WILSON ELSER

2023 VIRTUAL EMPLOYMENT & LABOR LAW SUMMIT

November 21, 2023

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November 21, 2023

Southeast | Mid Atlantic Employment Practices Liability Law Update

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Fourth Circuit Review

The Fourth Circuit Court of Appeals:

- In Richmond, Virginia;
- 15 active judges and 2 senior judges, appointed for LIFE;
- One of 12 regional Federal appellate courts;
- Hears appeals from the nine federal district courts in MD, VA, WV, NC, and SC, and federal admin agencies.

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Fourth Circuit Review

The Fourth Circuit Court of Appeals:

- Sets binding precedent on lower courts on Fed laws:
  - Americans with Disabilities Act of 1990;
  - Title VII of Civil Rights Act of 1964;
  - Age Discrimination in Employment Act of 1967; and
  - Family and Medical Leave Act of 1993

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Americans with Disabilities Act

The ADA prohibits discrimination in employment based upon disabilities, as we well as imposing affirmative requirements of confidentiality and reasonable accommodation.

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Americans with Disabilities Act

Jordan v. Sch. Bd. Of City of Norfolk, 640 F.Supp. 3d 341 (E.D. Va. Nov. 9, 2022).

EE says school building making her sick, requests transfer, denied. Files suit.

1) EEOC Dismissal Letter/Right to Sue is not sufficient to file a Virginia Human Rights Act claim.
2) Employee must receive Right to Sue from the Virginia OAG in order to file under VHRA.

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Americans with Disabilities Act

Pitts-Brown v. Renal Treatment Centers-Mid Atl., Inc., 2022 U.S. Dist. LEXIS 207411 (E.D. Va. Nov. 15, 2022)

EE has visual limits, eventually can't see computer. STD then terminated.

1) Plaintiff need not use the exact language from her EEOC charge when describing requested accommodations in complaint.
2) Provision of an ineffective accommodation is not enough to comply with the ADA.
3) Disability discrimination claim must be supported by some allegations suggesting discriminatory animus, beyond alleged failure to accommodate.

Motion to dismiss denied in part and granted in part.

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Americans with Disability Act

Hannah v. UPS, 2023 U.S. LEXIS 4402 (4th Cir. July 10, 2023)

EE w hip bursitis prevented driving his regular delivery truck.

As accommodation, asked use smaller vehicle could operate within his medical restrictions.

UPS denied request, offering unpaid medical leave of absence to allow EE to recover/resume his prior duties.

Suit claimed failure to provide a reasonable accommodation under the ADA.

DC found for ER: EE had not shown accommodations reasonable and unpaid leave was not a reasonable accommodation.

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Americans with Disability Act

Hannah v. UPS, 2023 U.S. LEXIS 4402 (4th Cir. July 10, 2023)

1) An employee must be able to show that the accommodations requested are **reasonable**.
2) Unpaid leave of absence is not a reasonable accommodation in all circumstances.
3) Requested accommodations that would violate a union's collective bargaining agreement need not be granted.
4) The ADA does not require employers to redefine their job descriptions to allow an employee to return to work.

Summary judgment for employer **affirmed**.

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Title VII of the Civil Rights Act of 1964

Prohibits discrimination on the basis of race, sex, religion, color, and national origin.

The most common claims employers see in hiring, firing, hostile work environment, and retaliation.

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Title VII of the Civil Rights Act of 1964

Laurent-Workman v. Wormuth, 54 F.4th 201 (4th Cir. Nov. 29, 2022)

EE sues alleging hostile work environment due (race-based by co-worker) and retaliation by supervisors through both discrete acts and retaliatory hostile work environment. EDVA granted the employer's motion to dismiss.

The Fourth Circuit affirmed dismissal of "discrete-act retaliation" claim but vacated the dismissal of the "race-based hostile work environment" and "retaliatory hostile work environment claims." The Court found the employee plead a plausible claim based on a "serious of hateful workplace encounters that consistently targeted her racial identify."

Court noted "together, the allegations tell a multi-act story of undermining, gaslighting, and disruption."

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Title VII of the Civil Rights Act of 1964

Laurent-Workman v. Wormuth, 54 F.4th 201 (4th Cir. Nov. 29, 2022)

TAKEAWAYS:

1) Alleging series of racially hostile remarks sometimes accompanied by physical intimidation was allegedly known to the supervisor met the threshold to state a claim for racially hostile work environment;
2) The "materially adverse" standard for pleading a Title VII retaliation claim applies to both private employees and federal employees.
3) Allegations of erroneous reprimands and denials of opportunities due to prior complaint might reasonably deter further protected conduct, as required to state retaliatory harassment claim.
4) Employee must allege more than a "speculative link" between protected conduct and discrete adverse action.

