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Affordable Care Act's Employer Mandate Delayed Again

As enacted, the Affordable Care Act required mid-size employers (those with 50 to 90 employees) to offer in 2014 minimum essential health coverage to employees working at least 30 hours a week or pay a fine of \$2,000 per employee above the first thirty employees. That 2014 deadline was delayed until 2015 by Presidential action. On February 12, 2014 the U.S. Treasury Department issued a final rule further delaying the requirement until 2016. [79 FR 8543]

Large employers (those with 100 or more employees) were required by the Act to cover ninety five percent of their employees by 2015. The New Treasury rule delays that ninety five percent coverage requirement until 2016 and, instead, requires employers only to meet a seventy percent benchmark in 2015.

Small employers (those with 50 or fewer employees) remain exempt from the Act's mandates and fines.

Eighth Circuit Reiterates That Bad Behavior and Unfortunate Outcomes Do Not Necessarily Rise to the Level of Employment Discrimination

In its January 13, 2014, decision in *Loretta H. Rester v. Stephens Media LLC et al.* [No. 12-3934] The U.S. Eighth Circuit Court of Appeals gave a useful review of the elements of proof for various claims of discrimination in the workplace.

Loretta Rester was a graphic artist for a community newspaper owned by Stephens Media. She had been involved in the development of a special edition golf publication whose content was rejected by a client. To address the client's concerns Rester met with the paper's general manager William Elderton. At that meeting Elderton, according to Rester's testimony, slammed his hand on the desk, screamed and cursed at her, and three times physically restrained her from leaving the room until Rester herself began "wailing and cussing and screaming and hollering" at which point she did leave the room.

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After a ten minute break outside in her automobile Rester returned and met further with Elderton and the paper's editor. At that second meeting Elderton apologized and Rester continued to remain on the job until the end of the day.

Nine days later, Rester emailed an account of the meeting to Dennis Byrd , the paper's publisher and Elderton's supervisor. Shortly afterward Rester met with Byrd and a human resources representative of Stephens Media where she told them that she desired to keep working at the paper.

A week after that meeting, when Stephens Media took no action against Elderton, Rester emailed to Byrd two weeks' notice of resignation. Byrd contacted her about continuing on at the paper noting that Elderton would be retiring at the end of the next month. Rester later that same day emailed Byrd that she would resign as she had indicated.

Rester then sued Stephens Media, Elderton, and Byrd claiming violations of federal law through which she had suffered sex discrimination, a hostile work environment, constructive discharge, and retaliation as well as violations of state human rights law. The district court gave summary judgment to the defendants on the federal claims and dismissed the state law claims.

In its decision on Rester's appeal of the summary judgment the Eighth Circuit addressed each of her claims.

On the sex discrimination claim, the court noted the four elements of proof: that Rester belonged to a protected class; that she possessed the necessary qualifications to perform her job; that she suffered an adverse employment action, and that she received different treatment from other similarly situated employees who did not belong to the protected class. Only the adverse employment action and disparate treatment elements were at issue and on both the court found that "Rester did not produce sufficient evidence to create a jury question for either element." Noting that Rester suffered no termination, loss of benefits, or change in job duties the court concluded that she "cannot establish a prima facie case of gender discrimination." Further, the court continued, even had Rester been able to show evidence of an adverse employment action, there was no record "that she received different treatment because of her sex."

On the hostile work environment claim, the court noted the four elements of proof: membership in a protected group; the occurrence of unwelcomed sexual harassment; that the harassment occurred because of her sex; and that the harassment affected a term, condition, or privilege of employment. This standard, the court went on, requires "extreme" conduct "rather than merely rude or unpleasant conduct" and that conduct "must permeate the workplace". Concluding that Elderton's actions did not create a hostile work environment the court stated: "This singular incident, while most unfortunate, does not meet the required standard. The incident related to a workplace disagreement and the conduct does not denote a sexist connotation. On the record, Rester has failed to establish that this incident permeated the workplace and thus has not established a prima facie case of hostile work environment."

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On the constructive discharge claim, the court noted that Rester was required to show that a reasonable person in her situation would find the working conditions intolerable, and that the employer intended to force her to quit. An employee, however, is required to give the employer a reasonable opportunity to correct the intolerable condition before quitting. Noting that Stephens Media attempted to convince Rester to stay on and that nothing in the record indicates that the employer knew or should have known that she would quit, her claim failed.

On the retaliation claim, Rester was required to show that she engaged in protected conduct; that a reasonable employee would have found her employer's retaliatory action materially adverse; and that the materially adverse action was causally linked to her protected conduct. Noting that Rester had failed to establish that she was subject to an adverse employment action at all, much less as materially adverse action, her claim failed.

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