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Consensual Sexual Conduct with Boss Undermines Employee's Title VII Claim

Maelynn Tenge worked closely with Scott Phillips at his company, Phillips Modern Ag Company. Tenge admitted that she and Phillips touched each other at least two times in the presence of Phillips' wife: on one occasion, she pinched Scott in the buttocks and, on a second occasion, Phillips pinched her. Phillips' wife then found a torn, suggestive note written by Tenge (one of several that Tenge had written) in the company dumpster. After piecing it together and reading it, she became upset. Soon after, Phillips fired Tenge. Tenge then filed suit against Phillips, his wife and the company, claiming sex discrimination in violation of Title VII and tortious interference with a business relationship. The trial court granted summary judgment, dismissing Tenge's claims, and she appealed.

In Tenge v. Phillips Modern Ag Co. (4/28/06), the U.S. Court of Appeals for the Eighth Circuit affirmed the summary judgment decision. It rejected Tenge's claim that Phillips' admission that his wife's jealousy led to her termination demonstrated that she was discharged because of her sex in violation of Title VII. Relying on Tenge's admission that she engaged in sexual conduct with Phillips that could have led his wife to suspect an inappropriate relationship, the appellate court concluded that the termination was not based on Tenge's status as a woman, but rather was based on Tenge's own actions, and therefore was not a violation of Title VII. The appellate court noted that "the ultimate basis for Tenge's dismissal was not her sex, it was [Phillips'] desire to allay his wife's concerns over Tenge's admitted sexual behavior with him." [back]

Employer's Divergence from Progressive Discipline Policy Sufficient for Finding of Racial Discrimination under Title VII and Section 1983

Lonnie Davis Jr., an African American corrections officer for the Wisconsin Department of Corrections, was demoted following allegations that he harassed a female co-worker. A five-page human resources memorandum detailed Davis' violation of a Department rule prohibiting "intimidating, interfering with, harassing (including sexual or racial harassment) demeaning, or using abusive language in dealing with others." Per the Department's Progressive Discipline policy, Davis' infraction was classified as a "category B" violation. First-time "category B" violations are punishable by a written reprimand. Davis' immediate demotion was inconsistent with the progressive discipline policy. The Department later claimed that "category B" was a typo and that the behavior should have been deemed classified as a "category C" violation, which, under the policy, would justify a demotion. Davis sued the Department, asserting that his demotion was based on his race and that the Department unlawfully tolerated a racially hostile work environment. After a jury ruled in favor of Davis, the Department appealed, claiming that the evidence offered at trial was insufficient to support the verdict.

In Davis v. Wisconsin Department of Corrections (4/27/06), the U.S. Court of Appeals for the Seventh Circuit refused to overturn the jury verdict. The appellate court noted that although there was no conclusive evidence that the officer was demoted due to his race, the Department's departure from its progressive discipline policy was sufficient to support the jury's reasonable determination that Davis was a victim of intentional racial discrimination. Moreover, the Department failed to produce uncontroverted independent evidence that no discrimination occurred. Thus, the appellate court concluded that the Department had failed to demonstrate that the jury verdict should be set aside as a matter of law. [back]

Employers Cannot Limit Time to File FMLA Claim as a Condition of Employment

Stryker Medical Division's employment application form stated that any claim brought by the employee under the Family and Medical Leave Act must be filed within six months. Timothy Conway signed that form when he applied for a job with Stryker. After being discharged by Stryker, Conway sued Stryker for violating the FMLA. Although the suit was filed after the expiration of Stryker's six-month period, it was filed well within the FMLA's statutory three-year time limit. Stryker requested that the court dismiss Conway's FMLA claims, arguing that Conway had contractually agreed to a six-month limitation period.

In Conway v. Stryker Medical Division (4/18/06), the U.S. District Court for Michigan concluded that the six-month limitation was unlawful and unenforceable under the terms of the FMLA as a matter of public policy. Citing the FMLA regulation that states that "employers cannot induce employees to waive ... their rights under FMLA," the court concluded that the limitation on the time to file a FMLA claim was offered as a condition of employment and fundamentally and impermissibly altered the employee's rights under the FMLA. [back]

Medical Marijuana User Not Disabled Under Oregon Law

Robert Washburn, an employee of Columbia Forest Products, suffered from leg spasms that kept him awake at night. Although Washburn had taken prescription medication to help him sleep, he later found that medical marijuana prescribed by his doctor, if smoked before bed, was more effective in helping him sleep. Consistent with its workplace drug policy prohibiting employees from reporting to work with a controlled substance in their system, Columbia tested Washburn's

urine on several occasions. The type of test used could determine only whether someone had used marijuana within a two to three week time span before the test. The tests were incapable, however, of determining whether a person was drug impaired at the time of testing. After testing positive for marijuana use, Washburn was placed on a leave of absence. He then requested that Columbia accommodate his condition by allowing him to take a different drug test, one aimed only at determining current drug impairment. Although Columbia and Washburn tried to negotiate the request, they were unable to reach an agreement and Washburn's employment was terminated. Washburn sued Columbia, claiming that it had discriminated against him on the basis of his disability in violation of Oregon law by failing to accommodate his medical use of marijuana.

In Washburn v. Columbia Forest Prods. Inc. (5/4/06), the Oregon Supreme Court addressed whether Washburn was disabled under Oregon law and, thus, whether his employer had a duty to accommodate him. Oregon law defines a disabled person as someone with an impairment that substantially limits a major life activity. Interpreting the disability statute, the court noted that the state legislature did not intend to categorize an impairment as substantially limiting if medication could help lessen the effects of the impairment such that an individual could perform the major life activity. Although Washburn claimed that he was impaired in sleeping, a major life activity, the court found that he was able to counteract his sleep problem by using prescription medication other than marijuana. Thus, he was not a disabled person under Oregon law and accordingly, his employer had no duty to accommodate his physical limitation by altering its drug testing procedure. [back]

Employer Is Not Obligated to Hire At-will Employee before Rescinding Job Offer

Kevin Petitte, who was currently employed at the time, applied for a job at DSL.net. After receiving a verbal offer, but before receiving an offer letter from DSL, Petitte resigned his position with his current employer. A few days later, he received the offer letter which contained language noting that he would be an at-will employee and that the letter was not a guarantee of employment for any specified length of time. The company then requested references from his previous employers. When he reported for his first day of work, Petitte was told to go home. Later that night, DSL told Petitte that it was not going to employ him. The company later rescinded its offer of employment, stating that information from one of Petitte's prior employers had caused DSL to change its mind about hiring him. Petitte filed a lawsuit approximately a month later, claiming breach of contract, negligent misrepresentation, and infliction of emotional distress.

In Petitte v. DSL.net, Inc. (3/27/06), Petitte argued that DSL was contractually required to hire him before it could fire him. The Connecticut Superior Court rejected that argument, finding that Petitte's employment was at-will and, therefore, DSL could exercise its right to terminate him before he was actually hired. An employer that changes its mind about a prospective employee, the court noted, should not be required to allow the person to actually start working before ending the relationship. According to the court, employers should not be required to take on the burden of giving an employee access to confidential information and beginning an agency relationship for an unwanted at-will employee. [back]

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