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Labor, Employment & Benefits e-News

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Employee who Suffered from PTSD Due to 9/11 Attacks Was Not Retaliated against by her Employer

Insurance company executive Karen Mowbray was in New York City on September 11, 2001 on a business trip. Although she was not physically injured in the attack, the experience caused her to suffer from post-traumatic stress disorder. After returning home, Mowbray continued to work for several weeks until she had a nervous breakdown. In November 2001, Mowbray notified the company of her PTSD diagnosis and requested a leave of absence under the Family and Medical Leave Act. After 16 weeks of leave, Mowbray returned to work; however, due to a recent merger, her job responsibilities had been substantially altered. A few months later, Mowbray was told by her supervisor to "start planning her exit" from the company. Later that month, she was given three options: to accept a position as manager at a different office; to seek a different executive position within the company; or to resign with a severance package of more than $240,000. Mowbray accepted the severance and resigned. Mowbray then filed a lawsuit against the company, claiming that she had been retaliated against in violation of the FMLA and constructively discharged.

In Mowbray v. American General Life Companies (1/13/06), the U.S. Court of Appeals for the Fifth Circuit affirmed summary judgment in favor of her employer on the grounds that Mowbray had not experienced an adverse employment action, such as a demotion or a reduction of salary or responsibilities. According to the court, the statement that Mowbray should "start planning her exit" did not constitute an adverse action because it was not an "ultimate employment decision." The court also rejected Mowbray's claim that she had been constructively discharged, noting that Mowbray had been offered three viable options, including two choices which would have allowed her to stay with the company, and that a reasonable person would not have felt forced to resign.

Law Firm's Refusal to Grant 16-Week Leave Was Not Pregnancy Discrimination

Donna Heaney was a legal secretary at a small law firm, where she worked primarily for two

litigation associates. Heaney notified the firm that she was pregnant and was having complications. The firm granted Heaney's request to take extra time off for her doctor's appointments, as well as for her wedding and honeymoon. Although the office administrator and one of the associates were supportive when they learned of Heaney's pregnancy complications, the other associate suggested that Heaney should consider a leave of absence if she did not feel that she could do her job.

A few months after she informed the firm about her pregnancy, Heaney was placed on 16 weeks of modified bed rest. Heaney asked the firm to hold her job open until her return. The firm denied her request, however, stating that it could not afford to use a temporary worker during that time. Instead, the firm terminated Heaney's employment and gave her two weeks severance pay. Heaney sued the firm for discrimination in violation of the Pregnancy Discrimination Act.

In Heaney v. Fogarty, Cohen, Selby, Nemiroff, LLC (11/14/05), the U.S. District Court for Connecticut granted the firm's motion for summary judgment, concluding that there was no evidence in the record to show that her termination was based on her pregnancy. According to the court, there was no evidence of past pregnancy discrimination by the firm. Further, the firm had articulated legitimate, non-discriminatory reasons for her termination, namely, that its usual practice was to limit disability leave to six weeks and that a temporary worker was not an adequate substitute for a full-time litigation secretary. In addition, the court noted that there was no evidence that the partner who actually made the decision to terminate Heaney's employment had ever exhibited any discriminatory animus.

Employee's Shortness of Breath Does Not Support Claim of Discrimination on the Basis of Actual or Perceived Disability

Aurelio Rosado was a general manager for Wackenhut, P.R., Inc., overseeing Wackenhut's operations and accounts. Although the company did well for several years under Rosado's leadership, by 2001, dropping revenues caused its upper management to send special project manager John Griffey to evaluate the productivity of Rosado's office. Griffey recommended substantial changes to improve profitability and Rosado was told to create a comprehensive action plan to implement the changes. A few days later, however, Rosado suffered a heart attack and was out of work for more than a month. By the time he returned, Griffey had taken over many of Rosado's job duties. Soon, according to Rosado, upper management at Wackenhut began to make comments encouraging him to retire. The company terminated Rosasdo's employment a short time later and appointed Griffey as the new general manager.

Rosado filed a lawsuit against the company for discrimination on the basis of actual or perceived disability and age under the Americans with Disabilities Act and the Age Discrimination in Employment Act. In Rosado v. Wackenhut Puerto Rico, Inc. (12/29/05), the U.S. Court of Appeals for the First Circuit affirmed summary judgment in favor of the employer. The appellate court concluded that evidence that Rosado exhibited shortness of breath after he returned to work was insufficient to establish that he was disabled or "regarded as" disabled by his employer under the ADA. The appellate court also rejected Rosado's age discrimination claim, concluding that Rosado had been unable to prove that the company's articulated non-discriminatory reason - Rosado's unsatisfactory managerial performance - was a pretext for age discrimination.

Employer's Open-Door Policy Was Not Sufficient to Preclude Strict Liability for Supervisor Harassment under the ADA

Miguel Arrieta-Colon, a Wal-Mart employee, suffered from Peyronie's Disease, which interfered with his ability to have sexual intercourse. Arrieta-Colon underwent penile implant surgeries to

correct this impairment. A side effect of his surgery was the appearance of a constant semi-erection, which was visible through his clothing. Soon after returning to work, Arrieta-Colon suffered harassment by his co-workers and supervisors, including questions such as "how it felt to have his new pump" and requests from a supervisor to borrow Arrieta-Colon's "pump" for a date. One of these comments was made on the store's public address system. Although Arrieta-Colon made numerous complaints to his superiors and the company's Human Resources Department failed to stop these remarks. Arrieta-Colon developed trouble sleeping, lost weight, became depressed, and eventually resigned. He later filed a lawsuit against Wal-Mart for disability discrimination in violation of the Americans with Disabilities Act.

After Arrieta-Colon won at trial, Wal-Mart filed an appeal claiming that the trial court failed to instruct the jury that an employer cannot be held liable for harassment if it takes reasonable steps to prevent and correct harassment and the employee unreasonably fails to avail himself of the employer's procedures. In Arrieta-Colon v. Wal-Mart Puerto Rico, Inc. (1/13/06), the U.S. Court of Appeals for the First Circuit ruled that, even though Wal-Mart had an open door grievance policy, it was not entitled to this jury instruction because the evidence established that Wal-Mart had failed to take action on Arrieta-Colon's numerous complaints. Thus, the court affirmed judgment that Wal-Mart was strictly liable for the discriminatory conduct of its supervisors and employees.

Employee's Assertion that her Mistakes Did Not Justify Termination Does Not Salvage Discrimination Claims under Title VII and the ADEA

Betty Cuttino worked as a business manager at a nursing home owned by Genesis Health Ventures. After discovering numerous record-keeping errors, Genesis terminated Cuttino's employment. Cuttino then filed suit, alleging discrimination on the basis of race, age, and gender, as well as retaliation for making complaints about wage disparities. In Cuttino v. Genesis Health Ventures, Inc. (1/11/06), the U.S. District Court for Connecticut granted the employer's motion for summary judgment. Rejecting Cuttino's claim that a jury should be allowed to decide whether the mistakes she made justified her termination, the court affirmed the principle that neither the jury nor the court is permitted to substitute its business judgment about what constitutes terminable conduct for that of the company. Ruling that Cuttino had failed to demonstrate a causal connection between her complaints about wage disparities and her termination, the court also granted summary judgment to the employer on Cuttino's retaliation claim.

For more information, please contact Stephen Aronson or Erin O'Brien Choquette or phone either of them at 800-826-3579.
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