

OPENING STATEMENT

Heyl Royster is pleased to present the Winter edition of the Employer's Edge. In this issue, three cases are discussed. Jim Nowogrocki from our St. Louis office analyzes an Eighth Circuit case addressing progressive discipline. *Lindeman v. St. Luke's Hospital of Kansas City* arose after a former employee filed an ADA claim after disclosing confidential information in violation of company policy. Keith Hill in Edwardsville authors an article based on the Seventh Circuit case, *Frey v. Hotel Coleman*, in which the court clarified the appropriate test for joint employer liability under Title VII. Finally, Emily Perkins in Peoria reminds employers about the importance of properly documenting poor performance and employee misconduct after analyzing *Abrego v. Wilkie*, a Seventh Circuit case involving race and gender discrimination, retaliation, and hostile work environment claims.

If you have any employment or labor law questions, please feel free to contact me or any of the attorneys in our Employment & Labor Practice.



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MISSOURI FEDERAL DECISION SHOWS THE IMPORTANCE OF FOLLOWING A PROGRESSIVE DISCIPLINE POLICY

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In *Lindeman v. St. Luke's Hospital of Kansas City*, 899 F.3d 603 (8th Cir. 2018), a case arising under the Americans with Disabilities Act (ADA), the Eighth Circuit Court of Appeals recently held that a former employee failed to show the employer's reason for his termination was pretextual because he did not point to any evidence that two co-workers were also at the last stage of a progressive disciplinary policy, thereby warranting termination for his additional violation.

Thus, the federal court found that summary judgment was properly granted in favor of the employer in a case involving a violation of a hospital's patient confidentiality policy.

Employer Followed Its Progressive Discipline Policy

The employer, a hospital, had a progressive discipline system under which an employee receives a

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verbal warning for the first infraction, a written warning for a second infraction, a suspension or second written warning for a third infraction, and termination for any subsequent infraction. In addition, the hospital had clear rules prohibiting the dissemination of confidential patient information, including patient names.

The Eighth Circuit found evidence that the employee first received a verbal warning after failing to answer or return a supervisor's phone calls. Next, the employee received a written warning for failing to abide by the hospital's timecard and call-in procedures at least five times. The next month, the hospital suspended the employee for failing to call in prior to missing a scheduled shift. Finally, when the employee mentioned the name of a patient to a number of individuals inside and outside of the hospital, the fourth infraction qualified him for termination.

Failure to Establish an ADA Claim

Subsequently, the employee, who suffers from obsessive compulsive disorder, attention deficit disorder, bipolar disorder, and other physical limitations, sued his former employer pursuant to the ADA.

Under federal law, once an employer articulates a legitimate non-discriminatory reason for a discharge, the burden shifts to the employee to present sufficient evidence that the employer's stated reason for the termination was "pretextual," meaning it was false and that discrimination was the real reason.

Pretext may be demonstrated by showing disparate punishment between similarly situated employees, but the former employee had to show that he and the alleged comparators "were similarly situated in all relevant respects."

Here, the plaintiff asserted that two other employees also revealed the name of the patient, but were not disciplined in any way. However, the Eighth Circuit said there was no evidence that those two individuals

were also at the last stage of the progressive disciplinary policy.

Moreover, the former employee conceded that he had, in fact, mentioned the patient's name after being expressly told that doing so was a violation of hospital policies. As such, the termination under the fourth step of the progressive discipline policy was not shown to be pretext for unlawful discrimination.

Summary of Decision

By following each step of its progressive disciplinary policy, the hospital was able to show as a matter of law, that its reason for the employee's termination—disclosure of confidential information in violation of policy as the fourth infraction—was a legitimate, nondiscriminatory reason for the adverse employment action.

SEVENTH CIRCUIT CLARIFIES APPROPRIATE TEST FOR JOINT EMPLOYER LIABILITY UNDER TITLE VII

By: Keith Hill, khill@heyloyster.com

A recent decision by the Seventh Circuit Court of Appeals clarified the appropriate test for joint employer liability under Title VII. The court held that the plaintiff, a hotel staff member, was employed both by the entity that ran the daily operations of the hotel and the entity that owned the hotel for purposes of her claims under Title VII. This case, *Frey v. Hotel Coleman*, 903 F.3d 671 (7th Cir. 2018), presented issues regarding the employer/employee relationship that arise in the not-so-uncommon scenario where one employer hires another entity to manage the day-to-day operations of an enterprise. In such a case, one entity provides the paycheck, but another entity does all of the other tasks one ordinarily associates

with an employer – hiring, firing, training, supervising, evaluating, and assigning.

In this case, Hotel Coleman, Inc., owned a Holiday Inn Express franchise in Algonquin, Illinois. Hotel Coleman hired Vaughn Hospitality, Inc. to run the daily operations of the hotel. Although staff members were on Hotel Coleman’s payroll and the management agreement stated that all staff were employed by Hotel Coleman, Vaughn Hospitality was responsible for hiring, supervising, directing, and discharging employees, and determining the compensation, benefits, and terms and conditions of their employment.

