

# Employment Law Briefing



NOVEMBER/DECEMBER 2013

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# How do you define “employee”?

## *Court scrutinizes shareholder’s role in discrimination case*

**T**oday’s workplaces involve many individuals whose roles blur the line between employee and ... something else. In *Mariotti v. Mariotti Building Products*, the U.S. Court of Appeals for the Third Circuit considered whether the district court had properly classified the plaintiff as a nonemployee, preventing him from invoking the protections of Title VII.

### **Awakening a dispute**

The plaintiff was a member of the board of directors and a shareholder in his family’s closely held building products business. He was responsible for developing a number of areas of the business and claimed that the divisions he managed had earned profits of more than \$15 million in the six years preceding his eventual termination.

In 1995, the plaintiff experienced a “spiritual awakening.” He believed that his newfound spirituality resulted in “a systematic pattern of antagonism” toward him that culminated in his firing in January 2009. The termination occurred after he delivered a eulogy at his father’s funeral in which he included comments about his faith as well as his “father’s good example.”

After the funeral, the shareholders convened a meeting and made the decision in a unanimous vote. Notably, the plaintiff’s termination letter indicated that he would continue to receive his distributions from the corporation and other related entities. Also, despite his termination, he continued to serve on the board of directors until August of 2009, when he lost his bid for re-election.

Following the loss of his board position, the plaintiff filed Title VII claims of religious discrimination and hostile work environment. The plaintiff asserted that company officers, directors and employees had made negative, hostile, and/or humiliating statements about him and his religious affiliation. The company moved to dismiss the complaint, arguing that the plaintiff wasn’t an “employee” under Title VII and couldn’t invoke its protections.

### **Following the guidelines**

On appeal, the Third Circuit relied on the test developed by the U.S. Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*. In that case, the Court considered whether the shareholder-directors



of a professional corporation should be counted as employees. The Court concluded that the common-law element of control was the principal guidepost in deciding whether an individual is an employee.

The Supreme Court also relied on the six guidelines the Equal Employment Opportunity Commission (EEOC) set forth in its compliance manual. In determining whether a shareholder-director is an employee, the guidelines point to whether:

1. The organization can hire or fire the individual or set rules regarding his or her work,
2. The organization supervises the individual’s work (and, if so, to what extent),
3. The individual reports to someone higher in the organization,
4. The individual is able to influence the organization (and, if so, to what extent),
5. The parties intend that the individual be an employee, as expressed in written agreements or contracts, and
6. The individual shares in the organization’s profits, losses and liabilities.

Affirmative answers to these queries support defining the individual as an employee.

## Scrutinizing his status

Getting back to *Mariotti*, the Third Circuit, as mentioned, focused on the six-factor test in *Clackamas*. It also considered the common-law control test, which looks to the level of control that an employer exerts over an individual to determine whether he or she is an employee or independent contractor.

*By sitting on the board of directors and serving as a corporate officer, the plaintiff had the ability to participate in fundamental business decisions.*

The court found that the plaintiff wasn't an employee. It pointed to his status as a shareholder, director and corporate officer, as well as his substantial authority and right to control the enterprise. Ultimately, by sitting on the board of directors and serving as a corporate officer, the plaintiff had the ability to participate in fundamental business decisions.



Furthermore, his termination letter made no mention of salary, as one would expect in an employee termination letter. Instead, it stated that he'd continue to receive his corporate distributions.

## Studying the factors

*Mariotti* demonstrates that courts will look to multiple factors in analyzing whether an individual is defined as an “employee” — and no single factor will make the determination alone. Employers should study these various factors carefully when heading into a dispute with a shareholder or anyone else who might be in a gray area. ♦

## Volunteer vs. employee

In *Juino v. Livingston Parish Fire Dist. No. 5*, the U.S. Court of Appeals for the Fifth Circuit looked at whether a volunteer may be considered an employee for purposes of invoking Title VII protections. The plaintiff, a volunteer firefighter, filed suit under Title VII, claiming harassment and retaliation. She alleged that a fellow firefighter had subjected her to sexual harassment and that no disciplinary action was taken when she complained to her supervisor. The district court dismissed her claim, finding that the plaintiff wasn't an employee because she received no remuneration. The plaintiff appealed, arguing that her fringe benefits could count as remuneration.

