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Employment Claims Born of the Pandemic

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Discrimination and Retaliation Cases during the Pandemic: Whodunnit? COVID-19 or an Employer Who Is Violating the Law?

Lawyers who advocate on behalf of terminated employees often operate as private detectives. Our role requires a full exploration of all the facts surrounding the termination, including the underlying employment, to figure out where the truth lies—or at least where the evidence points. This mission has become even more challenging during the pandemic. Is the employer exploiting this worldwide crisis to cover up what otherwise would be a clearly discriminatory or retaliatory termination? Or is the company simply making difficult but necessary decisions during unprecedented times to protect its long-term viability?

Consider a hypothetical employee who in November 2019 lodged a good faith complaint with Human Resources that she was being sexually harassed by the company's CEO. No employment lawyer would dispute that, in this example, the employee engaged in protected activity, and it would be unlawful to retaliate against her for doing so.

Also consider, in this hypothetical, that the employer wants to retaliate against the employee for complaining about sexual harassment.

In order to establish a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in a protected activity; (2) her employer was aware of this activity; (3) she suffered an adverse action; and (4) a causal connection exists between the alleged adverse action and the protected activity.

One of the simplest ways to show a causal relationship between the protected activity and adverse action is by demonstrating they occurred in close temporal proximity to one another. For example, if the employee was terminated or demoted within a few days or weeks of complaining about sexual harassment—and her job performance was otherwise satisfactory—she may be well poised to prove that, but for her complaint, she would not have been subjected to that action.

But what if the CEO got great legal advice and refrained from taking any action against her back then?

Then the coronavirus comes along and gives the company an apparent gift: the perfect "cover" to rid itself of the unwanted employee under the guise of the economic constraints presented by the pandemic. The employee can no longer avail herself of a temporal proximity argument several months later, and she loses, right?

Not so fast.

Courts have found temporal proximity to exist, notwithstanding the considerable passage of time between the protected activity and the retaliatory conduct, by measuring the time between those two key events from the earliest opportunity the employer has to retaliate against the employee following her protected activity. Enter the coronavirus. Here, the "earliest opportunity" doctrine might provide some protection for the employee who complained about sexual harassment especially if she was selected for termination over her peers who had not complained.

Another opportunity for the employer to use COVID-19 as a sword to violate the law rather than as a shield to protect the company might occur in the context of a reduction in force (RIF) connected to a diminution in the company's bottom line in the wake of the pandemic.

Of course, there would be nothing unlawful with such business decisions if they were free from bias. But if, hypothetically, employees in their 50s and 60s were included in the RIF and their much younger counterparts were spared, the coronavirus excuse may not cut it in court, and the employer may be found to have engaged in age discrimination in the termination process. Of course, a similar inference could be reached with any other protected class (such as race, gender, religion, disability, sexual orientation, or pregnancy) adversely affected by the RIF or job elimination if those in

the protected class are subjected to the adverse action in disproportionate numbers to those similarly situated who are outside that class.

Finally, aside from scenarios in which whole protected classes are impacted by a RIF, an employer who attempts to "hide" an unlawful termination of one member of a protected class by simply "slipping" the employee into an otherwise legitimate RIF may nonetheless still be liable if there are other facts supporting a discriminatory or retaliatory intent.

The goal of the plaintiff's employment lawyer in any discrimination or retaliation case is to ferret out the true motivation underlying the employer's adverse action against the employee. Indeed, I sometimes wonder whether, in our former lives, we plaintiffs' employment lawyers were all protagonists in mystery novels. Now that COVID-19 is in the picture, the employer is presented with the opportunity to bury that truth one layer deeper, particularly in discrimination and retaliation cases. While the task may be more challenging in this unprecedented time, with careful digging, the effective employee advocate will likely prevail in uncovering the true culprit—whether it is COVID-19, or an employer who is violating the law.

Sexual Harassment Delivered Remotely: A Boiling Cauldron of Trouble

As an employee rights advocate, sexual harassment in the virtual workplace has been on my radar since the COVID-19 pandemic created a seismic shift in our workforce from in-person to remote.

Although a welcome byproduct of remote work during the pandemic has been diminished opportunities for physical sexual harassment and assault, virtual sexual harassment, which presents its own unique harms, has most assuredly taken its place.

Sexual harassment delivered remotely packs two particularly insidious punches. First, without the usual cues which put the employee on notice that rules governing the workplace apply to their conduct (such as donning work attire, entering the brick-and-mortar workplace and interacting in person with colleagues), the potential harasser is emboldened to cross the already blurred line virtual work presents (think late night texts delivered while in pajamas where sexual innuendo infects work-related conversation). The lack of bystanders as witnesses to either discourage the would-be predator to act in the first place or intervene if he does is one other noxious ingredient added to this already disturbing mix. Second and even more importantly, the person

on the receiving end of such conduct is too often hobbled in her ability to identify that conduct for what it is: unlawful.

Indeed, most workplaces have yet to provide clear guidance to their workforce on this pernicious form of sexual harassment. Employers should view this now pervasive phenomenon of virtual sexual harassment as an opportunity to reinforce vital pre-existing training—that sexual harassment is not limited to physical touching but covers unwelcome behavior of a sexual nature in all guises—and that rules governing workplace conduct remain ironclad in the virtual as well as physical workplace.

The Pandemic's Devastating and Lasting Impact on Working Mothers: The New Frontier for Disparate Impact Claims?

