McKENNA EMPLOYMENT BULLETIN

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AGE DISCRIMINATION CLAIM DENIED

A former managerial employee lost his age discrimination claim notwithstanding an inappropriate age-related comment. In Jackson v. Cal-Western Packaging Corp., 2010 WL 703168 (5th Cir. 2010), the employee established his prima facia case by showing he was 69, qualified and replaced by someone who was 42. In response, the employer claimed that the employee was terminated for violating the company's sexual harassment policy. The former employee attempted to rebut it by asserting, for the first time on appeal, that the employer did not discipline younger employees who engaged in similar actions, commentary or emails with co-workers, and that the specific co-worker he had communicated with had never voiced her displeasure directly to him. The Appellate Court found that the pretext argument was untimely and, therefore, not considered. The Court also noted that the supervisor's statement that the employee was an "old, gray-haired fart" was just a stray comment and not sufficient to show animosity toward him because of his age.

HIV POSITIVE STATUS IS A DISABILITY UNDER THE ADA AMENDMENTS

In Horgan v. Simmons, 2010 WL 1434317 (N.D. Ill. 2010), the Court held that a terminated employee sufficiently stated a claim for disability discrimination under the recent amendments to the ADA. The employee alleged that he was able to perform the essential functions of his job without accommodation, but was terminated from his employment on the basis of his HIV-positive status. The Court ruled that the ADA amendments clarified that the operation of "major bodily functions," including "functions of the immune system," constitute major life activities under the ADA's first definition of disability. The Court held, therefore, that it was reasonable that the manager's HIV-positive status substantially limited one of his major life activities.

PERFORMANCE EVALUATIONS – NOT MATERIALLY ADVERSE ACTIONS

Poor performance evaluations do not necessarily constitute "materially adverse actions." In Booth v. District of Columbia, 2010 WL 1286318, the employees of the District of Columbia received diminishing employee evaluations in the months immediately after they file grievances with District officials complaining of alleged discrimination. The evaluations did not trigger any tangible loss, but to the contrary, the employees received promotions and corresponding pay raises. Accordingly, the Court held that the evaluations did not constitute "materially adverse actions."

In Porter v. Shah, 2010 WL 2160906 (C.A.D.C. 2010), a supervisor gave an employee an interim assessment in which the supervisor characterized the employee as borderline unacceptable and criticized the employee's performance of various tasks. The Court held this interim assessment was not a materially adverse employment action and did not constitute

retaliation. This was because the assessment was delivered orally, with no written record placed in the employee's personnel files, and it was superseded by his year-end annual review. Furthermore, it did not affect the employee's position, grade level, salary, or promotion opportunities.

POLITICAL PATRONAGE – NO KNOWLEDGE, NO CLAIM

In Everett v. Cook County, 2010 WL 1325681, a former employee of Cook County sued for wrongful termination. The former employee claimed that she was terminated because of her political patronage. The employee, however, failed to show that the decision makers knew of her political affiliation. In fact, the employee failed to show that any county employee knew of her political status. Accordingly, the District Court granted summary judgment in favor of the County.

APPEARANCE DISCRIMINATION – IS IT ON THE WAY

In a new book, The Beauty Bias: The Injustice of Appearance in Law and Life, a Stanford law professor argues that workers deserve legal protection against appearance-based discrimination unless their looks are directly relevant to their job performance.

The federal and several states civil rights acts bar discrimination on the basis of such things as race, sex, religion, national origin and ethnicity. One state, Michigan, and six local governments, the District of Columbia; Santa Cruz, CA; Madison, WI; Urbana, IL; Howard County, MD and San Francisco, CA have laws that protect against appearance discrimination.

Michigan, which banned appearance discrimination in the 1970's, averages one such lawsuit a year.

As an example, a fitness instructor in San Francisco was turned down for ownership of a franchise because she did not have a high muscle-to-fat ratio and did not look leaner than the public. She complained to the San Franciso Human Rights Commission and won.

These kinds of cases include diverse claims such as a woman whom a bank fired because she was too attractive, a librarian who complained she was denied promotions because she was seen merely as a pretty girl who wore sexy outfits and a bartender who sued when her employer adopted a new dress code that required her to style her hair and wear makeup.

EMPLOYER LIABILITY FOR THIRD PARTY HARASSMENT

In Beckford v. Department of Corrections, 2010 WL 1818052 (11th Cir. 2010), the Court held that the employer state Department of Corrections was not entitled to an exemption from liability under Title VII because it failed to remedy a sexually hostile work environment created by male inmates in the presence of female employees. The Court held that it did not matter that the Department of Corrections employees did not participate in or encourage the harassment. The Court held there was no reason to treat inmates differently from other third-party harassers.

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