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POOR PERFORMANCE STOPS TITLE VII CLAIM

In Chen v. Dow Chemical Co., 2009 WL 2851351 (6th Cir. 2009), the employee claimed race discrimination and retaliation under Title VII. The Court held the employee failed to show that her former employer's claim that she was fired because of poor performance was a pretext for discrimination. The employee claimed that her performance was actually up to the employer's standards. However, the employee had an 18-month history of performance problems, including failed performance audits, a negative review, customer complaints, conflicts with coworkers, and reports that she was unable or unwilling to follow mandatory procedures. The Court found that absent a reason to doubt its validity, the employer was entitled to rely on this information in deciding to terminate the employee and acted reasonably in doing so.

POOR PERFORMANCE PREVENTS AN AGE DISCRIMINATION CLAIM

In Smith v. City of Allentown, 2009 WL 4912120 (3rd Cir. 2009), the Court held that the employee failed to prove that the employer's non-discriminatory reason for the employee's discharge, the employee's substandard job performance, was a pretext for age discrimination. The facts were that the employee exhibited performance problems for several years and he admittedly failed to accomplish performance goals given to him by his supervisor. The Court held that a comment made by the employee's supervisor during the employee's termination meeting mentioning the employee's upcoming birthday and anniversary date did not demonstrate that the termination was motivated by discrimination. This was because the dates were mentioned only as a timeline for when the employee's resignation was expected. Finally, there was no evidence that the employer failed to follow a mandatory progressive discipline policy in relation to the employee.

ADA PROTECTION EXTENDED BEYOND DISABLED

The Eleventh Circuit has extended ADA protection to non-disabled job applicants in the pre-employment screening stage. In Harrison v. Benchmark Electronics Huntsville, Inc., --- F.3d ---, 2010 WL 60091 (11th Cir. (Ala.) 2010), the Court addressed the issue of whether a prospective employee could bring an Americans With Disabilities Act claim for a prohibited medical inquiry even though the employee was not disabled. In that case, the Eleventh Circuit followed the Second, Seventh, Eighth, and Ninth Circuits and held that a job applicant has a private right of action under 42 U.S.C. § 12112(d)(2), irrespective of his disability status.

In the pre-offer stage, which was at issue in this case, "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." § 12112(d)(2)(A). An employer may only inquire into the "ability of an applicant to perform job-related functions." § 12112(d)(2)(B) (emphasis added); see 29 C.F.R. 1630.14(a) (providing that an employer may make "pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions").

In finding that the applicant had a potential ADA cause of action, the Eleventh Circuit held that in contrast to the ADA's general prohibition of disability discrimination in Section 12112(a), which refers only to "qualified individuals with disabilities," Section 12112(d)(2) refers broadly to

"applicants." Accordingly, applicants are entitled to protection under the ADA.

ADEA CLAIM ALLOWED WHERE EMPLOYER WANTED SOMEONE YOUNGER HE COULD PAY LESS

In Mora v. Jackson Memorial Foundation, Inc., --- F.3d ----, 2010 WL 610263 (C.A.11, 2010), the 62 year old plaintiff filed a claim under the ADEA. Her supervisor grew dissatisfied with her and recommended to a chief executive that plaintiff's employment be terminated. The plaintiff was instead given a different position in the chief executive's office where she could be observed more closely. Plaintiff worked with the chief executive for a month, and errors and professionalism issues supposedly arose. Thereafter, plaintiff claimed she was called into the chief executive's office and told "I need someone younger I can pay less" and specifically named a 25 year old employee that he was replacing her with. Another employee alleged she overheard the chief executive state, "... you are very old, you are very inept. What you should be doing is taking care of old people…I need somebody younger that I can pay less and I can control." That employee also stated that she heard the chief executive state that the plaintiff was "too old to be working here anyway." The chief executive denied making the statements.

The District Court concluded that the employer met its burden of persuasion under the "same decision" affirmative defense and entered summary judgment for the employer.

After the plaintiff appealed, the Supreme Court in Gross v. GBL Financial Services, 129 S.Ct. 2343 (2009), clarified the nature of ADEA claims. The Supreme Court concluded that ADEA claims are not subject to the burden-shifting protocol set forth for Title VII suits. In addition, the Supreme Court ruled out the idea of a "mixed motive" ADEA claim, instead requiring plaintiffs to show that age was the "but for" cause of an employment action. Because an ADEA plaintiff must establish "but for" causality, no "same decision" affirmative defense can exist: the employer either acted "because of" the plaintiff's age or it did not. The Eleventh Circuit looked at the factual dispute and determined that there was a material factual question about whether the defendant discriminated against her on the basis of age.

NO ADEA CLAIM WHERE 59 YEAR OLD COACH REPLACED WITH YOUNGER COACH

In Stouter v. Smithtown Central School Dist., --- F.Supp.2d ----, 2010 WL 520628 (E.D.N.Y.,2010), a volleyball coach filed suit under the Age Discrimination in Employment Act (ADEA). The 59-year-old coach claimed that she was replaced by someone significantly younger in violation of the ADEA.

Three years prior to filing her claim, the coach had retired from teaching at the school. Thereafter, the coach was retained on a yearly basis for three more years to coach volleyball. Following the third year, she was replaced by the younger coach.

The court held that the fact that the school district did not reappoint the 59-year-old female coach as the volleyball coach after her retirement did not give rise to an inference of discrimination based on age, as required for the coach's proceedings under the ADEA. Even though the coach was replaced by someone significantly younger, the coach was appointed for three consecutive years following her retirement, twice appointed by the same athletic director who later denied her an appointment, and the school district hired other coaches over the age of 55. The District Court determined that such evidence weighed against a finding of discrimination.

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