McKENNA EMPLOYMENT BULLETIN

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PRIOR DECISION TO TERMINATE STOPS A RACE CLAIM

In Nichols v. Michigan City Plant Planning Dept, etc., No. 13-2893, June 19, 2014, 7th Circuit, the plaintiff, a part time worker, filed a Title VII action alleging that the employer subjected the plaintiff to a hostile working environment and terminated the plaintiff on account of his race. The plaintiff alleged he had a viable harassment claim because he alleged that certain co-workers called him “boy” and “black n*****” and interfered with various of his job assignments as a custodian. But the allegations of harassment totaled six alleged instances over a 2.5 week period. The court held this was not sufficiently severe to establish a viable harassment claim where the employer otherwise stated that the employee performed his job with no complaints. Further, the record showed that the plaintiff was going to be terminated the following week in favor of a permanent employee regardless of his job performance; the plaintiff was terminated after three co-workers reported that the plaintiff was acting strangely on the day of his termination; and the plaintiff failed to present evidence of any comparative co-worker who was treated more favorably.

REFUSING TO FOLLOW A WORK SCHEDULE PREVENTS A RACE CLAIM

In Huang v. Continental Casualty Co., No. 12-1300, June 13, 2014, 7th Circuit, the plaintiff filed a Title VII action alleging that the employer terminated the plaintiff from his position on account of his Chinese race and in retaliation for complaining about workplace issues. However, the record showed that the plaintiff was terminated because he consistently refused to accept weekend work as other members of his team were required to do. The plaintiff argued that his employer could not require him to do weekend work, where that requirement was not in the original job description. The court rejected this argument and affirmed judgment in favor of the employer. The court ruled that the plaintiff’s offer to work on Sunday only did not require a different result because the other workers were required to work both weekend days.

LACK OF COMPARATIVES PREVENTS A DISABILITY CLAIM

In Bunn v. Khoury Enterprises, Inc., No. 13-2292, May 28, 2014, 7th Circuit, the plaintiff filed an ADA action alleging that the employer failed to reasonably accommodate the plaintiff’s visual disability and also subjected the plaintiff to disparate treatment by suspending him and reducing his hours. The employer had offered an accommodation, which restructured the plaintiff’s job to require that he perform only those tasks in the ice cream store that he could perform with his impairment. The court found this was a reasonable accommodation. The court held that even though the plaintiff asked for a different accommodation the employer’s actual job restructuring provided the plaintiff with an equal employment opportunity. Further, the plaintiff failed to prove his bare allegation that a co-worker received more favorable treatment with respect to discipline or reduction in hours. The plaintiff also failed to present evidence that the employer’s explanation that
the reduction in hours was based on loss of customer traffic during winter season was not worthy of belief.

EMPLOYER’S FALSE REASON FOR NOT HIRING AN AFRICAN AMERICAN SUPPORTS THE APPLICANT’S RACE CLAIM

In Whitfield v. International Truck and Engine Corp., No. 13-1876, June 6, 2014, 7th Circuit, the plaintiff filed a Title VII action alleging that the employer failed to hire the plaintiff for an electrician position on account of his African-American race. The facts were that the term “black” was contained on the cover sheet of the plaintiff’s personnel file. Also, there was extensive evidence of a racially hostile work environment. Even though the employer had hired one African-American electrician near the time of the plaintiff’s application, this did not stop the plaintiff’s claim. This was because the one African-American electrician hired, who had extensive experience, was finally hired after her application had been pending for two years. Further, eleven white electricians had been hired during the same period and the applicant that was hired was the first African-American electrician that the employer had hired in decades. Finally, there was no race-neutral reason for the employer’s failure to hire the plaintiff because the employer’s argument that it wanted electricians with a certain type of experience was not supported where the evidence showed that certain white electricians were hired without such experience.

TWO RACIALLY DEROGATORY COMMENTS DID NOT CREATE A HOSTILE ENVIRONMENT

In Boyer-Liberto v. Fontainebleau Corp., 2014 WL 1891209 (4th Cir. 2014), a co-worker used the term “porch monkey” twice in a period of two days in discussing with an African-American hotel employee a single incident. The court held this was not so severe or pervasive as to change the terms and condition of the plaintiff’s employment. Therefore, it did not amount to a racially hostile work environment under Title VII or 42 USC Section 1981. The court found that while the co-worker’s statements to the employee were racially derogatory and highly offensive, they were singular and isolated.

EMPLOYER’S LACK OF KNOWLEDGE OF A DISABILITY STOPS AN ADA ACTION

In Jackson v. City of Hot Springs, 2014 WL 1876129 (8th Cir. 2014), an employee who was not rehired after he was certified as being able to return to work did not present sufficient evidence that he suffered an adverse employment action as the result of a defined disability. This was because at the time the city refused to rehire the employee, he no longer had pancreatitis, no longer was hospitalized, and no longer had drains in him. The employee’s only remaining ailments were neuropathy in his feet, his hernia and his alleged weakness. Most importantly, the court found that even assuming that those qualified as disabilities, the employee introduced no evidence that the city knew about them.