

GEORGIA EMPLOYMENT LAW CASE UPDATE

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TITLE VII: KNOWING AND VOLUNTARY RELEASE

Myricks v. Federal Reserve Bank of Atlanta, ___ F.3d ___, 2007 WL 675341 (11th Cir. 2007).

Dwight Myricks, a former employee of the Federal Reserve Bank, filed a complaint of race discrimination under Title VII. During that lawsuit, the bank restructured its operations and eliminated approximately 200 jobs, including Myricks's job. All employees were offered a choice between two severance packages: one year of salary and enhanced retirement benefits in exchange for a release of claims or two weeks of salary continuation without a release.

The bank sent a draft of the release to Myricks's attorney, along with a letter explaining that the release was intended to settle Myricks's pending lawsuit. Myricks and his attorney tried to negotiate a more generous severance package over the next two months, but they could not reach an agreement with the bank. On the last day of the severance offer, Myricks signed the severance agreement without any alterations. The bank then sought a judgment of dismissal of the pending lawsuit.

Myricks argued that the release did not prevent him from continuing with his lawsuit because it was not knowing and voluntary. Specifically, he argued that, because he and the bank were attempting to negotiate a more generous settlement package, the jury could infer that he did not understand that his execution of a severance agreement available to all employees would compromise his pending lawsuit. The Court of Appeals rejected this argument, however, and held that "an employee's decision to consult an attorney before signing a clear release creates a presumption that the release is enforceable." Since Myricks consulted with a lawyer and had over two months to review the release, this created a presumption of enforceability. "A genuine issue of fact may exist when an employee has not been given enough time to review the agreement after being terminated, is not educated enough to understand the waiver, or is misled to believe that the release was necessary to prevent the employer from taking an unlawful action, but an educated employee with ample time to consider an agreement cannot profess ignorance about its clear terms after consulting an attorney." Since Myricks presented no other evidence rebutting this presumption of a knowing and voluntary release, the bank was entitled to summary judgment.

TITLE VII: RETALIATION; PRETEXT

Crawford v. City Of Fairburn, ___ F.3d ___, 2007 WL 926052 (11th Cir. 2007).

A former police officer brought suit against the City of Fairburn alleging that he was forced to resign in retaliation for conducting an internal investigation of a female officer's complaints of sexual harassment. The City claimed it terminated Crawford's employment because it was dissatisfied with his work performance. Specifically, the City produced evidence that Crawford was terminated for five nondiscriminatory reasons: inaccuracy of his investigation of the female officer's complaints of harassment, problems with patrols and traffic stops on Interstate 85, complaints relating to officer pay, problems with dispatchers, and complaints of low morale and favoritism.

On appeal, Crawford did not attempt to rebut any of these reasons. Instead, he presented evidence that the City Administrator said Crawford's investigation of the female officer's complaints opened up a "can of worms" and was going to get the City sued. Crawford also pointed to a statement by the Administrator to the Chief of Police that the inaccuracy of the investigation was one reason Crawford was terminated. Crawford argued that, even though neither of these statements raised questions about the truthfulness of the City's proffered reasons, they were sufficient to create a triable issue of pretext because the suggested retaliatory animus.

The Court disagreed, however, and held that evidence of discriminatory or retaliatory animus alone does not allow a plaintiff to establish pretext without rebutting each legitimate, non-discriminatory reason proffered by an employer. Since Crawford produced no other evidence concerning the truthfulness of the City's proffered reasons, he failed to create a triable issue of pretext, and the Court affirmed summary judgment for the City.

TITLE VII: LEGITIMATE, NON-DISCRIMINATORY REASON

TITLE VII: SEXUAL HARASSMENT; TIMELINESS

Chambless v. Louisiana-Pacific Corp., ___ F.3d ___, 2007 WL 865854 (11th Cir. 2007).

Beverly Chambless alleged that Louisiana-Pacific denied her promotions due to her age and gender, subjected her to a sexually hostile work environment, and retaliated against her in violation of Title VII and the ADEA. Louisiana Pacific told Chambless she was disqualified from consideration for the promotion because of her failure to properly complete Family Medical Leave Act paperwork during sick leave. Chambless claimed that Louisiana-Pacific only created the FMLA paperwork requirements to deny her the promotion based on her gender and age. She further alleged that numerous instances of sexual harassment occurred during her employment, including sexual touching, jokes, and propositions by male employees.

