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Letter from the Editor
This is the second newsletter from the TBA Labor and Employment Section. I want to thank this issue's authors - Timothy Bland (who pulled double duty), Doug Janney, William Ryan, Michael Russell, Wes Sullenger (a repeat author), and myself.

If you have an article, an idea for an article, a suggestion, or even a constructive criticism, please e-mail (bbuchanan@kingballow.com) or call me (615-726-5484).

Thank you,
Bruce E. Buchanan

ADA Amendments Act
by
Timothy S. Bland


Expansion of Who the Act Covers as Disabled
The “Findings and Purposes” section of the ADAAA notes the U.S. Supreme Court, and lower courts, have interpreted the definition of disability too restrictively, meaning that persons who should have been protected under the ADA have not been. Although not changing the ADA's technical definition of disability, Congress states the term must be interpreted in favor of broad coverage to the maximum extent permitted under the terms of the law.

Mitigating Measures No Longer Relevant
Revising a major victory for employers, the ADAAA overturns the Supreme Court’s decision in Sutton v. United Air Lines, Inc. (1999), and related cases, which held that whether an individual is disabled should be determined with reference to mitigating devices, such as medication. The ADAAA states the determination of whether a condition substantially limits an individual’s major life activities must be made without regard to the effects of mitigating measures. The ADAAA specifically excludes eyeglasses and contact lenses from the list of mitigating measures that should not be considered. As a result of these changes, millions of persons not previously covered by the ADA will now qualify for its protections.

“Regarded As” Claims Expanded
In addition to protecting persons who actually have a disability, the ADA has always protected persons from discrimination because an employer “regarded” them as having a disability that they did not have. Under the original version of the ADA, persons who claimed discrimination because they were regarded as having a disability were required to prove the perceived disability substantially

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limited a major life activity.

According to the ADAAA, this interpretation was too narrow. Now, employees only need to show that discrimination based on a perceived disability violates the law, regardless of whether the impairment actually limits, or is perceived to limit, a major life activity.

Further, settling a disagreement among federal courts under the ADA, the ADAAA clarifies employers do not have a duty to reasonably accommodate individuals who claim “regarded as” discrimination. The ADAAA also specifically states “regarded as” claims cannot be based on impairments that are transitory or minor, which the ADAAA defines as an impairment with an actual or expected duration of six months or less.

“Substantially Limits” Expanded
To be protected as an individual who has an actual disability, the ADA requires the individual to prove he or she is substantially limited in a major life activity. The ADAAA states, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, (2002), the Supreme Court interpreted the term “substantially limits” to impose too high of a standard. Similarly, the ADAAA states the current EEOC regulations defining the term “substantially limits” as “significantly restricted” express too high of a standard. Accordingly, the ADAAA states the determination of whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis.” The ADAAA directs the EEOC to revise its regulations on the definition of “substantially limits” to be consistent with the goal of broadening coverage of individuals protected under the ADA.

The ADAAA also states an impairment that limits one major life activity does not need to limit other major life activities in order to be a disability. Also, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

“Major Life Activities” Clarified
The ADAAA contains an expanded, nonexclusive list of examples of major life activities. Among those now included are caring for oneself, performing manual tasks, learning, reading, bending, concentrating, and thinking. The ADAAA also clarifies that “major life activities” include major bodily functions including, but not limited to, functions of the immune system, normal cell growth, digestion, bowel and bladder functions, as well as neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

No Reverse Discrimination
The ADAAA makes clear that reverse discrimination claims may not be made under the ADA. Specifically, the Act states that individuals who do not have disabilities may not claim they were subject to discrimination because of their lack of a disability.

Advice
Employers should take several actions now to make sure they are in compliance with the law:
• Review employment policies and handbooks to ensure they are consistent with the terms of the ADAAA.
• Train managers and human resources personnel who deal with employees regarding reasonable accommodations within the ADAAA’s provisions.
• Review any past decisions to deny reasonable accommodations to employees because they were determined not to be “disabled” under prior law. Under the ADAAA, they might now qualify as disabled.
• Advise managers and supervisors that they must consult with the human resources department whenever an employee requests a reasonable
accommodation, so that human resources can ensure compliance with the ADAAA.