The Fifth Circuit looked to the “threshold-remuneration” test. It provides that remuneration may consist of salary or wages, or *significant* indirect, job-related benefits. If there is remuneration supporting a plausible employment relationship, courts will then proceed to the common-law agency test (which is generally used to classify someone as either an employee or independent contractor).

Ultimately, the court agreed that certain fringe benefits may count as remuneration, establishing an employment relationship. But the benefits at issue — such as receiving \$2.00 per fire/emergency call, a life insurance policy, and a firefighter's uniform and badge — were unlike the significant indirect benefits contemplated in previous decisions. In those cases, examples included retirement pensions, disability insurance and limited medical benefits. Thus, the Fifth Circuit affirmed the district court's decision and dismissed the plaintiff's Title VII claims.

# Following an “interactive process” under the ADA

**W**hether an employer is in compliance with the Americans with Disabilities Act (ADA) isn't a simple “yes or no” question. In many instances, employers need to engage in an “interactive process” with disabled employees to establish whether an accommodation is feasible. As the recent case of *Wilson v. Dollar General Corp.* shows, failing to do so could lead to legal risks.

## Vision problems

The plaintiff worked the night shift at a Dollar General distribution center, processing inventory and loading merchandise for delivery to the company's retail outlets. He was completely and permanently blind in his right eye after suffering a detached retina in his youth.

Within five months of being hired by Dollar General, he began experiencing vision problems in his left eye, requiring immediate medical attention. The plaintiff received treatment for several weeks and was cleared by his treating physician to return to work.

On the night he was to begin working again, his vision remained blurred and he was granted an additional day of leave and permitted to return the following night. The

following night, he drove to work but explained that he continued to have problems with his vision.

The plaintiff claims that his supervisor then gave him an ultimatum: Return to work or be fired. Being unable to work, he was terminated that evening. The plaintiff later filed a charge with the district court, alleging that Dollar General had unlawfully discriminated against him by failing to provide a “reasonable accommodation” for his disability, resulting in his discharge in violation of the ADA.

## 4 prongs for the plaintiff

In order to establish a case against his employer for failure to accommodate under the ADA, the plaintiff was required to show:

1. He was an individual who had a disability within the meaning of the statute,
2. His employer had notice of said disability,
3. With reasonable accommodation, he could have performed the essential functions of the position, and
4. The employer refused to make such accommodations.

Importantly, with respect to the fourth prong, ADA regulations provide that an employer may need to engage in the aforementioned interactive process with an individual in need of accommodation. This interactive process duty is generally triggered when an employee discloses a disability to the employer and expresses a desire for an accommodation. An employer who fails to engage in the interactive process won't be held liable if the employee cannot identify a reasonable accommodation that would have been possible.

## Unidentified accommodation

This particular case turned on whether the plaintiff could show, under the third prong of the test, that he could have performed the essential functions of his position had he been given a reasonable accommodation. The U.S. Court





of Appeals for the Fourth Circuit agreed with the district court and dismissed the claims. It found that the plaintiff could cite no evidence that, had he been granted leave, he could have performed the essential functions of his job on his requested return date.

Furthermore, the court found that the employer didn't violate its duty to engage in an "interactive process." This is because the plaintiff couldn't identify that a reasonable accommodation would have been discovered through such a process.

## Danger zone

### *Retaliation case looks to Supreme Court precedent*

**R**etaliation cases often pit one employer vs. one employee. But these disputes can grow more complicated. In *Byron Underwood v. Department of Financial Services State of Florida*, the U.S. Court of Appeals for the Eleventh Circuit heard a case involving not just the plaintiff, but his wife and two different employers.

#### **DFS and DOH**

The plaintiff was fired by the Florida Department of Financial Services (DFS) after working there less than three months. He'd previously worked for the Florida Department of Health (DOH) for 14 years.

