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Newsletters

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Seventh Circuit Decides That Title VII's Retaliation Clause Does Not Protect Participation in "Purely Internal" Investigations

When a hospital appointed a new director for its chaplain staff, a part-time chaplain employee informed the hospital's human resources officer that that she was uncomfortable with the director's appointment, partly due to his views on women. In light of the employee's report, the human resources officer initiated an investigation "to rule out any kind of hostile work environment issue. . . ." In the course of the investigation, the employee informed an investigator that the director "puts down women" and that he was "a Southern Baptist and a 'good ole boy.'" After the investigator and the human resources officer concluded that the director had not created a hostile work environment, the employee was informed that if she was uncomfortable working for the director, she should resign. The employee responded with an e-mail, in which she detailed her "preoccupation" with the director. The human resources officer then suspended the employee, hoping that she could put her feelings to rest. When she could not do so, she was fired. The employee sued under the retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, alleging that she was discriminated against for participating in an investigation under Title VII and for opposing an unlawful employment practice. The U.S. Court of Appeals for the Seventh Circuit rejected the employee's claims, finding that "purely internal" investigations are not the "investigations" to which Title VII's retaliation provision refers. Only investigations "by an official body authorized to enforce Title VII" fall within the scope of Title VII protection. Furthermore, the court determined that the employee had not been fired for her participation, but for her comments "that demonstrated bad judgment and a preoccupation with superficial characteristics." Finally, the court rejected the employee's retaliation claim based on opposition to an unlawful practice, finding that she lacked the required "good faith and reasonable belief" that she was acting in opposition to a statutory violation. While this decision limits the reach of Title VII's retaliation provision, employers must remain mindful of that provision when taking adverse employment action against any employee engaged in Title VII protected activity.

Hatmaker v. Memorial Medical Center, No. 09-3002 (7th Cir. Aug. 30, 2010)

County Coroner's Office Found Liable for Reverse Discrimination

A white chief deputy coroner was stripped of a portion of his duties and eventually terminated by his black supervisor because of an alleged loss of confidence and trust. Prior to his termination, the chief deputy coroner filed an internal complaint of harassment because he believed the coroner was

Attorneys

Anthony E. Antognoli

David Ian Dalby

Tom H. Luetkemeyer

Service Areas

Employee Benefits

Labor & Employment

Workers' Compensation Defense

pressuring him to hire black deputy coroners and interfered with his ability to discipline a black deputy coroner for arriving late to a crime scene and hospital, missing mandatory meetings, and falsifying time sheets. After his termination, the chief deputy coroner, claiming protection under the Government Employee Rights Act as an individual chosen to serve an elected official in a policymaking capacity, filed a charge of discrimination on the basis of race, sex, and age and retaliation against the coroner's office. The chief deputy coroner prevailed on his claim of "reverse" discrimination after the U.S. Court of Appeals for the Seventh Circuit concluded that the coroner's alleged reason for termination was pretextual. The evidence showed that disciplinary action against the black deputy coroner was warranted and that the coroner had a preference for black employees. In support of the latter point, a secretary testified that she overhead the coroner say, "I will put my people where they belong" and the court observed that the coroner had cancelled a contract a with forensic pathology association and hired away five of its employees, all of whom were black. Employers must recognize that the hiring or firing of an employee based on his or her race or ethnicity constitutes unlawful discrimination, regardless of the race or ethnicity of the employee who benefits from the decision.

Marion County Coroner's Office v. EEOC, No. 09-3595 (7th Cir. July 27, 2010)

Seventh Circuit Permits Equitable Reformation of Plan Terms to Correct Drafting Error

