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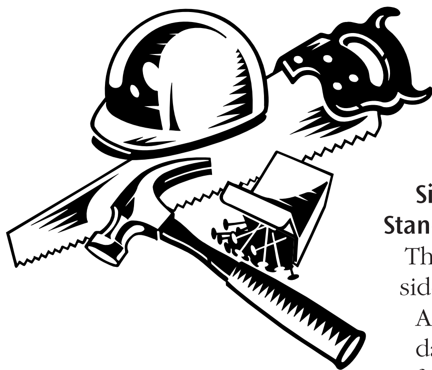
Clarification on ADA Claims and Sexual Harassment Claims in the Second and Sixth Circuits

The month of May closed with clarification from the Sixth and Second Circuits—on standards for ADA and Title VII. Departing from 17 years of precedent, the Sixth Circuit sought guidance from the Age Discrimination in Employment Act (ADEA) concluding that the ADA's express language, like as with the ADEA, prohibits discrimination "because of" an individual's protected category and not merely upon a showing that the protected classification was a "motivating factor" in the adverse employment decision. The newly adopted standard provides a basis for employers to defend against claims where mixed motives are alleged by the plaintiff.

The Second Circuit, in a case of first impression, split the results. Providing employers with a basis to defend against the claims brought by human resource professionals seeking to use their investigation of a sexual harassment complaints as the basis for a retaliation claim, the Second Circuit concluded that Title VII's prohibition against retaliation does not extend the scope of protected activity to a human resources professional conducting an investigation into sexual harassment complaints made by an employee prior to the complaining employee filing a Charge of Discrimination. The Second Circuit reasoned that the anti-retaliation provision in Title VII contains an opposition and a participation clause—and that conducting a pre-charge investigation failed to meet both criteria. However, the Second Circuit made clear that employers will be strictly liable under Title VII for sexual harassment committed by their executives, proxy, or alter egos.



Sixth Circuit Reverses Sole Cause Standard for ADA Claims

The "sole cause" standard for considering Americans with Disabilities Act claims is no longer the standard in the U.S. Court of Appeals for the Sixth Circuit. In reversing the 17-year-old precedent, the federal appeals court in Cincinnati, in an en banc unanimous decision, has found the "but-for" standard appropriate for ADA claims. *Lewis v. Humboldt Acquisition Corp., d/b/a Humboldt Manor Nursing Home*, No. 09-6381 (6th Cir. May 25, 2012). The Sixth Circuit has joined its sister circuits by setting aside its long-held standard. The court also refused to adopt the "motivating factor" analysis used in Title VII cases and by other circuits in ADA cases. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

Background

Susan Lewis, a registered nurse with Humboldt Acquisition Corporation, was terminated from her position in March 2006. The employer maintained it fired Lewis for her inappropriate behavior at work, which included yelling, using profanity, and criticizing her supervisors. Lewis, however, contended that the employer's reasons for terminating her were pretextual and that she was fired because of her medical condition, which made it difficult for her to walk and caused her to use a wheelchair occasionally. Lewis sued the employer for discrimination under the ADA.

At trial, Lewis requested a jury instruction using the "motivating factor" standard, which requires a plaintiff to show that her disability was one of the considerations the defendant took into account when taking action against the plaintiff. The employer requested a jury instruction stating that "Lewis could prevail only if 'the fact that [the] plaintiff was a qualified individual with a disability was the sole reason for the defendant's decision to terminate [the] plaintiff.'" The trial court granted the employer's request and the jury returned a verdict for the employer. Lewis appealed to the U.S. Court of Appeals for the Sixth Circuit. A panel of the appeals court affirmed; however, on rehearing en banc, the Sixth Circuit reversed and remanded the case for a new trial.

Old Standard: Sole Cause

For 17 years, district court judges in the Sixth Circuit have instructed juries that ADA claimants, in order to prevail, must show that their disability was the sole reason or cause for the discriminatory, adverse employment actions. This standard was based on *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), which involved claims under the ADA and the Rehabilitation Act of 1973. While both the Rehabilitation Act and the ADA serve the same goals (i.e., elimination of discrimination in the workplace), the Rehabilitation Act prohibits discrimination "solely" by reason of disability. Title I of the ADA

prohibits employment discrimination "because of" an individual's disability. Relying on these similarities, *Maddox* incorporated and applied the causation standard in the Rehabilitation Act to both types of claims because "[t]he ADA parallels the protection of the Rehabilitation Act."

Old Standard Rejected

In *Lewis*, the Sixth Circuit observed that despite the shared history and common goals of the ADA and the Rehabilitation Act, they do not share the same language. The ADA, even through its history of amendments, did not incorporate the sole-cause language used in the Rehabilitation Act. The court found that the terms "sole" and "because of" convey different meanings. A law establishing liability against employers who discriminate "because of" an employee's disability does not require the employee to show the disability was the "sole" cause of the discriminatory employment decision.

