

Seventh Circuit Opinion Confirms Flexible Analysis of Adverse Employment Actions

Labor & Employment Law Update

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On October 19, 2016, the United States Court of Appeals for the Seventh Circuit reversed a District Court's Rule 12(b) (6) dismissal of two plaintiffs' retaliation claims brought under Title VII and the Illinois Human Rights Act. In Volling and Springer v. Kurtz Paramedic Services, Inc., Case No. 15-3572, two Emergency Medical Technicians (EMTs) alleged that their employer and its new subcontractor refused to hire them because they had reported and/or supported claims of sex discrimination and sexual harassment against the employer's previous subcontractor to the Equal Employment Opportunity Commission.

The new subcontractor filed a motion to dismiss, arguing that the plaintiffs had not stated a viable retaliatory failure-to-hire claim because the plaintiffs had not applied for the position that they claimed they were denied. The District Court dismissed the retaliation claims after referring to the *prima facie* case for a retaliatory failure to hire, which required the plaintiffs to allege that they applied for and were qualified for the position sought.

On review, the Seventh Circuit examined the circumstances under which the plaintiffs claimed to have been refused a position to determine whether they alleged an adverse employment action distinct from a straightforward failure-to-hire claim. In this case, the employer terminated its contract with the previous subcontractor following the plaintiffs' reports of misconduct and replaced it with a new subcontractor. The employer informed all the EMTs who had worked with the previous subcontractor, with the exception of the two plaintiffs, on how to apply for unpublished vacancies with the new subcontractor. The new subcontractor hired all of these applicants. The plaintiffs never applied and were not hired. The Seventh Circuit reasoned that the plaintiffs alleged a discriminatory practice slightly different than a failure to hire – the failure to inform them of the vacancies where other employees who had not engaged in protected activity received notice of the positions. The Seventh Circuit stated, "plaintiffs' failure to apply stemmed from the very discriminatory practice they complained of, and their failure to apply need not bar their retaliation claims."

Employers should note that a court's analysis of retaliation claims may be flexible and stretch outside confines of oft-repeated *prima facie* cases. Discrimination and retaliation claims can stem from not only a failure to hire an applicant

because of his or her protected characteristic or prior protected activity, but also for any disparate treatment in the way employers publicize or recruit for the position prior to the hiring decision.

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