Chambless first argued that Louisiana-Pacific's claim that she improperly filled out sick leave paperwork was a violation of the FMLA and, therefore, could not be a legitimate reason for its decision. The Eleventh Circuit rejected this argument, however, because proof that Louisiana-Pacific violated the FMLA was irrelevant to the inquiry into whether Louisiana-Pacific discriminated against Chambless based on her protected traits. "A disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." In this regard, Chambless's allegations of an FMLA violation did not raise questions about whether her gender or age was a factor in the employment decision.

Chambless also appealed the magistrate's holding that her sexual harassment claim was untimely. The discrete acts of harassment alleged by Chambless, that were actionable as unlawful employment practices, such as Louisiana-Pacific's failure to promote and retaliation, fell within the limitations period. However, the non-discrete acts making up Chambless's hostile work environment claim, which were not individually actionable, fell outside the limitations period. The magistrate judge determined that the timely discrete acts of discrimination could not save the untimely non-discrete acts, and the Eleventh Circuit agreed.

“Where the discrete act is sufficiently related to a hostile work environment claim so that it may be fairly considered part of the same claim, it can form the basis for consideration of untimely, non-discrete acts that are part of the same claim. The pivotal question is whether the timely discrete acts are sufficiently related to the hostile work environment claim.” In this case, the Court concluded that the discrete acts alleged by Chambless did not meet that test. “The circumstances surrounding Louisiana-Pacific’s failure to promote and retaliation against Chambless do not suggest that those discrete acts were the same type of discriminatory intimidation, ridicule, and insult that characterized the untimely allegations. The timely discrete acts are thus not part of the sexual harassment hostile work environment claim and therefore cannot save the earlier, untimely acts that comprise that claim.”

TITLE VII: FARAGHER/ELLERTH DEFENSE

Baldwin v. Blue Cross/Blue Shield of Alabama, ___ F.3d ___, 2007 WL 805528 (11th Cir. 2007).

Susan Baldwin worked as a marketing representative for Blue Cross/Blue Shield, and claimed that she was subjected to sexually harassing behavior by her supervisor, Scott Head. According to Baldwin, Head frequently called her “babe” and used profanity in the office. She also claimed Head sexually propositioned her twice and unzipped his pants in front of her.

Baldwin did not complain about the alleged harassment for over three months because she claimed to be fearful of losing her job and because she decided to “just go along to get along.” When she did complain, Blue Cross investigated her allegations by interviewing Baldwin, Head, and three other office employees. None of them corroborated Baldwin’s allegations. Blue Cross gave a warning to Head that if the conduct was true or was proven true in the future, he would be subject to disciplinary action. Blue Cross also offered to provide an industrial psychologist to counsel Baldwin and Head and monitor their interactions to prevent any future problems. Baldwin refused this offer and insisted that she could no longer work with Head. The company then offered to transfer Baldwin to another office, which she again declined. These options were presented to Baldwin on two other occasions, but she refused both times. After Baldwin refused to return to work, Blue Cross demanded that Baldwin resign, and when she did not, it terminated her employment.

The Court of Appeals did not rule on whether Head’s sexual propositions and sexually-oriented conduct toward Baldwin created a hostile work environment because, even if it did, Blue Cross established that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that Baldwin unreasonably failed to take advantage of the preventative and corrective opportunities it provided. Baldwin did not dispute that she was aware of the company’s anti-harassment policy and complaint procedure, but claimed Blue Cross could not establish the Ellerth/Faragher defense because its investigation of her allegations was inadequate.

The court rejected Baldwin’s claim that the investigation was unreasonable for two reasons. First, it said “there is nothing in the Faragher or Ellerth decisions requiring a company to conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment. All that is required of an investigation is reasonableness in all of the circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company’s business[.]” Blue Cross satisfied this standard by

interviewing Baldwin, Head, and the three other employees. Second, even if the investigative process was somehow defective, the court held that Blue Cross's investigation was reasonable because it provided adequate remedial opportunities. Specifically, the court held that the warning to Head and its offer of counseling was sufficient remedial action, and that "a reasonable result cures an unreasonable process." In this regard, the Court further explained that "where the employer sees hostility but cannot tell if there has been harassment, warning the alleged harasser, requiring both parties to participate in counseling, and monitoring their interactions is a proper and adequate remedy, at least as a first step."

