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Labor, Employment & Benefits

Conduct Offensive to a Religious Person But Not Hostile Toward the Religion Is Not Religious Discrimination under Title VII

Mayra Rosario, an adherent of charismatic Catholicism, was an employee of the Puerto Rico Aqueduct and Sewer Authority, where, according to her, her co-workers criticized and mocked her because of her ardent religious beliefs. For example, one co-worker nicknamed her "Mother Theresa" in response to Rosario's complaints about the co-worker's vulgar language and another co-worker sang a bawdy Christmas carol to her, inserting her name in the song. InRosario v. I Rosario v. Puerto Rico Aqueduct and Sewer Authority(6/9/03), Rosario alleged that she had been subjected to religious harassment in violation of Title VII. Although the fact that Rosario had been subjected to rude, vulgar and unprofessional conduct was undisputed, the U.S. Court of Appeals for the First Circuit ruled that there was no evidence that the co-workers were motivated by hostility toward Rosario's religion. The court noted that there is a difference "between an environment that is offensive to a person of strong religious sensibilities and an environment that is offensive because of hostility to the religion guiding those sensibilities." Because Rosario could not prove the existence of the latter, the court rendered judgment in favor of the Sewer Authority.

Title VII's Prohibition Barring Retaliation against Those Who Participate in a Title VII Investigation or Proceeding Extends to Individuals who Defend Themselves from Charges of Discrimination

Eric Deravin filed a discrimination lawsuit against the New York City Department of Corrections, claiming that his supervisor deliberately blocked his promotion as retaliation for successfully defending himself against false sexual harassment charges. In Deravin v. Kerik (7/11/03), the U.S. Court of Appeals for the Second Circuit ruled that defending oneself against charges of discrimination could constitute participation in a Title VII investigation or proceeding, and thus, could form the basis for a Title VII retaliation claim. The court explicitly stated, however, that Title VII only protects the specific act of participating in Title VII proceedings and not the underlying conduct that is being investigated. The court noted that an employer still may discipline an employee if its investigation reveals wrongdoing by the employee.

Constructive Discharge Not Tangible Job Action for Purposes of Determining Whether Employer Can Assert the Affirmative Defense of Prompt Remedial Action

When Bobbi-Lyn Reed was 17 years old, she began working for MBNA Marketing Systems, reporting to William Appel, who was 34 years old. Appel made sexually suggestive comments to Reed and, on one occasion, allegedly forced Reed into performing oral sex on him. Reed did not report the harassment or the assault to MBNA management but, shortly thereafter, resigned from MBNA. Several months later, Reed returned to work for MBNA and again reported to Appel, who resumed making sexually suggestive comments to her. Within a few months, Reed reported Appel's conduct, including the sexual assault, to MBNA management. MBNA promptly investigated her claims and made the decision to terminate Appel's employment. Reed later filed a lawsuit against MBNA, claiming that it was vicariously liable for Appel's sexual harassment. Reed claimed that Appel's conduct toward her during her initial period of employment rendered her working conditions intolerable and, thus, her resignation should be considered a constructive discharge. She further argued that this constructive discharge was a tangible job action that barred MBNA from asserting the affirmative defense that it had exercised reasonable care in preventing and correcting sexual harassment and that Reed had unreasonably failed to take advantage of the preventative and corrective measures it provided.

In Reed v. MBNA Marketing Systems, Inc. (6/19/03), as amended, the U.S. Court of Appeals for the First Circuit declined to adopt a blanket rule as to whether a constructive discharge is a tangible job action, but ruled on these facts that MBNA was entitled to raise the affirmative defense. The court further ruled that MBNA had engaged in reasonable measures to prevent and correct harassment, but held that the question of whether Reed, as a frightened 17 year old, had unreasonably failed to take advantage of those measures at the time of the original harassment was a question of fact for the jury.

Union's Free Speech Rights Do Not Extend to Displaying Political Posters on Government Property

In the fall of 2000, the American Postal Workers Union drafted and distributed a poster comparing the campaign positions and voting records of then-presidential candidates George W. Bush and Albert Gore. The posters were displayed on the union-dedicated bulletin boards in non-public areas of several post offices. The Office of Special Counsel issued an advisory opinion stating that the posting violated the Hatch Act, which, in part, prohibits federal employees from engaging in political activity while on duty, in a government building, while wearing an official uniform or using a government vehicle. The U.S. Postal Service, therefore, instructed managers at all postal facilities to remove the posters.

The union filed a lawsuit claiming that to the extent the Hatch Act prohibited the display of the posters, it unconstitutionally infringed on the union's free speech rights. InBurrus v. Vegliante (7/14/03), the U.S. Court of Appeals for the Second Circuit ruled that the Hatch Act was not unconstitutional. Because the union bulletin boards were located in interior work areas of post offices, not open to the public, governmental regulations applicable to them need only be reasonable in light of the purpose of the forum and must reflect a legitimate governmental concern in order to be valid. The Hatch Act, which is intended to prohibit federal employees from using their official authority to influence elections, met these requirements.

New Connecticut Law Enables Employees to Use Paid Sick Leave When Exercising Their Rights under the Connecticut FMLA

Connecticut Public Act No. 03-213 provides that an employer who has a bona fide sick leave policy must allow its employees to use up to two weeks of accumulated paid sick leave to attend to a serious health condition of a son or daughter, spouse, or parent, or for the birth or adoption of a son or daughter of the employee. Although this Act does not expand the total amount of time allowed to employees under the Connecticut Family and Medical Leave Act, it forbids employers from denying or discouraging their employees the opportunity to use accumulated paid sick leave for at least two weeks of the leave. The Act also adopts the language from the federal FMLA regulations concerning the calculation of the amount of FMLA leave used by an employee. This new law is effective October 1, 2003.

New Connecticut Law Prohibits Employers from Discriminating against Volunteer Firefighters and Ambulance Service Providers, and Provides Financial Whistleblower Protection

Connecticut Public Act No. 03-259, Sec. 53 prohibits employers from discharging or in any other way discriminating against any employee who is an active volunteer firefighter or a member of a volunteer ambulance company because the employee is late arriving to work or is absent from work as a result of responding to a fire or ambulance call prior to or during the employee's regular hours of employment. This Act also prohibits employers from retaliating against employees engaged in financial whistleblowing activity. This is a result of the recent Sarbanes-Oxley Act as well as other cases of financial and accounting misconduct. It is effective October 1, 2003.

New Connecticut Law Revises Personnel Files Act to Protect EAP Files

Connecticut Public Act No. 03-187 amends Connecticut's Personnel Files Act to protect disclosure of information or the release of records concerning an

employee's voluntary participation in an employer-sponsored employee assistance program without the employee's consent, unless the disclosure is necessary to prevent harm to the employee or others.

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