TITLE VII Update

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Court Revives Sexual Harassment Claim for Female Trucker, Buries Retaliation Claim

Nichols v. Tri-National Logistics, Inc., 809 F.3d 981 (2016): Plaintiff Rebecca Nichols was a long-haul trucker for Tri-National Logistics and RMR Driver Services (collectively "TNI"). Nichols quickly developed an extensive record of unsafe driving. TNI required her to drive with a partner, ultimately assigning her to James Paris. Nichols testified in her deposition that Paris made unwelcome advances on their trips, which they took alone in the confined quarters of the truck's cab. She claimed she promptly reported these advances, but TNI took no action for days.

Ultimately, Paris proposed a quid pro quo: if she would sleep with him, he would forgive her a personal debt. She refused. The next day, Nichols complained to TNI again and was assigned a new partner. After three weeks of driving with Nichols, her new partner complained about her unsafe driving. TNI then fired her, citing her poor safety record. She brought suit under Title VII for sex discrimination and retaliation.

The district court dismissed Nichols's Title VII claims of sex discrimination and retaliation. The district court found that a "reasonable juror" could not find for Nichols on her discrimination claim, reasoning there was "no credible evidence" that Nichols complained to TNI before she stopped working with Nichols—and hence no evidence TNI failed to take appropriate remedial action. The Court also found that there was insufficient evidence that Nichols subjectively considered Paris's behavior so severe or pervasive as to alter her conditions of employment.

The Eighth Circuit reversed the dismissal of the sex discrimination claim. The Court found that material fact questions existed regarding (1) whether Nichols subjectively perceived Paris's actions as offensive; (2) whether Nichols reported the sex harassment several days before her TNI took remedial action; and (3) whether the remedial action was appropriate.

The Court concluded that a jury could conclude that Nichols considered Paris's conduct offensive. That Nichols decided to stay with her truck while TNI looked for another partner for her did not preclude such a finding. The Court reasoned that "'the law does not require an employee to quit or want to quit' when faced with a Hobson's choice." In assessing whether the employer's remedial action was reasonably prompt, the Court apparently found it significant that Nichols was in a confined and isolated environment with her alleged harasser for multiple days.

However, the Court affirmed the dismissal of Nichols' retaliation claim. In light of Nichols's longstanding record of poor driving, she failed to put forth evidence creating a material fact question that the termination was retaliatory.

Circuit Judge Lavenski R. Smith dissented from the reversal of the sex discrimination claim. As he viewed the record, the absolute earliest Nichols reported the conduct was two days before TNI

assigned her a new partner. In light of the evidentiary record, Judge Smith concluded that any alleged deficiencies in TNI's remedial action were not actionable.

Court Affirms Jury Verdict for White Police Officer Denied a Sought-after Transfer

Bonenberger v. St. Louis Metro. Police Dep't, 810 F.3d 1103 (2016): A white police sergeant brought a race discrimination claim against his police department and individual defendants for choosing an African American woman over him for the position of Assistant Academy Director. The plaintiff won at trial and defendants appealed.

On appeal, the defendants challenged the denial of their motion for judgment as a matter of law. The defendants claimed that the failure to give the plaintiff the Assistant Academy Director position was not a materially adverse action, because the position carried no change in pay, benefits, or rank.

The Eighth Circuit affirmed. The Court noted that "[d]enial of a sought-after transfer may constitute an adverse employment action if the transfer would result in a change in pay, rank, or *material working conditions*." The Court looked to its decisions on compulsory transfers for guidance, which hold that a transfer resulting in a "significant change in working conditions" could be materially adverse. Here, the Assistant Academy Director position offered significant supervisory duties, regular schedule and hours, greater prestige, and potential increased opportunity for promotion. In combination, these characteristics of the new position would have offered a material change in working conditions for the plaintiff. Hence, there were probative facts to support the verdict.

Employee Denied Both Front Pay and Reinstatement after Winning $1 Verdict

Olivares v. Brentwood Indus., 822 F.3d 426 (8th Cir. 2016): A naturalized American citizen appealed the district court's denial of front pay and reinstatement, after a jury found his employer terminated him because of his race and awarded him $1 in nominal damages. Although the plaintiff had not submitted damage evidence during trial, he had asked the district court for post-verdict equitable relief in the form of reinstatement or 18 years of front pay. The Court of Appeals affirmed.

During a post-trial hearing, the plaintiff explained he wanted to return to his former employer as a supervisor, where he made over $40,000 annually plus benefits. Job prospects around town were dim, paying about $8 per hour. His employer opposed reinstatement, stating the plaintiff had violated the company's trust by allowing his employees to violate safety rules.

No reinstatement. The Court first held that the district court did not abuse its discretion by denying reinstatement on the grounds that it would be neither possible nor practical. The Court noted that comparable positions had already been filled and the breakdown of trust between the parties was irreparable.

No front pay. The Court held the district court did not abuse its discretion when it denied front pay for want of evidence. The plaintiff had testified he was making about $20,000 annually at his new employer, described his past rate of pay, and the length of time he had expected to work at the defendant. However, the district court wanted more evidence to substantiate his testimony. The

Court stated that the plaintiff "only provided a vague estimate of his post verdict salary at his new employer," and concluded that he failed to establish a prima facie case for front pay.

