SMITH ANDERSON

EEO UPDATE

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EXPECT EXCELLENCE®

EEOC Developments

Administrative Statistics

- Volume
  - FY 2019 = 72,675 charges
  - Fewest since 1992
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for a decade – now 54% of all charges and continuing to ↑
  - Seems focused on ↓ inventory and settling through mediation

Administrative Statistics

- Location
  - FY 2019: NC – 4.6% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 50% of all charges nationwide

Litigation Statistics

- In FY 2019 – 144 new merits lawsuits filed by EEOC
  - Down 28% from prior year
  - Much less litigation than 10-15 years ago
  - Finite resources focused on systemic litigation
    - $39.1 million in recovered damages – lowest in 10 years
  - 95% success rate (settlements and jury verdicts)
    - 50% jury trial success rate (3 wins and 3 losses)

Systemic Statistics

- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2019
  - 450 systemic investigations resolved = $28M
    - Substantial ↑ in volume from prior year
  - Systemic charges: far more likely to result in "cause" determination
  - New lawsuits: 12% were systemic and 19% were multi-victim
  - Active lawsuits: 22% are systemic and 22% are multi-victim
  - EEOC had 100% success rate (settlement and verdict)

EEOC Composition

- General Counsel
  - Sharon Gustafson – R- confirmed August 2019 and term ends July 2023
- Five Commissioners
  - Janet Dhillon – R - confirmed May 2019 and term ends July 2022
  - Keith Sonderling – R - confirmed September 2020 and term ends July 2024
  - Andrea Lucas – R – confirmed September 2020 and term ends July 2025
  - Charlotte Burrows – D - Confirmed August 2019 and term ends July 2023
  - Jocelyn Samuels – D – Confirmed September 2020 and term ends July 2021
- What it Means
  - With 3 added in September, this is the first time there has been a full EEOC during Trump administration
  - EEOC will be Republican controlled until at least July 2022

Strategic Enforcement Plan: FY 2017-2021

1. Eliminating barriers in recruitment and hiring
   - Focus on class-based discriminatory practices (*e.g.*, background checks, job application forms, medical questionnaires)
2. Protecting vulnerable workers, such as immigrant and migrant workers

2017-21

3. Addressing selected emerging and developing issues

- Inflexible leave policies
- Duty to accommodate pregnancy-related limitations
- LGBTQ protection
- Temporary worker and "independent contractor" protection
- Muslim protection

2017-21

4. Ensuring equal pay for all workers
5. Preserving access to legal system
   - Releases; arbitration; and retaliation
6. Preventing Systemic Harassment

Pattern or Practice Claims

- Section 707 of Title VII states that the EEOC may bring a lawsuit if a "person or group of persons is engaged in a pattern or practice of *resistance* to the full enjoyment of any of the rights secured by this subchapter"
- In September 2020, the EEOC issued an Opinion Letter:
  - Section 707 claims must be based on intentional *discrimination/retaliation* prohibited by Sections 703 or 704 of Title VII – it does not create an independent basis for liability
  - Section 707 claims may be pursued in court only after a charge has been filed and conciliation attempted

Pattern or Practice Claims

- The EEOC previously had taken a different position in some cases
- Opinion Letter is not binding on courts
- Burrows (the lone D at the time) opposed the letter – "Today, the Commission not only abandons its duty to enforce the law as Congress intended, but it does so without any opportunity for prior public notice and comment."

Opioid Guidance

- In August 2020, EEOC issued Q&A guidance regarding opioid use and the workplace
- https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees
- Does not cover new ground, but does provide useful information
- The key points:
  - "The ADA allows employers to fire you and take other employment actions against you based on illegal use of opioids, even if you do not have performance or safety problems. But if you aren't disqualified by federal law and your opioid use is legal, an employer cannot automatically disqualify you because of opioid use *without considering if there is a way for you to do the job safely and effectively*."
  - "[O]pioid addiction (sometimes called "opioid use disorder" or "OUD") is itself a diagnosable medical condition that can be an ADA disability. You may be able to get a reasonable accommodation for OUD. But an employer may deny you an accommodation if you are using opioids illegally, even if you have an OUD."

