Labor and Employment Corner

by Joel P. Schroeder and Rozlyn Fulgoni-Britton

Never a Dull Moment: Lessons Learned from Some of 2013's Memorable Employment Law Cases

Employment litigators have it pretty good. Though the stakes are high and serious, our work is almost always interesting and often fun. Sentences describing our work frequently begin with, "You're not going to believe this, but…." Workplace disputes that turn into lawsuits can lead to high levels of drama. As with every year before it, 2013 had its share of intriguing employment law disputes. Below are just a few reported cases from across the country involving expletives during a mediation, a supervisor's troubling behavior resulting in his suicide and a sexual harassment lawsuit, and a nurse on Family Medical Leave Act (FMLA) leave who was caught having too much fun in Mexico.

You Can't Tell Your Employer to Shove a Settlement Offer Where the Sun Doesn't Shine

Emotions and tempers can run high in employment litigation, especially at mediation when settlement positions become known. *Benes v. A.B. Data, Ltd.*[1] illustrates the point. As employment lawyers know, retaliation claims are typically easier to prove than discrimination claims. But, can an employee maintain a retaliation claim when he breaks mediation protocol in a spectacularly hotheaded fashion?

After working for A.B. Data for four months, Michael Benes filed a charge of discrimination, alleging gender discrimination. The EEOC arranged a separate-room mediation with a go-between mediator to communicate demands and offers. Upon receiving a settlement offer he thought was too low, Benes broke the separation, barged into the employer's room and dramatically declared: "You can take your proposal and shove it up your ass and fire me and I'll see you in court." In Judge Easterbrook's words, A.B. Data "accepted Benes's counterproposal" and fired him within the hour. Benes abandoned his discrimination claim and sued A.B. Data in the Eastern District of Wisconsin, alleging retaliation.

Holding

The district court found, and the Seventh Circuit affirmed, that Benes was fired for his behavior at mediation, not because he alleged discrimination. The Seventh Circuit characterized Benes's mediation behavior as "less serious," but analogous to slandering or punching one of the employer representatives. The ability of the employer to react to such bad behavior would also make mediation more useful; there is no reason that Benes's behavior should be consequence-free. Moreover, the court noted that antiretaliation law asks whether a reasonable worker would be dissuaded from making or supporting a charge of discrimination. Like a sanction, firing an employee for bad behavior in mediation only discourages the behavior, not the filing of a charge in the first place. Alleging discrimination also doesn't insulate an employee from workplace discipline. If the employer would not have tolerated Benes's conduct at the workplace, there was no reason to tolerate it at mediation.

Lessons Learned

For employers, this case again underscores the ability of employers to enforce workplace rules consistently against all employees—including those who have charged the employer with discrimination. For employees, this case offers a reminder that antiretaliation statutes do not create a privilege for employees to misbehave. For counsel, this case illustrates the importance of talking with clients about mediation and court rules, expected decorum, and the importance of staying calm even in highly emotional situations.

Policies and Procedures Save the Day for Hospital in a Difficult Situation

Crockett v. Mission Hospital, Inc.[2] offers a sad tale of sexual harassment, deception, and death but serves as a reminder that employees should cooperate in internal investigations and that a company's well-administered policies and procedures can go a long way in avoiding legal liability.

Stephanie Crockett, a radiologic technologist, claimed that her supervisor sexually harassed her. The drama began when the hospital issued a final warning to Crockett, admonishing her to change her behavior and stop using her cell phone during work hours. After

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signing an acknowledgment of the warning, Crockett asked if she could speak to her supervisor about it in a nonpublic area of the hospital.

Odd things can happen in the workplace. At 8:30 p.m., Crockett and her supervisor met in an empty office, supposedly to discuss the warning Crockett had received. The supervisor proceeded to lock the door and insist that Crockett lift up her shirt and bra to prove that she wasn't wearing a wire to record him. He then kissed Crockett on the cheek and asked her to promise not to tell anyone. Soon after this incident, Crockett took several days of FMLA leave and stayed quiet about the incident.

