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EMPLOYMENT DISCRIMINATION

Cunico v. Pueblo Sch. Dist., 917 F.2d 431

Author: Judge Theis, sitting by designation

Plaintiff, Cunico, worked for defendant, Pueblo School District (the "District"), as a social worker. When the District began to experience financial difficulties, the need for lay-offs arose. Of the eight social workers, the District kept only the two most senior. Cunico was third in seniority and was consequently fired. The District later rehired a minority as a means of furthering its affirmative action program. Cunico subsequently brought an action pursuant to 42 U.S.C. § 1983, alleging she was discriminated against by the District. The District appealed the district court's order granting relief to Cunico.

The Tenth Circuit affirmed the judgment of the district court. The court noted that the purpose of a race-conscious affirmative action program must be to remedy the effects of past discrimination against a disadvantaged group. Because the District could not establish a past record of discrimination giving rise to the need for an affirmative action program, the decision to retain the minority social worker solely on the basis of race was impermissible.

Derstein v. Kansas, 915 F.2d 1410

Author: Judge Seth

Plaintiff, Derstein, brought a civil rights suit against three state district court judges, alleging he was unlawfully terminated from his job as a court services officer in response to allegations of sexual harassment. The district court ruled in favor of Derstein, awarding him damages for lost income, and mental and emotional distress. Derstein was also reinstated as a state employee. The judges appealed, claiming that: (1) the district court erred in denying their claims for qualified immunity; (2) Derstein had no protected property interest; (3) they were entitled to eleventh amendment immunity; and (4) the damage award was not supported by substantial evidence. Derstein cross-appealed, claiming he was denied a liberty interest.

The Tenth Circuit reversed the district court's ruling in favor of Derstein. The court ruled that Derstein was provided due process because he was not discharged until ten days after receiving notice of the charges against him. Accordingly, the court stated that it need not address the judges' remaining claims on appeal. The court also dismissed Derstein's cross-appeal because no liberty interest was impinged when he publicized the circumstances of his discharge.

DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377

Author: Judge Tacha

Plaintiff, DeVargas, brought a civil rights suit against defendants, Mason & Hanger-Silas Mason Company, Incorporated ("Mason & Hanger"), contract suppliers of security services to Los Alamos National Laboratories ("LANL") and individual managers of LANL. DeVargas argued defendants violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 when they refused to hire him for a security inspector position because of a physical handicap. The district court granted summary judgment in favor of Mason-Hanger and the managers of LANL.

The Tenth Circuit affirmed the grant of summary judgment to Mason & Hanger, holding that section 504 did not apply to the company. Section 504 prohibits discrimination against handicapped persons by "any program or activity receiving financial assistance." The court explained that since Mason & Hanger received a competitive bid contract to provide security services, it was not the recipient of a government subsidy. The court also upheld the grant of summary judgment to the individual LANL managers. The court explained that the district court properly relied upon *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), which held that section 504's prohibition against discrimination extended only to specific programs receiving federal assistance. The district court appropriately determined that Mason & Hanger, not LANL, employed a specific program that discriminated against DeVargas. The court found no congressional intent to give retroactive application to the Civil Rights Restoration Act of 1987.

Hill v. Goodyear Tire & Rubber, Inc., 918 F.2d 877

Per Curiam

Plaintiff, Hill, brought suit against defendant, Goodyear Tire & Rubber, Incorporated ("Goodyear"), under 42 U.S.C. § 1981. Hill contended that Goodyear discharged him in retaliation for his civil rights advocacy and discharged him because of his race. The jury found in favor of Goodyear, and Hill appealed the following district court rulings: (1) denying an injunction against Goodyear's maintenance of a hostile work environment; (2) refusing to give three jury instructions concerning Hill's claim for hostile work environment; (3) directing a verdict on Hill's claim for retaliatory discharge on the basis that retaliation does not state a claim for relief under § 1981; and (4) admitting evidence of Hill's bad character. Hill also alleged that there was insufficient evidence to support the jury's verdict in favor of Goodyear.

The Tenth Circuit ruled that the district court properly refused to issue an injunction against Goodyear or instruct the jury on Hill's hostile work environment claim. Moreover, the district court properly refused to submit Hill's retaliatory discharge claim to the jury because Hill's discharge, even if in retaliation for his civil rights advocacy, was not action-

able under § 1981. Further, the court declined to decide whether discriminatory discharge claims were still actionable under § 1981. Finally, the admission of evidence concerning Hill's character was not plain error, and the record contained substantial evidence to support the jury's verdict.

Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572

Author: Judge Ebel

Plaintiff, Hirschfeld, brought suit against the New Mexico Corrections Department ("NMCD") alleging gender-based discrimination, retaliation for complaints of sexual harassment, and constructive discharge. Hirschfeld alleged that while working at NMCD, the Captain of the security officers made unwelcome sexual advances. The district court found that the Captain was an agent of the NMCD and found that his conduct created a hostile work environment. The district court ruled, however, that NMCD was not liable for its employee's conduct, reasoning that the sexual harassment was not aided by the agency relationship. Hirschfeld subsequently appealed.

The Tenth Circuit affirmed the district court's dismissal of Hirschfeld's complaint. The court identified three alternative bases for holding an employer liable for an agent's creation of a hostile work environment: (1) the agent is acting within the scope of his employment; (2) the employer fails to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known; or (3) the agent, although acting outside the scope of his authority, purported to act or speak on behalf of the employer and there was reliance upon the apparent authority. The court found no liability under any of these tests. First, the court ruled that the district court properly held NMCD not liable under the first test because the Captain was not acting within the scope of his employment in his actions towards Hirschfeld. Furthermore, the district court correctly held no liability under the second test because NMCD took prompt remedial action after receiving notice of the sexual harassment. Specifically, the Captain was demoted. Third, the court ruled that there was no evidence indicating that the Captain had any supervisory authority over Hirschfeld's position. Accordingly, the Captain did not act or speak on behalf of NMCD. Thus, there was no employer liability under the third test. Finally, the court ruled that the district court properly dismissed Hirschfeld's constructive discharge claim. The district court's decision that Hirschfeld's evidence was not credible was not clearly erroneous.

Krause v. Dresser Indus., Inc., 910 F.2d 674

Author: Judge Logan

Plaintiff, Krause, was terminated at age fifty-two after being employed by defendant, Dresser Industries Incorporated ("Dresser"), for over twenty-five years. Krause filed suit claiming: (1) age discrimina-

tion; (2) violation of the Employment Retirement Income Security Act ("ERISA"); and (3) breach of an implied employment contract. The jury returned a verdict for Krause on all three claims. Dresser appealed, challenging the sufficiency of the evidence to support the verdicts.

The Tenth Circuit affirmed the decision of the district court. The court reasoned that the evidence produced allowed a reasonable jury to determine that age was a determining factor in Krause's termination of employment, and that Dresser breached an implied contract with Krause. The court explained that Krause offered sufficient evidence to rebut Dresser's non-discriminatory explanation for termination. Also, there was sufficient evidence to establish an implied promise that Krause would not be terminated until after employees of lower seniority were terminated. The court also ruled that since a breach of contract claim solely for lost salary is unrelated to an employee benefit plan, Krause's contract claim was not preempted by ERISA.

Marshall v. TRW, Inc., 900 F.2d 1517

Author: Judge McWilliams

Plaintiff, Marshall, brought a retaliatory discharge action against his employer, TRW Incorporated ("TRW"). Specifically, Marshall claimed that TRW terminated his employment because he filed a workers' compensation claim arising out of injuries sustained in the course of employment. The jury found in favor of Marshall for \$150,000 in actual damages and \$125,000 in punitive damages. Also, since there was hostility in the work place, reinstatement was found to be an inappropriate remedy. Instead, the district court awarded \$250,000 in future damages. TRW subsequently appealed, alleging: (1) Marshall's state tort claim of retaliatory discharge was pre-empted by § 301 of the Labor Management Relations Act; (2) there was no evidence of hostility in the work place, and in any event, the evidence does not support an award of \$250,000 in future damages; (3) the punitive damage award should be reduced to \$100,000; and (4) the district court erred in excluding evidence concerning the availability of the arbitration remedy.

The Tenth Circuit affirmed the district court's rulings, except the judgment for future damages. First, the court stated that Marshall's state tort claim was not pre-empted by § 301. The court reasoned that whether Marshall's discharge was retaliatory did not involve interpretation of the collective bargaining agreement ("CBA"). Thus, since the state-law remedy was independent of the CBA, there was no pre-emption by any federal labor laws. Second, the court reversed the judgment awarding future damages. The court stated that there was nothing in the record to support a finding of hostility. Third, the court ruled that the punitive damages were appropriate. The court stated that Oklahoma's cap on punitive damages awards in retaliatory discharge actions does not apply retroactively to an action commenced before the statute's effective date. Finally, the court stated that the availability of

arbitration was immaterial. The court reasoned that the state law remedy was independent of remedies provided for in the CBA.

Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306

Author: Judge Logan

Plaintiff, Messina, brought suit against Kroblin Transportation Systems, Incorporated ("Kroblin") claiming he was unlawfully terminated in violation of the Age Discrimination in Employment Act ("ADEA"). Messina's action also contained a pendent state law slander claim. The jury found in favor of Kroblin, and he subsequently appealed. On appeal, Messina contended the district court erred in instructing the jury. He alleged the instruction incorrectly required him to prove the ultimate question of the trial, whether age was the determinative factor in his discharge. Second, Messina alleged the district court erred in directing a verdict against him on his slander claim. Finally, Messina argued the district court erred on failing to admit into evidence the conduct of certain defense witnesses who violated a sequestration order.

The Tenth Circuit affirmed the district court's rulings. The jury instruction was not improper. The court explained that the instruction did not mislead the jury. Moreover, the court stated that it only reverses a jury instruction when it has a substantial doubt that the jury was fairly guided in its deliberations. Furthermore, the court found that the district court properly held against Messina on his slander claim. The court explained that Messina failed to satisfy the requirement that the slanderous statements be communicated to others beside the plaintiff. It reasoned that the slanderous statements in question were made by one corporate employee during the performance of his duties within the hearing of other corporate employees. This does not constitute publication. Finally, the district court properly balanced the interests of Messina in presenting his case with the prejudice that would arise if the jury knew that the witness misconduct caused a new trial. Moreover, the district court allowed Messina to cross examine the witnesses who violated the sequestration order.

Mitchell v. Mobil Oil Corp., 896 F.2d 463

Author: Judge Moore

Plaintiff, Mitchell, filed suit claiming that when defendant, Mobil Oil Corporation ("Mobil") raised the eligibility threshold for lump-sum payments, it forced him to take early retirement. Consequently, Mitchell argued that Mobil violated the Age Discrimination in Employment Act ("ADEA") and the Employment Retirement Income Security Act ("ERISA"). The district court entered judgment for Mitchell on the ADEA claim and ruled in favor of Mitchell on the ERISA claims. On appeal, Mobil contended that Mitchell did not meet his burden of proof on the age discrimination claim, and that he did not have standing to seek relief under ERISA.

The Tenth Circuit agreed with Mobil and reversed the decision of

the district court. The court explained that when an employee has established a *prima facie* case of age discrimination by constructive discharge, the employer may rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory business reason for its conduct. To prevail, the employee must then prove that the employer's proffered justification is a mere pretext for discrimination. Mitchell failed to do this. The court reasoned that his claim of pretext was based on an unsupported inference that Mobil changed its benefit plan to avoid the redundancy created by its forthcoming merger with another oil company. The court rejected this inference. Moreover, Mitchell did not have standing to seek relief under ERISA because he was no longer a participant of an employee benefit plan after taking a lump-sum distribution.

Polson v. Davis, 895 F.2d 705

Author: Judge Logan

Plaintiff, Polson, an employee of Kansas City, Kansas, contended that her relationship with defendant, Davis, deteriorated after she objected to his alleged discriminatory hiring policies. Polson was fired for "unprofessional conduct." Polson subsequently brought suit under various employment discrimination claims. The district court held for Davis, and Polson appealed. On appeal, Polson contended that the district court erred when it: (1) failed to instruct the jury on the theory of defamation *per se*, which does not require proof of actual damages; (2) granted summary judgment to Davis on her state retaliatory discharge claim; (3) granted summary judgment to Davis on her claim that the City was negligent in supervising her immediate superior, Davis; (4) rejected her Title VII claim, finding the statute's enforcement provisions to be the exclusive remedy for employment discrimination suits premised on its violation; and (5) refused to grant a new trial based on instances of improper testimony.

