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Labor and Employment Law **Notes**

7TH CIRCUIT GIVES GREEN LIGHT TO USE OF ILLINOIS PROCEDURAL LAW WITH SUMMARY JUDGMENT MOTIONS IN FEDERAL COURT DISCRIMINATION CASES AND EEOC PUTS BULLSEYE ON AUTOMATIC TERMINATION POLICIES

A. ILLINOIS STATE LAWS STANDARD APPLIES IN DECIDING A MOTION FOR SUMMARY JUDGMENT IN FEDERAL RETALIATORY DISCHARGE CASE

A Seventh Circuit panel has answered a question which, according to the authoring judge had “arisen repeatedly” that they “ducked” before. When a retaliatory discharge case governed by Illinois law is litigated in federal court, the standard of the state law must be applied to the motion for summary rather than the federal standard. This is because the two standards are materially different and the difference is rooted in a substantive policy of the state. The issue arose in the context of a retaliatory discharge claim under the Illinois Workers’ Compensation Act. Under the federal *McDonnell Douglas* standard, the employee could win her motion for summary judgment in some cases where the reason might be unknown to the employer, the actual firing has been done by a subordinate who may have left the company or be unwilling to cooperate in its investigation, or the employer may be unwilling to reveal the real reason because it would disclose an illegal, unethical or otherwise embarrassing practice (e.g., nepotism or blackmail), the one unrelated to the discrimination alleged in the lawsuit. Under the Illinois rule, the employee would have to prove the alleged discrimination was the cause of his or her firing.

The court held that it seemed unlikely that an airline would fire a baggage handler merely because he sprained a finger and might seek workers’ compensation, since worse injuries to baggage handlers are common. But plausible or not, no reasonable jury could have found that the airline had fired the plaintiff because its claims administrator had opened a file on the injury rather than because it believed that he had lied about having the flu, had disobeyed the doctor’s orders to wear a splint on an injured finger and to not lift anything with that hand. The court determined that they should consider whether this conclusion might be altered by the framework for deciding an employer’s motion for summary judgment in a retaliatory discharge case governed by Illinois as opposed to federal law, which is to say by *McDonnell Douglas*, or by state law. The question had arisen in the circuit many times. This Seventh Circuit panel determined that the conclusion would be altered by the application of Illinois law regarding motions for summary judgment rather than federal law. Under the *Erie Doctrine*, federal courts

in diversity cases apply state “substantive” law but federal “procedural” law. A substantive law is one motivated by a desire to influence conduct outside the litigation process, such as a desire to deter accidents, while a procedural law is one motivated by a desire to reduce the cost or increase the accuracy of the litigation process, regardless of the substantive basis for the particular litigation.

If an ostensibly procedural rule of state law is consigned to a particular substantive area of law, this suggests that it probably was motivated by substantive concerns and therefore should be applied by the federal court in a case governed by state law. *McDonnell Douglas*, unlike the rule that places the burden of proving an affirmative defense on the defendant, is not a general rule of procedure, applied regardless of the nature of the case. Initially it was limited to cases of employment discrimination (which includes retaliatory discharge, since employment discrimination means basing an employment decision on an unlawful ground), though it has since been adopted for use in other types of discrimination cases as well, e.g., racial discrimination against a franchisee, housing discrimination based on family status, racial discrimination in housing, refusal on racial grounds to enter into a contract, racial discrimination in treatment of a customer and racially motivated denial of credit. It’s designed to make it easier for plaintiff to withstand summary judgment in discrimination cases, and the belief that “a discrimination suit” (unlike, for instance, an action for negligence or breach of contract), puts the plaintiff in a difficult position of having to prove the state of mind of the person making the employment decision. Illinois, however, does not want to give plaintiffs in retaliatory discharge cases governed by state law that leg-up. It doesn’t want to modify the convention of principals of tort law. That is a substantive judgment, one that a state is free to make in areas governed by state law, whether the court thinks it wise or unwise. In most cases of employment discrimination, the state and federal standard for summary judgment will be materially the same and the federal judges’ greater familiarity with the *McDonnell Douglas* Doctrine to provide a compelling reason to apply it. But when a retaliatory discharge case governed by Illinois law is litigated in a federal court, the federal court must apply the standard of the state law to a motion for summary judgment, and not the federal standard, because the standards are materially different and the difference is rooted in a substantive policy of the state.

B. EEOC HAS INCREASED SCRUTINY AND FOCUS ON AUTOMATIC TERMINATION POLICIES POST-MEDICAL LEAVE

There are certain cases now lingering before the Illinois Department of Human Rights and the United States Equal Employment Opportunity Commission (“EEOC”) longer than they used to. The EEOC, as well as state anti-discrimination agencies, decided that cases involving automatic termination following medical leave deserve heightened scrutiny since the Obama Administration has taken office. The EEOC is displaying its displeasure with automatic termination policies by forcing heightened scrutiny on most cases that come before it after charges have been filed by terminated employees. The EEOC is taking the position that these policies violate the Americans with Disabilities Act (“ADA”) requirement that a request for medical leave, including extended leave, be assessed individually on a case-by-case basis. Previously employers believed these policies were non-discriminatory because they applied neutrally to all employees on medical leave. Employers need to re-think this position.

Many recent cases involving the EEOC should serve to remind the employers that the leave of absence is a common form of reasonable accommodation and that the duty of reasonable

accommodation has no set time period. If an employer has approved a certain period of medical leave but the employee is unable to return to work on the agreed date and seeks additional leave, employers need to determine whether continued leave would be a reasonable accommodation over inconvenience and undue hardship to the employer. This needs to be taken on a case-by-case basis.

Employers can no longer hide behind the assertion that this is a facially neutral non-discriminatory policy that is applied across the board to all employees. Employers need to review their medical leave of absence policy and long-term leave of absence policies to determine whether they are in compliance with the EEOC's new enforcement policies and procedures regarding automatic terminations during and following medical leave. It now appears the EEOC wants to see that the employers are making this determination on a case-by-case basis. Employers covered by the Family and Medical Leave Act ("FMLA") need to review their FMLA policy to ensure the policy does not call for automatic termination upon an employees failure to return to work upon expiration of the FMLA leave. Finally, employers need to eliminate policies that call for employees to be "100% with no restrictions" to continue working or return from leave. According to the EEOC such a policy violates the ADA.