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Security Guard Could not Establish Race or Gender Discrimination under Title VII when his Misconduct Was More Serious than the Misconduct by a Female Guard

Cornelius Wright was employed by Murray Guard, Inc. as a lieutenant security guard. After investigating an unauthorized entry at the facility where he was assigned, he reported that Annette Bradley, an African-American female guard, was responsible for the entry. Although Bradley denied being responsible, she was reassigned to another location and barred from contacting anyone at the facility. Shortly thereafter, Murray Guard received an anonymous letter accusing Wright of sexually harassing female guards and having sex with at least one guard. Murray Guard was unable to corroborate those allegations. Wright accused Bradley of spreading rumors about him. Bradley then reported that both she and Jennifer Bennett, another Murray Guard employee, had been sexually harassed by Wright. Bennett stated that Wright had pressured her to have sex with him and that five other women had been subjected to sexual advances by Wright. Murray Guard terminated Wright's employment on account of the allegations of sexual harassment (which Wright denied) and poor job performance, including a complaint from the facility he was guarding. Wright sued for race and sex discrimination under Title VII.

In [Wright v. Murray Guard, Inc.](#) (7/26/06) the U.S. Court of Appeals for the Sixth Circuit ruled that Wright could not establish that the employer's reasons for his discharge (the supported

allegations of sexual harassment and his performance deficiencies) were a pretext for race discrimination. The court noted that an employer must show that it made a "reasonably informed and considered decision before taking an adverse employment action" and that an employer is not required to show that "the decisional process was optimal or that it left no stone unturned." Wright was unable to show that Bradley's alleged misconduct in violating the no contact directive compared with Wright's alleged sexually harassing behavior, and since their acts of misconduct were different, they were not similarly situated. As a result, Murray Guard had legitimate reasons to subject Wright and Bradley to different disciplinary standards. [\[back\]](#)

Sexual Harassment Title VII Claim by Underage Employee can Proceed even if the Sexual Advances were Welcome

"Jane Doe," a 16-year old high school student, worked as a part-time ice cream scooper at Oberweis Dairy. She was supervised by Matt Nayman, who was 25 years old. In the course of her employment, Nayman would grope, kiss, hug, and grab the buttocks of Doe and some of the other young women who worked in the ice cream store. Nayman also invited some of the teenagers, including Doe, to his apartment, where he had sex with them. Doe filed a claim with the U.S. Equal Employment Opportunity Commission against Oberweis alleging sexual harassment by her supervisor in violation of Title VII. In separate criminal proceedings, Nayman was convicted of statutory rape. In the course of the EEOC proceeding, the EEOC sought to interview Doe. Her lawyer declined, citing his and Doe's psychotherapist's belief that the interview would be harmful to Doe. The EEOC dismissed the claim for lack of cooperation and issued a right-to-sue notice. Doe then filed a lawsuit in federal court. The trial court granted Oberweis's motion for summary judgment because Doe failed to exhaust her administrative remedies. The trial court also ruled that Doe could not establish she was the victim of harassment since Nayman's conduct was "welcome" in that Doe was a willing participant in both the erotic conversations with Nayman at the workplace and the sexual encounter in his apartment. Doe appealed.

In Doe v. Oberweis Dairy (7/28/06) the U.S. Court of Appeals for the Seventh Circuit explained that, while the EEOC regulations permit the agency to dismiss a complaint for lack of cooperation, neither the regulations nor Title VII make cooperation a condition of the employee's right to sue in federal court. The appeals court also ruled that federal courts in Title VII actions should defer to state law in deciding whether a minor was capable of "welcoming" the sexual advances of an older man. Because Doe was a minor under state law, her sexual encounter with Nayman was not "welcome," and thus, the appeals court reversed and reinstated Doe's claims. [\[back\]](#)

Salesman Was Not Entitled to \$2.6M Commission; Incentive Plan was Not a Contract