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EEOC Guidance on Applying Performance and Conduct Standards Under the ADA
by
Timothy S. Bland

The EEOC recently issued guidance entitled “The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities”, which was updated to conform to the ADA Amendments Act of 2008.

The guidance makes clear that employees with disabilities must meet job-related qualifications standards that are consistent with business necessity, and must be able to perform the essential functions of the position, with or without reasonable accommodation.

Performance Standards
The guidance contains a number of examples of performance standards that employers may apply to persons with disabilities, including:

- The same quantitative and qualitative requirements for performance of essential functions to employees with disabilities that they apply to employees without disabilities, such as production standards;
- The same evaluation criteria for employees with disabilities as for employees without disabilities, such as annual performance reviews; and
- An employer may give an employee a lower performance rating even if the employee responds by revealing that a disability is causing the performance problem.

On the other hand, the following may not be permissible:

- An employer cannot necessarily require an employee with a disability to perform a job in the same manner as a non-disabled employee. Reasonable accommodation may be required.
- An employer cannot withdraw a reasonable accommodation because an employee is given an unsatisfactory performance rating.

Conduct Standards
The guidance also directs employers in how to properly apply conduct standards:

- Employers may discipline employees with disabilities for violating a conduct standard.
- As long as the conduct rule is job-related and consistent with business necessity, an employer may discipline an employee even if the employee’s disability caused violation of the conduct rule.

Attendance Issues

- Employers must grant employees with disabilities the same access to an employer’s existing leave program as it does to all other employees.
- Employers must modify attendance policies as a reasonable accommodation, absent undue hardship.
- However, employers need not completely exempt employees with disabilities from time and attendance requirements. For example, an employer may be able to demonstrate an employee’s chronic, frequent, and unpredictable absences preclude the employee from performing one or more essential functions of the job.
Alcoholism

• Employers may require an employee, who is an alcoholic, to meet the same standards of performance and conduct applied to other employees.
• Employers may discipline employees who violate a workplace policy that prohibits the use of alcohol in the workplace.
• An employer may suggest an employee who had engaged in misconduct due to alcoholism go to its Employee Assistance Program in lieu of discipline.

As seen above, the ADA requires employers to navigate a myriad of requirements in enforcing their performance, conduct, and other standards. Employers, and their supervisors, must become intimately familiar with the ADA’s requirements to make sure they do so lawfully. Also, keep in mind that although courts generally adopt the EEOC’s guidance on the laws it enforces, they are not legally bound to do so. Some courts, therefore, may interpret the ADA differently than the EEOC.

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Proposed Employee Free Choice Act
by
Bruce Buchanan

The Employee Free Choice Act (EFCA) is the number one legislative priority for unions in the 2009 Congress. In the past Congressional session, the EFCA passed in the House of Representatives by a vote of 241 to 185. However, the Republicans in the U.S. Senate blocked the EFCA’s passage. President Barack Obama was a sponsor of the EFCA while a U.S. Senator. With the Democratic gains in the Senate, the EFCA appears to have gained enough supporters to pass although maybe not in its present form.

Although the proposed EFCA is usually referred to as “card check”, it also changes the National Labor Relations Act concerning bargaining, damages and penalties. The following are the key points of the legislation:

(1) If the National Labor Relations Board finds the majority of the employer’s employees have signed union authorization cards, the NLRB will certify the union as the employees’ bargaining representative;

(2) The employer must start bargaining with the union within 10 days of the union’s initial request for bargaining or such period as the parties agree upon;

(3) If the parties have negotiated for 90 days without reaching an agreement, a party (presumably the union) may notify the Federal Mediation and Conciliation Service and request mediation;

(4) If the parties have not reached an agreement within 30 days of the request for mediation, the FMCS shall order the bargaining dispute be submitted to an arbitrator;

(5) The arbitrator shall render a decision as to the terms of the agreement, including wage rates, benefits and other conditions of employment, which shall be binding on the parties for two years;

(6) The backpay remedy for the discharge of an employee during union organizing or before the parties reach their initial agreement shall include both backpay and
two times that amount as liquidated damages; and

(7) An employer, who willfully or repeatedly violates Section 8(a)(1) or (3) (i.e.,
threats, promises, interrogation, surveillance, discrimination) during union
organizing or before the parties reach an initial agreement, shall be subject to a
civil penalty not to exceed $20,000 per violation.