Michael Vaughn, president and co-owner of Vaughn Hospitality, hired the plaintiff, Bogustawa Frey, to work in the hotel’s guest services department. Frey alleged that, shortly after Vaughn hired her, he began to subject her to unwelcome and inappropriate sexual comments and advances. Frey complained to the housekeeping manager, but when that manager informed Vaughn, he laughed off the complaints and the behavior went unchecked. After Frey informed Vaughn that she was pregnant, Vaughn reduced her hours, rescinded a promise to promote her, assigned her to work the night shift without the customary additional pay, failed to consider her for a higher paying front desk position, asked her to perform duties that were difficult due to her pregnancy, and made inappropriate sexual comments related to her pregnancy. During Frey’s maternity leave, she filed a charge with the Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights (IDHR). One week after she returned to work, she was discharged. Frey added a claim of retaliatory discharge with the EEOC and the IDHR.

Frey filed suit in state court, alleging sexual harassment, hostile work environment, pregnancy discrimination, and retaliatory discharge under Title VII and the Illinois Human Rights Act (IHRA) against Hotel Coleman and Vaughn Hospitality. After the case was successfully removed to federal district court, Frey moved for summary judgment against Hotel Coleman

as to all counts, which was granted. Vaughn Hospitality moved for summary judgment asserting that it was not an employer as defined under Title VI and the IHRA. The court granted Vaughn Hospitality summary judgment with respect to Frey’s claims under Title VII, and Frey appealed.

On appeal, the Seventh Circuit held that the trial court erred in applying the test set forth in *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006). In *Smith*, the court’s task was to decide whether two *individuals* (diner managers) should be counted as employees or as employers for purposes of determining if the employer had met the 15 employee threshold for liability under Title VII. The *Frey* court determined that the *Smith* test was not applicable in this case. The court explained that a corporation cannot be counted toward the fifteen employee minimum because it is not an employee at all.

The court held that the applicable test is the multi-factor “economic realities test,” as set forth in *Knight v. United Farm Bureau Mutual Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991), under which five factors are considered: (1) the extent of the employer’s control and supervision over the worker; (2) the kind of occupation and nature of skill required; (3) responsibility for the costs of the operation; (4) method and form of payment and benefits; and (5) length of job commitment or expectations. Of these factors, the employer’s control over the worker is the most important, and courts give it the most weight. The court held that this test should be used to determine which entities are employees for purposes of Title VII and the IHRA.

The court vacated the trial court’s ruling that Vaughn Hospitality was not a joint employer of Frey and remanded the case to the trial court with instructions to apply *Knight’s* “economic realities” test. Despite leaving it to the trial court to apply the test, the court noted that from its “appellate perch,” it seemed likely that Vaughn Hospitality was indeed Frey’s employer.

In addition to clarifying the applicable test to determine whether an entity is an employer under Title VII and the IHRA, the *Frey* case serves as a warning to employers to be mindful of potential liability under anti-discrimination statutes when considering and implementing subcontracting relationships, joint ventures, independent contractor agreements, or hiring temporary employees.

DISCRIMINATION, RETALIATION, AND HOSTILE WORK ENVIRONMENT CLAIMS REJECTED BY SEVENTH CIRCUIT

By: Emily Perkins, eperkins@heylroyster.com

The Seventh Circuit recently analyzed a case involving race and gender discrimination, retaliation, and hostile work environment claims in a complaint which originated in the Northern District of Illinois. In *Abrego v. Wilkie*, 907 F.3d 1004 (7th Cir. 2018), the plaintiff was a former dental assistant at a Veterans Affairs dental clinic, and alleged that he was discriminated against based on his gender (male) and race (Hispanic), that he was retaliated against for filing EEO complaints, and that he was subjected to a hostile work environment. The record established that the plaintiff was terminated because of poor job performance in dealing with dental patients, intimidating co-workers, and behaving disrespectfully toward his supervisor.

The district court granted the defendant dental clinic's summary judgment motion. The plaintiff appealed to the Seventh Circuit arguing that he was discriminated against based on his gender and race and that other employees were treated more favorably. The Seventh Circuit held that the plaintiff failed to establish an inference of discrimination because he could not show that other employees were similarly situated or exhibited similar misconduct. Furthermore, the plaintiff failed to

establish that his race or sex caused his suspension and/or termination of employment. Rather, the record established that the plaintiff's employment was suspended and ultimately terminated for legitimate, non-discriminatory reasons relating to issues of insubordination.

The plaintiff also alleged that he was retaliated against for filing three EEO complaints, which constituted protected activity. The Seventh Circuit rejected the plaintiff's retaliation argument due to his failure to establish causation. The court concluded that the plaintiff was terminated for several legitimate, non-retaliatory reasons. Although the plaintiff could show that there existed close proximity between time he made discrimination complaints and adverse acts against him, he failed to present evidence to establish that the defendant's explanation for his removal was pretextual.

In his final allegation, the plaintiff claimed that his employer created a hostile work environment. He argued that his supervisors were short-tempered, hostile, unfairly critical, and disrespectful and that he was subjected to excessive monitoring. However, the court held that these conditions were not objectively offensive, severe, or pervasive and did not create a workplace permeated with discriminatory intimidation, ridicule, and insult. The plaintiff also failed to present sufficient evidence to establish that the alleged harassment was based on any protected class or in retaliation for any protected activity. Therefore, his hostile work environment claim failed.

The Seventh Circuit affirmed the defendant's summary judgment motion, holding that each allegation was insufficient under the law. This case is another example from the Seventh Circuit which shows the importance of properly documenting poor performance and employee misconduct. It also reminds employers to accurately articulate a legitimate, non-discriminatory reason when terminating an individual's employment.

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