MAY 2004, VOL. 2, NO. 5

ILLINOIS STATE BAR ASSOCIATION

FEDERAL CIVIL PRACTICE

The newsletter of the ISBA's Section on Federal Civil Practice

The use of other discriminatory acts to prove liability: An analysis of recent Seventh Circuit jurisprudence

By James W. Springer; Kavanagh, Scully, Sudow, White & Frederick, P.C.; Peoria, Illinois

I. Introduction

English and American law have generally looked with disfavor on attempts to prove (or disprove) liability, through proof of acts or behavior on other occasions. The general feeling of common law judges was (and is) that such attempts are both irrelevant and prejudicial. As Wigmore put it "…a very bad man may have a very righteous cause." John H. Wigmore, *A student's Textbook of the Law of Evidence* 65 (1935). However, that general policy has frequently been disregarded in suits involving discrimination, particularly discrimination in employment. The tendency among American courts is to be far more liberal in discrimination cases than in other types of cases in admitting evidence of similar wrongful acts on other occasions. See Michael L. Russell, "Previous Acts of Employment Discrimination: Probative or Prejudicial?," *Am.J.Trial Advocacy*, Fall, 2001, 297. The Seventh Circuit has gone along with the other circuits in this policy of liberal admission. However, three recent cases affirmed the denial of admission of such evidence, and thereby show the limits which the Seventh Circuit has placed on the use of other acts as proof.

II. The federal rules of evidence

The admissibility of evidence in all cases in the federal courts is governed by the Federal Rules of Evidence, three of which are relevant to the present subject. Fed.R.Evid. 404(a) states that "Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion…," with certain exceptions. Fed.R.Evid. 404(b) qualifies this policy by stating that while evidence of other acts is not admissible to prove character, by showing that a litigant acted in conformity with that character, such evidence may be admissible to prove "…motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident…."

Fed.R.Evid. 406 permits the admission of the evidence of habit or routine practice "…to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Finally, Fed.R.Evid. 403 states that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A commonly expressed rationale for limiting proof of acts on other occasions is the practical problems of the time and effort needed to litigate those other acts, with the parties producing conflicting testimony, and the judge having to instruct the jury on the subtleties of proof. Such complications are often said to create "a trial within a trial" and to justify exclusion on those grounds. *Soller v. Moore*, 84 F.3d 964, 967 (7th Cir. 1996).

Despite the above considerations, all circuits have tended to be quite liberal in their admission of proof of acts on other occasions, when the suit is brought for alleged discrimination. The Eighth Circuit stated this policy as follows:

> Circumstantial proof of discrimination typically includes unflattering testimony about the

IN THIS ISSUE

Federal Civil Practice

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call (217) 525-1760

OFFICE
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

Editor
Joseph G. Bisceglia
One IBM Plaza, Sue. 4600
Chicago, 60611

Associate Editors
Kathryn A. Kelly
219 S. Dearborn, Ste. 500
Chicago 60604

Joseph M. Gagliardo
515 N. State St., 28th Fl.
Chicago, 60610

David A. Herman
One W. Old Capitol Plz, Ste. 600
Springfield, 62701

Timothy J. Howard
211 Fulton St., #600
Peoria, 61602-1309

Robert L. King
211 N. Broadway, Ste. 2970
St. Louis, MO 63102-2793

Managing Editor/Production
Katie Underwood
kunderwood@isba.org

> employer's history and work practices—evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988).

The Seventh Circuit has generally followed this trend. One of the most widely quoted statements concerning the policy of liberal admissibility was presented in *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987), which stated: "A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries."

The Seventh Circuit proved its dedication to a policy of liberal admissibility in *Hunter v. Allis-Chalmers Corporation, Engine Division*, 797 F.2d 1417 (7th Cir. 1986), a suit for racial discrimination in employment. The Court of Appeals upheld the trial court in its admission of evidence of harassment directed toward black workers other than the plaintiff, against the defendant's challenges based upon Fed.R.Evid. 403 and 404.

III. Three recent Seventh Circuit cases

Despite the Seventh Circuit's general program of liberal admissibility, three recent cases affirmed the denial of evidence of other wrongful acts in discrimination suits.

In the very recent case of *Manuel v. City of Chicago*, No. 02-3036 (7th Cir. July 9, 2003), the plaintiff, a black female, sued for discrimination on the basis of race and sex, in violation of the Civil Rights Act of 1964 (42 U.S.C. §2000) and the Civil Rights Act of 1870 (42 U.S.C. §1981). The defendant moved in limine to exclude evidence of discrimination directed against other individuals. Plaintiff's counsel opposed the motion with a letter describing expected testimony from a co-worker, in which the co-worker opined that the plaintiff's superior was a racist and stated that she had observed the superior treat plaintiff, herself, and other black employees badly. The trial court denied the proffer of evidence, and was affirmed on appeal. Id. at 3.