Supreme Court of the United States

Bostock v. Clayton County

- Background
  - Title VII prohibits discrimination "because of . . . sex"
  - For decades, federal courts and the EEOC had concluded that Title VII's prohibition on sex discrimination *did not* include a prohibition on sexual orientation discrimination.
    - While Title VII prohibits employment discrimination because of "race, color, religion, sex, or national origin," "sexual orientation" is not on the list;
    - When Congress enacted Title VII in 1964, Congress did not intend to prohibit sexual orientation discrimination;
    - In 1964 when Title VII was written, an ordinary understanding of its prohibition on sex discrimination would not have included sexual orientation discrimination;
    - Since 1964, on several occasions Congress has considered legislation that would add "sexual orientation" to the list of protected traits, but each time the legislation had failed to become law.

Bostock

- Beginning in 2012, the EEOC changed its position and concluded that Title VII does prohibit such discrimination
- Some courts agreed with the EEOC, and some disagreed
- Supreme Court combined three cases to decide the issue
  - *Zarda v. Altitude Express* (2nd Cir. 2018)
    - The Second Circuit concluded that Title VII prohibits discrimination because of sexual orientation
    - The Seventh Circuit had reached the same conclusion in 2017
  - *Bostock v. Clayton County Bd Commissioners* (11th Cir. 2018)
    - The Eleventh Circuit reached the opposite decision
  - *EEOC and Stephens v. R.G. & G.R. Harris Funeral Homes* (6th Cir. 2018)
    - The Sixth Circuit concluded that Title VII prohibits discrimination because of transgender or transitioning status

Bostock

- The Supreme Court considered a lot of material before reaching a decision
  - The briefs and arguments of all parties in the three cases
  - Over 50 *amicus* briefs by interested non-parties
  - EEOC arguments in favor of an interpretation of Title VII that includes a prohibition on sexual orientation and gender identity discrimination
  - US DOL arguments taking the opposite position

Bostock

- Writing for the 6-3 majority, Justice Gorsuch, who was nominated by President Trump to succeed Justice Scalia, relied on a "textualist" method of statutory interpretation and prior decisions by Justice Scalia
- At the outset, he delivered the Court's conclusion
  - "Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Bostock

- He also addressed the counter-arguments
  - "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

Bostock

- According to the Court, the meaning of the text of Title VII has been clear and unambiguous since it was written in 1964, and that text prohibits discharging an individual because of the individual's sexual orientation or transgender status.
- To reach this conclusion, the Court undertook a detailed analysis of the key text of the statute, including the terms "sex," "because of," "discriminate," and "individual."

Bostock

- After doing so, it reached its textualist conclusion:
  - "From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. . . . If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. . . . The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex

Bostock

- If you change an employee's sex and the outcome of the challenged employment decision also would have changed, then you have employment discrimination because of sex – this involves a focus on the *individual* and *but-for* causation.
- So, if an employer fires a gay man because he is sexually attracted to men, it has violated Title VII because if the sex of the man was changed to a woman (who was sexually attracted to men), then the employer would not fired him

Bostock

- After reaching this conclusion about the ordinary public meaning of the statute, the Court then addressed each of the counter-arguments and reached several ancillary conclusions
  - The *label* given to a discriminatory practice is irrelevant to the analysis (*i.e.*, rejecting the argument that discrimination because of "sexual orientation" is different than discrimination because of "sex");
  - Sex need not be the sole or even the primary cause of the adverse action to provide the foundation for a Title VII violation, it simply has to be *a cause*;
  - An employer cannot escape liability by claiming that it treats male and female employees equally as *groups* because the focus is on the *individual (i.e.*, rejecting the argument that discrimination on the basis of sexual orientation is not sex discrimination because it impacts both men and women equally)

Bostock

- Finally, the Court rejected policy arguments raised in opposition to its conclusion
  - "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