Peril for Plaintiffs Who Conceal Employment Claims from Bankruptcy Court

Jones v. Bob Evans Farms, Inc., 811 F.3d 1030 (8th Cir. 2016): A plaintiff was judicially estopped from pursuing employment claims that he failed to disclose in his Chapter 13 bankruptcy proceedings.

In June 2009, the plaintiff began working for the defendant. He declared bankruptcy months later. Contrary to the court's confirmation order, the plaintiff did not disclose lawsuits "received or receivable" during the five-year plan of the bankruptcy.

In May 2012, the plaintiff quit his job. He then filed with a Title VII lawsuit in 2013, claiming that he experienced discrimination at work as early as 2009. In July 2014, the bankruptcy court terminated the plaintiff's bankruptcy and discharged his debts.

Motions ensued. The employer moved for summary judgment, arguing that the plaintiff was estopped from pursuing claims that were not disclosed to the bankruptcy court. The district court granted the motion. In response, the plaintiff reopened the bankruptcy estate and amended his schedules to include his employment claims. He then filed a motion with the district court to amend the summary judgment order, claiming that he cured his failure to disclose his claims in the bankruptcy court.

The district court denied the plaintiff's motion to amend. It concluded that his "last minute candor" did not prevent the application of judicial estoppel to bar his claims.

Reviewing for an abuse of discretion, the Court applied three-factor test articulated in *New Hampshire v. Maine*, 532 U.S. 742 (2001):

(1) Whether the party's later position is "clearly inconsistent" with its position in a previous proceeding;
(2) Whether the party persuaded the first court to accept its prior position;
(3) Whether the party asserting inconsistent positions would derive an unfair advantage if not estopped.

First, the Court found that the failure to disclose lawsuits in response to the bankruptcy court's order was tantamount to a statement that those lawsuits did not exist—a statement inconsistent with pursuing a discrimination claim.

Second, the Court found that the bankruptcy court's discharge of his debts was a sufficient, implicit acceptance of the debtor's position that no lawsuits existed. This in turn permitted a conclusion that the bankruptcy court was misled, even though the bankruptcy court had reopened the estate and allowed the plaintiff amended his schedules.

Finally, the court found that Jones "could have derived an unfair advantage" by concealing his discrimination claims. The Court noted that unsecured creditors could have recovered money from a potential settlement of the discrimination claims. The Court acknowledged that the plaintiff paid his creditors solely out of his income, and that the plaintiff had received no income from his claims

during his bankruptcy. Nevertheless, the Court concluded that judicial estoppel does not require that the nondisclosure lead to a different result in the bankruptcy proceeding. The party's intent to mislead suffices.

The plaintiff argued that his failure to disclose was inadvertent and that he lacked intent to mislead the court, rendering the application of judicial estoppel improper. The Court rejected this argument, noting that the failure to satisfy a disclosure duty is inadvertent only when the debtor "either lacks knowledge of the undisclosed claims or has no motive for their concealment." Because the plaintiff knew of the undisclosed claims and had a motive to conceal them, the Court would not disturb the district court's ruling.

Van Horn v. Martin, 812 F.3d 679 (8th Cir. 2016): The Eighth Circuit again affirmed the application of judicial estoppel where a plaintiff failed to disclose her discrimination claims to the bankruptcy court. The plaintiff had filed for Chapter 13 bankruptcy in 2007, and the bankruptcy court approved her plan in February 2008. In June 2012, the plaintiff lost her job. One month after filing her lawsuit, the bankruptcy court discharged her debts.

Her employer moved for summary judgment, concluding the plaintiff lacked standing and was estopped from asserting her claims because she failed to disclose them to the bankruptcy court. Following the analysis set forth in *Jones v. Bob Evans Farms, Inc.*, the Eighth Circuit concluded that the district court did not abuse its discretion in estopping the plaintiff from pursuing her discrimination claims.

Court Kicks Pro Se Plaintiff's Harassment and Retaliation Complaint at Pleading Stage

Blomker v. Jewell, 831 F.3d 1051 (8th Cir. 2016): Plaintiff Denise Blomker filed a pro se complaint against her former employer alleging a sexual harassment claim based on hostile work environment and a retaliation claim.

Out of seven allegations in support of her sexual harassment claim, the following were arguably the three most severe:

(1) "On February 24, 2010, Blomker's co-worker, Tom Will, 'moved his finger toward [a] button [on Blomker's shirt] and stopped approximately three inches from putting his finger between [her] breasts.' Will then said, with "a smirk on his lips, 'I can put a button right there.'"
(2) "On September 9, 2010, Will called out Blomker's name. 'As he came toward [Blomker,] [she] noticed he was sexually aroused (having an erection.' With a 'smirk on his face,' Will 'walked up and stood extremely close to [Blomker] that [she] stepped back from him.'
(3) "On January 10, 2013, [co-worker] Rottman had an erection while speaking to Blomker."