The Seventh Circuit recognized the general policy of admitting other acts of discrimination, but stated that the offer of proof contained few specifics and that the proposed labeling of the supervisor as a racist would have been "unfairly prejudicial" to the defendant, and would have threatened to turn the case into a series of "mini-trials" over the other accusations. Id. at 7. Although the defense counsel elicited at trial a denial from the supervisor that he ever discriminated against anyone on the basis of race, the court held that this did not open the door to the plaintiff introducing contrary evidence. The court held that the question and answer were improper, but limited the plaintiff's remedy to a jury instruction. Id. at 4.

The other two recent Seventh Circuit cases are similar in the failings that the Court of Appeals noted in the proffered testimony. In *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933 (7th Cir. 2001), a female employee sued the employer for sex discrimination, which consisted of sexual harassment and retaliatory termination. Plaintiff had previously alleged that the supervisor—alleged harasser—had threatened her with a knife, for which she filed a police report that resulted in the supervisor's arrest and trial on criminal charges. She asserted that she had received the "cold shoulder" from her co-employees after filing the criminal complaint, which she claimed showed prejudice against women and lack of responsiveness on the part of the employer. Id. at 942. The plaintiff also asserted that another supervisor was instructed by her superior not to attend the criminal trial of the arrested supervisor, which plaintiff asserted was a threat that showed an intent by the employer to retaliate against complaining workers. Id. at 942. The Court of Appeals held that the first item of proof would require "a long chain of inferences to reach its ultimate goal," and therefore had "limited probative value." Id. at 942. As to the second, the Court of Appeals held that the allegations "…were too far afield from the central issue in the case and would serve to confuse the jury." Id. at 942. The court also affirmed the exclusion of the supposed retaliatory discharge of the plaintiff on the grounds that it occurred a year and a half after the last time she had had any contact with her harassing supervisor, and that the termination had been for a legitimate cause. Id. at 943.

In *Schreiner v. Caterpillar, Inc.*, 250

F.3d 1096 (7th Cir. 2001), the plaintiff sued for sexual discrimination under the Civil Rights Act of 1964. She claimed that she was discriminated against in that her requests for wage increases were denied by the line supervisors, whereas similar requests by male employees were granted. An area supervisor had made the statement that the area where she worked was "not a woman's area," which the defendant employer moved to exclude in a motion in limine. The trial court granted the motion and was affirmed on appeal. The Court of Appeals held that the connection between the remarks by the supervisor and the denial of the plaintiff's salary increases "…was too tenuous to constitute evidence of discrimination." Id. at 1100. It was actually the line supervisors who had denied plaintiff's requested wage increases, and there was no evidence that the line supervisors had heard the remarks by the area supervisor, or that the line supervisors and area supervisor influenced each other or followed each other. In fact, the area supervisor had approved the plaintiff's request for a wage increase when it was presented to him.

IV. Discussion and conclusion

It is unlikely that the three cases reviewed above signal an intent on the part of the Seventh Circuit to retreat from its policy of liberal admissibility of evidence of other wrongful acts in discrimination suits. Rather, the three cases simply suggest the limits of that policy. The dispositions of *Alverio* and *Schreiner* are relatively simple to explain. In *Alverio*, there was a serious issue of relevance and probative value, in that the evidence which was excluded did not show that the plaintiff or any other employee was treated differently based upon her sex. The decision in *Schreiner* is explainable upon the judicial doctrine of "stray remarks," which is widely applied in discrimination cases. If a remark is made by a person without supervisory authority, or by a person who did not make the decision being challenged in the case at bar, or if the decision was temporally remote from the allegedly discriminatory action, or ambiguous, it will be barred as lacking relevance or probative value. *Walton v. McDonnell Douglas Corporation*, 167 F.3d 423, 426 (8th Cir. 1999).

The decision in *Manuel* is more interesting, since it deviates more strongly from the line of precedent that favors liberal admissibility of other discriminatory acts, even if directed against a person other than the plaintiff. The sourt was entirely right to say that the uses of other wrongful acts threatened to turn the case into a series of "mini-trials," but that is true of almost all cases that involve the use of evidence of other wrongful acts. There is no very obvious basis in the decision for distinguishing this case from other cases in which such evidence has been admitted and resulted in disputed and contradictory testimony over some other instance of supposed discrimination. It is possible that *Manuel* turned upon the minimal details contained in the offer of proof, which apparently consisted of a general statement that the witness would offer evidence of other discriminatory acts, with no specifics, and a statement that that witness regarded the plaintiff's superior as a racist. The Seventh Circuit has often been quite demanding on offers of proof, and it may be that the failure of the plaintiff's attorney to offer more detail resulted in the evidence being excluded.

