



McKENNA EMPLOYMENT BULLETIN

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- **PREGNANCY RELATED CONDITIONS ARE TREATED THE SAME AS OTHER CONDITIONS UNDER THE ADA**
- **HARASSMENT OF COWORKER DEFEATS RACE DISCRIMINATION CLAIM**
- **TITLE VII DAMAGE CAPS APPLY TO COMPENSATORY AND PUNITIVE AWARDS**
- **NO PRETEXTUAL TERMINATION FOR AN ATTORNEY REPLACED BY A BETTER QUALIFIED ATTORNEY**
- **CHRONIC FATIGUE SYNDROME CAN BE A DISABILITY**

PREGNANCY RELATED CONDITIONS ARE TREATED THE SAME AS OTHER CONDITIONS UNDER THE ADA

In Serednyj v. Beverly Healthcare, LLC, No. 10-2201 (August 26, 2011), 7th Circuit, the plaintiff alleged pregnancy discrimination against her employer in violation of the ADA when the employer failed to accommodate the plaintiff's request for light duty after experiencing complications arising out of her pregnancy. The Court affirmed judgment in favor of the employer. The Court held the plaintiff failed to establish any ADA violation where her pregnancy did not constitute a major limitation on any major life activity and where her complications were of limited duration. The Court also found that while the employer denied the plaintiff's request for light duty because its modified work policy granted requests for light duty only for work-related injuries and ultimately terminated the plaintiff when the plaintiff could no longer perform the essential duties of her job, this did not violate the ADA. The Court found that the employer's modified work policy did not treat non-pregnant co-workers in more favorable fashion than pregnant workers. In addition, the Court held that the plaintiff failed to produce evidence indicating that the employer treated non-pregnant co-workers with non-work-related injuries in a more favorable fashion than the plaintiff.

HARASSMENT OF COWORKER DEFEATS RACE DISCRIMINATION CLAIM

In Luster v. Ill. Dept. of Corrections, No. 09-4066 (July 19, 2011), 7th Circuit, the plaintiff alleged that his employer terminated him on account of his race after determining that the plaintiff had sexually harassed a female subordinate. The Court affirmed judgment for the employer and held that the employee had failed to establish that the employer had treated others outside his protected classification more leniently where the employee who the plaintiff alleged was comparable to him had engaged in the grievance process to retain his job while the plaintiff did not grieve his termination decision. Furthermore, the Court found that the employer properly relied on the employer's internal investigation report which supported the claim that the plaintiff had actually harassed a co-worker.

TITLE VII DAMAGE CAPS APPLY TO COMPENSATORY AND PUNITIVE DAMAGES AWARDS.

In a case of first impression in the Fifth Circuit, the Appellate Court held that Title VII's cap on damages applied to an employee's entire compensatory and punitive damages award in her

employment discrimination claim, rather than each individual claim. The female employee brought the action against her former employer, alleging various sex discrimination claims and a retaliatory termination claim under Title VII and the Texas Commission on Human Rights Act. See Black v. Pan American Laboratories, L.L.C., 646 F.3d 254 (5TH Cir. July 2011). The Fifth Circuit's ruling is in line with prior decisions from the Seventh Circuit, Tenth Circuit and D.C. Circuit. The U.S. Supreme Court has not addressed this issue.

NO PRETEXTUAL TERMINATION FOR AN ATTORNEY REPLACED BY A BETTER QUALIFIED ATTORNEY.

In Dulin v. Board of Com'rs of the Greenwood Leflore Hospital, 646 F.3d 232 (5th Cir. (Miss.) 2011), a white attorney, who had been terminated by a city and county hospital board, failed to present evidence that his termination and replacement with a black attorney was a pretext for race discrimination in violation of 42 USC §1981. The testimony indicated that the black attorney was admitted to the bar, practicing, and that she had been appointed by the governor to serve as a state judge for at least one year. Moreover, three board members testified that they were pleased with her performance because she was more attentive and proactive than the white attorney about alerting them to possible legal issues and offering her legal opinion. Even though the case was presented to a jury, the district court directed its verdict in favor of the Hospital, which was affirmed on appeal.

CHRONIC FATIGUE SYNDROME CAN BE A DISABILITY

In Valle-Arce v. Puerto Rico Ports Authority, 2011 WL 2652449 (1st Cir. 2011), a former Puerto Rican Ports Authority employee, who suffered from chronic fatigue syndrome (CFS), met her prima facie case for reasonable accommodation under the ADA by demonstrating that she could perform her essential job functions either with or without reasonable accommodation. The district court had directed a verdict in favor of the employer, finding that the employee could not fulfill her employment obligations due to absences. The First Circuit reversed and remanded for a new trial. The First Circuit noted that the employee testified that she was able to attend work regularly when granted a reasonable accommodation of a flexible schedule that allowed her to start work at 9:00 a.m. rather than 7:30 a.m.; her psychiatrist testified that it caused the employee a great deal of stress to go to work realizing that she was going to be late and that such worry led to many of her absences; and the evidence indicated that the employee had not been reprimanded in relation to her attendance during the time she was allowed a flexible schedule.

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