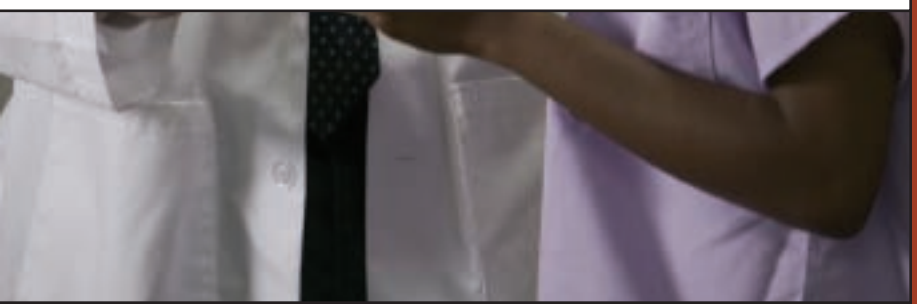
Employment Law Briefing

Insights on Legal Issues in the Workplace



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Employer liable for independent contractor's sexual harassment

A hospital claimed it wasn't liable for a doctor's alleged sexual harassment of female employees because he was an independent contractor — not an employee. But the Seventh Circuit didn't buy it.

Suit dismissed and reinstated

In *Dunn v. Washington County Hospital*, a female hospital employee alleged that a male doctor who was a department head subjected her and other female staff members to discriminatory working conditions in violation of Title VII of the Civil Rights Act of 1964. She also claimed that the hospital unlawfully retaliated against her for having complained about the alleged harassment.

Finding that the doctor was an independent contractor — not a hospital employee — the district court threw out the suit without a trial. The employee appealed.

The Seventh Circuit reinstated the suit for trial, on the ground that a jury could reasonably find the hospital liable for the doctor's offensive conduct. The court held that whether the person whose acts are complained of is an employee, an independent contractor, or a customer makes no difference. Employers have an arsenal of incentives and sanctions — including discharge — they can apply to affect employees' and independent contractors' conduct, and that using or failing to use these options can make an employer liable for the conduct.

The macaw analogy

In fact, the court stated that the actor didn't even have to be human. The court hypothesized:

> Suppose a patient kept a macaw in his room that bit and scratched women but not men, and that the hospital did nothing. The hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the hospital's responsibility to protect its female employees by excluding the offending bird from its premises.

The Seventh Circuit held that an employer is responsible for providing its employees with nondiscriminatory

working conditions. The genesis of the inequality doesn't matter. Rather, what matters is how the employer handles the problem. If the hospital failed to act reasonably after learning of the complaints against the doctor, it could be held liable for his offensive conduct.

Retaliation claim not sustained

As for the employee's retaliation claim, the Seventh Circuit upheld, with one dissent, the trial court's dismissal of that claim. The Seventh Circuit found that the hospital didn't engage in any of the alleged retaliatory acts, and the acts didn't constitute retaliation even if the conduct was imputed to the hospital.

The court noted that almost all of what the employee characterized as "retaliation" was the doctor's verbally asking the employee to withdraw her sexual-harassment complaint. Even if his verbal requests were nasty or uncivil or constituted threats, they didn't rise to the level of adverse employment actions, because unfulfilled threats that result in no material harm don't constitute adverse actions.

The Seventh Circuit conceded that one alleged retaliatory act wasn't entirely verbal. That was when the doctor pinned the employee against a cabinet in the coffee room and tapped her on the cheek with a closed fist. The employee never returned to work after this incident. But the court concluded this conduct wasn't imputable to the hospital, and one incident was insufficient to justify constructively discharging the employee.

Risky business

This case illustrates that an employer runs a risk when it relies on independent-contractor status to avoid liability under employment law. Here, the hospital assumed that the doctor was, in fact, an independent contractor. Classifying a worker as an independent contractor doesn't make it so under the law.

If the hospital had consulted the independent contractor/employee factors, it might very well have concluded that the doctor was actually a hospital employee. Furthermore, many states, such as California, have laws requiring employers to protect employees from discrimination and harassment by independent contractors.

How to determine who's an employee

In recent years, some employers have sought to avoid providing employee benefits and having to comply with employment statutes by treating workers as independent contractors or by leasing workers from other companies. But these practices' supposed advantages can be illusory, and employers who engage in them can subject themselves to substantial exposure.

If employers treat their workers as employees in every respect, merely calling them "independent contractors" won't establish such status. Rather, employers must show that the workers have the right to control the manner and means by which they perform their work. This can include:

- Setting their own hours,
- Having the right to refuse work,
- Having the right to subcontract work assignments, or
- Having the right to work for other employers.

Also, some jurisdictions require evidence that the worker has some investment in equipment and the ability to sustain both a profit and a loss.

Employers may also be surprised if they think that leasing employees from other companies will provide immunity to employment statutes. Even leased employees who are on another company's payroll can still be considered the lessee company's employees.

