



**McKENNA**  
**EMPLOYMENT BULLETIN**  
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**SETTLEMENT AGREEMENT TRUMPS  
 CLAIM OF REHABILITATION  
 DISCRIMINATION**

In Kersey v. Washington Metropolitan Area Transit Authority, --- F.3d ---, 2009 WL 3735487 (D.C., Nov. 10, 2009), a transit employee brought an action against his employer, a metropolitan area transit authority, alleging that his employer's refusal to promote him to positions requiring driving was discrimination and retaliation in violation of the Rehabilitation Act, 29 U.S.C. § 794(a). WMATA hired the transit employee as a bus operator. Shortly thereafter, the employee got into a fight with bus passengers, suffered injuries to his neck and back, and took a worker's compensation leave. The employee was still on leave four years later when WMATA terminated him for failing to report that he was arrested twice. After Kersey's union filed a grievance on his behalf, WMATA reinstated him. While still on leave, Kersey got into a fight with a WMATA employee on WMATA property and was again arrested and charged with assault and carrying a deadly weapon. He was subsequently acquitted by a jury. WMATA once again terminated the employee, referencing his medical disqualification from operating a bus based on his neck and back injuries, his record of violent physical confrontations, and his failure to report arrests.

The employee filed a grievance against this second termination. Thereafter, the employee and employer reached an agreement that by its terms constituted a "full and final settlement of this grievance." Under that agreement, the employee was reinstated "to a position of cleaner-shifter with the understanding that...under no circumstance will he be permitted to operate an authority vehicle." Soon after signing, the employee began attempting to apply for positions that required operating WMATA vehicles. WMATA refused to allow him to take a promotional test for such a position, informing

him that the Settlement Agreement precluded him from obtaining the position. The employee sued, claiming that WMATA's refusals to promote him to positions requiring driving constituted retaliation and disability discrimination under the Rehabilitation Act.

The district court granted summary judgment in favor of WMATA, finding, in part, that the employee had failed to rebut WMATA's legitimate, nondiscriminatory explanation for its actions. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed. It held that the settlement agreement providing that the employee was not permitted to operate vehicles was not rescinded by the employer, and thus the employer's reliance on the agreement was not a mere pretext for discrimination and retaliation, but rather was a reasonable, nondiscriminatory reason for its refusal to promote employee.

**MALE SUPERVISOR'S ACTIONS  
 TOWARDS A MALE EMPLOYEE ARE  
 INSUFFICIENT TO SHOW HOSTILE  
 ENVIRONMENT**

In Corbitt v. Home Depot U.S.A., Inc. 2009 WL 4432654 (11<sup>th</sup> Cir. 2009), a male employee alleged that his male supervisor made sexual comments and touched the employee. The facts are that the supervisor told the employee that he liked how the employee dressed, that he liked the employee's pants, that the employee's hair was beautiful, and that he liked the employee's green eyes. The Court held that these were compliments that a reasonable person would not have found offensive. The Court also found that more offensive comments were only made over the telephone, rather than in person, and most of the touchings were brief. Therefore, the Court found that the supervisor's alleged comments and touchings were not sufficiently severe or pervasive to support the male employee's hostile work environment claim under Title VII.

## **WOMEN'S STEREOTYPICAL ATTITUDES TOWARD GENDER VIOLATE TITLE VII**

The Eighth Circuit joined the ranks of the Third, Sixth, Seventh and Ninth Circuits and held that stereotypical attitudes toward gender violate Title VII if they lead to an adverse employment decision.

In Lewis v. Heartland Inns of America, L.L.C., --- F.3d ---, 2010 WL 184087 (8th Cir. (Iowa) 2010), the plaintiff alleged that she lost a job because of unlawful sex stereotyping and brought an action for sex discrimination and retaliation.

The plaintiff was a daytime front desk clerk of a hotel. She had excellent performance reviews until a female regional director decided that she was not a feminine dresser. The plaintiff described her appearance as 'slightly more masculine,' and her direct manager described her appearance as "an Ellen DeGeneres kind of look." The plaintiff preferred to wear loose fitting men's clothing, avoided makeup, wore her hair short, had been mistaken for a male and referred to as 'tomboyish.'

After seeing the plaintiff, the new woman director stated that the plaintiff lacked the 'Midwestern girl look.' The director also made comments about the attractiveness of women staff members, indicated that hotel staff should be 'pretty,' and advised a hotel manager not to hire an applicant because she was not pretty enough.

The new director made current employees re-interview for their jobs and insisted that interviews with front desk employees be videotaped so that she could decide whether they met her standard for attractiveness. The plaintiff protested the re-

interview process as discriminatory and was fired.

The Court held that there was sufficient evidence to send the gender discrimination and retaliation claims to a jury. The Court held that Title VII protects against adverse actions motivated by sex stereotyping.

## **FAILURE TO IMPAIR JOB PERFORMANCE MEANS NO RACIAL HARASSMENT**

In Ford v. Minteq Shapes and Services, Inc., 2009 WL 4039723 (7<sup>th</sup> Cir. 2009), a coworker called an employee a "black man" and a "black African-American." A supervisor commented that the employee did not have to worry about losing his job because the employer wanted to appear integrated. Another supervisor referenced the employee as a "gorilla." The employer also barred the employee from bringing his grandchildren to the company's Christmas party although other employees were permitted to bring their families. The Court held that these actions considered separately or in the aggregate did not amount to hostile work environment that would constitute racial harassment in violation of Title VII. This was because the employee did not take reasonable steps to inform the employer of the coworker's comments. Further, the supervisor's comments each happened only once and did not impair the employee's job performance. The Court found the Christmas party treatment happened too occasionally and outside the normal workday to rise to the level of a hostile work environment. Finally, there was no evidence that any of these actions occurred because of the employee's race.

Comment - This ruling seems to negatively affect an employee who continues to work despite adverse conditions.

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