



## McKENNA EMPLOYMENT BULLETIN

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### **ACTS DEMEANING TO PROFESSIONAL WOMEN CONSTITUTE HOSTILE ENVIRONMENT**

In Tuli v. Brigham & Women's Hosp., 2011 WL 3795599 (1<sup>st</sup> Cir. 2011), the Court found that the actions of a female hospital employee's male supervisor and co-workers were sufficiently severe to constitute a hostile work environment based on sexual harassment under Title VII. The facts were that the employee was a doctor spinal neurosurgeon at the hospital. The conduct of the supervisor and co-workers included ignoring the employee at a conference and instead referring questions to the "spine guys," asking the employee to "get up on the table and dance" at a graduation dinner and repeatedly referred to the employee as a "little girl." They questioned the employee's ability to perform surgery, told the employee that she was "really hot," funded a hospital-affiliation party with "strippers and cages and beer kegs," and threw the employee into a scrub sink and then the garbage. Finally, the employees asked the doctor neurosurgeon employee, who was of Indian descent, to wear a belly dancing outfit.

### **THREE YEAR OLD REPORT IS NO BASIS FOR RACE DISCRIMINATION**

In Everett v. Cook County, 2011 WL 3691305 (7<sup>th</sup> Cir. 2011), a Caucasian dentist brought a Title VII action. The male dentist submitted a productivity report indicating the dentist, who provided care for detainees at the county jail, was slightly more productive than an African-American dentist and included a statement by the former director that the African-American dentist only gained minimal administrative experience during the time as acting director. The Court held this is not evidence of pretext for discrimination in the decision to retain the African-American dentist but not the Caucasian dentist. The employer argued that the retention of the African-American was based on claimed greater productivity as well as qualifications and desire to lead. The Court held that the report cited by the Caucasian dentist was three years old and did not dispute the African-American dentist's experience. The Court found that serving as acting director did provide some experience for the African-American dentist. Finally, the plaintiff failed to present any background circumstances suggesting that the employer discriminated against the majority Caucasian race.

### **POOR PERFORMANCE BEFORE THE PROTECTED ACTIVITY REBUTS A RETALIATION CLAIM**

In Dickerson v. Bd. Of Trustees of Community College Dist. No. 522, No. 10-3381, September 16, 2011, the U.S. Court of Appeals for the Seventh Circuit held that the employer was entitled to judgment in the employee's action alleging failure to promote the employee and termination

of the employee on account of his mental disability and in retaliation for having filed a prior EEOC complaint. The Court found that a statement by the employer's vice-president that the employee should not have sued the employer if he wanted to get a promotion constituted some evidence of discrimination and retaliation. However, the Court found that the plaintiff failed to rebut the employer's explanation that the employer's adverse acts were related to the employee's poor job performance, which were long-standing and occurred both before and after filing of the EEOC charge. The Court found that the fact that the plaintiff believed that he was performing his job adequately was insufficient to insulate his case from judgment.

## **DIFFERENT TREATMENT FOR SIMILAR EMPLOYEES CAN EQUAL DISCRIMINATION**

In Eaton v. Indiana Dept. of Corrections, No. 10-3214, September 9, 2011, the U.S. Court of Appeals for the Seventh Circuit found that the employer was not entitled to judgment in the employee's Title VII action. The employee alleged that the employer discriminated against her on account of her gender when it terminated her due to her failure to work a specific job assignment. The Court found that the record contained evidence of disparate treatment because a male co-worker also failed to work a specific assignment given by the supervisor and he did not receive any discipline. Furthermore, the record did not support the employer's claim that the employer actually considered the employee's disciplinary history when making the termination decision.

## **CO-WORKERS' OPINIONS DO NOT SUPPORT RACE DISCRIMINATION**

In Yancick v. Hanna Steel Corp., No. 10-1368, August 3, 2011, the U.S. Court of Appeals for the Seventh Circuit affirmed judgment for the employer in a race discrimination action which alleged that the employer maintained a racially hostile work environment. The plaintiff alleged that the defendant allowed the plaintiff's African-American co-worker to physically harass the white plaintiff and that the white plaintiff ultimately sustained serious injuries when the same co-worker dropped a coil on the plaintiff. The Court held that the plaintiff failed to show that the co-worker's bullying behavior, or that the incident, which resulted in the plaintiff's serious injuries, were related to the plaintiff's race. The Court further held that the other co-workers' lay opinion that the harassing conduct was racially motivated did not require a different result because the co-workers provided no factual basis to support their opinions. In addition, the plaintiff failed to notify the employer of any belief that his race was the basis for the conduct of the harassing co-worker when the employee made his complaints about the harassment. The Court found that the plaintiff did not provide the employer with sufficient notice that the plaintiff was making a claim of racial harassment.

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