

April 1, 2010

I. EMPLOYMENT LITIGATION

Under Certain Circumstances, Commuting to Work May Have to Be Accommodated Under the ADA

In *Colwell v. Rite Aid Corp.*, --- F.3d ---, 2010 WL 1376301 (3d. Cir. Pa. April 8, 2010), plaintiff was employed as a cashier at the Rite Aid store in Old Forge, Pennsylvania since April 2005. Because of her personal preferences, her available hours were 9 a.m. to 2 p.m. or 5 p.m. to 9 p.m. Although the shifts that she worked varied, most were for weekdays from 5 p.m. to 9 p.m.

In the summer of 2005, Colwell was diagnosed with "retinal vein occlusion and glaucoma in her left eye," and eventually became blind in that eye. Although able to see out of her right eye and to perform her duties at work, Colwell informed her supervisor Susan Chapman that her partial blindness made it dangerous and difficult for her to drive to work at night. Colwell claims, and Rite Aid does not dispute, that public transportation was not an option for her because bus service ended at 6 p.m. and there were no taxis. Nonetheless, Chapman told Colwell that she would not be assigned only to day shifts because it "wouldn't be fair" to the other workers.

On October 12, 2005, Colwell submitted her resignation by leaving Chapman a handwritten note alleging she was treated unfairly and that there was prejudice against her. Neither Chapman nor anyone else at Rite Aid responded to Colwell's note.

Colwell filed this lawsuit in the District Court for the Middle District of Pennsylvania against Rite Aid and Chapman. The complaint alleged, among other things, claims under the Americans with Disabilities Act, ("ADA") and the Pennsylvania Human Relations Act, ("PHRA") for failure to accommodate Colwell's partial The District Court granted summary judgment to the defendants, holding that Rite Aid had no legal duty to accommodate Colwell's commute to work.

Plaintiff appealed and Rite Aid responded by arguing that Colwell "cannot establish either that she is disabled or that she suffered an adverse employment action, as the result of which plaintiff has failed to establish a prima facie case of disability discrimination[.]" The Third Circuit held that held plaintiff presented a genuine issue of material fact that she was significantly limited in the major life activity of seeing and agreed with the district court that a reasonable jury could find that Colwell is disabled under the terms of the ADA.

Colwell's principal claim on appeal is that the District Court erred in holding that Rite Aid had no duty to accommodate her shift request. The Third Circuit agreed with plaintiff and held that

employers must provide "reasonable accommodations" to disabled employees in setting work schedules, even when the only disability-related difficulty is commuting to work. The court held that holds that "as a matter of law changing Colwell's working schedule to day shifts in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates."

Employee Defending Against Charges That He Discriminated Against a Co-Worker Is Not Engaged in Protected Activity for Purposes of Title VII and PHRA Retaliation Claims

In *Driscoll v. Lincoln Technical Institute*, --- F.Supp.2d ---, 2010 WL 1257649 (E.D.Pa. March 30, 2010), Plaintiff, a Caucasian male, was formerly employed as the Director of Admissions at Lincoln Technical Institute. There, he supervised an all-female staff which included at least one African-American woman and one Vietnamese woman. In May 2007, another Lincoln employee, Barbara Dodd, who is an African-American woman, filed Equal Employment Opportunity Commission (" EEOC ") and PHRA complaints against Plaintiff because of two racially derogatory remarks he made to her. The Dodd complaints alleged that Plaintiff retaliated against her for reporting these offensive remarks by continuously criticizing her job performance and asking her co-workers not to speak to her. Eventually, Dodd was terminated.

Lincoln believed that Plaintiffs' remarks to Dodd were isolated incidents and prepared to defend him at a PHRA fact-finding conference. One day prior to the conference, Lincoln's Vice President and Executive Director met individually with four of the women Plaintiff supervised. During those meetings, Plaintiff's superiors learned that he had, in fact, created a hostile work environment for his female employees. The women he supervised related numerous examples of harassing, offensive, abusive and threatening behaviors. None had come forward previously due to fear of retaliation by Plaintiff.

Approximately five hours after the meeting with the women Plaintiff supervised, he was terminated for gross misconduct, including use of profane, abusive or threatening language or gestures or acting in an indecent or disrespectful manner, making disparaging remarks about Lincoln and its management, and harassing and threatening his coworkers.

Plaintiff's complaint alleges that he was terminated in retaliation for his assistance in the investigation of Dodd's discrimination complaint against him, and that causation can be inferred from the close proximity in time (five hours) between his meeting with the Vice President and Executive Director and his termination. Defendants moved for summary judgment on Plaintiff's claims of race and gender discrimination and retaliation. In response to the instant motion, Plaintiff voluntarily dismissed its race and gender discrimination claims. The only remaining issue was Lincoln's Motion for Summary Judgment on plaintiff 's retaliation claims under Title VII and the Pennsylvania Human Relations Act (" PHRA ").

Lincoln argued that in defending himself against Dodd's allegations, Plaintiff was not engaged in protected activity. Plaintiff, however, relied on the language regarding retaliation for assistance

or participation in an investigation, proceeding or hearing (the " participation clause "). His argument is that, although he was the target of an investigation into charges of racial discrimination, his participation in that investigation was in fact protected activity. This was an issue of first impression for this Court.

