



# Employment

## Law Briefing

Insights on Legal Issues in the Workplace

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# Did Employer Fire Disabled Employee Too Hastily?

An employee alleged that her employer violated the Family & Medical Leave Act (FMLA) and the Americans With Disabilities Act (ADA) when it discharged her. The court had to decide, in *Konipol v. Restaurant Associates*, whether it should allow her claims to go to trial.

## The Case Arises

After an administrative assistant was diagnosed with breast cancer, she underwent surgery and almost two months of radiation. Two months after ending the treatments, she stopped coming to work, alleging that she suffered from “extreme fatigue” — a radiation side effect. She also alleged that her supervisor harassed her



by complaining when she came to work late during her radiation treatments.

The assistant informed her supervisor in two telephone messages that she would be unable to come

to work. She sent a note from her doctor confirming her radiation-related fatigue and her need to take leave under the FMLA. The FMLA allows employers to require certification to verify a serious health condition and the need for leave. So the employer sent her a form

*The employer put form over substance in making its discharge decision.*

(Certification of a Health Care Provider) for her doctor to fill out and return.

The assistant returned the form a month later but it was incomplete. The employer immediately notified her, by mail, that the form was incomplete. She responded by voicemail, asking what else was needed, but the employer didn't respond. Instead, it terminated her employment 21 days later for having failed to complete the form. She filed suit in federal court, alleging that the employer violated the FMLA and the ADA and had created a hostile work environment.

## The Court Decides

The employer moved to dismiss all three claims on the ground that no facts were in dispute and it was entitled to judgment as a matter of law. The court refused to dismiss the FMLA claim, finding that triable issues of fact existed as to both the timeliness and completeness of the certification submission. The court held that a reasonable jury could conclude that the assistant tried to timely comply with certification in good faith and that her cancer-related fatigue caused any timeliness and substance shortcomings.

The court also refused to dismiss the ADA claim, ruling that a reasonable jury could find that the employer's

stated discharge reason was pretextual. But the court dismissed the hostile-work-environment claim, finding that the supervisor's tardiness complaints were not severe or pervasive enough to create a hostile work environment.

Thus, the court allowed the FMLA and ADA claims to proceed to trial.

### Haste Makes Waste

What can we learn from this case? That the employer acted too quickly and put form over substance in making its discharge decision. The employer clearly knew that the employee had asked for leave because of a serious health condition and that the FMLA permits 12



weeks of leave for eligible employees under these circumstances.

The employer failed to be flexible with respect to its receipt deadlines. Employers must give workers the benefit of the doubt when they are clearly making some effort to cooperate. Employers should also remember that, in addition to the leave requirements, the FMLA requires them to reasonably accommodate an employee's disability. This might include, under proper circumstances, time off beyond the 12 weeks of FMLA leave. Savvy employers will carefully

weigh all circumstances before deciding to discharge a disabled employee. 🏠

## Worker Alleges Disparate Treatment

This case involved a worker who was discharged for failing a drug test. Even though his employer tested both black and white employees, the worker claimed that the employer treated blacks and whites disparately in the workplace. He sued, alleging the existence of a hostile work environment.

A federal trial court rejected the worker's claim of racial discrimination. Let's see why the court in *Mack v.*

*Port Authority of New York* found for the employer and what we can learn from the decision.

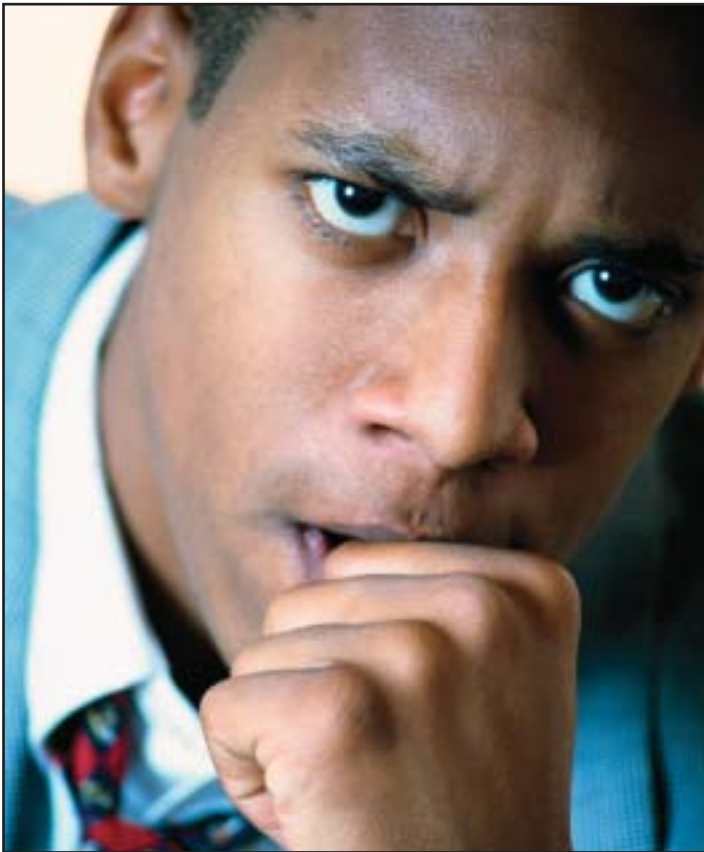
### The Case Begins

To hold his job driving a wrecking truck for the Port Authority, the worker had to submit to random drug tests. He claimed that his supervisor:

- ☛ *Harassed him,*
- ☛ *Made offensive racial jokes,*

- ☛ *Referred to him as “boy,”*
- ☛ *Said he was there to “appease” the supervisor,*
- ☛ *Targeted nonwhite workers for petty criticism, and*
- ☛ *Assigned the most onerous tasks to nonwhites.*

But the only specific instance of racial joking that the worker cited was that the supervisor allegedly made jokes about O.J. Simpson during his trial.



Alleging harassment, the worker complained to the employer’s Office of Equal Opportunity. Later, he tested positive for cocaine during a routine drug test and would have been fired but for a union-negotiated disciplinary waiver that required him to obtain psychological counseling. He complained that his clinical psychologist provided no meaningful counseling and was cold and disdainful toward him because he was African-American. The next year he again tested positive for cocaine and another disciplinary waiver saved his job.

The employer promoted the worker to the position of senior stock keeper and assigned him to work in a stock room. But he alleged that his previous supervisor still supervised him from time to time and continued to harass him by:

- ☛ *Singling him out for “special attention,”*
- ☛ *Calling him a “good boy” every time he finished a task,*
- ☛ *Citing him and other nonwhite workers for returning late from breaks while not reprimanding white late returnees, and*
- ☛ *Constantly accusing him and other nonwhite workers of “poor performance.”*

Meanwhile, the worker refused to provide a drug-test sample.

## The Discharge

The employer fired the worker and he sued, alleging the employer created a hostile work environment and subjected him to disparate treatment in violation of the Equal Protection Clause of the 14th Amendment. He sought relief under sections 1981 and 1983 of Title 42 of the U.S. Code.

To bring a successful claim under Section 1983, a plaintiff must show that:

1. *The defendant acted under color of state law, and*
2. *The defendant’s actions denied the plaintiff his federal statutory rights or his constitutional rights or privileges.*

The Port Authority was treated under the law as if it were a municipality. This meant that the worker couldn’t hold it vicariously liable for the supervisors’ actions under a theory of respondeat superior (“let the principal answer”).


So the worker had to show that his wrongful discharge was based on race because of his employer’s custom or policy. He had to show that his supervisor created

a hostile work environment and that the employer had a policy or custom of maintaining a hostile work environment. The court found that his supervisors lacked authority to make policy for the employer. Accordingly, the court dismissed the suit on the grounds that no material facts were in dispute and the employer was entitled to judgment as a matter of law.

### Employers Liable For Supervisors' Conduct

The employer here escaped liability because the worker chose to sue under Sections 1981 and 1983 with their higher level of proof, rather than under Title VII. But even if he had sued under Title VII, he would have had

*The worker had to show that his supervisor created a hostile work environment and that the employer had a policy or custom of maintaining a hostile work environment.*

difficulty establishing a nexus between the alleged hostile work environment and the events that led to his discharge. Nevertheless, employers should remember that they are clearly liable under Title VII for their supervisors' conduct — unless they have adopted a complaint procedure and employees fail to use it. 

## What a Difference One Remark Can Make

**W**hen a supervisor tells a veteran employee that he is less desirable because of his age and later discharges him, is it merely a stray remark? Or is it direct evidence of illegal age discrimination? The 3d U.S. Circuit Court of Appeals dealt with this issue in *Fakete v. Aetna Inc.*

### The Facts

An employee at U.S. Healthcare (USHC) was its oldest audit consultant when the company merged with Aetna in 1996. The merger agreement barred Aetna from firing any USHC employee for two years without a USHC executive's approval. When this provision expired in 1998, the consultant was age 56 and

three years away from becoming eligible to retire with a substantial pension.

Soon after the provision expired, the consultant asked his supervisor about his future at the company.

The consultant alleged that the supervisor told him the new management wouldn't be favorable to him because they were looking for younger single people who would work unlimited hours and that he wouldn't be happy there in the future.



