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Retaliation Claim Dismissed Based On Employer's Legitimate Non-Discriminatory Reason For Termination

Overview

Poulsen v. Humana Ins. Co.
United States Court Of Appeals For The Tenth Circuit
January 5, 2017

In this case the employee Ms. Poulsen (Poulsen) was appealing a district court's entry of summary judgment for her employer, Humana Insurance Company (employer/Humana), on her retaliation claim under the Americans With Disabilities Act, 42 U.S.C. § 12203(a) (ADA). ***The sole issue before the Court of Appeals was whether the employer's stated reason for terminating her employment was pretextual.*** The court agreed with the district court that there was no genuine issue of material fact concerning this issue and that the employer was entitled to judgment as a matter of law. Therefore, the court affirmed the entry of summary judgment in favor of the employer.

Factual Background

Employee's Employment History

The employee worked at the employer's Overland Park, Kansas office from

August 26, 2007 until her termination date, October 8, 2012. Beginning in 2009, her title was Utilization Management (UM) Nurse. Her position was terminable at will. Her responsibilities included providing the employer's insureds (referred to as members) with guidance pertaining to their healthcare needs, keeping track of them when they were hospitalized, assisting them with discharge from the hospital and transfers to other facilities, and presenting information to the medical director regarding their appropriate level of care.

The employer used progressive discipline and counseling for its employees and has implemented a Competency Improvement Plan Guide for dealing with employee behavior, performance, and attendance issues. Depending on the egregiousness of an incident, employees may receive coaching as a first step. If coaching does not resolve the problem, an employee may be placed on a performance improvement plan (PIP). An employee who fails to comply with the PIP's requirements may be terminated.

Employee's Bipolar Disorder And Noise Complaints

The employee asserted that she suffered from bipolar disorder, which caused her to experience bouts of depression and anxiety along with periods of mania. She claims this condition affects her major life activity of sleeping, leading her to be exhausted during working hours and to require a quiet work environment. She also asserts that during her manic periods she loses the ability to function cogently around others.

Throughout her employment, the employee frequently complained to her supervisors about the level of noise in the workplace. She did not mention that her sensitivity to noise was caused by bipolar disorder. Instead, she attributed it to her stress level. Due to her complaints she was assigned to a quieter area of the office.

Employee Acts Out At Employer's 2012 Summit

In August 2012, the employer held its "All Hands Summit" (Summit), a conference during which nurses from throughout the Company's central region traveled to its location in Overland Park for training and team building. On the first day of the Summit, some of the visiting nurses set up their workstations in empty cubicles adjacent to the employee's work space. The employee was attempting to work on a time-sensitive portion of her caseload. The nurses carried on a forty-five minute conversation over the cubicles. The employee asked them to be quiet. When they kept talking, she stood up and loudly shouted, "Shut up!"

Poulsen was taken to a conference room, along with supervisors Michelle Watson and Kathy Watkins. Poulsen was pacing, her hair was disheveled, and she appeared to be very upset. She did not mention bipolar disorder, but suggested that “maybe her medication needed to be adjusted and that her diet pill [might] be too strong.” Ms. Watkins told Poulsen that her behavior was inappropriate for the workplace and that she should apologize to the other nurses. She apologized and was sent home for the day.

The Summit continued two days later at a nearby hotel ballroom, where employees participated in an icebreaker exercise. Participants were asked to stand in front of the group and provide information about themselves, including something the group did not know about them. Humor was acceptable. Poulsen testified that when it was her turn to speak, she was in a manic state. Her participation in the exercise did not go well. She made several inappropriate and unprofessional comments of a personal nature that left coworkers uncomfortable.

Ms. Watkins contacted the employer's corporate human resources department for guidance about how to discipline Poulsen for her outburst to the visiting nurses and her inappropriate and unprofessional comments during the icebreaker exercise. Human resources determined that Poulsen's behavior constituted a terminable offense, but recommended, in lieu of termination, that she be offered a PIP.

On September 14, 2012, Poulsen met with her two supervisors who informed her that in lieu of termination, she was being placed on a PIP. Among other terms of the PIP, she would be required to actively participate in the employer's EAP, Life Sync, which provides behavioral health counseling. The PIP provided that failure to comply with its requirements would result in termination of her employment, and that failure to meet the other expectations of her role on an ongoing basis could also result in termination.

Ms. Poulsen's Application for FMLA Leave

On September 18, 2012, Poulsen met with her family physician. They discussed the stress of her work environment. He provided her with a note explaining that she had bipolar disorder. ***Poulsen never gave the note to anyone at Humana***, but planned to do so once she was approved for leave under the Family Medical Leave Act (FMLA).

Humana's FMLA program is handled by UNUM, a third-party administrator. Poulsen contacted UNUM to request intermittent FMLA leave. Because UNUM handles Humana's FMLA program, her supervisors had no involvement with the

FMLA application process, other than receiving notice that Poulsen had applied for leave.