Under the proposed EFCA, employers will have little opportunity to provide the
facts, law and their opinion on unionization. Why is that? Because once the union
receives union authorization cards from a majority of an employer's employees,
there will not be a secret ballot election or campaign, where the employees
would hear from both the employer and the union; rather, the union would
present the cards to the NLRB, which would certify the union as the employees'
bargaining representative based upon the cards.

The concept of card check is simple and heavily weighted in favor of the unions.
The union will solicit, cajole, and harass enough employees to sign authorization
cards which designate the union as the employees' bargaining representative and
then file the cards with the NLRB, which will certify the union. In this manner,
often the employer may not even know the union is trying to organize its
employees until after the cards are filed with the NLRB.

Although the card check aspect of the EFCA receives the most publicity, the
bargaining aspects could be the most detrimental to employers. Under current
law, bargaining begins with a reasonable period after the union wins an election
and when the parties are ready and prepared to bargain. Thereafter, each party
makes proposals and counterproposals. If the parties cannot agree on the terms
of an initial agreement, the union is free to strike, the employer may lock out
employees or the employer may implement its proposals, if an impasse is
reached. However, there is no requirement that the parties reach an agreement
nor can an arbitrator impose an agreement.

However, the EFCA changes the rules for bargaining. The union will have a
disincentive to compromise on its proposals because it can rely upon the
arbitrator to impose these proposals on the employer. A few unions, such as the
IBEW, have these types of arbitration clauses in many of their contracts. Based
upon the results of those arbitrations, the process is heavily weighted toward the
unions. The arbitrator can force an employer to grant large wage increases,
outrageous benefits and even impose multi-employer pension plans, which are
presently significantly underfunded. Furthermore, future withdrawal liability
from a multi-employer pension plan can easily be in the millions of dollars.

If this legislation becomes law, one would anticipate unions would make great
gains in their numbers due to the one-sidedness of the card check process and
bargaining/arbitration procedures.

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A Lesson in Liquidated Damages from Famous Dave’s
by
Michael Russell
*Chao v. Barbeque Ventures, LLC*, 547 F.3d 938 (8th Cir. 2008), provides a useful lesson in liquidated damages under the Fair Labor Standards Act. The Secretary of Labor brought suit against the owners of Famous Dave’s Restaurants in Omaha, Nebraska, under the FLSA on behalf of 25 employees who had worked at more than one location and were not paid proper overtime.

**What happened?**
The Famous Dave’s employees did not have their hours aggregated, even though many of the restaurants were owned by the same individuals. Instead, they received separate checks from each location. Aggregating some employees’ hours between the multiple locations where they worked would have resulted in overtime compensation, which they did not receive. An independent third-party handled the payroll.

The U.S. District Court granted summary judgment to the employees, awarding unpaid overtime compensation and liquidated damages. The employer appealed solely on the issue of liquidated damages.

**The Liquidated Damages Standard**
To avoid liquidated damages, an employer must have acted “in good faith” and with “reasonable grounds for believing” it had complied with the FLSA. “The employer bears the burden of proving both good faith and reasonableness, ‘but the burden is a difficult one, with double damages being the norm and single damages being the exception.’” *Id.* at 941-42.

Good faith is “an honest intention to ascertain and follow the dictates of the FLSA”, while reasonableness is an objective standard. *Id.* at 942.

**Ignorance is no excuse**
The defendants first argued it showed good faith by demonstrating the owners did not know some of their employees worked at more than one location. The court flatly rejected this. According to the Eighth Circuit, “[l]ack of knowledge is not sufficient to establish good faith.” *Id.*.

