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Section 1981 Only Covers Discrimination against Employees in the U.S

John Ofori-Tenkorang, an African-American research analyst worked for American International Group in Connecticut. AIG transferred Ofori-Tenkorang to work on a temporary basis in its South Africa offices. According to Ofori-Tenkorang, both before and after his transfer to South Africa, he was discriminated against based on his race. He claimed, among other things, that he was treated to greater scrutiny than white colleagues, unfairly blamed for poor business performance, threatened with termination after a poor performance review, and wrongfully accused of stealing funds. Ofori-Tenkorang sued AIG, alleging that he was discriminated against and retaliated against in violation of 42 U.S.C. § 1981. The trial court dismissed the section 1981 claim on the grounds that it does not apply to events occurring outside of the U.S. Ofori-Tenkorang appealed.

In Ofori-Tenkorang v. American International Group, Inc. (8/15/06), the U.S. Court of Appeals for the Second Circuit concluded that section 1981 did not apply to the discrimination that allegedly occurred in South Africa. The appeals court rejected Ofori-Tenkorang's claims that section 1981 should apply because his contract with AIG was

formed in the U.S. and AIG executives in the U.S. contributed to the alleged discrimination. The appeals court determined that the statute's language unambiguously requires that a person be within the jurisdiction of the U.S. in order to assert rights under the statute. The appeals court also observed that the language of the statute prohibits discrimination against persons who are within the U.S. and, thus, the focus is on the location of the alleged victim, not the location of the employer. Therefore, the appeals court upheld the lower court's decision to dismiss Ofori-Tenkorang's section 1981 claims that were predicated on alleged events in South Africa. [back]

Employer's Referral of Employee to Assessment by Psychologist after Report of Threat by Employee Does Not Establish Perceived Disability Claim under ADA

Edward Graham was an employee of Boehringer Ingelheim Pharmaceuticals. One of Graham's supervisors reported that he overheard Graham threaten to "go postal." Following its workplace violence policy, Boehringer placed Graham on a paid leave of absence and referred him to an independent psychologist for a fitness-for-duty evaluation. The psychologist found that it was inappropriate for Graham to return to work and recommended that Graham consult with an anger management therapist. Graham then met with a therapist, who reported that he found no significant evidence that Graham was a threat to others. However, the psychologist conducting the fitness-for-duty exam was not satisfied with the therapist's report and would not approve Graham's return to work unless he completed additional therapy sessions. Following the psychologist's directions, Boehringer required that Graham satisfy the psychologist's conditions before he would be returned to work. Graham believed that the conditions were unreasonable and elected not to complete them. Boehringer terminated Graham and, following his termination, Graham sued Boehringer, alleging, among other claims, that Boehringer discriminated against him based on a perceived mental disability in violation of the Americans with Disabilities Act.

In Graham v. Boehringer Ingelheim Pharmaceuticals, Inc. (9/6/06), the U.S. District Court for Connecticut rejected Graham's ADA claim. The court expressed doubts that Graham could establish that Boehringer regarded him as disabled within the meaning of the ADA because Boehringer had communicated to Graham that it wanted him to return to work after completion of the required therapy. However, assuming that Graham could demonstrate that Boehringer perceived him as disabled, Boehringer provided a legitimate, non-discriminatory reason for Graham's termination -- Graham's failure to comply with the protocol established by the psychologist performing the fitness-for-duty examination. Moreover, the court ruled that Graham did not sufficiently demonstrate that the company's reason for terminating his employment was pretextual. The court concluded that evidence of Boehringer's requirement that Graham undergo a fitness-for-duty examination did not establish that it regarded him as disabled; at most, the evidence suggested that the company regarded Graham's condition as a question that required assessment by a professional. [back]

Company's Proration of Employee's Production-Based Bonus upon Return from Leave of Absence Did Not Violate FMLA

Robert Sommer, a financial administrator for The Vanguard Group, was eligible for a bonus under Vanguard's Partnership Plan. Under the plan, the amount of a bonus paid to an employee depended in part on the number of hours worked. If an employee failed to meet the annual goal,

the bonus was prorated by the amount of hours that the employee was deficient. Vanguard did not count time spent on an unpaid leave of absence as time worked for purposes of calculating the bonus. However, vacation and sick time were considered hours worked for purposes of calculating the bonus. Sommer took a leave of absence under the Family and Medical Leave Act for approximately eight weeks. Vanguard paid Sommer a bonus but prorated the payment. Sommer sued Vanguard, arguing that it interfered with his rights under the FMLA by prorating his bonus payment for the time he spent on FMLA leave. The U.S. District Court for Pennsylvania dismissed Sommer's FMLA claim and he appealed.

