



ROBINSON & COLE LLP

Labor, Employment & Benefits



AFL-CIO Split May Increase Recruitment for Union Members

On July 25, 2005 the Service Employees International Union and the Teamsters Union, two of the country's largest unions, broke their affiliation with the AFL-CIO. The United Food and Commercial Workers Union broke its affiliation on July 29. With the departure of these three unions, the AFL-CIO reportedly has lost approximately 3.6 million of its 30 million members and about \$26 million of its \$126 million budget. The primary reason given by the disaffiliated unions for their decision to leave the AFL-CIO is that they have disagreed with the AFL-CIO's approach to advancing the labor movement. They reportedly have stated that increased recruitment of new members is the key to survival, given the decades-long decline of union members in the private workforce.

These unions operate primarily in the services industries, including healthcare and trucking, with jobs that may not be sent abroad. As unions grow more aggressive in trying to increase their membership, employers should be aware that they may be targeted for unionization.

\$100,000 Punitive Damages Award Upheld for Discrimination and Retaliation Claims under Title VII

Richard Tisdale worked as a handler and transport driver for FedEx in Nashville, Tennessee. After working for two years, Tisdale, an African-American, complained that African-American employees were not being promoted and that none served as managers or supervisors. When no substantial changes had been made after another year, the African-American employees boycotted the FedEx holiday party to protest what they perceived to be FedEx's discriminatory practices. Meanwhile, Tisdale had begun selling pallets (portable platforms), that FedEx would otherwise have put into dumpsters, to recyclers. Tisdale used the proceeds to set up an employee fund to pay for company holiday parties, picnics and other employee events. FedEx managers knew about and permitted his actions.

After another year, Tisdale wrote a letter to FedEx management signed by 18 other employees, documenting their allegations of discriminatory treatment. Tisdale was terminated soon after for theft of FedEx's pallets. He sued FedEx for discrimination and retaliation under Title VII, claiming that he had been terminated because he complained about the company's discriminatory practices. The parties stipulated to a back pay award of \$15,000 but FedEx challenged the jury's award of punitive damages of \$100,000. In [Tisdale v. Federal Express Corporation](#) (7/14/05) the U.S. Court of Appeals for the Sixth Circuit upheld the punitive damages award in favor of Tisdale. Even though the jury did not award any compensatory damages, the appeals court ruled that the award was within Title VII's statutory caps on punitive damages and was less than seven times the back pay award of \$15,000 that the parties had agreed upon.

Employee May Proceed with FMLA Claim after Signing a General Release

After working at Progress Energy for several years, Barbara Taylor began to have medical problems that caused her to miss work. She was refused leave under the Family and Medical Leave Act until she was out for six consecutive weeks for surgery. As a result of all of her absences, Taylor received a poor performance evaluation. She was terminated approximately one year later as part of a lay-off that was based on past performance. Taylor received \$12,000 in exchange for signing a general release and severance agreement that released the company from all claims under federal and local law. She then filed a lawsuit against Progress Energy claiming that the company had violated the FMLA by not informing her of her FMLA rights, improperly denying her request for medical leave, and terminating her because of her medical absences. Progress Energy claimed that Taylor's claims were barred because of the general release that she had signed. The court agreed and dismissed Taylor's claims. She appealed.

In [Taylor v. Progress Energy, Inc.](#) (7/20/05), the U.S. Court of Appeals for the Fourth Circuit overturned the lower court's decision and allowed Taylor to proceed with her FMLA claims against Progress Energy. The appeals court stated that the FMLA regulations do not allow an employee to waive her rights under the FMLA nor do the regulations allow an employer to induce an employee to waive her FMLA rights. The appeals court ruled that adherence to this policy was necessary to prevent employers from using financial incentives to reduce their FMLA obligations. The appeals court noted that, under the FMLA regulations, the waiver or settlement of FMLA claims must be authorized by a court or the U.S. Department of Labor.

White Employee Singled Out for Discipline May Proceed with her Race and Gender Discrimination Lawsuit under Title VII

Willa Russell was the only white female supervisor in the pipeline division of the Kansas City Water Services Department. One of her employees complained that she had made several racially offensive comments. An EEO investigator corroborated that Russell had used inappropriate language such as joking with a black employee about her family picking cotton, making a comment about Mexicans taking baths in fire hydrants, and referring to a male homosexual employee as "sissy pants." Russell was demoted and her pay was reduced. Russell's supervisors, a black male and a white male, were reprimanded but were not demoted and their pay was not reduced.

