Labor, Employment & Benefits e-News

DECEMBER 26, 2006

In This Issue

Employees Allegedly Instructed to Trail African-American Shoppers to Prevent Thefts May Proceed to Trial on Section 1981 Claims

A group of customers and employees of Walgreen Company sued Walgreens in federal court for civil rights violations. The customers claimed that they were treated disparately because of their race, alleging that they were closely followed by Walgreens employees while shopping, detained in Walgreens stores, forced to provide proof of purchase, and barred from the stores. The employees claimed that they were discriminated against and subjected to a hostile work environment in violation of Section 1981, alleging that they were forced to follow African-American customers around the stores to ensure they did not steal merchandise, and that they received harsher discipline and lesser benefits than other employees. The employees also alleged that Caucasian supervisors used racial epithets when speaking to African-American employees. Walgreens requested that the court dismiss the employees' Section 1981 claims.

In Jacobs v. Walgreen Company, (11/30/06) the U.S. District Court for Illinois ruled that the employees could proceed to trial on their Section 1981 claims. The court rejected Walgreens' arguments that the evidence could not establish that the alleged harassment was based on race.

The employees' claims, including that they were ordered to follow African-American customers to ensure that the customers did not steal anything, and were not similarly ordered to follow Caucasian customers, that Caucasian employees were treated more favorably, and that supervisors made comments including "that's the problem with you black people" could establish that the employees were harassed based on their race. The court also concluded that the evidence of racial remarks, orders to follow African-American customers, and detaining of African-American customers, demonstrated sufficiently severe and pervasive conduct to allow the employees to proceed to trial on their Section 1981 claims. Therefore, Walgreens' request that the court dismiss the employees' claims was denied. [back]

Nurse Practitioner Fails to Provide Sufficient Proof that Former Employer "Blackballed" Her in Retaliation for Filing Title VII Complaint

Evelyn Szymanski, a registered nurse and nurse practitioner, worked for CookCountyHospital . She filed a series of ten charges against the County with the U.S. Equal Employment Opportunity Commission. In one charge, she claimed that the County discriminated against her on the basis of her race (Caucasian) and national origin (Polish) by denying her overtime, excessively scrutinizing her work, and denying her business cards. The case was tried to a jury, but the jury rejected Szymanski's claims. Approximately three weeks later, the County terminated Szymanski's employment, claiming that she did not meet the hospital's requirement of having a collaborative agreement with a licensed physician. Szymanski filed another lawsuit against the County, alleging that her termination was retaliation for engaging in protected activity under Title VII of the Civil Rights Act. A jury found in favor of Szymanski, and the Court ordered that the County expunge any reference to her termination from her personnel file. Szymanski applied for other nursing positions, but was unsuccessful. She then filed another lawsuit, claiming that her former supervisor "blackballed" her in retaliation for her previous lawsuit in violation of Title VII by giving negative references to prospective employers and failing to expunge her termination records as previously ordered by the court. The lower court dismissed Szymanski's claims and she appealed.

In Szymanski v. County of Cook, (11/20/06) the U.S. Court of Appeals for the Seventh Circuit upheld the lower court's decision. The appeals court observed that to prevail, Szymanski had to show that her supervisor's responses to inquiries about her from possible employers were objectively "adverse" and not trivial. According to the court, this meant that Szymanski had to show that the supervisor was disseminating false information about her that a prospective employer would view as material. The court reviewed the evidence about what the supervisor said to prospective employers and found that it could not be construed as "blackballing." The court noted that when asked to rate Szymanski's performance, the supervisor rated her from "fair" to "good." Moreover, some of the prospective employers had hired Szymanski to be on their "on call" lists, contradicting her assertion that she was "blackballed." The court also noted that Szymanski's claims about her supervisor's motives were weakened by the fact that she continuously listed him as a reference. Finally, the court observed that Szymanski's own actions, including sending 287 e-mails to one prospective employer and accusing the employer of having an illegal employment application, hindered her chances of obtaining employment. Accordingly, Szymanski's retaliation claims failed. [back]

