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Retaliatory Failure-to-Hire Claim under Title VII Requires that the Candidate Apply for a Particular Position

For nine years Gladen Vélez was employed by Janssen Ortho, LLC. In that time she filed a lawsuit against the company alleging sexual harassment by a supervisor. She also claimed she was retaliated against for reporting manufacturing irregularities to the Food and Drug Administration. Her employment ended when Janssen closed the manufacturing plant where she had been employed. Vélez received more than $12,000 in severance payments. Three years later, Vélez submitted letters of interest to Janssen by mail and fax, requesting she be considered for "any position available." In response, Janssen's director of human resources wrote to Vélez indicating that she would not be interviewed given her prior lay-off and severance as well as current "business needs." Three days after the rejection letter was mailed, Janssen advertised two manufacturing positions in the local paper. Vélez sued Janssen under Title VII, alleging a retaliatory failure to hire.

In a case of first impression, Vélez v. Janssen Ortho, LLC (11/3/06), the U.S. Court of Appeals for the First Circuit ruled that, to establish a retaliatory failure-to-hire claim under Title VII, a job applicant must establish the following elements: (1) that she applied for a particular position; (2)

that the position was vacant; (3) that she was qualified for the position; and (4) that she was not hired for that position. The court explained that a retaliatory failure-to-hire claim requires evidence that the applicant applied for a discrete, identifiable position. General expressions of interest are insufficient. Because Vélez did not apply for any specific position, the court affirmed dismissal of her claim. [back]

Without Constructive Discharge, No Back Pay Award for Hostile Work Environment Claim

Lily Spencer, who is hearing impaired, sued her employer, Wal-Mart Stores, Inc., for failure to provide a reasonable accommodation under the Americans with Disabilities Act and hostile work environment. At trial, the jury rejected Spencer's reasonable accommodation claim but found in her favor on her hostile work environment claim. The jury awarded Spencer $15,000 in back pay and $12,000 in emotional distress damages. The trial court vacated the back pay award and Spencer appealed.

In Spencer v. Wal-Mart Stores, Inc. (11/22/06), the U.S. Court of Appeals for the Third Circuit agreed that the back pay award was properly vacated. The court explained that, without a successful constructive discharge claim, a successful hostile work environment claim alone is insufficient to support a back pay award. As the court noted, "if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue." [back]

Payment of Back Pay Constituted Reinstatement for Purposes of Compliance with Arbitrator's Award

José and Sandra Díaz, then employed by Excel Corp., allegedly attempted to steal meat by presenting a stolen sales receipt. Their employment was terminated the following day. During the termination meeting, José Díaz behaved in a profane, abusive and violent manner: he struck one of the security guards, cracking two of his ribs. The union, United Food & Commercial Workers Local 1776, filed a grievance and demand for arbitration challenging the workers' termination. The arbitrator – whose decision specifically stated that the conduct during the termination meeting was not being considered in the just cause determination – sustained the grievance, ruling that Excel Corp. had not established just cause for termination based on the alleged attempt to steal meat. As a remedy, the arbitrator ordered reinstatement. Excel reinstated Sandra Díaz with back pay, but did not reinstate José Díaz. Instead, Excel agreed to pay José Díaz back pay, but terminated him, retroactive to the date of the termination meeting, for his post-termination abusive and violent conduct. The union sued Excel alleging that, by terminating Díaz, the company failed to comply with the arbitrator's award.

In United Food & Commercial Workers Local 1776 v. Excel Corp. (12/1/06), the U.S. Court of Appeals for the Third Circuit rejected the union's claim. The court ruled that by paying Díaz the back pay owed, Excel had effectively reinstated him, in compliance with the arbitrator's order. The subsequent termination, even if retroactive, was based on independent grounds, known to the employee, the union and the arbitrator, and was not in disregard of the arbitrator's award. [back]

"Employee Choice" Rule Applies to Forfeiture Clause in Covenant Not to Compete; the Appropriate Standard to Determine whether Departure is Voluntary or Involuntary is Constructive Discharge

Paul Morris was employed as Senior Vice President and head of domestic equities by Schroder Capital Management North America, an investment banking and asset management company.

Morris's compensation consisted of an annual salary and a year-end bonus. A portion of the year-end bonus was deemed a "deferred compensation award" which would vest three years after the date of issue. The deferred compensation award plan was subject to forfeiture pursuant to a covenant not to compete. After the amount of assets he controlled was reduced from $7.5 billion to $1.5 billion – and before his deferred compensation awards had vested – Morris resigned, believing his job was a dead-end job. He then started his own hedge fund. Schroder Capital notified Morris that, by engaging in a business that competed with Schroder, he had forfeited his deferred compensation awards. Morris sued Schroder Capital in federal court in New York for breach of contract. The court dismissed Morris' claim finding that the compensation was forfeited pursuant to the covenant not to compete, which was ruled valid under the employee choice rule. On appeal, the U.S. Court of Appeals for the Second Circuit referred the question of the applicability and enforceability of the employee choice doctrine to New York's highest court.

In Morris v. Schroder Capital Management International (11/21/06), the New York Court of Appeals determined that, although covenants not to compete are generally disfavored, the "employee choice" doctrine is an exception. The exception applies where the receipt of post-employment benefits is conditioned on complying with a restrictive covenant. The court explained: "if the employee is given the choice of preserving his rights by refraining from competition or risking forfeiture by competing, there is no unreasonable restraint on his ability to earn a living." But under the constructive discharge standard, "when the employer deliberately makes the employee's working conditions so intolerable that the employee is forced into an involuntary resignation," the choice is essentially taken away. [back]

EEOC Issues Q&A Guidance on Revised EEO-1 Requirements

The Equal Employment Opportunity Commission recently posted "Questions and Answers – Implementation of Revise Race and Ethnic Categories" on its website. This Q&A is intended to clarify employers' obligations to comply with the revised race, ethnic and job categories in the new EEO-1 report. EEO-1 reports must be filed by employers with federal government contracts of $50,000 or more and 50 or more employees; or by employers who do not have a federal government contract but have more than 100 employees. [back]

New Federal Rules on Electronic Discovery Take Effect

Amendments to the Federal Rules of Civil Procedure governing "electronically stored information" took effect December 1, 2006. As reported previously in e-News, these new rules require parties to federal civil lawsuits to discuss early in the litigation the scope of disclosure of electronic data, procedures for identifying and protecting privileged information, and methods of production of electronic data. The rules expressly provide for the discovery of "electronically stored information" through interrogatories, requests for production, and subpoenas. Due to the possibility that production of electronic data could be burdensome, the new rules permit a party to resist producing electronic data on the ground that it is not reasonably accessible. The rules also recognize that, absent exceptional circumstances, the courts should not impose sanctions against a party that fails to provide requested electronic data that was lost through "routine, good faith operation" of that party's electronic information system. [back]

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