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Employers Cannot Transfer A Whistleblower To Prevent Conflicts With Other Workers

An employer's desire to prevent conflict between a whistleblower and other employees who were upset about the whistleblowing provides no defense to a retaliation suit, according to the Pennsylvania Supreme Court. In *O'Rourke v. Commonwealth of Pennsylvania Department of Corrections,* a prison employee uncovered and reported a meat-stealing ring at the prison kitchen. Following his report to prison officials, he was harassed by other prison workers and some prison inmates. To avoid any continued harassment, the prison transferred the whistleblower—to a less-desirable job. The whistleblower filed suit, claiming harassment and retaliation. The prison claimed the transfer was not retaliatory, but instead was designed solely to avoid conflict at the prison. Under Pennsylvania law, an employer has a defense to a whistleblower suit if it can show that its actions against the whistleblower "occurred for separate and legitimate reasons." The Court found that under the circumstances, the reasons for the employer's actions could not be considered "separate" from the report of misconduct. The Court reinstated the whistleblower's case, holding that he was "entitled to compensation" for the prison's actions.

Manager Who Cooks And Waits Tables Equals Non-Exempt Employee, Big Overtime Bill For Waffle House Owner

In yet another example of the rule that the content of an employee's duties, not the job title, governs exempt/non-exempt classification, a federal district court in Tennessee ordered the owner of several Waffle House franchises to pay 125 current and former managers $2.9 million in overtime pay. In *Cowan v. Treetop Enterprises,* the franchise owner argued that the managers were exempt executive employees. However, the plaintiff managers were often required to operate the grill and wait tables during their shifts. In fact, the plaintiffs were able to Waffle House's own manager training manual against the company. The manual states that a manager's "primary objective" is to become a "proficient grill operator." Gaining exposure to "daily management duties and responsibilities" was only a "second objective." In calculating the overtime pay, the court found that the managers worked on average 89 hours a week. Since the position called for the managers to work 10-hour days for six days followed by two days off, the court determined that they worked an average of 53 hours a week. The court then awarded time and a half pay for the 36.2 hours of overtime worked.

EEOC Intervention In Private Suits: Lowering The Bar For Class Certification

Defense lawyers have noticed a disturbing trend recently: an increase in the number of EEOC interventions in private discrimination suits. EEOC intervention can substantially benefit plaintiffs who are seeking to certify class action suits, because the EEOC enjoys more lenient class certification standards. Specifically, a smaller class of plaintiffs can be certified with EEOC intervention than would otherwise be possible under Rule 23's numerosity requirement. Defeating class certification can be critical to defendants, who face more pressure to

settle a case with more plaintiffs. Once the EEOC intervenes, however, class certification almost always follow. Moreover, plaintiffs will benefit from the EEOC's greater resources and ability to track potential patterns of discrimination at a company. But despite these benefits, not every plaintiff's attorney is rushing to seek EEOC intervention. Because the EEOC intervenes in cases on behalf of the United States and in the public interest, the agency's goals may not necessarily align with those of the private litigants. For example, the EEOC may be more willing to settle a case, and might use different tactics to arrive at settlement. Overall, however, EEOC intervention generally enhances a plaintiff's suit.

Private Entities May Prohibit Solicitation Despite California Constitution

The California Supreme Court recently ruled that the free speech provision of the California Constitution does not prohibit private restrictions on speech. The case, *Golden Gateway Center v. Golden Gateway Tenants Association,* in which a private apartment complex banned the unsolicited distribution of informational pamphlets, has implications for private employers as well. As a result of the ruling, people cannot use the California Constitution to challenge a private company's decision to prohibit leafleting in areas of the company's premises that are not freely and openly accessible to the public. Nonetheless, employers should be aware that blanket prohibitions on leafleting could run afoul of Federal labor laws, such as the NLRA, which protect individuals' rights to solicit and distribute materials concerning union organization and activities.

No Retaliation Claim For Jewish Manager Based On Complaints About Company's Voluntary Prayer Service, But Religious Discrimination Claim Survives

A Jewish manager at a car dealership who was fired soon after he complained about voluntary prayer sessions at the dealership could not maintain a retaliation claim, according to a federal district court in Minnesota. The court in *Chemers v. Minar Ford Inc.* noted that the prayer sessions were not illegal, and were in fact constitutionally protected, so the manager's complaints could not constitute a protected activity under Title VII or Minnesota law. However, the comments of the dealership owner—a devout Christian — that he "wanted everyone in this organization to be a Christian," supported the manager's religious discrimination case. The manager's excellent performance record with no written evidence of problems led the court to find a triable issue on whether the stated reason for the termination —poor performance—was a pretext for religious discrimination. However, the court found that the prayer sessions and the proselytizing did not rise "to the level of extreme, severe or abusive conduct" to support a claim of religious harassment.