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Weekly Employment Brief

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Influential Subordinate Can Be "Decisionmaker" in Discrimination Case

A federal appellate court has held that a company may be liable for unlawful discrimination even if the decisionmaker was unbiased, but a biased subordinate has a substantial influence on the employment decision. In *Hill v. Lockheed Martin Logistics Management, Inc.,* Ethel Hill, a 57- year-old sheet metal mechanic, claimed Lockheed terminated her because of her sex and age and in retaliation for her complaints of discrimination. Hill claimed that Edward Fultz, a Lockheed safety inspector, made derogatory comments about Hill's sex and age, including referring to her as a "useless old lady" and "a damn woman" and saying Hill was "useless and they needed to retire her." Hill complained about this conduct to her supervisor but was told to ignore it. Subsequently, Fultz was involved in initiating disciplinary action against Hill. The managers who made the formal termination decision relied on both Hill's disciplinary record and information obtained from fellow employees, and Fultz in particular. The district court granted Lockheed's motion for summary judgment, refusing to consider Fultz's biased statements and conduct because Fultz was not a "decisionmaker." Hill appealed and argued that Fultz's discriminatory animus was relevant because he had a substantial influence on the employment decision. The Fourth Circuit Court of Appeals (which encompasses Maryland, North Carolina, South Carolina, Virginia, and West Virginia), agreed and found that Lockheed based its decision to terminate Hill almost exclusively on reprimands initiated by Fultz and on Fultz's comments about Hill. While noting that an employer could "cleanse" the termination decision of bias through an independent investigation, the court found that Lockheed never even questioned Hill about the reprimands underlying the termination. Because many of the reprimands occurred after Hill had complained of Fultz's discriminatory conduct, the court reversed summary judgment and ruled and that a reasonable fact finder could determine the discipline arose from Fultz's anger about the complaints rather than from a fair evaluation of Hill's work. California employers should pay careful attention to this case because the Ninth Circuit Court of Appeals (which covers California) also imposes liability when the discriminatory animus of subordinates substantially influences employment decisions. This decision highlights the importance of conducting independent investigations to eliminate the impact that co-workers' discriminatory animus may have on employment decisions.

Plan Exclusion of Surgical Infertility Procedures Held Gender-Neutral

A federal appellate court rejected an employee's claim that her company's health plan's exclusion of surgical infertility procedures, which were performed solely on women, violated anti-discrimination laws. In *Saks v. Franklin Covey Co.,* Rochelle Saks sought reimbursement for various infertility treatments, including in vitro fertilization and intrauterine inseminations. The health plan denied reimbursement based on an exclusion in the plan for surgical infertility treatments. Saks sued her employer for sex discrimination in violation of Title VII and pregnancy discrimination in violation of the Pregnancy Discrimination Act ("PDA"). Saks claimed the company's health plan benefits for infertility were inferior to the benefits for non-pregnancy-related illness, and the plan provided incomplete coverage for treatments to address female infertility while providing complete coverage for the treatment of male infertility. The Second Circuit Court of Appeals (which encompasses New York, Connecticut and Vermont) affirmed the trial court's grant of summary judgment in favor of the employer. The court found that the PDA's prohibition of discrimination based on "pregnancy, childbirth and other related medical conditions" covers only conditions that are unique to women, whereas infertility is a medical condition that "afflicts men and women with equal frequency." As to the sex discrimination claim, the court found that although the surgical impregnation procedures at issue would only be performed on women, the procedures were used to treat both male and female infertility. Thus, exclusion of the treatment was gender neutral and did not discriminate based on sex.

Ninth Circuit Provides Guidance in Adjusting Pay Inequities

The Ninth Circuit Court of Appeals has provided needed guidance in the areas of remedying pay inequities and the evidence on which employers may rely in making such decisions. In *Rudebusch v. Hughes,* a group of professors at Northern Arizona University sued the university and its former president, Eugene Hughes, based on Hughes' decision to increase the salaries of certain female and minority male professors. The court applied a "manifest imbalance" test to the pay adjustments. While previously reserved for affirmative action plans, which give preference to women and minorities over other employees and applicants, this test requires that a manifest imbalance exist between those whose pay is adjusted and those whose pay is not adjusted, and that the adjustment plan not "unnecessarily trammel" rights of employees who do not receive a pay adjustment. In this case, the court ruled that no "unnecessary trammeling" occurred because, unlike a promotion situation, wherein competition for a finite number of positions means that favorable treatment of one necessarily adversely affects another, here there would have been no opportunity or funds available for any pay adjustments had the University not decided to address the pay imbalance. Therefore, the plaintiff professors were not denied anything to which they were ever entitled. The court remanded the case back to the district court, however, to determine whether the University's adjustments may have improperly gone beyond just attaining a balance. In its decision, the court recognized the value of regression analysis, which is a statistical application that can be used to analyze compensation disparities and predict how salary should vary with rank based on years of service, discipline, and the other attributes. However, the court emphasized the need to evaluate the surrounding facts and circumstances, even

with statistical evidence.

DID YOU KNOW?

The Equal Employment Opportunity Commission resolved a record number of 95,222 charges in its 2002 fiscal year, up from 90,100 charges the year before.