A lessor company and a lessee company can be joint employers, with the lessor company retaining control over the leased employees' employment terms and conditions. In determining joint employer status, the determinative factors include worker supervision, hiring and firing ability, involvement in day-to-day labor relations, establishing wage rates, promoting, and disciplining.

The bottom line: If you treat leased employees the same as you treat your regular employees, they will be legally deemed to be your employees as well as those of the leasing company.

Did an employer retaliate against an employee who took FMLA leave?

That was the question before the First Circuit in *Colburn v. Parker Hannifin/Nichols Portland Division*. The Family and Medical Leave Act (FMLA) forbids employers from striking back at or firing employees who are entitled to leave under the act for taking that leave.

Employee misses work

A machine operator began to miss work because of migraine headaches that were often accompanied by shooting pain, blurry vision, dizziness or nausea. After seven weeks, he applied for short-term disability benefits and said he was unable to perform any activities during an attack, including driving.

But despite repeated requests, the employee failed to give his employer the medical information it required to substantiate his need for medical leave and to determine his eligibility for disability benefits.

Because of repeated failure to submit the requested medical information and because he couldn't be reached at home on days when he called in sick, the employer became suspicious and hired a private investigator to surveil the employee.

Employer investigates

The investigator reported that, at around 2 p.m. on Jan. 28, 2002, the employee called his supervisor to report a severe headache, and stated that he wouldn't be able to come to work until later in the afternoon. Around 3 p.m., the investigator followed the employee dressed in workout clothes as he drove from his home to a gym. He left the gym 30 minutes later, wearing jeans and a shirt.

He then rented a video at a video store and drove to three other stores. He emerged from the last store at 5:05 with a paper bag containing what appeared to be two bottles. Around the same time, he voice mailed his supervisor that, because his migraine had returned, he wouldn't be coming to work at all that day.

The next day, the investigator again followed the employee as he drove to his gym, rented videos from two stores and stopped at a bank. After calling in sick around 2 p.m., he drove to another store and bought pretzels and a six-pack of beer.

The employer discharged the employee because his surveilled actions were inconsistent with the actions of someone experiencing incapacitating migraines. The employee claimed that his "minimal" actions on the surveilled dates weren't inconsistent with his having a migraine that prevented him from working.

Employee alleges retaliation

The employee sued, alleging that the employer had retaliated against him for having exercised his FMLA rights. The trial court granted judgment to the employer as a matter of law without a trial, and the First Circuit affirmed.

On appeal, the employee claimed that the company's reasons for firing him were pretextual because:

1. Placing him under surveillance was an "extraordinary step,"
2. The company never consulted any medical professional about whether his surveilled activities were inconsistent with those of someone suffering a migraine headache,

3. The company departed from its progressive discipline policy when it discharged him without warning,
4. The company's HR administrator seemed hostile toward him when discussing his medical leave, and
5. His taking leave and being discharged were close in time.

First Circuit weighs in

The First Circuit rejected all these arguments. It found that the employer's use of surveillance wasn't extraordinary, because it had hired private investigators in the past. Also, its suspicions were fueled by his failure to produce the requested medical information and its inability to reach him at home when he said he was too sick to work.

Next, the court found that the employer's failure to consult a medical professional was irrelevant because the employer relied on the employee's own description of his symptoms in which he stated he couldn't do anything including driving when he had a migraine.

Further, the court found that the employer had followed its progressive discipline policy, because the policy provided for immediate discharge for serious misconduct, which would encompass his conduct. And even if the HR administrator seemed hostile to him, she played no role in terminating his employment and had reason to be testy because he had repeatedly failed to provide requested medical information.

Finally, the First Circuit held that the discharge timing didn't show retaliatory motive because four months elapsed between the start of his leave and the firing.

> ***The employer became suspicious and hired a private investigator to surveil the employee.***

Creative arguments

One of the interesting aspects of this case is that, although the employee apparently was "dead in the water" after being caught by the surveillance, he persisted in filing a lawsuit, and his lawyers were able to come up with creative arguments in an attempt to show unlawful retaliation. This case shows that even smoking-gun evidence doesn't prevent a determined employee from suing.

English-only rule leads to lawsuit

In *Maldonado v. City of Altus*, Spanish-speaking city employees alleged that the city's imposition of an English-only rule led to the creation of a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. The district court ruled for the city without a trial, and the employees appealed to the Tenth Circuit.

English-only with exceptions

The case arose when the city proclaimed an official policy providing that "all work-related and business communications during the workday shall be conducted in the English language," except when "necessary or prudent to communicate with a citizen or criminal suspect in his or her native language" because of the person's limited English-language skills.

The policy provided exceptions for private communications between co-workers during nonwork time and between employees and their family members.

The city cited three primary reasons for adopting the policy:

1. Workers and supervisors couldn't understand what was being said over the city's radios.

2. Workers felt uncomfortable when co-workers spoke in a language they didn't know.
3. The use of a noncommon language around heavy equipment raised safety concerns.