In Sommer v. The Vanguard Group, Inc. (8/24/06), the U.S. Court of Appeals for the Third Circuit upheld the lower court's dismissal of Sommer's FMLA claim. The appeals court observed that, under the FMLA, an employee may not be denied a benefit to which the employee would have been entitled if the employee had not taken FMLA leave. Noting that this is the first case in which an appellate court has been required to distinguish between different types of bonuses for the purposes of an FMLA interference claim, the court drew a distinction between bonuses based on an absence of occurrence (for example, perfect attendance or safety) and bonuses based on employee performance (such as hours worked). The court determined that, if an employee qualified for an absence of occurrence bonus prior to FMLA leave, he cannot be disqualified for the bonus for taking that leave. However, the court noted that, where a bonus depends on the performance of the employee, an employee who takes FMLA leave may receive a lesser bonus. The court found that the Partnership Plan was a production-based bonus, based on the number of hours worked, and that therefore Vanguard's prorating of the bonus did not violate the FMLA. The court also rejected Sommer's argument that Vanguard violated the FMLA by prorating bonuses for those on FMLA leave, but not those on vacation or sick leave. The policy also provided for proration of bonuses for employees on other forms of non-FMLA leave, including workers' compensation and short-term disability; therefore, the court ruled that the policy complied with the FMLA's mandate that employees who take FMLA leave be afforded the same consideration for the bonus as other employees on other paid or unpaid leaves of absence.
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Investigation of Alleged Wrongdoing by Employee Did Not Constitute Adverse Action under Title VII

Pinaki Mazumder was a professor of engineering at the University of Michigan. A student copied a number of files that were stored on Mazumder's computer. Mazumder subsequently reported to the University that numerous files were stolen and the University began an investigation, concluding that the student had not committed any wrongdoing. During the investigation, the accused student and other students filed complaints against Mazumder, asserting that he made stereotypical remarks and required students to use University resources for commercial purposes. The University appointed a committee to investigate the students' allegations. However, after Mazumder filed a grievance with the University, the University's grievance review board determined that its investigatory procedure was irregular and it was determined that the allegations against Mazumder were not validated. Mazumder then filed a lawsuit against the University and school officials, alleging discrimination based on race, national origin, caste, and religion, and retaliation, in violation of Title VII of the Civil Rights Act of 1964. The U.S. District Court for Michigan dismissed Mazumder's discrimination claims and he appealed.

In Mazumder v. University of Michigan (8/9/06), the U.S. Court of Appeals for the Sixth

Circuit agreed with the lower court and ruled that Mazumder could not proceed with his claims. First, Mazumder failed to demonstrate that he suffered any adverse employment action as the result of the school's determination that the accused student was not guilty of theft. The appeals court ruled that Mazumder failed to offer any evidence that the copying of the files from his computer caused a material change in his employment. Second, the court determined that Mazumder failed to demonstrate that the University discriminated against him by appointing a committee to investigate the complaints against him. Mazumder did not identify any similarly-situated non-minority professors who the University did not investigate for wrongdoing. Moreover, the court ruled that Mazumder did not provide evidence that the reason for the investigation, the serious charges brought against him, were a pretext for discrimination. [back]

Court Upholds Arbitrator's Decision that Sexual Harassment Does Not Constitute "Just Cause" for Termination under Terms of Collective Bargaining Agreement