Restriction of litigants' access to protected health information under HIPAA

By Jeffrey P. Carren; Laner, Muchin, Dombrow, Becker, Levin, and Tominberg, Ltd.; Chicago

Regulations issued by the Secretary of Health and Human Services under the Health Insurance Portability and Accountability Act ("HIPAA") prohibit covered entities—health plans, health care clearinghouses and health care providers—from using or disclosing protected health information ("PHI") without the consent of the individual who is the subject of the information, unless such use or disclosure is specifically permitted by the regulations. Under HIPAA, PHI is individually identifiable health information that is created, received, maintained or transmitted by a covered entity, related to an individual's past, present or future physical or mental condition. 45 C.F.R. §160.103.

HIPAA regulations place barriers upon how parties to judicial or administrative proceedings may obtain information from health plans as well as from other covered entities (i.e., doctors and hospitals) that is needed for use in resolving claims. §164.512(e).

A litigant may seek to obtain written authorization from the subject individual that will permit a covered entity to release PHI to such party as it relates to their claim or injury. If this authorization is obtained, the covered entity releasing the information is required to release only that information that is explicitly authorized.

Covered entities—health plans, providers and clearing houses—are permitted to disclose PHI in the course of any judicial or administrative proceeding, notwithstanding the fact that they are generally prohibited from disclosing PHI. If the requirements of HIPAA regulations have been met, the covered entity is permitted to disclose the minimum amount of PHI necessary to satisfy the request. Where a party to litigation makes a request to a covered entity for PHI, upon satisfying the requirements of the regulations relating to such a request, it is permissible for such party to obtain and utilize such information to resolve the claim. There are two methods for obtaining PHI through discovery:

1. Obtain an order of a court or administrative tribunal that expressly authorizes disclosure of PHI. §164.512(e)(i)(i).
2. Serve a subpoena, discovery request or other process, without a court order or that of an administrative tribunal, through either of two methods. §164.512(e)(1)(ii).

Alternative No. 1: Advance notice to subject individual

The covered entity providing the information receives satisfactory assurances from the requesting party that reasonable efforts have been made by it to ensure that the individual whose PHI is to be disclosed has been given notice of the request.

With respect to this first alternative to a court order, the requesting party would need to provide to the requested covered entity a written statement and documentation showing the following:

1. The requesting party has made a good-faith attempt to provide written notice to the subject individual (if his location is unknown, by

mailing such notice to his last known address); and
2. The notice included sufficient information about the litigation to permit the individual to raise an objection to the court or administrative tribunal; and
3. The time for the individual to raise objections has elapsed, and either:
   a. No objections were filed, or
   b. All objections that were filed have been resolved by the court and the disclosures being sought are permitted as a result thereof. §164.512(e)(1)(ii)(A) and (iii).

Alternative No. 2: Action to obtain protective order

The covered entity from whom the PHI is requested receives satisfactory assurance from the requesting party that reasonable efforts have been made by it to secure a protective order that meets certain requirements.

In order to satisfy this second alternative to a court order, a requesting party would need to provide a written statement and documentation showing that either:

a. The parties to the proceeding have agreed to a qualified protective order and presented it to a court or administrative tribunal, or
b. The requesting party has requested a qualified protective order from such court or tribunal. A "qualified protective order" for this purpose is either an order or a stipulation by the parties that prohibits use or disclosure of the PHI for any purpose other than the litigation or proceeding, and requires the return of the PHI to the covered entity or its destruction at the end of the litigation. §164.512(e)(1)(ii)(B) and (iv).

Actions taken by covered entity

Notwithstanding the above-described procedures pertaining to subpoena or discovery requests without a court order, a covered entity is permitted to disclose PHI in response to lawful process without receiving the documentation noted above if the covered entity makes reasonable efforts to provide the notice to the subject individual or to seek a qualified protective order. §164.512(e)(1)(iv).

Procedures will likely be established in the course of discovery to limit the disclosure to that which is necessary in the matter. These procedures may utilize forms authorizing claimant release of specific information, notice and opportunities to object to the release of same, and/or protective orders issued by the court or administrative tribunal overseeing the matter in question.

Although the HIPAA privacy regulations place limitations upon acquiring PHI, it has not made discovery of it impossible. Use of the methods described above should provide litigants with access to the same information they reasonably require for resolving claims, while also protecting individuals' enhanced privacy rights under HIPAA.

