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### Employees Who Act Like Owners Are Still Employees under Title VII

Cyndee Smith, a part-time waitress for Castaways Family Diner, sued Castaways and its sole proprietor, Carrol Gonzalez, under Title VII for discrimination on the basis of her sex, race, and national origin and for retaliation. She alleged that, during the four months of her employment, a cook and a bus-boy uttered lewd remarks and inappropriately touched or attempted to touch her. Smith, who was white, complained about her co-workers, who were of a different race and national origin, but no action was taken. Castaways and Gonzalez requested that the court dismiss the Title VII claims because Castaways did not have 15 employees, an essential element of a Title VII claim. The trial court found that Gonzalez, who worked full-time in the health care industry, had delegated control of the restaurant to her mother and her husband and also found that they managed the restaurant much like owners. After the court dismissed Smith's claims, she appealed.

In [Smith v. Castaways Family Diner](#) (7/18/06) the U.S. Court of Appeals for the Seventh Circuit reinstated Smith's claims, determining that managers, supervisors, and other highly-placed employees are still employees for purposes of determining coverage for Title VII. The appeals court explained that equity partners, major shareholders, directors, and others who may hold an ownership interest in the employer may be excluded from the roster

of employees for purposes of determining coverage under Title VII. However, the appeals court noted that, although Gonzalez's mother and husband exercised broad authority to run the restaurant, that authority had been delegated to them by Gonzalez, the true owner of the restaurant. [\[back\]](#)

## **Employee Working for Six Months Eligible for FMLA under Successorship Theory**

Ronald Cobb, a truck driver, worked for Contract Transport Inc. for fewer than six months. When Cobb learned that he needed to have his gallbladder removed, he contacted his dispatcher who referred him to one of Contract Transport's owners. After his surgery, Cobb informed the owner that he was unable to work. The owner said she would send him an application for short-term disability leave, but instead she sent him notice of his termination. Cobb sued Contract Transport for violation of the Family and Medical Leave Act. Contract Transport asked the trial court to dismiss his claim on the ground that he had worked for less than six months and, therefore, fell short of the one year threshold for eligibility under the FMLA. The trial court agreed and dismissed Cobb's claim. He appealed.

In Cobb v. Contract Transport Inc. (6/28/06) the U.S. Court of Appeals for the Sixth Circuit reversed, ruling that because Contract Transport was the successor-in-interest to Cobb's previous employer, Byrd Trucking, he was eligible to assert an FMLA claim. The appeals court noted that Cobb had worked for three years for Byrd Trucking, that he drove the same route in the same manner as he had when working for Byrd Trucking, and used the same truck stops and relay points. In support of its ruling, the appeals court cited the FMLA's definition of employer, which expressly includes successors in interest, and the strong federal policy allowing employees to take reasonable medical leave. [\[back\]](#)

## **Court Explains OWBPA's Informational Requirements for Valid Releases of ADEA Claims**

McDonald's Corporation restructured its business operations by reducing its divisions from 5 to 3, its regions from 38 to 21, and its workforce by 500 employees nationwide. The former Atlanta region was merged with the former Nashville and Greenville regions to create a new Atlanta region. The manager of the new Atlanta region worked with a team of senior managers to reduce the region's 208 employees by 66, including five employees who were each over the age of 40 and who had worked for McDonald's for more than 15 years. McDonald's offered each discharged employee a severance package contingent on them signing a release of any claims against the company.

The five employees signed the releases and accepted the benefits, but two years later sued McDonald's for age discrimination under the Age Discrimination in Employment Act. The employees conceded that they had signed the releases but argued that the releases failed to comply with the Older Worker Benefits Protection Act because they did not provide nationwide data on the employees terminated by the restructuring. The trial court found that McDonald's should have provided nationwide data, not just the data for the Atlanta region, and that the absence of nationwide data rendered the releases ineffective to bar the ADEA claims. McDonald's appealed.

In Burlison v. McDonald's Corporation (7/11/06) the U.S. Court of Appeals for the Eleventh

Circuit reversed the trial court's ruling, determined that McDonald's had properly provided informational data on the Atlanta region, and dismissed the employees' claims. The appeals court concluded that, in order to achieve the OWBPA's goal of providing information to employees to help them decide whether to accept separation benefits, the decisional unit for establishing the scope of the information should relate to the Atlanta region. The appeals court noted that the five employees were among the 208 employees who worked in the Atlanta region, they were considered from employment only in that region, and the managers making the termination decisions only considered the 208 employees in that region. [\[back\]](#)

## **Shoddy Investigation Is Not Evidence of Pretext under Title VII**

Ray Forrester was discharged from Rauland-Borg Corporation after a co-worker complained that he had sexually harassed her. Forrester sued Rauland-Borg under Title VII, alleging that the investigation into the allegations of sexual harassment was "shoddy."

