



ROBINSON & COLE LLP

Labor, Employment & Benefits



Title VII Does Not Confer Protection against Retaliation for Utterly Baseless Claims

Thomas Mattson, a Caterpillar employee, claimed that his supervisor, Beth Cone, once brushed her breast against his arm and reached around him, without touching him, to get a clipboard. Mattson reported the incident to Caterpillar and the company conducted an investigation. At that time, Mattson admitted that Cone's contact was not seductive and may have been inadvertent. The internal investigation concluded there was no merit to a sexual harassment claim. Later, Mattson filed a sexual harassment charge with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission. After Caterpillar received the administrative charge, Chuck Hollis, a co-worker of Mattson, told Caterpillar that Cone's breast never touched Mattson and that Mattson wanted to get Cone fired. Caterpillar then fired Mattson for dishonesty. Mattson sued Caterpillar claiming he had been discharged in retaliation for having filed the administrative charge. In [Mattson v. Caterpillar, Inc.](#) (3/4/04) the U.S. Court of Appeals for the Seventh Circuit ruled that employees who file utterly baseless claims are not entitled to protection against retaliation. The court noted that Title VII was not designed to "arm employees with a tactical coercive weapon" and that, to be entitled to protection against retaliation, Title VII claims must meet good faith and reasonableness requirements.

To Invoke FMLA Protection, Employee Must Show that He Is Entitled To Leave

Steve Aubuchon was fired from his job with Knauf Fiberglass when his request for leave under the Family and Medical Leave Act was rejected. Aubuchon asked for leave to stay home with his wife until she delivered a baby, without telling Knauf whether there were any pregnancy-related complications. Aubuchon began his leave as soon as he submitted the oral request, without waiting for approval. In his subsequent written request for leave, Aubuchon also failed to specify the medical condition that triggered his request. By the time Knauf denied the request on the basis that there was no serious medical condition, Aubuchon had exceeded the allotted number of unexcused absences and was fired for absenteeism. Reinstated after presenting a doctor's note that his wife did, in fact, suffer from complications, Aubuchon was fired a second time when Knauf learned that he had lied in his application for employment by not disclosing that he had been fired by prior employers for excessive absenteeism. Aubuchon challenged his discharge as a violation of the FMLA.

In [Aubuchon v. Knauf Fiberglass, GMBH](#) (3/8/04), the U.S. Court of Appeals for the Seventh Circuit rejected Aubuchon's claim that he was fired in retaliation for asserting his FMLA rights. The court noted that Knauf properly rejected the request for leave since Aubuchon did not provide sufficient information for Knauf to find that he was entitled to the leave. The court explained that, to obtain FMLA protection, the employee must do more than just demand leave under the Act; he or she must submit sufficient information to the employer that the leave is requested for a purpose permitted under the Act. The court also rejected his claim that the second termination was in retaliation for having exercised the FMLA right. Aubuchon admitted to falsifying information on his application form, and acknowledged such falsification provided a basis for discharge and did not show that the falsification policy was applied more harshly to FMLA applicants than to other employees.

Television Host Was Independent Contractor and Could Not Assert Gender and Pregnancy Discrimination Claims

The host of a television program could not maintain a Title VII gender and pregnancy discrimination claim against a PBS station because she was an independent contractor, not an employee. In [Alberty-Vélez v. Corporación de Puerto Rico para la Difusión Pública](#) (3/2/04), the U.S. Court of Appeals for the First Circuit applied the "common law test" to examine the relationship between the host and the TV station. The court rejected Alberty's urging to adopt the "economic reality" test, under which she might be classified as an employee since she derived all her income from one source. The common law test, previously applied to age and disability claims, evaluates the manner, location and control in which work is completed, measured by factors such as: level of skills, source of instrumentalities, location of the work, length of relationship, right to assign/refuse additional work, method of payment and tax treatment. Alberty had advanced degrees in public communications and journalism, was trained in dance and modeling and had been on the faculty of the drama department of the University of Puerto Rico. She was responsible for her own wardrobe, stylists and accessories. For each episode, Alberty and the station executed a new contract, and she was not required to do any other tasks for the station. She was paid a lump sum per episode. Both Alberty and the station identified the compensation as income for professional services and not wages. Given those circumstances, the court concluded that under the common law test Alberty was an independent contractor, even though the station had control over the manner and location of the filming. Since Title VII does not protect independent contractors, her claim was dismissed.