The court noted that its sole-cause standard has become out of touch with the standards used by its sister circuits. "At this point, no other circuit imports the 'solely' test into the ADA … Our interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong," the court said. Accordingly, a unanimous Sixth Circuit rejected the sole-cause standard in ADA cases.

New Standard: Because Of

The court then denied Lewis's request to apply the "motivating factor" standard, which had been used in other circuits in ADA cases. Employing the same reasoning as it did in setting aside the sole-cause standard, the court found the motivating factor language, likewise, was not in the ADA.

Further, the court noted that the U.S. Supreme Court in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), declined to expand the reach of the motivating factor language in Title VII to cases under the Age Discrimination in Employment Act (ADEA) since Congress used distinct language to describe the appropriate standards in the two statutes. This language difference was particularly important because both Title VII and the ADEA were amended in 1991 and Congress chose not to import the motivating-factor language into the ADEA. Likewise, the Sixth Circuit in *Lewis* declined to import the motivating factor language into the ADA.

The Sixth Circuit again looked to *Gross* to determine the evidentiary standard appropriate for an ADA claim. The Supreme Court in *Gross* stated, "The ADEA and the ADA bar discrimination 'because of' an employee's age or disability, meaning that they prohibit discrimination that is a 'but-for' cause of the employer's adverse decision." The Sixth Circuit Court of Appeals found the same standard applies to both laws and adopted the because-of standard for ADA claims.

With this decision, the Sixth Circuit has eliminated 17 years of precedent and set a new course for the district courts under its jurisdiction for determining ADA claims.

Second Circuit Clarifies Title VII Liability Standards

The U.S. Court of Appeals for the Second Circuit has ruled that an employee conducting an internal investigation into harassment complaints may not be protected by the participation clause of the anti-retaliation provision of Title VII of the Civil Rights Act, in a question of first impression for the circuit. *Townsend v. Benjamin Enters. Inc.*, No. 09-197-cv (2d Cir. May 9, 2012). The court also determined that an employer is strictly liable under Title VII for sexual harassment committed by a senior executive who is a proxy or alter ego for the employer. This also was a question of first impression in the circuit. Accordingly, the court affirmed summary judgment for the employer and its principals on a human resources director's Title VII retaliation claim and upheld a jury verdict against the employer for sexual harassment committed by the employer's vice president. The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

Background

Karlean Grey-Allen was the human resources director for Benjamin Enterprises Inc. (BEI). When Martha Townsend, a BEI employee, complained about sexually harassing conduct she experienced by BEI Vice President Hugh Benjamin, Grey-Allen began an internal investigation of the allegations. However, before Grey-Allen could complete the investigation, she was fired by the company's president (and Hugh Benjamin's wife), Michelle Benjamin, because she felt Grey-Allen's discussion with an outside consultant about Townsend's sexual harassment allegations was inappropriate.

Townsend eventually left BEI and asserted claims for sexual harassment and constructive discharge under Title VII and the New York State Human Rights Law against BEI, Michelle Benjamin, and Hugh Benjamin, as well as a claim for battery under New York common law against Hugh Benjamin. Grey-Allen asserted a claim for retaliatory discharge under Title VII and the NYSHRL against BEI and the Benjamins.

The district court granted summary judgment dismissing Grey-Allen's retaliation claims under Title VII and the NYSHRL, but it allowed Townsend's claims to proceed to a jury trial. The jury found that Hugh Benjamin had subjected Townsend to a hostile work environment; that he was the alter ego of BEI and his actions were therefore imputed to BEI; and that Hugh Benjamin was liable for civil battery. The jury did not find BEI liable under Title VII for constructive

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discharge. It awarded Townsend $5,200 in damages against BEI and the Benjamins under Title VII and the NYSHRL and $25,200 against Hugh Benjamin on the battery claim. The district court also awarded her $141,308.80 in attorney's fees and costs.

Pre-Charge "Participation" in Internal Investigation Unprotected under Title VII

On appeal, Grey-Allen challenged the district court's pretrial dismissal of her Title VII retaliation claim (she did not pursue the NYSHRL claim on appeal), arguing that because participation in internal investigations is integral to the goals of Title VII, it should be deemed protected activity. The appellate court rejected this argument based on a reading of the plain language of the statute and affirmed the district court's dismissal of Grey-Allen's retaliation claim.

Title VII's prohibition against retaliation contains an opposition clause and a participation clause. Section 704(a) makes it unlawful for an employer to retaliate against an individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a) (emphasis added). The subchapter referenced in the statute describes the Equal Employment Opportunity Commission's powers and procedures. The court held that participation in an internal employer investigation unconnected with a formal EEOC proceeding does not qualify as protected activity under the participation clause.