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Title VII of the Civil Rights Act of 1964

Brown v. Bratton, 2022 U.S. App. LEXIS 33041 (4th Cir. Nov. 30, 2022)

Plaintiff, a black male, filed a 15-count, including a claim for hostile work environment pursuant to Title VII.

District Court granted summary judgment to the employer.

The Fourth Circuit affirmed.

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Title VII of the Civil Rights Act of 1964

Brown v. Bratton, 2022 U.S. App. LEXIS 33041 (4th Cir. Nov. 30, 2022)

TAKEAWAYS:

1) Isolated statements, even if "reprehensible and abhorrent," may not always rise to the level of sufficiently severe or pervasive to state a racially hostile work environment claim.
2) Where employer reprimand of co-worker results in no further offensive conduct, employer has taken effective remedial action and the conduct is not imputable.
3) Even supervisor conduct may not be imputable to the employer, if employee had the ability to report the supervisor's behavior but failed to take advantage of that preventative or corrective opportunity.

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Title VII of the Civil Rights Act of 1964

Balderson v. Lincare, Inc., 62 F.4th 156 (4th Cir. March 15, 2023)

Although one of employer's best sales reps, Plaintiff terminated for violating ER's "Corporate Health Care Law Compliance Program" and "Code of Conduct". EE did not dispute her conduct, but claimed ER gave male employee, who had engaged in similar conduct, only a "final written warning." The district court found for plaintiff, as male employee appropriate comparator and only difference between the two was their sex.

The Fourth Circuit **reversed**, finding core evidence showed plaintiff fired by a woman and replaced by a woman and, during entire process, no indication gender even remotely a factor in the employer's decision. Plaintiff acknowledged "no one ever made general-related comments directed at [her]."

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Title VII of the Civil Rights Act of 1964

Balderson v. Lincare, Inc., 62 F.4th 156 (4th Cir. March 15, 2023)

TAKEAWAYS:

1) Plaintiff's discriminatory discharge claim ultimately failed, because even though she met her *prima facie* case and a male employee was not terminated to allegedly similar conduct, there was no evidence to suggest animus based on sex, and she was replaced by a female.
2) Whether two employees are appropriate comparators for the purposes of showing pretext will depend on factors such as job title, job duties, and specific circumstances of compared conduct.

Judgment for plaintiff reversed.

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Age Discrimination in Employment Act

The ADEA prohibits discrimination against employees over age 40

Only statute not recognizing "reverse discrimination"

OK to fire younger workers in order to hire older workers.

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Age Discrimination in Employment Act

DiCocco v. Garland, 52 F.4th 588 (4th Cir. Nov. 3, 2022)

Plaintiff, 67-year old psychiatrist, brings ADEA claim versus U.S. Attorney General after failed allegedly discriminatory physical-fitness test as condition of her federal employment. Offered to retake test, resign, or be fired. Plaintiff resigned and sued.

The district court dismissed her complaint for lack of standing, finding that resignation did not constitute an adverse employment action.

Fourth Circuit reversed, holding plaintiff adequately pled injury despite resigned.

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Age Discrimination in Employment Act

DiCocco v. Garland, 52 F.4th 588 (4th Cir. Nov. 3, 2022)

TAKEAWAYS:

1) Giving an employee the ultimatum to resign or to be fired will not necessary absolve an employee from an age discrimination claim.
2) Employee who alleges she lost her job as a result of such ultimatum does not lack standing to pursue age discrimination claim.
3) Whether such an ultimatum is the proximate cause of a job loss is a fact question for the jury.

4th Circuit reversed and remanded.

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Age Discrimination in Employment Act

Spivey v. Mohawk Esv, Inc., 2023 U.S. App. LEXIS 14454 (4th Cir. June 9, 2023)

EE fired for failure to keep safe working environment after safety issues increased during his tenure.

DC found EE failed establish *prima facie* case as evidence showed he did not maintain a safe workplace, one of Ees job duties. Also plant's safety record included in the annual performance reviews. The court EE failed to establish he was meeting the employer's legitimate expectations.

DC also held EE failed to rebut ER's legitimate nondiscriminatory reasons.

