FENWICK & WEST LLP

Weekly Employment Brief

February 17, 2003

Allen Kato	Contributor	415.875.2464
Trey Wichmann	Co-Editor	650.335.7813
Shawna Swanson	Co-Editor	415.875.2487

Supervisor's Single Racial Slur Sufficient To Require Jury Trial of Race Harassment Case

The California Court of Appeal has concluded that one racial slur is enough to allow a race harassment case to go to a jury trial. In *Dee v. Vintage Petroleum, Inc.,* Glenda Dee was a production clerk who complained that her supervisor asked her to "make up stories" about his whereabouts, asked her on another occasion to secretly take a document from another supervisor's desk, and repeatedly insulted her and used profanity in her presence. When Dee told her supervisor that she felt uncomfortable lying for him, the supervisor said he never asked her to lie. When Dee noted that his request to "make up stories" was the same as telling a lie, the supervisor allegedly responded that this was her "Filipino understanding versus mine." Vintage Petroleum argued that this isolated racial comment was insufficient to support a claim of a hostile working environment on the basis of race, which requires harassment that is "sufficiently severe or pervasive to alter the conditions of employment." Although the trial court agreed and granted the employer's motion for summary judgment, the appellate court reversed that decision. The court ruled that a reasonable jury could determine that the supervisor's use of the racial slur explained his motivation for his other abusive conduct and remanded the matter for trial. This case underscores the importance of ridding the workplace of all racially-charged language by adopting and distributing strong, consistently-enforced anti-harassment policies and by conducting anti-harassment training.

Employee Terminated For Slapping A Groping Client Wins Retaliation Suit

A federal district court in Iowa has found an employer liable for retaliation for discharging an employee who slapped a mentally-disabled client who grabbed her breast. In *Van Horn v. Specialized Support Services Inc.,* Betty Van Horn worked in a group home for mentally-disabled clients. A resident-client, "KB," became infatuated with Van Horn and began to express his affection for her and to touch her on several occasions. As KB's inappropriate behavior progressed, Van Horn repeatedly complained to Specialized Support Services' management, but they took no action to address and remedy KB's behavior. On the final occasion, KB grabbed Van Horn's breast and, according to Van Horn, she "instinctively" slapped him. Specialized Support Services discharged Van Horn for violating its "no tolerance" policy prohibiting physical abuse of clients. Van Horn filed suit alleging sexual harassment and retaliation. The court rejected the claim of harassment, concluding KB's actions did not give rise to a "severe or pervasive" hostile work environment. As reported in an earlier edition of the W.E.B., the California Supreme Court is set to decide, in *Salazar v. Diversified Paratransit,* whether sexual harassment by a client, even if severe or pervasive, violates California's Fair Employment and Housing Act. However, the Iowa district court in this case concluded the employer "retaliated" against Van Horn by discharging her after she "opposed" the harassing conduct by slapping the client. Although the court recognized that self-defense normally is not a reasonable method of opposing workplace harassment, it ruled that Van Horn acted reasonably in this case, given the physical nature of the harassment and Specialized Support Services' failure to prevent further harassment by the client following Van Horn's complaints. The court awarded Van Horn more than $80,000 in damages, including $20,000 in punitive damages. Significantly, had Specialized Support Services acted in some manner following the initial complaint to prevent further harassment from occurring, this case may have turned out differently.

Employer's Failure to Place Employee in Position with More Prestigious Job Title, Without More, Cannot Support Discrimination Claim

A federal appellate court has ruled that an employer's refusal to transfer an employee to a job with a loftier title cannot be the basis for a discrimination claim. In *Grayson v. City of Chicago,* Mickey Grayson, an African-American employee who worked as a "Sub-foreman of Carpenters" for Chicago's Department of Transportation, applied for three open "Foreman of Carpenters" positions with the City. When the City filled the positions with three younger, white candidates, Grayson sued for race and age discrimination. The trial court granted the City's motion for summary judgment, because the "Foreman" job Grayson sought was "identical in all but title" to the "Sub-foreman" position he already held, including responsibilities, salary and benefits. The Seventh Circuit Court of Appeals (which encompasses Illinois, Indian and Wisconsin) upheld the ruling, finding that the City's failure to place Grayson in the Foreman position was not a "materially adverse employment action" as required to support a discrimination claim. The court observed, however, that the failure to promote an employee to a position with a more prestigious job title may be actionable in other situations where, for example, the difference in title could affect future job promotion opportunities.

Ninth Circuit To Reconsider Key Employment Arbitration Ruling

The federal Ninth Circuit Court of Appeals will reconsider an earlier ruling that a San Diego law firm did not violate federal discrimination laws when it rescinded a job offer to a legal secretary, Donald Lagatree, because he refused to sign an arbitration agreement. Pending a ruling in the case, *EEOC v. Luce Forward Hamilton & Scripps,* it is uncertain whether employers in states covered by the Ninth Circuit (including California) may require employees to arbitrate federal discrimination claims. The California Supreme Court has already ruled that employees may be required to arbitrate state-law discrimination claims.

DID YOU KNOW??

According to the Bureau of Labor Statistics, productivity among nonfarm businesses grew a record 4.7% in 2002, despite increased unemployment.