The court cautioned, however, that it was not deciding whether participation in an internal investigation *after* the filing of a formal charge with the EEOC would be protected under the participation clause. It also noted that Grey-Allen conceded that she did not know whether Townsend's allegations of harassment were true and, thus, lacked a good-faith belief that discriminatory action had occurred. Absent a good-faith belief, she could not claim she engaged in protected activity under the opposition clause of Title VII. The U.S. Supreme Court adopted an expansive interpretation of the opposition clause in *Crawford v. Metropolitan Government of Nashville & Davidson Cty*, 555 U.S. 271 (2009), holding that it is broad enough to protect an employee who speaks out about discrimination when answering questions during an employer's internal investigation, even if the employee did not initiate the complaint.

Automatic Liability for Conduct of Employer's Proxy or Alter Ego

The defendants appealed the district court's decision to reject BEI's reliance on the *Faragher/Ellerth* affirmative defense, which allows an employer to avoid *vicarious* liability for a hostile work environment created by a supervisor. To raise that defense successfully, an employer must not take a tangible employment action against the plaintiff and must demonstrate that:

1. the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
2. the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The Second Circuit affirmed the district court's rejection of the defendants' argument. The court held the *Faragher/Ellerth* affirmative defense is unavailable when the supervisor in question is the employer's proxy or alter ego. In that case, liability for the harasser's conduct is *automatically* imputed to the employer, regardless of whether the employer approved of the conduct. An individual's mere status as a supervisor with the power to hire or fire is not sufficient to qualify that individual as an alter ego of an employer. A supervisor is of sufficiently high rank to qualify as an employer's proxy or alter ego when the supervisor is a president, owner, proprietor, partner, corporate officer, or otherwise highly positioned in the management hierarchy.

Applying the law to the facts, the court found that a reasonable jury could have concluded that Hugh Benjamin was BEI's alter ego. He was the only corporate vice president of BEI, operating as second-in-command, with a position immediately below Michelle Benjamin in the corporate hierarchy. He also was a corporate shareholder with a financial stake in BEI. Moreover, he exercised a significant degree of control over corporate affairs, as demonstrated by his collaboration with Michelle Benjamin on corporate decisions, including hiring, and by the fact that supervisors and managers in the field reported to him directly.

Lessons Learned

The Sixth Circuit's decision in *Lewis* makes clear the importance of employers properly training supervisor and management personnel to document performance issues. These performance issues (whether they relate to attendance, behavior, competency, or expectations) should be documented in an objective manner which provides specific examples of the concerns as well as a clear framework for meeting expectations. While supervisor and managers may be "too busy" to document, the failure to document may directly result in an employer's inability to rebut that the alleged disability was not the "but for" reason for the adverse employment action. Additionally, and equally important, employer must ensure that all employees with similar deficiencies are treated similarly so as to avoid the

perception that a particular employee was coached or disciplined "because of" his/her disability.

The Second Circuit's decision in *Townsend* makes clear that there is no "executive privilege" when it comes to harassment. Employers must ensure management personnel understand that their actions and inactions while at work are not merely a reflection of the individual manager, but rather, are imputed to the employer. In many cases, an otherwise productive competent executive is too significant a liability when s/he has not mastered self-control and respect. The circuit also sent a clear message that human resource professionals may not be able to use their role as pre-charge investigators of sexual harassment complaints as the basis for protected activity. **TFL**

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[6]This article deals exclusively with large entity fees, but similar arguments can be made for small and micro-entity fees.

[7]*Patent Fee Proposal Attachment 1: Table of Patent Fee Changes,* U.S. Patent & Trademark Office (Feb. 9, 2012), www.uspto.gov/aia_implementation/fee_setting_-_ppac_hearing_attachment_1-table_of_patent_fee_changes_7feb12.pdf.

[8]*Id.*

[9]*Id.*

[10]*See* H.R. Rep. No. 112-98, at 46.

[11]€745 or approximately $950 for an opposition.

[12]Dennis Crouch, *Reviewing the New USPTO Post Grant Review System with Reference to EPO Oppositions,* Patently O (Jan. 06, 2012), www.patentlyo.com/patent/2012/01/uspto-post-grant.html.

[13]David Kappos, *Comparing the USPTO's New Post-Grant Processes and Associated Costs to EPO's,* Director's Forum (Mar. 8, 2012), www.uspto.gov/blog/director/entry/comparing_uspto_s_new_post.

[14]H.R. Rep. No. 112-98 at 39.

[15]Kappos, *supra* note 13.

[16]William Barber, *Comments to the Patent Public Advisory Committee on the "Proposed Patent Fee Schedule",* AIPLA at *7 (Feb. 29, 2012), available at www.aipla.org/advocacy/executive/Documents/AIPLA%20Comments%20to%20PPAC%20on%20Patent%20Fee%20Schedule-2-29-12.pdf.

[17]*Id.* at *7, 11.

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