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Weekly Employment Brief

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Ongoing Sexual Banter Not Sexual Harassment Under Title VII

In an unusually pro-employer decision, the federal Fourth Circuit (which encompasses Maryland, North Carolina, South Carolina, Virginia, and West Virginia) recently overturned a $7 million dollar jury verdict, holding that the alleged harassment was neither "because of sex" nor "severe or pervasive." In *Ocheltree v. Scollon Prods.,* Lisa Ocheltree, an employee at a costume shop, alleged her male co-workers engaged in open conversations about sex, including comments about the sexual habits of other employees, and used profane language. Ocheltree also claimed her co-workers simulated sex acts on a mannequin, showed Ocheltree a sexually explicit picture, and sang a sexually-charged song. A jury returned a verdict for plaintiff in excess of $7 million. In reversing, the Fourth Circuit held that Ocheltree "would have been exposed to the same atmosphere had she been male." Moreover, the court underscored that only three incidents were directed toward Ocheltree — the vulgar song, the sexual picture, and the sex acts with the mannequin. The court found these incidents were not sufficiently severe or pervasive to violate Title VII. California employers should keep in mind that California law does not precisely parallel Title VII, and all employers should prohibit workplace conduct of the type described above, whether or not technically unlawful.

"At-Will" Employment "Sufficiently Contractual" to Support Federal Discrimination Suit

A federal district court has held that an at-will employee may sue his employer under 42 U.S.C. Section 1981 (commonly known as "Section 1981"), a federal discrimination statute that prohibits race discrimination in employment contracts. In *McClease v. R.R. Donnelley & Sons Co.,* Anthony McClease, an African-American temporary employee, claimed his employer promised him that he was eligible for full-time employment, then terminated him because of his race. The employer argued that McClease had no contract — and thus no contract claim — because he was an "at-will" temporary employee. The court rejected the argument, holding that Section 1981 covers "at-will" employees, regardless of the precise terms and conditions of the employment. Although Section 1981 claims are not as common as claims under Title VII or state anti-discrimination laws, employers should take note that this statute provides at-will temporary workers (including those employed through an outside agency) possible legal recourse for discrimination in the workplace.

DLSE Warns: Less Work Can't Mean Less Pay For Exempt Employees

In light of the recent and continuing slowdowns and layoffs, California employers should be aware that the California Department of Labor Standards Enforcement ("DLSE") has opined that employers who reduce exempt employees' salaries based on a corresponding reduction in hours risk losing the benefit of the exemption. In a March 12, 2002 opinion letter, the DLSE advised that "the plain language of the [federal] regulations precludes an employer from reducing the salary of an exempt employee during a period when a company operates a shortened workweek due to economic conditions." Under this opinion, an employer who reduces an exempt employee's pay by, for example, 20% and shortens the workweek from five to four days risks losing the exemption from overtime as to that employee. This opinion conflicts with the federal Department of Labor's interpretation of the same regulations. Fortunately, the California opinion letter does not prohibit an employer from reducing the salary of an exempt employee based on poor performance "so long as the exempt employee still receives at least the minimum salary required to sustain the exemption." California employers should be mindful of this conflict between federal and state law but should comply with the stricter state law.

Age Bias Award Enhanced to Cover Negative Tax Consequences

In apparently a first-of-its-kind decision, a federal district court recently awarded a plaintiff $33,124 to compensate him for the negative tax consequences of "receiving his backpay award in one lump sum rather than over time as if he had remained employed." In *Jordan v. CCH Inc.,* Robert Jordan began working for CCH in 1987, at age 48, and was very successful selling tax and legal publications. CCH hired a new, younger manager in 1995 and laid off Jordan. Jordan sued for age discrimination. The jury returned a verdict for over $300,000, but Jordan petitioned the court for additional damages to compensate him for the negative tax impact associated with the lump sum award. The court found the request consistent with the "make-whole" purposes of the ADEA and the concept of compensating a plaintiff "for the lost 'time value of money,'" often associated with prejudgment interest. Employers should be aware that violations of the ADEA, and potentially other statutes resulting in the award of backpay, may involve monetary risk beyond lost earnings.