

January 1, 2012

I. EMPLOYMENT LAW

A Negative Evaluation Alone Does Not Constitute an Adverse Action

In *Raffaele v. Potter*, 2012 WL 33035 (E.D.Pa., January 06, 2012), Plaintiff Michael Raffaele was a United States Postal Service employee in Warminster, Pennsylvania. During the period from October 12, 2007, through March 3, 2008, plaintiff submitted twelve hiring requests to fill vacancies within his office. Despite the number of requests, the Board only addressed plaintiff's requests once, at which time it approved all six requests under consideration. During this same period of time, the Board also discussed and approved some of the requests by Lisa Layman, Postmaster of the Norristown, Pennsylvania office, who is younger and female.

According to plaintiff, the Board's prolonged delay in approving his hiring requests caused a staff shortage in his office that affected the terms and conditions of his employment, including the performance of the office which affected plaintiff's merit pay. In addition to the negative effects on the working conditions at the office, plaintiff also claimed that he received lower performance ratings resulting from defendant's discriminatory actions.

Plaintiff filed a complaint with the USPS Equal Employment Opportunity Office against defendant Postmaster General John E. Potter alleging age and sex discrimination as well as retaliation. Further, in his complaint, plaintiff claimed that the negative performance of his post office resulted in his merit and retirement pay being reduced.

The court found that Plaintiff did not suffer an adverse employment action. The court noted that Plaintiff was not discharged or demoted, nor did he suffer a decrease in pay. On the contrary, plaintiff was given 5.73% and 4% raises in total compensation in fiscal years 2007 and 2008, respectively.

Plaintiff argued that an employee can be subject to an adverse employment action even if not subject to one of the "traditional" actions (i.e. firing, failing to hire, failing to promote, reassignment, or a significant change in benefits), so long as the employer's actions affect the terms of conditions of his employment. The court rejected this argument noting that a plaintiff did not endure a materially adverse change in the terms and conditions of employment. A change is materially adverse when it rises to the level of "a termination of employment, a demotion evidence[d] by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices unique to a particular situation." Therefore, the Court found that plaintiff did not show that he endured a materially adverse change to the terms and conditions of his employment. The court recognized that plaintiff's job

was made more difficult by the staff shortages; however, it noted that none of the changes that plaintiff lists amount to anything more than would be expected from an experienced manager during difficult financial times.

Plaintiff also argued that he received lower performance ratings because of defendant's alleged discrimination, and that these lower performance ratings constitute adverse employment actions. The Court of Appeals has previously held that when a negative performance evaluation is accompanied by an increase in pay, the evaluation is not, by itself, an adverse employment action. The court further held that even a negative evaluation that results in a less than expected wage increase is not per se an adverse employment action.

II. GENERAL LITIGATION

Confidentiality Clause in Settlement Agreement Not Enforceable

In *Vares-Ebert v. Kelberg*, 2012 WL 33902 (N.J. Super. A.D., January 9, 2012), unpublished, Plaintiff Rebecca A. Vares–Ebert, individually and as executrix of the estate of Patricia Vares, filed a complaint seeking damages for the wrongful death of Patricia Vares, plaintiff's mother. She alleged that defendants Bernard Kelberg, D.O., and Michael Gersten, M.D., misdiagnosed her mother's medical condition. The matter settled prior to trial. Plaintiff appeals from the April 12, 2010 order that permitted defendant Kelberg to deposit in court the funds to effectuate the settlement, dismissed the complaint, and enforced the settlement. The order also directed that plaintiff could withdraw the settlement funds when she signed the Stipulation of Dismissal and Release in the form attached to the order.

On appeal, plaintiff argued that the parties never agreed on the terms of the settlement. She also contended that the conditions contained in the settlement agreement restricting her ability to provide details of the case are unenforceable because the conditions are an unconstitutional prior restraint of her right of free speech. Plaintiff also argued that the terms of the release are not consistent with the terms of the settlement agreement.

