EMPLOYER'S EDGE

HEYL ROYSTER

A Newsletter for Employers and Claims Professionals — *Summer 2018*

A WORD FROM THE PRACTICE CHAIR

With the sun finally shining, we are pleased to present the Summer edition of Heyl Royster's *Employer's Edge*. In this issue, Emily Perkins authored an article based on the Seventh Circuit case, *Skiba v. Illinois Central Railroad Company*, in which the court issued an advantageous ruling for employers facing retaliation claims under Title VII and the Age Discrimination in Employment Act. Patricia Hall analyzed an interesting case involving personnel decisions and the importance of consistent employment practices in another Seventh Circuit case, *Freelain v. Village of Oak Park*. Finally, Jordan Emmert discussed a positive ruling for employers involving retaliation and race discrimination allegations which arose after the plaintiff filed internal complaints with his employer in *Madlock v. WEC Energy Group, Inc*.

If you have any questions about the content of this newsletter or any employment law questions, please feel free to contact me or any of the attorneys in our Employment & Labor Practice.

Bradford B. Ingram
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DISCRIMINATION AND RETALIATION CLAIMS REJECTED DUE TO FAILURE TO ARTICULATE STATUTORILY-PROTECTED ACTIVITY

By: Emily Perkins, eperkins@heylroyster.com

In an unpublished case the Seventh Circuit held that the plaintiff's discrimination and retaliation claims failed because the plaintiff failed to provide any evidence that he engaged in any statutorily-protected activity. *Skiba v. Illinois Central Railroad Company*, 884 F.3d 708 (7th Cir. 2018). Employers should note that mere complaints, without an indication of a protected class is insufficient to prove discrimination or retaliation.

Mark Skiba (plaintiff) alleged that his former employer, the Illinois Central Railroad, unlawfully discriminated against him on the basis of age and national origin and retaliated against him for complaining about a superior. When Skiba was hired, he was fifty-five years old. He worked as an entry-level management trainee. After completing the training program, he served in multiple management-level positions. At the age of fifty-eight, he received a promotion. However, while working this new position, his supervisor allegedly became

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verbally abusive. He notified the human resources department of his supervisor's behavior, but the behavior continued. After several months of enduring the abuse, he requested reassignment to a different department. At the same time he made the request, his supervisor informed the director of human resources that the plaintiff had issues with his performance. Due to this information, plaintiff's request for reassignment was denied.

Plaintiff filed a formal complaint with the human resources department against his supervisor and alleged: (1) hostile work environment, (2) retaliation, (3) disrespectful behavior based on plaintiff's medical condition, and (4) discrimination by holding plaintiff accountable for other people's errors. After the complaint and several follow-up emails did not provide him relief, plaintiff filed a charge of discrimination with the Equal Employment Opportunities Commission on the basis of age and national origin and unlawful retaliation for reporting his complaints about his supervisor.

The district court granted summary judgment on behalf of Illinois Central Railroad. On appeal, the Seventh Circuit analyzed the retaliation claim, noting that the plaintiff failed to establish that he engaged in any statutorily-protected activity. "Statutorily-protected activity 'requires more than simply a complaint about some situation at work, no matter how valid the complaint might be. [T]he complaint must indicate [that] discrimination occurred because of sex, race, national origin, or some other protected class. Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient.'" *Skiba*, 884 F.3d at 718. (Internal citations omitted.)

The Seventh Circuit concluded that the plaintiff failed to provide any evidence about his supervisor which would suggest that he was protesting discrimination on the basis of his age or national origin. Rather, the issue was a mere "personality conflict" and described his supervisor as one who "'berate[ed], badger[ed], and disrespect[ed]' his subordinates." *Id*. at 714-15. He never suggested that his supervisor acted with unlawful discriminatory animus. Therefore, the court held that his retaliation claim failed.

