



**McKENNA**  
**EMPLOYMENT BULLETIN**  
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**MALE CAREGIVER'S CLAIM OF GENDER BIAS REJECTED**

In Samuels v. City of Baltimore, 2009 WL 3348134 (D.Md., Oct. 15, 2009), a male caregiver for his four young children filed a claim of gender discrimination arising out of the recommendation that he be terminated following excessive absences. The City had an attendance policy that if an employee accumulated seven unplanned absences in any 12-month period, the supervisor was required to "recommend the employee for termination." After the seventh unplanned absence, the plaintiff's supervisor recommended him for termination. The plaintiff was ultimately terminated. The district court noted that while Title VII does not protect against discrimination based on caregiving responsibility, it does prohibit discrimination based on sex. Accordingly, the Court construed the complaint as asserting a claim of "sex plus" discrimination, under which the plaintiff alleges that he was terminated because he is a man who has children. A "sex plus" theory of discrimination is based upon allegations that an employer disparately treated a subclass within a protected class. In support of his claim that he was treated unfairly because he was a male caregiver, the plaintiff presented evidence that he was criticized for missing work due to caregiver responsibilities. The district court determined that the evidence did not support a finding that he was treated any differently than female caretakers. Accordingly, the district court granted summary judgment in favor of his employer.

**LAY OPINION WITNESS HELD NOT COMPETENT TO TESTIFY WITH REGARD TO LOST EARNINGS AND PENSION BENEFITS**

In Donlin v. Philips Lighting North America Corp., 2009 WL 2871216 (3d Cir. 2009), a temporary employee asserted she was not hired as a full-

time employee because of sex discrimination in violation of Title VII. The employee attempted to provide her own testimony not just about her actual earnings, but also about her estimated lost earnings and pension benefits. The Court held the employee was not competent to testify about her estimated lost earnings and pension benefits. This was because the employee had been at the company less than one year. She had not developed an in-depth knowledge of the company's salary structure, advancement opportunities, pay raises or employment patterns. Therefore, the Court held that the employee lacked personal knowledge of the business, as required for her to be competent to provide lay testimony about her estimated lost earnings and pension benefits.

**COURT AWARDS FEES TO THE EMPLOYER BECAUSE THE EMPLOYEE LITIGATED IN BAD FAITH**

In Mach v. Will County Sheriff, 580 F.3d 495 (7<sup>th</sup> Cir. 2009), the Court awarded fees to the employer on the employer's motion for summary judgment because the employee litigated in bad faith five of the six claims at issue on the motion for summary judgment. Following summary judgment, the District Court granted in part the employer's motion for fees and costs. The Court found that the employee had litigated in bad faith by abandoning five of his six allegations of age discrimination only after the employer had filed its opening summary judgment brief. The Court ruled that the employee caused the sheriff to brief all six arguments when the employee knew, based on the discovery, that those arguments were "worthless." 580 F.3d at 498.

The Court found an exception to the typical American rule, under which each party bears its own litigation expenses, where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. 580 F.3d at 501. Because the federal age discrimination statute, the ADEA,

fee-shifting provision refers only to a prevailing plaintiff, the Court held that the statutory fee-shifting provision does not preclude application of the common law rule that a prevailing defendant may obtain attorney's fees if the plaintiff litigated in bad faith. *Id.*

Bad faith may be found in the conduct of the litigation.

The Court affirmed the award of attorney's fees to the employer because the employee knew that five of the six bases for his claims were "worthless" and "non-starters" after discovery had erased any doubt that the employee's arguments had even a chance of success.

This case provides a basis for employers to seek attorney's fees under a common law rule, outside of the fee-shifting provisions of federal employment statutes, where employees have litigated in bad faith.

## **NO SEXUAL HARASSMENT WHERE THERE IS NO TANGIBLE EMPLOYMENT ACTION AND EMPLOYEE FAILS TO REPORT HARASSMENT**

In *Roby v. CWI, Inc.*, 2009 WL 2615973 (7<sup>th</sup> Cir. 2009), the Court found there was insufficient evidence that a female employee suffered a constructive discharge as required to establish a tangible employment action against the employee and to hold her employer strictly liable for an alleged supervisor's sexual advances toward the employee.

The employee failed to show that the alleged harassment involved tangible employment action. The Court ruled that even though the actions

were deplorable, there was no evidence indicating that the employee's working conditions were so intolerable that she had to quit. Nor was there evidence that the supervisor spent an inordinate time around the employee after he was disciplined by the employer. The evidence indicated that the employer undertook efforts to reduce the number of contacts between the employee and the supervisor. Because the alleged harassment by the supervisor did not result in a tangible employment action, the employer was entitled to assert an affirmative defense against the employee's claim because the employer promptly investigated the employee's report of harassment and disciplined the supervisor. In addition, the Court found that the employee unreasonably failed to take advantage of the employer's existing corrective opportunities to avoid harm because the employee waited five months to report the harassment.

## **INQUIRY INTO RETIREMENT PLAN DID NOT GIVE RISE TO AGE DISCRIMINATION**

In *Betz v. Chertoff*, 2009 WL 2634406 (8<sup>th</sup> Cir. 2009), a supervisor inquired into an employee's retirement plans shortly after a co-worker about the same age as the employee had retired. The Court ruled this inquiry did not give rise to an impermissible discriminatory intent. Furthermore, the supervisor had no authority over the allegedly similarly situated younger employees who were promoted to GS-11 status.

Therefore, the Court ruled that the Department of Homeland Security did not discriminate against the employee because of her age by not promoting her from the GS-7 grade to the GS-11 grade.

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