

Thirteen Month gap Between Protected Activity and Alleged Retaliation Leads To Summary Judgment For Employer

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In *Anderson v. Donahoe*, a U.S. Postal Service employee suffered from asthma. The employee claimed his employer failed to accommodate his disability which allegedly arose due to flare ups of his condition that he experienced while working as a part-time mail processor. For seven years, from 2002 through 2009, the employee filed multiple complaints with the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) in addition to union grievances, requesting a reasonable accommodation of his disability. During the same seven-year period, the employee had extended periods of absences from work. The employee sued his employer claiming that it had violated the Americans with Disability Act (ADA), the Family Medical Leave Act (FMLA), and the Rehabilitation Act. The trial court granted the employer summary judgment. The employee appealed. The Seventh Circuit of the U.S. Court of Appeals affirmed the granting of summary judgment against the employee.

The employee had a long standing diagnosed condition of chronic persistent bronchial asthma, and thus, his request for a reasonable accommodation centered on his contention that his workplace was damp and had enough mold and mildew to make him ill. In response to the employee's initial OSHA complaint, the employer hired an inspector to conduct tests and then later undertook \$32,000 in renovations and remedial work to remove the mold. The employee's treating doctor wrote that to accommodate the employee's condition, he should be assigned to a post in the security office or a comparable work environment outside of the mail sorting area. The employer did not grant that request. What then started was a series of back and forth communications between the employee, his employer, and the treating physician allergy immunologist, with the employee repeatedly attesting to the symptoms of illness experienced only at his workplace, and the employer claiming it offered the employee masks to wear while at work and had a separate medical opinion clearing the employment to return to work.

After an unsuccessful charge with the EEOC, the employee filed suit against the employer alleging unlawful discrimination based on race, sex, age, disability, harassment, retaliation, and failure to accommodate his

disability. When the employer filed its motion for summary judgment, the employee first raised a claim under the FMLA. The trial court granted the employer summary judgment based upon a lack of evidence that the employer had not accommodated the employee's asthma in retaliation for his prior EEOC and OSHA complaints. Moreover, while the employee did not receive his specifically requested accommodation of an assignment to a different work location, the trial court found no causal connection between his protected activity, his filing of EEO and OSHA complaints, and his treatment at work. The trial court also decided that the employee had forfeited or failed on the merits with respect to his FMLA, failure to reasonably accommodate, and Rehabilitation Act claims.

On appeal, the Seventh Circuit stressed that the employee had to provide direct or indirect evidence to support his claims of retaliation discrimination under the Rehabilitation Act. Lacking evidence of an event comparable to an adverse admission by the employer, the employee sought to prevent summary judgment with indirect evidence. With indirect evidence, the employee could try to point to suspicious occurrences, timing, and statements, and compare treatment of similarly situated employees to show that the reason for the employer's discipline was pretextual. All the employee had, however, was evidence of suspicious timing and pretext which failed to create a material issue of fact. The biggest deficiency in the evidence was the 13 month gap between the employee's protected activity of seeking a reasonable accommodation and the disciplinary action taken by the employer.

The Seventh Circuit also underscored the absence of any evidence that employees who did not file EEO or OSHA complaints were treated any differently by the employer. Finally, the Seventh Circuit rejected the remaining claims of the employee on the grounds that they were not properly asserted through an amended complaint and could not be raised for the first time in response to a motion for summary judgment.

The Anderson opinion serves as a reminder to employers not to take hasty disciplinary action against employees who claim to have disabilities. Instead, a steady documentation of subsequent work rule violations, while also taking steps to reasonably accommodate an employee, may well be recognized by courts as building sufficient grounds for a non-retaliatory termination. To navigate the shoals of such situations, employers should work closely with their counsel.

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