In analyzing plaintiff's age discrimination claim, the Seventh Circuit noted that comments describing the plaintiff as "low energy" or that another candidate would be "a little faster" were not attributed to the plaintiff's age. The plaintiff also could not provide any evidence that younger employees were given preferential treatment. He failed to provide details of the employees' qualifications or employment history that would allow the court to deduce that their hiring was a result of discriminatory motive. Because he could not show any younger employee was similarly situated, his age discrimination claim failed.

Similarly, the plaintiff failed to provide sufficient evidence to support a discrimination claim based on national origin claim. Plaintiff's claim was simply based on the fact that he was American and his supervisors, including the supervisor whom he alleges was verbally abusive, were Canadian. However, plaintiff failed yet again to demonstrate that a particular protected characteristic was a motivating factor for any employment decisions. Therefore, his national origin claim also failed.

In evaluating the facts of the *Skiba* case, the Seventh Circuit noted the activity did not constitute statutorily-protected activity. In this case, the plaintiff made several allegations, but he failed to articulate a discriminatory motive or base any alleged behaviors on statutorily-protected characteristics. Mere complaints, without an indication of a protected class are insufficient to prove discrimination or retaliation. Statutorily-protected activity requires more than workplace complaints, no matter how valid those complaints might be.

For questions relating to discrimination or retaliation complaints, please contact the attorneys in the Employment & Labor Practice Group.

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A SEVENTH CIRCUIT REMINDER: CONSISTENCY IS KEY

By: Patricia Hall, phall@heylroyster.com

The Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) both provide protected time-off for employees with certain medical conditions. The ADA protects individuals with disabilities from discrimination, and the FMLA provides twelve weeks of leave during a twelve-month period to qualified employees for qualified health reasons. The qualifying health reasons under the FMLA and disabilities protected under the ADA are defined extensively within both Acts. Each Act also protects employees from retaliation by the employer for asserting their right to utilize protected leave. To prove a retaliation claim under the FMLA and the ADA, an employee must prove: (1) he or she engaged in a protected activity; (2) the employer took a materially adverse action against the employee; and (3) the protected activity is what caused the adverse action. An action is materially adverse if it would have dissuaded a reasonable worker in the plaintiff's position from taking time off of work under either the FMLA or ADA.

In *Freelain v. Village of Oak Park*, 888 F.3d 895 (7th Cir., 2018), the plaintiff, Rasul Freelain, was a police officer who had worked for the defendant, the Village of Oak Park, since 2002. The co-defendant, Dina Vardal, was a Sergeant within the police department. *Freelain,* 888 F.3d at 899. In 2012, the plaintiff spent several weeks off of work to address some stress-related medical ailments following a sexual harassment claim he made against Vardal. *Id.* Plaintiff was required to utilize his accrued paid sick time while he was off of work for his medical leave. After plaintiff was released to work by his treating physician, he met with the Chief who informed him that the sexual harassment investigation was unfounded and they would not be pursuing any action against the Sergeant. Due to the nature of his ailments and his position as a public safety officer, the plaintiff was also advised that he would have to pass a psychological evaluation prior to returning to duty. Plaintiff then requested secondary employment, which was approved three months later. *Id.*

The plaintiff filed his lawsuit alleging that his employer retaliated against him in three ways. He claimed, (1) the employer misclassified his leave time in a way that was materially adverse; (2) the employer retaliated by requiring a psychological evaluation prior to his returning to work; and (3) the employer's three-month delay in approving his request for secondary employment was materially adverse. *Freelain*, *Id*. at 900. The employer filed a motion for summary judgment, and the Northern District of Illinois granted the employer's motion. *Id.* The Seventh Circuit affirmed the decision on April 30, 2018. *Id.* at 906.