A telecommunications company offered its employees a cash balance pension plan. The plan included a complex formula for converting the accrued benefit of participants from a predecessor pension plan into a benefit under the new plan. Under this formula, an "applicable transition factor" was to be multiplied by the lump sum value of the accrued benefit under the earlier plan to determine the transferred benefit. The terms of the plan, however, required that this "applicable transition factor" be multiplied twice, rather than once as was intended. The employer's in-house lawyer testified that he had made the drafting mistake and had neglected to delete a clause from a previous draft of the plan document. All participant notices and disclosures confirmed the employer's intention to use a single transition factor, and account statements used the correct formula in calculating participant balances. The district court noted that no employees had complained about the use of the single transition factor, and that prior to the lawsuit there was no showing that employees relied on the actual language of the plan. Based on this evidence, the district court found that the plan formula contained a scrivener's error and permitted equitable reformation of the plan's terms. The U.S. Court of Appeals for the Seventh Circuit affirmed, finding that the Employee Retirement Income Security Act (ERISA) authorizes equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that does not reflect the reasonable expectations of benefits. Thus, noting that "even administrators of ERISA plans" make mistakes, the court permitted the employer to reform the plan's language to avoid the consequences of the "devastating drafting error" that had occurred. Commentators have referred to this as the case of "the $1 billion mistake." In order to correct any type of drafting mistake, employers should maintain an exhaustive record showing the true intentions of their benefit plans.

Young v. Verizon's Bell Atlantic Cash Balance Plan et al., No. 05-C-07314 (7th Cir. Aug. 10, 2010)

Safety Concerns Outweigh Desire to Wear Religious Head Covering

A class of Muslim women sued their employer, asserting that it had failed to excuse them from the employer's dress policy, which prohibited employees from wearing head coverings. The employer was a private corporation that ran federal and state prisons in the United States. In 2005, the employer instituted a policy that prohibited employees from wearing head coverings unless the covering was issued as part of the employee's uniform. Plaintiffs sought an accommodation under this policy that would allow them to wear a khimar — an "Islamic religious head scarf, designed to cover the hair, forehead, sides of the neck, shoulders and chest." Prior to the creation of the 2005 ban on head coverings, Muslim employees had been allowed to wear khimars in the work place. The employer defended the claim by asserting that the khimar posed a legitimate safety risk, as it could quickly be used as a choking device, as a restraint, and generally presented unnecessary material that prisoners could grab hold of. Additionally, the ban was generally concerned with the ability to bring contraband into the facility in different forms of head coverings, such as baseball caps. Ultimately, the U.S. Court of Appeals for the Third Circuit upheld summary judgment in favor of the employer, recognizing that a religious accommodation that presents a genuine safety or security risk can "undoubtedly" constitute an undue hardship. While there had never been a safety or security incident involving a khimar, the court held that an employer does not need to wait until such an incident occurs before taking steps to mitigate a risk. Religious accommodations function in a similar

fashion to disability accommodations, and employers must address each request individually and be able to support the denial of a requested accommodation with a justifiable explanation for the rejection.

Equal Employment Opportunity Commission v. Geo Group, Inc., No. 09-3093 (3d Cir. Aug. 2, 2010)

Four Complaints Over Four Years Does Not Constitute Hostile Work Environment

A female employee of an Iowa racetrack and casino reported four discrete incidents of alleged harassment by a male co-worker to her immediate supervisor over a four-year period. The alleged incidents of harassment included the male co-worker pulling her hair, brushing the back of his hand across her breast, responding angrily when she refused his request to be "more than friends," and spreading a rumor that she had performed oral sex on him. The employee sued the racetrack, claiming that she was subjected to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 as amended, based upon these and other unreported incidents of alleged discrimination. The U.S. Court of Appeals for the Eight Circuit affirmed summary judgment for the employer, holding that these discreet incidents over a four-year period were insufficient to establish that the alleged discriminatory conduct was sufficiently severe or pervasive to constitute a hostile work environment. Further, the court held that even if the employee could establish a hostile work environment, the racetrack had adequately responded to her complaints under its published anti-harassment and anti-discrimination policies. Finally, the Eighth Circuit recognized that the racetrack did not know about the unreported incidents of allegedly improper conduct complained of by the employee. Although employers must be careful to take complaints of improper conduct seriously, isolated incidents over long periods of time will rarely rise to the level of a hostile work environment.

