

HRAGC LEGAL UPDATE

FEDERAL

DECEMBER 17, 2020

United States Court of Appeals for the First Circuit

On December 9, 2020 the First Circuit Court of Appeals affirmed a jury verdict in a retaliation case that is instructive on how to manage a current employee who makes a claim that prompts a customer to no longer want to work with that person – and how mismanaging the employee can tee up a strong retaliation claim. The Court also clarified the causation standard for a retaliation claim under the False Claims Act, joining other Circuit Courts in employing the “but-for” causation standard. A Plaintiff must prove that her protected conduct was the but-for cause of the adverse employment action.

Plaintiff was a key account manager who filed a qui tam action under the False Claims Act accusing her employer, one of her key customers and others of bribery and fraud. Ultimately, the U.S. Department of Justice took up the civil suit on behalf of Plaintiff. The key customer named in the suit promptly asked that Plaintiff be removed from her account. The company agreed, removed Plaintiff not only from that key account but also from her other accounts and placed her on an indefinite paid administrative leave. The company did not disclose to her customers that she was on a paid leave, and her email and phone access were immediately blocked. She continued to receive her base pay, full incentive bonus, and standard annual raise and retained the use of her company car and gas card. She was allowed to return to work 13 months later after the employer settled the lawsuit with the government. Plaintiff was given several of her former accounts and some new accounts but was not permitted to handle one significant growth account. The explanation for keeping that account from her varied but was loosely tethered to customer complaints that she was not responsive (during the period she started her leave when the employer did not disclose that she was on leave).

Plaintiff brought a claim for retaliation under the False Claims Act. The jury found in Plaintiff’s favor and awarded her \$762,525. The key questions on appeal were whether Plaintiff was placed on leave because of her protected conduct and whether assignment of her accounts was an adverse employment action. The Court affirmed the jury verdict, finding that the employer clearly placed Plaintiff on leave because of her filing suit: she was removed from the account of the key customer who was named in the suit within days of receiving the customer’s request and after the two company lawyers spoke, and not returned to work until the suit was settled. Placing her on leave, removing her from the company email, and removing her from all of her accounts (as opposed to just the one customer who asked that she be removed) were viewed as retaliatory. The Court easily found the assignment of her accounts was an adverse employment action. Actions like reducing wages and significantly reducing responsibilities are generally seen as adverse employment actions.

When an employee engages in statutorily protected conduct that prompts a customer to complain and request adverse action, the employer must take great care in responding, particularly where the employee remains employed. Yielding to the customer could be permissible but only if the employer takes other steps to minimize a wage loss, diminished responsibilities or other adverse employment action. This case also illustrates the typical traps: any adverse action must be narrowly tailored, well documented and supported by objective evidence as juries and courts will look skeptically at whether the stated reason for the action is legitimate or nothing more than a pretext for retaliation. The case is *Lestage v. Colonoplast*, Case No. 19-2037.

Equal Employment Opportunity Commission

The EEOC issued an update to Section 12 of its Compliance Manual addressing religious discrimination. The updates are focused on two areas: (1) the types of protections available to employees experiencing religious harassment or discrimination (including accommodations), and (2) defenses available to religious employers against employee claims.

Employers should consult the update to reevaluate how they handle religious expression, what protections are afforded to those acting on religious beliefs, and to address conflicts between religious beliefs and company policies. EEOC investigators may hold employers to new standards, use different background and information to assess evidence, and give greater weight to religious freedom than what may have existed in prior investigations. In this update the EEOC:

- Encourages employers to allow religious expression to the same extent as other types of expression
- Suggests ways an employer may use the Religious Freedom Restoration Act to decline a requested accommodation with which it disagrees on religious grounds
- Affirms the exemption for religious employers from certain antidiscrimination laws
- Attempts to offer guidance to employers when struggling how to provide diversity training or enforcing EEO policies when an employee objects on religious grounds
- Did not specifically mention LGBTQ rights but implies religious rights could supersede individual rights
- Permits investigators to rely solely on an employee's testimony that a belief, practice or observance is religious

NEW HAMPSHIRE

Best Practices to Maintain a Safe Workplace

With the prospect of widespread availability of vaccines, employers must consider how to handle those who decline to be vaccinated or who are unable to be vaccinated. While permissible generally (unless specifically prohibited), mandating vaccination may be fraught with too many risks. Some employees will be entitled to an accommodation on religious or disability grounds to be free from vaccination. An employer's duty to maintain a safe work environment under OSHA will remain paramount, and mandatory state guidelines will likely remain in place for a time: vaccine availability will not relieve an employer of fulfilling its duty or its obligation of compliance. Consider the following:

- Review and follow the Governor's Universal Guidelines (last updated December 9, 2020)
- Regularly consult CDC and other government guidelines and recommendations
- Update company policies and educate employees on the update policies and any changes related to vaccines
- Encourage but do not mandate vaccination, unless in a critical industry or truly necessary to protect workers
- Implement a policy to request proof of vaccination
- Evaluate workers who decline a vaccination or who are unable to be vaccinated and how best to address them
- Remain open to accommodation requests for those who decline to be vaccinated
- Train supervisors and HR personnel on how to handle questions and concerns
- Consider the impact on morale and employee retention
- Consult the EEOC vaccination guidance issued December 16, 2020

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