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Successors

The D.C. Circuit held in S & F Market Health Care v NLRB that the NLRB misapplied its “perfectly clear” successor doctrine wherein a successor employer is bound by the terms of a predecessor’s collective bargaining agreement only when it is “perfectly clear” that the new employer intended to retain all of the predecessor’s bargaining unit employees without changing the terms and conditions of employment. In this case, when the successor acquired the predecessor it offered to bargain with the SEIU, which was the representative of the predecessor’s employees. The union filed an unfair labor practice contending that S & F was bound by the terms of the contract the union had with the predecessor company. The NLRB found that it was “perfectly clear” that S & F, in that it did not announce its intent to establish new working conditions when it took over control of the predecessor company and retained employees, had intended to be bound by the existing union contracts. The Circuit Court overturned the NLRB and held that the “perfectly clear” successor doctrine applies only to cases in which the successor employer had led the predecessor’s employees to believe that the terms of their employment would remain unchanged after accepting employment with the successor. In this case, the Court determined that “. . . no employee could have failed to know that significant changes were a foot . . .”

Reasonable Steps

The Seventh Circuit held in Porter v Erie Foods International, Inc that when an individual claims to have been harassed by a co-worker, he or she must show that the employer was negligent either in discovering or remedying the harassment. An employer can avoid liability for co-worker harassment if it takes prompt and appropriate remedial steps that are likely to prevent the harassment from recurring. In this case, a noose was found hanging in a work place and the court found that the action of the company when this was reported was sufficient to uphold the employer’s motion for summary judgment. When the sole African-American employee on the third shift reported seeing the noose, the employer promptly investigated and posted a reemphasis of its anti-discrimination policy and warned that violations of the policy would result in discharge and offered to transfer the complaining employee to a different shift, which she declined. The employee quit and filed a lawsuit.

Awards

A Federal jury in Colorado awarded a former employee of United Airlines \$3 million in damages after finding that the employer was guilty of retaliation after the employee filed a claim of sex discrimination. McInerney v United Airlines. The former employee became pregnant and requested a transfer to other duties because of complications that occurred during her pregnancy. When her request was denied, she filed a claim of discrimination with her employer. After approving FMLA leave and then sick leave, the employer denied her request for additional leave. When the employee failed to return from the originally approved leave, she was discharged. While the jury found that she failed to prove discrimination, the employee did prove retaliation and therefore the jury awarded the \$3 million in damages.

Pretext

The Ninth Circuit held in EEOC v Boeing Corp that the EEOC was entitled to a trial against Boeing because the EEOC had evidence which might prove adequate to convince a jury that the reasons articulated by the employer for its employment actions might be pretextual. In this case, a female employee complained about a hostile work environment and was transferred to a new work group and two months later was laid off. The employer articulated reason for the reduction in force (RIF) of this employee was because the employee had the lowest RIF assessment scores in her new department. A co-worker asserted that the complaining employee's supervisor, when she filed her complaint prior to her transfer to the new work unit, frequently made demeaning and derogatory remarks about women. The complaining employee asserted that her supervisor refused to transfer her to the work group she requested in which she would perform similar work, but when assigning her to the work group to which she was transferred assured her that she would not be subject to being "RIF'd" in the new work group even though she had not done similar work to that which was done in that work group.

Cat's Paw

The Seventh Circuit in Martino v MCI Communications Services Inc dba Verizon Business Services, Inc affirmed the granting to the employer by the District Court of a motion for summary judgment. In this case, a former employee alleged that he was laid off during a nationwide reduction in force (RIF) because of his age in violation of the ADEA. The employee based his allegation of age discrimination on the animus of his immediate supervisor when the decision to make him one of the employees who would be laid off was decided. Because his immediate supervisor was not the decision maker who decided which employees would be laid off, the employee relied on the "cat's paw" theory that the biased supervisor influenced the wrongful decision. The court held that even though his immediate supervisor made derogatory comments because of the employee's age, the actual decision maker was two levels above the immediate supervisor and the decision maker considered several factors in determining which employee would be laid off. The court relied on the recent U.S. Supreme Court decision, previously reported in an earlier issue of **Employee Briefs**. In Gross v FBL Financial Services in which the U.S. Supreme Court held that it is not enough to show that age was a motivating factor, but a plaintiff must show that "but for" his age the adverse action would not have occurred.

Medical Costs

AON Consulting Company surveyed more than 60 leading health care insurers representing more than 100 million insured individuals and found that health care costs are projected to increase by 10.4% for HMOs, 10.4% for POS plans and 10.7% for PPOs in 2009. The cost of prescription drugs are projected to increase by 9.3% in 2009. The Kaiser Family Foundation received responses from 2,000 employers and on the basis of the replies reported that 40% of employers are likely to require employees to pay a higher portion of the cost of doctor visits, will raise annual deductibles and the amount workers pay for prescription drugs and will increase the amount employees pay as a portion of medical premiums. A spokesman for the Business Roundtable projected that the annual health care costs for employees will rise by 166% over the next decade -- to \$28,530 per employee per year. The spokesman, who is also the CEO of Eastman Kodak, opined that "maintaining the status quo is simply not an option . . . these costs are unsustainable and would put millions of workers at risk . . ."

ADA

The EEOC filed a class action lawsuit against United Parcel Service alleging that the leave of absence policy of UPS violated the ADA. The policy allows employees to take up to 12 months off for medical reasons but, the EEOC alleges, the policy does not adequately accommodate employees with disabilities, deprives disabled employees of promotions, provides for termination of disabled employees, and otherwise adversely affects their status as employees. The lead plaintiff in this case suffered from

multiple sclerosis and took a 12 month medical leave. Shortly after she returned from the medical leave, she had recurring symptoms and asked for accommodation in the form of changed duties. Instead of making efforts to accommodate her needs, UPS fired the employee. Because of the size of UPS and the possible number of employees that might be in the class, this case may lead to major damages, if upheld by the courts.

Gender

In Prowel v Wise Business Forms, Inc, the Third Circuit held that while sexual orientation is not a protected class under Title VII, an “effeminate” man may raise a claim of sexual discrimination and get to trial if he can demonstrate that a fellow employee was acting to punish the employee’s non-compliance with gender stereotypes. In this case, some of the co-workers referred to the plaintiff as “Princess, Rosebud” and similar terms and made fun of the way he walked and talked. The employee complained to his supervisor, but the harassment continued and no effective action was taken by the employer. The employee told some co-workers that he was considering suing the employer for not stopping the harassment. He subsequently met with company representatives about his allegations. Two months later, he was terminated for “lack of work.” The employee sued for gender discrimination and retaliation. The District Court dismissed the suit but, the Third Circuit reversed finding that Title VII does not bar such a lawsuit.

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