



Title VII Allows Claims of Sexual Harassment Motivated by Sexual Orientation

The Ninth Circuit Court of Appeals has ruled that an employee subjected to severe, pervasive, and unwelcome physical conduct of a sexual nature in the workplace may assert a claim under Title VII, including situations where the employee alleges that the motivation for the harassment was his sexual orientation. The court determined that whether the harasser is motivated by hostility based on sexual orientation is irrelevant so long as the harassment was because of sex. In *Rene v. MGM Grand Hotel, Inc.*, the plaintiff was employed at a Las Vegas casino. He alleged that he was subjected to unwanted sexual touching, crude jokes, name calling, and whistling, by several of his male co-workers and supervisor. This case expands the Ninth Circuit's interpretation of federal Title VII to prohibit discrimination based on sexual orientation. California, and some other states, already have statutes that expressly prohibit discrimination or harassment on account of sexual orientation.

Court Upholds Jury Verdict that Company Discriminated Against Disabled Employee during a Reorganization

In *Wennik v. PolyGram Group Distribution Inc.*, a branch manager who suffered from depression and anxiety disorder and who previously had taken a leave of absence, sued when he was turned down for another position within the company after a company-wide reorganization. Out of eight eligible managers, he was the only one who was not "slotted" for a new position and was instead required to apply and interview. The company argued that it did not discriminate based on the plaintiff's disabilities, because it had kept the plaintiff's job open until he returned from leave, gave him time off to get well, granted his requested accommodations when he returned to work, and encouraged him to interview for the new position. However, the jury heard testimony that the interviewer believed that the plaintiff may have been on a "blackball" list. The jury also heard evidence that while the plaintiff had excelled in his former position and was acknowledged by the interviewer as having far more experience than the candidate ultimately hired, he was the only eligible manager not "slotted" for a position. The jury, however, did reject the plaintiff's age claim and the federal appellate court determined that the interviewer's statement, "when I get over 55, there's no way you'll find me in this business" did not present direct evidence of age discrimination. This case highlights the importance of implementing reorganizations and layoffs in a nondiscriminatory fashion, and in ensuring that interviewers and hiring managers are properly trained to make lawful hiring decisions.

Are Employees "Regarded as Disabled" Entitled to an Accommodation?

In the 3rd U.S. Circuit Court of Appeals, that question will go unanswered for now. In *Buskirk v. Apollo Metals*, the federal appellate court found it unnecessary to decide whether a plaintiff who claims he

was regarded as disabled has the right to sue over the denial of a reasonable accommodation. While several federal circuit courts of appeal, as well as the lower court in this case, have decided that such "regarded as" employees are not entitled to reasonable accommodations, the issue still appears to remain open in California and in the Ninth Circuit (although a couple of California District Courts have held against such a requirement to accommodate "regarded as" cases). The *Buskirk* court determined that whether or not the company was required to provide a reasonable accommodation, it did so. The plaintiff was hired as a laborer and suffered a work-related injury that left him unable to perform his job. While admitting that he was not disabled under the ADA, the plaintiff claimed the employer regarded him as disabled when it terminated him and failed to accommodate him by considering him for several posts that became vacant. However, since the company reinstated the plaintiff after his termination and placed him in the first vacancy that arose in one of the less strenuous positions he requested, it had in fact accommodated him. Because the entitlements of "regarded as" employees still remain an open question, employers should generally consult with counsel prior to taking any adverse action against an employee requesting an accommodation.

Employee's Verbal Request for FMLA Leave Sufficient to Qualify for Leave and Job Protection

A U.S. District Court in Indiana allowed a parts manager for a car dealership to proceed with his Family and Medical Leave Act (FMLA) claim when he was fired after requesting leave for heart surgery. The employer in *Gerking v. Wabash Ford* claimed that it never considered the employee on FMLA leave, but on paid leave since he received substantially all of his salary during the leave and never signed the company's leave application. However, the employee had asked his supervisor whether he should request a "family leave" and the company representative who handled leaves told him that he did not need to sign the leave application. In allowing the employee to proceed with his FMLA claim, the court explained that all the employee must do is raise the possibility of an FMLA leave verbally and that the company, through its agent, can waive its own requirement of a signed application. The company also tried to justify its termination of the employee based on allegations that the employee sexually harassed another employee. While an employee on FMLA leave is not entitled to greater rights of employment than he would enjoy if he had been continuously at work, the employer was unable to show that it would have fired the employee if he had not been on FMLA leave since the company had not fired other employees for sexually inappropriate behavior in the past. This case illustrates that courts generally take a dim view of employers who erect barriers to employees' requesting and receiving FMLA leaves, and underlines the importance of adherence to company policies and procedures to ensure that all like situations are treated the same.