## The Discharge

A few months later, the supervisor warned the consultant in writing because he had unexplained workplace absences. The supervisor threatened to place the consultant on probation that would result in his discharge if he failed to:

- ☛ *Explain future absences,*
- ☛ *Obtain the supervisor's approval before changing travel plans, or*
- ☛ *Provide the supervisor with a daily completed-tasks summary.*

The supervisor fired the consultant three months before his pension would have vested. He filed suit,



alleging that by discharging him and refusing to transfer him, Aetna violated the Age Discrimination in Employment Act (ADEA).

The ADEA protects workers over 40 from discharge based on age. To prevail on an ADEA claim, plaintiffs must show that their ages actually motivated and determinatively influenced their employers' discharge decisions. A plaintiff can meet this burden by presenting direct evidence of discrimination sufficient to allow a jury to find that the decision makers relied substantially and negatively on age in reaching a discharge decision. This evidence leads to a presumption that the persons expressing bias acted on that bias when they made the challenged employment decisions.

## The Rulings

The trial court examined the supervisor's statement that he was "looking for younger single people" and that, as a consequence, the consultant wouldn't be happy at Aetna in the future. The trial court concluded that the statement "was a stray remark that did not directly reflect the decision-making process of any particular employment decision." Finding that no facts were in dispute and that the employer was entitled to judgment as a matter of law, the trial court dismissed the suit without a trial.

The 3d Circuit reversed and sent the suit back to the trial court for further proceedings. The 3d Circuit found that the supervisor's words showed that he preferred younger employees and planned to implement his preference by firing the consultant.

The supervisor made his statement in direct response to a question from the consultant about how he fit into the supervisor's plans. In this context, a reasonable jury could find that the statement was a clear, direct warning that the consultant was too old to work for the supervisor, and he would be fired soon if he didn't leave on

his own initiative. Significantly, the consultant didn't rely on remarks made by anyone not involved in the challenged employment decision. The supervisor made both the remarks and the discharge decision.

## The Meaning of It All

This case presents an obvious lesson: The supervisor was insufficiently sensitive to the possibility of an age-discrimination lawsuit. While legitimate discharge reasons may have existed here, the supervisor's remarks opened the door for the court to find age discrimination. Employers can avoid this by training supervisors about the possible bases for employment-discrimination lawsuits. 🏠

# Enforce Your Antiharassment Policy Or Lose Its Protection

**H**aving a company policy against sexual harassment doesn't get a company off the litigation hook if the company doesn't properly enforce the policy.

That's what the 5th Circuit U.S. Court of Appeals decided in *Hatley v. Bally's*.

## Complaints Arise

Bally's had a well-publicized policy forbidding sexual harassment in the workplace. The company trained new employees on how to deal with sexual harassment and established a grievance procedure for these complaints.

Two of the company's cocktail waitresses formally complained to management in 1997 and 1998 that supervisors sexually harassed them. They described in detail pervasive, severe harassment consisting of repeated inappropriate touching, vulgar comments, propositions and physical aggression. Although the company investigated the complaints, it did nothing to stop the harassment.

## Jury Awards Damages

The waitresses quit and filed suit under Title VII of the 1964 Civil Rights Act, alleging a hostile work environment. Both testified that the company failed to effectively separate them from the harassing supervisors. Four other waitresses testified that the company had failed to respond to their earlier sexual-harassment complaints.

The jury found in favor of the waitresses and awarded damages. But the court ruled in favor of the company as a matter of law, and the waitresses appealed.

## 5th Circuit Reverses


The 5th Circuit found that the waitresses' evidence was sufficient to support the jury's finding that the harassment created a hostile work environment. The court also found that the evidence supported a finding that the company was vicariously liable for the harassment. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate authority over the employee."

But the 5th Circuit disallowed punitive damages, because Bally's policy to prevent sexual harassment constituted proof of its good-faith effort to prevent and punish sexual harassment.

## Expensive Lessons

Even though this employer escaped paying punitive damages, it couldn't have been happy with the outcome. It still lost, despite having gone to the trouble and expense of enacting comprehensive anti-sexual-harassment procedures and investigating the complaints.

What the employer failed to do was to ensure that those responsible for enforcing the policy knew what to do with the investigation's findings to avoid exposure. The employer could have better trained managers responsible for enforcement or delegated the investigation to a trained professional, such as its attorney.

If you're interested in training your staff to conduct investigations or in having our firm perform investigations, please don't hesitate to contact us. 

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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

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We welcome feedback from you about this newsletter. We believe it is important to continue to apprise our friends, colleagues and clients of legal issues and ongoing changes in this most volatile and important area of law. You may also visit our website, which has recently been modified to include several helpful employment-related pages and sites at [www.hl-law.com](http://www.hl-law.com).

If you have any questions or comments about this publication, or if you know someone who would like to be included in our mailing list, please call **Michael J. Rose** at 860-249-1361 or e-mail me at [mrose@hl-law.com](mailto:mrose@hl-law.com).

Very truly yours,

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