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Weekly Employment Brief

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Company's Decision to Eliminate 'Deadwood' Insufficient to Prove 60-Year Old Executive's Age Discrimination Case

The Ninth Circuit Court of Appeals has held that a 60-year-old executive, discharged after his company made a commitment to eliminate 'deadwood,' did not have a claim under the Age Discrimination in Employment Act ('ADEA'). In *Pottenger v. Potlatch Corp.,* Charles Pottenger joined Potlatch in 1968, eventually becoming a Group Vice President. Between 1997 and 2000, Pottenger's division lost over $200 million. In January 1999, Potlatch's president decided the Company needed to make significant changes to improve its performance, referring to Pottenger and his team as an 'old management team' using an 'old business model.' In February 2000, Pottenger received a below average performance evaluation. In March 2000, Potlatch's management committee, which included Pottenger, met to discuss cost-cutting strategies and agreed to eliminate 'deadwood.' The company's president and CEO ultimately decided that Pottenger was not capable of bringing about real and significant change in the division's operation. Pottenger was terminated and was replaced by a 43 year old executive. Pottenger sued, claiming age discrimination under the ADEA and other Idaho state law claims. The district court granted Potlatch's motion for summary judgment, because Pottenger could not show that the Company's legitimate, nondiscriminatory reason for discharging him-a lack of confidence in his performance abilities-was a pretext for age discrimination. The Ninth Circuit (which also covers California) affirmed, finding that the 'deadwood' and 'old management team' remarks did not sufficiently support an inference of age discrimination. The court recognized that, although perhaps unfair and unwise for Potlatch to blame Pottenger for the Division's losses, the company has 'leeway to make subjective business decisions, even bad ones,' so long as they are not discriminatory.

Blondes May Have More Fun, But They Are Not A Protected Group Under Title VII

A Pennsylvania federal court has ruled that a white, Jewish, blonde woman from Moldavia who claimed she was harassed because of her gender, race, religion and national origin failed to establish a hostile work environment claim even though her employer's comments and questions were 'unprofessional and in poor taste.' In *Shramban v. Aetna,* Brigitte Shramban alleged her manager made discriminatory comments regarding 'the only way to tell a natural blond,' and 'what people say about blonds.' The manager also allegedly asked personal questions about her boyfriend, commented on her 'Moldavian way,' and mimicked her accent. The court granted Aetna's motion for summary judgment, finding that even though the manager's actions may have constituted immature taunting and teasing, they were insufficient to support a finding that the harassment was motivated by gender, race, religion or national origin. As for the manager's comments about Shramban's blonde hair, the court noted that 'being blonde is not a protected group under Title VII.' The court also found that the comments in this case, which spanned over a year, 'were neither severe nor sufficiently continuous, concerted or prolonged to alter conditions of employment.' According to the court, Shramban was simply a 'hypersensitive employee,' whereas a reasonable person in a similar position would not have found the alleged comments objectively hostile. Lastly, the court found that Aetna properly responded to her complaints by taking investigatory actions and transferring her to another facility without demoting her or substantially altering her job duties. Although the employer prevailed in this case, it did so only after incurring the costs of litigation and a summary judgment motion. More effort to eliminate unprofessional behavior from the workplace might have helped this employer avoid costly litigation.

New California Law Extends Labor Law Protections to Illegal Immigrants

Last spring, the United States Supreme Court held in *Hoffman Plastic Compounds, Inc. v. NLRB,* that an illegal alien was not entitled to backpay under the National Labor Relations Act, because such an award 'trivializes the immigration laws' and 'condones and encourages future violations' (reported in the April 8, 2002 edition of the **W.E.B. Update**). Concerned about the potential far reaching effect of this decision, California recently passed a law that provides illegal aliens all rights and remedies available under state labor, employment and civil rights laws, except for any reinstatement remedy prohibited by federal law. Effective since January 1, 2003, section 3339 of the Civil Code also provides that a person's immigration status is irrelevant to the issue of liability in proceedings to enforce such state laws. The law also provides illegal aliens heightened protection from the discovery of their immigration status, barring such inquiries absent a showing of clear and convincing evidence that the discovery is necessary to comply with federal immigration law. The new law directly authorizes the award of backpay to illegal aliens and may yet be challenged as unconstitutional for conflicting with federal immigration law and policy.

Anti Retaliation Bill Passes California Assembly

The California Assembly recently passed a new bill, AB 274, which would create a rebuttable presumption that an employer's adverse action was retaliatory if taken within 90 days of being questioned about an illegal labor practice. The bill, which is now before the Senate, would permit employees to file a complaint with the state labor commissioner or pursue a private right of action against the employer. Although the bill would not apply if an employee falsifies a claim to forestall an adverse employment action, opponents of the bill argue that it will make it easier for employees to avoid disciplinary actions by making false claims.

Did You Know?

According to a recent study, more city and county governments enacted laws in 2002 prohibiting employment discrimination based on sexual orientation than in any previous year. Fifteen more local jurisdictions passed such laws, bringing the nationwide total to 119 cities and 23 counties.