Employer Did Not Violate FLSA by Requiring Employees to Don Safety Gear before Clocking In

Barber Foods, a poultry processing plant, required its employees to put on hygienic and safety equipment (lab coats, hair nets, earplugs, safety glasses, and steel-toed shoes), before they punched in. Employees also were required to punch out before they removed their gear. Barber allowed employees to clock in six minutes before their shift and/or six minutes after, allowing them twelve minutes of "swing time." The employees claimed that they should be paid for the time spent gearing up, walking from the lockers to the production area (where the time clocks were located), and for walking back to the lockers to remove the clothing and safety equipment after they had punched out. Claiming that Barber required them to "work off the clock," the employees sued for violation of the Fair Labor Standards Act.

In [Tum v. Barber Foods, Inc.](#) (3/10/04), the U.S. Court of Appeals for the First Circuit ruled that Barber was not required to pay its employees for time spent donning and removing safety gear. The court noted that donning and doffing the required gear was an integral and indispensable part of the job, but the time spent of these tasks was "*de minimis*," and therefore, not compensable. As to the walking and waiting times, the court found them to be "preliminary or postliminary" to the employee's activities and excluded from compensation.

Acceptance of Offer of Judgment for Title VII Claims Bars Award of Attorney's Fees

Darnel Wilson sued his employer, Nomura Securities International for racial and religious discrimination under Title VII. Before trial, Nomura made Wilson an offer of judgment for \$15,000, provided that judgment was "inclusive of all costs available under all local, state or federal statutes accrued to date." After accepting the offer, Wilson claimed that attorney's fees were not "costs" and petitioned the court for an additional \$35,325 in attorney's fees. In [Wilson v. Nomura Securities International, Inc.](#) (3/2/04), the U.S. Court of Appeals for the Second Circuit ruled that Wilson was not entitled to attorney's fees. The court explained that "costs" refers to all costs available under the statutes that provide the basis for the claim. Because Title VII specifically included attorney's fees within its definition of costs, the amount of attorney's fees were included in the offer Wilson accepted.

Corporate Affiliation is Insufficient for Criminal Indictment for OSHA Violation Against Parent Corporation

L.E. Myers Company, a wholly owned subsidiary of MYR Group, was in the business of repairing high-voltage lines. MYR oversaw the safety programs of its subsidiaries, including LEM, and provided safety manuals and instructions to employees of its subsidiaries and was jointly responsible with its subsidiaries for training the latter's employees in safety matters. After two LEM employees were killed while repairing high-voltage lines, the U.S. Attorney sought a criminal indictment against MYR. The indictment charged a violation of the Occupational Safety and Health Act: causing the death of an employee by willfully violating OSHA rules. In [United States v. MYR Group, Inc.](#) (3/16/04) the U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of the criminal indictment against MYR. The court sternly rejected the prosecution's argument that OSHA regulations do not limit the duty to provide proper training to a company's own

employees, but just to employees in general. The court noted that corporate affiliation was insufficient for criminal responsibility, especially when there was no claim that MYR had taken any action to justify disregarding the separate corporate identities. Charges were dismissed only as to MYR but remain pending as to LEM.

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The logo for Robinson & Cole LLP is displayed on a dark blue, horizontal rectangular background with a slight wave-like top edge. The text "ROBINSON & COLE" is in a large, white, serif font, and "LLP" is in a smaller, white, sans-serif font to the right.

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