Labor, Employment & Benefits e-News

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Supreme Court Expands Test for Retaliation under Title VII

Sheila White, a forklift operator, was the only female employee working in the Maintenance of Way department at Burlington Northern. A few months after being hired, White complained to company officials that her immediate supervisor had made repeated comments that women should not be working in that department and that he had made insulting and inappropriate remarks to her in front of her male colleagues. Soon after her complaint, a different supervisor removed White from her position as a forklift operator and assigned her to a laborer position, albeit one with the same salary and benefits. He explained that her co-workers had complained that "a more senior man" should have the "less arduous and cleaner job" of forklift operator. A couple of weeks later, White filed a complaint with the Equal Employment Opportunity Commission, alleging sexual discrimination and retaliation. Soon after, White was suspended for 37 days without pay for being insubordinate to a supervisor. After bringing an internal grievance, Burlington Northern reinstated White to her former position and awarded her back pay for the days she was suspended. White sued Burlington Northern for sex discrimination and retaliation in violation of Title VII.

In Burlington Northern & Santa Fe Railway Co. v. White , the U.S. Supreme Court created a broader test for retaliation under Title VII than previously had been used by many federal courts. The court noted that, in order to sustain a claim for retaliation under Title VII, the

alleged retaliatory action must cause the employee materially adverse harm that might dissuade a reasonable worker from making or supporting a charge of discrimination. The court explained that the materiality component distinguishes between significant and trivial harms to the employee. The court also explained that the reasonable worker standard is an objective standard that allows the courts to administer retaliation claims. Applying this new test to the facts, the court determined that White presented sufficient evidence for the jury to conclude that White's reassignment to the laborer position involved duties more arduous and dirtier than the forklift operation position. The court also noted that White presented evidence that the 37-day suspension caused her emotional distress for which she sought medical treatment. The court concluded that the jury properly could have found that White's reassignment to the less favorable position and her suspension were materially adverse and might deter a reasonable person from making a claim of discrimination. Accordingly, the court affirmed the jury's award of $46,750 in damages. [back]

Employer May Be Liable for "Rubber Stamp" Theory of Liability under Title VII

Stephen Peters, who is African-American, worked at BCI Coca-Cola Bottling Company. Peters was the most senior member of the department and generally had weekends off. Peters was instructed that he had to begin working on Sundays. Peters told his district manager, Cesar Grado, who is Hispanic, that he could not work on Sunday because he had plans and he had not felt well all week. Grado informed Peters that he had to come to work and that failure to do so could lead to termination. That Saturday evening, Peters felt sick, went to an urgent care clinic, cancelled his plans for Sunday, and called a supervisor advising that he could not work on Sunday. The following Monday, Grado reported Peters' failure to report to work to BCI's human resources department. Nobody from human resources asked Peters why he did not report to work or speak with his supervisor. Relying on Grado's report of Peters' insubordination, BCI terminated Peters.

Peters filed a charge with the U.S. Equal Employment Opportunity Commission alleging that he was terminated as a result of racial discrimination. The EEOC then sued BCI on Peters' behalf asserting that, although BCI's human resources department made the decision to terminate Peters and did not know that he was African-American, there was evidence that Grado harbored racial animus toward African American employees and Grado was the sole source of the information that led to Peters' termination. The trial court dismissed the EEOC's claim and the agency appealed.

In EEOC v. BCI Coca-Cola Bottling Company, Los Angeles (6/7/06) the U.S. Court of Appeals for the Tenth Circuit reversed the lower court's decision and allowed the EEOC's claim on Peters' behalf to proceed. The appeals court adopted the "cat's paw" or "rubber stamp" theory where an employer may be liable for the acts of a biased subordinate even if the subordinate is not the decision-maker if that subordinate is the source of the information resulting in the adverse job action. The appeals court stated that employers may avoid liability by conducting an independent investigation of the allegations against an employee. [back]

Real World Job Stress Does Not Constitute Retaliation under Title VII

Joseph Lujan worked as a ranger for the U.S. Forest Service. A USFS officer e-mailed Lujan's

supervisor, complaining that Lujan had been disruptive during a training program, had arrived late to the second training day, and was careless with expensive equipment. The following month, after Lujan left another training session early without permission, his supervisor issued a warning restricting his hours to a standard non-flexible work schedule. Lujan called in sick for most of that month without providing a doctor's note. His supervisor then informed Lujan that he was required to provide a doctor's note for his sick leave and he was placed on a six-month restrictive leave schedule. A short time later, Lujan was placed on a 90-day performance improvement plan. Lujan sued the USFS, alleging that his supervisor retaliated against him for filing an EEOC race discrimination complaint against the USFS earlier that year. After the court dismissed Lujan's complaint, he appealed.

