McKENNA EMPLOYMENT BULLETIN

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"HOSTILE ENVIRONMENT" NOT ALWAYS ACTIONABLE

In Ward v. Empire Vision Center, 2010 WL 598662 (W.D., New York), the plaintiff was an optical assistant at a vision and eye care center. She claimed she was subjected to a hostile work environment.

She alleged the manager tortured, attacked and verbally abused her by asking her questions relating to her performance of her duties, listening in on phone calls, standing in close proximity to her when she worked at the front desk, falsely accusing her of performance problems, calling her a liar, following her throughout the store, calling her into his office to discuss performance issues, and issuing her written disciplinary warnings.

The District Court held that assuming the allegations could rise to the level of a "hostile environment", the plaintiff still had not filed a proper cause of action. There was no allegation that the employer's conduct was motivated by race, age or gender, or any other inappropriate discriminatory basis. Accordingly, the case was dismissed.

HOSTILE ENVIRONMENT SHOWN BASED ON GENERAL COMMENTS TOWARD A PROTECTED GROUP

In Reeves v. C. H. Robinson Worldwide, Inc., 2010 WL 174074 (11th Cir. 2010), the employee testified there was language that her co-workers used that was unusually offensive. Much of the language, while vulgar, was not gender-specific. The employee also identified gender-derogatory language addressed specifically to women as a group in the workplace. The employee objected to the language and made formal complaints to supervisors and executives.

The employee filed suit and the District Court granted summary judgment to the employer holding that the offensive conduct was not motivated by sex because the derogatory language was not directed at the employee in particular. The Circuit Court of Appeals reversed and held there was much evidence of gender-specific, derogatory comments made about women on account of their sex. Therefore, there was sufficient evidence to present a jury question of disparate treatment.

The Court of Appeals held that to prove a hostile work environment under Title VII a plaintiff must show two things: that his or her employer discriminated because of his or her membership in a protected group and that the offensive conduct was either severe or pervasive enough to alter the terms and conditions of employment. The Court held that a plaintiff can prove this by showing severe or pervasive discrimination directed against his or her protected group, even if not individually singled out. Title VII's test is whether members of one sex are exposed to

disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

DRUNK DRIVER TERMINATION – NOT A VIOLATION OF THE ADA

A police chief who was terminated following a drunk driving accident that led to the suspension of his driver's license could not show he was a "qualified individual with a disability" as required to support an ADA claim. Budde v. Kane County Forest Preserve, 2010 WL 724140 (7th Cir. 2010). The police chief could not perform the essential job functions in that he violated work place rules that prohibited officers from being publically intoxicated and from violating public laws. In addition, as a result of the drunk driving, his driver's license was suspended. Therefore, the police chief was not able to drive, which was an essential job function.

The employer's specific requirements for the job determined the outcome of the case. The outcome would most-likely have been different had the individual been terminated for a drinking problem that did not violate any work place rules.

TITLE VII LIABILITY FOR TEMPORARY EMPLOYMENT AGENCY

In EEOC v. Kelly Services, Inc., 2010 WL 1076058 (8th Cir. 2010), the Court ruled on a case of first impression: a temporary employment agency's referral obligations under Title VII. In Kelly Services, the temporary employment agency had refused to refer a Muslim temporary worker to a commercial printing company. The printing company had a dress policy prohibiting headwear and loose-fitting clothing. The employment agency did not refer the employee because the employee refused to remove her khimar for work. A khimar is a headscarf worn by Muslim women that hangs down to just above the waist. The Court ruled that the EEOC failed to establish a prima facie case of religious discrimination because the EEOC did not show that the business had an available position to which the agency could refer the plaintiff when she applied for temporary work. The EEOC produced no evidence that the company had an available position to which an agency could refer the plaintiff. In addition to this, the Court held that the temporary employment agency's reason for its failure to refer the temporary worker to that business, the business' facially neutral, safety-driven dress policy, was legitimate and nondiscriminatory and was not shown to be pretexual.

Comment: While the reason the agency did not refer the temporary worker in this case was held to be non-pretextual, this case indicates that in the appropriate situation a temporary employment agency would be liable under Title VII for refusing to place a worker contrary to the protective categories in Title VII.

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