Cross v. Prairie Meadows Racetrack and Casino, Inc., No. 09-3427 (8th Cir. Aug. 12, 2010)

Female Welder Successfully Sues Employer for Pregnancy Discrimination

A female welder at a boat repair facility learned she was pregnant and received clearance from her doctor to continue welding. Despite the doctor's opinion, the employer's "common sense" led him to have "some questions about her being pregnant and being able to safely perform the job that she was required to do." Accordingly, the employer transferred the employee to a night-shift position, where she distributed tools. After working in the position for one month, the employee experienced pregnancy complications and was placed on bed rest and unable to work for the remainder of her pregnancy. Because the employee had used all of her allotted time off and was not eligible for Family Medical Leave Act time off, the employer terminated her. The employee sued under Title VII of the Civil Rights Act of 1964, as amended, alleging that she had been discriminated against on the basis of her pregnancy both when she was transferred and when she was terminated. The U.S. Court of Appeals for the Sixth Circuit found that the employee's transfer, despite it allowing her to receive the same pay and benefits, was an adverse employment action because the new position required night shifts and less skill than the position from which she was transferred. The Sixth Circuit further found that the employee's pregnancy was a motivating factor for the transfer, condemning the employer for failing to undertake "an objective evaluation to determine whether [the employee] could perform her welding job while pregnant. . . ." The court emphasized that the employer's concerns for the employee's safety, "while laudatory, do not justify an adverse employment action." In contrast, the court found that the employee's termination was not an adverse employment action motivated by her pregnancy, reasoning that the employer's "decision to terminate [the employee] was . . . based on a combination of her being unable to work and her lack of any available medical leave, not upon her pregnancy per se." Employers should avoid taking adverse employment actions based on their subjective view that a pregnant employee may be harmed by or unable to perform the job.

Spees v. James Marine Inc., No. 09-5839 (6th Cir. Aug. 10, 2010)

Male Pilots Not "Similarly Situated" to Female Flight Attendants in Discrimination Case

Three male pilots were terminated after a female flight attendant accused them of sexual harassment. The pilots contended that their termination was discriminatory because the female flight attendant and other females actively participated in the conduct of which they were accused, but the females were not terminated as the males were. The pilots each filed charges with the Equal Employment Opportunity Commission (EEOC), all of which were dismissed. The pilots

then filed their claims of discrimination with the U.S. District Court for the District of Arizona, which found in favor of the employer. On appeal, the U.S. Court of Appeals for the Ninth Circuit focused on the issue of whether the pilots and the flight attendants were "similarly situated" employees. The district court had held that the pilots were not similarly situated to the flight attendants because they did not report to the same supervisor, and because the flight attendants complained of the conduct whereas the pilots did not. The court of appeals found that the district court misapplied the "same supervisor" requirement, reasoning that it was irrelevant in this situation based upon the facts. But the appellate court also found that the district court correctly concluded that the male pilots and female flight attendants were dissimilar because the males had not complained. Under these circumstances, the appellate court found that summary judgment was properly granted in favor of the employer. In order to avoid liability for workplace harassment, employers should be careful to properly draft, implement, and enforce harassment and discrimination policies that expediently and thoroughly address any legitimate complaints by employees.

Hawn v. Exec. Jet Mgmt, Inc., No. 08-15903 (9th Cir. Aug. 16, 2010)

High Functioning Teacher Diagnosed With MS Not Disabled Under the ADA

An elementary school music teacher who had multiple sclerosis (MS) sued her employer, a school district, claiming that it had failed to reasonably accommodate her disability, refused to hire her for an administrative position because of her disability, and retaliated against her for filing a charge of discrimination in violation of the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Minnesota Human Rights Act (MHRA). Although the teacher had MS, both her doctor and the school district's expert observed that she had minimal MS-related impairments and lived a relatively normal life. The teacher claimed, however, that she had difficulty projecting her voice, heat sensitivity, fatigue, sensory loss, difficulty chewing, and an inability to teach music. The U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment in favor of the school district, holding that although the teacher had been diagnosed with MS, her physical impairments did not substantially limit any major life activity. The Eighth Circuit further held that the teacher was not "regarded as" disabled by the school district, despite its recognition of her diagnosis. The teacher's "regarded as" claim was based upon the school district's renewal of an accommodation plan including air conditioning and a microphone for the teacher each year, a principal expressing doubt to a colleague about the teacher's ability to handle an administrative job, and an employee of the district telling the teacher that it was not possible for her to move to an administrative position. Although employers may be required to provide reasonable accommodations to employees with disabilities, they are neither required to treat every diagnosis as a qualifying disability, nor to provide any accommodation requested by an employee.

