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Weekly Employment Brief

September 3, 2002

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Employee's Request for "Family" Leave Insufficient to Trigger FMLA Protections

In *McCarron v. British Telecom,* a Pennsylvania federal district court recently gave helpful guidance regarding what triggers an employer's FMLA obligations. The Family and Medical Leave Act requires the employee to provide sufficient information to enable the employer to determine whether the leave qualifies under the FMLA, and also requires the employer to obtain this information from the employee. In McCarron, the court harmonizes these duties. Following the employee's vague request for leave to attend to "family" issues, the employer attempted to contact the plaintiff at home to gather details. The employee refused to cooperate, did not return to work, and the employer terminated his employment. The court held that the FMLA did not protect the employee for two reasons. First, he failed to provide sufficient information to determine whether the leave was FMLA-qualified. Second, the employer satisfied its duty to attempt to determine whether the FMLA applied. This decision reinforces the notion that, while there are no "magic words" necessary to request an FMLA-protected leave, employees must provide their employers with sufficient information for them to determine whether it qualifies under the statute. An employee's refusal to cooperate in this regard serves as a defense for employers who then refuse to treat the leave as FMLA-protected. However, the burden is on the employer to attempt to obtain information from the employee in order to determine whether the FMLA applies.

Inappropriate Sexual Comments and Gestures Are Not Hostile Work Environment

In *Duncan v. General Motors Corp.,* the Eighth Circuit Court of Appeals held that an employee failed to establish that a former supervisor's allegedly inappropriate statements and gestures created a hostile environment. According to plaintiff, a supervisor displayed sexually charged items in his office (including a computer screensaver with a naked woman, and a sexually suggestive plant). The supervisor also jokingly portrayed the employee as a member of a fictitious "man-haters club" (purportedly because she refused to go on a date with him). The court concluded that the supervisor's actions "were boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment." This decision emphasizes that a plaintiff must do more than merely establish that improper sexual behavior occurred in the workplace to prove a hostile work environment. Rather, a plaintiff must establish that such behavior was severe enough to alter a term, condition or privilege of employment.

Performance Counseling and Documentation of Performance Problems Are Key to Successful Defense of Age Discrimination Claim

In *Wallace v. O.C. Tanner Recognition Co.,* the First Circuit Court of Appeals affirmed dismissal of an employee's age discrimination claim, because the plaintiff's performance problems constituted a legitimate, nondiscriminatory basis for his termination. Tanner terminated plaintiff after twenty years of service based on weak production as a salesperson. The employee alleged that Tanner terminated him because of his age. To establish discriminatory animus, he directed the court to statements by his supervisors a few years prior to the termination where they asked him about his retirement plans. One month prior to the termination, however, the supervisor documented eight concerns about plaintiff's performance. Thereafter, in multiple counseling sessions, the supervisors addressed the unsatisfactory performance and gave plaintiff an opportunity to correct his performance problems. However, one month later, the employee's sales production remained stagnant, and he appeared disinterested in his job, all of which Tanner documented and relied on to terminate the plaintiff. Regarding the "retirement" questions, the court found they were "brief, stray remarks unrelated to the termination decision or process." This decision reinforces the notion that performance-based terminations of employees in protected classes should be supported by thorough documentation of the performance problems and/or counseling sessions.

NASA Settles Failure To Promote Discrimination Class Action For $3.7 Million

The EEOC and NASA recently settled a class action complaint of race discrimination brought by an African-American engineer on behalf of other similar situated employees at NASA. Following a nearly five year period during which NASA and the EEOC sparred over whether and to what extent a class should be certified, the federal agency that oversaw the dispute certified the class. Soon after, the parties settled the matter for $3.7 million. As part of the settlement, NASA agreed to award a minimum of 22 future promotions to class members. NASA further agreed to work with an independent expert at its own expense to make revisions to its performance management system. This settlement confirms that class-action race discrimination claims continue to be a prominent concern for employers at all levels, and in both the public and private sector.