court explained that, while absences for treatment of alcoholism are protected by the FMLA, absences caused by the *use* of alcohol are not.

Further findings noted

Furthermore, the appeals court found that, during the worker's conversations with Nucor's employees, he'd made no mention of anything that could have constituted notice of a need for FMLA leave until April 11, when he told his

supervisor that he believed he was having a "nervous breakdown." The appeals court found that these comments — in the context of the worker's previous unexcused absences, drunken behavior and shifting explanations of why he couldn't come to work — were inadequate to apprise Nucor of any FMLA obligations.

The appeals court also noted that, even if the worker's remark on April 14 to the other supervisor that he "wanted to get some help" constituted sufficient notice, the remark didn't alter the fact that the worker's immediately preceding absences weren't, and didn't appear to Nucor to be, FMLA protected. Thus, the court concluded that he'd failed to give Nucor sufficient notice of his potential need for FMLA leave and affirmed the dismissal of his claim.

Employers beware

This case demonstrates the need for employers to beware of circumstances in which employees don't report for work. Management, preferably under the advice of legal counsel, must assess whether any absence qualifies the worker for FMLA protection and act accordingly. Failure to do so can result in awards of back pay and liquidated damages. ♦

Two things that don't usually go together

Age discrimination meets technology misuse

As separate issues, age discrimination and the misuse of technology are no strangers to the employment law arena. But one recent case, *Cervantez v. KMGP Services Company*, brought the two together before the U.S. Court of Appeals for the Fifth Circuit.

Cookies in the break room

Beginning in 1975, the plaintiff worked for various owners and operators at the Scurry Area Canyon Reef Oil Companies (SACROC) Unit. In 2000, the unit was acquired by KMGP Services Company, which hired the worker. At that time, the worker signed off on KMGP's Information Security User Policy (ISUP), which forbade "[I]ndecent,

profane, obscene, intimidating, or unlawful" use of the company's computers.

In November 2006, a KMGP employee checked the break room computer for viruses and uncovered a large number of "cookies" indicating that the worker's user ID and password had been used to access pornographic Web sites. Subsequently, a human resources (HR) representative determined that the worker had been at work on Aug. 22 and 23, two dates on which the ID in question was used to access prohibited Web sites.





On the HR rep's recommendation, KMGP terminated the 57-year-old worker and replaced him with a 43-year-old.

The HR rep informed the worker that he was being terminated for accessing prohibited Web sites. Although the HR rep didn't show the worker the log of Web sites visited, he advised him of its existence and stated that he personally believed the worker had visited the sites.

Lawsuit in the courtroom

In August 2007, the worker filed a lawsuit alleging KMGP had fired him in violation of the Age Discrimination in Employment Act (ADEA).

The court granted KMGP's motion for summary judgment, and the worker appealed. He asserted that the court had strayed from binding precedent by applying an erroneously high burden of proof and failed to recognize an issue of material fact among KMGP's alleged inconsistencies.

First, the appeals court found that the trial court had applied the correct law, explaining that the U.S. Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.* stated that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."

The worker argued that, though the log book showed his ID and password were used to access inappropriate Web sites at times he was at work, the log included many entries for the evening of Aug. 23 — long after his shift had ended. In addition, a second, more comprehensive log showed attempts to access prohibited Web sites using his ID and password on many other dates, including dates when he hadn't worked.

The appeals court rejected this argument, finding that the trial court had correctly concluded that the worker had "failed to come forward with summary judgment evidence to create a genuine issue of material fact that Defendant's 'stated grounds for his termination were unworthy of credence.'" The appeals court held that, contrary to the worker's argument, a fired employee's actual innocence of his employer's proffered accusation is irrelevant as long as the employer reasonably believed it and acted on it in good faith.

Additional points

In addition, the appeals court found that KMGP's purported inconsistencies didn't create a genuine issue of material fact. The court explained that the mere existence of KMGP's second, more comprehensive log didn't establish a disputed material fact regarding the truth of KMGP's stated grounds for the firing.

The court went on to say that the HR rep's statement that he personally thought the worker had accessed the prohibited Web sites was immaterial because the HR rep had told the worker that he was being discharged because his ID and password had been used to access prohibited Web sites — the same reason KMGP advanced in the district court and on appeal.

A fired employee's actual innocence of his employer's proffered accusation is irrelevant as long as the employer reasonably believed it and acted on it in good faith.

Both sides of the story

Although the company here was successful, this case highlights the importance of conducting a thorough investigation before terminating an employee. Specifically, every investigation should include getting the employee's side of the story. If an investigation appears to have been conducted in an unfair way, it could have an adverse impact on the outcome of the case. ♦

ADA case turns on participation in accommodation process

The accommodation process is a key part of the Americans with Disabilities Act (ADA). But who's at fault when the single accommodation offered is rejected and no other alternatives are discussed? Such was the question faced by the U.S. Court of Appeals for the Second Circuit in *McBride v. BIC Consumer Products*.

Chemical fumes

As of June 2001, a long-time BIC employee was working as a utility operator in the cartridge assembly area of the ink systems department. Her work in this position involved exposure to various chemical fumes.

At that time, the worker reported to BIC that she was suffering from a respiratory ailment as well as panic and anxiety attacks. At her doctor's recommendation, the worker took a medical leave of absence as allowed under her employment contract for a period of up to 12 months.

