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Newsletters

# Employment Practices Newsletter - May 2011

**May 3, 2011**

### Employee's Failure to Report Renewed Harassment Fatal to Racial Harassment Claim

A black employee claimed that two of his co-workers started taunting him with racial epithets soon after he was hired. In accordance with the company's anti-harassment policy, the employee complained to the company owner. The company owner immediately berated the two co-workers and warned that further harassing incidents would result in immediate termination. One of the co-workers continued to use racial epithets. The employee then complained to another worker, but never reported the later incidents to the owner. The employee sued, alleging that the employer violated Title VII of the Civil Rights Act of 1964, as amended (Title VII), for failing to address his co-workers' continued use of racial epithets. The employee argued that the employer was liable for two distinct failings: (1) inadequate discipline following the initial harassment; and (2) failure to address the later harassment—of which the employer had notice through the employee's complaints to the other worker. The U.S. Court of Appeals for the First Circuit rejected the employee's arguments and held that "when co-workers, rather than supervisors, are responsible for the creation and perpetuation of a hostile work environment . . . an employer can only be liable if the harassment is causally connected to some negligence on the employer's part." The court ruled that the employer's response to the initial harassment was "swift and appropriate" and that the employee's failure to report to the company owner, as ordered, was "fatal to his claim of employer liability." Employers should adopt an anti-harassment policy that makes clear whom the employee must notify about harassing incidents. By ensuring a swift and initial response to harassment, and a clear directive as to whom employees must notify of current and further harassing incidents, employers will be able to defend against any subsequently filed lawsuit.

*Wilson v. Moulison N. Corp.,* Case No. 10-1387 (1st Cir. Mar. 21, 2011)

### Employee Must Show "Intolerable" Working Conditions to Establish Constructive Discharge

A pregnant employee used nearly all of her annual paid time off during the first three months of the year, leading the employer to advise her that she could have no more absences. When the employee ignored the warning and began a medical leave on the very next workday, the employer told her that the absence "[wasn't] going to work." The employee took this as a termination and chose not to return to work. Instead, she sued the employer for constructive discharge

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under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, alleging that the employer had made attendance demands that were impossible for a pregnant woman and did so with the intention of making her quit. The U.S. Court of Appeals for the Eighth Circuit found that while the employee's work conditions were "unpleasant and unprofessional," they were not "intolerable," as required to establish constructive discharge. Further, the employee had failed to establish that the employer intended to make her quit or should have foreseen that she would quit because of its demands. Employers should remember that an employee alleging constructive discharge will have to prove both that work conditions were "intolerable" and that the employer specifically intended to force the employee to quit or should have reasonably foreseen that the employee would quit.

*Trierweiler v. Wells Fargo Bank,* Case No. 10-1343 (8th Cir. Apr. 8, 2011)

### Contractor's Employees Deemed "Statutorily Protected Employees" and Permitted to Handbill Under New "Access Standard"

A group of restaurant employees engaged in handbilling on casino premises as a part of an organizing campaign by Las Vegas unions. Although not employed by the casino itself, the employees worked on casino property and handbilled in front of restaurants operated by their employer on behalf of the casino. The casino asked the employees to cease their organizing efforts. The employees refused, prompting a visit from the police, who issued citations and removed the employees from the premises. The employees alleged unfair labor practices against the casino. The National Labor Relations Board (NLRB) determined that the casino had, in fact, violated the National Labor Relations Act (NLRA) by prohibiting the handbilling and that the restaurant employees were rightfully on the property as they worked regularly and exclusively on it. In reaching its decision, the NLRB developed an "access standard," which strikes a balance between the rights of the contractor employees and the property owner's rights. Under the "access standard," the property owner may lawfully exclude handbilling on its property, but only where the property owner demonstrates that the activity significantly interferes with the use of the property or where exclusion is justified by a legitimate business reason. Here, the NLRB determined that the casino failed to make the requisite showing and thus violated NLRA Section 8(a)(1) when it prohibited the restaurant employees from handbilling on the premises. Employers should be mindful that the right to organize may extend to more than the employer's own employees, and that the employer's contractor's employees may be "statutorily protected" in their organizing activities.

