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Employer Prerogative and Employee Rights: The Never-Ending Tug-of-War

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Employment Law

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I. INTRODUCTION

Where there are employees and employers, there will be employment relationships in need of mending. That reality is enough to guarantee that employment law will always be a warm, if not hot, area of the law. The article and notes on employment law in this issue demonstrate that the development of employment law continues apace.

Professor Michael Hayes's article[1] reviews numerous National Labor Relations Board ("Board") cases and court cases to determine how evidence of pretext is used to assess whether an employer's asserted reasons for firing an employee were genuine or pretext for illegal antiunion motive. In an attempt to bring order to the Board's numerous positions regarding evidence of pretext, Professor Hayes examines the various types of evidence of pretext, noting that because evidence comes in various strengths it should be used in different ways and have different implications. He urges the Board to specify the appropriate uses of evidence of pretext to present a consistent vision of what qualifies as proof of pretext.

The notes provide an analysis of an Eighth Circuit Court of Appeals decision and two Missouri appellate court cases addressing three employment issues: how an employer must discharge its duty to provide reasonable accommodation under the Americans with Disabilities Act ("ADA"),[2] how fraud claims interact with the employment at-will doctrine, and under what circumstances mental stress can support workers' compensation recovery.

Jill Kingsbury's student note[3] examines an employer's duty to engage in the interactive process of determining what a reasonable accommodation is under the ADA. Analyzing an Eighth Circuit case[4] in which the employer declined to participate in the process of determining what a reasonable accommodation would be for a previously successful employee who had suffered a disability as

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1. Michael J. Hayes, *Has* Wright Line *Gone Wrong? Why Pretext Can Be Sufficient to Prove Discrimination Under the National Labor Relations Act*, 64 MO. L. REV. 883 (2000).

2. 42 U.S.C. §§ 12101-12113 (1994).

3. Jill S. Kingsbury, Note, *"Must We Talk About That Reasonable Accommodation?": The Eighth Circuit Says Yes, But is the Answer Reasonable?*, 64 MO. L. REV. 967 (2000).

4. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944 (8th Cir. 1999).

a result of a car accident, Ms. Kingsbury explores whether ADA liability should flow from the mere refusal to engage in the process or should follow only after a plaintiff proves that the process could have yielded a reasonable accommodation.

James Meadows's student note[5] examines the nature of employment at-will and concludes that a recent Missouri state appellate court decision[6] improperly authorized recovery for a fraud claim that stemmed from a refusal to employ after an alleged offer of employment. The decision analyzed the possibility of recovery for a plaintiff who spent time and money to prepare himself for a new job that he alleged had been offered to him, but which was withdrawn before he started work. Mr. Meadows notes the difficulty in determining whether fraud claims are sufficiently separate from the underlying at-will employment to be actionable or are so related to the underlying at-will employment that they are barred by the at-will employment doctrine.

Natalie Riley's student note[7] analyzes a recent Missouri state appellate court decision[8] to determine how much job-related mental stress is sufficient to trigger workers' compensation recovery. The court ruled that the proper comparison in determining if the stress suffered by the plaintiff was sufficiently extraordinary for the resulting harm to be compensable under the Missouri workers' compensation statute would be whether the stress suffered by the plaintiff was greater than that suffered by those in positions similar to plaintiffs industry-wide, with particular emphasis on those employed by the defendant.[9] Ms. Riley analyzes whether this choice is appropriate.

These works provide a good entrance into employment law, an area marked by profound clashes between employee rights and employer prerogative and between the employer's right to define a job and the government's right to regulate the employment relationship.

II. FEDERAL EMPLOYMENT STATUTES

The National Labor Relations Act ("NLRA")[10] and ADA limit employer prerogative and provide job protection to employees by constraining the employer's prerogative to set the terms and qualifications for continued employment. For example, the NLRA prohibits employers from affecting an employee's employment, e.g., terminating an employee, because of the

5. James E. Meadows, Note, *Dancing Around Employment At-Will: Can Fraud Provide Plaintiffs a Way to Hold Their Employers Liable?*, 64 MO. L. REV. 1003 (2000).

6. *See* O'Neal v. Stifel, Nicolaus & Co., 996 S.W.2d 700 (Mo. Ct. App. 1999).

7. Natalie D. Riley, Note, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 64 MO. L. REV. 1023 (2000).

8. *See* Williams v. DePaul Health Ctr., 996 S.W.2d 619 (Mo. Ct. App. 1999).

9. *Id.* at 628.

10. 29 U.S.C. §§ 151-169 (1994).

employee's prounion sentiment. That limitation means that an employer has an incentive to create a reason for firing an employee who has been terminated because of prounion sentiment. Professor Hayes's article springs from this area.

Pretext analysis is necessary because employers attempt to exercise prerogative that statutes explicitly limit. Given the broad prerogative normally flowing from the doctrine of at-will employment, the employer's general desire to fire seems acceptable. Thus, Professor Hayes's article is all about determining when an employer has exceeded the bounded prerogative allowed by the NLRA. Because pretext issues arise only after the employment relationship has changed substantially or after the relationship has ended, pretext disputes will always be contentious. How evidence of pretext is treated by the Board will always be a highly contested issue whose resolution must consider fairness to an employee whose views are clearly contrary to his employer's and may have gotten him fired. Professor Hayes's analysis of these issues is strong and will be enlightening to all who must deal with knotty pretext issues. As Professor Hayes's article and the Supreme Court's recent case, *Reeves v. Sanderson Plumbing Products, Inc.*[11] demonstrate, pretext issues in employment will be extant as long as employers arguably ignore the legal restraints on employer prerogative.