On May 9, 2002, the worker's doctor cleared her to return to work, provided that she avoid exposure to any fumes. On June 5, the worker met with a BIC supervisor who offered to provide her with a respirator to accommodate her doctor's avoidance-of-fumes requirement. The worker rejected this offer and neither party discussed any additional potential accommodations.

The supervisor then instructed the worker not to report for work the next day. A month later, following the expiration of the twelve-month leave, BIC terminated the worker on the grounds that she'd refused to accept BIC's proposed accommodation of her disability and failed to propose any alternative accommodation.

The worker filed a lawsuit, alleging failure to accommodate under the ADA. The district court granted BIC's motion for summary judgment, and the worker appealed.

Primary issues

On appeal, the primary ADA issues were whether the worker could perform the essential functions of her job with a reasonable accommodation and whether BIC had failed to offer such an accommodation or "reassignment to a vacant position." The appeals court found that the worker had

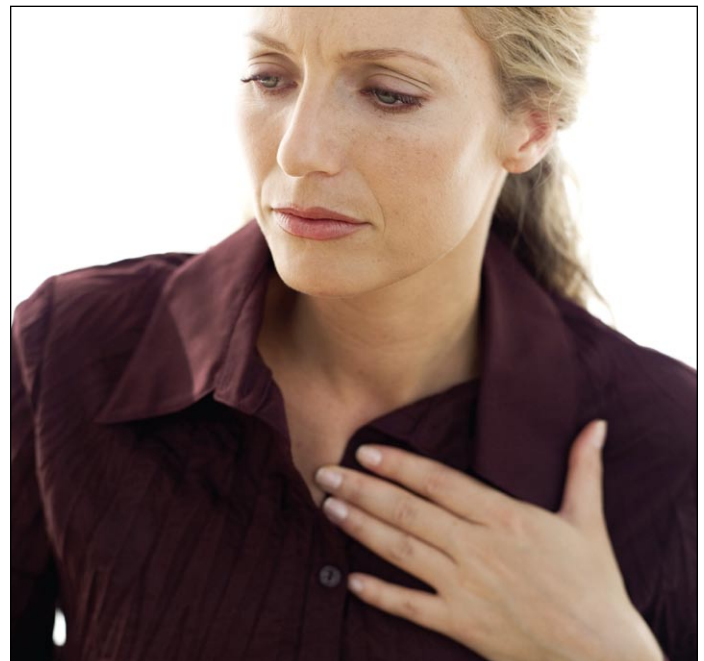
failed to present any evidence of an accommodation that would have allowed her to perform the essential functions of her predisability position.

Thus, her claim rested on the availability of reassignment. To succeed, she had to demonstrate the existence at (or around) the time when accommodation was sought of an existing vacant position for which she was qualified and to which she could have been reassigned.

The appeals court found that the worker had presented no evidence of this. In fact, BIC presented evidence that the vast majority of vacant positions required extensive applicable professional experience, proficiency with a variety of business software and, in many cases, a college degree — all of which the worker lacked. Therefore, the appeals court confirmed the summary judgment in favor of BIC.

Two-way street

Most ADA cases deal with an employer's failure to engage in this process. The law, however, is a two-way street. As this case shows, employees must participate in the process by suggesting alternatives and being flexible in their requests. ♦



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A Termination is Not Always a Termination When the FMLA is Involved

In an ideal world, employers would always receive a minimum of 30 days' notice of an employee's need to take an FMLA leave of absence. Because not all medical leaves of absence can be planned, the FMLA makes a specific allowance for unforeseen medical leaves:

When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer *as soon as practicable* under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave....

When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

29 C.F.R. 825.303(a), (c).

Randolph v. Grange Mutual Casualty Co. (Franklin Cty. 12/22/09) illustrates what it means for an employee to provide notice "as soon as practicable."

On December 5, 2002, James Randolph suffered a severe episode of depression, blacked out, and failed to report for work. Because December 5 was Randolph's last day of probation for prior attendance violations, his employer terminated him. When Randolph awoke from his blackout, he discovered a voicemail message on his cell phone from his supervisor terminating him. With that discovery, Randolph had a break-down, abandoned his plans to call work to explain his absence, aborted a trip to his doctor, and drove to his mother's house. It was his mother who, late that night, spoke to the same supervisor, stating that Randolph was having a nervous break-down and suffering from a recurring condition that warranted medical leave. Randolph had a similar conversation the following day with the personnel department, but his employer refused to reverse its termination decision.

The court of appeals reversed the trial court dismissal of Randolph's FMLA claim, and concluded that a jury issue existed on whether the company interfered with Randolph's attempt to take unforeseeable FMLA leave on

December 5. Under the FMLA, "[w]hen the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case."

Grange argued that Randolph did not provide notice of his need for FMLA leave as soon as practicable on December 5, citing to the nearly 9-hour gap between when he awoke from his blackout and when his mother finally contacted his supervisor. The appellate court rejected that argument, concluding that it should be up to jury to conclude whether Randolph's fragile emotional state excused him from not contacting his employer upon coming to.

These regulations and this case illustrate the importance of having reasonable call-in procedures for employees:

1. Unless an employee is completely incapacitated or otherwise unable to call-in or have someone else call-in for him or her, an employer does not have to excuse a failure to abide by the policy.
2. Call-in procedures should allow for someone other than the employee to call-in and report an unscheduled absence, if the employee is unable to do so.
3. If an employee legitimately cannot call-in because of "unusual circumstances," the employee must do so as soon as reasonably practical.

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