The court held that the confidentiality provisions of the settlement agreement are inconsistent with N.J.S.A. 45:9–22.23a(10) and Rule 1:38, which permit free access by the public to the information sought to be concealed. Severance of these provisions ordinarily would not permit enforcement of the agreement. Defendant, however, advised this court at oral argument that the provisions are not central to the settlement and urged enforcement of the settlement as modified by elimination of the confidentiality provisions.

Although the court held that the confidentiality provisions cannot be enforced and are severed from the settlement agreement, it found there was no discrepancy between the terms of the settlement agreement and the release and, therefore, affirmed the order as modified.

A Finding of Bad Faith Is Pivotal To a Spoliation Determination

In *Bull v. United Parcel Service*, --- F.3d ----, 2012 WL 10932 (3d Cir. (N.J. January 4, 2012)), Plaintiff, a part-time employee of UPS injured her neck and shoulder on the job in late December 2005. The company doctor diagnosed her with contusions and strains to her shoulder and neck, and restricted her lifting to twenty-five pounds. She was referred to an orthopedic specialist who lowered the lifting restriction to twenty pounds. UPS placed her on a temporary work assignment that did not involve lifting, but at the end of the 29-day assignment she stopped working and began receiving workers' compensation. On March 29, 2006, the orthopedic specialist opined that—though Bull was only 70 percent recovered—she had reached maximum medical improvement. The doctor restricted her overhead lifting to 10 pounds, but did not mention other types of lifting.

Plaintiff returned to work and presented the specialist's note. She received a new work assignment, but after five days her new supervisor told her that her medical restrictions made it impossible for UPS to continue assigning work to her. UPS advised her to seek permanent disability.

Plaintiff wished to be reinstated and asked her union representative for help. The representative advised her to get a second opinion. Dr. Farber examined her and gave her a note that said among other things: "patient is capable of lifting 50 pounds or more." UPS, however, found numerous inconsistencies with the note. Plaintiff's union representative then advised her to get another note, and to get more information to satisfy UPS's issues. Plaintiff presented a second note from Dr. Farber's office. UPS also found multiple problems with the second note.

UPS requested the original records because the notes were illegible. Plaintiff never responded and instead filed an employment discrimination lawsuit. At the trial, plaintiff's attorney sought to introduce a copy of the first letter and UPS objected on the basis of "best evidence." During a sidebar, the court asked plaintiff's lawyer where the original was and the attorney said he had been told it no longer existed. The judge overruled UPS's objection, but when plaintiff's lawyer requested the copy be introduced into evidence, the judge asked plaintiff where the original was. She said it was in her home. The judge declared a mistrial. Plaintiff sent the originals to UPS five days later.

The District Court ruled that plaintiff's failure to produce originals of the medical notes was spoliation and it invoked its inherent authority to order the case dismissed with prejudice as a sanction. Plaintiff maintained that the District Court abused its discretion by ordering the sanction.

On appeal, the Third Circuit addressed two questions. First, whether the production of facsimiles and copies -- in place of the originals -- can be considered spoliation; and, second, whether plaintiff's specific acts or omissions provided a reasonable basis to rule that she spoliated evidence, warranting dismissal with prejudice.

UPS argued that it hounded plaintiff for the originals over the course of years, but got no response. However, the court counted a total of only two requests by UPS for the original documents in the entire span of the case and neither of these inquiries were discovery requests. The court concluded from this that the District Court was wrong when it declared that UPS made "multiple" requests of plaintiff for the original notes. The court also concluded that the District

Court lacked evidence that plaintiff intentionally failed to produce the originals and found that any inference of plaintiff's intent to obstinately withhold the originals failed for a lack of any factual foundation that she actually knew UPS wanted them. The Third Circuit concludes from all of this that the District Court abused its discretion in ruling that, within its spoliation analysis, plaintiff intentionally withheld the original documents from UPS. And, since plaintiff did not act in bad faith, there was no spoliation.

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