Legal Matters®

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The 'Great Resignation' causing questions about noncompetes

Because of the unusually high number of Americans who voluntarily left their jobs as the economy opened after the early stages of the pandemic, the past two years have become known as the "Great Resignation." The key driver has been the boom in job openings, creating lots of opportunities for workers seeking a better situation.

Many of these workers have noncompetition agreements in place that bar them from leaving to work for a competitor and/or sharing any of your company's confidential information with a new employer.

However, the government has been engaging in a concerted effort to rein in noncompetes. For example, President Joe Biden has stated that he would like to eliminate all noncompetes that are not absolutely necessary to protect a narrowly defined category of trade secrets. Along these lines, he has ordered the Federal Trade Commission to use its rulemaking authority to curtail noncompetes that might unfairly limit worker mobility. In addition, senators from both parties have introduced bills to bar noncompetes for hourly workers.

Meanwhile, nearly a dozen states have banned noncompetes for low-wage and blue collar workers.

If your company uses noncompetes and other restrictive covenants, this means you will be confronting hard questions.

For example, what if an employee with a noncompete agreement decides to bolt for what you view as a competitor? Should you sue to enforce? If you don't do it for one employee, future employees may claim you waived the noncompete and you might not be able to enforce it against them.

If you do sue to enforce the agreement, you will have to show that the new employer actually is a competitor, that you're likely to suffer "irreparable harm" if the worker takes that new job, that whatever harm you suffer is worse than the harm the employee would suffer by being deprived of an opportunity and that enforcing the noncompete wouldn't unreasonably prevent the worker from plying his or her trade.

If your noncompete is unreasonably broad (for example, it binds workers who don't have access to trade secrets and/or the geographic restrictions are too broad), you face an uphill battle. A good employment attorney can

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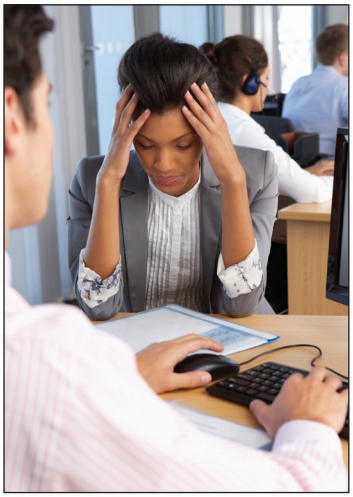
Federal court adopts 'objective reasonableness' standard for retaliation



Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against workers who report discrimination and harassment in the workplace. But if what the employee perceives as unlawful workplace behavior is not actually illegal, are they still protected from retaliation for reporting it?

A recent ruling from the 10th U.S. Circuit Court of Appeals suggests that the answer is "yes."

In that case, Viktoria Reznik, who worked as director of project management for Utah company inContact, received internal complaints from two native Filipino employees that a manager had repeatedly subjected them to racial slurs.

Reznik reported the complaints to her immediate supervisor and the head of HR. Both apparently assured Reznik that no employee would face reprisal for reporting the incidents.

Nonetheless, Reznik was fired soon after for not being a "good culture fit."

Reznik brought a Title VII retaliation claim in federal district court, but a judge dismissed the case on the grounds that Title VII does not protect non-citizens working for U.S. companies and therefore the offending manager's conduct was not technically illegal.

But the 10th Circuit overturned the decision, ruling that her lawsuit could proceed. Specifically, it found that the lower court should have focused on whether it was "objectively reasonable" for an employee to believe he or she was reporting illegal conduct. The court said that in this case it was, since the conduct in question absolutely would have been unlawful if not for an obscure, narrow exception that few nonlawyers are aware of.

The lesson for employers is that it's dangerous to assume that just because underlying discriminatory conduct is technically not illegal, they won't face repercussions for retaliating against the person who brought it to their attention. A better approach is not to tolerate a hostile environment no matter who is being targeted. A good employment lawyer can help guide you through the process.

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Actual denial of leave unnecessary for liability under FMLA

Under the federal Family and Medical Leave Act, or FMLA, eligible employees may take up to 12 weeks of leave in a 12-month period to manage a serious health condition or care for a new child or for a relative with a serious health condition.

A recent case out of Illinois underscores that merely discouraging an eligible employee from taking leave is enough to land an employer in court, even if the leave is never actually denied.

The worker in that case, Salvatore Ziccarelli, was a 27-year corrections officer with the Cook County Sheriff's Office in Chicago. He periodically took FMLA leave for work-related post-traumatic stress disorder during that time.

In 2016, on the advice of his doctor, Ziccarelli called his FMLA benefits manager to discuss using some of his remaining leave to enroll in a two-month treatment program for his PTSD.

According to Ziccarelli, the manager told him "you've taken serious amounts of FMLA ... don't take any more FMLA. If you do so, you will be disciplined."