The Seventh Circuit found that no retaliation exists under the FMLA or the ADA when granting unlimited unpaid leave to a police officer in addressing his medical ailments. *Freelain*, 888 F.3d at 901. There was no evidence that the employer in this case acted inconsistently with its normal paid leave practices, and the plaintiff provided no evidence that the employer took any materially adverse actions against him in retaliation for use of the medical leave time. *Id.* at 906. In making this determination, the Seventh Circuit explained that the FMLA does not require employers to pay employees when they are utilizing family or medical leave. *Id.* at 901. It further advised that employers are permitted to apply any paid leave it provides its employees while the employees utilize FMLA leave and are not otherwise required to pay the employee for time off under the FMLA or ADA. *Id*. at 902. Since the employer acted consistently with the FMLA, the plaintiff was required to show that the employer acted inconsistently with its normal leave practices in order to show that the actions taken by the employer were retaliatory in nature. *Id.* at 901.

The court found the plaintiff was unable to show the employer acted inconsistently with its normal leave practices and the plaintiff failed to show that the

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employer acted in a way that was materially adverse against him. *Freelain*, 888 F.3d at 901. With regard to the plaintiff's misclassification claim, the court held that the employer did not act with malice or recklessness, and the misclassification of leave time caused plaintiff no harm as the plaintiff was eventually made whole by restoration of his sick leave and compensation for any unpaid time he spent on leave. *Id.* at 903. Further, the employer's requirement that the plaintiff undergo a psychological evaluation prior to returning to duty was reasonable as the plaintiff was a public safety officer and had spent several weeks off of work as a result of stress-related ailments. *Id.* at 903-904. Finally, the court found the employer's three-month delay in approving the plaintiff's secondary employment request was not retaliatory as such decisions are discretionary and the plaintiff was not singled out for the delay. *Id.* at 905.

The *Freelain* case highlights the importance of consistent employment practices, particularly in areas governed by statute. Each situation requiring the use of leave time under the FMLA or ADA is distinct. While the FMLA and ADA provide protections for employees, these statutes also provide guidance to employers with regard to implementing policies that can be applied in all situations, in order to protect employers from being found liable in retaliation cases. It is important to know the situations for which the FMLA and ADA provide protection and to have a process in place that allows for the employee to utilize the leave time. While an employer is not required to pay an employee while they take time off of work under the FMLA, they must act consistently in granting leave to avoid an appearance of any employee being singled out. The Seventh Circuit reminds us that "federal courts do not second-guess personnel decisions that lie within the reasonable discretion of employers." Consistency is key. *Freelain*, 888 F.3d at 903.

SUMMARY JUDGEMENT UPHELD FOR EMPLOYER IN RACIAL DISCRIMINATION CASE

By: Jordan Emmert, jemmert@heylroyster.com

The Seventh Circuit recently affirmed summary judgment in favor of the employer in *Madlock v. WEC Energy Group, Inc.,* 885 F.3d 465 (7th Cir. 2018). The plaintiff, Madlock, worked for the Wisconsin Electric Power Company (WEPCO), for approximately 40 years. Madlock was a senior member of the industrial billing division and described herself as a "confident and knowledgeable African American Woman." *Madlock*, 885 F.3d at 468. Though Madlock was not in management, she was a Lead Customer Service Specialist and was a point person for a team of billers who would come to her with questions.

In 2011, WEPCO made the decision to assign new management to the billing department where Madlock was assigned. The new management team consisted of Tiller, the manager, Frelka, the Director, and Wrycza, the team leader and Madlock's direct supervisor. Wrycza and Madlock butted heads almost immediately. The new management team began to take notice of some issues with Madlock's behavior, such as personal phone use. In February of 2012, Wrycza gave Madlock an official written coaching, the first step in WEPCO's graduated discipline system, for a billing error she made in June of 2011. Madlock filed a grievance against the discipline, but it was denied by Tiller. In May of 2012, Wrycza issued Madlock a Record of Disciplinary Action, the second step in the discipline system, because Madlock had approved a bill that overcharged a customer by $58,900. Frelka subsequently downgraded the discipline to the first step. Madlock received another discipline in November of 2012. *Id*.

