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EMPLOYMENT LAW

Third Circuit Provides Practical Guidance on Common Workplace Issues

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Special to the Legal

Two recent published decisions of the U.S. Court of Appeals for the Third Circuit provide continued guidance to employers and their counsel on issues that frequently arise in the workplace. The first, *Chinery v. American Airlines*, No. 18-3118, 2019 U.S. App. LEXIS 22213 (3d Cir. July 25, 2019), affirms summary judgment in favor of the employer in a case of alleged online harassment. The second, *Ehnert v. Washington Penn Plastic,* No. 18-3364, 2019 U.S. App. LEXIS 22434 (3d Cir. July 29, 2019), affirms judgment in favor of the employer where the employee argued that he was "qualified" to work under the Americans with Disabilities Act (ADA) at the same time he was seeking long-term disability benefits. While neither of the decisions are precedential, unpublished decisions continue to provide guidance to all potential parties.

OFFENSIVE FACEBOOK POSTINGS

In *Chinery*, Melissa Chinery worked as a flight attendant for American Airlines based out of Philadelphia. She was represented by the Association of Professional Flight Attendants Union and ran for president of its Philadelphia local chapter in November 2014. Chinery lost the election, but claimed that during its course and thereafter, she was harassed by a group of flight attendants who were part of a Facebook group used primarily by Philadelphia-based flight attendants. American Airlines had nothing to do with the Facebook group, and there was no evidence that the company was aware of posts within the group.

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Specifically, Chinery cited numerous posts that used vulgar language about the union election that Chinery interpreted as being directed at her. There were also multiple posts that called Chinery's supporters "cavalier harpies" and "shrews of misinformation" among other offensive gender-based phrases.

Chinery complained about these posts to American Airlines' human resources department, which investigated her claims but found them to be meritless.

"Chinery claims that the investigator failed to adequately address her concerns and that American Airlines could have enforced its social media policy against the flight attendants at issue but chose not to." Chinery brought suit against American, claiming that she was subject to a hostile work environment and retaliation under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of American and Chinery appealed.

POSTS WERE NOT HARASSING UNDER TITLE VII

Initially, the court affirmed dismissal of the sexual harassment claim, finding that the complained-of conduct was neither severe nor pervasive enough to "amount to a change in the terms and conditions of employment." The court rejected Chinery's novel argument that the allegedly offensive posts were "pervasive" because "social media posts are public and endure." The court found no authority to suggest that "permanence" alone is enough for a reasonable trier of fact to conclude that the posts rose to the level of pervasiveness.

Secondly, while the posts were found to be offensive, the court affirmed that they constituted only "offhand comments and isolated incidents" that do not rise to the level of harassment as a matter of law.

ALLEGED INADEQUATE INVESTIGATION IS NOT HARASSMENT

Finally, Chinery argued that American's failure to (in her mind) adequately investigate her claims and the company's failure to enforce its social media policy constituted a level of "severe" harassment. The court also rejected this argument, finding that Chinery failed to show how "American's shortcomings caused a material change in the terms of condition of her employment. Rather, any failure to investigate or discipline the flight attendants merely preserved the very circumstances that were the subject of the complaint."

The case brings to the legal system a very real conundrum for employers in the age of social media. An employer, of course, is not responsible for intra-employee social media postings, but the court implied that the employer's failure to investigate or apply its own social media policy might have some bearing on the question of whether respondeat superior liability may be attributed to the employer—but the (alleged) failure to follow policy will not, in and of itself, rise to the level of actionable harassment.

INCONSISTENT STATEMENTS REGARDING DISABILITY

In *Ehnert v. Washington Penn Plastic*, Hahns Ehnert was a temporary employee assigned by a staffing company to work at Washington Penn Plastic in April 2012. It was understood that Ehnert would be considered for hire by Washington Penn at the conclusion of his temporary assignment. While Ehnert worked at Washington Penn, he suffered from a "variety of medical conditions, but never requested any accommodations" from the company. On May 23, the last day at his workplace, Ehnert was advised by the staffing agency that he would not be hired on a permanent basis.

A few months later, in July 2012, Ehnert completed an application for Social Security disability insurance benefits on which he represented that he had been "unable to work due to a 'disabling condition' since May 21, 2012—two days before his temporary assignment at Washington Penn ended." Ehnert was ultimately granted the sought-for SSDI benefits based upon a finding that he was "unable to perform any past relevant work" and that there are "no jobs that exist in significant numbers in a national economy that Ehnert can perform."

Ehnert subsequently brought a claim against Washington Penn and the staffing agency, alleging that he had been discriminated against on the basis of his disability. Thus, Ehnert set up a classic "speaking out of both sides of your mouth" situation (McNemar v. Disney Store, 91 F.3d 610 (3d Cir. 1996)) in which his claim for disability benefits conflicted with his assertion that he was "otherwise qualified" to perform the duties of his position in his ADA claim. The district court granted summary judgment in favor of Washington Penn and Ehnert appealed.

The case reinforces the need for employers and their counsel to review claims for disability benefits made by current or future (potential) litigants for the type of inconsistencies recognized by the court.

LTD REPRESENTATION INCONSISTENT WITH ADA CLAIM

The court began its consideration by noting that when a plaintiff's claim that he was "a qualified individual with a disability" conflicts with a concurrent claim for disability benefits in which he asserts that he was "unable to work," a court's first inquiry is whether the representations are "patently inconsistent," as in *Cleveland v. Policy Management Systems,* 526 U.S. 795, 806 (1999). Ehnert argued that his apparently conflicting representations were not "patently inconsistent" because he represented to the Social Security Administration that "he could not work because he was being discriminated against." The court rejected this argument based upon a finding that Ehnert represented "to the SSA that he was incapable of performing any work beginning May 21, 2012," and that such representation "crashes face first against" his current representation that he "had been able to work at that time."

Secondly, the court rejected Ehnert's assertion that his representations could be reconciled because "reasonable accommodations are not considered by the SSA when making its decision." While the court recognized this to be accurate, Ehnert presented no evidence that he had sought any accommodation during the course of his employment.

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