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Newsletters

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Auto Salesman Terminated for Poor Sales Fails to Show Pretext for Discrimination

A 50-year old employee worked for an auto dealership as a car salesman for approximately 10 years before his termination. The salesman received several awards for sales performance between 2001 and 2005, but also received warnings for failure to meet sales quotas in four separate months during 2004 and 2005. In 2006, the dealership implemented a new sales quota and informed employees that those who did not meet at least 85 percent of it were subject to dismissal. The dealership determined several months later that the 50-year old salesman failed to meet the new quota for the second quarter of 2007 and discharged him, along with a 32-year old salesman who also did not satisfy the quota. The dealership's records showed that the 50-year old salesman's performance was among the poorest in the 18 months leading to his discharge. The 50-year old salesman sued the dealership, alleging that he was terminated in violation of the Age Discrimination in Employment Act. The 50-year old salesman argued that the dealership allowed staff to ostracize and mock him because of his age. He further claimed that in addition to calling him names, co-workers criticized his appearance as outdated, excluded him from a staff picture, and moved his desk from the lobby to prevent him from greeting potential customers. The U.S. Court of Appeals for the First Circuit affirmed summary judgment in favor of the dealership, holding that while the 50-year old salesman had presented *prima facie* evidence of age discrimination, he failed to show that the dealership's legitimate, nondiscriminatory reason for his firing — his poor sales performance — was a pretext for bias. Employers must remain mindful of potential claims of discrimination when taking adverse employment actions against employees, and base those decisions on legitimate nondiscriminatory business reasons rather than subjective criteria whenever possible.

Melendez v. Autogermana Inc., Case No. 09-1804 (1st Cir. Oct. 12, 1010)

Workers on H-2B Visas Not Entitled to Recoup Expenses Under FLSA

Temporary guest workers from Peru, Bolivia and the Dominican Republic, who were employed as housekeepers, desk clerks, and maintenance staff at a New Orleans area hotel in 2005 and 2006, were paid between $6.04 and $7.79 per hour. Those wages exceeded the federal minimum wage of $5.15 per hour. However, the hotel refused to reimburse the workers' visa, transportation, and recruitment costs. The workers contended that those expenses effectively cut their wages to substantially less than $5.15 per hour during their first pay

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periods. They consequently sued the hotel under the Fair Labor Standards Act (FLSA). On interlocutory appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed a district court holding that the FLSA covers foreign workers holding H-2B visas, but also ruled that the statute does not require employers to reimburse workers' visa, transportation, or recruitment expenses. After a rehearing before the Fifth Circuit *en banc,* the divided panel held 8-6 that foreign temporary guest workers are covered under the FLSA, but that they are not entitled to recover from employers their cost for visa fees, payments to recruiters, and transportation to the United States. Employers must make certain that they compensate H-2B visa employees in accordance with applicable state and federal minimum wage laws. However, employers are not required to include visa, transportation, and recruitment expenses incurred by H-2B visa employees when calculating the applicable minimum wage rate.

Castellanos-Contreras v. Decatur Hotels LLC, Case No. 07-30942 (5th Cir. Oct. 1, 2010)

Empty Promises of Flexibility at Bargaining Table Insufficient to Prevent Impasse

Following the expiration of the collective bargaining agreement between a hospital group and its nurses, the parties engaged in significant bargaining attempting to agree on a new contract. Ultimately, the parties remained far apart regarding the two largest areas of negotiations: health care and wages. The union continued to assert that it was "flexible" with respect to these issues, but made no material change to its position on the issues. Ultimately, the hospital group declared an impasse and instituted its last, best and final offer on these points. The union filed an unfair labor practice charge with the National Labor Relations Board, alleging that the employer's unilateral conduct violated Sections 8(a)(5) and (1) of the National Labor Relations Act. The administrative law judge overseeing the dispute rejected the union's position, holding that "mere assertions of flexibility, unaccompanied by further concrete proposals," established that neither party had anything further to offer on the issue. Employers engaged in stalled negotiations should remember that it may be possible to unilaterally implement a last, best and final offer if the parties have reached an impasse, and a union cannot forestall this through token promises of flexibility.

Sutter West Bay Hospitals d/b/a California Pacific Medical Center, Nos. 20-CA-34705, 20-CA-34899 (Sept. 21, 2010)