*New York, New York Hotel and Casino,* 356 NLRB No. 109 (NLRB Mar. 25, 2011)

### Employers Should Be Aware of State Laws Prohibiting Marital Status Discrimination

Although no federal law prohibits discrimination by private employers based on marital status, a number of state laws include such status as a protected class. The Minnesota Supreme Court recently considered a case where a husband and wife worked for the same employer. The husband, employed as the company's president, offered to resign his employment. The wife, employed as a sales and marketing coordinator, was terminated shortly thereafter. The company's CEO told the wife that he would like to terminate her because "she would be uncomfortable or awkward remaining employed" after her husband left the company. The CEO also told her that her position was going to be eliminated because she would likely relocate with her husband. The wife then sued the employer, alleging marital status discrimination in violation of Minnesota law. The employer argued that a claim for marital discrimination must be supported by a finding that the termination was an act "directed at the institution of marriage" and claimed that the employee had been fired for legitimate business-related reasons. The Minnesota Supreme Court held that a claim for marital discrimination does not require that an employee prove a direct attack on the institution of marriage. The Court instead determined that "marital status" includes "protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse." Importantly, this means that an anti-nepotism policy prohibiting employment of married couples by a company is illegal in Minnesota. Many other states, including California, Florida, Illinois and Wisconsin, also prohibit marital status discrimination. This decision is a reminder that all employers, and especially national employers, should review and update their anti-nepotism and anti-discrimination policies to ensure compliance with state laws.

*Taylor v. LSI Corporation of America,* Case No. A09-1410 (Minn. Apr. 13, 2011)

**Ledbetter Act Allows Pay Bias Claims of White Employees to Proceed**

A black employee was able to return to his position with a municipal employer after voluntarily resigning. He received credit for his previous years of service to the employer so that he did not need to "start over." The employer did not afford the same benefit to three white employees under similar circumstances. The white employees sued, claiming that their employer discriminated on the basis of race by refusing to credit their seniority, which in turn lessened their pay rate. At the time the employees initiated their lawsuit, the Lilly Ledbetter Fair Pay Act of 2009 (Act) had not been enacted. Consequently, the court dismissed the employees' claims after discovering that the first discriminatory paycheck they received was in 2002 rendering their 2004 Equal Employment Opportunity Commission (EEOC) charges untimely. However, after the Act was enacted, the employees argued that the issuance of each discriminatory paycheck they received constituted a separate discriminatory act, and because some of those payments were within the limitation period, their claims should go forward. The U.S. Court of Appeals for the Seventh Circuit agreed, finding that the Act provides "that the statute of limitations for filing an EEOC charge alleging pay discrimination resets with each paycheck affected by a discriminatory decision." Additionally, the court held that the Act may be applied retroactively. Employers should be mindful that the Act applies retroactively to May 28, 2007 and includes reviving any pending claims that had previously been dismissed.

*Groesch v. City of Springfield,* Case No. 07-2932 (7th Cir. Mar. 28, 2011)

**NLRB Permits Telephone Technicians to Visit Customers Wearing "Prisoner" Shirts**

Telephone technicians in Connecticut launched a mobilization campaign to notify the public of their dissatisfaction with the progress of negotiations with a local phone company. As a part of the campaign, technicians, including 1,000 "customer-facing" workers, wore a variety of shirts, one of which was a "prisoner shirt." The front of the shirt read "INMATE #" and the back of the shirt featured vertical stripes and bars surrounding the message "Prisoner of AT&T." The company directed employees not to wear the shirts and issued one-day suspensions to noncomplying employees. The union filed an unfair labor practice charge under Section 8(a)(1) of the National Labor Relations Act against the company, alleging that the disciplinary action interfered with their well-established right to make their concerns and grievances pertaining to the employment relationship known. A majority of the National Labor Relations Board (NLRB) agreed in the face of a dissenting opinion that argued "special circumstances" warranted the interference. In dissent, NLRB Member Brian E. Hayes stated that the "prisoner shirt" had the potential to frighten customers in their own homes and thereby cause substantial damage to the company's reputation. The majority found this fear overstated because the words on the front of the shirt were in small print and the technicians visited customers to fulfill appointments, wore identification tags and other company paraphernalia, and parked their company trucks near customers' homes. These circumstances mitigated any potential for customers to confuse the technicians with actual inmates. This decision shows that the "special circumstances" exception to a union's right to notify the pubic carries a heavy burden that may require a showing of actual customer dissatisfaction to support an allegation of damage to an employer's reputation.

