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Navigating the Mixed-Motive Causation Standard in Title VII, ADA and FMLA Claims

THURSDAY, FEBRUARY 8, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Mixed Motive Causation Standard and When it Arises

Jenny Gassman-Pines

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Mixed Motive Causation Standard

- Alternative to *McDonnell Douglas* burden-shifting framework
  - A legitimate, non-discriminatory reason for adverse action is not a complete defense
  - Plaintiff can defeat the defense if she can show a protected characteristic was a "motivating factor" for the adverse employment action

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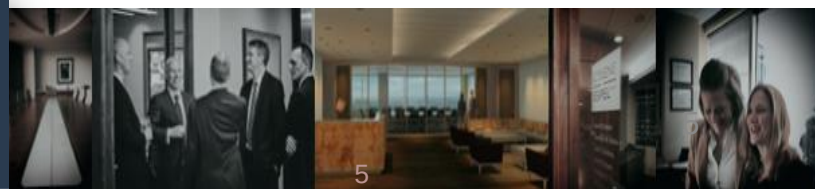

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Mixed Motive Causation Standard

- Title VII: 42 U.S.C. § 2000e-2(m)
- One way an employee can establish an unlawful employment practice
- Plaintiff must show:
  - (1) the defendant took an adverse employment action against the plaintiff; and
  - (2) a protected characteristic was ***a*** motivating factor for the defendant's adverse employment action.

Mixed Motive Causation Standard

- Employer response:
  - Employer would have made the same decision "in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B)
  - Potential to eliminate damage and reinstatement
  - Allows employee to argue for and receive declaratory relief and fees

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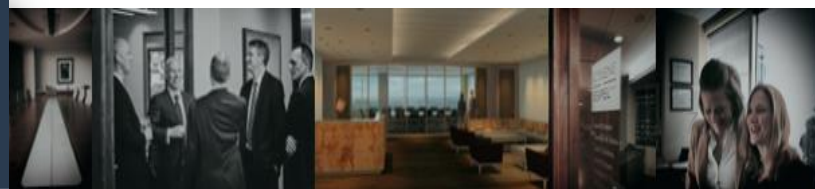

Mixed Motive in Practice

- Pleading stage
- Summary judgment
- At trial

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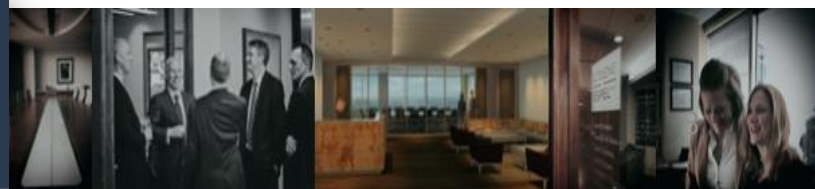

Title VII and ADA Mixed Motive Cases

S. Jeanine Conley
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February 8, 2018

Title VII

- Under Title VII (the statute which, among other things, prohibits employment discrimination on the bases of race, color, sex, religion and national origin), an employee may use two different theories to show discrimination:
  - "but for" causation or single motive theory
  - mixed motive theory (1991 amendment to Title VII: 42 U.S.C. § 2000e-2(m))

Title VII

- “But for" causation - discrimination was the single motive behind the alleged discriminatory act (alleged discriminatory act would not have occurred but for the intent to discriminate). Any other possible excuse has to be shown to be pretext.

- Under a "mixed motive" analysis, an employee can still prevail by showing that discrimination was one of the operative motives behind the alleged discriminatory act.
  - Remedies limited

Chavez v. Credit Nation Auto Sales, LLC (Jan 2016)

- Company owner allegedly made comments that he was "very nervous" that the mechanic's gender transition could "negatively impact his business." The company owner disciplined the mechanic for various performance issues, and ultimately fired her when he found her asleep at work.
- Eleventh Circuit reversed district court grant of summary judgment in favor of employer reasoning that an employee could still recover declaratory relief and attorneys' fees, though not damages, by establishing that discrimination based on a protected characteristic was a "motivating factor" for the adverse employment action.

Eleventh Circuit Clarifies *Chavez*

- *Quigg v. Thomas County School District (Feb. 2016)*- alternatives to the *McDonnell Douglas* burden-shifting framework were not as narrowly available as past cases suggested
- the proper framework on summary judgment should be to ask only whether a plaintiff offered evidence sufficient to convince a jury that:

  (1) the defendant took an adverse employment action against the plaintiff; and

  (2) [a protected characteristic] was ***a*** motivating factor for the defendant's adverse employment action.

