**RASHRM**

**EMPLOYMENT LAW UPDATE**

**MARCH 2014**

**DISCRIMINATION**

Federal Circuit Courts

*Andrews v. CBOCS West, Inc.*, 12-3399 (February 14, 2014)

***Facts***: Plaintiff was a server at a Cracker Barrel restaurant. She was white and in her mid-fifties. In 2003, she had filed and settled a different discrimination claim. An Associate Manager at that time told the Plaintiff that if he ever made Manager, he would fire the Plaintiff, presumably because of all the money Plaintiff had cost the Company. In 2006, the Associate Manager was promoted. Shortly thereafter, he was overheard saying he was going to make the Caseyville restaurant the first all-black Cracker Barrel. He also made daily comments to Plaintiff regarding her age. The Manager then persuaded Plaintiff to seek a transfer and, believing the transfer had gone through, gave her notice at the Caseyville restaurant. The transfer did not go through and Cracker Barrel terminated her after she failed to report to work after three weeks, in accordance with company policy. Plaintiff filed a complaint for age and race discrimination.

***Summary***: The trial court granted summary judgment on the basis that the employer had not taken any adverse employment action because the Plaintiff had quit by failing to report to work for three weeks. The Circuit Court affirmed. Cracker Barrel did not fire the Plaintiff and, for that reason, could not be deemed to have taken an adverse employment action against the Plaintiff.

*Adams v. City of Indianapolis*, (Nos. 12-1874 & 13-3422) (7th Cir. February 4, 2014)

***Facts***: A group of black police officers and firefighters sued the City of Indianapolis alleging that the examination process it used to rank candidates for promotion in the police and fire departments had a disparate impact on black candidates and was intentionally discriminatory. The plaintiffs in the first case were 36 black police officers and firefighters who were passed over for promotions between 2007 and 2009 in favor of candidates who achieved higher composite scores in the 2007 and 2008 testing sessions. The court dismissed the disparate-impact claims because the complaint alleged that the city’s promotion process was intentionally biased rather than facially neutral. Ultimately, the district court entered summary judgment for the city because the plaintiffs had not produced any evidence that using the test results to make promotions was a pretext for discrimination.

***Summary***: Although the district court mistakenly assumed that allegations of intentional discrimination necessarily defeated a disparate-impact claim, here the disparate-impact claims failed in any event because they were stated as legal conclusions, without any factual content to support an inference that the city’s examination procedures caused a disparate impact on black applicants for promotion in the police or fire departments. Additionally, the disparate-treatment claims lacked any evidentiary support and were properly resolved in the city’s favor on summary judgment.

*Wilson v. Cook County*, No. 13-1464 (7th Cir. February 10, 2014)

***Facts*** A staff worker for Cook County Hospital secured sexual favors from a job applicant. As it turned out, the staff worker had no authority to hire or fire employees at the hospital and had “created” a position in exchange for sexual favors. The staff worker held a “political patronage” position and had escaped a background check that would have discovered similar conduct with his previous employer. The Plaintiff brought a claim against Cook County under Title VII of the Civil Rights Act.

***Summary:*** In denying the Plaintiff’s claim of a violation of her equal protection rights from sexual harassment, the Court determined that the Plaintiff could not establish a custom or practice on the part of the County of ignoring or condoning sexual harassment. Moreover, the evidence did not establish a policy or custom of the County that was the “moving force” of the harassment. Instead, the employee himself was the cause of the sexual harassment, not the County. Similarly, plaintiff’s claim for a violation of her due process rights failed as she failed to show that the County’s action in hiring the staff worker was taken with “deliberate indifference” to a known or obvious consequence. In addressing the Title VII claim, the Court initially noted that Title VII does protect “prospective” employees. However, here there was never an employment position to begin with and, as such, Title VII protection was not available.

*Chaib v. State of Indiana*, No. 13-1680 (February 24, 2014)

***Facts:*** Plaintiff claimed her supervisor made inappropriate sexual comments to her during her probationary training period. When she complained to him of the sexual harassment type behavior, he then reprimanded her unnecessarily and refused to train her. After successfully completing the probationary period, the supervisor again yelled at her and shook his finger in her face telling her to do her job as a correctional officer. At this point, she made a formal complaint which included all of the inappropriate actions during the probationary period. The Human Resource Manager performed an investigation. Although she found no evidence to support the claim of discrimination or sexual harassment, she did find that both the plaintiff and the supervisor had engaged in conduct unbecoming a corrections officer and recommended that both be reprimanded. Over the next couple of years, the Plaintiff received increasingly worse performance evaluations. She then filed a claim before the EEOC claiming gender and national origin discrimination and retaliation.

