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Weekly Employment Brief

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Backlash Discrimination After September 11 - World War II Revisited?

"Backlash Discrimination" has hit the workplace as a result of September 11, and it is definitely an issue employers need to be aware of. In a recent EEOC hearing, Arab, Muslim, and Sikh organizations discussed workplace problems their members have faced since September 11. According to EEOC Chair Cari Dominguez, "we have received many reports of employment discrimination . . . against people who are, or are perceived to be, Arab, Muslim, Sikh, Middle Eastern, or South Asian." Ms. Dominguez emphasized the need to encourage hesitant victims to file discrimination charges and to "caution employers not to take their cues from those who view people as members of groups rather than as individuals." In another sign that the EEOC is taking backlash discrimination very seriously, EEOC Vice Chair Paul Igasaki compared the discriminatory reaction to Sept. 11 to the aftermath of the 1941 attack on Pearl Harbor in which Japanese Americans were sent to internment camps simply because of their ancestry. Igasaki said that the commission would respond to reports of such workplace discrimination as "a high priority." Employers are therefore well advised to be vigilant to this sort of discriminatory activity and to take firm, swift action when it occurs.

Hiring Illegal Alien Janitors = Behavior Worthy Of John Gotti

Convincing the U.S. Court of Appeals that your business competitor is guilty of mob boss behavior is not an easy thing, but Commercial Cleaning Services has gotten past the first step. When the janitorial services contractor allegedly lost business to Colin Services due to its illegal alien hiring scheme, it brought suit against Colin under the Racketeer Influenced and Corrupt Organizations Act. Better known as "RICO," this enormously powerful statute is a best friend of federal prosecutors for use against organized crime and drug rings, and has put such notables as John Gotti and Sammy "the Bull" Gravano behind bars. The lower court dismissed the suit for failure to state a claim. The Court of Appeals, however, noted that the "civilian" version of RICO is applicable if the plaintiff can show a "direct relation" between the injury asserted and the injurious conduct alleged. In this case, Commercial could claim direct injury proximately caused by Colin's illegal hiring practices. Employers who are uncertain about the legality of their workers need to be extra cautious, for if this suit is successful based on RICO grounds, your competitors may soon have a very dangerous weapon at their fingertips!

Deafness Not A Complete Bar To Employment As A UPS Driver

UPS may need to accommodate a deaf employee by letting her drive trucks. In *Morton v. United Parcel Service*, the Ninth Circuit Court of Appeals held that Jana Morton, a deaf UPS employee, could go to trial on her claim that the shipping company's complete bar against deaf drivers discriminates against her under the Americans with Disabilities Act (ADA). Morton wanted to drive trucks in part because that is the surest route for career advancement at UPS. The court stated that it is not necessarily an undue hardship or a safety risk for UPS to accommodate Morton by letting her drive trucks weighing less than 10,000 pounds, even though she is barred by federal

law from operating those that are larger than that. UPS policy requires all potential drivers to be qualified for driving the larger trucks, regardless of the truck they eventually use. As such, this case serves as an important reminder to employers that they need to engage in an "interactive process" with their disabled employee to come up with an appropriate reasonable accommodation.

How Much Is Enough?

It is often difficult to determine just how much employers have to do when faced with co-worker sexual harassment claims. The Ninth Circuit Court of Appeals helped clear these muddy waters a bit when it held that an employer's prompt investigation and subsequent separation of workers in a co-worker sexual harassment may be an "appropriate response" in certain situations. In *Swenson v. Potter*, Melody Swenson was a mail-sorter in the United States Postal Service who was repeatedly harassed and "hit on" by co-worker Philip Feiner for several months. However, she did not notify her superiors until after Feiner physically grabbed her hand. Within 3 days the company took immediate action by first strongly reprimanding Feiner for his conduct, temporarily separating the two employees, and then launching an investigation. After the investigation, the two were permanently separated and contact between them was severely limited. The court looked at the "overall picture" and determined that the Postal Service's overall actions were adequate. Although an employer needs to look at each instance of sexual harassment independently, this case affirms the notion that your best defense to a sexual harassment suit is an immediate and balanced response.

Labor Unions - The New Comeback Kid

Labor unions, derided by some during the Internet boom years as derelict anachronisms of a bygone era, are making a comeback - and none so prominently as the biggest and most influential of them all, the AFL-CIO. In response to what he claims is the most "anti-worker administration we've seen in years," AFL-CIO President John J. Sweeney announced a "substantial escalation" of its current political program at the labor union's annual convention, this year held in Las Vegas. The expanded program centers on training union candidates for public office, and then organizing strongly to get them elected. To help members running for office, the union is establishing a new political action committee fund dedicated to providing resources for campaigns. Other goals for the upcoming year include a strong "get out the vote" effort, recruiting new members, and organizing local workplaces. With the downturn in the economy and unemployment on the rise, one can expect even more aggressive union activity, both in politics and in the future.