SMITH O'CALLAGHAN & WHITE
33 NORTH LASALLE STREET
SUITE 3800
CHICAGO, ILLINOIS 60602

TELEPHONE (312) 419-1000
FACSIMILE (312) 419-1007
WEBSITE www.socw.com

Unusual Fact Patterns Resulting in Useful Lessons for Employers

In the following cases involving very unusual fact patterns, employers may find useful lessons. Although at first blush, the following cases would appear to involve rare fact circumstances, the resulting court holdings have potentially broad and practical implications for day-to-day management of personnel issues.

1. Joyner v. Garrett, 751 F. Supp. 555 (E.D. Va. 1990). The District Court denied summary judgment for the employer where the record was unclear regarding the employer's attempts to reasonably accommodate the employee's religious beliefs, including that a co-worker had placed a curse on her, and whether such attempts would create undue hardship.

An employee engaged in religious-inspired disruptive behavior at work – speaking in tongues, rebuking co-workers and pouring holy oil on the floor and equipment. In one instance, the employee allegedly hit a co-worker, placed her hands around his neck and began to choke him. The employee admitted that she wanted to harm her co-worker but denied hitting him and claimed that she placed her hands under his cheeks and prayed for him. The employee felt provoked because she believed her co-worker was a member of a cult and had placed a death curse on her. The employee was terminated after the incident, and she complained of religious discrimination under Title VII.

Implications for Employers

- Although religion does not immunize an employee from discipline for disruptive behavior, it should not subject an employee to more severe discipline than other employees have received for similar actions. Thus, the District Court denied the employer's motion in order to determine whether this employee's discharge was more severe than other employees' punishments for workplace assaults.

- Although the employee's behavior was harmful to co-workers, additional facts were needed to determine whether accommodations like a change in job assignments or a lateral transfer had been considered. If other measures had been considered, the Court required additional information as to whether those measures would result in undue hardship.

- The duty to reasonably accommodate does not require an employer to accommodate when an employee's performance is inadequate, or when the accommodation violates a valid employer policy or creates undue hardship.

2. Weber v. Infinity Broadcasting Corp., 2005 U.S. Dist. LEXIS 40724 (E.D. Mich. Dec. 14, 2005). In this case involving an allergic reaction to a co-worker's perfume and disability discrimination, the District Court reduced the employee's damages where the jury's award clearly exceeded any award supported by the evidence presented and violated the statutory damage caps under Title VII.

A radio disc jockey ("DJ") alleged disability discrimination under the ADA, and a jury awarded her over $10,000,000 after exposure to a co-worker's perfume triggered an allergic reaction and forced her to take extended leaves, after which she was terminated for failure to perform production tasks required of a DJ. The Court reduced the total award to $814,000 plus attorneys' fees and costs, in accordance with the $300,000 statutory damage cap provided by Title VII and $514,000 for past economic damages, and noted that even the employee's own testimony would not support damages as large as those awarded by the jury.

The Court stated that an allergy does not constitute a disability under the ADA. Impairment of the employee's "radio voice" did not qualify as impairment of a major life activity, and losing her "radio voice" would not render her unable to work in a broad class of jobs. Also, the Court seriously considered reducing the employee's past economic damages from $514,000 to 0 because she was an at-will employee not under contract with the employer. However, the employer failed to raise these arguments at trial, and the Court refused to address arguments that the employer did not properly preserve.

Implications for Employers

- The Court will rarely rule on unraised issues. Preserve all viable arguments and explore all options. The Court independently considered eliminating the future economic damages. If the employer had moved for reduction of those damages, the Court likely would have granted the motion. Furthermore, if the employer had timely argued that an allergy was not a disability under the ADA, the claim may have been thrown out entirely.

- An allergy is typically not a disability under the ADA, although in certain circumstances it can be. The allergy alleged in this case was too intermittent in nature to qualify and did not substantially impair any major life activity.

- The employee claimed that her damaged "radio voice" limited her speaking ability. Speaking in a "radio voice" is not a major life activity where one can speak normally in a regular environment. Any contention that her allergy limited the major life activity of working would also be without merit. When work is a major life activity, the employee must be substantially impaired in a broad class of jobs – not only the job of radio DJ during allergic reactions.

3. Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004). The First Circuit Court of Appeals affirmed summary judgment for the employer where accommodating an employee's religion by granting an exemption from the dress code would cause undue hardship. The First Circuit held that the only accommodation the employee would accept, a total exemption from the dress code, would result in undue hardship where such an exemption would interfere with the employer's public image.

An employee wore a facial piercing. During her employment, the employer modified its dress code, banning all facial jewelry except for pierced earrings. The employee continued to wear her facial piercing for several months until supervisors told her to remove it. In response, the employee said she belonged to the Church of Body Modification ("CBM"), and the piercing was part of her religion.