- In line with Second, Third, Fifth, Sixth, and Tenth Circuits

Defenses Still Available to Employer

- Employer can still reduce damages by showing it would have made the same decision "in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B).

- Partial defense allows an employer to escape liability for actual damages and the potential for reinstatement but leaves a litigant's ability to request declaratory relief and fees intact.

Eighth Circuit Applies McDonnell Douglas to Mixed Motive Cases

- Only the Eighth Circuit persists in applying *McDonnell Douglas* to mixed-motive claims based on circumstantial evidence

Oehmke v. Medtronic, Inc., 844 F.3d 748 (8th Cir. 2016)

- Inference of intent by manager comments that plaintiff did not have cancer undercut by fact that it granted nearly every accommodation request made
- Left open whether a mixed-motive or but-for causation standard should be applied, finding employer met plaintiff-friendly mixed-motive standard

Title VII Retaliation Claims

University of Texas Southwestern Medical Center v. Nassar (2013)

- Retaliation claims filed under Title VII must be proved according to traditional principles of but-for causation, not the lessened causation test stated in the 42 U.S.C. § 2000e–2(m).

- Supreme Court reasoned that based on its decision in *Gross* and on common law principles of tort law, the plaintiff was required to show that a retaliatory motive was the "but for" cause of the adverse employment action.

ADA

- Seventh Circuit says NO - mixed motive claims not viable under ADA. *Serwatka v. Rockwell Automation, Inc.* (Jan. 2010)based on *Gross*

- Does *University of Texas Southwestern Medical Center v. Nassar* change that analysis?

- Fourth Circuit says NO - *Gentry v. E. W. Partners Club Mgmt. Co.* (Mar. 2016), district court correctly applied a "but-for" causation standard to ADA claim, instead of a Title VII "motivating factor" causation standard

What about the ADEA?

- EEOC's Office of Federal Operations (OFO) found that the "mixed motive" analysis applies to age discrimination cases in the federal sector. *Alotta v. Dept. of Transportation*, EEOC Appeal No. 0120093865 (June 17, 2011),
- *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167 (2009)- Supreme Court bars private sector employees from using mixed motive analysis limiting age discriminaton claims to those where "but for" causation could be shown.
- OFO cited with approval a recent federal district court decision from Texas, holding Gross's bar on use of the "mixed-motive" analysis inapplicable to federal sector cases, in that federal sector claims are covered by a different ADEA provision, thus, reopening the door to federal sector employees seeking relief for age discrimination claims in "mixed motive" cases.

Two Types of FMLA Claims

- **Interference**
  - Plaintiff must show she was entitled to a benefit under the FMLA, but was denied that entitlement.
- Statutory Authority
  - 29 U.S.C. § 2615(a)(1)—"It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [FMLA]."

Two Types of FMLA Claims

- **Retaliation**
  - Plaintiff alleges that the employer discriminated against him for exercising his FMLA rights.
- Statutory Authority
  - 29 U.S.C. § 2615(a)(2)—"It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]."

"Mixed Motive" under FMLA

- Unlike Title VII, there is no ***statutory*** authority for applying mixed-motive standard.
  - The DOL has, however, promulgated regulations that may apply.
- Courts look to Price Waterhouse, which was overruled on its mixed-motive analysis when Congress passed the Civil Rights Act of 1991.
- In Desert Palace, Supreme Court recognized that proof of mixed-motive under Title VII to be direct or circumstantial.

Mixed Motive after Desert Palace

- Option #1 – "Same Decision" Test
  - Plaintiff must demonstrate that a discriminatory consideration was a motivating factor in the decision.
  - The employer must then establish the affirmative defense that it would have made the same decision absent the discriminatory motive.

Mixed Motive after Desert Palace

- Option #2 – "Modified" McDonnell Douglas Test
  - Same first two steps.
  - Third step is modified to require the plaintiff to show either: (1) that the employer's reason is a pretext or (2) that the employer's offered reason, while true, is only one of the reasons for its conduct.

- **29 C.F.R. § 825.220(c)**

- The Act's prohibition against interference prohibits an employer from discriminating or ***retaliating*** against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as ***a negative factor*** in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See § 825.215.