Conclusion

- While many employers already prohibited sexual orientation and gender identity discrimination, now all covered employers must do so; and a failure to do so has more serious consequences. So, employers should
  - Review their Equal Employment Opportunity policies to assess whether they prohibit discrimination and harassment because of sexual orientation or gender identity;
  - If such prohibitions are not included, they should be added;
  - Any such new policies should be circulated to all employees;
  - Consider soon conducting sexual harassment training that is focused on sexual harassment because of sexual orientation or gender identity, and certainly update any future harassment training programs to cover those topics; and
  - Make sure that managers and Human Resources personnel are aware of this legal development and take steps to ensure compliance when making and vetting adverse employment actions, as well as when making hiring decisions.

Broader Impact

- While the *Bostock* Court careful limited the scope of its decision and stated that its holding did not necessarily extend to other statutes or fact patterns, other courts already are relying on it in other areas
- *Grimm v. Gloucester County School Board* (4th Cir.)
  - Defendant issued a policy that prevents students from using a restroom that does not match their "biological gender"
  - Grimm, a transgender male student, asserted Constitutional and Tile IX claims
  - Title IX prohibits discrimination "on the basis of sex," and citing *Bostock*, the 4th Circuit "ha[d] little difficulty" concluding that the Defendant's policy was discriminatory
  - This case and/or similar cases likely will reach the Supreme Court

Broader Impact

- *Frappied et al v. Affinity Gaming Black Hawk* (10th Cir.)
  - Plaintiffs included eight women over 40 who were fired by new ownership
  - The case involved several issues, but focusing on one here
  - Plaintiffs asserted Title VII claims alleging that they were fired because they were "older women" – a so-called "sex-plus" claim
  - Here, the plus factor was age – a factor not covered by Title VII
  - Nonetheless, revisiting its prior decisions in light of *Bostock*, the Court held that sex + age claims are viable under Title VII and, focusing on the individual, if a female plaintiff can show that she would not have been discharged if she was male, then she has established a Title VII claim
  - *Bostock's* focus on but-for causation and the individual likely will have broad impact

Comcast v. NAAAM

- Congress passed the Civil Rights Act of 1866 ("Section 1981") in the aftermath of the Civil War
- It states that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."
- In 1975, the Supreme Court ruled that Section 1981 provides a claim for employment discrimination on the basis of race

Comcast

- In this case, the Court had to decide the appropriate causation standard that applies to a Section 1981 claim
- The plaintiff asked the Court to conclude that a plaintiff merely had to prove that race was "a motivating factor" in the decision
- The defendant argued that a plaintiff should have to prove that "but-for" race, the plaintiff would not have experienced discrimination

Comcast

- Writing for what was essentially a unanimous Court, Justice Gorsuch focused on the text of the statute
- The Court concluded that while the text was not clear, "but-for" causation was the appropriate standard
- The Court examined other aspects of the law in 1866, as well as subsequent Supreme Court precedent, and it concluded that all pointed toward but-for causation

Comcast

- The Court acknowledged that in 1991 Congress amended Title VII to include a "motivating factor" causation element
- But, the Court concluded that there was no reason to believe or conclude that what Congress did in 1991 had impact on the meaning of an 1866 statute
- In sum, the Court held that "[t]o prevail [on a Section 1981 claim] a plaintiff must initially plead and ultimately prove that, but for race, [the plaintiff] would not have suffered the loss of a legally protected right."

Conclusion

- Plaintiffs alleging race discrimination can bring both Title VII claims and Section 1981 claims
- In recent years, many plaintiffs have relied more on Section 1981 claims because they do not require the plaintiff to first go to EEOC and they have remedies that are in some ways broader
- But after *Comcast*, it is clear that, while in some ways Section 1981 claims may be preferable to Title VII claims for plaintiffs, they will be harder to prove because under Section 1981 plaintiffs must prove "but-for causation," whereas under Title VII they simply must prove "motivating factor" causation.