His wife also worked for the DOH and, one month before his termination from the DFS, she settled a discrimination case with the DOH. Many DFS employees, who had also formerly worked for the DOH, knew of the plaintiff's wife's claims against the DOH. The plaintiff alleged that some of these employees were involved in the decision to terminate him.

The plaintiff argued that his firing was retaliatory, citing two supporting circumstances:

1. He and his wife had formerly worked at the same agency.
2. Both had worked with those who eventually fired the plaintiff, allegedly based on their knowledge of the wife's discrimination claims.

He argued that he was a member of a protected class because he was married to his wife, who had engaged in

#### **In spite of everything**

Although the employer in *Wilson* ultimately prevailed, it did so in spite of its failure to engage in an interactive process to accommodate the plaintiff's disability.

Employers must always mind the need for engaging their disabled employees in a dialogue to uncover potential reasonable accommodations. If an employer neglects to even engage in the interactive "accommodation discovery" process, it may find itself with no defense if the employee presents a viable accommodation after asserting a disability claim. ♦



a protected activity, and "because he was the victim of retaliation thereafter."

#### **Supreme Court decision**

The DFS argued that the plaintiff's retaliation claim, if successful, would "impermissibly expand" the scope of the U.S. Supreme Court's decision in *Thompson v. North American Stainless, LP*. In *Thompson*, the Court allowed an employee to bring a retaliation claim under Title VII when he was fired after his fiancée, a co-worker, filed a discrimination charge against their mutual employer.

The Supreme Court reached this decision partly based on previous case law's broad interpretation of the antiretaliation provision of Title VII. The Court explained that this provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Ultimately, the Supreme Court concluded that the plaintiff in *Thompson* fell within the “zone of interests” protected by Title VII because he:

- Was an employee of North American Stainless, and
- Wasn’t an *accidental* victim of retaliation — harming him was the employer’s intended means of retaliating against his fiancée.

The Court further elaborated that the firing of a close family member will almost always support an action for retaliation, while inflicting a milder reprisal on a mere acquaintance will almost never do so.

### Standing argument

The plaintiff in *Underwood* argued that, under *Thompson*, he had standing to sue the DFS. As the husband of an employee engaging in protected activity, the plaintiff claimed, he was within the “zone of interests” contemplated under Title VII.

The district court didn’t reach the issue of standing because it found that the plaintiff couldn’t show that his employer had engaged in an unlawful employment action. That is, the DFS didn’t retaliate against one of its own employees based on that employee’s protected conduct. *Thompson* was different because, there, the employer retaliated against its own employee based on her protected act and did so by firing another employee.

On appeal, the Eleventh Circuit agreed. It found that the plaintiff couldn’t make a third-party retaliation claim when his wife’s protected activity was directed at another employer.

*The firing of a close family member will almost always support an action for retaliation.*

### Third parties

Although the plaintiff in *Underwood* was unable to invoke the protections of Title VII, employers must be cognizant of the potential for third-party retaliation claims. Courts will look to the relationship between the employee alleging retaliation and the employee who engaged in protected conduct. Title VII’s protections may extend to other employees who haven’t engaged in protected activity if the relationship is deemed to be within the zone of interests.

Therefore, employers should take care not to engage in activity that may be construed as retaliatory against an employee who complains of discrimination (or other illegal treatment), as well as any staff member who maintains a close relationship with that employee. ♦

## History lesson: A Title VII case

Every employee has a history all his or her own. The importance of tracking and documenting this history is emphasized in *Muor v. U.S. Bank National Association*, a recent case that went before the U.S. Court of Appeals for the Eighth Circuit.

### Mixed reviews

The plaintiff, a native of Cambodia, had been employed by U.S. Bank in a variety of positions since 1983. She became an International Banking Specialist in 1999.

Over the course of her employment, the plaintiff had a history of mixed performance reviews. While she often

received overall ratings of “solid performance,” critiques throughout the years indicated that she needed to improve her accuracy and attention to detail.

In 2007, the plaintiff challenged an unfavorable review, claiming that she’d been discriminated against. When she was told that she could submit a rebuttal to the performance evaluation, the plaintiff declined.

