



NINTH CIRCUIT UPDATE: FALL 2005

This bulletin provides an update of recent employment laws for employers in states served by the United States Ninth Circuit Court of Appeals, including Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Please contact us if you have any questions about these decisions or about their effects on your organization.

Being a Culturally Insensitive Jerk Creates Company Liability

The recent case of El-Hakem v. BJY, Inc. (July 21, 2005), involves an employee named Mamdouh El-Hakem, who is an American citizen of Arabic heritage and his employer's Chief Executive Officer, Gregg Young. At some point during his employment, Young began to refer to El-Hakem as "Manny" instead of his given name of Mamdouh. Even in the face of El-Hakem's objections, Young continued its use. El-Hakem requested that if Young found Mamdouh too difficult to pronounce, that he could refer to El-Hakem by his last name and call him simply "Hakem." With the sensitivity of a charging rhinoceros, Young immediately suggested that El-Hakem should instead go by "Hank." Young continued to use the objectionable nicknames for almost a year. Young also expressed the opinion that a more "Western" name might increase El-Hakem's chances for business success and allow him to be more acceptable to the employer's clientele.

After a jury verdict for \$30,000, finding intentional discrimination and a hostile work environment, the Ninth Circuit Court of Appeals addressed several issues. The Court emphasized that names – not just physical or genetic characteristics – can be so inseparably tied to a person's race and ethnicity that discrimination based on such a feature will be considered discrimination on account of the related characteristics. Also, although the Court found that Young's nicknames were not especially severe, it observed that offensive conduct does not have to be especially severe or serious if there is evidence that the discriminatory conduct was pervasive or frequent.

Several lessons may be learned from this case. The first is to note that employers and employees cannot discriminate in any way against people from Arabic or Muslim backgrounds. Even President Bush has, on numerous occasions, sought to remind the American people

“that the war against terrorism is not a war against Muslims, nor is it a war against Arabs. It's a war against evil people who conduct crimes against innocent people.” This case also teaches that discriminatory conduct in the workplace doesn't have to be particularly severe in order to create a hostile work environment. Like water torture, even the seemingly innocuous drip... drip... drip... of discrimination can result in pain for an employer. The last lesson might be the simplest. Dale Carnegie was right: A person's name is, to that person, the most beautiful sound in any language. It's not a far cry to translate the facts from this case into troubling circumstances where the plaintiff was of African, Japanese, or Mexican heritage.

Employer Liability for Customer Harassment

Another discrimination case of note is Galdamez v. Potter (July 15, 2005). The plaintiff, born in Honduras and speaking English with a discernable accent, began work for the Postal Service in 1983 and became postmaster in Wilhelmina, Oregon in 1993. After implementing a number of policy changes in the local post office, she encountered significant hostility and opposition from customers and fellow employees over a period of three years. Several customers, including the mayor, indicated displeasure at having a Hispanic postmaster and criticized her accent. An anonymous letter promised to “get rid of you foreigner” and Galdamez and her co-employees received several warnings that certain people in the town would not think twice about killing her. Galdamez's car was vandalized in the post office lot. She even received considerable attention from the local media. Believing that such negative attention was due to her accent and national origin, Galdamez filed a lawsuit alleging race, color, and national origin discrimination in violation of Title VII.

The Court held that this evidence of third party harassment could support a hostile work environment claim against the Postal Service. Though the harassment was not generated from within by co-workers or supervisors, the Court observed that the Postal Service still had a duty to investigate and attempt to remedy the harassment once it knew or reasonably should have known about it. Galdamez testified that she complained immediately to her supervisors about such harassment and that their response was limited at best. The Court held that the Postal Service could have been held liable for harassment by third parties if it failed to take

reasonable steps within its power to address the problem. This holding forced the Court to reverse the judgment below and order a new trial.

These facts serve as a good reminder that it's not just internal employees and supervisors that can create discrimination and other legal issues for employers. Where an employee interacts with the public, third parties can also create difficult and non-ignorable legal situations involving Title VII. An employer retains a duty to investigate harassment and discrimination and to remedy the harassment or discrimination as far as reasonable. An employer should have a policy in place for reporting harassment and a defined procedure for providing a remedy. This is true whether the harassment is due to national origin, race, color, sex, or other protected characteristics.

Keeping Employees Honest About FMLA Leave

The Ninth Circuit Court of Appeals also decided Tellis v. Alaska Airlines (July 12, 2005). The plaintiff, Charles Tellis, was employed by Alaska Airlines as a maintenance mechanic in Seattle, Washington. On the morning of July 4, 2000, he requested leave time to take care of his pregnant wife and then failed to show up for his July 4 evening shift. Tellis' vehicle apparently broke down on July 6, so he flew to Atlanta to pick up another vehicle which he owned. He departed for Atlanta on July 6, drove this vehicle across the country, and arrived in Seattle on the evening of July 10. During this trip, Tellis' sister-in-law stayed with his wife and, on July 9, assisted with the birth of a baby girl. While on the road, Tellis called his wife regularly on his cellular telephone. He failed to show up on his next regularly-scheduled shift, July 11, and representatives from Alaska Airlines tried without success to contact him. Based on his unexcused absences, it terminated his employment.

The FMLA allows eligible employees leave "to care for" a family member with a serious health condition. Department of Labor regulations explain that the phrase "to care for" a family member extends to both physical and psychological care, and includes situations where the family member may be unable to care for his or her own basic medical, hygienic, nutritional, safety, or transportation needs. Furthermore, the regulations state that "caring for" includes providing psychological comfort and reassurance beneficial to a person with a serious health condition who is receiving inpatient or home care. The Ninth Circuit examined these

regulations in the context of this case and determined that “providing care to a family member under the FMLA requires some actual care which did not occur here.” It stated that FMLA leave “to care for” a family member necessarily must involve some level of participation in ongoing treatment of the serious medical condition requiring that the employee stay nearby to the ill family member. Because Tellis was not in close physical contact with his wife during the leave, his cross-country journey was not protected under the Act and the Court found that Alaska Airlines could terminate his employment. Any indirect psychological reassurance to his wife was just a side benefit of an activity which otherwise would have been unprotected and did not rise to the level of contact and support triggering FMLA protection.

Heed this lesson and make sure that everyone at your business knows and follows proper FMLA procedures. Provide forms upon request, but don’t be shy to ask employees for certification or documentation of the reasons for the requested leave. If an employee requests leave “to care for” a family member, that employee must be present and responsible for the well-being of that family member in some direct way in order for that leave to be FMLA-protected.

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