



ROBINSON & COLE LLP

Labor, Employment & Benefits



Complaints of Paramour Favoritism Not Grounds for Retaliation Claim under Title VII

William Wilson worked as Director of the Audio-Visual Center at Delta State University. Delta State's President, David Potter, appointed Michelle Roberts as Chief Information and Planning Officer, making Roberts Wilson's boss. Roberts and Wilson did not work well together and their relationship quickly deteriorated. Thereafter, Roberts prepared a plan to consolidate two departments, including Wilson's department, to create a new technology learning center, which would eliminate Wilson's position. Wilson met with Potter to discuss his frustration regarding the changes in the department. During the meeting, Wilson told Potter that Roberts only got her job because she was having an affair with a university administrator and, Wilson claimed, the university favored Roberts. The university approved the consolidation of the departments and Wilson's position was eliminated.

Wilson sued alleging, among other things, that Delta State eliminated his job in retaliation for his complaints to Potter, in violation of Title VII. After Wilson presented his evidence at trial, the trial court summarily found in favor of Delta State, finding that Wilson could not establish a case of retaliation because he had not engaged in activity that is protected by Title VII when he complained about Delta State's alleged preferential treatment of Roberts. Wilson appealed.

In [Wilson v. Delta State University](#) (8/12/05), the U.S. Court of Appeals for the Fifth Circuit upheld the trial court's dismissal. The appeals court noted that the law in the Fifth Circuit was well established that complaints about paramour preference or favoritism are not covered by Title VII because "when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender." Wilson argued that, even if Title VII did not protect against "paramour preference," he should nonetheless be able to pursue his retaliation claim because he reasonably believed that it did when he made his complaint. The court disagreed, distinguishing Wilson's mistake regarding what constitutes unlawful conduct under Title VII from other cases where an employee mistakenly believes his employer engaged in conduct that would have been unlawful had it actually occurred. The appeals court concluded that, even if Wilson had been terminated for complaining about favorable treatment received by Roberts, the termination was unrelated to Wilson's gender and, thus, was not retaliation under Title VII.

Same-Sex Target of Coworker Bullying Has Possible Claim for Assault and Battery, but Not Sex Discrimination under Title VII

Thad Shafer worked at Kal Kan Foods without incident for three years. Then, one summer, Shafer had four encounters with Alan Dill, one of his coworkers. According to Shafer, Dill, about 6 inches taller and at least 100 pounds heavier than Shafer, remarked that Shafer had a "cheerleader ass" that "would look real nice on my dick" and forced Shafer's face down to his crotch, while clothed, gesturing "to give the impression that Shafer was performing fellatio." On another occasion, Dill "grabbed Shafer's hand and moved it to his crotch, again while clothed and moved it forcefully, as if Shafer were masturbating him." The force was enough to put Shafer in fear that Dill would break his arm. Dill also approached Shafer in the company locker room when Shafer was wearing a shirt and pulled a handful of hair from Shafer's chest. Finally, Dill bit Shafer on the neck hard enough to raise welts, though not to penetrate the skin. Shafer complained about Dill's conduct to Cindy Hargis, whom he apparently believed was the appropriate recipient of such complaints, though Hargis was no longer in Kal Kan's human resources department. Hargis left Kal Kan's employ without generating any written record of the Shafer's complaint.

Around this time, Shafer also learned that his wife had had affairs with two men who worked at Kal Kan, neither of whom was involved in the incidents with Dill. After quarrels broke out between Shafer and the rivals for his wife's affections, Kal Kan warned and ultimately terminated Shafer. Shafer sued, alleging Kal Kan discharged him in retaliation for his complaints against Dill. Kal Kan asserted that it let Shafer go because his personal life affected his work. At trial, the court granted summary judgment in favor of Kal Kan based on its finding that Kal Kan was not responsible for the co-worker's conduct because it had no knowledge of it. Shafer appealed.

In [Shafer v. Kal Kan Foods, Inc.](#) (8/1/05), the U.S. Court of Appeals for the Seventh Circuit ruled that, while Dill clearly set out to humiliate Shafer, Title VII does not cover tort claims against co-workers. The appeals court noted that Kal Kan could be accountable for Dill's misconduct only if it knew what was going on and did nothing in response. However, although Shafer contended that he complained orally to Hargis, he failed to offer evidence that she was the appropriate person to whom he should have complained, particularly given that Hargis was no longer a personnel officer, nor was there any contrary evidence, such as an employee handbook, directing employees to take their complaints to Hargis. Because Dill was not a supervisor; Shafer's salary, duties and promotion opportunities were unaffected; and Shafer conceded that once he told his supervisor, Dill's aggression ended, the appeals court concluded that Kal Kan could not be held accountable for Dill's conduct.