Statistics tell a powerful story about COVID-19's impact on women in the workforce. According to the Center of American Progress, in September 2020, four times as many women as men dropped out of the labor force, both "voluntarily" and involuntarily. *See* Julie Kashen et al., *How COVID-19 Sent Women's Workforce Progress Backward*, CTR. FOR AM. PROGRESS (Oct. 30, 2020). The magnitude of the inequality is staggering. Indeed, in July 2020, a Washington Post article grimly entitled, *Coronavirus child-care crisis will set women back a generation*, pointed out that "[o]ne out of four women who reported becoming unemployed during the pandemic said it was because of a lack of childcare—twice the rate among men." Alicia Sasser Modestino, WASH. POST (July 29, 2020).

A Brookings Institution article illuminates why working mothers have been so disproportionately impacted during the pandemic:

> Balancing work and family obligations has long been the reality for women in the United States. Historically, women have been the primary caregivers in their families. This has remained true even as most women work outside the home and provide important contributions to household income. Mothers working full-time spend 50% more time each day caring for children than fathers working full-time. But COVID-19 and the uncertainty around childcare and in-person instruction for school-aged children this fall has further increased this burden.

Nicole Bateman & Martha Ross, Why has COVID-19 been especially harmful for working women? BROOKINGS (Oct. 2020).

The Brookings Institution article, which was published in October 2020, portended (accurately) that the disparate impact on working women will only get worse:

> As the pandemic persists, women will continue to shoulder a disproportionate share of its burden . . . . For those women who have been able to keep their jobs, many will continue to balance competing priorities. To earn a paycheck, those who cannot telework must show up physically to work, potentially posing health risks to themselves and their families, and requiring them to find alternative care arrangements for their children if school or daycare are unavailable.

A Fortune Magazine article summarized the import of this phenomenon in bone-chilling fashion:

> We are living in a moment in history unlike any in our lifetimes, with an unstable confluence of factors triggering the loss of a generation of progress in workplace equality—a lost generation of professional, predominantly millennial women . . . . Not since 9/11 have Americans experienced a defining event that so fundamentally and immediately changed our day-to-day lives.

Allison Robinson, COVID-19 is causing a backslide in workplace gender equality. Here's how to stop it, FORTUNE (Aug 3. 2020).

The Fortune article, authored almost a year ago, emphasized the "unique opportunity" business leaders have "to enact change that will keep diverse talent in the workplace while creating a culture where they can grow and thrive." Given its findings that "professionals who are limited by rigid in-office requirements can thrive in a remote work environment," the article's author recommended employers "embrace and implement flexibility," including remote options.

With the advent of the coronavirus Delta variant, the same concerns and opportunities highlighted by these journalists and think tanks a year ago are just as painfully relevant today. Heather Long, *'We're Back to panicking': Moms are hit hardest with camps and day cares closing again*, WASH. POST (Aug. 6, 2021).

Like the Fortune article, the Lean In and McKinsey and Company Survey emphasized the unique and powerful position employers are in to stem the hemorrhaging. But first they need to recognize the magnitude of the problem. As the CEO of Lean In so poignantly observed:

> To think that we may lose all the hard-earned progress we've seen in the representation of women in a single year, it really has us breathless . . . and we think it should have anyone who's a leader of an organization breathless, too.

Abby Vesos, If We Had a Panic Button, We'd be Hitting it. Women Are Exiting the Labor Force En Masse—And That's Bad For Everyone, TIME (Oct. 17, 2020).

These stark statistics may very well support a disparate impact claim by working mothers who, as the pandemic continues, need to continue to work remotely to manage their childcare and work responsibilities and are stymied by their employers' blanket requirements (absent business justification) that all employees must return to the physical workplace.

Just as federal and state law prohibits intentional discrimination, so too do they prohibit "practices that are fair in form, but discriminatory in operation"—that is, practices that have a disparate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Disparate impact discrimination exists where a facially neutral employment practice "fall[s] more harshly on one [protected] group than another and cannot be justified by a business necessity." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Disparate impact claims proceed in three steps. First, the plaintiff must make a *prima facie* showing that a facially neutral practice has a discriminatory impact. The employer then bears the burden of showing either that the challenged practice did not cause the disparate impact or that the practice is "job related for the position in question and consistent with business necessity." If the employer does so, the employee can still prevail by showing that an "alternative employment practice" could achieve the same business goals as the challenged practice but with less discriminatory impact. *See* 42 U.S.C. § 2000e-2(k)(1); *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009); *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 382 (2d Cir. 2006).

Although it is more common for disparate impact plaintiffs to use employer-specific statistics to make their initial showing of discrimination, for some employers, this data may not yet be available. The data we already have about the economy as a whole, however, definitively demonstrates the staggeringly unequal impact of COVID-19 on America's working women. And corporate practices that instantiate or exacerbate that inequality, such as requiring all employees to return to the physical workplace during the pandemic, necessarily will have a discriminatory impact on women.

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The pandemic has turned our lives inside out and upside down. It has caused our professional and personal lives to not only intersect more frequently but also at times to collide. Employers would be wise to resist the temptation to exploit the pandemic to circumvent the law. Just as importantly, a reasonably flexible employer who engages in open communications with employees about the challenges they face during this unprecedented time not only enhances the likelihood that it will maintain high productivity and morale (productivity's inseparable cousin) but also diminishes the likelihood that it will end up at the other end of a lawsuit.

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