In Forrester v. Rauland-Borg Corporation (6/29/06) the U.S. Court of Appeals for the Seventh Circuit ruled that Forrester's assertion that the company's sexual harassment investigation was "shoddy" was not sufficient to rebut his employer's stated reason for his termination. The question to be determined in a discrimination case, the appeals court reasoned, is not "whether the employer's stated nondiscriminatory ground for the action of which the plaintiff is complaining is correct but whether it is the true ground of the employer's action rather than being a pretext for a decision based on some other, undisclosed ground." If the employer's stated nondiscriminatory ground for the employment action is the true ground, the court explained, then the reason is not a pretext for discrimination. [\[back\]](#)

## **Male Employee's Reverse Gender Discrimination Claim Rejected under Title VII and Section 1983**

City Water and Light employee Jerry Yeager was driving to work when co-worker Carolyn Schwartz pulled up behind him at a traffic light. Yeager got out of his car, reached into Schwartz's open window, and pinched her breast. When Yeager's supervisor confronted him about his behavior, Yeager smiled and claimed that the pinch was accidental. He then was forced to resign for violating CWL's sexual harassment policy. Yeager sued for reverse gender discrimination under Title VII and Section 1983, alleging that Schwartz frequently violated CWL's sexual harassment policy, but was treated more leniently than he.

In Yeager v. City Water and Light Plant of Jonesboro, Arkansas (6/30/06) the U.S. Court of Appeals for the Eighth Circuit rejected Yeager's claim, ruling that he did not show that his termination based on improper behavior was pretextual. Yeager's action, the appeals court explained, elicited an immediate complaint. Schwartz, however, denied that she had violated the sexual harassment policy and there were no pending allegations against her. The appeals court noted that an employer may differentiate between "sexually oriented conduct that elicits a complaint from an offended co-worker, and arguably comparable conduct that is nonetheless tolerated by co-workers without complaint." [\[back\]](#)

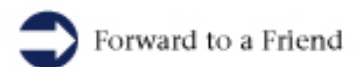
## **HIV-Positive Applicant May Proceed with Disability Discrimination Claim under Rehab Act**

Lorenzo Taylor applied to the Foreign Service and received an offer of employment conditional on his passing a medical exam. Taylor then voluntarily informed the U.S. State Department that he is HIV-positive, but that he does not require constant medical attention and that his doctor asserted that he could live anywhere in the world. After the State Department declined to hire Taylor, he brought a claim for disability discrimination under the Rehabilitation Act. The trial court agreed with the State Department that Taylor's HIV-position condition rendered him unable to serve at all of the overseas posts, an essential function of his position, and that there were no reasonable accommodations without imposing undue hardship on the State Department. After the trial court dismissed Taylor's claim, he appealed.

In Taylor v. Rice (6/27/06) the U.S. Court of Appeals for the District of Columbia Circuit ruled that Taylor's claim can proceed to trial because there was not enough evidence to show that his requested accommodations were unreasonable. Taylor had requested that he be placed in countries which have the capacity to treat HIV, or that he be placed anywhere, with permission to use leave to obtain medical treatment. [\[back\]](#)

### **Massachusetts Closer to Minimum Wage Increase**

On July 12th, the Massachusetts House of Representatives approved a bill to increase the Commonwealth's minimum wage to \$7.50/hr. in January 2007, and to \$8.00/hr. in January 2008. The state's minimum wage is currently \$6.75/hr. The bill, passed by a 154-0 vote, was previously passed by a voice vote in the Senate on July 6. However, late last week, Governor Romney returned the bill to lawmakers and recommended scaling back the increase to \$7 an hour. Under Governor Romney's proposal, the minimum wage would increase to \$7/hr. in January 2007, and would be subject to further review and possible future increases every two years. The Legislature may choose to reject Governor Romney's proposal and return the bill to him without any changes. If that happens, Governor Romney will have 10 days to sign or veto the bill. [\[back\]](#)



For more information, please contact [Stephen Aronson](#) or [Alice DeTora](#) or phone either of them at 800-826-3579. Visit our Labor, Employment and Benefits website at [www.rc.com](http://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.

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