Employee Welfare Plan Created Lifetime Benefits for Retired Union Employees

A group of retired union employees received health coverage under an agreement with their former employer. A successor employer changed the insurance provider of the retirees' medical plan and made changes to deductible and co-pay amounts. The retired employees then sued under the Employee Retirement Income Security Act (ERISA) and the Labor Management Relations Act, alleging that the changes to their medical care breached the agreement that they had negotiated with their former employer. The district court held that the employees' agreement did not include a promise of lifetime benefits to the retired employees. The U.S. Court of Appeals for the Seventh Circuit found that the agreement did intend to provide lifetime benefits to the retirees, and remanded the case to district court to determine whether the successor employer had breached the agreement by making changes to the retirees' medical benefits. The court stated that the right to lifetime health care coverage only exists where the plan contract specifically provides for it. Although the agreement did not define the medical benefits that the retired employees were entitled to, it did rely on language in another agreement, and thus the court read the two agreements together. The court found that the agreement intended to create lifetime coverage based on the lack of a coverage ending date, and the continuation of coverage for the retired employee's dependents in the event of their death. The court noted that the intent to provide lifetime coverage was especially clear when the terms of coverage for retired employees were compared with the very date- and event-specific terms of coverage for terminated employees. Employers should specifically state the terms of coverage in employee welfare plan agreements and provide language ensuring that only the terms of the agreement at issue govern. Employers should also make sure to include a reservation-of-rights clause in all welfare agreements.

Temme v. Bemis, 2010 WL 3528846 (7th Cir. Sept. 13, 2010)

Sexual Harassment Not Present Where Alleged Female Harasser Treated Both Male and Female Employees in the Same "Vulgar and Inappropriate Way"

After being transferred to the bakery section of her employer, a grocery store, a female employee was subject to "rude,

vulgar, and sexually charged behavior" from a female co-worker over a period of six months. The female co-worker's behavior included molding genitalia out of dough and shoving them into the employee's face, rubbing her hands and body against the employee, and smacking the employee on her buttocks. The employee claimed that she reported incidents of sexual harassment to numerous managers and co-workers and that no action was taken. The employer denied that the employee had ever complained. The alleged harasser also engaged in similar sexually charged conduct towards other male and female store employees. The employee filed several claims, including sexual harassment in violation of the Missouri Human Rights Act. The U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment for the employer on the sexual harassment claim. While acknowledging that Missouri law recognized same-sex harassment, the appellate court stated that the employee "failed to present sufficient evidence that 'the conduct . . . constituted gender discrimination, and not just . . . conduct . . . tinged with offensive sexual connotations,'" because the alleged harasser treated all employees–both male and female–in the same vulgar and inappropriate way. In other words, the employee had failed to show that her gender was a contributing factor in the harassment. Despite the court's conclusion in this case, employers should undertake prompt and thorough investigations of sexual harassment complaints in the workplace.

Smith v. Hy-Vee, Inc., Case No. 09-2631 (8th Cir. Oct. 12, 2010)

Employee Not Entitled to FMLA Benefits Because New Employer Not a "Successor in Interest" of Her Former Employer

An employee formerly employed by a retail chain was hired by another retail chain when it purchased her former employer's leasehold out of bankruptcy. After several months of employment with her new employer, the employee requested leave under the Family and Medical Leave Act to provide assistance and care to her seriously ill mother. The employee's new employer granted her some unpaid leave, but not all that she requested. The employee sued the new employer, arguing that it violated the Family Medical Leave Act (FMLA) in failing to grant her all of the leave she requested. The district court held that the employee was not entitled to leave under the FMLA because her new employer was not a successor in interest to her former employer and thus, the employee could not add her period of service with her former employer in order to satisfy the FMLA requirement that a leave-eligible employee must be employed for at least 12 months by the employer from which leave is requested. The employee appealed, arguing that her employer was a successor in interest and that she qualified for leave under the FMLA. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling. The court held that although the employer had purchased the former employer's lease, rehired a few of the former employer's employees, and generically described its business similar to that of the former employer, the similarities ended there and were insufficient to establish that the employer was a successor in interest to the former employer. Employers that purchase businesses and/or acquire new employees from other employers should be aware of successorship issues when considering whether to grant an employee's request for leave.

Sullivan v. Dollar Tree Stores Inc., No. 08-35413 (9th Cir. Sept. 27, 2010)

No Bias or Retaliation Where Employee Laid Off in City Reorganization

A native Nigerian and naturalized citizen was employed by the city of Houston as a city planner. When the department underwent reorganization, he was laid off, along with several other individuals who were also of African descent. The reorganization was based upon a "last come, first leave" basis, although other employees with less seniority than the city planner were retained due to their specific job duties. Laid off employees were placed on a rehire list. A year later, while the others had been rehired, the city planner remained unemployed. He sued the city, alleging that his due process rights were violated by the layoff process, that he was discriminated against based upon his national origin, and that he was retaliated against. The U.S. Court of Appeals for the Ninth Circuit considered the city planner's argument that the reorganization procedures were not properly followed in determining which planners to lay off. The city planner contended that the city's failure to follow the procedures permitted it to discriminatorily dismiss its African planners under the pretext of reorganization. The court determined that the city planner's claim lacked merit as he failed to refute the evidence which established that the procedures were applicable similarly to employees who were members of the protected group and those who were not. The court also considered the district court's determination that the city planner failed to exhaust his administrative remedies with respect to the retaliation claim, and concluded that though the city planner had previously filed Equal Employment Opportunity Commission (EEOC) charges following his layoff, neither could be construed to trigger an investigation by the EEOC of a charge of retaliation. Because the city planner had failed to exhaust his

administrative remedies, by the time he filed his complaint, the retaliation claim was time-barred. This case serves as a reminder that when undertaking reorganization efforts, employers must ensure that the procedures are carefully followed to ensure that there is no inference of discrimination in the layoff selection or rehire processes.