Employee's failure to register specific complaints doomed her sexual harassment and retaliation claims under Title VII

By Joseph M. Gagliardo; Laner, Muchin, Dombrow, Becker, Levin, and Tominberg, Ltd.; Chicago

In *Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2003), the plaintiff sued the City of Chicago for events arising out of her employment training with the Chicago Police Department. In her Complaint, the plaintiff claimed that a hostile environment existed based on a number of different sexually hostile incidents she alleged took place before her probationary employment with the City ended. She also claimed she was retaliated against for complaining about this conduct.

Having first concluded that no tangible employment action was taken against the plaintiff by the City, the court then went on to analyze whether the City was negligent in discovering or remedying the alleged harassment. In looking at this issue, the court stated that, for the plaintiff to survive summary judgment, the employer must be provided with enough information so that a reasonable employer would think there was some probability that the plaintiff was being sexually harassed. The court concluded that the plaintiff failed in two respects. First, the plaintiff failed to direct a complaint to her homeroom instructor, as required by City policy, and the plaintiff was not excused of that obligation merely because she thought it would be futile or unpleasant. Additionally, this defect could not be overcome by the plaintiff's claim that she had complained to others. In rejecting the plaintiff's argument, the court stated that the plaintiff's complaints were vague; and she never expressed her feelings of harassment or offered any examples of what she considered harassing or demeaning conduct. Instead, she complained about matters that were not sexual in nature, such as an officer kicking her to correct her stance.

In rejecting the retaliation claim, the court stated that it has never held that an employer can retaliate when there has been no protected expression. Thus, since the plaintiff failed to utilize the specified complaint procedure, and failed to provide details sufficient to put the City on reasonable notice that she was claiming sexual harassment; she could not assert a retaliation claim as a matter of law.

Arbitrator had authority to decide Family Medical Leave Act issues

By Joseph M. Gagliardo; Laner, Muchin, Dombrow, Becker, Levin, and Tominberg, Ltd.; Chicagoa

In *Butler Manufacturing Co. v. United Steelworkers of America*, 336 F.3d 627 (7th Cir. 2003), Butler, the employer, brought an action to vacate an arbitration award entered pursuant to a collective bargaining agreement ("CBA") between Butler and the United Steelworkers of America ("Union"). In the award, the arbitrator applied the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601, et seq., to help resolve a dispute which concerned

possible excuses for some of an employee's absences. In the suit, Butler claimed, and the district court agreed, that the arbitrator had exceeded his authority in applying the FMLA.

In their CBA, the parties had incorporated a detailed absenteeism policy that established a point system pegged to the frequency and types of employee absences. Upon reaching a certain level of points, an employee could be disciplined up to and including termination. The employee in question, Michelle McMahill, had absences from work and was told that future absences would only be authorized by the Company, without assessing points, if the absences fell within the sick leave provisions of the CBA, were qualified under the FMLA, or were clearly of an emergency nature.

After McMahill received notice about her absences, she missed three additional days due to health problems experienced by her husband and sons. Butler refused to treat these as absences that would not result in the assessment of additional points, and McMahill was ultimately terminated. The Union contested the termination, and the dispute was submitted to arbitration. In its post-hearing brief, Butler argued that these absences were not covered by the FMLA.

After considering the respective positions of the parties, the arbitrator ruled that McMahill's absences were qualified absences under the FMLA. Accordingly, he found that McMahill's termination was not supported by just cause, and he ordered her reinstatement, along with back pay.

The Seventh Circuit recognized that a court's role in reviewing an arbitral award is quite limited, and that, with few exceptions, an award will be enforced as long as the arbitrator does not exceed the authority delegated by the parties.

In looking at this question, the Seventh Circuit ruled that the arbitrator was authorized to examine the FMLA in at least two ways. First, the CBA contained a provision that "Butler … offers equal opportunity for employment, and continuation of employment to all qualified individuals in accordance with the provisions of law …." (emphasis supplied). Since the FMLA is a law, the court concluded that this provision authorized the arbitrator to apply the FMLA. Additionally, the court stated that Butler cannot have it both ways. Principles of estoppel prevent a party to arbitration from taking a position before the arbitrator that invites consideration of external law, losing in arbitration and then seeking relief in federal court by arguing that the arbitrator lacked authority to consider the law in the first instance.

No back pay or front pay available to undocumented workers in a retaliatory discharge proceeding filed under the Fair Labor Standards Act

By Joseph M. Gagliardo; Laner, Muchin, Dombrow, Becker, Levin, and Tominberg, Ltd.; Chicago

In *Renteria v. Italia Foods, Inc.*, N.D. Ill. No. 02 C 495, 8/21/03, Judge Kennelly addressed the type of relief that is available to undocumented workers in a retaliation proceeding filed under the Fair Labor Standards Act ("FLSA"). The court concluded that, based on the Immigration Reform and Control Act of 1986 ("IRCA"), an award of back pay and/or front pay would contravene the policies embodied in IRCA because said awards assume continued illegal employment of the worker by the employer.