The ADA does not allow employers to define a job so that it may only be performed by an employee without a disability, unless the job must be defined in that way. While the employer generally may define its jobs and their respective responsibilities as the employer sees fit, the ADA constrains that prerogative by obligating employers to engage in an interactive process that finds a reasonable accommodation for a worker with a disability who is generally qualified to do a particular job. This may require the employer to redefine certain aspects of its jobs in recognition of the employee's disability. For example, in *Fjellestad v. Pizza Hut of America, Inc.*,[12] the case at issue in Ms. Kingsbury's note, a car accident that severely injured Ms. Fjellestad triggered Pizza Hut's duty to accommodate. Fjellestad had worked for Pizza Hut for more than twenty years and had shown herself able to perform her job successfully for years before her accident. At issue was Pizza Hut's refusal to accommodate Ms. Fjellestad.

Assessing the appropriateness of Pizza Hut's refusal to engage in the accommodation process may depend both on Pizza Hut's duty under the statute and the timing of its decision. Because that process necessarily constrains the employer's prerogative, a refusal to engage in the process may appear to breach the employer's duty under the ADA by allowing the employer to assert prerogative that the statute specifically restricts. In addition, that an employer's action results in an employee's termination may impact how the employer's prerogative meshes with the employee's right. The refusal to engage in an

11. 120 S. Ct. 2097 (2000).
12. 188 F.3d 944 (8th Cir. 1999).

interactive process may appear unreasonable, or at least less reasonable than it would be were the result not the termination of, in Fjellestad's case, a two-decade employment relationship. The refusal to engage in the process, might reflect the employer's desire to control the structure of its job but may also provide an impetus to hold the employer liable for the refusal to engage in the process even if little or no proof exists that engaging in the process would have yielded a reasonable accommodation. In assessing Pizza Hut's actions and the court's response to it, Ms. Kingsbury attempts to resolve this core clash of employer prerogative and employee right under the ADA.

III. STATE EMPLOYMENT DOCTRINES

At-will employment is the ultimate in employer prerogative and the nadir of employee rights. This prerogative allows the employer to construct the job and its requirements in any way the employer sees fit and yields no liability even for termination for distasteful reasons. Consequently, in *O'Neal v. Stifel, Nicolaus & Co.*,[13] the case at issue in Mr. Meadows's note, the possibility that a job offer had been revoked before Mr. O'Neal began work was not inherently problematic, as it was clearly within the employer's prerogative. However, as Mr. Meadows's note makes clear, that prerogative is not unlimited. The employment at-will doctrine is not a defense to fraud, even when the fraud relates to employment. Consequently, even though damages may not flow directly from an employer's exercise of employment at-will rights, damages may flow from fraudulent behavior that merely relates to the employment.

Attempting to distinguish an employer's nonfraudulent exercise of employment at-will rights from the fraudulent exercise of the same rights is at the heart of Mr. Meadows's note. However, fairly determining whether the exercise of employment at-will rights is fraudulent may appear dependent on the timing of such exercise. In *O'Neal*, the decision to withdraw the job offer was made at the beginning of the employment relationship. Thus, the exercise of the employment at-will doctrine, while always harsh, may have seemed most justified at this point in the employment relationship, i.e., before the employment relationship had been shaped by plaintiff's working experiences. Consequently, the court's unwillingness to apply the doctrine at the most justifiable time in the employment relationship may help explain why Mr. Meadows suggests that the court appeared to ignore the employment at-will doctrine and the employer's prerogative completely.

Workers' compensation statutes do not explicitly limit employer prerogative, but implicitly do so by allowing recovery for certain harms caused by working. While employers are free to structure their jobs in any appropriate manner, workers' compensation schemes guarantee that the harm from such structuring will not fall directly on the employee. In *Williams v. DePaul Health*

13. 996 S.W.2d 700 (Mo. Ct. App. 1999).

Center,[14] the case at issue in Ms. Riley's note, the court determined what level of job stress was sufficient to trigger recovery under Missouri's workers' compensation statute when that stress caused mental harm. That question is necessarily related to how the employer structures its jobs and the appropriate constraints on that structuring.

In determining how much stress is sufficiently extraordinary to require that workers' compensation pay for the resulting harm, the *Williams* court had three options. First, the court could have determined that extraordinary stress was any stress more severe than that suffered by an average worker. Second, the court could have determined that extraordinary stress is that which is more severe than that suffered by the average worker performing plaintiff's job throughout the industry. Third, the court could have determined that extraordinary stress is that which is more severe than that suffered by the employer's average worker in the plaintiff's job classification.

The court provides the least constraint on the employer's prerogative in the third case by equating reasonable stress with whatever stress the employer generally exerts on its workers. Conversely, the first and second options constrain the employer by suggesting that the stress all employers exert on their employees helps define the reasonable level of stress for any particular employer. Thus, the employer's exercise of prerogative in structuring its jobs, i.e., the definition of its job solely by its own standards, may yield recovery under the workers' compensation statute. While that may not be a direct constraint on an employer, it might impact how an employer structures its jobs. In analyzing which solution or combination of solutions is most reasonable considering the goals of workers' compensation, Ms. Riley implicitly provides insight into issues of employer prerogative.

IV. CONCLUSION

Each article in this section implicitly or explicitly explores the calibration of employer prerogative and employee rights in its specific context. In doing so, the reader will recognize that the tug-of-war between employee right and employer prerogative will occur even when the applicable statute or rule appears clear. Indeed, the battleground may be more fiercely contested because the applicable rules seem clear. As an employment relationship deepens, the stakes grow higher and the employer's responsibility to the employee may also seem to deepen. Thus, conflicts may become more pronounced and more difficult to resolve. Such is the nature of employment law. This impressive collection of works introduces important employment law issues and raises several issues that will plague employment law well into the future.

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14. 996 S.W.2d 619 (Mo. Ct. App. 1999).