Fourth Circuit affirmed the district court's findings.

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Age Discrimination in Employment Act

Spivey v. Mohawk Esv, Inc., 2023 U.S. App. LEXIS 14454 (4th Cir. June 9, 2023)

TAKEAWAYS:

1) Employee who is counseled in performance reviews for reason for termination cannot establish he was meeting employer's legitimate expectations.
2) Minor inconsistencies in employer representatives' accounts of termination does provide evidence of pretext for discrimination.

Summary judgment for employer affirmed.

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Family and Medical Leave Act

The FMLA mandates 12 weeks of unpaid leave for qualifying employees;

- Employers of 50 or more EE's within 75 mile radius;
- EE's who worked 1250 hours in prior 12 months
- Who need leave for own serious health condition or of immediate family member;
- Compliance can be complicated.

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Family and Medical Leave Act

Sawyer v. Tidelands Health Asc, LLC, 2023 U.S. App. LEXIS 14880 (4th Cir. June 15, 2023)

EE, registered nurse, applied for and granted intermittent leave under FMLA, but then corrective actions for absences she accrued after being granted FMLA leave.

Employer then issued more serious corrective action for threatening a co-worker, resulting in termination. Termination letter explained last corrective action as third written correction action in 24 months and her second serious corrective action during her employment, either of which results in termination under employer's policy.

Plaintiff sued under FMLA leave alleging retaliation for taking leave.

DC granted MSJ to ER, upheld on appeal by 4th Cir.

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Family and Medical Leave Act

Sawyer v. Tidelands Health Asc, LLC, 2023 U.S. App. LEXIS 14880 (4th Cir. June 15, 2023)

TAKEAWAYS:

1) One determination of a justification for termination is enough.
2) Corrective actions alone may not establish that an employee suffered harm because a corrective action may discourage the employee from taking leave.

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Family and Medical Leave Act

Adkins v. CSX Transp., Inc., 70 4th 785 (4th Cir. June 16, 2023)

ER issued furlough notices to EE's at West Virginia facility.

Over 65 EE's requested leave based on claimed minor soft-tissue injuries sustained while off duty.

All forms similar in content; all signed by two chiropractors; and all called for leave of eight weeks or more.

Under ER's benefits plan, EE furloughed while on medical leave receives health and welfare benefits for up to two years. Otherwise, furloughed EE receives benefits for only four months. Suspecting benefits fraud, ER charged EE's violating workplace rule against dishonesty and, following hearings, terminated employment. 58 employees filed suit alleging, among other claims, violating FMLA.

DC granted MSJ, upheld by 4th Cir.

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Family and Medical Leave Act

Adkins v. CSX Transp., Inc., 70 4th 785 (4th Cir. June 16, 2023)

TAKEAWAYS:

1) When an employer gives a legitimate, nondiscriminatory reason for terminating an employee, it is not court to decide whether the reason was wise, fair, or even correct, so long as it was the genuine reason for the employment decision.
2) Employers must be able to investigate and address plausible allegations and employees have been dishonest in their medical leave claims.

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Family and Medical Leave Act

Hannah P. v. Haines, 80 F.4th 236 (4th Cir. Aug. 15, 2023)

EE hired for 5-year term. After hire, diagnosed with depression and informed supervisors of diagnosis, but she did not request accommodations.

She applied for two positions but not selected for either. ER noted lateness, plaintiff alleged coincided with aggravated depression symptoms. Plaintiff eventually took leave. Then denied multiple positions due to concerns about her "lateness."

Plaintiff filed suit alleging FMLA interference. DC found FMLA interference but that EE's non-selection for position neither a direct result or, nor caused by ER's FMLA interference because an email from an officer of the employer described the employee as a disciplinary problem and he testified he considered the employee's attendance issues to have begun before the interference.

The Fourth Circuit affirmed the district court's finding as to minimal damages.

Family and Medical Leave Act

Hannah P. v. Haines, 80 F.4th 236 (4th Cir. Aug. 15, 2023)

TAKEAWAYS:

1) FMLA leave does not protect against prior issues, such as absences.
2) Damages for FMLA interference can be limited.
3) The Fourth Circuit does not allow consequential damages in FMLA cases—employee has the burden of showing the FMLA interference proximately caused the non-selection to the position.

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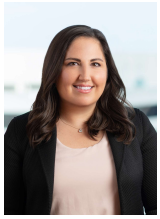

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