The court, however, reached a different conclusion as to the availability of compensatory damages based on *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002). On this issue, the court noted that, in *Hoffman Plastic*, the Supreme Court did not preclude the NLRB from taking any remedial action for the employer's improper firing of an undocumented worker; to the contrary, the Supreme Court expressly preserved the NLRB's ability to issue injunctive and declaratory relief. Additionally, an award of compensatory damages, unlike those of back pay and front pay, does not assume the undocumented worker's continued and illegal employment by the employer.

Seventh Circuit reaffirms that plaintiffs who prove pay discrimination may be awarded back pay even if the illegal pay decision occurred outside the limitations period

By Robert H. Brown; Laner, Muchin, Dombrow, Becker, Levin, and Tominberg, Ltd.; Chicago

In *Reese v. Ice Cream Specialties Inc.*, ___ F.3d ___ (No. 02-1633) (7th Cir. 2003) and *Hildebrandt v. Illinois Department of Natural Resources*, ___ F.3d ___ (Nos. 01-0364 and 01-3690) (7th Cir. 2003), plaintiffs claimed they were paid less than they should have been because they were an African-American and a woman, respectively. The allegedly illegal pay decisions were made outside the 300-day limitations period established by Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.). However, plaintiffs received paychecks at the allegedly illegal rate within the limitations period. The court found that the payments made within the limitations period were not barred because each was a "discrete discriminatory act" which was repeated each time a new illegal payment was made, citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), *Bazemore v. Friday*, 478 U.S. 385, 395-396 (1986), *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1003 (7th Cir. 1994), and *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996).

As Judge Wood pointed out in *Reese* (slip opinion at p. 3), a discrete discriminatory act via receipt of smaller paychecks caused by discrimination

is not a "continuing violation" where a violation depends on the cumulative effect of individual acts.

Judge Woods' holding in *Reese* and Judge Ripple's in *Hildebrandt* seem to be unremarkable, perhaps meriting only brief unpublished opinions. However, both judges went to great lengths to discuss in detail their logic and to analyze pertinent cases regarding the concept that issuance of each paycheck is a discrete act. This seems to be for two reasons: First, according to Judge Ripple in *Hildebrandt* (slip opinion at p. 13): "We … seemed to depart from this conclusion in *Dasgrupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997)." Second, as every experienced discrimination attorney knows, there really is not much logical distinction between adverse actions such as discriminatory demotion or failure to promote, and/or institution of neutral, but discriminatory, seniority systems, on one hand, and a discriminatory pay decision on the other. Each action usually means smaller paychecks for the alleged victim. Yet, claims may be totally barred by the statute of limitations in the former category of actions (see, e.g., *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1997)), while not being totally barred in the latter.

Stripping away the Court's valiant and sometimes slightly strained efforts to logically and legally harmonize the conflicting decisions and inconsistent policies regarding the two categories of cases, it all comes down to a "narrow channel" of relief from the statute of limitations provided by the Supreme Court in *Bazemore* for "strict paycheck cases that do not involve allegations of discrete discriminatory acts such as failure to promote, or discriminatory plans or systems." *Reese*, slip opinion at pp. 9-10.

The teaching of *Reese* and *Hildebrandt* is that cases alleging discriminatory pay levels have a special statute of limitations status compared to most other alleged violations of discrimination statutes. This entitles a successful plaintiff to back pay relief for all pay received during the limitations period and prospective injunctive.

Is an adverse action necessary to state a retaliation claim?

By Shari Rhode; Rhode & Jackson, P.C.; Carbondale, Illinois

Burwell v. Pekin High School (Central District, Case No. 00-2111), now on appeal to the 7th Circuit, is a Title IX sexual harassment and retaliation case brought by a senior at Pekin High School. The administration did not find sexual harassment, but rather a conflict between the plaintiff and her brother on one side, and other male students on the other.

The administration took action to keep the two sides apart in several ways, including the imposition of certain restrictions on the plaintiff. Plaintiff based her retaliation claim on these alleged restrictions. Plaintiff claimed that the school "retaliated against her by preventing her from attending intramural games, by refusing to allow her to travel to and from school down certain streets and by monitoring her travels to and from school."

What makes this decision particularly interesting is that the district court applied the standard of requiring a plaintiff to have suffered an "adverse action" in order to state a claim of retaliation, relying on Title VII jurisprudence in making this determination. Using this analysis, the district court found that the plaintiff failed to present facts that, even when taken in the light most favorable to her, constituted material adverse action. The district court specifically stated that "[w]hile the restrictions may have made Plaintiff unhappy and may have caused her some inconvenience, this court concludes that the restrictions did not cause a 'material harm.'"