In support of her retaliation claim, Blomker alleged among other things that her employer denied her a raise, suspended her, and ultimately terminated her.

Blomker attached a letter from her employer setting forth the alleged reasons for her termination: (1) she called her supervisor "a g**-d****ed f***ing liar" and grabbed a supervisor's arm and twisted it; (2) she threatened to send copies of e-mails in her possession to the Equal Employment Opportunity Commission (EEOC) and the court; and (3) she copied unnecessary people on emails after repeatedly being warned not to do so.

The Court affirmed in a 2-1 decision. Turning first to the sexual harassment claim, the Court found that seven alleged instances forming her sexual harassment claim did not rise to the level of an actionable hostile work environment claim.

Next, the Court found that Blomker failed to state a claim for retaliation, even though two of the alleged reasons for her termination mentioned her intent to file an EEO complaint. The Court's analysis began by recognizing Title VII retaliation claims require the plaintiff to show but-for causation. However, the employer's letter, which Blomker attached to her Complaint, identified other reasons for Blomker's termination. The Court appeared to accept the other reasons as true, concluding, "Blomker's inclusion of the letter of removal in her complaint shows, on its face, that Blomker's protected activity was *not* a but-for cause of the alleged adverse action by the [employer]."

Circuit Judge Beam dissented. He criticized the employer and district court for treating the motion to dismiss as if it were being decided at summary judgment. Judge Beam found the plaintiff plausibly pled hostile work environment sexual harassment, based on her allegations of unwelcome sexual advances and other harassing conduct. He viewed the majority's suggestion—that dismissal was appropriate because none of the incidents involved actual touching—"set a dangerous precedent for sexual harassment plaintiffs." As to the retaliation claim, he concluded that the plaintiff's allegations—that she was denied a pay raise, suspended, and ultimately terminated within months of filing suit—was sufficient to state a plausible claim for retaliation.

Summary Judgment for Employer Affirmed Despite Racist Comments from Decision-Maker and Friends

Hutton v. Maynard, 812 F.3d 679 (8th Cir. 2016): Herman Hutton appealed the district court's dismissal of a Title VII retaliation claim. Hutton, a white man, claimed he was terminated from his position as Chief of Police of England, Arkansas, in retaliation for his desire to promote an African American staff member to the police department. The Eighth Circuit affirmed.

The day before Hutton was fired, he told the Mayor of England, that he wanted to promote an African American staff member. The Mayor responded, "You do whatever you think is right, Chief." Due to restructuring, the employee in question did not receive the promotion immediately. However, she was promoted to a new position: head dispatcher.

In addition, Hutton alleged that Mayor and his friends, including a City Council member, openly made racially charged remarks. Hutton alleged they called African Americans "those people," "them people," and "the people from the other side of the tracks." One of the Mayor's friends used the "n-word," and, according to Hutton, Maynard took no offense at the use of the term.

Hutton's employer put forth an ample number of legitimate business reasons to fire him.

The district court dismissed Hutton's claims at summary judgment. The district court held that Hutton did not establish a genuine factual dispute that the employer's stated reasons for termination were pretextual.

Hutton argued that the decision to grant summary judgment was improper for several reasons. Among those reasons, Hutton asserted that the Mayor's use of and tolerance for racist language was sufficient to prove pretext. The Court accorded these statements little weight, because Hutton

did not allege that the offensive statements were made in a connection with any part of his employment, in connection with city business of any kind, or near the time of Hutton's decision to promote the African American employee or his termination.

Court Limits Cat's Paw Liability: Discriminatory Wrongdoer Must Knowingly Dupe the Decisionmaker into Taking Adverse Action

Cherry v. Siemens Healthcare Diagnostics, Inc., 829 F.3d 974 (2016): Farrell Cherry, an African American, brought suit against his former employer for race discrimination stemming from his termination. The district court granted summary judgment or the employer. Cherry appealed, and the Eighth Circuit affirmed.

Cherry worked for Siemens in the Rapid City, South Dakota area from 1981 to 2011. In 2008, he got a new supervisor, Blaine Raymer. That same year, Dave Eide became one of Cherry's co-employees under Raymer. Both Raymer and Eide made derogatory comments to or about Cherry and told stories or jokes creating a racially hostile environment for Cherry.

In 2011, Siemens initiated a reduction in force. Raymer's direct supervisor, David Siebert chose the three lowest-performing employees—one of which was Cherry—for termination. Siebert's assessment of performance was based on performance reviews. Raymer, as Cherry's supervisor, had completed hers.

On appeal, Cherry argued that the "cat's paw" theory of liability applied because the negative reviews completed by Raymer played a part in her termination. The Court explained, "The cat's paw analysis applies in situations where 'a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker *as a dupe in a deliberate scheme to trigger a discriminatory employment action*." Because "Raymer did not actually know of the planned reduction in force at the time he [completed the negative performance reviews,]" the Court decided the "cat's paw" analysis did not fit. The Court found Cherry failed to create a genuine factual dispute as to causation, because there was no evidence that Siebert, the decisionmaker, harbored discriminatory motives.