Donald Dukart was an employee of LB&B Associates, a government services contractor, and a member of the International Brotherhood of Electrical Workers, Local No. 113. The collective bargaining agreement between LB&B and the Union provided that employees could be discharged for "just cause." In a separate article, the agreement provided that "any employee engaged in sexual harassment ... may be subject to immediate discharge." Dukart was terminated by LB&B for making sexually harassing comments to a female employee. Dukart grieved the termination and the dispute was submitted to arbitration. The arbitrator found that Dukart had engaged in sexually harassing conduct, but that termination was not warranted. The arbitrator found that the "just cause" provision of the agreement applied and that, under that provision, just cause for termination did not exist because of Dukart's positive work record and potential for rehabilitation. The arbitrator ordered Dukart reinstated. LB&B filed a complaint in the U.S. District Court for Colorado, seeking to have the arbitrator's ruling overturned, but the court ruled in favor of the Union and upheld the arbitrator's ruling.

On appeal, in LB&B Associates, Inc. v. International Brotherhood of Electrical Workers, Local No. 113 (8/29/06), the U.S. Court of Appeals for the Tenth Circuit also upheld the arbitrator's ruling. LB&B argued that the arbitrator's award was contrary to the collective bargaining agreement, pointing to the article providing for "immediate discharge" of an employee who engages in sexual harassment. The appellate court rejected this argument, noting that the agreement did not explicitly provide that sexual harassment constituted just cause. The court observed that the arbitrator interpreted the agreement to mean that an employee who engages in sexual harassment may be discharged, but only if LB&B establishes just cause for the discharge. [back]

Employee Who Quit after Alleged Incidents of Inappropriate Contact by Manager May Proceed to Trial on Sexual Harassment and Constructive Discharge Claims

Brenda Patton worked for Keystone RV Company, which manufactures recreational vehicles. According to Patton, over the course of approximately one month, she was sexually harassed by a manager who oversaw some of the company's plants. The manager allegedly told her about rumors that they were having an affair, leered at her, and stared at her. Patton claimed that on

one occasion the manager reached inside her shorts and touched her thigh, on another occasion put his arm around her, and on another occasion touched her calf. After being transferred against her wishes, Patton ultimately left Keystone and did not return. Patton sued Keystone, alleging that she was subjected to a sexually hostile work environment and constructively discharged in violation of Title VII. The lower court rejected Patton's claims, finding that the alleged harassment was not so severe or pervasive as to alter her working conditions. She appealed.

In Patton v. Keystone RV Company (8/1/06), the U.S. Court of Appeals for the Seventh Circuit reversed the lower court's decision and instead ruled that Patton could proceed to trial on her claims. The appeals court acknowledged that the mere existence of physical contact does not automatically create a hostile work environment under Title VII. The appeals court determined that two instances of contact, the manager's putting his arm around Patton's waist and his touching of Patton's calf, likely did not constitute actionable harassment if they occurred in isolation. However, the manager's alleged touching of Patton's thigh under her shorts, in combination with his inappropriate statements, was sufficiently severe to allow a jury to decide her hostile work environment claim. [back]

EEO-1 Reports Will Be Revised for 2007

Employers with more than 100 employees, or those with more than 50 employees and $50,000 in federal contracts, are required to submit an annual EEO-1 Report to the U.S. Department of Labor by September 30th of each year. Beginning next year, the report will be revised to reflect demographic changes. According to a new DOL Notice the new EEO-1 Report adds new categories, including a category for "Two or more races." Also, the former category "Asian or Pacific Islander" has now been split into two separate categories for "Asian" or "Native Hawaiian or other Pacific Islanders." In addition, the EEOC is strongly encouraging employers to have workers self-identify their race and ethnicity, as opposed to a visual identification by the employer. The new EEO-1 Report also divides the "Officials and Manager" job category into two subgroups: "Executive/Senior Level Officials" and "First/Mid-Level Officials." The DOL believes that this change will help determine whether women and minority groups, although attaining "management" status, have effectively become stuck in middle management. The new EEO-1 Report will be due by September 30, 2007. The DOL notes that employers may have to collect additional or different information than they traditionally have been collecting and may need to conform any existing employee self-identification forms to the new categories. [back]

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