***Summary:*** Since the Plaintiff did not complain of a lack of training during her probationary period, this claim could not be used against the employer to substantiate discrimination. An employer cannot be said to take adverse action against an employee when the employer did not know of the alleged mistreatment. Moreover, there was no evidence to suggest that the claimed “lack of training” had caused any change in the plaintiff’s terms or conditions of employment. The Court further found that poor performance reviews alone cannot be the basis for a finding of an adverse employment action. Of note, the Court analyzed the facts of the case under the direct versus indirect method of establishing discrimination as well as the newer standard of whether a reasonable jury could infer prohibited adverse discrimination and an adverse employment action based on that discrimination. The employer was granted summary judgment under both standards.

**ERISA**

Federal Circuit Courts

*Herzog v. Graphic Packaging International, Inc.*, No. 13-1717 (7th Cir. February 13, 2014)

***Facts:***In September 2008, an employee was diagnosed with stage four cancer. At that time, and for four years prior, he had a supplemental life insurance policy that listed his wife as a beneficiary. Two months after the diagnosis, during a period of open enrollment, he cancelled the supplemental life insurance and elected a different benefit package that include a life insurance policy for his wife and children as well as an accidental death and dismemberment policy for himself. After his death in mid-2009, his wife filed suit claiming that the employer had wrongfully terminated the supplemental life insurance policy.

***Summary:*** First, the wife’s breach of contract claim under the policy was removed to federal court because the state law contract claim was preempted by ERISA. The Court then affirmed the trail court’s grant of summary judgment. The wife failed to produce any evidence that anyone, other than her husband, had terminated the supplemental life insurance policy. Her argument that the timing of the cancellation simply did not make sense did not support her claim that the employer had terminated the policy. She presented no evidence to overcome the evidence that the benefit election form submitted during the open enrollment period did not select the supplemental life insurance policy. The payroll records in 2009 showed that no deduction was made for the supplemental life insurance policy, as had been done in 2008 and the four years prior. “Suspicious timing” was insufficient to make a triable issue and summary judgment was proper.

*Kolbe & Klobe Health and Welfare Benefit Plan v. Medical College of Wisconsin, Inc.*, No. 12-3837 (7th Cir. February 5, 2014)

***Facts:*** A health plan paid medical bills incurred by a plan participant. After the payments were made, the health plan determined that the participant was not covered for the benefits paid and sued the hospital for reimbursement under theories of breach of contract and violation of ERISA. The hospital denied reimbursement on the basis that the hospital had provided the services and that the hospital had not made a mistake in billing the health plan.

***Summary:*** The case was decided under principles of contract. The hospital has no contractual obligation to refund the payment. The mistake, if any, was made by the health plan in failing to ascertain, before payment was made under the plan, that the actual participant was covered for the benefits paid to the hospital.

**RETALIATORY DISCHARGE**

Federal Circuit Courts

*Phillips v. Continental Tire the Americans, LLC*, No. 13-2199 (7th Cir. February 14, 2014)

***Facts:*** An employee reported to the employer’s health services for an injury he claimed to have suffered on the job. In addition to seeking medical treatment, he requested to file a worker’s compensation claim. Pursuant to company policy, he was requested to submit to a drug test. The policy provided several circumstances in which an employee could be required to submit to a drug test. One of the enumerated reasons was the initiation of a worker’s compensation claim. When the employee refused the drug test, he was terminated. Although not at issue in the case, the employee continued pursuit of his worker’s comp claim and received worker’s compensation benefits.

***Summary:*** Illinois recognizes a claim for retaliatory discharge where an employee is terminated because he files or it is anticipated that the employee will exercise his worker’s compensation rights. However, causation requires more than a discharge in connection with filing a claim. The ultimate issue is the employer’s motive in discharging the employee. Here, the employee did not show the employer was motivated to discharge the employee because of his worker’s compensation claim. Rather, he was terminated because he refused to take a drug test upon initiation of a worker’s compensation claim as required by company policy. The Court specifically stated that “but-for: causation is insufficient to establish retaliatory discharge.

**STATUTORY CONSTRUCTION – EMPLOYEE CLASSIFICATION ACT**

Illinois Supreme Court

*Bartlow v. Costigan*, No. 115152 (February 21, 2014)

***Facts:*** The Illinois Employee Classification Act is designed to classify individuals in the construction industry as employees or independent contractors. The Illinois Department of Labor is charged with enforcing the statute. Following an investigation, the Department of Labor issued a ruling and imposed statutory penalties because an employer had misclassified its employees as independent contractors. The employer filed suit challenging the constitutionality of the statute.