UNUM notified Poulsen that she needed to return a medical certification from her doctor by October 5, 2012, in order for her FMLA leave request to be approved. She later received an extension until October 12 to provide the documentation. But before she could do so, her employment was terminated on October 8, 2012.

Events Leading to Ms. Poulsen's Termination

As a UM Nurse, Poulsen had the option to work on-call on evenings and weekends. While serving on call, she was required to answer pages from the employer's answering service, document information on the employer's computer system—known as CGX—and complete on-call tracking logs and submit them to her manager.

On-call employees sometimes received phone calls requesting that the member be transferred from a hospital to a different facility. When this happened, the on-call employee was responsible for contacting the hospital to get the clinical information related to the transfer, entering the information into CGX so that the employer's regional medical director could approve the transfer, and following up with the hospital concerning authorization for the transfer.

Poulsen served as a weekend on-call nurse from September 21 through 24, 2012. On September 22 and 23, CGX was unavailable due to a scheduled system upgrade. Poulsen received several calls that weekend. She told the facilities that contacted her that her computer system was down and she was unable to assist them. She testified that she asked each caller if theirs was an expedited request. When told that it was not, she informed them they should call back the following Monday.

One of the calls Poulsen received, but failed to offer assistance for, was from Research Medical Center (RMC), regarding a member who needed to transfer from patient acute care to a skilled nursing facility. The employee's supervisor testified that in spite of the problems with CGX, Poulsen should have asked RMC to fax her the information necessary to review the member's proposed transfer with the employer's regional medical director and to provide RMC with a response concerning the transfer. Also, despite the CGX issues, Poulsen should have contacted the regional medical director—via phone, fax, or email—to provide the clinical information needed for the member's transfer.

Poulsen did not contact the regional medical director through any of these means. She testified it was her understanding that the problems with CGX had relieved her of further responsibility in the matter, and that everything had to be processed through CGX in any event. She also testified that because the system was down, she “couldn't receive faxes, and ... could not send anything to the medical director.”

CGX became available again on September 24. According to her supervisor, when Poulsen came into the office after the on-call incident, she should have immediately notified her supervisor that there was a patient who had not been properly transferred due to the CGX outage. Although Poulsen had written down the names of the members for whom she received calls and notified her supervisor of this fact, she never provided this information to her supervisor or any other case management nurse. Poulsen explained that her supervisor never asked her for a copy of her notes.

On September 25, Humana's on-site nurse for RMC, Cindy Latz, contacted Poulsen to ask whether the regional medical director had approved the member's transfer. Poulsen confirmed that no approval had been issued.

On September 27, Ms. Latz informed Poulsen that the corporate office had opened a case file in CGX for the member. She suggested Poulsen should document the case file, providing details about the system being unavailable and taking the case from a pending to an inpatient status. Poulsen responded that she “couldn't remember the time” and that she “told the provider that [she] could not help him due to computer problems.” Poulsen did not document the file after this conversation with Ms. Latz.

Poulsen's supervisor testified that once the case was created in the CGX system, the file should have been charted, the case taken from pending to inpatient status, and any nurse's notes should have been inserted. The supervisor later received a complaint from RMC concerning Poulsen's failure to assist with the member's transfer. On October 2, the supervisor checked the member's file and found no notes or activity from Poulsen. The supervisor testified that other than Poulsen, she was unaware of any utilization nurse who failed to chart for a period of ten days concerning an event that fell within the nurse's area of responsibility.

After consulting with the management team and corporate human resources, Ms. Watkins began procedures to terminate Poulsen's employment. On October 8, the employee's two supervisors and human resources met with Poulsen and informed

her that the employer was terminating her employment, effective immediately. Poulsen was provided with a memorandum detailing the basis for Humana's decision.

Poulsen filed a lawsuit alleging unlawful retaliation in violation of the American with Disabilities Act.

Court's Decision

Like the lower district court, the court assumed for summary-judgment purposes that Poulsen had established a prima facie case of retaliation. ***The court held that the burden therefore shifted to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge.***

The court held that the employer had articulated such a reason: Poulsen's employment was terminated because while she was already on a PIP, she failed to follow proper protocol regarding a member's case when working on-call, and afterwards failed to properly document the member's case file.

The court cited authority holding that for the proposition that a plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. The court noted that in establishing pretext, an employee can show the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief, and that typically, an employee demonstrates pretext in one or more of three ways:

- (1) With evidence that the employer's ***stated reason*** for the adverse employment action are ***false***;
- (2) With evidence that the employer ***acted contrary to a written policy prescribing the action to be taken*** by the employer under the circumstances; or
- (3) With evidence that the employer ***acted contrary to an unwritten policy or contrary to the employer's practice*** when making the adverse employment decision affecting the employee.¹

¹ *Macon v. United Parcel Serv., Inc.*, 743 F. 3d. 708, 714 (10th Cir. 2014) (brackets, ellipsis, and internal quotation marks omitted).