Nyrop v. Independent School District No. 11, No. 09-2083 (8th Cir. Aug. 4, 2010)

Offering Voluntary Measures to Reduce Workforce Aids Employer in ADA Defense

A public employer advised its employees that a reduction in force (RIF) was necessary, mainly due to a decrease in workflow. As an alternative to the RIF, the employer offered buyouts that would pay workers who voluntarily resigned a percentage of their annual salary, which could be combined with applicable retirement benefits, and the employees were permitted to seek employment through other divisions under the employer's control. Although 56 percent of the impacted employee group were age 50 or older, only 43 percent of those individuals who were involuntarily discharged were in that age group, while the others opted for the buyout and/or moved to another division. Workers within the 50-and-above age group filed a class action lawsuit against their employer claiming that they were impermissibly discriminated against based on their age. The trial court dismissed the claim under the Age Discrimination in Employment Act on summary judgment. The U.S. Court of Appeals for the D.C. Circuit affirmed. The appellate court reasoned that the statistical evidence the workers proffered in support of their claim was unpersuasive because it included the employees who had voluntarily accepted the buyout and, consequently, suffered no adverse employment action. While the workers argued that the inclusion of that group was proper because those employees had only accepted the buyout because of fear of being discharged, the appellate court disagreed because at the time of the buyout the number and identity of employees who would actually be subject to the RIF was unknown. Additionally, the court found persuasive that the average age of the division that the RIF impacted was 52, and that because less than half of the employees who were discharged as a result of the RIF were age 50 or over, the evidence actually showed that the younger workers may have been disproportionately

affected. This case underscores the benefit employers may receive from offering voluntary measures to reduce their workforce, and the importance of analyzing key factors in any group of workers who may be subject to adverse employment action.

Aliotta v. Bair, No. 09-5234 (D.C. Cir. Aug. 13, 2010)

Third Circuit Addresses Statistical Significance in Disparate Impact Class Action

Two female railroad employees brought a class action gender discrimination suit against their employer challenging the alleged adverse impact of a company rule requiring all of the employer's unionized employees to have at least one year of continuous service in their current position before they could be considered for a promotion to a management job. The female employees argued that they were adversely impacted by the rule because they would not qualify for promotion in instances where they had taken pregnancy leave. Plaintiffs' expert, using an aggregate methodology, determined that the one-year rule had a statistically significant adverse effect on female employees. The employer's expert found that when the data was not aggregated, the company's policy had no significant adverse impact on female employees. Under relevant U.S. Supreme Court precedent, it is the plaintiff's burden to identify a specific employment practice that causes a disparate impact based on sex. However, the U.S. Court of Appeals for the Third Circuit noted that the Supreme Court has provided no "definitive guidance" on how to gauge whether such evidence is adequate. Typically, the court held, a disparate impact plaintiff will have to show that the disparity in impact is sufficiently large and that it is highly unlikely to have occurred at random. The court further stated that while there is no precise threshold that must be met in every case, a finding of statistical significance with a probability level at or below .05, or at 2 to 3 standard deviations or greater, will typically be sufficient. Accordingly, the Third Circuit held that plaintiffs' statistics analysis created a genuine issue of material fact as to whether the one-year rule caused a disparate impact on female employees. Because statistics are commonly relevant in employee class action cases, employers should be careful in implementing broad-based policies to ensure that such policies do not disadvantage any protected class of individuals in a statistically significant fashion.

Stagi v. Nat'l R.R. Passenger Corp. d/b/a Amtrak, No. 09-3512 (3rd Cir. Aug. 16, 2010) (unpublished)

California Supreme Court Limits the "Stray Remarks" Doctrine in Discrimination Cases

A former director of operations and director of engineering sued his employer alleging age discrimination based, in part, on derogatory age-related remarks made to him by fellow co-workers. According to the employee, he had been told that his opinions and ideas were obsolete and too old to matter, that he was slow, fuzzy, sluggish and lethargic, and that he did not display a sense of urgency and lacked energy. Other coworkers had called him an old man, an old guy, an old fuddy-duddy, and told him that his knowledge was ancient. The trial court granted the employers motion for summary judgment, finding that plaintiff's evidence of "stray remarks" by non-decision-makers in support of his discrimination claim were insufficient evidence of discrimination to merit a trial. Under the "stray remarks" doctrine, which is routinely applied to federal discrimination claims, discriminatory remarks made by co-workers or non-decision-makers are not enough to overcome an employer's motion for summary judgment. Courts deem such evidence irrelevant because it is not probative of a discriminatory animus on the part of those actually involved in the decision-making process. The California Court of Appeals reversed, holding the stray remarks admissible as potential evidence of discriminatory animus. The California Supreme Court agreed and rejected strict application of the stray remarks doctrine in California discrimination cases, counter to the doctrine's wide acceptance in federal courts. The Supreme Court held that evidence of non-decision-makers' stray remarks are admissible and must be considered along with the totality of the facts in determining whether the plaintiff has presented sufficient evidence of discrimination to necessitate a trial on the merits. The Court's holding makes it more difficult for California employers to dispose of cases on summary judgment where the plaintiff's discrimination claims rest on stray remarks made by non-decision-makers.

