

## STATEMENTS OF WOMAN DECISION MAKER SUPPORT INFERENCE OF SEXUAL STEREOTYPING

In Chadwick v. WellPoint, Inc., 561 F.3d 38 (1<sup>st</sup> Cir. 2009), the plaintiff applied for a promotion but the position was ultimately offered to someone else. The plaintiff was the mother of an 11-year-old son and 6-year-old triplets. The plaintiff brought a claim of sex discrimination under Title VII alleging that the employer failed to promote her because of a sex-based stereotype that women who are mothers, particularly of young children, neglect their jobs in favor of their presumed childcare responsibilities. The plaintiff pointed to the fact that she was more qualified than the person awarded the position. The plaintiff's supervisor, also a woman, explained to the plaintiff the decision not to promote the plaintiff by stating "it was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now."

The Court stated that several courts have had occasion to confirm that the assumption that a woman will perform her job less well due to her presumed family obligations is a form of sex-stereotyping and that adverse job actions on that basis constitute sex discrimination. The Court said that if the work performance of a woman (or a man, for that matter) suffers due to childcare responsibility or due to any other personal obligation or interest, an employer is free to respond accordingly, at least without incurring liability under Title VII. However, the Court cautioned that an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities.

The Court rejected the argument that the supervisor's words must explicitly indicate that the plaintiff's sex was the basis of the supervisor's assumption. The Court found that a reasonable jury could infer from the supervisor's explanation that the plaintiff was not denied the promotion because of her work performance or her interview performance but because the

plaintiff and others assumed that as a woman with four young children, the employee would not give her all to the job.

The Court found that this inference was supported by several facts. First, the supervisor learned of the plaintiff's three six-year-olds just two months before she denied the plaintiff the promotion. Second, the supervisor's reaction upon learning of the employee's three small children was "Bless you!" The Court found that a jury could reasonably conclude that the supervisor meant that she felt badly for the employee because her life must have been so difficult as the mother of three young children. The Court found this assumption supported by the supervisor's later explanation to the employee that the employer interviewers, all female, would feel "overwhelmed" if they were in the plaintiff's position. Finally, the Court ruled that because a plaintiff alleging discrimination infrequently has direct evidence of bias, sex discrimination can be proven through the elimination of other plausible non-discriminatory reasons until the most plausible reason remaining is discrimination.

The inference of sexual stereotyping was further supported by the fact that the supervisor explained the non-promotion in one way to the plaintiff, that she had too much on her plate with her kids and school, and in a different way in her deposition, that the plaintiff had performed poorly in interviews. The Court found that a jury could reasonably question the veracity of this second explanation given that the plaintiff was an in-house, long time employee.

## MIXED MOTIVE METHOD OF PROOF IS NOT AVAILABLE UNDER THE ADEA

In Gross v. FBL Financial Services, No. 08-441, Decided June 18, 2009, the U. S. Supreme Court held that the text of the Age Discrimination in Employment Act does not allow an employee to establish discrimination by showing that age was one of the motivating factors for the employer's action. The Court ruled that the employee must show that age was the decisive factor behind the employer's adverse job action.

Thus, mixed-motive cases are unavailable under the ADEA. The Court ruled that the ADEA's wording bars discrimination because of an individual's age and, therefore, age must be the reason for the employer's actions.

The court further held that to establish a disparate treatment claim under the plain language of the ADEA, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. This proof may be direct or circumstantial but the burden of proof always stays with the plaintiff.

Title VII permits mixed-motive cases. This decision creates different standards between discrimination under Title VII and ADEA discrimination claims.

## **NO ADA CLAIM FOR DOCTOR TERMINATED FOR THREATENING TO KILL COWORKERS**

In Bodenstab, M.D. v. County of Cook, 2009 WL 1739908 (7<sup>th</sup> Cir. 2009), a doctor, who had recently been diagnosed with cancer, told a coworker that if the cancer had metastasized, he was going to kill his supervisor and coworkers. The doctor further stated it was possible he might die in the ensuing gun battle with police. Out of concern for his safety, the coworker contacted the Chicago Police and the FBI. Upon learning from the police of the threats, Cook County Hospital first suspended and then fired the doctor.

The doctor filed a claim for violation of the Americans with Disability Act and the First Amendment.

The doctor claimed he was "regarded" as impaired in a major life activity in his ability to interact with others. The Seventh Circuit did not decide whether interacting with others qualifies

as a major life activity or whether he was substantially limited in this activity, both required under the ADA. Instead, the Seventh Circuit held that even assuming the doctor could establish a prima facie case of discrimination, there was no evidence that his termination for threats of violence was a pretext. In addition, the Seventh Circuit held that he was not a qualified individual with a disability because he presented a "direct threat" to his own health and the safety of others. The Seventh Circuit also held that there is no legal obligation to accommodate conduct as opposed to a disability.

The First Amendment claim fared no better. The Seventh Circuit determined that the same facts that established no ADA violation applied equally to the First Amendment claim and determined that the doctor was not terminated for exercising any right of speech but terminated for threatening to kill coworkers.

## **COURT ALLOWS CAUSE OF ACTION FOR DISCRIMINATION BECAUSE OF NOT BEHAVING ACCORDING TO AN EMPLOYER'S GENDER EXPECTATIONS**

In Kastl v. Maricopa County Community College District, 2009 WL 990760 (9<sup>th</sup> Cir. 2009), the Ninth Circuit ruled on the issue of whether it is unlawful to discriminate against a person because they do not behave in accordance with an employer's expectations. The Ninth Circuit held that it is unlawful to discriminate against a transgender, or any other, person because he or she does not behave in accordance with an employer's expectations for either men or women.

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