



EIGHTH CIRCUIT UPDATE: SEPTEMBER 2005

This bulletin provides an update on employment issues for organizations with a presence in those states in the Federal Eighth Circuit. Please contact us if you have any questions about these decisions or about their effects on your business.

What Kinds of Job Actions Can Get Your Company Sued?

Employers in Eight Circuit states (Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakota) should take heed of a recent decision by their federal Court of Appeals addressing what type of job actions employees can make into a “federal case.” Under the anti-discrimination and anti-retaliation provisions of Title VII and other similar laws, an employee can only make a case over “adverse employment actions.” Although that may sound straightforward, there has been much litigation over what type of job action constitutes an *actionable* adverse employment action, i.e. one that may end up before a jury.

For example, the Eighth Circuit has previously held that poor performance ratings do not, in and of themselves, constitute an actionable adverse employment action because they do not have a tangible effect on the recipient’s employment. The fact that a poor evaluation may eventually impact promotion opportunities or salary increases is insufficient to establish an adverse employment action. A poor performance evaluation may become actionable, however, if it is used as a basis to detrimentally alter the terms and conditions of the recipient’s employment. If the poor evaluation is actually considered and does effect such a decision, it is actionable at that stage because it has had a tangible effect on the recipient’s employment. Similarly, if a poor evaluation precludes an automatic raise, it has had a tangible effect on the recipient’s pay, a term and condition of employment.

One logically might think that any transfer would affect an employee’s working conditions. However, even a job transfer to another location does not necessarily constitute an actionable adverse employment action when there is no change in title, salary, benefits or working conditions. Where the only changes due to a transfer are the

normal inconveniences associated with a transfer, the transfer decision is not actionable. However, if the transfer is accompanied by a “considerable” diminution of duties or skill level required for the job, then the transfer does work a change in the employee’s conditions of employment sufficient to make the transfer actionable in court.

These principles were discussed in the case of *Turner v. Gonzales*, decided by the Eighth Circuit on August 30, 2005. In *Turner*, the plaintiff was a female FBI agent who had a twenty-year history of consistent “Superior” or “Excellent” performance ratings. She had worked her way up to being the senior ranking officer at the location where she worked in North Dakota. After a series of events, including a denied promotion, some misogynist comments, and an assignment which went to a much less experienced officer, Turner filed an EEO complaint alleging gender discrimination. About a month later, Turner received a “Superior” rating on her next performance review. However, she objected to a portion of the review because it did not give her credit for certain assignments she handled. Turner sent a memo to her supervisor’s supervisor advising him of her issues with the performance review. He indicated he would address her concerns with her supervisor. Five days later, Turner received a new, unscheduled performance review which downgraded her rating from “Superior” to “Minimally Acceptable/Unacceptable.” Her next scheduled performance review was also poor, which made Turner eligible for an involuntary transfer. Of course she was transferred and, thereafter, Turner’s supervisor closely monitored and documented her performance. She was eventually terminated.

Turner sued the FBI under Title VII for sex discrimination, retaliation, and a hostile working environment. Whereas Turner’s discrimination and hostile environment claims were dismissed, the Eighth Circuit found that she had presented enough evidence that she was subjected to an “adverse employment action” because of her complaints of discrimination to entitle her to a jury trial on her retaliation claim. Although the FBI argued that none of the actions it took with regard to her employment rose to an actionable level, the Eighth Circuit disagreed. The FBI also argued that it had plenty of documentation to support its evaluation of her performance. However, the FBI’s evaluation was not supported by reports from those working with plaintiff in the field.

The Court held that, although not all of the actions taken against Turner constitute “adverse employment actions” per se, in this case, these actions had a “significant” effect of the terms and conditions of employment. Specifically, the performance evaluations directly affected her pay, eventually affected her assignments, and there was a considerable lessening of her status after her transfer. Therefore, Turner was able to make a “federal case” out of the FBI’s decisions.

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