In Lujan v. Mike Johanns, Secretary U.S. Department of Agriculture (5/25/06) the U.S. Court of Appeals for the Tenth Circuit upheld the lower district court's dismissal of Lujan's complaint. The appeals court stated that, in order to prevail, Lujan needed to show that he was subjected to an adverse employment action. The appeals court, however, determined that there was no evidence that Lujan suffered a change in his employment status. The court further determined that none of the disciplinary action taken against him created a hostile work environment. In commenting on Lujan's allegations, the appeals court stated that the evidence merely portrays "a work environment that exhibits the monitoring and job stress typical of life in the real world." This case was decided before the Supreme Court issued its ruling in Burlington Northern & Santa Fe Railway Co. v. White, reported above. [back]

Employer Not Required To Investigate whether Employee's Sickness Gave Rise to FMLA Leave

Marquita Phillips was absent from her job at Quebecor due to sickness on several occasions. Quebecor's attendance policy provided that an employee with 4-7 chargeable absences (including absences due to sickness) within a 12-month period was subject to termination. When Phillips was absent again because she was "sick," she was warned that if she maintained the same number of chargeable absences, she would be terminated. Several months later, after another chargeable absence, Phillips was terminated. She was later diagnosed with a head tumor and sued Quebecor claiming that her absence should have been considered lawful leave under the Family and Medical Leave Act.

In Phillips v. Quebecor World RAI Inc. (6/12/06), the U.S. Court of Appeals for the Seventh Circuit ruled that, because Phillips did not learn of her head tumor until months after her termination, Quebecor had no notice of her illness and, accordingly, could not be liable under the FMLA. The court noted that an employee's reference to being "sick" does not suggest to the employer that the medical condition might be serious or that the FMLA could be applicable. The court also noted that requiring employers to determine whether every employee's sickness is covered by the FMLA would impose too substantial a burden on employers and was not required by the FMLA. [back]

"Wait Time" Compensable under the FLSA

The U.S. Department of Labor conducted an audit of Akron Insulation's wage practices. The DOL determined that Akron had paid employees only for the time they were at an actual job site. The DOL concluded that Akron had violated the overtime provisions of the Fair Labor Standards Act by failing to pay employees for the time they spent at Akron's place of business receiving their assignments, waiting for other crew members, loading trucks, and performing other activities that the DOL concluded were necessary preparation time.

In Chao v. Akron Insulation & Supply, Inc. (6/9/06), the U.S. Court of Appeals for the Sixth Circuit agreed that Akron owed 45 employees approximately $95,000 in back pay. The court also agreed that there was sufficient evidence that employees needed to be at Akron before they traveled to the job site - time that is compensable under the FLSA. The court determined that Akron could not dispute the amount of pay owed because Akron had failed to keep adequate time and wage records. [back]

Allowing Employees To Cash In Sick Leave May Violate the Tax Code

On June 8, 2006, a Senior Actuary with the Internal Revenue Service Tax Exempt and Government Entities Division told a New York State Bar Association Conference that firms that allow public employees to cash in sick leave after they accumulate a certain amount of leave may violate the Internal Revenue Code. According to the speaker, employees are required to pay taxes on all compensation even if they decide not to cash in their leave. According to the speaker, whenever an individual controls when he or she will pay the tax on the income, it is considered deferred compensation. The speaker noted that, under the current tax laws, individuals should not have the ability to defer compensation unless there is substantial risk of forfeiture. One option suggested by the speaker for minimizing this risk is to establish a "use it or lose it policy." [back]

New Rule Issued on Electronic Storage of I-9 Forms

On June 15, 2006, the U.S. Department of Homeland Security issued an interim rule regarding Electronic Signature and Storage of Form I-9, Employment Eligibility Verification . Under this new interim rule, employers may sign and retain I-9 forms electronically, and also may electronically scan and store the existing I-9s, as long as the specified electronic filing system standards are met. The DHS is upgrading the downloadable PDF version of the I-9 form to enable employers and employees to electronically sign and save completed I-9 forms. [back]

For more information, please contact Stephen Aronson or Alice DeTora or phone either of them at 800-826-3579.
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