The Tenth Circuit found that the Kansas Supreme Court abolished the distinction between defamation *per quod* and defamation *per se*, and that defamation could no longer be presumed, but must be established by proof. Second, the court held that Polson's situation could not be classified under the public policy exception to the employment-at-will doctrine since the alternative remedy under the Kansas Acts Against Discrimination was adequate. Thus, summary judgment on her state retaliatory discharge claim was proper. Third, the court found that the negligent supervision cause of action did not exist in Kansas. Fourth, although the court agreed that Polson could bring a § 1983 claim on actions proscribed by Title VII if those actions also violated the Constitution, the jury's finding that Polson's termination did not violate equal protection resolved this issue against her. Finally, the court ruled that the improper testimony did not deny justice, and Polson's prior refusal of a mistrial barred her from seeking a new trial.

Spulak v. K Mart Corp., 894 F.2d 1150

Author: Judge Seymour

Plaintiff, Spulak, brought suit against K Mart Corporation ("K Mart") under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, alleging that defendant, K Mart, illegally discharged him because of his age. He also asserted a pendant state claim for age discrimination and for extreme and outrageous conduct. Spulak prevailed on the ADEA claim and was awarded back pay, liquidated damages, and front pay in lieu of reinstatement. K Mart subsequently appealed. The issues on appeal were whether Spulak established a violation of ADEA and whether the damages awarded were appropriate.

The Tenth Circuit affirmed the decision of the district court. The court accepted the findings of the district court that Spulak was singled out for unduly harsh and discriminatory treatment, and that he established a case of constructive discharge. Moreover, the court found that his age, his employment record, and his constructive discharge established a *prima facie* case of age discrimination. The court also approved the district court's award of damages. Liquidated damages were appropriate because age discrimination was the predominant motive for Spulak's constructive discharge. Reinstatement, rather than front pay, is the preferred remedy. It was not appropriate in this case, however, because K Mart exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship was impossible.

Torrez v. Public Serv. Co., 908 F.2d 687

Author: Judge Jones, sitting by designation

Plaintiff, Torrez, appealed the district court's order granting summary judgment in favor of defendant, Public Service Company of New Mexico ("PNM"). The district court found that the signing of a release by Torrez at the termination of his employment constituted a knowing and voluntary waiver of his right to bring an employment discrimination suit. On appeal, Torrez argued that: (1) the district court considered only the language of the release, and not the totality of the circumstances; (2) he did not knowingly and voluntarily waive his right to bring a discrimination action; and (3) his intent and understanding should not have been decided by summary judgment.

The Tenth Circuit held that the district court erred in granting summary judgment for PNM. The court reasoned that the totality of the circumstances was not considered. Pursuant to Fed. R. Civ. P. 56(c), summary judgment should only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In assessing the totality of the circumstances, the court concluded that there were material issues. For example, the release failed to specifically mention waiver of employment discrimination claims. Furthermore, Torrez did not consult with an attorney before he signed the release, nor did PNM advise him to do so. Moreover, Torrez

did not have the opportunity to negotiate terms of the standard release form; in fact, he was required to sign it. Finally, Torrez testified that he viewed the release as releasing only those claims arising out of the termination plan. He did not understand the release, however, to be a bar to bringing a discrimination claim.

Baker v. The Weyerhaeuser Co., 903 F.2d 1342

Author: Judge McWilliams

Plaintiff, Baker, brought two causes of action against her employer, The Weyerhaeuser Company ("Weyerhaeuser"), as a result of being sexually harassed by a fellow employee. First, she alleged that pursuant to Title VII, 42 U.S.C. § 2000(e), Weyerhaeuser knowingly allowed sexual harassment in the workplace, thereby creating a hostile environment. Baker's second cause of action was that Weyerhaeuser inflicted emotional distress by outrageous conduct. The district court entered judgment for Baker on both causes of action, and Weyerhaeuser subsequently appealed.

The Tenth Circuit affirmed the decision of the district court. First, the district court's decision that Weyerhaeuser violated Title VII was supported by the record. There was pervasive sexual harassment of Baker by a coworker. Weyerhaeuser, through Baker's supervisors and others, knew or should have known of the harassment and failed to take corrective measures. The court also affirmed the intentional infliction of emotional distress determination. The court explained that the district court properly declined to base Weyerhaeuser's liability on the theory of *respondeat superior*. This would have required a finding that the coworker's harassment was committed in the course of, and in furtherance of, his employment. Rather, the district court properly premised liability on Weyerhaeuser's own conduct, namely, its utter failure to take action against the coworker.