Court Dismisses Discrimination Claims of Employee Terminated During RIF

Janet Merillat was employed by Metal Spinners, Inc., as a buyer in the materials department. The company created a new vice president position with responsibility for managing the materials

department employees, including Merillat. The company hired Craig Wehr, age 38, to fill the position, at a salary of $62,500. Merillat was age 49, and her salary was $49,800. Merillat had a cartoon on her bulletin board that satirized the differences in salaries paid to men and salaries paid to women. On the day that Merillat was told that Wehr had been hired, she was asked to take down the cartoon. The company subsequently experienced financial trouble and, several months after Wehr was hired, Merillat and a few other employees were laid off as part of a reduction-in-force. Merillat sued Metal Spinners, alleging age and sex discrimination in violation of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act, and violation of the Equal Pay Act. The lower court dismissed all of Merillat's claims and she appealed.

In Merillat v. Metal Spinners, Inc., (12/6/06) the U.S. Court of Appeals for the Seventh Circuit agreed with the lower court and ruled that Merillat could not proceed to trial. The appellate court observed that this case involved a "mini reduction in force," in which an employee's duties are absorbed by another employee. The court explained that Merillat presented sufficient evidence that she was performing satisfactorily at the time of the RIF and that her duties were absorbed by Wehr, who is male and younger. However, Metal Spinners presented evidence of several legitimate reasons for terminating Merillat, including that many of her duties could be eliminated by implementation of a computer system, she had less experience than Wehr, and she had some difficulties working with co-workers. Therefore, the appeals court determined that it was Merillat's responsibility to show that these reasons were pretext for discrimination. Although Merillat attempted to disprove the reasons cited by the company, she did not provide sufficient evidence that the real reason for her termination was discrimination. Despite that Merillat's performance may generally have been satisfactory enough to retain her in better times, that did not establish that the reasons for terminating her during a RIF were pretextual. Moreover, the fact that the company asked Merillat to remove the cartoon did not demonstrate a bias by the company sufficient to support an inference of discrimination. Finally, Merillat's Equal Pay Act claim also was dismissed because, although Wehr and Merrilat's pay was different, the evidence demonstrated that Wehr and Merrilat did not have equal levels of responsibility. [back]

Evidence that Employer's Decision to Terminate May Have Been Based on a Mistake is Insufficient to Establish Race Discrimination under Title VII, Court Rules

Everett Young, an African American, worked as a retail investigator for Dillon Companies in its King Soopers grocery stores, responsible for policing possible theft. Dillon investigated Young based on claims that he was abusing telephone privileges during working hours. In the course of this investigation, Dillon found that on a certain date, surveillance cameras showed that Young left work more than two hours early, failed to punch out, and then misrepresented in records that he stayed until the end of his shift. Young maintained that he had worked the entire shift and another employee supported Young's account. Nonetheless, Dillon terminated Young's employment for theft of time. Young filed a lawsuit against Dillon, alleging among other claims that Dillon terminated him because of his race in violation of Title VII of the Civil Rights Act. The lower court dismissed Young's claims and he appealed.

In Young v. Dillon Companies, Inc., (11/9/06) the U.S. Court of Appeals for the Tenth Circuit upheld the lower court's decision. With respect to the Title VII claim, the appeals court ruled that Dillon had set forth a legitimate, non-discriminatory reason for Young's dismissal, and Young could not establish that this reason was pretextual. The court explained that the relevant question was whether Dillon had a good faith belief at the time of the discharge that Young had engaged in misconduct, or whether Dillon's explanation was so implausible that a jury could find that it was actually a subterfuge for discrimination. The court noted that Young set forth evidence that the

reason he was terminated was false, such as time records showing that he actually punched out after the end of his scheduled shift on the day in question. However, the court ruled that, although Young presented some evidence casting doubt on Dillon's reasons for termination, the record indicated that those who made the decision were not aware of this evidence until after the decision was made. According to the court, there were no facts indicating that the evidence supporting Young's explanation was ignored or suppressed because of discriminatory motive. Even if the investigation could have been more extensive, there was no evidence in the record of racial animus. Although Young alleged that one of the investigators previously referred to another African American employee as a "monkey" he failed to demonstrate a sufficient connection between that investigator and the decision to terminate his employment. That investigator did not make any recommendation to the decision-makers or otherwise participate in the decision to terminate Young. Thus, the court ruled that the evidence was insufficient for Young to establish that Dillon's motivation in terminating his employment was discriminatory. [back]

