



McKENNA  
EMPLOYMENT BULLETIN

James P. DeNardo

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**A STATEMENT DURING AN INTERNAL INVESTIGATION IS PROTECTED FROM RETALIATION UNDER TITLE VII**

In Crawford v. Metropolitan Government of Nashville, No. 06-1595, Decided January 26, 2009, in response to questions by an official of the employer local government during an internal investigation into rumors of sexual harassment by a supervisor, the employee reported that the supervisor had sexually harassed her. The employer government did not take action against the alleged harasser but soon after fired the employee, alleging embezzlement. The employee filed suit under Title VII claiming that the government employer retaliated against her for reporting the supervisor's behavior. The employee claimed she was protected by 42 USC §2000e-3(a), which makes it unlawful for an employer to discriminate against any employee who has opposed any practice made an unlawful employment practice by Title VII. The District Court granted summary judgment to the employer on the basis that the statement occurred during an internal investigation.

The U.S. Supreme Court reversed and held that the antiretaliation provisions of Title VII extend to an employee who speaks out about discrimination, not on her own initiative, but in answering questions during an employer's internal investigation. The Supreme Court held that the word "opposed" in Title VII may be used to describe someone who has taken no action at all to advance a position beyond disclosing the position. Therefore, a person can "oppose" by responding to someone else's questions just as surely as by initiating the discussion.

**THE ILLINOIS CIRCUIT COURT HAS JURISDICTION OVER FEDERAL §1981 CLAIMS**

In Blount v. Stroud, No. 105577, Decided January 23, 2009, the employee brought a claim in the Circuit Court of Illinois alleging retaliatory discharge and a violation of 42 USC §1981 alleging discrimination in the termination of her

employment when she refused to testify falsely at a co-worker's civil rights hearing. The Illinois Supreme Court held that the Circuit Courts of Illinois have subject matter jurisdiction over retaliatory discharge and federal 42 USC §1981 claims. The 42 USC §1981 claims are not excluded by the Illinois Human Rights Act.

**SETTLEMENT AND WITHDRAWAL OF AN EEOC CHARGE DOES NOT STOP AN EEOC CHARGE**

In EEOC v. Watkins Motor Lines, Inc., No. 08-2483, Decided January 23, 2009, the District Court dismissed a motion by the EEOC to enforce its subpoena during an investigation of an employee's charge of discrimination. The District Court ruled that the existence of a prior settlement between the employee and the employer which conditioned settlement on withdrawal of the charge meant the EEOC had no jurisdiction to investigate the charge.

The Seventh Circuit reversed and held that the EEOC is not required to grant an employee's request to withdraw a charge of discrimination and that the EEOC continues to have subject-matter jurisdiction to complete its investigation in spite of a settlement. This is because Title VII authorizes a District Court to adjudicate subpoena enforcement actions filed by the EEOC.

**BETTER TEST SCORES OF COMPARATIVES PREVENTS TITLE VII LIABILITY**

In Jackson v. City of Chicago, No. 07-3772, Decided January 13, 2009, the employee alleged that the employer denied the employee two promotions on account of his race. Two co-employees received the promotions. The Court affirmed summary judgment for the employer and found that both successful candidates had better scores on written tests than the employee or had submitted required work samples. The Court ruled that the plaintiff could not rely on the

contention that both candidates had unfair advantage in being given relative training opportunities. The opportunities were discrete events that took place more than 300 days before the employee filed the EEOC charge.

### **SUBMITTING TO THE REAL OR PRESUMED BIASES OF OTHERS SUPPORTS TITLE VII SEX DISCRIMINATION LIABILITY**

In Schroer v. Billington, 2008 WL 4287388 (D.D. C. 2008), a male-to-female transsexual alleged that she was denied employment by the Library of Congress because of her sex in violation of Title VII. The Library of Congress's reason for not hiring the plaintiff was that she might lack credibility with members of Congress and might be unable to maintain her military contacts acquired as a male. The Court held that considering the real or assumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices. The Court ruled that the Library of Congress's reasons for not hiring the plaintiff were explicitly based on the employee's gender non-conformity and her transition from male to female and were facially discriminatory as a matter of law.

### **POOR UNDERSTANDING OF THE SALES MARKET AND "JOB SHOPPING" WERE VALID REASONS FOR NOT HIRING AN APPLICANT**

In Johnson v. Cook, Inc., 2008 WL 5008559 (N.D. Ill. 2008), the Court ruled that a medical device company was entitled to summary judgment on a sales training program applicant's age discrimination claim. The Court ruled that the applicant failed to establish a prima facie case even though he was over 40 years old at the time he applied, that he was at least

minimally qualified for the entry level position sought but was not hired. The Court ruled that the applicant did not show that those hired were substantially younger and were similarly situated. In addition, the Court ruled that the company's reasons for rejecting the applicant, because he had too much sales experience, his low salary expectations indicated he was not highly motivated, that he had a poor understanding of the sales market despite his alleged experience, and he had a history of "job hopping" which made him an undesirable candidate, were legitimate and non-discriminatory reasons for not hiring the applicant. Therefore, they were not a pretext for age discrimination.

### **FAILURE TO TREAT EMPLOYEES IN A SIMILAR WAY SHOWS RACE DISCRIMINATION**

In Madden v. Chattanooga City Wide Service Dept., 2008 WL 4977335 (6<sup>th</sup> Cir. 2008), an employee alleged a cause of action under Title VII for race discrimination. The terminated African-American employee sued the employer and alleged racial animus on the part of his supervisor. The employee presented evidence that the supervisor had failed to report to decisionmakers white co-workers' conduct identical to the employee's conduct that had led to the employee's discharge. This conduct was setting off fireworks at work sites. The Court ruled that a connection was, therefore, made between the supervisor's discriminatory attitude and the decisionmaker's termination decision. The supervisors' discriminatory attitude was imputed to the decisionmakers.

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#### **McKenna Storer has offices located at:**

33 N. LaSalle Street  
Suite 1400  
Chicago, IL 60602  
(312) 558-3900

666 Russel Court  
Suite 303  
Woodstock, IL 60098  
(815) 334-9690

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