**Failure to complain is no excuse**
The defendants next argued the employees’ failure to complain about overtime pay demonstrated good faith. The Court dismissed this argument noting, “The fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the statute.” *Id.* (quoting *Williams v. Tri-County Growers*, 747 F.2d 121, 129 (3d Cir. 1984)).

**A third party payroll administrator is not a shield to liability**
Finally, the defendants argued they showed good faith by engaging a third party payroll manager. Citing workers compensation laws which hold a third party administrator is an “extension” of the employer, the court rejected this defense. The Eighth Circuit reasoned an employer cannot escape liability for liquidated damages by delegating its payroll responsibilities to someone else. *Id.* at 943.

**The moral of the story**
Liquidated damages were originally mandatory under the FLSA. In 1947, Congress passed an amendment allowing employers to escape liability for liquidated damages if they proved they acted in good faith and with reasonableness. The case of Famous Dave’s demonstrates that liquidated damages are still the norm.

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The Department of Labor (DOL) issued its final revisions to the Family and Medical Leave Act (FMLA) regulations, which became effective January 16, 2009 (The DOL also issued new regulations addressing the Servicemember Amendment to the FMLA, but this article will not discuss those regulations due to the length of this article). The following are many of the changes to the FMLA regulations:

**Eligibility Notification** - Increased the period from two to five business days, absent extenuating circumstances, for an employee's request/employer's knowledge for employers to notify an employee whether he qualifies for FMLA leave and designate such as FMLA leave, or request medical certification.

**Sufficient Notice of Need for FMLA Leave** - Absent unusual circumstances, employees may be required to follow established call-in procedures as long as those procedures are not more stringent with respect to timing for the FMLA leave than they are for other forms of leave. However, where unusual circumstances prevent the employee from complying with the employer's normal reporting policy, the employee must provide notice "as soon as practicable" under the circumstances.

**Medical Certification** - There are separate medical certification forms depending on whether it is an employee's own serious health condition or a family member's serious health condition. If an employer requires a certification from a doctor, it may provide a statement of the essential functions of the employee's position to the doctor. If so, a sufficient medical certification must specify what functions of the employee's position the employee is unable to perform, so the employer can determine if the employee is unable to perform one or more of the essential functions.

An employer may request information about a health care provider's specialization and an employee or family member's diagnosis and certification from a health care provider that intermittent or reduced leave is medically necessary.

**Incomplete Medical Certifications** - When an employee submits a medical certification form (which must still be submitted within 15 days) that is incomplete or insufficient, the employer must advise the employee in writing as to what additional information is needed and give the employee seven calendar days (or longer if unable to comply within that time frame despite the employee's diligent good faith efforts) to complete and return the form.

**Clarification and Authentication of Medical Certifications** - An employer may now directly contact an employee's health care provider for purposes of authenticating information provided on a medical certification form without first obtaining an employee's permission. The rule specifies only a health care provider, HR professional, leave administrator, or management official may contact an employee's health care provider. An employee's direct supervisor is expressly prohibited from contacting an employee's health care provider.

**Serious Health Condition** - If a serious health condition is contingent on continuing treatment, the first and only (if followed by a "regimen of continuing treatment") doctor's visit must occur within seven days of the first day of incapacity; if contingent on treatment two or more times, the second doctor's visit must occur within 30 days of the first day of incapacity, unless extenuating circumstances exist.
**Employee Notice Requirements** - An employee seeking additional FMLA leave (for a previously certified condition) must specifically make reference to the FMLA or the previous condition for which FMLA leave was used.

**Chronic Condition** - "Periodic" means "twice or more in a year"; thus, an employer cannot require an employee to visit a doctor more than twice a year for a chronic condition.

**Waiver** - An employee may waive his/her FMLA rights retroactively in a settlement, but not prospectively, without approval of the DOL or a court.

**Light Duty** - Time spent in a light duty position will not count toward an employee’s 12-week allotment. Employees have the right to eventual restoration to their former position while they continue on light duty until the end of the 12-month leave time period.

