

Georgia Employment Law Update
By David A. Cole
Freeman Mathis & Gary, LLP

First Amendment

Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007).

Internal complaints about caseloads by two case workers were not constitutionally protected speech that shielded them from transfer or termination because, in filing the complaints, they spoke as employees to improve their work environment, not as citizens addressing a matter of public concern.

The plaintiffs worked as case workers for the DeKalb County Department of Family and Child Services (“DeKalb DFCS”) who frequently complained to their supervisors that their case loads were too high. One plaintiff was fired after she was placed on a performance plan and failed to meet her quota for closing cases. The other requested and received a transfer, but it resulted in a five percent reduction of her salary. They filed suit under § 1983, alleging that their termination and transfer were in retaliation for protected First Amendment speech. The district court denied the defendants’ motion for summary judgment on qualified immunity grounds, which the defendants challenged on interlocutory appeal.

The Eleventh Circuit stated that, following Garcetti v. Ceballos, the First Amendment does not protect government employees when they speak as employees as opposed to citizens; to be protected speech, an employee must speak as a citizen on a matter of public concern. The plaintiffs argued that they spoke as citizens on a matter of public concern because children could be mistreated or die because they were overworked and could not handle all cases assigned to them. However, none of the plaintiffs’ complaints specifically identified a single child who was in danger. Therefore, the court concluded that “the form and context in which the complaints by Boyd and Robinson were made are indicative of the fact that they intended to address only matters connected with their jobs at DeKalb DFCS.” Therefore, the plaintiffs “spoke as government employees about their jobs and not as citizens,” and they had no First Amendment cause of action based on the their employer’s reaction to the speech.

Legitimate, non-discriminatory reason

Springer v. Convergys Customer Mgmt. Group, Inc., 509 F.3d 1344 (11th Cir. 2007).

For purposes of articulating a legitimate, non-discriminatory reason, it was unnecessary for the plaintiff to have actually been considered for position, where the decision maker had first-hand experience with the plaintiff and believed she was not a good candidate.

A long-term African-American employee filed an action against her employer alleging a racially discriminatory failure to promote under §1981. In moving for summary

judgment, the employer conceded that the plaintiff established a *prima facie* case, but argued that it promoted another employee over the plaintiff for the legitimate and non-discriminatory reason that the other employee was more qualified. The plaintiff claimed, however, that the promotion opportunity was never posted, as required by company policy. As such, she argued that the company should be precluded from relying on superior qualifications as a legitimate, non-discriminatory reason because she was not considered for the promotion.

Indeed, the decision maker testified that she did not consider the plaintiff a candidate for the promotion. The Eleventh Circuit noted, however, that the decision maker's testimony, when read in context, indicated only that her familiarity with the plaintiff's qualifications and prior work performance led her to the conclusion that the plaintiff was not a good candidate for the position. A subjective impression of respective candidates, provided there is a clear and reasonably specific factual basis for it, is a permissible reason for employment action. Accordingly, there was no genuine issue of material fact that the company selected what it considered to be the superior candidate for the position, and the court affirmed summary judgment.

Rehab Act: qualified individual with disability

Garrett v. Univ. of Alabama at Birmingham, 507 F.3d 1306 (11th Cir. 2007).

Employee receiving treatment for breast cancer failed to establish that she was a qualified individual with a disability under the Rehabilitation Act because the periods of her impairment were short term and did not substantially limit her in a major life activity.

The plaintiff was diagnosed with breast cancer and underwent two surgeries. In the following months, she underwent radiation therapy and a course of chemotherapy treatments. At work, she completed all her duties, but required additional time and took frequent breaks. The plaintiff also experienced periodic episodes of diarrhea during her radiation therapy, which sometimes affected her at work. At home, the plaintiff experienced difficulty sleeping, and her husband performed the household tasks of cleaning, laundry, shopping, and cooking.

The plaintiff argued that the side effects of her treatment for cancer disabled her by substantially limiting her in the major life activities of caring for herself, performing manual tasks, lifting, and working. The Eleventh Circuit disagreed, reasoning that the most severe periods of limitation that the plaintiff suffered during her cancer treatment were short-term, temporary, and contemporaneous with her treatment. A severe limitation that is short term and temporary is not evidence of a disability. Additionally, evidence of the plaintiff's impairments and limitations at the time of litigation, several years after the employment decision at issue, are irrelevant. "Since the disability must be the cause of the discrimination, the requirement that a person must presently be substantially limited necessarily means that the person must be substantially limited in a major life activity at the time of the discrimination, and not several years later."