The second element of the Faragher/Ellerth defense was also satisfied because Baldwin unreasonably failed to take advantage of Blue Cross's preventative and corrective opportunities. Initially, it was unreasonable for Baldwin to reject the company's offers of counseling and office transfer. Even if she had not refused, however, her failure to report her allegations sooner would also have satisfied this element. The court held that Baldwin's three-month delay was "anything but prompt, early, or soon," and rejected her argument that her delay was reasonable because she feared being fired and felt that silence would best serve her career interests. Were it otherwise, the court explained, the Faragher/Ellerth defense "would largely be optional with plaintiffs[.]"

FELA: STANDARD OF CAUSATION

Norfolk Southern Ry. Co. v. Sorrell, 127 S. Ct. 799 (2007).

Sorrell was injured while working for the Norfolk Railroad, and he sought damages for his injuries in Missouri state court under the Federal Employers' Liability Act. FELA makes a railroad liable for an employee's injuries "resulting in whole or in part from [the railroad's] negligence," but reduces any damages awarded to an employee in proportion to the amount of negligence attributable to the employee.

Missouri's jury instructions applied different causation standards to railroad negligence and employee contributory negligence in FELA actions. An employee would be found contributorily negligent if his negligence "directly contributed to cause" the injury, while railroad negligence was measured by whether the railroad's negligence "contributed in whole or in part" to the injury. On appeal, the railroad argued that these jury instructions were improper and that the same causation standard should apply to railroad negligence and employee contributory negligence under FELA. The Supreme Court agreed.

Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law, and unless common-law principles are expressly rejected in FELA's text, they are entitled to great weight. The Supreme court observed that the prevailing common-law view at the time FELA was enacted was that the causation standards for negligence and contributory negligence were the same, and that FELA did not expressly depart from this approach. A review of FELA model instructions showed the Court that there are a variety of ways to instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence. The Supreme Court explained that states have flexibility in deciding how to make such instructions, but they must do so in a manner that applies a single standard of causation. As such, case was remanded to the Missouri Court of Appeals to address Sorrell's

argument that any error in the jury instructions was harmless, and whether a new trial was required.

SECTION 1981: MINISTERIAL EXCEPTION

Ross v. Metropolitan Church of God, 471 F. Supp. 2d 1306 (N.D. Ga. 2007).

Dennis Ross, an African American, was hired as the Minister of Worship Arts at the Metropolitan Church in Cumming, Georgia. The job involved leading the Metropolitan Worship Arts Department, conducting musical activities at the church, and assisting in the production of CDs, videos, and other products. Ross alleged that, upon starting his employment, Pastor Ramsey made racially derogatory comments to him and expressed dissatisfaction with Ross's music, telling him that "this is a white church, Shirley Caesar music won't work here," and "since you've come, the church is experiencing white flight." Shortly thereafter, Pastor Ramsey terminated Ross.

Ross sued Pastor Ramsey and the church for race discrimination under § 1981. The defendants moved to dismiss based on the ministerial exception, which holds that the Free Exercise and Establishment Clauses of the First Amendment prohibit a church from being sued by its clergy for decisions relating to its internal management and administration. The court agreed.

Despite its name, the ministerial exception is not limited to the minister-church relationship. If the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, or if the position is important to the spiritual and pastoral mission of the church, then the employee may be considered a "minister" for purposes of the ministerial exception. Applying this analysis, the court said it had "little difficulty in concluding" that Ross's § 1981 claim was barred by the ministerial exception. His duties of supervising the Worship Arts Department and directing the musical affairs of the church involved "church governance" and "supervision or participation in religious ritual and worship," and were thus ecclesiastical in nature. Accordingly, the court dismissed the claim on the basis that any other decision would require it to unconstitutionally encroach into the internal affairs of church management.

STATE LAW: NEGLIGENT HIRING

Underberg v. Southern Alarm, Inc., ___ S.E.2d ___, 2007 WL 704589 (Ga. App. 2007).

Kelly Underberg was kidnapped at gunpoint by Bert Fields, a convicted violent felon who had once worked for Southern Alarm as a "promotions representative" selling home security systems door-to-door. Southern Alarm did not perform a background check before hiring Fields, which would have revealed that he had been convicted of burglary and kidnapping in South Carolina in 1979, sentenced to life in prison, and paroled in 1995.