**Poster/General Notice** - A covered employer is required to post and distribute a general notice, even if its employees are not eligible to take FMLA leave. The general notice must also be provided to each employee by including the notice in employee handbooks or guides, or if employers do not maintain handbooks or guides, by providing the notice to new employees at the time of hire. Instead of the physical posting of notice, Internet posting would be acceptable as long as it is conspicuously posted on an employer’s website, accessible to applicants, and all employees have access to company computers.

**Eligibility** - The 12 months of employment for eligibility need not be consecutive, but a continuous break of seven or more years of service need not be counted. However, the following are exceptions to the break in service of more than seven or more years: military obligations; written agreement, including a collective bargaining agreement, with an intent to rehire; an employee is maintained on the payroll for paid or unpaid leave, during which some benefits are provided; and if an employer chooses to recognize prior service.

Time spent fulfilling an employee’s military obligations counts towards 1,250-hour and 12-month requirements. If an employee is initially ineligible for FMLA leave but during leave becomes eligible, FMLA leave is counted from that point forward.

**Retroactive Designation** - Employees must show the employer’s failure to timely designate leave does not cause harm or injury to the employee. If there is no such harm or injury, retroactive designation is permissible under the FMLA.

**Fitness for Duty** - If employer requires a fitness-for-duty certification before returning to work, the employer must inform the employee it will include such and the employer must provide essential functions of employee’s position with the designation notice for use by the health care provider.

**Recertifications** - Employers may require an employee to obtain recertifications every six months, instead of every 30 days, where the chronic condition will last for an extended period of time. An employer may request medical recertification in less than 30 days if the employee requests an extension of leave, circumstances have significantly changed on duration or frequency of absence or severity of illness, or the employer receives information that "casts doubt" on the employee’s absence.

**Perfect Attendance Bonuses** - An employer may disqualify an employee from perfect attendance because they took FMLA leave if it does so for other forms of leaves.
Substitution of Paid Leave - If an employer requires an employee to take paid leave during FMLA leave, the employee must follow the company's leave-requesting procedures, such as advance notice and use of full day's leave.

Counting of Intermittent Leave - An employer may opt to count intermittent leave as small as increments as used to account for other types of leave; however, it cannot be greater than one hour segments.

Post-Pregnancy Intermittent Leave - If intermittent or reduced schedule leave is medically necessary for a serious health condition of a mother, newborn child, or adopted child, no employer agreement is necessary.

Less than 30 Days Notice for Foreseeable Leave - An employee must respond to an employer's inquiry on why it was not possible to give 30 days notice.

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Is Timing Really Everything?
by
William B. Ryan

If you have handled a retaliation case, you are familiar with the concept of “temporal proximity,” which refers to the time period between a plaintiff’s protected activity (PA) and the adverse action (AA) challenged by the plaintiff. Close temporal proximity between the PA and the AA is generally recognized as relevant evidence that the plaintiff’s PA was a factor in the challenged AA. The idea is where the AA closely follows the PA little other than the PA could have motivated the AA. So absent direct proof of retaliatory motive, the argument is that retaliation may be inferred if the PA is close in time to the AA.

A question, which continues to be addressed by federal and state courts, is whether close temporal proximity between the PA and AA alone can give rise to an inference of retaliatory motive? If the answer is yes, a follow-up question arises: how close must the AA be to the PA in order to create an inference of retaliation? Several recent cases from Tennessee appellate courts and the Sixth Circuit provide answers.

In Kinsler v. Berkline, LLC, 2008 WL 4735310 (Tenn. Ct. App. Oct. 27, 2008), the Eastern Section of the Tennessee Court of Appeals held proof of close proximity alone between the PA and the AA can establish causation. In this case, an employee was fired by his employer three days after he backed out of a workers’ compensation settlement agreement. He filed a Tennessee common law retaliatory discharge claim. Despite the closeness in time between the PA and the AA presented by Kinsler, the trial court granted summary judgment in favor of the defendant stating that timing alone is insufficient to establish a causal connection between the PA and the AA. In support, the trial court relied on the Tennessee Supreme Court’s decision in Conatser v. Clarksville Coca-Cola Bottling Co., 920 S.W.2d 646, 648 (Tenn. 1995), which cited Larson’s treatise on workers’ compensation for the rule that “proximity in time without evidence of satisfactory job performance does not make a prima facie case.”
On appeal, Kinsler argued the rule endorsed in Conatser was supplanted in Allen v. McPhee, 240 S.W.3d 803, 823 (Tenn. 2007), where the Tennessee Supreme Court held “close temporal proximity of a complaint and a materially adverse action are sufficient to establish a prima facie case of causation.” The court of appeals agreed and applied the rule announced in Allen, which involved a THRA retaliation claim.

