Cases *cont'd from page 33*

U. S. Department of Agriculture (USDA) because the facility was a recipient of federal funds in the form of rental assistance. During one such inspection, the Dixons' supervisor, Christina Saunders, saw that the rental office had been decorated with art containing references to the Bible, and asked that it be removed. Saunders believed that the display was in violation of the federal Fair Housing Act (FHA), and feared losing her job if the facility was found to be non-compliant with the Act. Ms. Dixon had previously been told that, under Hallmark's policy, she could not display religious items in the management office. According to Saunders, Ms. Dixon "made it clear that the picture was not going to come down" and left the office, and Saunders called her own supervisor. That manager instructed Saunders to take down the artwork herself. Ms. Dixon, however, returned to the rental office with her husband, and they allegedly insisted on re-hanging their artwork. Saunders ultimately fired both Dixons for insubordination. The Dixons, however, claimed that Mr. Dixon was fired because, as Saunders alleged said, "You're fired, too. You're too religious."

The Dixons filed a lawsuit against Hallmark, alleging that it violated Title VII of the Civil Rights Act of 1964 by intentionally discriminating against them, failing to accommodate their sincerely held religious beliefs, and retaliating against them. The Dixons also asserted claims of retaliation and housing discrimination in violation of the FHA. The district court granted Hallmark's motion for summary judgment, rejecting the plaintiffs Title VII intentional discrimination and retaliation claims, and finding, on their failure-to-accommodate claim, that it was unclear whether they held a sincere religious belief regarding the removal of their artwork. It held that § 3604(b) of the FHA did not cover the Dixons. The defendants could not have interfered with the Dixons' right to not be discriminated against in the terms, conditions or privileges of the rental of a dwelling when they were evicted because the manager's apartment was "part of their compensation, not a rental."

On appeal, summary judgment in favor of the defendants was affirmed, in part. The U.S. Court of Appeals for the Eleventh Circuit held that a reasonable jury could conclude that Saunders's alleged comment ("You're fired, too. You're too religious.") constituted direct evidence of religious discrimination. Because the Dixons raised a genuine issue of material fact as to whether Hallmark intentionally discriminated against them on the basis of their religious beliefs, the district court erred by granting summary judgment on that claim. On the Title VII failure-to-accommodate claim, the appellate court vacated and remanded the district court's grant of summary judgment. The differing testimony as to whether the Dixons held a sincere religious belief that conflicted with the employer's directive to remove their artwork raised a genuine issue of material fact as to the first prong of the failure-to-accommodate analysis (that they held a bona fide religious belief that conflicted with an employment requirement). The Dixons also satisfied both remaining prongs: that they informed Hallmark of that belief; and were discharged for failing to comply with the conflicting employment requirement.

On their Title VII retaliation claim (that they opposed Hallmark's "unlawful employment practice," the decision to keep its workplace free of religious symbols), the Eleventh Circuit concluded that the Dixons failed to demonstrate a viable claim. While they *subjectively* believed that Hallmark's policy was an "unlawful employment practice," they pointed to no evidence to show that the belief was *objectively* reasonable — that is, statutory or case law that could reasonably be believed to prohibit a private employer from keeping its own workplace free of religious references. The absence of anything in the FHA to prohibit religious symbols in the workplace did "nothing to further the Dixons' obligation to demonstrate that the law prohibits a private employer from deciding to keep its workplace free of religious symbols."

On the last issue, retaliation and housing discrimination under the FHA, the court found the court below erred, but affirmed on other grounds. The district court was incorrect in finding that the FHA did not apply because the FHA's definition of "to rent" included "to grant for a consideration the right to occupy premises," which included providing an apartment in exchange for management and maintenance services. However, to establish a claim for retaliatory housing discrimination, the Dixons had to show that Hallmark "coerce[d], intimidate[d], threaten[ed], or interfere[d] with" their exercise of rights granted under § 3604(b). Since the Dixons failed to show how § 3604(b) provided a right to hang religious artwork in Hallmark's rental office (which was separate from their personal dwelling premises), and because § 3604(b) provided no such right, the Dixon's claim for retaliatory housing discrimination failed. *Dixon v. The Hallmark Companies, Inc.*, 627 F. 3d 849 (11th Cir. 2010).

Employee Speech and Retaliation

Lauck had been an employee of the Campbell County Sheriff's Department for 22 years, rising to the rank of deputy sheriff. He was also the lead officer on his shift. The sheriff decided to transfer Lauck to the Civil Process Division. Lauck would retain his pay and rank, but would no longer be the lead officer on his shift. Lauck refused the transfer and claimed that he was being demoted and constructively discharged. He brought a state law breach of contract claim, and civil rights claims under 42 U.S.C. §1983, alleging a denial of procedural due process and retaliation for speech protected by the First Amendment.

With regards to the First Amendment retaliation claim, the U.S. Court of Appeals for the Tenth Circuit followed a five-step approach. First, the court determined "whether the employee spoke pursuant to his official duties." If the answer was no, the court next examined whether the speech was on a matter of public concern. If the answer was yes, the court then determined whether the employee's interest in commenting on the issue outweighed the interest of the State as an employer. In the fourth step, the court decided whether the employee had shown that the speech was a substantial or motivating factor in a detrimental employment decision. Last, the court decided whether the employer showed that it would have taken the same employment action even in the absence of the protected speech.