The court relied on the case *Erickson v. Marsh & McLennon Co. Inc.*, 117 N.J. 539, 569 A.2d 793 (1990), where the New Jersey Supreme Court applied the New Jersey Law Against Discrimination (" NJLAD "), which includes a participation clause functionally identical to that in Title VII and the PHRA. The court ruled that an employee defending against charges that he sexually harassed a co-worker is not engaged in protected activity under the NJLAD. It reasoned, in part, that an employer's failure to investigate allegations of discrimination and take remedial action exposes it to litigation under federal law, and the plaintiff's reading of the law would expose an employer to litigation from the alleged illegal actor any time it fulfilled its obligation to investigate and take remedial action to address illegal discrimination in the workplace. The court here held that since the participation clauses in both the NJLAD and the PHRA are interpreted as identical to the Title VII participation clause, the holding in *Erickson* is instructive in this case. Therefore, the court held that an employee defending against charges that he discriminated against a co-worker is not engaged in protected activity under Title VII or the PHRA. As such, Plaintiff was unable to establish a *prima facie* case of retaliation.

II. GENERAL LITIGATION

Attorney-Client Privilege Outweighs Company Electronic Communications Policy Allowing it to Pry Into Employee's Private Emails

In *Stengart v. Loving Care Agency, Inc.*, --- A.2d ---, 2010 WL 1189458 (N.J March 30 2010), Plaintiff Marina Stengart was Executive Director of Nursing at Loving Care, Inc. until her resignation on January 2, 2008. The following month, she filed an action against the company alleging, among other things, violations of the Law Against Discrimination. Prior to her resignation, plaintiff communicated with her attorneys, Budd Larner, P.C., through her personal, password protected, Yahoo email account on her company provided laptop. These communications pertained to plaintiff's anticipated suit against the company.

After plaintiff filed suit, the company extracted and created a forensic image of the hard drive from plaintiff's computer. In reviewing plaintiff's Internet browsing history, an attorney at Sills Cummis discovered numerous communications between plaintiff and her attorney from the time period prior to her resignation. Sills Cummis did not advise Budd Larner that the image extracted from the hard drive included these communications.

Many months later, in answering plaintiff's interrogatories, the company referenced and included some of plaintiff's emails with her attorneys. Plaintiff's attorney requested the return of the originals and all copies of all such communications. Sills Cummis refused and plaintiff applied for an order to show cause with temporary restraints. The judge denied temporary restraints but

scheduled the application as a motion. In support of its claimed right to pry into and retain plaintiff's communications with her attorney, the company relied upon the electronic communications policy allegedly contained in the company handbook. In seeking the return of her emails with her attorney, plaintiff argued that the company failed to demonstrate it had ever adopted or distributed such a policy and, that she was unaware of an electronic communications policy that applied to executives such as herself. The trial judge denied plaintiff's motion finding that the emails were not protected by the attorney-client privilege because the company's electronic communications policy put plaintiff on sufficient notice that her emails would be viewed as company property. Plaintiff appealed.

On appeal, the court found that there was a factual dispute regarding the application of the company policy which was not resolved by the trial court. The court, however, did not resolve the factual issues regarding the application of the company policy. Instead, the court chose to focus on the enforceability of such a company policy, which purports to transform private emails or other electronic communications between an employee and the employee's attorney into company property. The court noted that this required a balancing of the company's right to create and obtain enforcement of reasonable rules for conduct in the workplace against the public policies underlying the attorney-client privilege.

The court weighed the company's ebbing interest in enforcing its regulations, as the means of prying into an employee's private affairs, against the employee's considerable interest in maintaining the confidentiality of her communications with her attorney. The court provided that, absent the impact of the company's policy, the attorney-client privilege applies to the emails and would protect them from the view of others. The court provided "[e]ven when we assume an employer may trespass to some degree into an employee's privacy when buttressed by a legitimate business interest, we find little force in such a company policy when offered as the basis for an intrusion into communications otherwise shielded by the attorney-client privilege."

The court reversed the order of the trial court and remanded for the entry of an order requiring the turnover of all emails exchanged by plaintiff and her attorney in possession of the company, the company's attorneys, or their agents or employees. The court also ordered the deletion of all these emails from any computer hard drives upon which they were stored and demanded a hearing to determine whether Sills Cummis should be disqualified from further representing the company.

The Supreme Court granted Loving Care's motion for leave to appeal and focused its analysis on two principal areas: the adequacy of the notice provided by the Policy and the important public policy concerns raised by the attorney-client privilege. After its review of the parties' arguments, the Supreme Court modified and affirmed the judgment of the appellate court holding that Stengart had an objectively reasonable expectation of privacy in pre-suit e-mail messages exchanged with her attorneys; the e-mail messages were protected by attorney-client privilege; Loving Care's counsel violated professional conduct rule regarding handling of communications inadvertently sent to a lawyer; and remand was necessary, for hearing on what sanctions, if any, should be imposed on Loving Care's counsel.

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