Egan v. Del. River Port Auth.,

851 F.3d 263 (3d Cir. 2017)

- Egan experienced migraine headaches.
- A co-worker of Egan testified in a deposition that he heard Egan's supervisor, in an "upset and angry" tone, complain about Egan's ability to complete tasks because of health issues.
- Employer eliminated his position while he was out on FMLA leave.
- Court refused to give a mixed-motive instruction, and jury found in favor of the employer.

Egan v. Del. River Port Auth., (cont.)

- Third Circuit reversed.
- Court relied on 29 C.F.R. § 825.220(c), which states that "[t]he Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights," and further states that "employers cannot use the taking of FMLA leave as a negative factor in employment actions."

- **73 Fed. Reg. 67934 (2008)**

- The Department proposed in paragraph (c) to state explicitly that the Act's prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights. Section 2615(a)(1) makes it unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided for under the Act. Although section 2615(a)(2) of the Act also may be read to bar retaliation (*see Bryant v. Dollar General Corp.*, 538 F.3d 394 (6th Cir. 2008)), the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation.

Egan v. Del. River Port Auth., (cont.)

- Court concluded that the DOL regulation was entitled to *Chevron* deference.
- Thus, under the DOL regulation, "an employee who claims retaliation and seeks to proceed under a mixed-motive approach must show that his or her use of FMLA leave was '***a negative factor***' in the employer's adverse employment action."

Egan v. Del. River Port Auth., (cont.)

- Direct evidence is ***not*** required.
  - Citing Desert Palace, court reasoned that "we should not depart from the 'conventional rules of civil litigation,' which allow a plaintiff to prove his claim using direct or circumstantial evidence."
  - Joins First, Seventh, Ninth, and Tenth Circuits.

Egan v. Del. River Port Auth., (cont.)

- Remanded for the district court to consider:
  - "[W]hether there was evidence from which a reasonable jury could conclude that the Port Authority had legitimate and illegitimate reasons for its employment decision and that Egan's use of FMLA leave was a ***negative factor*** in the employment decision."

Wallner v. Hilliard,

590 Fed. App'x 546 (6th Cir. 2014)

- In June 2009, Wallner requested FMLA for knee replacement from Aug. 11 until "approximately" Oct. 11.
- After surgery, STD listed her return to work date as Sept. 22.
- On Sept. 15, HR called Wallner to inquire about her RTW.
- Wallner tried to explain the difference between STD vs. FMLA, and conversation got "heated."

Wallner v. Hilliard, (cont.)

- Plaintiff was cleared to return to work on Oct. 5.
- Upon return to work:
  - Wallner received a "final warning" for her conduct during the Sept. 15 telephone call.
  - Wallner's colleague began tracking her start-times.
- Terminated on Oct. 15 for "accumulation of deficiencies," including: tardies and taking 6 weeks (instead of 4 weeks) to recover from surgery.

Wallner v. Hilliard, (cont.)

- Plaintiff brought both single-motive and mixed-motive FMLA retaliation claim.
- Lower court granted SJ for employer.
  - "Although her FMLA leave was indeed a *but-for* cause of her receiving the Warning and consequently her termination, the FMLA only prohibits *proximate* causation between FMLA leave and termination."

Wallner v. Hilliard, (cont.)

- Sixth Circuit reversed as to mixed-motive FMLA claim.
- Because parties agreed that Price Waterhouse applied, court declined to decide whether burden-shifting under McDonnell Douglas applied.
  - Noted that "the typical examination of pretext, which is geared toward single-motive claims, is only imperfectly applicable to mixed-motive cases."

Wallner v. Hilliard, (cont.)

- "On its face, the document is easily susceptible to the interpretation that Wallner's FMLA-related absence was one of four or five reasons motivating her discharge . . . ."
- "A reasonable jury could find that Wallner's exercise of her FMLA rights may have been a motivating factor in [her employer]'s decision to terminate her."

Richardson v. Monitronics Int'l, Inc.,

434 F.3d 327 (5th Cir. 2005)

- Plaintiff had carpel tunnel syndrome and worked as a CSR for Monitronics beginning in July 2000.
- FMLA request was denied in Jan. 2001, since had not worked for a year.
- Plaintiff subsequently received FMLA, but was not allowed to work OT upon return until he was trained on a new software.
- District court granted summary judgment for employer.