The supervisor then reported to management that Crockett "flashed" him to prevent him from reporting her cell phone misuse. When management followed up with Crockett, she denied the supervisor's allegations, refused to elaborate, and said only that something "horrific" had occurred. She was suspended pending an investigation into the supervisor's claims. Human resources representatives provided Crockett with a copy of the sexual harassment policy and the procedure by which to make a complaint. She was put on administrative leave and reinstated seven days later because the "flashing" claims were unsubstantiated. More than a month later, Crockett provided management with a tape recording of a conversation with the supervisor and finally told the hospital the full details. Management confronted the supervisor, who denied the allegations and committed suicide soon after the meeting.

Crockett was fired a little less than a week later for tape recording patients in violation of hospital policy and the Health Insurance Portability and Accountability Act (HIPAA). She then sued the hospital for a variety of claims, ultimately alleging a hostile work environment in violation of Title VII.

Holding

It is well established that an employer will be liable for harassment by a supervisor if the harassment results in a tangible adverse employment action. If it does not result in a tangible employment action, the employer can establish an affirmative defense to liability by showing: (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.[3]

The district court held, and the Fourth Circuit affirmed, that the hospital was entitled to an affirmative defense because it exercised reasonable care to prevent and promptly correct any sexually harassing behavior even though Crockett did not take advantage of it. Crockett's suspension during the investigation could not constitute an adverse employment action because she would only tell the hospital that something "horrific" had happened and the employer had no knowledge of any sexual harassment. Moreover, the hospital had a comprehensive sexual harassment policy in place that was both disseminated and enforced. The hospital immediately investigated Crockett's supervisor despite having limited information. The lack of participation by Crockett hindered the hospital's investigation but did not make its efforts unreasonable.

Lessons Learned

This case reminds us of the serious issues that can arise in the workplace and their very real consequences. An employee's reluctance to report harassment or discrimination is certainly understandable—he or she may feel shame, not want to make waves, or fear retaliation. However, for employers, an uncooperative employee may hamstring their ability to take action and resolve workplace issues. This case reminds us of the importance of a well-crafted and well-enforced policy and that an employee will have a more difficult time succeeding on a sexual harassment claim when he or she fails to take advantage of the employer's policies and procedures. But it's not enough to simply have a policy in place. To assert an affirmative defense without an adverse employment action, the policy must be followed and the employer must act promptly and with reasonable care. Because the hospital here did both, it could not be held vicariously liable for the supervisor's alleged harassment of Crockett.

With Facebook Friends Like These …

The proliferation of social media in the past few years has created an additional source of evidentiary fodder for employment litigation. *Lineberry v. Richards*[4] offers an example of an employee representing one thing to her employer and quite another on Facebook.

Carol Lineberry, a registered nurse at Detroit Medical Center, shared pictures of her Mexican beach vacation on Facebook—riding on a motorboat, lying on a bed holding bottles of beer, and standing while holding her grandchildren. Pretty standard, right? The problems for Lineberry were twofold: (1) she was Facebook friends with some of her co-workers and (2) she was on FMLA leave from her job.

After injuring her back moving stretchers, Lineberry's doctor issued medical restrictions, including not standing for more than 15 minutes, not pushing or pulling more than 20 pounds, and not lifting more than 5 to 10 pounds. Based on these restrictions, Lineberry was approved for three months of FMLA leave. Shortly after beginning leave, Lineberry received medical clearance to go on her preplanned vacation to Mexico because the trip was less physically demanding than work.

Lineberry's co-workers, who had access to her pictures and status updates as her Facebook friends, complained to supervisors about what appeared to be a misuse of FMLA leave. Lineberry's supervisor confronted her about the pictures in an e-mail after Lineberry complained about not receiving a "get well" card from the staff. The

supervisor was not pleased and responded: "Since you were well enough to travel on a 4+ hour flight, wait in customs lines, bus transport, etc., we were assuming you would be well enough to come back to work." Lineberry responded that she used wheelchairs at the airports to avoid standing. The supervisor reported her concerns about Lineberry's FMLA misuse to hospital management.