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In March of 2013, Tiller decided to move Madlock out of Industrial Billing department and into the Volume Billing department, which handled smaller residential accounts. Tiller cited Madlock's billing errors as the reason for the move. Madlock was moved to a cubicle in the center of the room between two managers, and her Industrial Billing team was told not to come to her with questions any longer. WEPCO did not give Madlock a new team immediately due to her unfamiliarity with Volume Billing. The move did not affect Madlock's salary or title, but some co-workers described the transfer as a demotion. Wrycza expressed her view to Madlock's new supervisor that Madlock is a "strong black woman"— a phrase Wrycza had used before. *Id*. at 469.

On April 4, 2013, Madlock was again disciplined for making an error made from the prior year which resulted in a $10,000 credit back to a customer. Madlock filed an internal discrimination report against Wrycza, alleging that Wrycza discriminated against her on the basis of age and race. Madlock also filed a grievance challenging the discipline from April 4, 2013. In response, WEPCO compiled a list of Madlock's prior disciplines, both official and unofficial. In December of 2013 a position opened that would have been a promotion for Madlock, however she was not chosen due to her disciplinary record. Madlock subsequently filed a lawsuit alleging WEPCO discriminated against her because of her race and retaliated against her for filing the internal discrimination complaint. *Id*.

The court noted that the new test for evaluating a discrimination claim is whether the evidence would permit a reasonable fact finder to conclude that the plaintiff's race caused the discharge or other adverse employment action. *Id.* at 470. It mentioned further that an adverse employment action is some quantitative or qualitative change in the terms or conditions of employment that is more than a subjective preference. *Id.* The court ultimately concluded that Madlock did not suffer an adverse employment action because she did not experience a reduction in pay, the loss of a title, or a material change in her working conditions. The court considered whether losing her lead position would constitute an adverse employment action, but ultimately decided that it did not. The court relied on *Place v. Abbott Labs.,* 215 F.3d 803 (7th Cir. 2000), which held that a temporary loss of a leadership role does not constitute an adverse employment action. *Place*, 215 F.3d at 810.

The court also analyzed Madlock's retaliation claim. Madlock's primary basis for the retaliation claim was that the discipline she received in May of 2013, for the billing error she made in August of 2012, harmed her chances of receiving a promotion and that the discipline was in retaliation for her filing of the internal discrimination complaint. The court identified two methods by which an employee can succeed on a retaliation claim — the direct approach or indirect approach. In order to succeed on the direct approach, an employee must show, (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; and (3) there was a causal link between the protected activity and the adverse action. *Madlock,* 885 F.3d at 472. To succeed on the indirect approach, the employee must show (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; (3) she was meeting the employer's legitimate expectations; and (4) she was treated less favorably than similarly-situated employees who did not engage in protected activity. *Id.*

The court held that Madlock's claim failed under both approaches. The court reasoned that Madlock failed the indirect approach because she did not identify a sufficient comparator. *Id.* It also reasoned that she failed the direct approach because she failed to show a causal link between filing her complaint and her receipt of the discipline or the compilation of the list. *Id.* The court noted that timing alone is not sufficient to establish a genuine issue of material fact to support a retaliation claim. *Id.* at 473.

This case provides a valuable lesson to employers. WEPCO implemented and utilized a graduated discipline procedure. They approached the situation in a fair

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and objective manner and documented each situation in writing, which ultimately helped them show that Madlock's claims could not prevail. However, this case also provides examples of what a supervisor should not say. Statements such as those arguably led to Madlock initiating this lawsuit. Even if the comments are not intended as discriminatory, those comments should be avoided.

For any questions relating to discipline systems, racial discrimination, or age discrimination, please contact the attorneys in our Employment and Labor Practice. We also regularly host seminars dedicated to employment and Human Resources topics. If you would like to learn more about these training sessions, please do not hesitate to contact us.

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