Interestingly, the Kinsler court noted, in Ellis v. Buzzi Unicem USA, 293 Fed. Appx. 365, 375 (6th Cir. June 24, 2008), the Sixth Circuit had applied the rule set forth in Conatser, rather than the rule announced in Allen, in a workers’ compensation retaliatory discharge case involving Tennessee law. The panel majority in Ellis held Allen did not overrule the proposition endorsed by the Conatser court, i.e., an employee cannot rely on temporal proximity alone to establish a prima facie case of retaliation. Id. at 375. The majority also relied on the Western Section’s decision in Newcomb v. Kohler Co., 222 S.W.3d 368, 391 (Tenn. Ct. App. 2006), which relied on Conatser when it stated “an employee cannot rely on the mere short passage of time between the filing of a workers’ compensation claim and subsequent termination to prove a prima facie case of retaliation.” Id.

What persuaded the Kinsler court to disregard the Sixth Circuit’s decision in Ellis? Judge Moore’s dissent in Ellis appears to have played a significant factor. In her dissent, Judge Moore noted the Allen court followed the majority of federal circuit courts of appeals to hold temporal proximity between the PA and the AA alone is sufficient to establish a prima facie case of causation. Id. at 379. According to Judge Moore, the rule endorsed by Conatser was not able to be reconciled with the rule announced in Allen. Id. at 379 n.3.

In light of Allen and Kinsler, close temporal proximity between the PA and AA alone may give rise to an inference of retaliatory motive under Tennessee law, but what does the Sixth Circuit say? Mickey v. Zeidler Tool and Die Co., 516 F.3d 516 (6th Cir. 2008) provides a good discussion on the concept of temporal proximity, as well as mixed Sixth Circuit case law on this point. In Mickey, the employer fired the plaintiff on the same day that it learned of his PA. Under this circumstance, the court held temporal proximity between the PA and AA alone raised an inference of retaliatory motive.

Writing for the majority, Judge Cole acknowledged, however, that confusion exists under Sixth Circuit case law as to whether temporal proximity between the PA and the AA alone was sufficient to raise an inference of retaliatory motive (see, e.g., DiCarlo v. Potter, 358 F.3d 408, 421 (6th Cir. 2004)) or whether temporal proximity must be coupled with other evidence of retaliatory conduct to establish a causal connection (see, e.g., Tuttle v. Metropolitan Government of Nashville, 474 F.3d 307, 321 (6th Cir. 2007)). Judge Cole found the Sixth Circuit cases could be reconciled and noted permitting an inference of retaliatory motive based on the closeness in time between the PA and the AA made sense because an employee would generally be unable to couple temporal proximity with additional evidence of retaliatory motive where the actions happened closely in time. Id at 525. But the requirement of additional evidence, in additional to temporal proximity, is reasonable where some time elapses between the PA and the AA. Id. Judge Cole noted the distinction was necessary because otherwise, employers who retaliated swiftly and immediately upon learning of PA “would ironically have a stronger defense than those who delay in taking adverse retaliatory action.” Id.

Assuming close proximity alone between the PA and the AA is sufficient to establish retaliation, how close in time must the PA be to the AA to give rise to an inference of retaliation? The U.S. Supreme Court has not directly confronted
the issue, but in a 2001 *per curiam decision*, *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001), the Court made the following comment concerning plaintiff’s lack of proof on the issue of causation:

The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be “very close.” *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001). See, e.g., *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir. 1992) (4-month period insufficient).