***Summary:*** The Act creates a broad presumption that any individual “performing services” for a construction contractor is an employee of that contractor. The statute places the burden on the “contractor” to establish that “the employee” is an independent contractor, sole proprietor or partnership. If a person is misclassified, the Department of Labor can impose penalties and require the contractor to pay the employee benefits or other compensation lost or denied the individual. Since the Act makes the Department of Labor’s determination subject to the Administrative Procedure Act, the Supreme Court found the Act passed the constitutional due process challenge. Further, since a person of ordinary intelligence had a reasonable opportunity to understand what conduct was prohibited under the Act, the statute was not unconstitutionally vague.

**SEVERANCE AGREEMENT – BAR TO SEX DISCRIMINATION CLAIM**

Illinois Appellate Courts

*Wheeling Park District v. Arnold*, No. 1-12-3185 (1st Dist. February 26, 2014)

***Facts:*** The executive director of the Park District decided to terminate an employee for poor performance. Before termination, however, the employee was given the option to resign and receive a severance agreement that paid her for three months, including COBRA benefits. After the agreement was signed, the District’s insurance carrier contested the employee’s unemployment benefits. However, when the District learned of this, the challenge was immediately withdrawn. Thereafter, the employee attempted to rescind the severance agreement claiming the District’s Board had not approved the severance agreement. She then filed a claim for sex discrimination with the Department of Human Rights.

***Summary:*** A severance agreement does not create new debt and, as such, did not require approval by the District Board who had given the executive director authority to make all hiring and firing decisions.

**WORKERS’ COMPENSATION**

Illinois Appellate Courts

*City of Chicago v. Illinois Worker’s Compensation Commission*, 2014 IL App (3d) 121507WC (January 6, 2014)

***Facts:*** The claimant – who was a candidate fire paramedic in training at the city’s fire academy – discovered that he was injured following training. The evidence showed that the intense workouts from the training caused claimant to become severely dehydrated. During an emergency room visit, he was diagnosed with rhabdomyolysis, acute kidney failure, and compartment syndrome. Because he was unable to return to work, he filed an application for duty-related disability benefits pursuant to Section 6-151 of the Illinois Pension Code. The city’s pension board denied the application, finding the claimant had fully recovered, and the circuit court affirmed the board’s decision on administrative review.

 After being terminated by the city for not being able to perform his duties, the claimant filed an application for adjustment of claim under Section 8(c) of the Worker’s Compensation Act, seeking worker’s comp benefits. Following a hearing, the arbitrator found that the claimant was entitled to temporary total disability (TTD) benefits plus medical expenses under the Act because the evidence showed that claimant's injuries arose out of and in the course of his employment with the city, his present condition of ill-being was causally related to those work injuries, and he was not a "duly appointed member" of the city's fire department. The arbitrator, however, denied the claimant's claim for temporary partial disability (TPD) benefits and/or maintenance benefits.

 Both parties appealed, and the commission unanimously rejected the city's arguments that the claimant's claims were barred by Section 1(b)(1) of the Act and the doctrines of *res judicata* and/or collateral estoppel. The commission modified the arbitrator's decision by awarding the TPD benefits and reducing the award of medical expenses, and the commission affirmed and adopted the arbitrator's decision in all other respects. The circuit court affirmed the commission's ruling, and the appellate court affirmed in part and reversed in part.

***Summary:*** On appeal, the city maintained that the claimant's claim was barred by Section 1(b)(1) of the Act because he was a "duly appointed member" of the city's fire department. The city argued that the claimant was a "duly appointed member" of the fire department because he was hired as a fireman/paramedic, on the fire department's payroll, and a full and contributing member of the pension fund. The court, however, disagreed with the city because the claimant had not been formally admitted to the responsibilities and privileges of the city's fire department at the time of his injury. Thus, the Commission's ruling that the claimant was not a "duty appointed member" of the Chicago fire department was not clearly erroneous.

 The city then argued that the pension board's denial of claimant's claims for duty disability barred his workers' comp claims under the doctrines of *res judicata* and/or collateral estoppel. The appellate coat determined that *res judicata* did not apply to this case, but some of the claimant's claims were barred by collateral estoppel. According to the appellate court, *res judicata* did not apply because the litigation before the pension board involved different parties than the case before the commission (i.e., the pension board and the city, respectively). In addition, the claimant's claim for duty disability benefits did not involve the same cause of action and subject matter as his claims for workers' comp benefits. Collateral estoppel did apply to claimant's claims for TPD benefits and medical expenses after August 3, 2009 (the date of the pension board's decision). Collateral estoppel, however, did not apply to the commission's award of TTD benefits and medical expenses prior to that date because the pension board’s decision was fully consistent with the commission’s decision.

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