Underberg previously wrote her name, address, and telephone number on a form that asked whether she was interested in having someone contact her about installing a security system. On two occasions, Fields knocked on Underberg's door and asked to come in and speak with her about an ADT system. She declined both times, explaining that she was busy, and asked him to return another time. Underberg also testified that, during this period of time, Southern Alarm's

name and telephone number appeared on her caller identification system “a lot,” and Southern Alarm was the only ADT franchise that ever tried to contact her. One day Underberg went home from work early and found Fields in her home. Fields identified himself as “the ADT salesman,” and then bound her with duct tape, placed her in her own car, and took her to South Carolina. After Underberg promised to give him \$6,000, Fields drove her home.

Underberg appealed the trial court’s conclusion that Southern Alarm’s failure to perform a background check on Fields was not a proximate cause of her kidnapping. Since the kidnapping did not occur within Fields’s working hours, the issue was whether Fields abducted Underberg “under the color of employment,” or under circumstances “wholly unrelated” to his employment. The Court of Appeals adopted rationale from cases in other jurisdictions that neither termination of the employment relationship nor the passage of time necessarily break causal connection as a matter of law. In this regard, the Court said that “[w]hether the employment-related contact and the later event in which the injuries occur are so separated by time or other circumstances that the former cannot reasonably be said to be a substantial factor in producing the result complained of depends upon the facts in each case.”

The Court concluded that circumstantial evidence existed from which a jury could infer that Fields’s contact with Underberg was employment-related. Promotions representatives like Fields were encouraged to contact friends and neighbors on their own time to sell ADT security systems. Underberg and Fields resided in the same small town, and the security system policy empowered him to contact her. Also, since Underberg filled out a form with personal information that she placed in a box earmarked for Southern Alarm and/or ADT, and since Underberg reported multiple telephone contacts by Southern Alarm, a jury could infer that Southern Alarm had given Underberg’s contact information to Fields as a potential lead. For these reasons, summary judgment was not appropriate, and the case was remanded to the trial court.

STATE LAW: MASTER AND SERVANT; SCOPE OF EMPLOYMENT

Marwede v. EQR/Lincoln Ltd. Partnership, __ S.E.2d __, 2007 WL 641527 (Ga. App. 2007).

Mandy Mancini was employed as the managing agent for an apartment complex. Her office was located on the premises, and she also lived in one of the apartments in the complex and received a rent reduction as a part of her job, but she was not required to live on-site. Mancini left work one afternoon and drove the short distance to her apartment-home in her own car. She was off work and not planning to return. The leasing office was located in the “Clubhouse” of the complex, and her apartment was located two apartment buildings away, each of which had its own road or drive. She drove around the end of the building in which the Clubhouse was located, then past the first apartment building. Mancini was just beginning to turn onto the road to her apartment building when she saw a pedestrian, Katherine Marwede, and slammed on her brakes. Marwede fell to the ground and was injured. The parties disputed whether Mancini’s car actually struck Marwede.

Marwede appealed the jury’s finding that the apartment complex was not liable for Marwede’s injuries because Mancini was not acting within the scope of her employment at the time of the accident. Marwede argued that, while an employee generally is deemed to act only for his own

purposes while commuting to or from work, an exception to this rule is that “the period of employment generally includes a reasonable time for ingress to and egress from the place of work, while on the employer’s premises.” This exception is predicated on the rationale that, until the employee has actually departed the premises, he has not started traveling on a route of his choosing that is wholly disconnected from his employment.

In this case, Marwede argued that the ingress/egress exception meant that an employee who is on property owned, managed, or operated by her employer is necessarily acting within the scope of employment as a matter of law. The Court of Appeals disagreed with such a bright-line interpretation, however. As the Court explained, the exception is based on an assessment of reasonable time: the period of employment generally includes a reasonable time for ingress to and egress from the place of work, while on the employer’s premises. The corollary of this rule is that lingering on the job site after work may mean that an employee is acting for personal benefit and not within the scope of employment. As such, the issue of whether an employee is acting within the scope of employment remains a fact-specific inquiry, and mere presence on an employer’s property does not establish that an employee is acting within the scope of employment, even if the employee is departing the premises. Accordingly, the Court of Appeals held that the jury was authorized to find that Mancini was not acting within the scope of her employment at the time of the incident.