Richardson v. Monitronics Int'l, (cont.)

- Fifth Circuit affirmed, but concluded that mixed-motive analysis was appropriate.
- Relied on FMLA regulations.
  - "[E]ven though the text of the FMLA does not explicitly authorize the use of the mixed-motive framework, the regulations promulgated under it clearly anticipate mixed-motive cases."
  - District court erred in applying McDonnell-Douglas.

Woods v. START Treatment,

864 F.3d 158 (2d Cir. 2017)

- Woods worked as a substance abuse counselor and she had a long record of poor performance.
- Woods took FMLA leave for different serious health conditions during her employment.
- In April 2012, Woods returned from an FMLA leave and was terminated 12 days later for poor performance.

Woods v. START Treatment, (cont.)

- District court granted summary judgment to employer and applied a "but for" causation standard.
- Second Circuit reversed.
- Held that that the "negative factor" causation standard set forth in the FMLA regulations must be applied to cases involving FMLA retaliation claims.
- Held that § 2615(a)(1) protects against retaliation.

Wisbey v. City of Lincoln,

612 F.3d 667 (8th Cir. 2010)

- Wisbey worked as an Emergency Dispatcher.
- He requested intermittent leave due to anxiety and depression.
- Medical certification stated that while he could perform his job, he needed time off intermittently.
- City requested a fitness-for-duty exam, which Wisbey did not pass.
- Later terminated because he was unfit for duty.

Wisbey v. City of Lincoln, (cont.)

- Eighth Circuit affirmed district court's grant of SJ to the employer.
- Noted that "the kind of causal connection required for a *prima facie* case is ***not*** 'but for' causation, but rather a showing that an employer's retaliatory motive played a part in the adverse employment action."
- Concluded that the City had no retaliatory intent and that suspicious timing was not enough.

Bartels v. S. Motors of Savannah, Inc.,

681 Fed. App'x 834 (11th Cir. 2017)

- Bartels indicated that he would need time off in the future for unborn baby with bone disease.
- He was terminated after he (1) used profanity when asking why he had not been given tickets to the event; (2) stated guests at his own social gatherings used flowerpots to relieve themselves; (3) used profanity; and (4) complained to an assembled group of employees about the need to coordinate within a short time frame.

Bartels v. S. Motors of Savannah, (cont.)

- Affirmed lower court's grant of SJ to the employer.
- Held that Bartels failed to timely raise the mixed-motive claim.
- And, even if timely, his mixed-motive claim failed because "the only reasonable conclusion supported by the record is that SMA would have terminated Bartels because of the [charity event] incident regardless of whether Bartels indicated a need for FMLA leave."

Gordeau v. City of Newton,

238 F. Supp. 3d 179 (D. Mass. 2017)

- Police officer worked for City since 1998.
- Took FMLA between 2008 and 2012.
- In 2012, Department created a new position. Officer applied, but did not receive the position.
- Claimed City retaliated against him for taking FMLA leave.
- Jury found for City.

- **Genera Verdict Form**

- *1) Did the City of Newton consider protected FMLA sick leave a "negative factor" when evaluating Plaintiff for the disputed position?*
- *2) Whatever your answer to question 1 alone, did the City of Newton select another officer for the disputed position for legitimate reasons?*

Gordeau v. City of Newton, (cont.)

- Court concluded that the general verdict form was inappropriate because retaliation claims brought under the FMLA must be proved according to a ***but-for*** causation standard.
- Analyzed Price Waterhouse, the FMLA text, the statute's structure and legislative history, and public policy.
- Rejected the "negative factor" test and refused to apply Chevron to § 825.220(c).

Gordeau v. City of Newton, (cont.)

- Use of "***for***" in 29 U.S.C. § 623(a)(2) is synonymous with "***because of***."
- Citing Nassar, "if the FMLA is meant to provide workers with the same protections as Title VII, but no more, then the causation standard for retaliation claims under both statutes ought be the same."
- Noted that DOL's comments state that "since the FMLA followed Title VII, both should be 'construed in the same manner.'"

Successfully Defending Mixed-Motives

- Do not rely ***solely*** on the employer's legitimate, nondiscriminatory reason.
  - Argue that "no reasonable juror" could find that FMLA was a "negative factor."
  - See Bartels
- Utilize "same decision" defense.
- Argue for "But-For" Causation.
  - See Gordeau

QUESTIONS?

Thank you.

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