



McKENNA EMPLOYMENT BULLETIN

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January, 2012

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FALSE REPORTS DO NOT SUPPORT SEX DISCRIMINATION BUT RETALIATION WAS PRESENT

In Benuzzi v. Bd. Of Education of the City of Chicago, No. 10-3021, July 21, 2011, the Court affirmed judgment for the employer in the plaintiff's Title VII action alleging that the employer's three separate suspensions were based on the plaintiff's gender. The plaintiff's supervisor had given the decision-maker false accounts of the plaintiff's job performance. However, the plaintiff failed to present any evidence that the supervisor's animosity towards the plaintiff, which led to the allegedly false reports, was based on the plaintiff's gender. The Court did hold that the plaintiff's claim that her supervisor's issuance of disciplinary action and workplace hours restriction were in retaliation for the plaintiff giving a deposition in a discrimination case were valid and supported a retaliation claim where the supervisor issued disciplinary action and restriction of hours just one day after the plaintiff had participated in the deposition.

INABILITY TO PERFORM ONLY ONE JOB PREVENTS AN ADA CLAIM

In Powers v. USF Holland, Inc., No. 10-2363, December 15, 2011, Seventh Circuit, the plaintiff alleged that the employer violated the ADA by enforcing the employer's 100% healed policy when refusing the plaintiff's request to return to work with certain medical restrictions. The plaintiff also alleged the employer failed to provide him with the reasonable accommodation of allowing plaintiff to return to work as a long-haul truck driver that did not require the plaintiff to perform certain loading dock duties. The Court held that the plaintiff failed to show that he was qualified under the ADA as an individual who was substantially limited in the major life activity of working. This was because the record showed that the plaintiff was capable of performing long-haul truck driving work, and the record showed at most that he was unable to return to only the city-driver position that he held at the time of his medical leave of absence. The Court further held that the employer's 100% healed policy did not subject the employer to liability under the ADA where the record showed that the employer considered the plaintiff's impairment as affecting only the plaintiff's ability to perform the defendant's city-driver position.

POOR PERFORMANCE, NO COMPARATIVES AND LACK OF EVALUATOR KNOWLEDGE DEFEAT RACE AND RETALIATION CLAIMS

In Abuelyaman v. Ill. State University, No. 10-2926, December 13, 2011, Seventh Circuit, the plaintiff alleged that the employer failed to renew the plaintiff's university teaching position because of the plaintiff's race and in retaliation for the plaintiff registering complaints about discrimination to his co-workers. The Court found that the plaintiff did not show race

discrimination because the plaintiff failed to present evidence regarding disparate treatment of co-workers where the plaintiff's proposed comparatives were of different rank than the plaintiff and had different job performance expectations. The Court also found that the plaintiff had failed to show that other professors, who had similar sub-par performance evaluations as the plaintiff over a five-year period were not terminated. Finally, with respect to his retaliation claim, the Court found that the plaintiff failed to show either that the evaluation committee was aware of his discrimination complaint or that he had engaged in protected conduct by making any complaints related to discrimination.

HOSTILE ENVIRONMENT SEXUAL HARASSMENT REQUIRES OBJECTIVE OFFENSIVE LANGUAGE

In Overly v. KeyBank Nat. Ass'n, 2011 WL 5505338 (7th Circuit 2011), the Court found that a supervisor's occasional gender-based comments to his female subordinate were not sufficiently severe or pervasive to rise to the level of a hostile work environment under Title VII. The male manager had referred to a female employee as "cutie" but stopped when the employee asked. The supervisor's statement that the employee and another female co-worker's "pretty faces" would better represent their company at a golf outing than his "ugly mug" was not objectively offensive, even if the employee may have found it subjectively offensive. The Court found, therefore, that these acts were not sufficiently severe or frequent to meet the standard for a hostile work environment pursuant to Title VII.

TITLE VII'S RELIGIOUS EXEMPTION INCLUDES EXEMPTION FROM HARASSMENT AND RETALIATION CLAIMS

In Kennedy v. St. Joseph's Ministries, Inc., 2011 WL 4068458 (4th Cir. 2011), the employer was a tax-exempt religious organization which operated a nursing care facility. The plaintiff, who was a member of the Church of the Brethren and as a matter of religious principle, wore modest garb that included long dresses/skirts and a cover for her hair. The Assistant Director of Nursing Services for the employer informed the plaintiff that her attire was inappropriate for a Catholic facility and that it made residents and their family members feel uncomfortable. The plaintiff stated her attire was a function of her religious beliefs and would not change it. The employer terminated the plaintiff.

The plaintiff filed a complaint under Title VII alleging religious harassment, retaliatory discharge and discriminatory discharge on the basis of religion. The Court held that the employer was exempt from the plaintiff's claims for religious harassment and retaliation under the religious exemption to Title VII because all of the plaintiff's claims arose out of her employment with the employer.

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