*AT&T Connecticut,* 356 NLRB No. 18 (NLRB Mar. 24, 2011)

**Fifth Circuit Decides: No Hostile Work Environment Claims Under USERRA**

In this class action case, employees alleged a claim for hostile work environment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits civilian employers from discriminating against employees based on military service. The bases for the employees' claims were that the employer harassed and discriminated against them by making derogatory remarks regarding the employees' military service and obligations. An example of the comments alleged were: "If you guys take more than three or four days a month in military leave, you're just taking advantage of the system;" "I used to be a guard guy, so I know the scams you guys are running;" and "Your commander can wait. You work full time for me. Part-time for him." The U.S. Court of Appeals for the Fifth Circuit dismissed the employees' claims on the grounds that USERRA does not prohibit harassment of military members nor otherwise contemplate a hostile work environment claim. The court held that the statute's plain language did not cover hostile work environment claims, but only discrimination and acts of retaliation against service members because of their service. The

court held that the statute did not refer to harassment, hostility, insults, derision, derogatory comments or any similar words. The court also engaged in an analysis of USERRA's legislative history and language of other federal antidiscrimination statutes and concluded that neither supported recognition of a hostile work environment claim under USERRA. At least in the Fifth Circuit, no hostile work environment claim under USERRA may be brought by an employee. Employers should be mindful to not only strictly comply with USERRA but also avoid situations that might lead to claims of hostile work environment because other federal circuit courts have assumed, without deciding, that USERRA provides a claim for hostile work environment.

*Carder v. Continental Airlines, Inc.,* Case No. 10-20105 (5th Cir. Mar. 22, 2011)

### Store Manager Covered by FLSA Exemption Despite Performing Primarily Nonexempt Work

A store manager working 50 to 65 hours per week sued her employer, seeking overtime compensation on behalf of herself and other similarly situated store managers under the Fair Labor Standards Act (FLSA). For FLSA overtime purposes, the employer deemed store managers to be exempt executives. Although the store manager performed significant amounts of nonexempt tasks, the U.S. Court of Appeals for the Fourth Circuit found that she carried out managerial and nonmanagerial tasks concurrently and that her nonexempt functions served the employer's managerial goals of customer satisfaction and store profitability. Despite the fact that the store manager was performing nonmanagerial tasks 100 percent of the time, the court concluded that ultimately she was the only individual responsible for running and managing the store. Accordingly, the court held that the store manager was exempt from the FLSA's overtime requirements. Without a viable individual claim, the court further held that the store manager could not proceed with overtime claims on behalf of others whom she alleged were similarly situated. Employers should be aware that a managerial employee may properly be designated as exempt under the FLSA where he or she is given sole responsibility for the management of a facility, even in circumstances where the employee is also performing nonexempt work.

*Grace v. Family Dollar Stores,* Case No. 09-2029, (4th Cir. Mar. 22, 2011)

### Context Determines if First Amendment Protects Workplace Speech

A speech and language therapist claimed unlawful First Amendment retaliation based on the nonrenewal of her contract with a state regional agency. The therapist believed that the agency had adopted an improper policy regarding determinations for eligibility. During a speech to a group of parents, the therapist stated that she was confused and concerned about the criteria the regional agency was using for eligibility. She also told parents to contact certain advocacy organizations for guidance concerning their rights and posted a notice with contact data for the advocacy groups. When her contract was not renewed, the therapist sued the agency's regional director, the regional agency, and the state director of the child development services agency. The core issue on appeal was whether the therapist's speech was so intertwined with her job duties that it failed to qualify for protection under the First Amendment. The U.S. Court of Appeals for the First Circuit affirmed the dismissal of the regional director on qualified immunity grounds, but reversed the dismissal of the suit against the state regional agency and the state director. The court found that the therapist's speech did not bear the appearance of performance of her job duties or rely on her official status as a person contracted by the state. Moreover, there was no indication that parents received her speech as if she were speaking on behalf of a state agency or that she used her position with the state to give her speech greater weight. The court also found that the matter discussed by the therapist concerned data generally available to the public. Therefore, the court held that the nonrenewal of the therapist's contract plausibly constituted retaliation for the therapist's protected speech. Governmental employers should be aware that simply because employees discuss topics that overlap with their job responsibilities does not automatically mean that the U.S. Constitution falls out of the picture. The context of the speech, including its timing, location, and how the audience perceives the speech, is critical.