Our Lady of Guadalupe School v. Morrissey-Berru

- One of the questions expressly left open by *Bostock* was the impact of that decision on religious institutions
- This case continues a series of recent Supreme Court decisions that discuss the impact of employment laws on religion
- (In fact, just last week, at the start of the term, Justices Thomas and Alito issued a statement critical of the *Obergefell* case that recognized a constitutional right to same-sex marriage, complaining that the Court had favored a "novel constitutional right" over the religious liberty interest protected by the First Amendment)

OLG

- This case combined two decisions from the 9th Circuit
- In both of those cases, the 9th Circuit had concluded that elementary school teachers at religious schools could pursue federal discrimination claims and were not exempt from those laws under what is known as the "ministerial" exception
- The Supreme Court, in a 7-2 decision written by Justice Alito, reversed both decisions

OLG

- The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
- It protects the right of religious institutions to decide matters “of faith and doctrine” without government intrusion
- It also protects religious institutions’ autonomy “with respect to internal management decisions that are essential to the institution’s central mission,” including “the selection of individuals who play certain key roles”

OLG

- Based on these principles, over the years, district courts had developed a "ministerial exception" to federal discrimination laws that prohibited certain employees of religious schools from pursuing claims
- In 2012, in *Hosanna-Tabor v EEOC*, the Supreme Court unanimously approved the ministerial exception

OLG

- The Court in that case focused on several factors:
  - The title held by the plaintiff (which included the word “minister”);
  - The religious training received by the plaintiff;
  - The plaintiff took advantage of tax laws that benefit ministers;
  - The plaintiff’s job duties included a role in conveying the religion’s message and mission

OLG

- In these cases, the Ninth Circuit had weighed those factors and concluded that the plaintiffs were not entitled to the ministerial exception because they did not have "minister" in their job titles and did not have a lot of religious training.
- The Supreme Court rejected that approach, explaining that the factors in *Hosanna-Tabor* should not be applied like that

OLG

- Instead, the Court explained that "[w]hat matters at the bottom, is what an employee does. And, implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school"
- And, in these cases, the plaintiffs performed "vital religious duties" that included providing education consistent with the religious tenets of the religious schools at which they were employed and, therefore, they were covered by the ministerial exception and could not pursue discrimination claims
- In sum, "When a school with a religious mission entrusts a teacher with the responsibilities of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

Conclusion

- The Court has interpreted the "ministerial exception" broadly
- It is hard to imagine that many teachers at religious schools will not be covered by that exception, which means that such schools will have broad protection from discrimination and employment lawsuits – when brought by teachers and other officials
- It also suggests that the Court will interpret the scope of the First Amendment broadly when it interacts with employment law at other times, and we can anticipate similar outcomes in future decisions

Little Sisters of the Poor v. Pennsylvania

- Affordable Care Act ("ACA") required group health plans to provide "preventative care and screenings" coverage
- The government adopted regulations under this provision that included a "contraceptive mandate"
- Much litigation ensued, including arguments based on the Religious Freedom Restoration Act ("RFRA")
- And, a new President was elected with a new administration

LSOP

- Two additional rules were adopted
  - Religious exemption: An employer that objects to contraception based on sincerely held religious beliefs
  - Moral exemption: An employer that objects to contraception based on sincerely held moral grounds
- These exemptions are available to all employers, even publicly traded companies
- In this case, the Court, in a 7-2 decision by Justice Thomas, concluded that these rules were permitted under the ACA and were not procedurally flawed

Conclusion

- An issue left open by the case is whether the exemptions were *arbitrary and capricious* and whether they were *required* by the RFRA
- Two Justices wrote a separate opinion, arguing that the RFRA required at least the religious exemption
- Two Justices wrote a separate opinion, suggesting that the exemptions may be arbitrary and capricious
- We should anticipate more Supreme Court cases that address the intersection between religion (and the RFRA) and employment laws

Retaliation

Gogel v. Kia Motors Mfg. (11th Cir. *En Banc*)

