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Eighth Circuit Chips Away at 'Honest Belief' Defense and Creates 'Intertwinement Test' for Disability Discrimination Cases

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On July 1, 2024, in *Huber v. Westar Foods, Inc.*, in a 2–1 decision, the Eighth Circuit Court of Appeals departed from the "honest belief" defense recognized by the First, Second, Fourth, Fifth, and Seventh Circuits (and U.S. Equal Employment Opportunity (EEOC) guidance), holding that an employer must show that its reason for discharging a disabled employee who violated a workplace rule or engaged in misconduct is "sufficiently independent" of the employee's disability.

Creating a new "intertwinement test," as coined by the dissent, the court held that if there is "some connection" between the discharge and disability, the claim may proceed to a jury. As stated by the dissent: "The intertwinement rule also creates a lose-lose situation for employers: let employee misconduct go or risk drawn-out litigation…. Employers will now have to think twice about imposing discipline," and if they do, "courts and juries will now sit as super[ ] personnel department[s] [to] reexamine[] [those] business decisions."

On July 15, 2024, the appellee filed a petition requesting that the Eighth Circuit rehear the case *en banc*.

Quick Hits

- The Eighth Circuit held that an employer may not use the "honest belief" defense where the reasons for discharging an employee are not "sufficiently independent" from the disability.
- The court held that if an employer's reason for an adverse employment action is "so inextricably related" to the former employee's disability, they must be considered together, which is a question for a jury.
- The court held that individuals with "influence over the decision-making process," including those who respond to requests for accommodation, can also create delegated (as decision-makers) liability for employers based on their actions.
- Regarding requests for leave under the FMLA, the court held that it is for a jury to decide whether the employer was put on notice prior to the termination decision, whether the employee notified the employer of the need for FMLA leave as soon as practicable, and whether there was a causal connection between the disability-related issue and policy

violation.

Background

In this case, a restaurant manager with diabetes was discharged after violating the company's attendance policy for the third time in less than a year of employment. She was first given a verbal warning, and then a written warning, which noted that further violations could result in additional discipline, including discharge. On December 20, 2019, she did not open the restaurant as required, but instead drove herself to a doctor's office and made multiple calls to her son and boyfriend. She did not notify her employer of her absence. The following day she slept in and contacted her employer upon waking and emailed a doctor's note excusing her from work through December 26. Her supervisor was upset and yelled at her five times that she just had to make a "simple phone call" to inform him of her absence. Immediately thereafter, the supervisor contacted the business owner, and the decision was made to terminate her employment when she returned from her leave of absence on December 26.

On December 22 and several times thereafter, the former employee requested Family and Medical Leave Act (FMLA) paperwork, which was not given to her. She then received an extended doctor's note for leave through January 2, 2020. On December 26, the employer discharged her as planned. The employment termination letter stated she was discharged for failing to follow the company's notice procedures for absences, which she was "fully aware" of, having been previously disciplined for not abiding by them. The former employee filed a lawsuit alleging violations of the Americans with Disabilities Act (ADA), FMLA, and the Nebraska Fair Employment Practices Act (NFEPA).

The ADA and NFEPA prohibit discrimination on the basis of disability. The FMLA requires employers to provide employees with up to twelve weeks of unpaid, job-protected leave per year for a "serious health condition" that prevents them from being able to perform their jobs.

The 'Honest Belief' Defense and the New 'Intertwinement Test'

The Eighth Circuit held that while typically an employer cannot be liable for discrimination when it discharges an employee based on its honest belief that the employee engaged in misconduct or violated a workplace rule, such a good-faith argument must go to a jury where the reasons for discharge are not "sufficiently independent" from a disability. The court held that if the employer's reason for termination of employment (or other adverse employment action) is "so inextricably related" to the employee's disability, they must be considered together, as "'it [is not] much of a stretch to conclude,'" for example, that the "'disability caused [the] termination'" when the "'disability caused missed work, and missed work caused termination." The ADA prohibits discrimination "on the basis of disability," which requires that the disability is at least a "motivating factor." Yet, this new intertwinement test is broader, as noted by the dissent, only requiring "some connection" between the disability and the termination of employment.

In this case, the former employee, who had two prior warnings for failing to follow the call-in policy, failed to call in—allegedly due to her disability (diabetes)—making it her third instance of violating that policy over the course of a year. The employer, on the other hand, honestly believing that she could call in but chose not to (as she drove herself to the doctor's office and had called her son and boyfriend numerous times), thus discharged her for a third violation of the call-in policy.

The court held that a reasonable jury could determine that her diabetic episode was not independent from the termination of her employment, because she was discharged for failing to call in due to her

diabetic episode. The court noted the termination was made on the employer's assumption (i.e., honest belief) that her disability did not preclude her from calling in. (Essentially, the employer did not believe that the employee could not call in.)

Thus, the court stated that whether the employer acted in good faith and whether her disability caused the conduct were both questions of fact for a jury. This is a significant development for employers because it will be harder to obtain summary judgment, and juries will in effect sit as super-HR departments to determine whether a business decision was sound.

Supervisors May Be Delegated 'Decision-Makers' if Allowed to Respond to Requests for Accommodation

The Eighth Circuit also held that not only do decision-makers create liability for employers, so too do influencers of decision-makers and delegated decision-makers—in this case, two supervisors. The employer argued the business owner was the only decision-maker, and therefore, the court should not consider any actions of the supervisors as evidence of the owner's discriminatory animus. The court did not agree. It noted that when there is a small number of decision-makers (here, one owner), they rely on other workers who interact with the affected employee in making a decision. Accordingly, the court held that a factfinder could interpret the supervisor's reaction to the employee's accommodation requests as delegated authority to make decisions, and thus, the supervisor's past actions must be considered to determine if there is a discriminatory animus. Further, the court noted that one supervisor had decision-making influence over the owner's decision, his having decided to discharge the employee based on a single phone call with the supervisor. The court concluded this created "a genuine issue" as to whether they influenced the decision-making process, which again is a fact question for a jury.

Key Takeaways

- Employers may want to be careful when discharging someone they "honestly believe" has violated a policy or engaged in misconduct, if that conduct is not "sufficiently independent" of the employee's disability—even if the misconduct is repeated behavior previously unrelated to the alleged disability.
- Employers may want to memorialize verbal warnings, document policy violations/misconduct consistently, and include language that confirms that further violations may result in further discipline, up to and including termination.
    - If the "final straw" is not sufficiently independent from a disability, employers might want to consider whether another written warning is warranted in lieu of termination of employment.
- As decision-maker influencers' actions may impute liability to the employer, the decision-maker may want to understand all the interactions between the former employee and the supervisor—so that when relying on the supervisor's conclusion regarding the situation, the decision-maker has all the facts that may be used to determine discriminatory animus.
    - Decision-makers may want to refrain from relying solely on a single influencer when ultimately approving a termination of employment or other adverse employment action.
    - Decision-makers may want to question the supervisor(s) to gain as much knowledge about the previous interactions with the employee. In this case, for example, a key fact was that the influencer raised her voice at the former employee on the phone and yelled five times that she could have made a "simple phone call." Decision-makers

may want to explain to individuals who may influence the decision-making process that they need to know the “good, bad, and ugly” about the interactions so they can make the best decision possible.

- Employers may want to train supervisors to spot and respond to requests for accommodation, however they are made (e.g., informally, without magic request language, etc.), and then document the same. In addition, supervisors may want to notify whoever has the final say over an employment termination decision of all accommodation requests and the responses. Careful consideration of a denial of an accommodation can help determine that there is not a way the employee can be reasonably accommodated without causing an undue hardship to the employer.

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