Lauck identified two statements that

allegedly resulted in the retaliatory action: an incident report asserting that a fellow deputy had used excessive force, and a letter from his attorney about the department's failure to prevent a murder. The first statement was found not to be protected speech because it was prepared as part of Lauck's duties as a deputy sheriff. The letter also was not protected speech. Even assuming that the speech was not part of Lauck's official duties and on a matter of public concern, the claim failed because of a lack of evidence of causation: Lauck's transfer was not ordered until seven months after the letter, and Lauck received a positive performance appraisal and a merit salary increase between the time of the letter and his transfer.

The court also dismissed Lauck's due process and contract claims. There was no breach of a contractual obligation, and Lauck had no "legitimate claim of entitlement" to his position, necessary to support a due process claim. Lauck also claimed a due process violation in a constructive-discharge context. Constructive discharge occurred when a reasonable person in the employee's position would view the working conditions as intolerable to the point that he or she would feel compelled to resign. To establish a valid due-process constructive-discharge claim, the former employee had to show that a property right was violated; that the employer knew or intended that intolerable conditions were imposed on the employee; and the employee was denied the necessary procedure. Lauck could not establish any of these elements. There was no evidence from which a juror could infer that a reasonable person would find working conditions in the Civil Process Division to be intolerable; Lauck did not suggest that the sheriff knew that the working conditions would be intolerable to a reasonable person; and Lauck did not demonstrate, or even suggest, that he was not provided with an adequate hearing. The court affirmed the grant of summary judgment in favor of the defendants. *Lauck v. Campbell County*, No. 09-8085, 2010 WL 5061041(10th Cir. Dec. 13, 2010).

Title VII and Discrimination

Brian Grigsby worked as an Air Traffic Controller for the Federal Aviation Administration (FAA). During his original training with the FAA in its Indianapolis office, he became aware of his Native American heritage. He educated himself about his roots, and claimed that this led to a number of hostile encounters with his coworkers, where they referred to him as "Chief," "Running Planes Together," and "Metal Rain." Grigsby requested and was granted a transfer to another facility, in Terre Haute, Indiana, and worked there for eight years. After learning that there would be a reduction in force at that location, Grigsby applied for several positions with the FAA in Indianapolis. The FAA's human resources department rated Grigsby as "qualified" for many posts and interviewed him, but he was not selected by the hiring official. Grigsby claimed that when he mentioned his Native American heritage at a meeting with the assistant air traffic manager at the Indianapolis Center, the manager's demeanor turned sour and the meeting abruptly ended. Grigsby brought a discrimination claim under Title VII of the Civil Rights Act of 1964 against the Department of Transportation (DOT). The district court granted the DOT's motion for summary judgment.

To establish discrimination sufficient to survive a motion for summary judgment, two methods of proof were available—direct or indirect. Under the direct method, a plaintiff had to offer direct evidence that acknowledged a discriminatory animus on the part of the employer or circumstantial evidence which established discriminatory motive. In this case, Grigsby's only showing was the encounter with the manager who, he claimed, ended the interview abruptly when he mentioned his Native American origin. The court noted that this evidence did not "point directly to a discriminatory reason for the employer's action."

Using the indirect method, a plaintiff had to establish a prima facie case by showing that he was a member of protected class; that he applied for and was qualified for an open position and was rejected; and that the position was filled by a person not in the protected class who had similar or lesser qualifications. An inference of discrimination then arose that the employer could rebut by offering a non-discriminatory, legitimate reason for the personnel action. The FAA asserted that it did not select Grigsby because he could not "maintain operational currency at the Indianapolis Center at the start of his employment and because he lacked familiarity with the Center's upgraded technology." The court held that Grigsby was not qualified for the positions. Although he did have a "Full Performance Level" certification, he did not have "Certified Professional Controller" status, which was required for the new job openings. Further, even if Grigsby was qualified, he failed to show that the positions were awarded to applicants who had similar or lesser qualifications than he did, as all the successful applicants were Certified Professional Controllers, familiar with the technology and automation in place in Indianapolis. The court, for purposes of argument, took the analysis further and held that, even had Grigsby established a prima facie case, he could not overcome the FAA's legitimate reason for failing to select him. The U.S. Court of Appeals for the Seventh Circuit upheld the lower court's grant of summary judgment in favor of the DOT. *Grigsby v. LaHood*, No. 10-1072, 2010 WL 4923568 (7th Cir. Dec. 06, 2010).

Pledge of Allegiance

New Hampshire's School Patriot Act required that public schools authorize a period, during the school day, for students to voluntarily participate in the recital of the Pledge of Allegiance. The only obligation for non-participants was that they respect the rights of the students who chose to participate. The Freedom from Religion Foundation (FFRF) brought an action against a public school district, claiming that the rights of FFRF members' children were violated when the district implemented the New Hampshire law. The district court dismissed all of FFRF's federal claims and issued a final judgment in favor of the school district. FFRF appealed. The issue on appeal was whether the law violated the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Due Process Clause of the U.S. Constitution.

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