Niels Jensen worked as a software sales representative for IBM. Under IBM's sales incentive plan, Jensen's compensation included a base salary of \$75,000 and a commission/incentive bonus of an additional \$75,000 if he met his sales quota of \$2.5 million. Jensen was informed of his compensation structure in a letter, which noted that the plan did not "constitute a promise by IBM to make any payments under it" and that IBM retained the right to modify and cancel the plan" at any time up until actual payment under the program had been made." In addition to the letter, IBM distributed a glossy brochure explaining the incentive plan that showed the commission rates (up to 6%) that applied if a sales representative exceeded the sales quota. IBM also directed employees to the sales incentive section on the company's intranet for further information. The intranet contained a provision limiting commission on large sales. A few months later Jensen closed an exceptionally large sale of more than \$24 million and calculated his commission to be \$2.6 million. When IBM determined his commission was limited to \$500,000 on

account of the intranet rule, Jensen sued for breach of contract.

In Jensen v. International Business Machines Corporation (7/24/06) the U.S. Court of Appeals for the Fourth Circuit rejected Jensen's argument that the sales incentive plan was a unilateral offer made by IBM to its employees that became an enforceable contract when its conditions were fulfilled. The court noted that the plan specifically and clearly stated that it was not a promise and that no one became entitled to payment until payment was made. In addition, the court noted that Jensen's argument focused only on one document and ignored the other documents that specifically limited the commission rate that applied to large sales. [\[back\]](#)

FMLA Requires Employers To Provide at Least 15 Days for Compliance with Recertification Requirement; Enrolling in Vocational School after Unsuccessful Efforts at Finding Comparable Job Does Not Constitute Failure to Mitigate Damages

Jackie Killian worked for Yorozu Automotive as a welder. Having started on third shift, Killian had accumulated enough seniority to move to the first shift, earning among the highest hourly wages in her area. Killian submitted a request for leave under the Family and Medical Leave Act to undergo surgery. In support of her request, Killian submitted a medical certification that stated she could not return to work for several weeks. During surgery, Killian's doctor realized her condition was more serious than anticipated and scheduled a follow-up appointment for the next week. Six days before she was scheduled to return to work, Killian contacted the company nurse to request an extension of her leave. According to Killian, the nurse replied, "That's fine. Get a statement and we'll extend the leave." Believing she had been granted the leave and that she had 15-days under the FMLA to get the medical certification, Killian did not immediately contact her doctor. A few days later, Killian received a call from her supervisor asking about her absence. Killian explained that she had requested an extension of her leave and contacted her doctor who faxed a new certification to Yorozu that same day. When Killian called the Human Resources Department to confirm receipt of the medical certification, she was terminated. Killian was unsuccessful at finding a job equivalent to the one she last held at Yorozu, despite checking with the local unemployment office, reading newspaper listings, and contacting friends who worked at other factories. After being unemployed for eight months, Killian enrolled in cosmetology school, passed the certification exam and was hired by a hair salon. She then sued Yorozu Automotive for terminating her in violation of the FMLA. After a bench trial, the court awarded Killian \$55,000. Yorozu appealed the judgment, arguing that its recertification requirement did not violate the FMLA and that Killian did not adequately mitigate her damages.

In Killian v. Yorozu Automotive Tennessee, Inc. (7/20/06), the U.S. Court of Appeals for the Sixth Circuit rejected Yorozu's appeal. The appeals court ruled that the FMLA regulations provide that when the need for leave is not foreseeable (as when a doctor during surgery determines that the patient needs additional time off from work) the employee must provide the certification within the timeframe requested by the employer - which must allow at least 15 calendar days after the request. Yorozu's policy, which allowed for termination within those 15 days, conflicted with the FMLA regulations and was, therefore, unlawful. The appeals court determined that Yorozu had interfered with Killian's rights to FMLA leave, and that she was entitled to recover back pay, as well as front pay. The appeals court also rejected Yorozu's claim that Killian had failed to properly mitigate her damages. The appeals court determined that enrolling in a vocational program after a diligent, but unfruitful eight-month search for comparable work did not constitute a failure to mitigate. [\[back\]](#)