- Andrea Gogel worked for KIA, which was a subsidiary of KMC (based in Korea)
- Jackson was the SVP of HR and Admin for KIA
  - Tyler was HR Manager and reported to Jackson
  - Gogel was Team Relations Manager and reported to Jackson
    - Team Relations was responsible for HR matters after on-boarding, including workplace investigations
    - As Team Relations Manager, Gogel led such investigations, and she was expected to help the company handle such matters in-house and to avoid litigation

Gogel

- Ledbetter worked in the General Affairs department
  - General Affairs was responsible for office furniture, special events, and other administrative tasks
- Ledbetter was responsible for Protocol and Events
  - Events had to be consistent with Korean protocol
  - So, when Korean executives visited, she had to greet them with flowers and pour them wine

Gogel

- Ledbetter did not like those responsibilities and complained to Gogel
- Ledbetter also reported to Gogel that she believed that her boss was having an affair with the President of KMC
- In late 2008, Gogel asked Jackson whether she could investigate the alleged affair
  - Concern about favoritism
  - Concern about whether the affair was consensual
- Jackson declined to authorize an investigation
- Then, the HR Coordinator for KMC asked Gogel to investigate, but to not tell Jackson
- Before she completed the investigation, he changed his mind and told her to stop the investigation and destroy all records

Gogel

- In March 2009, Tyler (HR Manager) was promoted with a new title
- Gogel was unhappy she did not get a similar promotion and complained to Jackson that she believed Korean management discriminated against women
- Jackson asked Tyler to investigate
- Tyler prepared a report in September 2010 that outlined the concerns employees had with Korean management
- When Jackson met with Gogel to discuss her concerns, she told him that she wanted an independent investigation

Gogel

- On November 10, 2010, Gogel filed a Charge of Discrimination with EEOC alleging sex and national origin discrimination
- On November 19, 2010, Tyler filed a Charge of Discrimination with EEOC alleging national origin discrimination and retaliation
- They both were represented by the same law firm

Gogel

- In December, Jackson and in-house counsel met separately with Gogel and Tyler and asked them to sign an agreement
  - They would not discuss their Charge with co-workers
  - They would not ask co-workers to assist with their Charges
  - They would not malign the company to co-workers
  - They would not try to access company files to support their claims
- They signed the agreement

Gogel

- At the end of December 2010, Gogel received a $12k bonus
- Tyler, however, breached the agreement by downloading dozens of documents and forwarding hundreds of work emails to his personal email
- He was fired
- He sued alleging retaliation
- The court granted KIA's summary judgment motion
- He appealed and lost

Gogel

- Meanwhile, on December 10, 2010, Ledbetter had filed a Charge of Discrimination with EEOC, alleging sex, race, and national origin discrimination
- Jackson found out about the Charge on December 23
- He immediately was alarmed because the Charge revealed that Ledbetter was represented by the same firm that represented Gogel and Tyler
- He suspected that Gogel and Tyler were recruiting employees to sue the company
- Two employees reported to Jackson that they had noticed Gogel spending a lot of time with Ledbetter and that Ledbetter had told them that she was planning to pursue claims against the company, that she was working with the law firm that was helping Gogel and Tyler, that Gogel was encouraging her to sue the company, and that Gogel was the ringleader

Gogel

- On January 19, 2011, Jackson confronted Gogel with the allegations and evidence
- She denied the allegations (and she continued to deny the allegations throughout her subsequent lawsuit, though she did admit to providing the lawyer referral)
- Jackson did not believe her and terminated her employment because he believed that she had been encouraging employees to sue the company, that her acts were inconsistent with her job duties, and that, therefore, he had lost confidence in her

Gogel

- Gogel then filed a new Charge with EEOC, alleging retaliation
- Afterwards, Gogel filed this lawsuit, alleging sex and national origin discrimination, as well as retaliation
- The district court granted summary judgment for the employer, and she appealed
- The panel affirmed summary judgment on the discrimination claims, but reversed on the retaliation claim
- The 11th Circuit then heard the case *en banc*, affirming summary judgment on the discrimination claim and focusing solely on the retaliation claim