Based on *Breeden*, defense counsel would be remiss in not arguing a three-month period between the PA and the AA by itself was insufficient to establish a causal connection. However, in *Singfield v. Akron Metropolitan Housing Authority*, 389 F.3d 555, 563 (6th Cir. 2004), the Sixth Circuit held a period of a little more than three months between the PA and the AA was sufficient to establish a causal connection. In light of *Singfield*, plaintiff’s counsel should certainly argue three months between the PA and the AA alone is sufficient to establish causation. But it is interesting that *Singfield* did not cite or reference the Supreme Court’s *Breeden* decision in holding that closeness in time between the PA and the AA alone gives rise to an inference of causation.

In summary, Tennessee law and Sixth Circuit case law permit evidence of temporal proximity alone to establish causation in retaliation cases, but how close the PA must be to the AA to give rise to an inference of retaliation remains an open question.

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Ad Hoc Punishments Explode in Employer’s Face

by Wes Sullenger

The Sixth Circuit Court of Appeals, in *Madden v. Chattanooga City Wide Services Dept.*, 549 F.3d 666 (6th Cir. Nov. 25, 2008), upheld a trial court judgment concluding a city intentionally discriminated against an African-American employee. The court awarded the employee substantial damages even though the employee violated policies by setting off firecrackers while working because supervisors had not punished white employees also observed setting off firecrackers.

The employee worked for a street maintenance crew. In 2005, he and his crew were working in a rural area when the employee set off some firecrackers. The employee testified, at trial, that he explained to his supervisor that he had used the firecrackers to ward off a dog, a frequent use of firecrackers by street maintenance employees. The employee’s supervisor and another manager who investigated the incident, however, testified the employee never mentioned a dog and instead told them he had been joking on the job. This, they said, justified terminating the employee. Testimony showed they forwarded their recommendation to a city administrator who agreed with the termination decision. All three individuals who acted on behalf of the city testified no other incident involving employee use of firecrackers had ever been brought to their attention.
The employee responded at trial by offering testimony of other current and former employees regarding the widespread use of firecrackers in the workplace. The testimony showed various supervisors had witnessed such behavior, including the supervisor who initiated the action against the plaintiff in the case. Because that supervisor provided the information that filtered up to the managers who decided to terminate the plaintiff, the trial court concluded his apparent discriminatory motive infected the whole process, making the employer liable for discrimination. The trial court then awarded the employee backpay, compensatory damages, and front pay.

The Sixth Circuit agreed with the trial court. It rejected the employer’s claim that use of firecrackers at work justified the plaintiff’s termination. While the policy prohibiting firecrackers might serve a salutary purpose, management had previously seen white employees use firecrackers at work but had never punished, much less terminated, an employee for violating the policy. In fact, the supervisor who initiated the termination process against the plaintiff had previously ignored firecracker use by white employees. Because the employer had not conducted an independent investigation but had relied only on that supervisor’s version of events in deciding to terminate the employee, the appellate court attributed the supervisor’s discriminatory motive to the employer.

The appellate court also upheld the trial court’s damage award. The backpay award was not tolled by the employer’s offer to reinstate the employee. An offer of reinstatement that is rejected can limit an employee’s backpay but only if the offer was unconditional. Because the employer’s offer here required the employee to dismiss his legal proceedings, it did not limit the backpay award. The awards of front pay and compensatory damages were likewise appropriate.

The employer lost the case and suffered a substantial damages award because it failed to apply its policies uniformly. Its supervisors apparently had discretion to determine when they would and would not apply certain workplace policies. In light of this ad hoc enforcement, the employer’s subsequent failure to investigate fully and independently the events reported by the supervisor doomed its hopes of supporting its termination of the employee.