Okpala v. Houston, No. 10-20175, unpublished opinion (5th Cir. Oct. 4, 2010)

Consistently Enforced Criminal Records Policy Defeats Hiring Bias Claim

A female job applicant disclosed two misdemeanor shoplifting convictions on her application for a customer service representative job at a freight company. The job applicant was interviewed for the job by a midlevel manager who reported to his supervisor that she was the "ideal candidate." The supervisor advised the manager that hiring the job applicant woman would be like "[o]pening up a can of worms" and "asking for the NAACP." The manager nonetheless gave the job applicant a conditional offer pending a drug test. But the job applicant was never hired because the manager was terminated and the company enforced its policy against hiring applicants with theft records. The job applicant sued under Title VII of the Civil Rights Act of 1964, as amended, and Section 1981, for race-based failure to hire after the manager's replacement selected a white male to fill the position. The U.S. Court of Appeals for the Eighth Circuit upheld the company's decision not to hire, holding that there was no direct evidence of racial discrimination because the job applicant continued to receive consideration for the job after the alleged discriminatory statements were made. Additionally, even if there was direct or indirect evidence of racial discrimination, the job applicant would not have been hired because of the company's policy against hiring applicants with theft records. Evidence showed that the policy had been consistently enforced 28 times over the preceding 18-month period. Employers should note that a legitimate workplace policy consistently enforced in a nondiscriminatory manner can protect them from hiring bias claims.

EEOC v. Con-Way Freight, Inc., Case No. 09-2926 (7th Cir. Sept. 22, 2010)

No Discrimination or Retaliation Where Firefighter Complained of Conduct He Did Not Personally Find Offensive

An African American firefighter helped his female co-worker file a grievance after the co-worker found a t-shirt worn by their supervisor to be "offensive." The firefighter proofread the grievance and slid it under the door of the fire department's deputy chief. When the deputy chief received it, he ordered an internal affairs investigation, during which the firefighter was interviewed. When questioned, the firefighter lied and told the investigators that he had not helped with the grievance. When the firefighter later admitted that he had proofread and turned in the grievance, he was advised that a show cause hearing would be conducted to determine if he should be terminated. After presenting no evidence at the hearing, the firefighter ultimately chose to resign when given the choice to do so voluntarily, or be terminated. Following his resignation, the firefighter alleged that he was discriminated against based on his race and retaliated against for assisting his female co-worker with her grievance. The U.S. Court of Appeals for the Eleventh Circuit rejected both the discrimination and retaliation claims. It first found that the firefighter was not subjected to an adverse employment action because his resignation was voluntary. Second, the court rejected the firefighter's claim that the investigation into the grievance was a "sham" designed to target him, noting that upon receiving the grievance, the department followed its regular procedure of launching an investigation. Furthermore, it was logical to include the firefighter in the investigation as he was the employee who had delivered the grievance to the deputy chief. Finally, the court found that the firefighter had not engaged in protected activity in order to bring a claim under the retaliation provision of Title VII. The court noted that the firefighter had no good faith belief that he was challenging unlawful conduct since he did not personally find the t-shirt "offensive," just "unprofessional." Employers that receive complaints of discrimination or harassment should be sure that they are consistent in how they respond in order to prevent further claims of discrimination or retaliation.

Ross v. Perry, No. 09-15392, unpublished opinion (11th Cir. Sept. 22, 2010)

Lilly Ledbetter Act Does Not Preserve Failure to Promote Claim

A Haitian national was working as a sheet metal assembler. His employer offered an opportunity for its employees to work off-site for greater pay, per diems and additional training, making the off-site positions highly coveted. In 2002, and again in 2003, white employees with less seniority were promoted to these positions before the Haitian employee, leading him to file a formal grievance with the Equal Employment Opportunity Commission (EEOC). However, the employee's claims

were time-barred as he did not file his grievance with the EEOC until well after the tolling of his 300 days within which to do so. The employee argued that his claim was saved by the Lilly Ledbetter Fair Pay Act of 2009 (Lilly Ledbetter Act), which allows a new tolling period to begin every time an employee receives a paycheck based on a discriminatory wage. The U.S. Court of Appeals for the Third Circuit rejected the employee's argument, finding that the Lilly Ledbetter Act does not encompass failure to promote claims. Accordingly, the employee's failure to file his claim within 300 days of his promotions being denied was not saved. When employers are making decisions regarding wages, promotions, or any other employment actions, such determinations must not be based upon an employee's race, color, religion, sex or national origin.

Noel v. Boeing Co., No. 08-3877 (3rd Cir., Oct. 1, 2010)