



## McKENNA EMPLOYMENT BULLETIN

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### **IF YOU DISCOURAGE A TITLE VII COMPLAINT, YOU RETALIATE**

In Young-Losee v. Graphic Packaging Intern, Inc., 2011 WL 222513 (8<sup>th</sup> Cir. 2011), an administrative assistant filed a formal complaint of sexual harassment against her company. The plant supervisor met with her, wadded up her complaint, called it "total bullshit", and threw it in the garbage can. The supervisor told the employee to leave and said he never wanted to see her again. The employee left, did not return to work and eventually filed a retaliation suit. The court held that the manager's actions in response to the employee's complaint would have dissuaded a reasonable employee from making a complaint of harassment. Thus, the employee suffered a materially adverse action sufficient to support her claim for retaliation under Title VII.

### **YOUR EMPLOYEE MUST ALLEGE FACTS TO SUPPORT A CLAIM OF AGE AND GENDER DISCRIMINATION**

In Joren v. Napolitano, No. 10-1017, February 7, 2011, the Seventh Circuit affirmed the dismissal of a Title VII action against the employer. The employee alleged that she was subject to hostile work environment in her airport security screener job. The employee based her claim on gender, age and disability discrimination. The employee also alleged she was discriminated against based on her disability in violation of the Federal Rehabilitation Act. However, the plaintiff's allegations did not suggest any facts indicating that either age or gender played any role in her employer's actions. Because the employee did not allege sufficient facts to support her complaint, the court dismissed her complaint. In addition, the court held that the plaintiff's Federal employee claim under the Rehabilitation Act was pre-empted by the Aviation & Transportation Security Act.

### **YOUR SUPERVISOR'S BIAS CAN BE LINKED TO YOUR EMPLOYMENT DECISION**

In Schandelmeier-Bartels v. Chicago Park District, Nos. 09-3286 and 09-3468, February 8, 2011, the jury returned a verdict in favor of the plaintiff in a Title VII action in which the employee alleged she was terminated on account of her race shortly after the employee's supervisor had harshly criticized the plaintiff through use of racial slurs. The supervisor did this when the plaintiff reported a possible incident of child abuse against an African-American child by the child's African-American aunt. The supervisor did not

make the termination decision. However, the decision-maker, who made no independent investigation of the employee's alleged job-related shortcomings, relied on the memorandum drafted by the racially biased supervisor who also recommended the employee's termination. This permitted the jury to find a link between the racial bias of the supervisor and the employer's termination decision.

### **IF YOU TERMINATE RIGHT AFTER A TITLE VII COMPLAINT AND ALSO CHANGE YOUR REASON, YOU MAY HAVE RETALIATED**

In Loudermilk v. Best Pallet Co., LLC, 2011 WL 563765 (7<sup>th</sup> Cir. 2011), the employee alleged that the employer terminated the employee in retaliation for the employee's protest of racial discrimination with respect to job assignments. The employer terminated the employee within minutes after the employee handed the supervisor a note raising the protest. The employer first argued that the supervisor had not read the employee's note when the termination occurred but that he had read the note at some point in time. Subsequently, the employer shifted explanations for the plaintiff's termination by stating that the employee was fired for taking pictures of the worksite. The employer suggested that the employee was fired for gathering evidence to support his claim of racial discrimination. The court held that the termination was sufficiently close to the employee's protest so as to generate an inference of retaliation which was also supported by the employer's shift in explanation for the termination.

### **YOUR EMPLOYEE WITH PERIODIC EPISODES OF DEBILITATING PAIN MAY HAVE A DISABILITY UNDER THE ADA**

In EEOC v. Autozone, Inc., No. 10-1353, December 30, 2010, the EEOC alleged that the employer failed to accommodate the employee's back-related disability. The employee experienced periodic episodes of debilitating pain. The employee's testimony was that he was unable to take care of himself, which included almost daily assistance with respect to dressing and washing himself. The court held that a jury could potentially find that the employee's impairment was covered under the ADA. The fact that the employee experienced only periodic flare-ups of his back condition did not require a different result under the ADA. Further, the court held that the employee was not required to present medical testimony in order to establish the severity of his disability.

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