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McKENNA EMPLOYMENT BULLETIN

James P. DeNardo and Kristin D. Tauras

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THE PREGNANCY DISCRIMINATION ACT IS NOT RETROACTIVE

In AT & T Corp. v. Hulteen, ___S. Ct. ____, 2009 WL 1361539 (2009), the United States Supreme Court held that AT & T did not violate the Pregnancy Discrimination Act when, prior to the enactment of the PDA, it paid pension benefits pursuant to a seniority system calculated in part under an accrual rule that gave less retirement credit for pregnancy leave than for medical leave generally.

For many years, AT & T had based its pension calculations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy absences than for other medical leaves. In 1978, Congress added the Pregnancy Discrimination Act to Title VII to make it clear that it was discriminatory to treat pregnancy-related conditions less favorably than other medical conditions. On the PDA's effective date, AT & T replaced its old plan with a new one giving the same service credit for pregnancy leave as for other disabilities prospectively, but did not make any retroactive adjustments for pre-PDA personnel policies. Thus, employees who had taken pregnancy-related medical leave before the PDA had a reduction in their total employment term and consequently smaller AT & T pensions.

Affected female employees and their union brought a Title VII action against AT & T alleging sex and pregnancy discrimination in connection with the calculation of their pension benefits. The Supreme Court determined that pre-PDA differential pension accrual plans did not violate Title VII. Section 703(h) of Title VII states: "[I]t shall not be unlawful employment practice for an employer to apply different standards of compensation...pursuant to a bona fide seniority...system...provided that such differences are not the result of an intention to discriminate because of...sex." The Supreme Court held that the PDA was not retroactive, and because AT &T's pre-PDA pension system was pursuant to a bona fide seniority system's terms, AT & T was insulated from challenge under Title VII for their pre-ADA pension plan.

Prior to the Supreme Court's decision, three Circuits had ruled on the issue with inconsistent holdings. The Sixth and Seventh Circuits had previously held that reliance on a pre-PDA differential accrual rule to determine pension benefits did not constitute a violation of Title VII. The Ninth Circuit had previously found a Title VII violation based on a similar pre-PDA pension system.

JOB APPLICANT'S CLAIM OF GENDER DISCRIMINATION DENIED

In Turner v. Public Service Company of Colorado, 563 F.3d 1136 (6th Cir. 2009), a job applicant brought a Title VII claim against a prospective employer alleging sex discrimination when the power plant company failed to hire her to an entry level position. The job applicant applied three times to the same position over the course of six years. On the third try, the applicant passed the first two levels in the evaluation process -- a standardized written test to measure the applicant's mechanical aptitude and a screening of her resume – and failed the third level. The third level was an interview with a standardized set of questions presented to each applicant designed to elicit information pertaining to particular qualities of competencies appropriate for the job. The job interview portion was scored and the applicants with the highest scores received job offers. Seventeen prospective employees were interviewed, including two females for six vacant positions.

According to the employer, the applicant performed poorly during her interview and

received the second-lowest rating. The applicant even admitted that she felt that she was struggling through during the entire interview. The other female applicant scored the second highest, and was offered a position, which she later turned down due to personal reasons. The District Court granted summary judgment in favor of the prospective employer.

On appeal to the Sixth Circuit, the applicant argued that the employer did not "prove" that it refused to hire the applicant based on her low interview score. The Sixth Circuit rejected the notion that the employer had to prove that it refused to hire the applicant based on her interview performance. Rather, the Sixth Circuit held that the employer was only required to "put forth enough evidence to carry its burden of production and rebut [the applicant's] prima facia case."The Sixth Circuit held that the prospective employer more than satisfied the burden by (1) producing score sheets showing that the employee ranked second to last among interviewees, (2) demonstrating that only the top interviewees received job offers and (3) presenting testimony by the decision-maker that the decision not to hire the applicant was based on her poor job interview.

The applicant also argued on appeal that the stated reason was a pretext, asserting in part that the company had settled a sexual harassment lawsuit fifteen years earlier for conduct that occurred between 1980 and 1988. While recognizing that a prior hostile work environment can be relevant to the determination of pretext where there is a nexus between the prior conduct and the current charge of discrimination, there was no nexus between the sexual harassment during the 1980's and the decision to not hire the applicant in 2004.

POOR ATTITUDE PREVENTS AN AMERICANS WITH DISABILITIES ACT CAUSE OF ACTION

In Lloyd v. Swifty Transportation, Inc., Seventh Cir. No. 07-1476, January 9, 2009, the plaintiff filed an Americans With Disabilities Act action alleging that the employer passed over the plaintiff for job promotions to various lead-truck driver positions and imposed discipline for workplace violations because of the plaintiff's disability. With regard to the promotion at issue, the Seventh Circuit ruled that the plaintiff failed to rebut the employer's explanation that the plaintiff was not promoted due to the plaintiff's poor attitude that drew complaints from co-workers. In addition, the plaintiff also failed to present evidence that other drivers who committed similar infractions were not disciplined by the employer.

TEMPORARY EMPLOYEE CAN SUE THE BORROWING EMPLOYER FOR RETALIATORY DISCHARGE

In Hester v. Gilster-Mary Lee Corporation, 386 Ill. App. 3d 1104 (5th dist. 2008), the plaintiff, whose direct employer was a temporary employment agency, filed a claim for retaliatory discharge against the borrowing employer. The employee alleged that she was retaliated against after she testified at a workers' compensation hearing of a fellow employee at the borrowing employer's packaging plant. The trial court dismissed the Complaint by the borrowed employee. The Appellate Court reversed and held that even though the plaintiff's direct employer was the temporary employment agency, she could still state a claim for retaliatory discharge against the borrowing employer.

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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