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Briefly

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OVERREACTING TO SOCIAL SECURITY MISMATCHES

GETS EMPLOYER IN TROUBLE

Mary Dee Allen

"In this day of emphasis on immigration enforcement, one might think that an employer cannot do enough to eliminate illegals from its workforce."

In our July newsletter, we suggested that an employer should react to Social Security mismatch letters not too strong, not too weak, but just right. In this day of emphasis on immigration enforcement, one might think that an employer cannot do enough to eliminate illegals from its workforce. However, as the recent case of Zamora v. Elite Logistics Inc., 98 FEP Cases 298 (C.A. 10, 2006) points out, the employer can go overboard.

The employer had received a tip that INS might soon conduct an inspection of its facility, and together with some lax procedures in the past, the employer's response to its perceived problem was to have the Social Security numbers of all of its 650 employees checked by two outside contractors. Both reported that someone else had used the plaintiff's Social Security number. The employer's personnel director called plaintiff in and told him that he had 10 days to provide documentation showing that he had a right to work in the U.S. The same procedure was used with all other employees whose Social Security numbers revealed apparent inconsistencies. The personnel director testified that he did not call the toll free number provided by Social Security to verify information, and did not ask plaintiff if he had ever worked in the town where his number had been used, but instead decided to put the burden of proof on the employee because there were many others whose right to work had been called into doubt. When the personnel director gave plaintiff a 10-day deadline, he also gave him a form (in English and in Spanish) telling him that he could be terminated if he failed to provide adequate documentation.

Although plaintiff was later revealed to be a legal resident, he did not bring any more documents in the 10-day period. The personnel director then told plaintiff he was off work indefinitely until he provided the documentation but he could return to work if he did provide it. Later in the same day, plaintiff brought the personnel director a naturalization certificate showing that he had become a U.S. citizen and a report of earnings from the Social Security Administration. The Social Security document only increased the personnel director's concern, however, because it showed a different birth date than the one plaintiff had originally provided. Therefore, the personnel director did not accept the new documents, and told plaintiff that he wanted Social Security papers or another Social Security number. He told plaintiff not to return to work until he got another Social Security number. Plaintiff testified that he showed the personnel director his Social Security card but that the personnel director rudely told him that the number was stolen from someone else. The next day plaintiff brought in a Social Security document, dated that same day and bearing an office stamp, which stated that the number was assigned to him. The personnel director told plaintiff he would have to verify the document, which he did, and 2 days later the plaintiff was called and asked to return to work.

When the plaintiff returned to work, he brought a letter which stated that before he could consider

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KNOW YOUR ATTORNEY

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going back to work, he needed two things: an apology in writing, and a complete explanation of why he was terminated. The personnel director testified that he considered this a resignation because he was not going to apologize to the plaintiff. The plaintiff testified that the personnel director grabbed the letter and told him he was fired because he would not apologize and did not have to explain. The personnel director admitted that he may have told plaintiff to "just get the hell out."

The issue presented from the above fact pattern, is whether the plaintiff was discriminated against on the basis of his race or national origin in violation of Title VII. The defendant employer argued that its motive was to avoid INS sanctions by checking the immigration status of its employees, noting that an employer has been held liable if it failed to investigate suspicious circumstances. The plaintiff argued that the personnel director's demands for additional documents went beyond what is required under the law at the time of hiring to meet the employer's duty to insure that a prospective employee has the right to work in this country, and those demands would have been prohibited under the law at the hiring stage. Further, the plaintiff argued that the employer rejected documents that are specifically listed in the law as being sufficient. The plaintiff also argued that the employer's decision to put the entire burden on the employee, rather than doing any further investigation itself, and the fact that plaintiff was treated rudely, and suspended prematurely, was evidence of pretext.

The Tenth Circuit Court of Appeals agrees with the plaintiff, overturning the trial court's granting of summary judgment to the employer. The appeals court finds that the evidence was sufficient to raise a question of the fact as to whether the defendant's stated motive was a mere pretext for a prejudiced decision. The court suggests that the laws provisions that an employer's requests for more or different documents than are required under the hiring provisions are unlawful even though the legal provisions technically apply to hiring rather than to post-employment. The court addresses the lower court's concern that the employer could have been liable if the plaintiff turned out to be an undocumented alien, by indicating it "[o]verstates the employer's exposure to penalties by implying that the employer is strictly liable for employment of undocumented aliens. To the contrary, the employer's duty, it appears, is to exercise due diligence and to investigate suspicious circumstances." The court also cites another court ruling that "[e]ven the INS concedes that so long as the employer investigates a situation in a timely way, there seems to be no reason for an employer to suspend the worker during the investigation."

