



McKENNA EMPLOYMENT BULLETIN

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POOR PERFORMANCE TRACK RECORD DEFEATS RETALIATION CLAIM

In O'Leary v. Accretive Health, Inc., No. 10-1418 (September 21, 2011), the U.S. Court of Appeals for the Seventh Circuit affirmed judgment in favor of the employer in an action where the employee alleged that the employer terminated the employee in retaliation for having reported to management sexual harassment allegedly committed by a member of management against another employee and race discrimination in the treatment of another employee by another member of management. The Court held that the complaint of sexual harassment did not constitute protected conduct because the employee could not have held a reasonable belief that the one-time occurrence involving verbal remarks constituted sexual harassment. The Court held that the employee's report of race discrimination did qualify as protected conduct because the complaint was based on a pattern of activity by a member of management against three African-American subordinates. But, the Court held that the judgment in favor of the employer was still proper because the employer based the termination on the plaintiff employee's poor job performance that began prior to the complaint of race discrimination. The Court also held that the plaintiff-employee failed to present evidence contesting the fact that the decision-maker and others had complained about his poor job performance prior to the plaintiff-employee making the race discrimination complaint.

SUBSEQUENT NON-SEXUAL ACTS DO NOT CONNECT PRIOR HARRASSING ACTS

In Jenkins v. Mabus, 2011 WL 2936331 (8th Cir. 2011), the Court held that the conduct of employees after a certain date, which included statements that a civilian employee "slept around" and referred to the employee as a "drama queen," were not similar in nature, frequency, and severity to alleged conduct that occurred before that date. The prior acts were sexual advances. The Court, therefore, held that the alleged conduct after the date did not constitute a continuing violation for purposes of filing an EEOC charge. The later acts must be similar to the prior acts to bring the prior acts within the 300 day charge filing requirement set out in Title VII. The Court held that the later conduct consisted of insults, slights, and affronts that were markedly different from the prior sexual advances.

POOR PERFORMANCE STOPS A THIRD PARTY RETALIATION CLAIM

In Stansberry v. Air Wisconsin Airlines Corp., 2011 WL 26219001 (6th Cir. 2011), a fired employee sued his former employer alleging "association discrimination" under the ADA. While

the employee was not disabled, his wife suffered from a rare and debilitating autoimmune disorder. The employee alleged that the employer terminated him because of unfounded fears that the employee would be “distracted” at work on account of his wife’s disability.

The Court held that the employee’s termination did not constitute associational discrimination. Under the “distraction” theory, an employee would be somewhat inattentive at work because of the disability of someone with whom he or she is associated. To establish a prima facie case of associational discrimination, the employee must show that the adverse employment action occurred under circumstances that raise a reasonable inference that the disability of the relative was the determining factor in the termination decision. The Court held that the plaintiff-employee could not prove this element because the record was filled with evidence that the employee had not performed his job to his employer’s satisfaction. Furthermore, there was no evidence to suggest that the employee’s discharge was based on any unfounded fears that his wife’s illness might cause him to be inattentive in the future.

ADMINISTRATIVE LEAVE TERMINATION DATE IS FOUND VALID

In Berry v. Chicago Transit Authority, 2011 WL 1559455 (N.D. Ill. 2011), the city transit authority terminated a female employee after she was on administrative hold for three years to recover from an injury. The employee alleged that her termination constituted sex discrimination under Title VII. The Court held that the termination was the application of a pre-existing policy in a nondiscriminatory manner. The Court found that the employee had received generous benefits while off work for three years and that the transit authority’s guidelines stated termination could result if an employee failed to integrate back into the work force within three years. Therefore, the termination did not constitute sex discrimination.

HARASSMENT AFTER RETURN FROM FMLA LEAVE DOES NOT STATE A CAUSE OF ACTION UNDER THE FMLA

In Breneisen v. Motorola, Inc., No. 10-1982 (September 2, 2011), the U.S. Court of Appeals, 7th Circuit, affirmed judgment dismissing an employee’s FMLA action which alleged that the employer harassed him upon his return from FMLA leave which aggravated his medical condition and caused him to lose his job. The Court ruled that the cause of the plaintiff’s injury is irrelevant under the FMLA and that the employee’s claimed aggravation of his pre-existing injury is not a valid theory of recovery under the FMLA. The Court also found that the employee could not recover under the FMLA because the alleged aggravation of his injury occurred after the second, unprotected leave of absence and when the employee had already exhausted his yearly 12-week FMLA benefit.

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