



ROBINSON & COLE LLP

Labor, Employment & Benefits



EEOC Not Precluded from Suing Employer that Defeated Race Discrimination Claims by Same Litigants

Thirty-six African-American employees of Pemco Aeroplex sued their employer for race discrimination, including racial harassment. About a year later, the U.S. Equal Employment Opportunity Commission sued Pemco for subjecting more than 200 black employees to a hostile work environment. The EEOC petitioned the district court to consolidate its lawsuit with the earlier lawsuit filed by the employees. Pemco objected to the consolidation claiming the lawsuits were substantially different and that the consolidation would cause Pemco extreme prejudice. The court denied the EEOC's request to consolidate, but allowed discovery taken in one case to be used in the other case. After discovery was concluded, the EEOC again requested that the cases be consolidated for trial. Again, Pemco resisted. The district court denied the EEOC's request. The lawsuit brought by the individual employees proceeded to trial. The EEOC attorneys attended the trial, but did not sit at counsel's table, did not examine witnesses, and did not participate (other than as spectators) in the trial. After the trial, the jury returned a verdict for Pemco, rejecting the race discrimination claims alleged by the individuals. Having prevailed in that first lawsuit, Pemco petitioned the court for summary judgment in the pending EEOC lawsuit. The district court granted Pemco's motion, finding that the issues and the evidence in the EEOC action were the same as those in the private lawsuit. Accordingly, the court dismissed the EEOC's action and the EEOC appealed.

In [Equal Employment Opportunity Commission v. Pemco Aeroplex, Inc.](#) (9/13/04), the U.S. Court of Appeals for the Eleventh Circuit reversed the district court and reinstated the EEOC's action. The appeals court ruled that the EEOC was not barred from proceeding in its action because it was not a party, and was not in privity with the individual plaintiffs in the earlier lawsuit, despite the joint discovery and the apparent advisory role of the EEOC in the private lawsuit. In addition to the absence of factors establishing privity, the appeals court noted that it is very rare to find privity when the party in the latter action is a governmental agency seeking to enforce powers beyond the authority of private litigants. Moreover, the appeals court noted it would be inequitable to bind the EEOC to result of the private action when Pemco succeeded at keeping the EEOC out of that lawsuit.

Court Erred by Granting Deferential Review to Denial of LTD Benefits When Employer Interfered in Administrative Appeal Process

After a work-related injury and subsequent diagnoses of fibromyalgia and sarcoidosis, Celeslie Epps-Malloy applied for and received long-term disability benefits under the disability plan of her employer, Merck & Co. UNUM Life Insurance Company of America administered the plan. About three years after she began receiving the benefits, UNUM requested medical information from Epps-Malloy. The medical information noted that her prognosis to return to gainful employment was "never." By this time Epps-Malloy had been determined by the Social Security Administration to be permanently disabled. However, UNUM informed Epps-Malloy that its review of the medical documentation led it to conclude that she no longer met the requirement of the disability plan that she be "unable to perform any and every duty" of her occupation. Therefore, her benefits were being terminated. Epps-Malloy appealed and submitted another medical report that noted she was totally disabled. As part of this appeals process, UNUM notified Epps-Malloy that Merck requested an independent medical exam. The IME disagreed with the sarcoidosis diagnosis but did not address the fibromyalgia. On the basis of the IME's report, UNUM upheld its denial of benefits. Epps-Malloy then sued Merck, the Plan, and UNUM seeking to have her benefits restored. The district court determined that the proper standard of review to be applied was the "arbitrary and capricious" standard. Given the IME's opinion, the court found that the denial of benefits was not arbitrary or capricious.

On appeal, the U.S. Court of Appeals for the Third Circuit reversed. In [Kosiba v. Merck & Co.](#) (9/13/04), the appeals court determined that the standard of review applied by the district court was too deferential. Merck's intervention in the appeals process (after having delegated claims decisions to the Plan Administrator) requesting that Epps-Malloy submit to an IME, was suggestive of procedural bias, particularly when all the information on record established that she was disabled. The appeals court then remanded the case to the district court with instructions to apply a moderately heightened arbitrary and capricious standard of review.

Tangible Adverse Employment Action Not Required to Prove Title VII Retaliation Claim, Says Tenth Circuit

Terrie Hillig worked for the Defense Finance Accounting Service. During her five-year tenure at DFAS, Hillig filed two race discrimination complaints against her supervisors, which were later settled. Hillig then applied for a job with the U.S. Department of Justice. She was given an interview and claimed she was told she was a "perfect fit for the job." When she was not hired, Hillig sued DFAS under Title VII alleging she was denied the DOJ position because of negative evaluations from her supervisors in retaliation for having filed her prior complaints. The jury awarded Hillig \$25,000, even though it determined that she did not show she would have gotten the job without the negative evaluations. The judge then set aside the verdict, ruling that, because Hillig did not show that she would have gotten the DOJ job but for the negative evaluations, she failed to prove a "tangible employment action."

In [Hillig v. Rumsfeld](#) (8/30/04) the U.S. Court of Appeals for the Tenth Circuit reinstated the jury verdict, ruling that Hillig did not need to show that she suffered a tangible adverse employment action. According to the appeals court, all Hillig needed to show was that she was subjected to an "adverse employment action." In this case, Hillig did not need to show that she was denied the DOJ job because of the negative reference; all she needed to show was that the discrimination had a likely effect on future job opportunities. The negative reference by Hillig's supervisor was such an act, even if the prospective employer provided a different explanation for refusing to hire Hillig. The Tenth Circuit includes Wyoming, Colorado, Kansas, New Mexico, Oklahoma, and Utah.