*Decotiis v. Whittemore,* Case No. 10-1242 (1st Cir. Mar. 24, 2011)

### Employee Failed to Qualify as an Individual with Disability Under the ADA

An employee underwent hip replacement surgery and later tried to return to work with restrictions. The employer's doctor examined the employee but did not clear her to return to work. The employer terminated the employee in accordance with the employer's return-to-work policy, which prohibited employees from returning to work if their injuries resulted in medical

restrictions. The employee sued under the Americans with Disabilities Act (ADA), arguing that her medical restrictions would not have prevented her from performing the essential duties of her job and that the employer failed to meet its obligation to reasonably accommodate her limitations. Applying the pre-ADA Amendments Act of 2008 (ADAAA) standard, the U.S. Court of Appeals for the Seventh Circuit held that the employee was not a qualified individual with a disability because she failed to show objective evidence establishing that the employer considered her medical restrictions to disqualify her from a broad class of jobs. With regard to the employee's failure to accommodate claim, the court held that the ADA does not require an employer to create a new position that consists of only a subset of duties of an employee's prior position. With the Equal Employment Opportunity Commission's recent publication of regulations implementing the ADAAA, employers should be cognizant of the fact that courts will, in most cases, shift their focus away from determining whether an individual qualifies for coverage under the ADA and focus instead on whether the employer sufficiently engaged in the interactive accommodation process in determining ADA violations.

*Kotwica v. Rose Packing Co.,* Case No. 09-3640 (7th Cir. Mar. 22, 2011)

### No Title VII Violation Because Mail Carrier's Request to Have Saturdays Off Would Cause Undue Hardship

An employee who was the most junior full-time letter carrier in his area was a Seventh Day Adventist who wanted to have Saturdays off of work. The employer had a seniority system where the six most junior full-time letter carriers had rotating schedules resulting in approximately every sixth Saturday off of work. The employee submitted a written request to his supervisor asking for a religious accommodation to have every Saturday off. The supervisor and a union representative met with the employee and offered the employee leave for part of the day on Saturdays to attend church services. The employee rejected the offer. The employer subsequently asked the other full-time letter carriers whether they would be willing to give up any of their nonscheduled Saturdays to accommodate another letter carrier. Each declined. After another meeting with the employee, the employer offered him a lateral transfer to another office or a different position. The employee would not accept this alternative and began requesting leave for numerous Saturdays, which the employer denied. Ultimately, the employee stopped working on scheduled Saturdays and the employer fired him. The employee sued his employer claiming religious discrimination and failure to accommodate religious beliefs, in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII) and the Religious Freedom and Restoration Act of 1993. The U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment for the employer, stating that accommodating the employee's religious beliefs "could not be accomplished without undue hardship," because it would force the employer to violate its own seniority system and cause "more than a *de minimis* impact on co-workers" by depriving the co-workers of rights under the seniority system. Employers should be aware that Title VII requires reasonable religious accommodations, as long as the accommodations do not create undue hardship.

*Harrell v. Donahue,* Case No. 10-1694 (8th Cir. Mar. 31, 2011)

### "Overwhelming Evidence" of Poor Performance Defeats ADA Claim

A former state employee who was blind in one eye and suffered from cerebral palsy alleged that she was fired on the basis of her disability in violation of the Americans with Disabilities Act. Despite accommodations, the employee's work product was plagued with serious grammatical and spelling errors, and she made mistakes on mailing labels and had difficulty with filing documents alphabetically. Although training classes were offered to the employee, she did not attend. Citing the "overwhelming evidence" demonstrating that the employee had done a poor job, the U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment in favor of the employer on the basis that the employee did not satisfy her burden to establish a *prima facie* case of disability discrimination, nor could she show that the proffered reason for her termination (i.e., poor job performance) was a pretext for discrimination. This case serves as an important reminder that careful documentation of poor performance can be valuable evidence against allegations of discrimination.

*Whitfield v. Tennessee,* Case No. 09-6488 (6th Cir. Mar. 25, 2011)