Employee's Arguments That There Was a Question of Fact For the Jury

The employee argued that there were several factual reasons why a reasonable jury could not believe the employer's proffered explanation for her termination.²

Temporal Proximity³

She argued that the close temporal proximity between the date she requested FMLA leave, September 20, 2012, and the date the employer Humana terminated her employment, October 8. In addressing this point, the court found it important that Poulsen's request for FMLA leave was communicated to UNUM, rather than her supervisors. ***Furthermore, the court pointed out the fact that Poulsen did not notify her supervisors that she sought leave as a form of accommodation for bipolar disorder.*** The court held that: "...even assuming her FMLA request qualified as a request for a reasonable accommodation under the ADA, the temporal proximity between the request and her termination is insufficient to establish pretext." The court felt the two weeks that passed between her request for FMLA leave (September 20 and her termination October 20) was not close enough in time to establish temporal proximity.⁴

The court stated the following:

Ms. Poulsen's cited failure to work the member's case properly occurred after her FMLA application but shortly before her termination. At that point, she had been on a [PIP] for a little over a week. Humana's concerns about her lack of professionalism predated the FMLA application, and were borne out by her intervening misconduct. These facts are sufficient to defeat any inference of retaliation created by the temporal proximity of the termination to her application for FMLA leave.

Other Employee Arguments

Poulsen also argued that because the PIP included a provision requiring her to obtain counseling, a reasonable jury could infer that her mental health condition drove the decision to terminate her employment, thereby making it more likely she

² Please see the full decision for the court's full analysis of all the arguments made by the employee in this case.

³ Temporal proximity is the concept of the "closeness" in time between the protected activity and the adverse action, which in this case was Poulsen's termination. This concept is something that all employer's must be aware of in deciding whether or not their proposed action against an employee might be argued to be unlawful retaliation.

⁴ Please note, the concept temporal proximity, and what is close enough in time to establish the adverse action was based on part on the protected activity, varies greatly from court to court. Many courts might have found this was in fact close enough in time to establish this connection, based on temporal proximity.

was terminated for protected activity relating to that condition. The court felt this argument did not address or anyway demonstrate that the reasons given for her termination were not worthy of belief. The court held that the mere fact that mental health issues were somehow involved in the chain of events that led to termination does not demonstrate pretext.

Ms. Poulsen also charges Humana with pretext because it failed to follow its progressive disciplinary policy. She complains she “was placed into a PIP without benefit of a second written ‘Coaching’ as provided for in the ... policy.” But the disciplinary policy did not require that each progressive step be followed in the case of a “critical” offense, i.e., one which could result in immediate termination. The court noted that the conduct that resulted in Poulsen's PIP constituted a critical offense, for which she could have been terminated under the employer’s policy. Instead, she was given a final opportunity to remain employed with the employer by complying with the plan. Therefore, the court concluded that Poulsen was thus actually treated more favorably than the policy required, that under these circumstances, any failure to provide a second written coaching does not establish pretext on the employer’s part.

The court affirmed the district court's entry of summary judgment for the employer.

Summary and Important Points

1. The EEOC definition of unlawful retaliation is as follows:

Retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces. The EEO anti-retaliation provisions ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without employers taking materially adverse actions in response.

2. In general, the three elements of a retaliation claims are as follows:

(i) The employee engaged in protected activity;

(ii) The employer subjected the employee to an **adverse employment action**; and

(iii) A **causal link existed** between the protected activity and the adverse action.

3. The list of what constitutes “protected activity” is very long. ***There are many types of protected activity you need to be aware of, including but not limited to, the following:***

- Filing a workers compensation claim
- Alleging harassment or discrimination
- Speaking out against harassment or discrimination against other employees
- Taking or requesting protected leave, such as family or medical leave, etc.
- Filing a claim with a state or federal agency
- Acting as a spokesperson on behalf of other employees regarding terms and conditions of employment
- Attempting to organize a union
- Participating as a witness on behalf of another employee’s claims of violations before a state or federal agency
- Requesting workplace accommodations based on the employee’s disability status
- Raising issues regarding workplace safety
- Whistle blowing variety activity

4. This case focused on the ***timing of the termination***. ***Many courts have found that "temporal (time) proximity" is enough to raise inferences of unlawful motive or retaliation.*** If a personnel action is going to take place in relatively close time proximity to the employee's protected activity, the employer ***MUST*** be able to show the ***REAL REASON*** for the adverse action against the employee is based on performance related issues, not the employee's protected activities. That is why the court in today’s **Legal Update** did such a thorough review of the facts leading to this employee’s termination. The court was satisfied that the real reason was legitimate and non-discriminatory.

5. The court alluded to the fact Ms. Poulsen was an at-will employee in this case. Although there is no discussion of "at-will" employment in this case, it is important to note, that ***in this type of case where the employee is alleging the employer did something illegal, unlawful or a violation of public policy (for example,***

retaliation) "at-will" becomes irrelevant. The issue in these types of cases becomes what is the **REAL REASON** the employee was terminated?

If you have any questions concerning this email or any other employment law related issues please do not hesitate to contact me by either replying to this email or by telephone at 888-851-1160 or my assistant Nanci Berry at this number.

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