Flight Attendant Temporarily Restricted from Safety Sensitive Duties Due to Depression Was Not Regarded as Disabled under the ADA

Jake Pittari is employed by American Eagle Airlines as a flight attendant, classified by the Federal Aviation Administration as a "safety sensitive" position. Pittari requested intermittent leave under the federal Family and Medical Leave Act to obtain treatment for depression and anxiety. Pursuant to American Eagle's policies, Pittari notified the company's medical department that he was taking certain medications. The company became concerned that the medications could impair Pittari's cognitive ability to perform his duties. Accordingly, American Eagle arranged for Pittari to take a screening test. An independent psychologist reviewed the test results and concluded that Pittari had impairments that might compromise his problem-solving skills and reaction time. As a result, the company restricted Pittari from working in safety-sensitive positions, including flight attendant. After his medications were adjusted, Pittari was retested and received differing medical evaluations as to whether he could perform the duties of a flight attendant. The company refused to lift Pittari's work restriction. Pittari then requested a binding third-party medical evaluation. A neuropsychologist evaluated Pittari and concluded he was fit for duty and the company released Pittari to return to work. Pittari sued American Eagle, alleging, among other claims, that the company discriminated against him in violation of the Americans with Disabilities Act. After trial, a jury found in favor of Pittari on his ADA claim. American Eagle appealed the verdict.

In Pittari v. American Eagle Airlines, Inc., (11/9/06) the U.S. Court of Appeals for the Eighth Circuit overturned the jury's verdict. The appeals court observed that, to prevail on his ADA claim, Pittari had to prove that American Eagle mistakenly believed that his impairment substantially limited him in the major life activity of working. The court ruled that Pittari failed to meet his burden of proof on this issue. According to the court, although American Eagle restricted Pittari from performing safety-sensitive duties, Pittari was not restricted from performing other jobs, such as baggage handler or ticket agent. The court also ruled that American Eagle did not regard Pittari's impairment as "substantially limiting." The court noted that the company's records indicated it considered Pittari's restrictions to be temporary in nature, not permanent or long-term as would be required for a successful ADA claim. Therefore, the court concluded that there was insufficient evidence in the record to show that the company regarded Pittari as substantially limited in the major life activity of working. [back]

Medical Note Excusing Employee From Work, Coupled With Employee's Request for FMLA Forms, May Be Sufficient Notice to Employer Under FMLA

Kathryn Hemenway worked for the Albion Public School District as a classroom aide. She had conflicts with another aide, which she claimed resulted in depression and anxiety, and aggravated her pre-existing colitis. Hemenway left work on a school day and visited a physician to treat these conditions. Her physician presented her with a note excusing her from work for the remaining three weeks of the school year. The note did not provide any details about Hemenway's medical condition. Hemenway gave the note to a secretary at the school where she worked and requested Family and Medical Leave Act forms, but was told that the forms were not immediately available. Hemenway subsequently received an e-mail from the school indicating that she was a "no call, no show" and was terminated. After some further communications between Hemenway and the school, the school claimed that Hemenway resigned; however, Hemenway denied that she resigned and asserted that she was terminated. Hemenway sued the School District, alleging that she was denied FMLA benefits. The School District sought dismissal of Hemenway's FMLA claim.

In Hemenway v. Albion Public Schools, (11/15/06) the U.S. District Court for Michigan decided that Hemenway presented enough evidence to proceed to trial on her FMLA claim. The School District argued that the note from Hemenway's physician, which stated only "please excuse patient from work for three weeks," was insufficient to put the School District on notice that Hemenway was unable to perform the functions of her job due to a serious health condition. However, the court ruled that, based on the totality of the circumstances, including Hemenway's notice to the school that she was ill and needed to see her doctor, her submission of the note to the school, and her request for FMLA forms, there was a genuine dispute about whether the circumstances provided the school with sufficient notice and Hemenway was entitled to proceed to trial on that issue. The court also declined to dismiss the case based on the School District 's claim that Hemenway did not have a "serious health condition." Hemenway presented sufficient evidence that she was incapacitated for three days, attended more than one doctor's appointment, and was prescribed treatment for her conditions. Therefore, the court held that there was enough evidence for Hemenway's FMLA claim to proceed to trial. [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.
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.