



**McKENNA
EMPLOYMENT BULLETIN**

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**NO GENDER DISCRIMINATION FOR
MALE FIRED FOR ACCESSING PORN
SITES ON HIS WORK COMPUTER**

In Farr v. St. Francis Hospital and Health Centers, 2009 WL 1838298 (7th Cir. 2009), a male respiratory therapist was fired for allegedly accessing pornography and other inappropriate "hacking" sites on his work computer. Thereafter, as part of a grievance proceeding, the employee hired a computer expert who was able to show that the porn sites were unintentionally placed on the computer through websites the employee admitted accessing, which then automatically downloaded a list of links to pornographic websites. The employee, however, admitted to intentionally accessing 17 of the 31 websites the employer deemed "inappropriate."

The employee filed a claim for reverse gender discrimination, claiming that the hospital assumed he was guilty of looking at the pornography sites because he was the only man working in the department. The employee claimed that even though he was logged onto the computer during all relevant times, all employees would access the same computer and, therefore, the hospital should have considered that a female may have been the one to access the porn sites. The hospital countered that it did an internal investigation, which revealed that the employee was the only one there during the times when the websites were accessed.

In a reverse discrimination claim, where the employee is in the majority, the employee must set out background circumstances that show that the employer discriminates against the majority or that there is "something fishy going on." The employee was not able to do so. Even if the hospital had turned to him first, it was clear that he was not fired because of his gender; he was fired because the initial investigation convinced

the employer that he was the one accessing the inappropriate websites.

**FAILURE TO USE EMPLOYER'S
COMPLAINT PROCEDURE DOOMS
TITLE VII CLAIM**

In Taylor v. Solis, 2009 WL 2014144 (C.A.D.C. 2009), the Court found that an African-American female employee unreasonably failed to use her employer's complaint procedure to report her alleged sexual harassment by a supervisor. What the employee did was confide the harassment shortly after it occurred to her friend who was a member of management. However, the employer's complaint procedure specifically required the employee to report the harassment to an equal employment opportunity counselor or the EEO manager. The employee's friend was neither.

The Court found, therefore, that the employer had an affirmative defense to the employee's Title VII hostile workplace claim.

**RETALIATORY INTENT NEED NOT BE
THE SOLE MOTIVE TO RECOVER ON
A RETALIATION CLAIM**

In Valentino v. Village of Chicago Heights, 2009 WL 2253406 (7th Cir. 2009), the employee alleged that her employer terminated her in retaliation for statements that the Village of South Chicago Heights paid several of the mayor's relatives and friends for hours they did not actually work. The Village defended saying they terminated the plaintiff because of the plaintiff's "theft" of the office sign-in sheets and that was their true motivation for firing the plaintiff.

The Court applied the same "mixed motive" standards applicable to non-retaliation cases and held that the retaliatory intent need not be the sole motive behind a termination decision, even

in a retaliation case, for a plaintiff to have an actionable claim. The burden is on the defendants to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct.

COMPARATIVES SHOW RACE DISCRIMINATION

In Lee v. Kansas City Southern Ry Co., 2009 WL 1856069 (5th Cir. 2009), an African-American train engineer alleged race discrimination and as part of his case submitted the record of a white fellow employee who had performed the same job. The plaintiff showed that his record and the white fellow employee's record were marked by a comparable number of serious moving violations and that these were sufficiently similar to require comparison of the two. The plaintiff alleged that the final violations of failing to obey a stop signal were indistinguishable for both he and the white fellow employee. The facts were that although the African-American employee and his white fellow employee had different immediate supervisors, the ultimate decision maker on rehiring after firing was the same person for both engineers. While both the African-American train engineer and his white fellow employee were fired, the white employee had been reinstated and the African-American employee had not.

The Court held the two employees were comparative for purposes of the African-American's suit and the records could be compared in determining whether the African-American was the victim of race-based employment discrimination.

COURT ALLOWS A CLASS OF ONE

In Hanes v. Zurich, 2009 WL 2501725 (7th Cir., 2009), a plaintiff stated a claim for an equal protection violation in a rare "class-of-one" case.

Hanes brought an action against a village and eleven police officers, alleging that his repeated arrests, solely for reasons of personal animus, violated the Equal Protection Clause.

Hanes alleged that as a result of a long-running and somewhat mysterious dispute with his neighbors, both Hanes and the neighbors have complained repeatedly to the police. Yet, when the police responded, they arrested only Hanes, no matter who initiated the complaint. They arrested Hanes at least eight times, and those arrests have led to thirteen criminal charges for minor crimes. Every single charge was later dropped. Hanes filed a complaint for violation of his Equal Protection rights claiming that the police have treated him unequally by ignoring his complaints against others and arresting only him because they "hate" him and "do not respect him." Those reasons, Hanes insisted, were "unrelated to the police officers' duties."

The officers moved to dismiss Hanes's complaint for failure to state a claim, arguing that selective enforcement of the law can never violate the equal protection clause under a class-of-one theory because of the discretion inherent in police power. The Seventh Circuit disagreed.

The Seventh Circuit held that while discretionary police decision-making is off-limits from class-of-one claims such as a traffic cop who has no way to distinguish among many speeding drivers, non-discretionary police decision-making can establish a class-of-one case. An officer who repeatedly arrests someone solely because of malice does have a way to distinguish between the citizen repeatedly arrested and the citizen left alone: the officer hates the arrestee. The officer motivated by malice alone is not exercising discretion and is not weighing the factors relevant to the officer's duties to the public. The Seventh Circuit found that Mr. Hanes set forth a sufficient claim for a class-of-one equal protection claim.

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