The appeals court also rejected Shafer's argument that Dill's behavior constituted sex discrimination, which it distinguished from sexual horseplay. To be characterized as sex discrimination, conduct must be severe or pervasive enough to create an objectively hostile or abusive working environment such that the conditions of the employment differed on account of sex. The appeals court concluded that, while certainly severe, what happened to Shafer was not "pervasive" enough to alter the conditions of his employment. Further, the evidence suggested that Dill picked on individuals of either sex and that Shafer did not establish that his encounters with Dill were anything more than personal animosity or juvenile behavior. The appeals court concluded, "if Shafer is describing events accurately, he has a solid claim against Dill under state tort law for both assault and battery. What he lacks, however, is a claim against Kal Kan for sex discrimination."

Same-Actor Inference Difficult to Overcome in Discrimination Case

James Coghlan worked as a commercial fisherman for American Seafoods Company, formerly a Norwegian-owned company that operates shipping vessels. Coghlan was working as Master of the Victoria Ann when ASC purchased the vessel. When the Victoria Ann was taken out of service, ASC's Vice President of Operations, Inge Andressen, named Coghlan to be Master of another ship, the Katie Ann. Andressen passed over at least one Norwegian-born candidate in making the appointment. Coghlan served as Master to Katie Ann until ASC decided to place another vessel, the American Dynasty, back into operation. At that time, ASC appointed Coghlan as Mate of the Dynasty. Although the transfer technically constituted a demotion in job title from Master to Mate, Coghlan's new position provided an opportunity to make more money and Coghlan approved of the change.

A year later, the Icelandic-born Master of the American Dynasty, Kristjan Petursson, was temporarily absent. Instead of appointing Coghlan as the "Relief Master," Andressen selected a Norwegian-born employee, Jan Hogseth. Andressen said that he based the selection on a recommendation by ASC's Fleet Operations Manager, Frank Vargas, an American, who had day-to-day contact with the ships. Later that year, in an effort to reduce costs, Andressen demoted Petursson to Mate and removed Coghlan. Andressen offered Coghlan the position as Mate of the Katie Ann and selected a Norwegian-born employee to serve as Master. Because Coghlan was previously Master of the Katie Ann, Coghlan rejected the offer and sued ASC, claiming national origin discrimination in violation of Title VII. ASC argued that the court should dismiss the case, in part, because the same individual whom Coghlan claims discriminated against him, Andressen, had appointed Coghlan and promoted him a short time earlier, creating an inference that he was not biased against non-Norwegians. The court granted ASC

summary judgment and Coghlan appealed.

In [Coghlan v. American Seafoods Company LLC](#) (7/7/05), the U.S. Court of Appeals for the Ninth Circuit upheld the trial court's ruling. The appeals court concluded that the "same actor influence" created a heightened burden that an employee must overcome to demonstrate discrimination. The court concluded that "the point of the same-actor inference is that the evidence rarely is sufficient to find that the employer's asserted justification is false when the actor who allegedly discriminated against the plaintiff had previously shown a willingness to treat the plaintiff favorably." The appeals court also concluded that Coghlan had not met that heightened burden because the evidence suggested that Andressen named Coghlan Mate of the American Dynasty only a year prior to the first challenged adverse employment action and there was no additional evidence of pro-Norwegian bias. The appeals court also noted that Coghlan failed to refute Andressen's testimony that he had based his decisions in large part on an American employees' recommendations, whom Coghlan conceded were not biased against him based on his non-Norwegian ancestry.

Connecticut Supreme Court Announces Rules for Jury Instructions in Discrimination Cases and Bars Coworker Testimony about the Company's Reasons for Termination

Stephen Jacobs began his employment for General Electric, six months before his 50th birthday. Jacobs worked at GE's Bridgeport plant as Manager of Fabrication and Sourcing. Although Jacobs did not have an engineering degree, which was one of the minimum qualifications for his position, he did have significant relevant employment experience in the industry. Throughout his employment, Jacobs received generally positive employment evaluations. However, on several occasions he was told that he needed to develop greater knowledge of materials management at the Bridgeport facility.

GE laid off Jacobs as part of a reduction in force; however, GE continued to employ four other manufacturing-related employees in positions similar to the one that Jacobs had held. All four of the remaining employees had degrees in either mechanical or electrical engineering. Two of the three were younger than Jacobs and at least one employee had less job seniority than Jacobs. Jacobs sued, alleging that GE discriminated against him based on his age. Following a trial, the jury found in favor of GE. Jacobs appealed claiming that the trial court improperly instructed the jury that to prevail, Jacobs was required to prove both that GE's proffered reason for his layoff was false and that Jacobs' age was the motivating factor in GE's decision to lay him off. Jacobs also argued that the judge improperly allowed his coworkers to testify regarding the reason for his termination.