The employee filed a religious discrimination charge with the EEOC. During the EEOC conciliation process, the employer recommended that the employee wear a band-aid or a clear plastic retainer over her piercing. The employee refused the suggested accommodation, saying her religious beliefs required that her piercing was visible at all times.

Implications for Employers

- Accommodation is a two-way street. While the employer has a duty to make good faith efforts to accommodate the employee, the employee also has a duty to cooperate with those good faith efforts from the employer.

- Where an accommodation would create undue hardship, the employer has no duty to accommodate before taking an adverse employment action. Because a blanket exception to the facial jewelry policy would interfere with the employer's public image and cause undue hardship, the employer had no duty to accommodate the employee.

- Courts acknowledge that employees' appearances reflect upon their employers and recognize the importance of personal appearance regulations. Courts have upheld dress code and clean shaven policies that appeal to customer preference and promote a professional public image.

4. Dotson v. BRP US Inc., 2008 U.S. App. LEXIS 5897 (7th Cir. 2008). In this case, the Seventh Circuit held that FMLA leave and workers' compensation benefits may run concurrently, and termination of an employee with a compensable injury does not violate the Family and Medical Leave Act ("FMLA") where the employee has exhausted all available FMLA leave and is unable to return to work at the time of termination. Thus, employers may count workers' compensation time towards FMLA leave and terminate employees who exceed twelve weeks of allotted leave time in one year without violating the FMLA.

An employee sustained a back injury at work and filed a workers' compensation claim. After surgery, the employee could not work for eight months. The employer notified the employee that his absence would be treated as FMLA leave and told him the number of FMLA leave

days he had remaining during the twelve month leave period. The employer's attendance policy tracked FMLA leave and contained a provision that "[a]n employee who is unable to work for more than twelve weeks will be considered automatically terminated at the expiration of that period, regardless of the reason for the inability to work."

Because the employee had already used more than half of his FMLA leave for the year, the employee's twelve weeks of FMLA leave expired less than two months after his injury – long before doctors cleared him to return to work. Consequently, the employer terminated him.

Implications for Employers

- Employers can run FMLA leave and time in which employees collect workers' compensation benefits concurrently. FMLA regulations 29 C.F.R. §§ 825.702(d)(2) and 825.207(d)(2) allow an employer to run FMLA leave and workers' compensation time concurrently, provided that the employer gives proper notice to the employee.

- The employer may terminate the employee at the conclusion of FMLA leave without violating the FMLA, even when the employee sustains a compensable injury. Section 825.216(d) of the FMLA states: "If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of the FMLA and must look to the workers' compensation statute or ADA for any relief or protections."

- The employee in this case did not raise any arguments under the Americans with Disabilities Act ("ADA"). However, employers will need to assess whether such employees are protected under the ADA prior to making termination decisions.

- The termination did not violate the FMLA, despite the employee's willingness to return to work. The lawfulness of the termination is based entirely on FMLA regulations and exhaustion of available FMLA leave. The employee's conduct, however well intentioned, had no bearing on the outcome.

5. Velez-Sotomayor v. Progreso Cash & Carry, Inc., 279 F. Supp. 2d 65 (D. P.R. 2003). The District Court denied summary judgment where issues of material fact existed as to whether the employer attempted to reasonably accommodate an employee's belief that a Santa hat celebrates Christmas and whether suspension for her refusal to wear the hat was pretext for pregnancy discrimination. The Court held that a Santa hat is a Christmas symbol prohibited by the employee's faith. The Court also found that the employer made stray remarks about a pregnancy epidemic, criticized the employee for frequent bathroom use and denied her request to sit on a high stool while working as her pregnancy progressed.

During the holiday, the employer wanted cashiers to wear Santa hats. The employee informed the employer that her faith prohibits the celebration of Christmas and was suspended until the holiday season ended. At the time of her suspension, the employee was six months pregnant. The employee returned to work in early January, requesting hours. The employer told her that she was not needed due to the slow season. The employee filed a complaint alleging religious and pregnancy discrimination, claiming that the suspension was pretext where the employer did not want to grant her maternity benefits. The employer claimed that the employee did not have a bona fide religious belief because her religion prohibits celebrating the religious aspects of the holiday, not Santa.

Implications for Employers

- With little or no difficulty, the employer could have accommodated the employee's religious beliefs and avoided lengthy and costly litigation. The cashier could have worked without wearing a Santa hat or been transferred to a different position during the holiday season.

- Non-religious symbols can conflict with beliefs. Trees, wreaths, nativity scenes, stockings, and Santa hats symbolize Christmas, and some religions prohibit celebration of the entire holiday, not just the religious symbols and aspects of it.

Smith O'Callaghan & White
www.socw.com

Terry J. Smith terry.smith@socw.com
Mary Aileen O'Callaghan maoc@socw.com
Laura A. White laura.white@socw.com

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