Gogel

- Title VII prohibits retaliation against employees who:
  - Participate in a Title VII investigation, proceeding, or hearing
  - Oppose any practice made unlawful by Title VII
- To make a *prima facie* case of retaliation, an employee must show: (i) protected activity, (ii) adverse action, and (iii) a causal connection between the two
- Then, the employer must show a non-retaliatory reason for the adverse action, after which the employee must show that the employer's reason was a pretext for retaliation
- Ultimately, the employee must prove that but-for her protected activity, she would not have experienced the adverse action

Gogel

- Gogel alleged that she was discharged on January 19 because she filed a Charge on November 10, and the Court concluded that she had stated a *prima facie* case of retaliation
- The Court also concluded that KIA had offered a non-retaliatory reason – the fact Jackson believed she had recruited another employee to sue the company

Gogel

- The Court then concluded that Gogel had failed to show pretext
  - After she filed her Charge, she received a raise
  - She did not suffer any adverse action until after Jackson learned about the Ledbetter Charge and received the witness reports
  - While Gogel denied the recruitment, whether she *actually* recruited Ledbetter was not the real issue – the issue was whether Jackson *reasonably believed* that she had done so
  - And, Gogel offered no evidence to refute that Jackson reasonably believed she had recruited Ledbetter to sue

Gogel

- Gogel next argued that KIA's reason for terminating her employment – that she recruited Ledbetter to file a lawsuit – could not provide a defense because such action would have been protected oppositional activity
- The Court rejected this argument

Gogel

- To qualify as protected oppositional activity, "the manner in which an employee expresses her opposition . . . must be reasonable."
- If the oppositional activity "so interferes with the employee's performance of her job that it renders her ineffective in the position for which she was employed" then it is not reasonable or protected

Gogel

- Gogel was an HR employee and her job responsibilities included investigating employee concerns and attempting to resolve those disputes in-house and avoid litigation
  - She certainly had a protected right to report concerns about her employment to EEOC
  - And, she had a protected right to report to management concerns about her employment or the company's treatment of other employees
  - But, she did not have a protected right to refer an employee to a lawyer or to solicit an employee's pursuit of litigation against the company
- Accordingly, the Court rejected her argument that KIA's reason was unlawful and affirmed summary judgment for KIA

Driskell v. Summit Contracting Group (4th Cir.)

- Summit is a general contractor
- Driskell was employed as an Assistant Superintendent and was assigned to a project in Charlotte
- He reported to Rhyner, who reported to Fudge
- Fudge reported to Padgett (President and CEO)
- Driskell's father also worked for Summit

Driskell

- In June and July 2015, Driskell noticed that Rhyner was drinking alcohol at lunch and then returning to work intoxicated and acting belligerently
- For example, one day Rhyner returned to work after lunch drunk and brandishing a handgun, which was against company policy

Driskell

- Driskell reported his concern to Fudge, believing that Rhyner's intoxication was a safety issue
- Fudge informed Padgett
- Driskell's father reported Driskell's concerns to Padgett's wife, who also was an executive
- The Padgetts, however, did not believe the Driskells and wrote in emails that they believed the Driskells were scheming to file a "bogus lawsuit"

Driskell

- After another incident with Rhyner's drinking, Driskell reported his concerns directly to Padgett
- Padgett sent Born to investigate
- Rhyner denied the allegations, and Born told Driskell to stop reporting things because what happens at the job site stays at the job site
- Born then took Rhyner to lunch and bought him beer
- Born submitted a report to Padgett, concluding that Driskell was a "good kid," but needed to "grow a pair of balls"

Driskell

- The next day, Driskell and Rhyner met
- Rhyner had been drinking and told Driskell that his team needed to work harder
- Driskell said that if he pushed them harder it would yield safety issues
- When Driskell turned to leave, Rhyner repeatedly punched him in the face
- Driskell fought back, and Rhyner told Driskell he was fired

Driskell

- Driskell reported this incident to Padgett
- Padgett told Driskell that he was not fired
- Driskell said he would quit if Rhyner was not discharged, and Padgett did not respond
- Later, Fudge told Driskell to return his work tools, which surprised Driskell because he planned to return to work
- Driskell reported Rhyner to the police, and Rhyner was charged with assault