### Claims and allegations

In 2008, her supervisor gave her an overall rating of “needs improvement,” explaining that she continued to perform below expectations and didn’t fully understand

the more complicated aspects of her job. When she was later presented with this review along with a written warning, she became ill and went home. Several days later, the plaintiff delivered a letter to the bank accusing her supervisor of discrimination as well as disputing her written warning and 2008 evaluation.

The plaintiff then went on short-term disability leave. One of her supervisors attempted to speak with her about her allegations of discrimination, but she replied that she didn't want to talk about it. She returned to work on a part-time basis a few months later, but the bank eventually filled her position after she failed to request approval for her continued absence. Later, the bank offered her a similar position requiring her to report to a former supervisor. She refused to take the position, declining to explain why.

She later asserted claims of race and national origin discrimination as well as unlawful retaliation under Title VII. Specifically, she asserted that one of the supervisors of the part-time position, who had also contributed to her 2008 evaluation, had made disparaging remarks about her ethnicity several years earlier. She claimed that he'd told another employee that she couldn't write or speak English and that she "should go back to Cambodia where she came from." She also claimed that the supervisor had told another employee that she and another Asian employee had "slanty eyes."

### Lack of evidence

In order to prevail in a discrimination claim, a plaintiff must show that he or she:

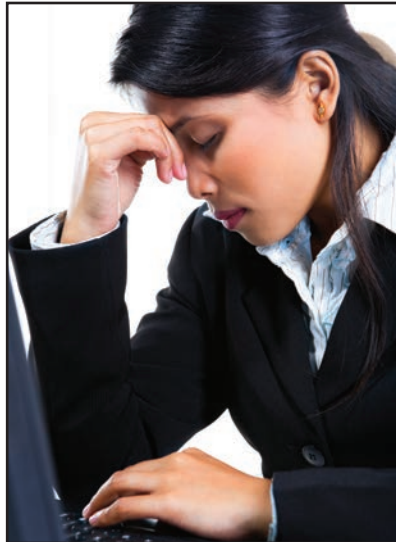
1. Is a member of a protected class,
2. Met the employer's legitimate expectations,
3. Suffered an adverse employment action, and
4. Experienced circumstances that give rise to an inference of discrimination.

Once the plaintiff presents a prima facie case, the employer has the opportunity to proffer a legitimate, non-discriminatory, nonretaliatory reason for its actions. The employee must then offer evidence that the employer's reasons are pretext for discrimination or retaliation.

Here, the Eighth Circuit found that the plaintiff's discrimination claims were without merit, citing as its reasons the plaintiff's inability to link the disparaging remarks with her negative performance reviews and replacement (the alleged adverse employment action). Furthermore, the plaintiff offered no evidence that the bank's asserted reason for her negative performance reviews, namely her tendency to commit errors, was pretext for discrimination.

### Letter of the law

In order to make out a claim of retaliation, a plaintiff must demonstrate that he or she engaged in protected activity and suffered a materially adverse employment action. Furthermore, a plaintiff needs to show that the materially adverse employment action in question was causally connected to the protected activity.



In this case, the Eighth Circuit found that the plaintiff couldn't show that the bank took any adverse employment action against her based on her letter alleging discrimination. Citing its previous decision in *Bassett v. City of Minneapolis*, the court found that the plaintiff hadn't suffered an escalating pattern of adverse actions that occurred in close temporal proximity to her complaints of discrimination.

As evidence, the Eighth Circuit pointed to the fact that the alleged adverse actions — such as the bank's hiring of a replacement — occurred about eight months after the plaintiff's protected activity (submitting the letter alleging discrimination).

### Timing and record keeping

*Muor* illustrates the importance of timing in analyzing an employee's retaliation claims. As it did in this case, a court will skeptically view any discrimination made long after the alleged protected activity.

This case also demonstrates the importance of good record keeping. The employer prevailed, in part, because it was able to produce written evaluations created throughout the years that documented the employee's shortcomings. When the employee later asserted discrimination, the employer was able to use these records as evidence that there were legitimate, nondiscriminatory reasons for filling her position with another employee. ♦