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Citing Sale-of-Business Exclusion, Appeals Court Reverses $500,000 Judgment for Violation of the WARN Act

Airtherm Products, Inc., a manufacturer of heating and air conditioning products, entered into an asset purchase agreement with Airtherm LLC. Under the agreement, ALLC promised to offer employment to API employees. API issued a notice to its employees informing them that it was in the process of being sold and that on the day of the sale it would be closing the plant, terminating employees, and providing severance payments to eligible employees. The notice also informed employees that ALLC would re-open the plant following the sale and would begin to take applications for employment, hoping to hire many former API employees. A group of former API employees, including many who were hired by ALLC, sued API for failing to provide them with adequate notice under the Worker Adjustment and Retraining Notification Act. The court ruled in favor of the workers and awarded damages of $515,661.92. API appealed. In Wilson v. Airtherm Products, Inc. (2/3/06), the U.S. Court of Appeals for the Eighth Circuit reversed the judgment. The appeals court ruled that the WARN Act specifically provides that a seller of a business is not obligated to provide notice to its employees; that obligation falls on the purchaser. The appeals court distinguished the sale of a business as a going concern from the sale of assets, in which the seller retains the notice obligation.

Co-Worker Harassment May Constitute Retaliation under Title VII

Anna Jensen, a U.S. Postal Service employee, reported that her supervisor, Carl Waters, made an unwanted sexual proposition and a series of inappropriate sexual comments. Waters was suspended and eventually discharged. While the investigation was pending, Jensen was assigned to Waters' former work station. Upon arrival to that unit, Jensen was subjected to the silent treatment as well as to insults by a letter carrier who was friendly with Waters. Jensen also was threatened by another carrier, who would drive carts towards her at a rapid pace. Both carriers told Jensen that they disagreed with her decision to report Waters and with the USPS' decision to discharge him. For the next 19 months Jensen was subjected to offensive comments on a regular basis, as frequently as three times per week. Jensen filed a lawsuit against the USPS, alleging sex discrimination and retaliation in violation of Title VII. After the trial court dismissed her claim,

she appealed. In Jensen v. Potter (1/31/06), the U.S. Court of Appeals for the Third Circuit restored the claim and remanded the case to the trial court. In a decision written by now U.S. Supreme Court Justice Alito, the appeals court ruled that a jury could find that Jensen was subjected to conduct that was sufficiently severe and pervasive to constitute harassment. The appeals court noted in particular the "pounding regularity" of the carriers' insults and the physical threats by another carrier and concluded that there was evidence connecting these actions to Jensen's report of Waters. Further, the appeals court concluded that Jensen could show that the USPS was aware of the conduct by Jensen's co-workers and failed to take prompt remedial action.

Appeals Court Upholds Judgment in Sexual Harassment Case, including Attorney's Fees in Excess of $436,000

After working in the banking industry for 12 years, Jennifer Farfaras was hired by Citizens Bank and Trust of Chicago. Citizens Bank was owned by brothers Robert Michael and George Michael, who were Chairman/CEO and Director, respectively. Throughout Farfaras' employment both men, as well as the bank president, engaged in inappropriate conduct towards Farfaras. The conduct included demands for sexual favors, a "steady stream" of sexually explicit comments, as well as unwelcome touching and fondling. Despite Farfaras' repeated requests that the men stop this conduct, the conduct did not abate. A year-and-a-half after she commenced her employment, Farfaras was discharged. She sued Citizens Bank for sex discrimination and sexual harassment and the individuals for assault, battery, and intentional infliction of emotional distress. After a jury verdict in her favor, Farfaras was awarded $356,752.90 in back pay, compensatory and punitive damages. The court also awarded her attorney's fees in the amount of $436,766.75. Citizens Bank appealed. In Farfaras v. Citizens Bank and Trust of Chicago (1/11/06), U.S. Court of Appeals for the Seventh Circuit upheld the monetary awards. The appeals court noted that both the trial court and the jury were in a superior position to assess the proper damages award. The court further noted that lay testimony (rather than psychological or medical testimony) about the impact of the wrongful conduct was sufficient to establish emotional injury. As to the attorney's fees, the appeals court affirmed the use of the lodestar method (multiplying the number of hours reasonably spent by a reasonable hourly rate) in calculating the award.

Substantial Wage Disparity Was Insufficient to Establish National Origin Claim under Title VII

Auto mechanic José Quiñones sued his former employer, Houser Buick, for national origin discrimination under Title VII. Quiñones, who is from Puerto Rico, claimed that under the flat rate compensation system implemented by Houser he was being paid substantially less than Wayne Barnes, a white U.S.-born co-worker. Under the flat rate system, a mechanic could earn more if he completed a job in less time than had been estimated, thus being able to move on to the next job faster. In the three-year period in which both men worked for Houser, Quiñones earned a total of $86,000, while Barnes earned $210,000. InQuiñones v. Houser Buick (2/2/06), the U.S. Court of Appeals for the First Circuit upheld the dismissal of Quiñones' complaint. The appeals court determined that the wage disparity was insufficient to show discrimination, given Quiñones' admission that under the flat rate system a mechanic could enhance his compensation by working faster, being organized, and maintaining better work repair diaries. The appeals court noted that any of these factors, rather than discrimination, could explain the higher compensation earned by Barnes.

Independent Contractor Was Limited to Equitable, Not Monetary Relief, under the ADA

Gary Lunnin worked as an independent carpet installer. He obtained jobs by reporting to the warehouse of Carpetmax of Whitman, where installation projects were assigned. Lunnin sued Carpetmax for violation of the Americans with Disabilities Act, claiming that he was being denied projects because of his HIV status. In his complaint, Lunnin asserted that Carpetmax violated both the employment (Title I) and public accommodation (Title III) provisions of the ADA. The trial court dismissed the Title I claim because Lunnin was an independent contractor and not an employee. The court also dismissed the public accommodation claim. Lunnin appealed the dismissal of the public accommodation claim. Before the appeal was heard, Lunnin died, and his executrix proceeded with the appeal. In Goodwin v. C.N.J., Inc. (1/30/06), the U.S. Court of Appeals for the First Circuit affirmed the dismissal. The appeals court ruled that the public accommodation provision of the ADA provided for only injunctive relief, not monetary damages. Since Lunnin could not now obtain injunctive relief due to his death, his appeal was ruled moot.

OSHA Issues Publication Aimed at Reducing Motor Vehicle Injuries

The U.S. Occupational Safety and Health Administration, together with the National Highway Safety Administration and the Network of Employers for Traffic Safety, have joined efforts to publish a guide aimed at reducing motor vehicle-related deaths and injuries. The publication, "Guidelines for Employers to Reduce Motor Vehicle Crashes" offers 10 steps for building a workplace driver safety program. While cautioning that the guidelines do not constitute standards or regulations, the introduction contains a reminder of the employer's obligation under OSHA's General Duty Clause: to provide a workplace free from recognized hazards likely to cause death or serious physical harm.

For more information, please contact Stephen Aronson or Erin O'Brien Choquette or phone either of them at 800-826-3579. Visit our Labor, Employment and Benefits website at www.rc.com. To view back issues, visit our searchable archives. If you would like certain information covered in future communications, let us know. We welcome your feedback.