Pilot Could Not Establish a Joint Employer Relationship to Maintain FMLA Claim against Company Client

David Morrison worked for Magic Carpet Aviation, a wholly-owned subsidiary of Amway Corporation, as a pilot, flying members of the Orlando Magic basketball team around the country. Magic Carpet had a contract with Orlando Magic, Ltd., owned by RDV Sports. Morrison asked Harry Mitchell, his supervisor, for four weeks of time off to deal with depression. Mitchell granted Morrison two, rather than four, weeks off. When Morrison asked for additional time, Mitchell fired him. Morrison then sued Magic Carpet, Mitchell, Amway, and RDV Sports for violation of the Family and Medical Leave Act. The district court dismissed Morrison's claims, reasoning that the FMLA did not apply as neither Magic Carpet nor Amway Corp. had enough employees, and RDV Sports was not Morrison's employer. In [Morrison v. Magic Carpet Aviation, Inc.](#) (9/8/04) the U.S. Court of Appeals for the Eleventh Circuit upheld the dismissal. In rejecting the claim that RDV was Morrison's employer, the appeals court noted the fact that RDV did not have the power to hire or fire Morrison. Rejecting the claim that RDV controlled the worksite, the appeals court explained that, although RDV leased the plane piloted by Morrison (the "worksite"), RDV did not have any rights under the lease other than to have members of its organization be flown in it. A third argument advanced by Morrison was that he was required to wear an RDV identification badge, Orlando Magic neckties, and parka. But the court noted that Morrison did not prove that RDV, rather than Magic Carpet, required Morrison to don that attire. In addition, the court noted that the contract between Magic Carpet and Orlando Magic, Ltd. specifically provided that all crew members would be under the exclusive control of Magic Carpet. Given all these factors, Morrison could not establish an employment relationship with RDV Sports and was barred from proceeding on his FMLA claim.

Employee's Dishonest Answers to Questionnaire Provide Valid, Non-Pretextual Basis for Termination

In applying for a job with Tennant Company, Kevin Carter was required to complete a "Health History Questionnaire" which asked about prior work-related

injuries and medical treatment. The questionnaire also required the applicant to certify that the answers are complete and true. The form noted that “[a]ny misrepresentation or omission may be justification for ... termination of employment.” While Carter disclosed having back and neck trouble (claiming it had been corrected by chiropractic adjustment), he did not disclose a prior back injury or its treatment. At the time Carter began his employment with Tennant, he was still getting workers’ compensation benefits for that prior back injury. Two weeks after his benefits ceased, Carter reported to his Tennant supervisor that he injured his back while at a customer’s site. He filed a workers’ compensation claim and sought medical treatment, returning to the chiropractor who had previously treated him. The chiropractor noted that the recent incident had re-aggravated a work-related injury sustained the prior year -- the back injury that Carter had not disclosed in completing the Health History Questionnaire. Carter was then discharged for having failed to report that back injury. Carter sued Tennant for having discharged him in retaliation for exercising his workers’ compensation rights and for violating the Illinois Right to Privacy in the Workplace Act. In [Carter v. Tennant Company](#) (9/13/04), the U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of Carter’s claims, noting that the employee’s dishonest answers to the employer’s questionnaire about prior work-related injuries and treatment was a valid reason for discharge. The appeals court noted that the workplace privacy statute prohibited the employer from specifically asking whether the applicant had ever filed a workers’ compensation claim or received workers’ compensation benefits, but did not prohibit questions about prior occupational injuries.

Court Upholds \$1.1 Million Jury Verdict for Title VII Sexual Harassment by Permitting Amendment of Complaint Post-Judgment to Add State Law Claims To Avoid Federal Statutory Damages Cap

After being subjected to sexual harassment for 15 years, which caused her severe depression and two hospitalizations, Rita Baker left her job at John Morrell & Company. She then sued her former employer for sexual harassment, hostile work environment, retaliation, and constructive discharge in violation of Title VII. After trial, a jury awarded Baker \$839,470 for compensatory damages, \$33,314 for back pay, \$38,921 for front pay, \$650,000 in punitive damages, and \$174,927 for attorney’s fees. Because of the Title VII statutory cap that limited her award to \$300,000, Baker moved to amend her complaint to add violations of the Iowa Civil Rights Act. The district court granted Baker’s motion, which enabled Baker to recover \$1.1 million. John Morrell & Company appealed. On appeal, in [Baker v. John Morrell & Company](#) (9/3/04), the U.S. Court of Appeals for the Eighth Circuit upheld the trial court’s decision granting the amendment. The appeals court rejected the company’s argument that, had it known that damages could exceed the \$300,000 damages cap, then it might have settled, noting that throughout the case the company was aware that Baker’s demand had exceeded the statutory cap.

New FLSA Regulations in Limbo: Senate Appropriations Committee Approved Amendment to Deny Funding for Enforcement of New Regulations

On September 15, 2004 the U.S. Senate Appropriations Committee voted to approve an amendment that denies funding for enforcement of the new Fair Labor Standards Act overtime regulations. The Senate amendment tracks the amendment passed last week in the House (H.R. 5006), with one significant difference: the Senate amendment specifically provides that the old regulations remain in effect, except as to the new salary thresholds.

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The logo for Robinson & Cole LLP is displayed on a dark blue, curved banner. The text "ROBINSON & COLE" is in a white, serif font, with "LLP" in a smaller font to the right. The banner has a slight shadow effect.

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