In [Jacobs v. General Electric Company](#) (9/1/05), the Connecticut Supreme Court agreed with Jacobs that the jury should have been instructed that, even if GE's stated reasons for his layoff were true, if it also found that GE's decision was motivated by age discrimination, the jury could still find in favor of Jacobs. The court clarified that there are two methods by which Jacobs could have proven age discrimination, the first by proving directly that GE had a discriminatory motive in making the layoff decision and the second by showing indirectly that GE's claimed reason for the layoff was pretextual. The court concluded that the trial court's instructions to the jury incorrectly merged the two methods. The court also concluded that Jacobs' coworkers could not testify about their personal opinions as to whether Jacobs should have been laid off, since neither participated in that decision. Accordingly, their testimony was improper. For both reasons, the court ordered a new trial in the case.

Employer who Promoted Employee Cannot Rely on Lack of Qualification as Reason for Termination

Cherie Hugh worked as a volunteer recruiter at the Butler Family County YMCA. Thereafter, she was named Director of the Big Brothers/Big Sisters program at the YMCA. About a year later, Hugh was informed that she was being terminated for poor performance because she was lacking in leadership skills. Hugh's supervisors stated that she was terminated because she had cancelled a meeting, because signs for a program had not been completed, and because she had dressed inappropriately for a meeting. In neither the termination letter nor a subsequent meeting did the YMCA inform Hugh that she was being terminated due to her lack of qualifications for the position. The YMCA replaced Hugh with a male employee at a higher salary. Hugh sued the YMCA alleging sex discrimination in violation of Title VII. The trial court granted summary judgment for the YMCA because it concluded that Hugh could not establish that she was qualified for her position, as she did not hold the required degree in social work nor did she have experience as a case worker. Hugh appealed.

In [Hugh vs. Butler County Family YMCA](#) (8/12/05), the U.S. Court of Appeals for the Third Circuit concluded that the trial court erred because the YMCA could not rely on Hugh's lack of job requirements as grounds for the termination because it had hired, and then promoted Hugh, knowing she did not meet the requirements. The appeals court concluded that satisfactory performance of duties, leading to a promotion, establishes an employee's qualification for a job, even where the employee lacks certain stated job requirements. The appeals court noted that, had Hugh not disclosed information regarding her qualifications or otherwise misrepresented her qualifications, its conclusion would be different. In the absence of such evidence, however, the appeals court ruled that the trial court erred in concluding that Hugh had not established that she was qualified for the position.

Employer Sanctioned for Not Preserving E-Mails Evidencing Employee's Complaints and Employer's Defense of Reduction in Force

Dino Broccoli sued Echostar Communications for sexual harassment and retaliation under Title VII. He alleged that Stacie Andersen, a human resources administrator for Echostar, engaged in a series of inappropriate, sexually-charged behaviors, and related questioning and badgering of him, and thereby created a hostile work environment. He also alleged that, in retaliation for his rebuffs to her, Andersen orchestrated the termination of his employment under the guise of an organizational realignment and reduction in force and also provided false and defamatory employment references to his would-be employers.

Broccoli testified that he complained about Andersen to two of his supervisors at Echostar both orally and via e-mail. Those supervisors agreed and testified that they forwarded Broccoli's complaints to their superiors both orally and via e-mail. Broccoli also met with Andersen's supervisor who told him that she would take care of the problem. The supervisor denied meeting with Broccoli. After his termination, Broccoli hand-delivered a complaint to Andersen, who testified that she forwarded the complaint to her supervisors.

Before trial, Broccoli had requested that Echostar produce e-mails showing his repeated complaints about Andersen's conduct and information about the organizational realignment. Echostar did not produce those documents. Echostar explained that its e-mail/document retention policy automatically sent all items over seven days old to the user's deleted items folder and all items over 14 days old then are automatically purged from that folder. The e-mails are not recorded or stored in any back-up media. When 21-day old e-mails are purged, they are forever unretrievable. Echostar argued that it had no knowledge of Broccoli's complaints until it received a letter from Broccoli's girlfriend and, until that time, it was under no obligation to preserve any e-mails or other records.

As a result of Echostar's conduct, Broccoli asked for sanctions. In [Broccoli v. Echostar Communications Corporation](#) (8/4/05), the U.S. District Court for Maryland found that Echostar acted in bad faith by failing to suspend its e-mail and data destruction policies or preserve essential documents from the time of Broccoli's complaints and that those actions prejudiced Broccoli in his attempt to litigate his claims. As a result, the court limited Echostar's ability to present evidence that Broccoli's termination was based on a corporate reorganization and that his termination was for a legitimate nondiscriminatory reason, and further gave the jury an adverse inference instruction that allowed the jury to infer that all of the documents purged or destroyed by Echostar would have been adverse to it. Finally, the court ordered that Echostar pay \$16,000 in attorney's fees and costs.

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