Reid v. Google, Inc., No. S158965 (Cal. Aug. 5, 2010)

California Supreme Court Rules Against San Francisco in Equal Protection Clause Challenge to Public Contracting Ordinance

Since 1984 the city of San Francisco maintained public contracting ordinances which granted preferential treatment to minority-owned businesses (MBEs) and women-owned businesses (WBEs). A construction company submitted a low bid for a project, but the city considered awarding the project to a WBE with a higher bid pursuant to one such ordinance, found at Article 1, Section 31 of the California Constitution. The low bidder sued to have the ordinance declared unconstitutional, arguing that the statute was preempted by the Human Rights Treaty and violated federal equal protection principles. Following oral argument on cross-motions for summary judgment, the court consolidated the case with another similar challenge to the same ordinance by another construction company. The court then declared the ordinance unconstitutional and issued an injunction prohibiting preferences in public contracting on the basis of race or sex. The city appealed to the California First District Court of Appeals, which held that there was no preemption and no equal protection violation, but remanded to the trial court to determine whether there was intentional discrimination. On August 2, 2010, the California Supreme Court held that the ordinance violates the Equal Protection Clause and remanded the matter to the trial court on the issue of intentional discrimination.

Coral Construction, Inc., v. City and County of San Francisco, No. S152934 (Cal. Aug. 2, 2010)

New Illinois Law Prohibits Employer Inquiry or Use of Credit History in Hiring and Employment Decisions

Effective January 1, 2011, Illinois employers will be prohibited from inquiring about or using the credit history of an employee or prospective employee as a consideration in hiring, recruiting, discharge or compensation. The Employee Credit Privacy Act (Act) (H.B. 4658) was signed into law by Illinois Governor Pat Quinn on August 10, 2010. The Act also prohibits employer discrimination or retaliation against a person who files a complaint or participates in an investigation relating to violations of the Act. The Act provides for limited exceptions to the credit check prohibition by permitting employer access to individual credit checks for certain employment involving bonding or security, unsupervised access to more than $2,500, signatory power over more than $100 in assets, and access to confidential or trade secret information. It specifically exempts banks, insurance companies and many public sector jobs from the credit check prohibition. Employers will still be permitted to conduct background checks of applicants and employees as long as the background check does not include a credit history.

Illinois Wage Payment and Collections Act Amended to Provide Increased Protections for Employees

On July 30, 2010, Illinois Governor Pat Quinn signed into law a bill amending the Illinois Wage Payment and Collection Act (Act) to provide increased protections for employees who have been subjected to illegal withholdings from their wages. Under the amended Act, Illinois Department of Labor (IDOL) wage orders will be final agency decisions that may be enforced by the IDOL or challenged by an employer in the state trial courts under the Illinois Administrative Review Act. Previously, wage orders issued by the IDOL were not self-enforcing and the agency had to initiate actions in the trial courts to enforce the wage orders. Thus, under the amended Act, employers will need to fully address wage claims at the IDOL, and the agency's decisions will be subject to limited judicial review. Also under the amended Act, an employee will be able to file actions for alleged violations directly in the state trial court and will be eligible for reimbursement of all costs and reasonable attorneys' fees. The amended Act also permits employees to file class action lawsuits against employers and protects employees from retaliation for reporting alleged violations of the Act. Additionally, the amended Act increases criminal penalties under the Act and repeat violators will be subject to a Class 4 felony if convicted twice within a two-year period. The amendments also allow employees to recover two percent interest per month from the time of the underpayment of wages, as opposed to recovery of interest after successful adjudication of claims as is the current law. The amended Wage Payment and Collection Act takes effect January 1, 2011.