Temporal proximity: causal connection

Thomas v. Cooper Lighting, Inc., 506 F.3d 1306 (11th Cir. 2007).

When temporal proximity alone is relied upon to establish a causal connection between alleged protected activity and adverse action, the proximity must be “very close” to withstand a motion for summary judgment.

The plaintiff complained of sexual harassment by a supervisor in writing to his company’s human resources department. Approximately three months later, he was terminated for excessive absenteeism under the company’s “no fault” absenteeism policy. Among other things, the plaintiff filed a Title VII retaliation claim against the company, claiming that his termination was in retaliation for his prior complaint of sexual harassment. The district court granted summary judgment to the employer on the basis that the employee’s allegations “did not come close to the threshold of a hostile work environment required by Title VII,” and thus did not constitute protected activity because he did not have an objectively reasonable belief that the complained-of conduct violated Title VII.

The Eleventh Circuit affirmed, but did not reach the issue of whether the employee held an objectively reasonable belief of unlawful conduct. Instead, the court held that the employee failed to produce sufficient of a causal connection between his complaint and termination. Although the burden of causation can be met by showing close temporal proximity between the protected activity and adverse action, the court explained that “mere temporal proximity, without more, must be ‘very close’ . . . a three to four month disparity between the statutorily protected expression and the adverse employment action is not enough.” The three-month period between the plaintiff’s complaint and termination, did not rise to the level of “very close” and, since he produced no other evidence of causation, his claim failed as a matter of law.

Religious accommodation

Morrisette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317 (11th Cir. 2007).

The plaintiff, a Seventh Day Adventist, claimed she was terminated because of her “deep religious convictions” that prevented her from working any shift on Friday or Saturday from 3:00 p.m. to 11:00 p.m. She filed a Title VII claim for religious discrimination against her employer, but after a bench trial, the district court granted judgment to the employer on the basis that it reasonably accommodated her religious beliefs.

The Eleventh Circuit reviewed the decision for clear error. The evidence showed that the company employed a neutral rotating shift system and allowed employees to make independent arrangements to swap shifts. The company did not have an obligation to affirmatively take efforts to swap the plaintiff’s shifts for her. Additionally, the company encouraged the plaintiff to transfer to another position within the company that did not require her to work shifts during the specified times. Finally, the company did not terminate or otherwise discipline the plaintiff for a period of approximately three months,

even though she refused to work her scheduled Friday shifts and did not find a replacement. Based on these facts, the district court's decision was not clearly erroneous.

Title VII retaliation: protected activity

Scarborough v. Bd. of Trustees Fla. A&M Univ., 504 F.3d 1220 (11th Cir. 2007).

Employee's call to campus police for protection against hostile faculty member and swearing out protective order was a protected activity under Title VII anti-retaliation section, and could not be considered a legitimate, non-discriminatory reason for termination.

The plaintiff (a male) was an academic advisor in the school of nursing who claimed he was subject to unwanted sexual advances by a female supervisor. He filed a written complaint and was transferred under the dean's direct supervision. Thereafter, the plaintiff's tires were slashed and the former supervisor confronted the plaintiff in the hallway, ostensibly about a telephone bill, and used profanity and threatened the plaintiff with physical violence. The plaintiff then filed a campus police report and requested an injunction against the supervisor. He immediately went to the county courthouse to get the injunction papers signed and then gave copies of the police report and injunction papers to the dean. The following day, the dean terminated the plaintiff for "unprofessionalism."

Florida A&M argued that the employee's involvement of the police in his dispute with the supervisor was unnecessarily disruptive and, therefore, adequate grounds for termination of his employment. The Eleventh Circuit disagreed, however, and reversed the district court's grant of summary judgment. "Although involving the police in an employment dispute will not always be considered part of the protected conduct that prohibits retaliatory action, where, as here, it allegedly derived from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment, it cannot be deemed the 'unprofessional' conduct for which an employee can be terminated Accepting Florida A&M's rationale would, for example, permit the termination of an employee who reported a rape by a supervisor to the police." Accordingly, the police report could not serve as a legitimate, non-discriminatory reason, and the court remanded the case for a determination of whether other reasons justified the plaintiff's termination.