What is necessary to establish that an individual has a disability?

By Shari Rhode; Rhode & Jackson, P.C.; Carbondale, Illinois

In *Poor v. Bridgestone/Firestone, Inc.* (Central District, Case No, 00-2321), the court issued a decision on a motion for summary judgment in a case under the Americans with Disabilities Act that provides an excellent text for anyone practicing or wishing to practice in the area of disability discrimination.

The plaintiff was a tire builder. He claimed that he was having pains in his lower arms and hands. It was ultimately determined that he had inflammatory arthritis and early Scleroderma. His physician indicated his work activity should be limited to light duty with lifting of no more than 25 pounds, periodic rest stops every two to three hours, and avoiding environmental exposure to significant changes in temperature. While the doctor's opinion changed slightly over time, the restrictions did not.

Ultimately, the plaintiff was placed in the position of tire inspector. He began experiencing difficulties performing this job because it required repetitive motion. The plaintiff moved to several other positions and ultimately was laid off when the plant was scheduled to close in December 2001. The bulk of the court's opinion deals with the question of whether the plaintiff has established that he is a person with a disability as it is defined under the ADA.

Plaintiff contended he was substantially limited in the major life activities of lifting, sleeping, walking, breathing and working. Addressing each of these in turn, the court concluded that the plaintiff was not substantially limited in any of these activities when compared to an average person in the general population, and thus failed to establish that he was an individual with a disability. Importantly, the court noted that the relevant period of time to look at to make that determination is the "time the employment decision is made."

Due process does not require that punitive damages be capped at a 4-to-1 ratio with compensatory damages

By Devlin J. Schoop; Laner, Muchin, Dombrow, Becker, Levin, and Tominberg, Ltd.; Chicago

In *Mathias v. Accor Economy Lodging, Inc.*, No. 03-1010 (7th Cir. Oct. 21, 2003), the Seventh Circuit held that a jury verdict, in which punitive damages exceeded compensatory damages by more than four times a single-digit ratio, was not unconstitutionally excessive in violation of due process. *Mathias* is the first case in the Seventh Circuit to apply the recent United States Supreme Court case, *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003), in which the Supreme Court stated that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."

In *Mathias*, plaintiffs brought a diversity suit against defendants who owned and operated a 191-room hotel in downtown Chicago that was entirely infested with "bedbugs." For four years, hotel management failed to fumigate for insects, despite numerous patron complaints. A jury verdict awarded the plaintiffs $5,000 in compensatory damages, and $186,000 in punitive damages (a ratio of 37.2-to-1). Applying Illinois substantive law, the Seventh Circuit held that the evidence adduced at trial justified the jury's verdict as to both the compensatory and punitive damages award. The defendants, citing *Campbell*, argued that due process required that the punitive damages award be capped at $20,000 because *Campbell* stated that a punitive damages award that is "four times the amount of compensatory damages might be close to the line of constitutional impropriety." Judge Posner, writing for the court, noted that *Campbell* did not establish a prophylactic rule that always barred punitive damages where the ratio between punitive and compensatory exceeded 4-to-1. Instead, the Supreme Court only held that "there is a presumption against an award that has a 145-to-1 ratio" and that any punitive damages award that exceeded this ratio was presumptively prohibited.

In all other cases, however, *Mathias* creates a two-part analysis for determining the propriety of a punitive damages award. First, the permissible maximum ratio of punitive to compensatory damages in a jury verdict depends on whether the punitive damages awarded in the particular case is necessary to achieve their intended purpose—providing meaningful civil relief to the plaintiff while deterring the defendant from repeating its misconduct. Thus, where a plaintiff is awarded substantial compensatory damages, there is less need to impose significant punitive damages, since compelling the defendant to pay a large compensatory sum provides sufficient deterrent effect against repeated misconduct. But where, as in *Mathias*, the plaintiff suffers an injury that provides only nominal compensatory damages, tort law permits a jury to impose a larger punitive damages award to ensure that the defendant is sufficiently deterred from repeating its misconduct.

Second, once the jury verdict is rendered, the ultimate ratio of punitive-to-compensatory damages in the jury award is scrutinized to determine if it offends standard notions of due process. Factors to be considered in assessing the constitutionality of the punitive damages award include: (1) whether the award is proportional to the wrongfulness of the defendant's misconduct; (2) whether the defendant had reasonable notice that it could be subjected to punitive damages for its alleged misconduct; and (3) ensuring that the damages award is based on the defendant's conduct, and not its status (i.e., a corporation should be punished for its conduct, not for being a corporation).