When Lineberry returned to work in April, the hospital followed its progressive discipline policy and held several meetings. Lineberry admitted to lying about using a wheelchair at the airports, and the hospital eventually terminated her for a violation of the hospital's dishonesty policy, which prohibited "dishonesty, falsifying, or omitting information, either verbally, or in written format (including electronically) on [hospital] records including, but not limited to payroll records, human resources records, etc." Lineberry then sued the hospital for violating her FMLA rights by interfering with her right to be reinstated and for retaliating against her for taking FMLA leave.

Holding

At summary judgment, the Eastern District of Michigan ruled in favor of the hospital for two reasons. One, FMLA gives an employee on leave the same workplace benefits and discipline as a continuously employed employee. An employer has a right to discipline or terminate an employee for reasons unrelated to an exercise of FMLA rights. Lineberry openly admitted to violating the hospital's dishonesty policy, and based on this admission, the hospital had a right to terminate her regardless of her leave status. Two, because the social media evidence provided the hospital with particularized facts sufficient to develop an honest belief of FMLA misuse by an employee, the court also found the hospital would prevail based on the Sixth Circuit's honest belief doctrine.

Lessons Learned

Social media's influence in the workplace continues to grow. This case underscores the potential importance of social media as evidence in both internal investigations and in litigation. Employees should consider how much information they disclose on Facebook and whether they should give their co-workers (and supervisors) access to their social media pages. Employers usually don't have the time, resources, or desire to monitor their employee's social media accounts. Here, however, the hospital didn't single out Lineberry to make sure she was complying with her FMLA restrictions. Instead, the hospital only acted when other employees with whom Lineberry shared her Facebook page brought the misconduct to its attention. The hospital, understandably feeling duped by Lineberry, then used the information to establish a basis for termination under their policies that was unrelated to her FMLA leave. This case also underscores that the employer need not always be 100 percent correct. The hospital didn't have to launch an independent investigation into Lineberry's vacation. Instead, the employer may be absolved of liability when it honestly believes that an employee lied and misused his or her FMLA leave and discharges an employee based on that belief.

There's never a dull moment in the employment law world. These three cases are just a few from this year that make us go hmmm. … ⊙

Endnotes

[1] *Benes v. A.B. Data, Ltd.*, __ F.3d __, 2013 WL 3838112 (7th Cir. 2013).

[2] *Crockett v. Mission Hospital, Inc.*, 2013 WL 2350454 (4th Cir. 2013).

[3] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998).

[4] *Lineberry v. Richards*, 2013 WL 438689 (E.D. Mich. 2013).

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Rules of Civil Procedure, for example, I might discuss that with the Federal Litigation Section. With issues surrounding law school loans, for example, I might reach out to a YLD member to make sure that the issue is on the radar. But these are just informal actions, my role is simply to support the workings of the Government Relations Committee and its advocacy programs.

What advice do you have for Younger Lawyers Division and Law Student Division members who wish to become more active?

Great question. People who are active in an organization get a disproportionate share of the benefits of membership. Show up at meetings. Talk to leaders face to face. Volunteer. Join a section or division. When your e-mails are ignored, make phone calls. When your phone calls are ignored, talk to leaders face-to-face AGAIN! In any busy volunteer organization, there will be a certain amount of nonresponsiveness or delays in getting back to you. Busy practitioners are bombarded by e-mails from all sides, handling heavy dockets, family issues, health issues, whatever. The person who persists and makes a clear case will likely break through. Be aware that opportunities often come to those who volunteer to do tasks that others consider unpleasant or tedious.

What is "sending the elevator back down"?

The French have an expression *"renvoyer l'ascenseur."* It refers to those who get to the top of a profession and "send the elevator back down" to bring up others to share in good luck. In this context, it means opening a door for a younger lawyer to give him or her a chance to shine or, put another way, really using my position and vantage point to assist well-meaning people in overcoming hurdles. I am thankful to the many local and national FBA leaders who sent the elevator my way and who were patient and supportive as I developed skills and experience. ⊙