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Best Practice Lessons from *Best Pallet* Decision

By Lynn Urkov Thorpe, Esq.

Valuable lessons can sometimes be drawn from the travails of others. A recent Seventh Circuit decision is a case in point. While the employer in Loudermilk v. Best Pallet Company LLC, 2011 WL 563765 (7th Cir. 2011), may still prevail, it might have avoided the trial it now faces - or even the lawsuit that was filed - if its workplace policies and practices or the EEOC complaint had been handled differently.

The plaintiff, Mr. Loudermilk, is African-American. While employed at Best Pallet, he worked on a machine to disassemble pallets and stack the wood for re-use. He claimed that each side of the machine should have had at least two workers but that the company staffed the machine so that two Hispanic workers worked on one side of the machine while he was required to work alone. According to Mr. Loudermilk, he was criticized for not keeping up and letting the boards fall, and when he complained that he was not getting the help he needed, the Hispanic employees responded with racial comments.

Mr. Loudermilk complained several times to management. When no action was taken, he started talking about filing an EEOC Charge. Mr. Loudermilk took photographs of the work area that he planned to use to show the machine and why two stackers were needed on each side. His supervisor instructed him to stop taking pictures. Mr. Loudermilk again complained that he was being treated differently than Hispanic workers, and his supervisor told him to put it in writing - so he did. The next day, Mr. Loudermilk handed his supervisor a note and his supervisor fired him on the spot. Mr. Loudermilk filed an EEOC Charge alleging race

discrimination and retaliation. After the EEOC found probable cause of discrimination, this lawsuit followed.

The employer prevailed on summary judgment in the district court. The district court judge concluded that Mr. Loudermilk failed to provide evidence of causation because his only evidence was the short time between handing the note to his supervisor and his termination. The district court credited the employer's explanation that the supervisor did not read the note and that even if the supervisor had read it, Mr. Loudermilk could not rely solely on suspicious timing to prove his case.

The focus of the appeal was the retaliation claim. The Seventh Circuit found enough evidence to raise a genuine issue of material fact and remanded the case for trial. Several factors were red flags to the court. First, although there was a question about when the supervisor read the note, the appellate court dispatched this issue as follows: "[O]nly the day before, Loudermilk had made an oral complaint about racial discrimination and [his supervisor] had told him to 'Put it in writing.' What did [his supervisor] think was in the note he received the next day? An invitation to a birthday party?"

Another problem for the employer was that it gave inconsistent reasons for firing Mr. Loudermilk. At the EEOC, the employer maintained that Mr. Loudermilk's termination was the result of a reduction in force. In the district court, the employer maintained that the decision for Mr. Loudermilk to leave was mutual. After Mr. Loudermilk disputed that reason, the company stated that it fired Mr. Loudermilk because he violated company policy by taking photographs of the worksite (and not because of what the note said).

The Seventh Circuit found that reason - the alleged policy violation - to be especially troublesome because it appeared that it might have been manufactured after the fact and because, even had the policy existed, it might have been "devised to curtail an investigation [,which] is not the sort of neutral rule that would adequately explain a discharge." The court found that this policy violation rationale could be deemed a "fishy" explanation that would support a finding of pretext.

The timing, too, suggested at least a fact question on pretext. While in the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) mere temporal proximity is ordinarily not sufficient to establish pretext, the fact that the termination came so quickly on the heels of the protected activity became a fact issue for the jury to decide. The Seventh Circuit held that the district judge erred in his belief that timing could never support an inference of causation.

The employer might have avoided this position (finding itself at trial) had it handled matters differently from the beginning. As we have written before, although an employer is allowed to develop arguments as litigation progresses, changing rationale for an employment decision can give rise to pretext. Here, the company offered wildly different reasons for terminating Mr. Loudermilk that could not be chalked up to an evolving argument. Moreover, the claimed policy against taking photographs in the workplace may not

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have helped the company even had it been asserted at the outset of litigation. As noted in a previous article and as the Seventh Circuit alluded, the EEOC may look askance at otherwise valid workplace policies (such as a prohibition on secret recordings in the workplace) if an employee is attempting to gather evidence of discrimination when the policy violation occurred.

Finally, this case serves as another example of the value of proper execution of employment law fundamentals. Mr. Loudermilk complained of discrimination, but his complaints were ignored and never investigated. His supervisor failed to consult with human resources or legal counsel before the termination decision. The policy violation on which the company ultimately relied was never memorialized in writing. Each of these missteps could have been avoided.

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