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Court Does Not Find Hostile Work Environment at New York Metropolitan Opera

Office behavior that is offensive to everyone may not create a hostile work environment. In a recent decision, *Brennan v. Metropolitan Opera Association, Inc.*, the New York State Appeals Court found that a stage manager at the Metropolitan Opera could not prove that her work environment was hostile to heterosexuals. The employee, Martha Brennan, argued that she was subjected to a hostile work environment because other employees posted pictures of men in various stages of undress on a bulletin board in a common office space. The Court rejected Brennan's arguments that these pictures created a hostile work environment based on her sexual orientation, finding that no reasonable jury would believe the photographs were offensive to heterosexuals just because they were heterosexuals. This decision demonstrates that offensiveness alone may not be enough to prove a hostile environment if the behavior is offensive to both men and women, heterosexual and gay. However, a more appropriate employer response in such a situation may be to prohibit (and remove) such photographs as unprofessional in a business environment.

Employee Who Delays Reporting Sexual Harassment Can't Hold Employer Liable

Both "predators" and "interested men" can be harassers under Federal sexual harassment laws. In *Matvia v. Bald Head Island Management, Inc.*, a Federal appellate court recently decided that a woman who delayed reporting her supervisor's sexual advances could not hold her employer liable for sexual harassment. The Court rejected the employee's argument that the company's sexual harassment policy was difficult to understand and remember. Since she did not take advantage of the company's sexual harassment policy, her employer could not be liable for the supervisor's conduct. The employee also said that she waited to report the sexual advances until she could decide whether her supervisor was a "predator" or merely an "interested man." The Court found that these labels were irrelevant, if the behavior is unwanted and so severe or pervasive that it alters the employee's conditions of employment. This decision demonstrates the importance of having an effective sexual harassment policy in place—one that directs employees to follow certain steps to report harassment immediately—to limit or avoid liability for sexual harassment.

San Francisco Enjoined from Enforcing Union Card Check Rule at Airport

Labor unions can't get around Federal union election laws. In *Aeroground, Inc. v. City and County of San Francisco*, a Federal court recently granted an injunction against the City and County of San Francisco, preventing them from enforcing a card-check union-representation rule at the San Francisco Airport (SFO). The card-check rule requires employers at the airport to enter into a labor agreement with a union under the threat of not being able to do business at the airport if it refuses. The rule has allowed unions at the airport to organize nearly 2,000 workers at SFO without going through a National Labor Relations Board election. In this case, Aeroground, one of the employers at SFO, asked for an exemption to the card-check rule and was denied its request. The company filed a petition with the federal court,

and the court agreed with Aeroground that the card-check rule likely interferes with substantive rights and requirements established by the National Labor Relations Act. Based on this temporary injunction, it seems likely that the Federal court will find card-check rules to be preempted by Federal labor relations laws.

Employer's Honest Belief that Employee Abandoned Job Is Defense Under FMLA

An employer's honest belief is a valid defense under the Family and Medical Leave Act (FMLA). In *Medley v. Polk Co.*, a Federal appellate court recently found that the employer did not violate the FMLA by firing an employee who took leave after her father had a heart attack because it had a good faith belief that she abandoned her job. In this case, the Court found that the employee did not comply with the Act's requirement of providing a note from her father's doctor showing the need to care for her father, and she was unreachable for the eleven days after she left work. She also missed a meeting with her supervisor to discuss her "future" with the company. The Court ruled that an employer who discharges an employee honestly believing that the employee has abandoned her job and is otherwise not using FMLA leave is not in violation of the Act. Because the employer is not firing the employee based on discrimination, it cannot be liable under the FMLA. This decision demonstrates that an employee who does not follow the procedures outlined in the FMLA after the employer's reasonable attempts to obtain such compliance may not receive protections under the Act.

Inability to Type Not a Disability

An employee may be disabled under California law, but not under Federal law. In a recent decision, *Thornton v. McClatchy Newspapers*, a Federal court in California ruled that a newspaper reporter who was unable to type did not have a disability. Although a repetitive stress injury left Jacalyn Thornton unable to type, the court found that she was not limited in her ability to work or perform manual labor. Specifically, she could still perform a variety of other tasks besides typing, including grocery shopping, driving, making beds, and doing laundry. The court also found that the employer's effort to accommodate Ms. Thornton was not evidence that she was disabled. Although the court found that Thornton was not disabled under federal law, she will still be able to proceed with her claims under the California Fair Employment and Housing Act. This decision may demonstrate the differences between the Federal "substantial limitation" requirement and California law's new "limitation" standard.

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