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Sixth Circuit Holds Burden-Shifting Framework Does Not Apply to Summary Judgment Analysis of Mixed-Motive Discrimination Claims

by Douglas B. Janney III

In White v. Baxter Healthcare Corporation, 533 F.3d 381 (6th Cir. 2008), the U.S. Court of Appeals held for the first time that the familiar burden-shifting framework used to assess most employment discrimination claims in which the plaintiff relies upon circumstantial (as opposed to direct) evidence is inapplicable to “mixed-motive” discrimination claims. In so doing, the court “lowered the bar” for plaintiffs and held “to survive a defendant’s motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) ‘the defendant took an adverse employment action against the plaintiff; and (2) ‘race, color religion, sex, or national origin was a motivating factor’ for the defendant’s adverse employment
A mixed-motive claim is one in which the plaintiff is attempting to prove, while certain permissible factors may have motivated a challenged employment practice or action, a protected characteristic was also “a motivating factor” for that practice or action. 42 U.S.C. §2000e-2(m), enacted as part of the Civil Rights Act of 1991, specifically allows for this type of claim. For the first decade after its passage, many courts required plaintiffs to present “direct” evidence that an employer considered a protected characteristic in making a challenged employment decision. In 2003, however, the U.S. Supreme Court held a plaintiff may prove a mixed-motive discrimination case using either direct or circumstantial evidence. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

Desert Palace involved a challenge to a jury instruction. As such, the Court in that case did not consider whether the burden-shifting framework announced in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and later modified in Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981), applies to the pretrial summary judgment analysis of mixed-motive claims based on circumstantial evidence in the same manner that it applies to single-motive claims based on such evidence.

In Baxter, the Sixth Circuit added to the growing number of divergent views among the federal circuit courts of appeal and became the first to hold “the McDonnell Douglas / Burdine burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims.” Baxter, 533 F.3d at 400 (emphasis in original). In establishing a plaintiff asserting a mixed-motive claim need only show she was subjected to an adverse employment decision in which her protected characteristic was “a motivating factor,” the court directed “this summary judgment analysis just described, rather than the McDonnell Douglas / Burdine burden-shifting framework, [must] be applied in all Title VII mixed-motive cases regardless of the type of proof presented by the plaintiff.” Id. The court reasoned, unlike in single-motive cases, in mixed-motive cases “a plaintiff can win simply by showing that the defendant’s consideration of a protected characteristic ‘was a motivating factor for any employment practice, even though other factors also motivated the practice.'” Id. at 401 (emphasis in original) (quoting 42 U.S.C. §2000e-2(m)). The court explained:

As the shifting burdens of McDonnell Douglas and Burdine are unnecessary to assist a court in determining whether the plaintiff has produced sufficient evidence to convince a jury of the presence of at least one illegitimate motivation on the part of the defendant, we conclude that the McDonnell Douglas / Burdine framework does not apply to our summary judgment analysis of mixed-motive claims. The only question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury in such cases is whether the plaintiff has presented “sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for’” the defendant’s adverse employment decision.

Id. at 401 (quoting Desert Palace, 539 U.S. at 101).

Significantly, the court also observed “[t]his burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff’s claim.” Id. at 400. It reiterated that “[a]s ‘inquiries regarding what actually motivated an employer’s decision are very fact intensive,’ such issues ‘will generally be difficult to determine at the summary judgment stage’ and thus will typically require sending the case to the jury.” Id. at 402 (quoting Wright v. Murray Guard, Inc., 455 F.3d 702, 721 (6th Cir. 2006)). In the case before it, the Court did just that, finding the plaintiff’s “downgraded performance evaluation constitutes an adverse action.” Id. at 400 (emphasis in original) (quoting 42 U.S.C. § 2000e-2(m)).
"employment action" and "there is a genuine issue of material fact concerning which standard . . . [the plaintiff's supervisor] should have used to evaluate [the plaintiff]'s . . . performance. If the jury were to conclude . . . that [one measure] was the appropriate standard, then it could legitimately infer from [the supervisor's] failure to apply this correct standard that an impermissible factor - namely [the plaintiff]'s race - served as at least a partial motivation for his decision . . . ." Id. at 402, 406.

_Baxter_ serves as another link in an expanding line of cases implying the burden-shifting framework's days (or years) may be numbered. Sooner or later, the Supreme Court will decide its fate in single as well as mixed-motive employment discrimination cases. Stay tuned.

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**Save the Date: 13th Annual Labor & Employment Forum**
The 13th Annual Labor & Employment Forum will be held April 23, 2009, at the TBA offices in Nashville. The agenda and registration information will be forwarded to Section members as soon as they are available.

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