In *Mathias*, the evidence showed that the defendant ignored repeated warnings from its pest control contractor that a full-scale fumigation of the hotel was necessary, and repeatedly rented specific rooms that the defendant had previously placed on "do not rent, bugs in room" status. Because the defendant knew or should have known that the infestation constituted a health code violation punishable with the revocation of its operator's license, and the jury award was clearly based on the defendant's demonstrated misconduct, the Seventh Circuit concluded that the $186,000 punitive damages award did not offend due process and was appropriate given the egregious degree of the defendant's misconduct.

Case synopsis

By Patricia M. Fallon

Robinson v. Sappington, 351 F3d 317 (7th Cir. 2003) Case No. 02-3316

Melissa Robinson brought this cause of action for hostile work environment, sexual harassment and constructive discharge pursuant to Title VII against Macon County and State Court Judge Warren A. Sappington. The district court entered summary judgment in favor of the defendants. The 7th U.S. Circuit Court of Appeals reversed and remanded the judgments in favor of Judge Sappington and Macon County but affirmed the judgment in favor of Judge Shonkwiler. (Slip Op. at 1-2). *Robinson v. Sappington*, 351 F3d 317 (7th Cir. 2003). In addition to the astounding facts, this case furthered the breadth of constructive discharge in the 7th Circuit.

The facts are those alleged by plaintiff in her complaint. Melissa Robinson was hired as a judicial secretary to Judge Warren Sappington of the Sixth Judicial Circuit in Macon County, Illinois in March, 1994. Ms. Robinson's position, which was later classified as a judicial clerk, included general secretarial duties, attending court with the judge, handling docket entries and setting dates for cases. While Ms. Robinson worked exclusively for Judge Sappington and he was her primary supervisor, she and other judicial clerks were told to report to Janice Shonkwiler, the administrative assistant. (Slip Op. at 2-

3). During the last four months of her employment, Ms. Robinson alleges numerous instances of sexual harassment by Judge Sappington that resulted in her constructive discharge in November, 1996.

The facts of this case include sexually suggestive and intimidating incidents that occurred weekly and sometimes daily. Judge Sappington told Ms. Robinson frequently that she was beautiful, and he referred to her as a "blonde Demi Moore" or a "golden goddess." Judge Sappington made a special effort to shake Ms. Robinson's hand at the beginning and end of each day, admitting to her later that it was an attempt by him to experience physical contact with her which he knew to be inappropriate. Some of the alleged harassment included overtly sexual comments made by Judge Sappington to Ms. Robinson. On one occasion, he offered to purchase a sexual device for Ms. Robinson so she would not be inclined to "mess around" with various men after she separated from her husband. On another occasion, Judge Sappington told Ms. Robinson that certain male attorneys were only speaking to her on a particular day because the clothing she was wearing revealed her nipples. Judge Sappington made the statement that he would like Ms. Robinson to "sit on his face" on at least two different occasions. He closely monitored Ms. Robinson's behavior in the courthouse and even after business hours. During one weekend when Ms. Robinson was visiting her mother's farm, Judge Sappington flew his private plane over the farm several times. On a separate occasion, Judge Sappington grabbed Ms. Robinson's face with his hands and told her at point-blank range that if she "shacked up" with anyone, he would kill her. Finally, Judge Sappington made Ms. Robinson listen to the details of a grisly murder and then suggested that she might suffer a similar fate. (Sip Op. at 23-24).

Ms. Robinson reported Judge Sappington's inappropriate conduct to Janice Shonkwiler who advised Ms. Robinson to speak directly with Judge John Greanias who is the presiding judge for Macon County Circuit Court. Judge Greanias suggested that Ms. Robinson take an administrative leave and when she returned he reassigned her to another Judge. However, one week later, Ms. Robinson was informed that she was being transferred back to Judge Sappington. As a result of her complaints against him, Judge Sappington informed Ms. Robinson that he was extremely angry with her and his demeanor became cold and distant. A few weeks later, Judge Greanias informed Ms. Robinson that she would be transferred again but this time to Judge Francis who Judge Greanias stated would make her life "hell" for at least six months. Judge Greanias also suggested that it would be in Ms. Robinson's "best interests" to resign. Ms. Robinson did resign in November, 1996. (Slip Op. at 8-12).