Driskell

- The next day, Ms. Padgett sent several internal emails, claiming that the Driskells were engaged in a "scam" and were "plotting a bogus lawsuit"
- Driskell did not report to work that day or the next (and he had no PTO) because he was injured in the fight and doctor advised him to stay home for two days
- During those days, he reached out to Fudge and asked where he should next report to work when he was cleared to return by his doctor
- At the direction of Ms. Padgett, Fudge did not respond, and in emails the company discussed who would be the "designated terminator" and "give [Driskell] the boot."

Driskell

- The company deactivated Driskell's phone and iPad
- He suspected that meant he had been fired, so he reached out to Fudge who did not respond
- So, the next day he returned his phone and iPad, believing he had been discharged

Driskell

- Driskell filed a lawsuit, alleging wrongful discharge and REDA (NC Retaliatory Employment Discrimination Act) claims
- He advanced two theories: (i) he was fired because he complained about Rhyner's drinking and safety issues, and (ii) he was fired because the company thought he would file a workers' compensation claim as a result of injuries suffered during the fight

Driskell

- Case was tried to a jury verdict
- Driskell was awarded $65k in lost wages and $681k in punitive damages (which was capped by statute at $250k)
- And, the Court also awarded him $442k in attorneys' fees

Driskell

- To prove his retaliation claim, Driskell had to prove: (i) protected activity, (ii) adverse action, and (iii) causal connection between the two
- Summit argued that there was no adverse action because Driskell quit

Driskell

- The Court rejected that argument
  - While Driskell did threaten to quit, a threat to quit is not the same as quitting
  - Summit would not respond to his emails and texts
  - Summit deactivated his work devices
  - When Driskell turned in his work devices, Summit did not tell him he was making a mistake
- So, the Court concluded that the evidence supported the jury's conclusion that he was fired

Driskell

- Summit argued that internal complaints are not protected activity
- The Court rejected that argument too:
  - Simply proposing to a supervisor a way to comply with safety rules is not protected activity
  - But an internal complaint alleging ongoing safety violations is protected activity
  - When deciding whether the activity is protected, a court should consider: (i) whether the report led to an investigation, (ii) whether the report was made to someone other than supervisor, and (iii) whether workplace safety was a focus
- The Court concluded that Driskell's complaints were protected under this analysis

Driskell

- Summit argued that the evidence conclusively showed that it fired Driskell for non-retaliatory reasons – insubordination and taking off two days
- The Court rejected this argument, pointing to all of the evidence that would support a conclusion of retaliatory motives:
  - Internal emails that characterized Driskell's concerns as a "scam"
  - Lackluster investigation that concluded with the observation that Driskell needed to "grow a pair of balls"
  - Failure to discipline Rhyner

Driskell

- Summit argues that punitive damages were improper
- The Court rejected this argument
- Punitive damages may be awarded when there is clear and convincing evidence that the defendant's conduct involved fraud, malice (personal ill-will), or willful conduct (intentional disregard to rights and safety of others)
- The Court concluded that Ms. Padgett's emails and the refusal to seriously investigate or discipline Rhyner demonstrated malice
- And, Born's statement that Driskell needed to grow a pair of balls demonstrated a conscious disregard of safety
- In sum, the jury's award was affirmed, and Driskell recovered roughly $750k

Conclusions

- Retaliation claims can be difficult to defend
- When the protected activity is close to the adverse action, then a case is particularly hard to defend
- So, when that is the case, a company must carefully weigh whether taking adverse action is worth the risk
- But, if the employee engages in improper conduct after the protected activity, that can provide a non-retaliatory reason for the adverse action
- For most employees, encouraging co-workers to pursue legal rights under Title VII would be protected oppositional activity
- But, for HR managers, in-house counsel, and other employees whose jobs involve handling employment investigations in house and avoiding litigation, such activity likely will not be protected
- And, be very careful when sending emails – they can be costly!

SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson

October 15, 2020

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