Ziccarelli also claimed he never told her how much FMLA leave he sought to use and that while she never specified what the discipline might entail, he feared based on past experience that he would be fired. Instead, he retired from his position.

He then filed a claim in U.S. District Court alleging that his employer violated his FMLA rights by

discouraging him from taking leave. The judge threw out his case, ruling that he needed to show the employer actually denied his benefits.

Ziccarelli appealed, and the 7th U.S. Circuit Court of Appeals ruled in his favor, reinstating his claim.

The court concluded that a reasonable jury could find that the employer interfered with Ziccarelli's FMLA rights just by threatening discipline, noting that the law itself explicitly forbids an employer from "interfering with, restraining, or denying" such rights.

There's now a good chance that the employer will have to pay damages to Ziccarelli. Even if it doesn't, it has already expended considerable time and money defending the claim through an appeal. You can avoid a similar situation by having an attorney review your own FMLA processes.

Case highlights importance of 'interactive process' for disability accommodations

The federal Americans with Disabilities Act requires employers to engage in what is known as the "interactive process" with workers with disabilities who request accommodation to do their jobs.

In this process the employee, his or her health care provider and the employer discuss the nature of the disability, the limitations it may place on the worker's ability to perform essential job functions and possible solutions.

A recent case from Ohio highlights how critical it is for employers to engage in this process in good faith or risk being sued.

The employee was Jeanne King, a registered nurse at Steward Trumbull Memorial Hospital near Youngstown. In the spring of 2017, King informed the hospital that she couldn't work because of her asthma, which was exacerbated by seasonal allergies and stress.

Three weeks later, she inquired about an unpaid leave of absence. The administrator who handled leave requests determined King was ineligible for leave under the federal Family and Medical Leave Act (FMLA) but didn't tell King she qualified for non-FMLA leave for up to a year under her union's collective bargaining agreement.

The administrator also allegedly received inaccurate information about how many hours King worked in the prior 12 months and wrongly believed that she had already taken too much sick time to qualify for FMLA leave, which apparently delayed the processing of her leave. Though King told her supervisor and HR numerous times that she was trying to apply for leave, the hospital terminated her a few weeks later for "failure to apply timely for a leave of absence."

King sued the hospital under the ADA, arguing that it failed to reasonably accommodate her disability.

A trial judge ruled against her, but the 6th U.S. Circuit Court of Appeals reversed on appeal, finding that the hospital should have known about King's asthma based on her repeated absences, that her request for leave constituted a request for a reasonable accommodation and that her termination while her leave request was still pending could be seen as a premature halt to the interactive process. Now her suit can proceed to a jury (if her employer doesn't make an acceptable offer to settle out of court).

The takeaway for employers is to treat any leave request as a request for an accommodation under the ADA, engage thoroughly in the interactive process and be sure to talk to an employment attorney when facing such a situation.

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review your restrictive covenants and help you determine if your agreements make sense in light of the changing work environment and reforms in your own state.

And what happens if you have job openings and you encounter a good candidate bound by a noncompete? Would hiring them subject your company to a lawsuit? Is the worker worth the time and money to fight the suit? These are also questions an employment attorney can help you with.

A couple of things are true for every employer. First, you should sit down with an attorney and review your agreements to confirm they're both reasonable and necessary based on your industry and geographic location.

Additionally, make sure you're not relying solely on noncompetes to protect confidential information. Instead, review and strengthen your internal codes of conduct and maintain a culture where your employees will respect confidentiality.

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Employee fired after leaving without permission can't sue

A Michigan man who left work without permission to go to his doctor's office — but clocked out and called in for "FMLA time" — could not bring a disability discrimination claim over his subsequent termination, a federal appeals court recently decided.

The employee, who worked at a paperboard factory, suffered from irritable bowel syndrome and took intermittent leave between May and August 2017, as well as two months of leave that he took continuously.

Before his continuous leave expired, he came back to work with doctor's orders for frequent restroom breaks and days off between flare-ups.

The employer didn't let workers leave their machines unattended without coverage from another employee.

One day, the employee got a voicemail from his doctor's office informing he had missed an appointment and had to come to the office to sign paperwork or he would be dropped as a patient. He interpreted that to mean he had to get to the office before it closed that day.

That morning, he asked his supervisor if he could leave early to go to the doctor, but was allegedly told he couldn't because nobody was available to cover his shift.

That afternoon, his supervisor again told him she couldn't find coverage. He said he had to leave and "had FMLA." He claimed the supervisor responded, "OK, then, leave," although the supervisor denies this.

The employee clocked out, called in for FMLA leave and went to the doctor. He was ultimately fired for leaving the premises without permission, a cause for termination under his union's collective bargaining agreement.

The worker filed suit alleging retaliation and discrimination under the federal Persons With Disabilities Civil Rights Act, but a trial judge and an appeals court both ruled that he had no claim. Specifically, the court found he failed to show any "discriminatory animus" to overcome the employer's purportedly legitimate grounds for termination.