The issue of when a constructive discharge can be considered an adverse employment action for the purposes of Title VII is extremely important because the U.S. Supreme Court has stated that an employer may not raise an affirmative defense against liability if the employee suffered an adverse employment action. (Slip Op. at 25-26). In *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the high court stated that an employer is responsible for a hostile work environment created by a supervisor. But, if the employer can show that it took reasonable steps to prevent and timely correct any sexual harassment and that the complaining employee acted unreasonably in failing to take advantage of the employer's policy or assistance, then that employer may raise an affirmative defense to liability. However, the court stated in *Ellerth* that "…no affirmative defense is available…when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." 524 U. S. at 765. Appellate courts around the country are divided on the issue of whether constructive discharge can be an adverse employment action. In Robinson, the 7th Circuit followed the reasoning of the First and Second Circuits, finding them "instructive in resolving the case before us." (Slip Op. at 32) {see *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (1999), finding that a tangible employment decision such as demotion, discharge, or similar economic sanctions requires an official act of the company or enterprise, but a constructive discharge does not fall into the same category. The court stated that a co-worker could cause a constructive discharge just as easily as a supervisor can cause it. *Caridad*, 191 F.3d at 294; also see *Reed v. MBNA Marketing Systems Inc.*, 333 F.3d 27 (2003), finding that a constructive discharge resulting from harassment by a supervisor cannot automatically be considered a tangible employment action. The court stated that each case must be reviewed independently in order to avoid disproportionate liability toward the employer. *Reed*, 333 F.3d at 33-34.} Although this court agreed with the other circuits' reasonable and well-founded concerns regarding holding an employer liable for actions or harassment that the employer did not condone, the 7th Circuit summarized that drawing a distinction between the actions of a co-worker versus those of a supervisor would remedy these concerns. (Slip Op. at 34).

In *Robinson*, the 7th Circuit made a clear distinction between the actions of a co-worker versus those of a supervisor and ultimately decided that a supervisor's harassment can impose liability on the employer. The court stated that the "common thread in *Caridad* and *Reed* is a concern that equating constructive discharge with other types of tangible employment actions will impose liability on employers when the offending employee has not been empowered by the employer to take the actions at issue." (Slip Op. at 34). However, as pointed out in the Second Circuit, unlike a co-worker, a supervisor is empowered by the company to act as an agent on the company's behalf and to make economic decisions with regards to other employees under his or her control. *Caridad*, 191 F.3d at 294. More specifically, the 7th Circuit followed the rationale used by the First Circuit in *Reed* and stated that if official action by a supervisor makes employment intolerable, "we believe constructive discharge may be considered a tangible employment action." (Slip Op. at 34-35).

The defendants in *Robinson* contended that at the time of Ms. Robinson's resignation, the harassment by Judge Sappington had

ceased and therefore her resignation cannot be considered a constructive discharge. (Slip Op. at 35-36). In rejecting this argument, the court found genuine issues of material fact that preclude summary judgment. After Ms. Robinson was transferred involuntarily back to Judge Sappington, he was very angry. Evidence in the record supports the inference that Judge Sappington did not intend to cease his harassment of Ms. Robinson. He continued to exhibit an inappropriate romantic interest in her while he resumed the practice of closely monitoring her actions. The court found Judge Sappington's behavior could be reasonably construed as intimidating and threatening. The evidence states that Judge Greanias believed that the only way to protect Ms. Robinson from Judge Sappington was to transfer her to Judge Francis where her life would be "hell" for the first six months. Judge Greanias' only other suggestion to Ms. Robinson was that she resign immediately, which she did. The 7th Circuit concluded that Ms. Robinson followed the procedure provided by her employer when she reported her workplace complaints to Shonkwiler and later to Judge Greanias. Ultimately, the court found enough evidence to suggest that a jury could find the responses of Ms. Shonkwiler and Judge Greanias to be inadequate. The court stated that under these circumstances and in viewing the facts in the light most favorable to Ms. Robinson, Judge Sappington's harassing and offending behavior had not ceased at the time of her resignation. Further, the only alternative employment provided to Ms. Robinson would subject her to an equally cruel working situation. The court found that a jury could conclude that Ms. Robinson suffered a constructive discharge. (Slip Op. at 36-38).

Finally, the court found that Macon County is a necessary party to this action because they may have to pay on any adverse judgment. Conversely, the court found the claims against Judge Shonkwiler and Judge Sappington to be redundant and the court affirmed the award of summary judgment in favor of Judge Shonkwiler.

(For a full text of this case, please refer to the Slip Opinion at Case No.02-3316).

psst...Wanna get ahead of the game?

This newsletter is available on the ISBA's Web site nearly two weeks before it comes to you in the mail--meaning you could be informed about important issues and updates affecting your practice long before the competition.

Sound good? Hundreds of other attorneys who think so have already signed up. So before any more time goes by, send an e-mail to jlyman@isba.org and tell her you want this newsletter electronically—and all the benefits that go along with being in the know.

Federal Civil Practice
Illinois Bar Center
Springfield, Illinois 62701-1779
May 2004
Vol. 2, No. 5

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820