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## Employment & Labor Law FLASHPOINTS April 2018

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### Seventh Circuit Examines What Constitutes Adverse Employment Action

To prevail on employment discrimination claims, plaintiffs must demonstrate that they suffered an adverse action that resulted in a qualitative or quantitative change in their terms and conditions of their employment. Typical adverse actions include employment terminations and demotions. However, when encountering situations in which such acts did not occur, plaintiffs push the limits on alleging what may be an adverse action in order to bring their claims before a court. Courts must then wade through the evidence to determine whether a true adverse employment action did in fact occur. The Seventh Circuit did just this in *Madlock v. WEC Energy Group, Inc.*, 885 F.3d 465 (7th Cir. 2018), and, in doing so, provided an instructive analysis of what may constitute an actionable adverse action, which could give rise to employer liability.

#### *Factual Background*

Wisconsin Electric Power Company (WEPCO) employed Madlock since 1977. Madlock describes herself as a “confident and knowledgeable African American woman.” 885 F.3d at 468. In the mid-90s, Madlock began working in WEPCO’s “Meter to Bill” division, which was broken up into two sections — industrial billing for large commercial customers and volume billing for smaller commercial and residential customers. Madlock held the position of “Lead Customer Service Specialist” which did not place her in management, but made her a point person for a team of “billers.” *Id.*

In 2011, WEPCO assigned a new management team to its Meter to Bill division and ordered this team to conduct a comprehensive review of the division to reduce rebills. Cathy Wrycza was hired as “Team Leader” for this new team and became Madlock’s direct supervisor. Madlock and Wrycza’s relationship was rocky from the beginning, and at some point Wrycza admitted to Madlock that she had problems dealing with Madlock’s “stature,” which Madlock took as a reference to her height and demeanor in conversation.

WEPCO’s management had noted concerns with Madlock’s conduct prior to Wrycza being hired; however, her conduct came under greater scrutiny after Wrycza’s team came onboard. Wrycza began to discipline Madlock in February 2012, commencing with the first step in WEPCO’s disciplinary process, called an official written “coaching.” *Id.* This was followed by the second step, a “Record of Disciplinary Action,” in May 2012 for approving a bill that overbilled a customer by

\$58,900. Interestingly, the February 2012 discipline was rescinded in August after management determined Madlock had not received requisite training at the time she made the error, which reduced the May 2012 discipline to the first step in the discipline process. Madlock was again disciplined in November 2012 for unprofessional language and inappropriate behavior.

Wrycza and Madlock's issues came to a head in February 2013. At that time, Madlock was transferred out of the Industrial Billing section due to her billing errors. The transfer did not affect Madlock's title or salary, but Madlock was moved to a cubicle in the center of the room between two managers, and her team was instructed to no longer go to her for help as a point person. Madlock was not initially given a new team in the Volume Billing section due to her unfamiliarity with that section's billing processes. Two of Madlock's coworkers described the transfer as a demotion and "total humiliation."

Madlock's new supervisor was Shemieka Phillips, an African-American woman. At some point, Wrycza spoke to Phillips about her insecurities with Madlock and informed Phillips that Madlock was a "strong black woman." 885 F.3d at 469. Wrycza used this phrase again during a conversation with a union steward at a dinner asking the steward how she dealt with "strong black women." *Id.*

Phillips prompted Madlock to file an internal complaint of discrimination against Wrycza, which she did on April 12, 2013. Wrycza first learned of the complaint on May 14, 2013, when she was interviewed as part of the internal investigation. On May 16, 2013, Phillips disciplined Madlock for a mistake that was reported to a manager on April 4, 2013. Madlock grieved this discipline, and, in her response to the grievance, Phillips created a list of Madlock's prior unofficial coachings and disciplines based on records in Madlock's personnel file.

In December 2013, Madlock applied for a promotion but was denied such due to her work record. Madlock filed a grievance over this decision, which was denied. Madlock then filed suit in federal court, alleging a violation of 42 U.S.C. §1981 based on race discrimination and retaliation for her internal complaint of discrimination.

