



## McKENNA EMPLOYMENT BULLETIN

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### **IF YOU CONTRACT FOR APPLICATION OF TITLE VII AND THE IHRA, IT BRINGS LIABILITY UNDER THOSE STATUTES**

In Rabe v. United Air Lines, Inc., No. 09-3300, U. S. Court of Appeals, 7<sup>th</sup> Circuit, February 28, 2011, the Court found that the District Court had subject matter jurisdiction to consider the plaintiff-employee/foreign citizen's lawsuit alleging the employer discriminated against the plaintiff by terminating her based on her national origin, age and sexual orientation in violation of Title VII, the ADEA and the Illinois Human Rights Act. The District Court had based its ruling on a finding that the plaintiff, as a foreign national who worked for the employer abroad, was not covered by those statutes. The Court held that whether the plaintiff worked in the U.S. is a factual issue effecting the merits of the claim, rather than the District Court's subject-matter jurisdiction. The Court also held that parties could properly agree in the plaintiff's employment contract to extend statutory legal protections to the plaintiff who might not otherwise be covered by the statutes themselves. The District Court also had subject-matter jurisdiction over the employment contract where the plaintiff had satisfied requirements of diversity jurisdiction.

### **CLAIMS THAT INVOICES VIOLATE PUBLIC POLICY BECAUSE OF A DUTY TO UPHOLD THE LAW AND ACT WITH HONESTY ARE TOO GENERAL TO SUPPORT A CLAIM OF RETALIATION**

In Rabin v. Karlin and Fleisher, LLC., No. 1-10-0643, March 18, 2011, the Illinois Appellate Court affirmed the dismissal of the plaintiff's complaint. The plaintiff, an investigator for a law firm, alleged that the law firm misled its clients by sending out invoices for the investigator's work at higher rates than he was paid, and disguising that he was an employee. The Appellate Court affirmed the dismissal and held that the allegations that the firm's invoices violated public policy because the attorneys have a duty to uphold the law and to act with scrupulous honesty were too general to justify exception to the general rule of at-will employment.

### **IF YOUR EMPLOYEE TAKES A SPIRITUAL HEALING PILGRIMAGE, IT IS NOT PROTECTED BY THE FMLA**

In Tayag v. Lahey Clinic Hosp., Inc., 2011 WL 241968 (1<sup>st</sup> Cir. 2011), the Court held that a spiritual healing pilgrimage does not compromise medical care within the meaning of the Family and Medical Leave Act (FMLA). Therefore, the employee's unexcused absence on the spiritual

healing pilgrimage whose purpose was to assist her husband, who otherwise had received only ordinary medical care, was not protected. A certification from the cardiologist stating that the employee's husband was "not incapacitated" and that the employee did not require leave to provide assistance to him to make a 7-week healing pilgrimage did not justify intermittent FMLA leave. The certification from the employee's husband's cardiologist stated that he was not incapacitated and that the employee would not need leave. While the employee prayed and spoke with a priest and other pilgrims at the pilgrimage, the employee's husband sought no conventional medical treatment and saw no doctors or health care providers.

## **TERMINATION OF WHITE WORKER WHILE DISCUSSING WAYS TO HIRE AFRICAN-AMERICANS RESULTED IN REVERSE DISCRIMINATION**

In Radentz v. Marion County, No. 10-1523, April 5, 2011, the Seventh Circuit reversed and held that the District Court committed error in granting the employer's motion for summary judgment in a reverse discrimination action. The employee alleged that the employer terminated plaintiffs' contract to perform forensic pathology services on account of their race. The Seventh Circuit held that the following questions of fact remained as to the real meaning for the termination: (1) defendants' rationale for terminating plaintiffs' contract, as a cost saving measure, could have been accomplished without terminating plaintiffs; (2) the record suggested that no cost savings actually occurred as a result of the termination; and (3) plaintiffs' supervisor otherwise expressed satisfaction with plaintiffs' services. Furthermore, the record showed that the head of defendants' agency discussed ways to hire more African-Americans by replacing white workers and in fact hired African-Americans as plaintiffs' replacement.

## **FACTORS OTHER THAN SEX JUSTIFY PAY SCALES**

In Randall v. Rolls-Royce Corp., No. 10-3446, March 30, 2011, the Seventh Circuit held that the District Court was correct in granting the employer judgment in a Title VII action in which the plaintiffs alleged that the defendant had an anti-female discriminatory practice of setting base pay of female employees below that of male employees in the same job range category. The employees also alleged that the employer denied female employees promotions they would have received had they been male. The Seventh Circuit affirmed judgment in favor of the employer and found that the record showed that a factor other than sex was responsible for the instant 5% wage differential between the sexes. That factor was that more males were employed in jobs that commanded higher wages within the same job-range category. The Court also found that the record did not support the plaintiff's claim that females were denied promotions because data showed that women were promoted more rapidly than males.

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