Russell sued the Water Services Department alleging race and gender discrimination and claiming that she had been singled out for discipline when she was demoted. In [Russell v. City of Kansas City, Missouri](#) (7/12/05), the U.S. Court of Appeals for the Eighth Circuit reversed the lower court's dismissal of her claims and allowed Russell's case to proceed to a jury. The appeals court noted that the investigations had revealed that black and white employees regularly used profanity and engaged in racial banter without appearing to be offended, and the alleged victims of Russell's comments speculated that Russell had been singled out for discipline because of her race. The appeals court concluded that, when the only white female supervisor presents strong evidence of double standards, a jury should decide whether she is the victim of intentional race or gender discrimination.

Employee May Sue for Sexual Harassment Based on Sexual Favoritism

Edna Miller and Frances Mackey worked at the California Department of Corrections where the Chief Deputy Warden allegedly had sexual affairs with several of his employees. The warden favored the individuals with whom he had sexual relations, and they received promotions, and privileges such as reporting to the warden instead of to their immediate supervisors. The warden promoted an employee and Miller and Mackey complained, arguing that Miller was more qualified for the position. Miller and Mackey later resigned because of increasing stress. They sued the Department of Corrections for sexual harassment and retaliation under the California Fair Employment and Housing Act.

In [Miller v. Department of Corrections](#) (7/18/05), the California Supreme Court ruled that pervasive sexual favoritism can support a claim of sexual harassment. The court, citing the EEOC, noted that when sexual favoritism is widespread, women may be viewed as "sexual playthings," which creates an atmosphere demeaning to women. Thus, the court determined that, when widespread sexual favoritism is severe and pervasive enough to alter an employee's working conditions, it may create a hostile work environment.

EEOC Issues Publication on an Employer's Responsibilities to Employees with Cancer

On July 26, 2005, the Equal Employment Opportunity Commission issued a [question and answer publication](#) on the application of the Americans with

Disabilities Act to individuals with cancer. The publication defines when cancer is considered a disability under the ADA, such as where radiation substantially limits an individual's ability to care for herself or even when an individual was unable to care for herself in the past. The publication further clarifies when an employer may ask an employee about cancer, such as to justify the use of sick leave or if the cancer is affecting her ability to do her job. It also discusses reasonable accommodations that employers may provide their employees who have cancer. Some of those accommodations include: leave for doctor's appointments, periodic breaks, a private area to rest or to take medication, adjustments to a work schedule, and reassignment to another job. Employers may be required to provide more than one accommodation for the same employee with cancer.

Court Creates Test for Negligent Misrepresentation Claim against Former Employer that Provided Erroneous Employment History

Marsha Singer worked in customer service for Beach Trading Company. She was introduced in a company-wide e-mail as the vice president of daily operations. About a year later, she left Beach Trading to work for HRK Industries as a customer service manager. Henry Kasindorf, the owner of HRK Industries, was concerned about the representations Singer had made in her resume and decided to contact Beach Trading in order to verify Singer's professional experiences. Instead of asking Beach Trading to confirm or deny Singer's employment history, Kasindorf engaged in a subterfuge, misrepresenting his identity and the nature of his calls. According to the memorandum Kasindorf prepared, none of the Beach Trading employees confirmed Singer's position as a customer service manager or vice president. HRK Industries then terminated Singer's employment because she was hired under fraudulent terms and she had misrepresented her previous position on her resume. Singer sued Beach Trading and its customer service supervisor for negligent misrepresentation, defamation, and intentional interference with a contractual relationship. The court dismissed her claim and Singer appealed.

In [Singer v. Beach Trading Company](#) (7/19/05) the Appellate Division of the New Jersey Superior Court ruled that Marsha Singer could proceed with her negligent misrepresentation claim against Beach Trading and the supervisor. The appellate court ruled that a former employer may be held liable for negligent misrepresentation of a former employee's work history if (1) the inquiring party clearly identifies the nature of the inquiry, (2) the employer voluntarily decides to respond to the inquiry and thereafter unreasonably provides false or inaccurate information, (3) the person providing the information is acting within the scope of his employment, (4) the recipient of the incorrect information relies on its accuracy to support an adverse employment action against the employee, and (5) the employee suffers quantifiable damages proximately caused by the negligent misrepresentation. The appellate court affirmed the dismissal of Singer's defamation and tortious interference claims.

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