### *The Seventh Circuit's Analysis of Madlock's Race Discrimination Claim*

The Seventh Circuit opened its analysis with a reminder that it "recently cleaned out the 'rat's nest of surplus tests' that plagued our case law on the subject of race discrimination," citing to its decision in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016). *Madlock, supra*, 885 F.3d at 470. In *Ortiz*, the Seventh Circuit eliminated the direct and indirect methods of proving employment discrimination and expressly rejected the use of "convincing mosaic" as a legal requirement in such cases. The Seventh Circuit replaced those tests with a straightforward inquiry — whether the evidence would permit a reasonable fact-finder to conclude that the plaintiff's protected status (race, age, religion, etc.) caused the adverse employment action. To make this determination, all evidence is to be placed in a "single pile" and evaluated as a whole, rather than categorized and evaluated separately. *Ortiz, supra*, 834 F.3d at 766.

In *Madlock*, the Seventh Circuit recognized that its new legal standard "presupposes the existence of an adverse employment action, so the threshold issue we must resolve is whether such an action

has even occurred.” 885 F.3d at 470. After careful consideration, the Seventh Circuit answered this inquiry in the negative for Madlock.

In reviewing Madlock’s claim, the court noted that an adverse action is some qualitative or quantitative change in the terms and conditions of employment that is more than a mere subjective preference. These changes can involve an employee’s wealth, career prospects, or changes to conditions that are humiliating, degrading, unsafe, or unhealthy. That being said, the court was quick to caution that not everything that makes an employee unhappy is an actionable adverse action.

In this case, Madlock alleged that her transfer was the unlawful adverse action. However, the court noted that the transfer caused no reduction in salary, loss of benefits, or loss of title. Madlock emphasized that it did cause her to lose her team of billers who were told to no longer approach her with questions, resulted in her being assigned a cubicle in between two managers, and was viewed by two of her coworkers as a demotion and humiliating. Matlock’s arguments were unavailing as the court found that none of the purported consequences were a qualitative or quantitative change in terms and conditions of employment. In particular, concerning the loss of her team, the court ruled that such action was temporary in nature to allow Madlock time to adjust to the new section. As to the alleged instruction to her team to not approach her, the court found that the team was merely told to not use Matlock as a point person, as opposed to having to avoid her altogether. With respect to the cubicle, Madlock’s dislike for her new cubicle location reflected a purely subjective preference rather than a hardship. The court found Madlock’s most compelling evidence to be the testimony from her coworkers that the promotion was humiliating and a demotion but held such evidence insufficient to demonstrate that the transfer was an adverse action because the “public perceptions were not a term or condition of employment.” 885 F.3d at 471, quoting *Spring v. Sheboygan Area School District*, 865 F.2d 883, 886 (7th Cir. 1989).

Ultimately, because the transfer affected no material change in Madlock’s employment, Madlock was unable to show that it qualified as an adverse action and could not overcome WEPCO’s motion for summary judgment.

#### *The Seventh Circuit’s Review of Madlock’s Retaliation Claim*

In addition to race discrimination, the Seventh Circuit also reviewed Madlock’s retaliation claim. For her retaliation claim, Madlock alleged that in retaliation for her internal complaint, she was disciplined in May 2013 for errors she committed the previous August and her supervisor created a list of her informal counselings and disciplinary actions, which was “peppered” with inaccuracies. 885 F.3d at 472. Reviewing Madlock’s claim under both the indirect and direct approach, the court found it insufficient to allow a reasonable fact-finder to find by a preponderance of the evidence that Madlock was entitled to a verdict.

Madlock was unable to succeed under the indirect approach because she could not identify a sufficient comparator. In particular, she failed to identify any employee who committed an error months before management learned of the error. In addition, she had no true comparator for the

listing of prior counselings because this list was created as part of the grievance process, as opposed to the discipline process, and no one else had filed a grievance.

Madlock failed under the direct approach as well because she was unable to show a causal link between her protected activity and the alleged adverse actions. Noting that timing alone is insufficient to establish a genuine issue of material fact, the court found that Madlock had no evidence that anyone in management ever responded to her negatively due to her filing a complaint. In fact, the supervisor who actually imposed the discipline and created the list, Phillips, was the individual who encouraged Madlock to file her internal complaint. Madlock attempts to overcome this evidentiary gap by alleging that Phillips knew some of the events included in the list were false, and that such showed her retaliatory intent. The court noted that Phillips testified that she relied on the contents of Madlock's personnel file to make the list and had no knowledge that anything in the file was incorrect — as long as she genuinely believed in the correctness of the file, there is no evidence of retaliatory intent.

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