The court found that a jury could conclude that the personnel director had jumped to the conclusion that the plaintiff had used a Social Security number illegally, despite the lack of any strong evidence that he had, and apparently never considered the possibility that the plaintiff was instead a victim of the misuse of his Social Security number by another. Further, the personnel director failed to do any investigation of his own, such as contacting the Social Security Administration, and did not even look at the documents

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SUPREME COURT INTERPRETS RETALIATION PROVISIONS BROADLY TO GO BEYOND THOSE RELATED TO EMPLOYMENT OR THAT OCCUR AT THE WORKPLACE

The U.S. Supreme Court in Burlington Northern and Santa Fe Railroad Co. v. White, _____ U.S. _____ (2006) addresses the scope of Title VII's anti-retaliation provision, and the reach of the phrase "discriminate against." The Court addresses the question of whether that provision confines actionable retaliation to activity that affects the terms and conditions of employment, and how harmful the adverse actions must be to fall within its scope. The Court concludes that the actions forbidden by the anti-retaliation provision extends beyond employment and events that occur at the workplace. It further concludes that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. This means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Fred Baker

"...the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

The case involved a fact pattern in which the plaintiff filed retaliation claims on two separate incidents: (1) a transfer from her job as forklift operator to track laborer, with the same pay and benefits, after she complained to company officials about harassing and discriminating treatment by her co-workers and supervisor; and, (2) her suspension without pay for 37 days for alleged insubordination, shortly after filing an EEOC charge. A grievance committee had held that the insubordination charge was unfounded, and she later received full back pay for the suspension.

The employer argued that the discrimination and retaliation provision of Title VII limited the scope of the retaliation provisions to actions that affect employment or alter the conditions of the workplace. However, the Court noted that there are no such limiting words appearing in the anti-retaliation provision, and there was strong reason to believe that Congress intended differences that its language suggests. That is, the discrimination provisions seek to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct. The Court indicated that an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Thus, while Title VII's anti-discrimination provision is limited to employment-related discrimination, the anti-retaliation provisions extend beyond workplace-related or employment-related retaliatory acts and harm.

However, the anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. The Court indicates that a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. The requirement of material adversity separates significant from trivial harms, as Title VII does not set forth a general civility code for the American workplace.

The Court then applied these standards to the facts of the case. The Court first addressed the reassignment of the plaintiff from forklift duty to standard track laborer. The Court finds that a reassignment of job duties is not automatically actionable, but instead depends upon the circumstances of the particular case and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." Based on the circumstances of this case, the jury reasonably found on the considerable evidence that the laborer duties were by all accounts more arduous and dirtier than the forklift operator position, that the forklift operator position was objectively considered a better job. Regarding the 37-day suspension without pay, even though the plaintiff was ultimately reinstated with back pay, the jury could have concluded that many

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the plaintiff had initially provided. Finally, the plaintiff testified that the personnel director had been rude to him during their conversations, and the totality of the circumstances indicated that a reasonable jury could find that the stated reason for the conduct was in fact a mere pretext for the unlawful, discriminatory treatment of plaintiff in his suspension. Regarding the termination, the court found that a reasonable jury could disbelieve the personnel director's testimony that he had no idea why the plaintiff should have felt he was owed an apology. Further, the personnel director's expressed belief that the plaintiff had resigned appears to conflict with his reaction, which was to rudely tell the plaintiff that he was fired and to "just get the hell out." The court found that the personnel director's response, which could be seen as both rude and ugly, is relevant evidence that could support an inference of pretext. Although the personnel director had no legal duty to apologize, he did more than decline to apologize, he adamantly refused and also acted in a hostile and rude tone.

Editor's Note - While the above case may seem an unusual, it is reminder that the current immigration laws are intended to be very even-handed - to require the hiring of only those authorized to work, but at the same time to prohibit discrimination or disparate treatment of immigrants. Our last newsletter addressed in great depth how an employer should respond to a Social Security mis-match situation. The current case involves a slightly different issue, that being evidence that others were using the same Social Security number. Several lessons to employers come out of this case. First, the rude, hostile treatment of the plaintiff by the personnel director suggested to the court a discriminatory attitude and served as evidence of pretext; such conduct should be avoided. Second, the court suggests that even in conducting investigations, the employer may be required to accept whatever documents the employee provides that are listed in the law that appear to be genuine, rather than demanding specific documents, even in the case of post-employment investigations of suspicious circumstances. Third, at least in some circumstances, the employer may be required to make some inquiries of its own, without placing all the burden on the employee. Finally, the case suggests there is no reason for an employer to suspend an employee during such an investigation. It should further be noted that there was a dissenting opinion, so these areas of the law continue to be sensitive and advice of counsel is recommended.

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reasonable employees would find a month without a paycheck to be a serious hardship, concluding that an indefinite suspension without pay could well act as a deterrent to exercising Title VII rights, even if the suspended employee eventually received back pay.

Editor's Note - It is important to remember that this rule applies only to the anti-retaliation provision, which makes it illegal for an employer to discriminate against an employee because he or she complained about discrimination or testified, assisted, or participated in a Title VII proceeding. In its emphasis on context, the Court indicates that a supervisor's refusal to invite an employee to lunch is normally trivial, and thus a non-actionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. It remains to be seen how the courts will apply this new test to situations where an employee complaining about discrimination or sexual harassment, for example, is ostracized by co-workers, and shunned by supervisors.

The bottom line is that retaliation cases may be the most dangerous type of Title VII litigation. Judges and juries are perhaps less inclined today to believe that employers intentionally discriminate, but are much more likely to believe that an employer or supervisor retaliated against an employee for complaining about harassment or discrimination. Further, it has been the editor's experience that about one-third of discrimination cases brought today have some retaliation claim as well.

Another important point to note is that there are about 80 different federal laws with anti-retaliation provisions, and it is likely that many of these statutes will be interpreted in the same manner as this case.