"Crew Leaders" Were Not Executives under the FLSA

Mountaire Farms, a chicken processing company, classified its "crew leaders" as executives under the Fair Labor Standards Act. Their duties included transporting six or seven crew members, known as "chicken catchers," from their homes to various farms and supervising those crew members in the performance of their duties. In addition, the crew leaders checked in with the growers, divided the chicken houses into sections to facilitate the catching process, directed the placement of fans, oversaw the crating and transport of chickens, and completed reports on performance. Mountaire Farms paid the crew leaders a salary but did not pay overtime compensation. In response to a challenge to their classification, the company claimed the crew leaders were properly classified as exempt under the FLSA because the crew leaders supervised at least two other employees, could issue disciplinary warnings, recommended personnel for hire, could approve requests for holidays, and had the ability to staff a crew. The trial court agreed with Mountaire Farms and dismissed the complaint. The crew leaders appealed.

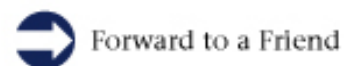
In Davis v. Mountaire Farms, Inc. (7/20/06) the U.S. Court of Appeals for the Third Circuit determined that dismissal was improper because the testimony as well as the written job description for the crew leaders did not include recruiting, hiring, promoting or firing employees, a necessary element of the executive exemption. The matter was returned to the trial court for further proceedings. [\[back\]](#)

Terminated Food Service Worker Later Reinstated with Pay Has Title VII Claim

Donna Randolph was employed as a food service worker for the Ohio Department of Youth Services at an all-male, maximum-security youth intake facility. Randolph alleged that inmates working alongside her in the kitchen daily listened to music with lyrics that were degrading to women, used body language offensive to female workers, and directed foul and offensive language only to female workers. Despite Randolph's complaints about the inmates' behavior, the Department took no action. Randolph also alleged that an inmate tried to sexually assault her and later sexually assaulted her. Randolph did not promptly report either incident. However, she reconsidered and told two inmates that she was going to report her assailant. The inmate found Randolph, threw her against a kitchen table, and lifted her off the floor by her throat. Randolph's supervisor witnessed the incident, but characterized it as "horseplaying." The supervisor did not talk with Randolph or the inmate, investigate the incident, or report the incident. After Randolph returned from a vacation she and two other female workers reported the choking incident. A short time later, the inmate who had assaulted Randolph accosted her and threatened to harm her if she reported the sexual assault incidents. Other inmates also threatened her. Randolph later told a supervisor that she had been raped. The Department investigated Randolph's claims and concluded that the sexual encounters were consensual. Randolph was admitted to a local hospital, was placed on administrative leave, and later applied for and received disability benefits. The Department then discharged Randolph. She filed a grievance and, over one year later, was reinstated with back pay and transferred to a new location. Randolph sued the Department asserting claims for sex discrimination, hostile work environment sexual harassment, and retaliation in violation of Title VII. The trial court dismissed all of her claims and Randolph appealed.

In Randolph v. Ohio Department of Youth Services (7/13/06) the U.S. Court of Appeals for the Sixth Circuit determined that the trial court had improperly analyzed the verbal and physical incidents separately. According to the appeals court, all of the incidents, both verbal and physical, must be viewed under the totality of the circumstances test to determine whether Randolph was harassed on account of her sex. The appeals court also rejected the Department's assertion that, by accepting work in a prison environment, Randolph had acknowledged that she might face inappropriate and deviant behavior. Rather, the appeals court noted that Randolph's allegations

were so serious that they satisfied the test for creation of a hostile work environment. Finally, the appeals court ruled that the Department's placing her on administrative leave and terminating her employment were adverse job actions, despite her later reinstatement with back pay. [\[back\]](#)



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