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Worker has cause of action

Worker also has right to jury trial on retaliation

By Jane Pribek

Minnesota's workers' compensation law allows a cause of action for threatening to discharge an employee for seeking benefits, the Court of Appeals has recognized.

The court additionally held that a claimant alleging retaliatory discharge under the act has a right to a jury trial.

The latter ruling especially is "vitally important" to employees in Minnesota alleging retaliatory discharge, said Minneapolis attorney Michelle Dye Neumann, representing plaintiff Darrel Schmitz.

"It's a constitutional right. And it's an important right that people have their rights vindicated in front of their peers."

STAFF PHOTO: BILL KLOTZ

Michelle Dye Neumann and Phil Kitzer say their client is "fighting the good fight."

Facts

Schmitz worked at U.S. Steel's iron-ore facility in Keewatin, where in 2006, he allegedly injured his back at work.

Afterward, his supervisor and a higher-up, Larry Sutherland, called Schmitz. Sutherland allegedly told him U.S. Steel would take a "very dim view" of him filing an accident report, the first step in a workers' compensation claim.

Schmitz hasn't worked at U.S. Steel since January 2007. He filed a subsequent workers' compensation claim, which was denied.

He filed a complaint asserting retaliatory discharge for seeking workers' compensation and failure to offer continued employment. The St. Louis County court granted summary judgment against him, but the Court of Appeals reversed.

On remand, the District Court granted U.S. Steel's motion to quash Schmitz's demand for a jury trial. The court also granted Schmitz's motion to amend the complaint to add the threat-to-discharge claim.

After a bench trial, the District Court rejected Schmitz's retaliatory-discharge claim, but entered judgment for Schmitz on his threat-to-discharge claim, awarding $15,000 in emotional-distress damages, and later $203,113 in fees and over $9,000 in costs.

Post-verdict, U.S. Steel filed a motion arguing that the District Court shouldn't have recognized the threat-to-discharge cause of action, and claiming it was entitled to assert a *Faragher/Ellerth* affirmative defense. The company additionally argued the District Court should've applied the *McDonnell Douglas* burden-shifting framework to Schmitz's threat-to-discharge claim, and that Schmitz didn't prove that U.S. Steel's conduct was "cruel or venal."

Judge Shaun Floerke denied U.S. Steel's motion.

U.S. Steel appealed, and Schmitz cross-appealed regarding his jury-trial rights.

The Court of Appeals affirmed in part, reversed in part and remanded, ruling almost entirely for Schmitz in a 44-page opinion on May 13.

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The Opinion

First, the court upheld the threat-to-discharge cause of action.

There was no caselaw regarding threats to discharge, but the court characterized the statute as "unambiguous." Specifically, sec. 176.82, subd. 1 calls for civil liability for "discharging, threatening to discharge, or intentionally obstructing" an employee seeking workers' compensation.

The court listed the claim's elements:

(1) A person with knowledge that the plaintiff suffered a workplace injury;

(2) Attempts to dissuade him from seeking workers' compensation benefits through one or more communications;

(3) The communication(s) create a reasonable apprehension of discharge; and,

(4) As a result, plaintiff delays or ceases seeking workers' compensation.

Next, the court rejected U.S. Steel's contention that recovery requires showing "cruel or venal" conduct by the defendant.

"The concern of the statute is not with how severe or outrageous a particular threat might be, but whether it deters an employee from filing a claim," wrote Judge Natalie Hudson. "Indeed, it is often the most insidious or seemingly benign threats that are the most effective."

The court then held that Floerke correctly declined to analyze Schmitz's threat-to-discharge claim using *McDonnell Douglas* burden-shifting, applicable to retaliatory discharge claims.

Hudson wrote:

"Unlike the retaliatory-discharge context, in which the employee suffers an adverse employment action, such as discharge or demotion, for which there may have been a legitimate reason, it is never permissible to deter an injured employee from seeking workers' compensation benefits."

Likewise, the court rejected U.S. Steel's argument that it should have been allowed to assert the *Faragher/Ellerth* affirmative defense, used in hostile work environment cases, because Sutherland made the threat and there was no evidence U.S. Steel had actual or constructive knowledge of Sutherland's threat.

The court relied upon the agency principles laid out in both *Faragher* and *Ellerth*, where an employer may escape vicarious liability for its employees' torts only if the tortfeasor is acting outside the scope of employment. Unlike sexual harassment, the proscribed conduct here falls directly within a supervisor's scope of employment, the court reasoned.

Lastly, the court rejected Schmitz's claim that the failure-to-offer-continued employment claim warranted a jury trial, but agreed that a constitutional jury-trial right exists for his retaliatory discharge claim.

The rulings turned on whether the claim is an action at law, for which the Minnesota Constitution guarantees a right to a jury trial, or an equitable action where there's no constitutional jury-trial right.

"Having analyzed both the substance of the claim and the relief sought, as determined by all of the pleadings, we conclude that an action brought in District Court under Minn. Stat. § 176.82, subd. 1, alleging the tort of retaliatory discharge and seeking only money damages, is an action at law for which the Minnesota Constitution guarantees the right to a jury trial," Hudson wrote.

The continued-employment claim, however, sought an equitable remedy and there is no attendant jury-trial right.

Counsel's Comments

Neumann, of Halunen & Associates, said the jury-trial ruling is the opinion's most important conclusion — for her client certainly, but also, it signals a greater willingness by the appellate courts to find a constitutional right to a jury trial in other types of employment claims, potentially including the Minnesota Human Rights Act.

"This is a helpful opinion in moving that argument forward," she said.

Neumann also said the court appropriately rejected the "convoluted burden-shifting formula" advocated by the defense.

Her co-counsel, Phil Kitzer, said the court didn't address the fees and costs ruling, but he anticipates the issue will reemerge after trial on the remaining claim.

Schmitz, who lives in a part of the state where jobs are scarce, remains unemployed and is seeking disability benefits. He's been living on his retirement savings since his injury. Kitzer said, "He's been fighting the good fight for six years now, and we potentially have two more in front of us."

Chuck Knapp chairs the state bar's Employment Law Section. The Faegre Baker Daniels attorney said the opinion very likely merits high-court review, given the novelty of its issues.

"The opinion itself is a great read and any young employment lawyer should read it," Knapp said.

"While the cause of action it recognizes, I don't think at the end of the day as a practical matter is a significant new claim, clearly there was some great advocacy on both sides that led to this outcome," he said. Knapp reasoned that the damages were low in this case, which would likely hold true in other cases, too — so that's why its significance is somewhat diminished.

William Mitchell College of Law Prof. Kenneth Kirwin characterized the opinion as "pretty straight forward, comprehensive and well-reasoned."

Doug Christensen and Marilyn Clark of Dorsey & Whitney in Minneapolis, and Rod Torbic of U.S. Steel in Pittsburgh represented the company. None of them returned calls seeking commentary.

The case is , Schmitz v. U.S. Steel.