Despite the written policy's exceptions, the employees testified in depositions that they were told that the policy barred all use of Spanish in the presence of a non-Spanish speaker — even during breaks, lunch hours and private phone conversations. They also testified that the policy subjected them to racial and ethnic taunting and made them feel like second-class citizens. And they produced a newspaper article that quoted the mayor calling Spanish a "garbage" language.

The Tenth Circuit found that the city's evidence of business necessity was "scant."

Severe and pervasive

The Tenth Circuit had to determine whether a rational juror could find — based on the record — that the English-only policy's impact on Spanish-speaking workers was sufficiently severe or pervasive to create a hostile work environment.

The court first looked to EEOC guidelines on English-only work rules. While the guidelines aren't controlling, they do constitute a body of experienced and informed judgment to which courts and litigators may properly resort for guidance.

The EEOC guidelines provide that an English-only rule that applies at all times is considered "a burdensome term and condition of employment" that presumptively violates Title VII. An English-only rule that applies only at specified times doesn't violate Title VII if the employer can justify the rule by showing business necessity. So the court held that a jury could reasonably conclude that an English-only rule could create a hostile work environment in the absence of business necessity. The city bore the burden of establishing business necessity.

Scant evidence

The Tenth Circuit found that the city's evidence of business necessity was "scant." It showed no written record of any communication, morale or safety problems resulting from the use of non-English before the policy was implemented. Only one employee had ever complained about the use of Spanish in the workplace before the policy was adopted.

Also, the city presented no evidence of city business being disrupted or delayed because Spanish was spoken on the radio and no specific examples of safety problems resulting from the use of Spanish. Moreover, evidence showed that the city applied the policy during lunch hours, breaks and private phone conversations when no business reason existed for restriction. The Tenth Circuit concluded that a rational jury, under these circumstances, could find a hostile work environment existed.

Narrow is best

Employers should be aware that not all jurisdictions follow the ruling in this case. But it would be wise for employers who contemplate an English-only rule to make it as narrow as possible. The employer here did attempt to do that in the way it drafted the policy. But — in implementing the rule — the city's managers failed to stick to the letter of the written policy. Moreover, an employer must be able to document the rule's business necessity. This will leave the employer in a strong position to defend adopting the policy.

Mandatory medical treatment and the Fair Labor Standards Act

The question before the Seventh Circuit was whether an employer had to pay an employee for time she spent attending and traveling to and from employer-mandated therapy sessions. Let's see how the court decided *Sehie v. City of Aurora*.

The city requires therapy

An emergency dispatcher's primary duty was to respond to 911 calls. When her eight-hour shift ended on Dec. 14, 2000, her superiors required her to work another shift to fill in for a co-worker who had called in sick. She became angry and left after working only a half-hour of the additional shift. When she returned to work, she reported her absence as a work-related injury.

The city required her to submit to a fitness-for-duty evaluation conducted by a doctor. He concluded that she was fit for duty, but recommended that the city require her to attend weekly psychotherapy for six months as a condition of her continued employment. The city then ordered her to see the city's therapist on her own time, denying her request to see her own therapist whom she had frequently consulted. She saw the city's therapist for 16 hourly sessions, spending two hours traveling to and from each session by car.

The dispatcher sued the city under the Fair Labor Standards Act (FLSA), alleging the city owed her for the time she spent attending and commuting to the mandated therapy. The trial court ruled for the dispatcher, and the city appealed.

Who benefited?

First, the Seventh Circuit considered whether the counseling sessions were necessarily and primarily for the city's benefit. FLSA requires employers to pay employees for all time spent in:

> … physical or mental exertion, whether burdensome or not, controlled and required by the employer, and pursued necessarily and primarily for the benefit of the employer or his business.

The city argued that medical treatment always primarily and necessarily benefits the employee, and the fact that it mandated medical treatment was inconsequential. The city argued further that the treatment necessarily and primarily benefited the dispatcher, because it would minimize the possibility of her again walking off her job and being subject to discharge.

The Seventh Circuit disagreed, because attendance at the sessions was a mandatory condition of her employment, and the city was short staffed. These facts created a strong inference that the counseling sessions were for the city's benefit. Moreover, the court found it "odd" that the city wouldn't let her see her own therapist if it believed that the therapy sessions were primarily for her benefit.

The court held that the record established that the purpose of the required counseling sessions was to enable her to perform her job and to relate more effectively to co-workers. Under these circumstances, the Seventh Circuit affirmed the trial court's conclusion that the city prescribed counseling to ensure that the dispatcher properly responded to emergency calls and stayed on the job in a short-staffed position.

The proper focus

This opinion highlights the risk an employer runs when it usurps the role of an employee's own doctor. The city should have focused on the dispatcher's behavior, rather than prescribing a course of treatment to modify that behavior.

In addition to the wage-and-hour violation, the city could have left itself open to a disability-discrimination suit on the basis that it perceived the employee to be disabled. Savvy employers ascertain whether a job is being properly performed — not the possible medical causes for the lack of performance — unless an employee requests an accommodation.

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

"Above all, we are at your service …"

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