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H.R. ALERT*

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The Fifth Circuit Court of Appeals Reverses Summary Judgment in Favor of Employer and Orders a Title VII Trial to Proceed Where the Employer Claims a "Mistake" in Stating its Reasons for Discharging the Plaintiff/Employee

In the recent decision of *Staten v. New Palace Casino, LLC*, 2006 WL 1737438 (5th Cir.(Miss.)), the Fifth Circuit Court of Appeals [which governs federal district court cases on appeal in Mississippi, Louisiana and Texas] issued an important ruling to which all employers should pay close attention. In *Staten*, Ursula Staten, a former employee, claimed that she had been discriminated against in connection with her employment as a cook at New Palace Casino. Subsequent to her discharge, plaintiff Ursula Staten ["Staten"], filed a charge of race discrimination with the EEOC against her former employer, New Palace. In response to the EEOC charge, New Palace defended its termination of plaintiff, stating that all employees in her department had been laid off. Staten then filed a second charge of discrimination, which ultimately led up to her filing a lawsuit under Title VII against New Palace, alleging race discrimination and retaliation.

Throughout the EEOC's investigation and up through the date it filed its motion for summary judgment, New Palace maintained that all employees in the plaintiff's department had been terminated as part of a lay-off. After completing and exchanging discovery and taking depositions in the lawsuit, New Palace proceeded to file a motion for summary judgment, seeking dismissal of plaintiff's claims of race discrimination and retaliation in connection with her termination. Interestingly, in supporting its summary judgment, New Palace attached an affidavit of its Chief Financial Officer, articulating a different reason for the casino's decision to terminate the plaintiff. The Chief Executive Officer acknowledged that he previously had given a different reason for the plaintiff's discharge prior to his affidavit. He explained that he had made a "mistake" in offering inconsistent justifications for the casino's decision to terminate the plaintiff and that when he realized his mistake, he wanted to correct the record and provide all relevant documentation.

The district court had granted the casino's motion for summary judgment in all respects with regard to the plaintiff's claims of discrimination and retaliation. On appeal, the Fifth Circuit reversed the summary judgment in favor of New Palace on the discrimination claim, finding that the casino's inconsistent explanations for the plaintiff's termination and the timing of its change in explanation, could lead a fact-finder to conclude that the casino's "asserted" justification for terminating Staten was false or unworthy of credence. The appeals court then reversed the district court's grant of summary of judgment, finding that the plaintiff had in fact met her burden of showing that there was an issue of fact as to whether the casino's proffered reason for Staten's termination was not true, but rather a pretext for alleged discriminatory behavior.

The lower court had determined that Staten was required to further produce additional and independent evidence of discrimination of New Palace's decision to terminate her, but the appellate court disagreed. As stated by the Fifth Circuit, a plaintiff's proof of a *prima facie* case of discrimination and pretext may and usually does establish sufficient evidence for a jury to find discrimination. Here, pretext was found in the inconsistency by the employer in explaining why Staten was discharged.

As most employers know, under Title VII, a plaintiff can prove a *prima facie* case of race discrimination by showing that (1) she is a member of a protected group; (2) she was qualified for the position at issue; (3) she was discharged or suffered some adverse employment action; and (4) she was replaced by someone who was not a member of her protected group or, that she was treated less favorably than others similarly situated to her. If the plaintiff makes a *prima facie* showing, the burden then shifts to the employer to articulate legitimate, non-discriminatory reasons for its actions. If the employer meets this burden, the plaintiff then has the burden of proving that the employer's proffered reason for a challenged action is not true, but instead is a pretext for discriminatory purpose. In *Staten v. New Palace*, the Fifth Circuit made clear that when an employer offers inconsistent explanations for a challenged employment decision as it did here, a fact-finder may infer that the proffered reasons are pretextual and not worthy of belief.

Employer Tip: This recent decision by the Fifth Circuit in *Staten v. New Palace* underscores the need for employers to be mindful that consistency is the key in articulating the reasons for any adverse job action involving an applicant, an employee or, a former employee. In this case, the casino's reasoning for the challenged employment action changed over time; the circuit court determined that this inconsistency in stating the reasons for the challenged action, standing alone, would mandate that the plaintiff's Title VII case proceed to a full trial on the merits under Title VII. For those employers who are responding to unemployment claims, EEOC charges, OFCCP complaints, etc., the reasons articulated for any type of adverse job action should be truthful, accurate and consistent. The decision of *Staten v. New Palace Casino* case underscores the costly legal repercussions stemming from inconsistency and inaccuracy.

* H.R. ALERT *is intended to provide late-breaking news in the employment arena.*

The Fifth Circuit Finds that Alleged Touching Can Be Severe Workplace Harassment

In another recent Fifth Circuit Court of Appeals decision, the federal appeals court again reversed a district court's grant of summary judgment in favor of an employer. In *McKinnis v. Crescent Guardian, Inc.*, 2006 WL 1880364 (C.A. 5th (La.)), the Court was faced with a claim of alleged workplace sexual harassment. The plaintiff, Dana McKinnis, had worked as a security guard for Crescent Guardian. She claimed that her supervisor had asked her for hugs and kisses and had touched her breasts and thighs. She further alleged that she had complained to a supervisor and subsequently to the Chief Executive Officer, but felt they did not believe her. McKinnis subsequently resigned and claimed constructive discharge.

In her lawsuit, plaintiff claimed sexual harassment in violation of Title VII and also retaliation through alleged constructive discharge. After discovery, Crescent Guardian proceeded to file a motion for summary judgment, on the grounds that the alleged conduct toward the plaintiff was neither sufficiently severe nor pervasive to alter the terms and conditions of her employment. In granting summary judgment in favor of the employer, the district court concurred with the employer, concluding that plaintiff's allegations of sexual harassment were "simply not severe enough or pervasive enough to support a hostile work environment claim." As stated by the district court, the fact that the supervisor allegedly touched "plaintiff's breasts and thigh on one occasion does not reflect the frequency or severity of harassing behavior that Title VII was intending to address."

On appeal, the Fifth Circuit reversed, stating that the plaintiff's allegations included more than just inappropriate comments. As stated by the circuit court, the supervisor allegedly touched "the intimate areas of McKinnis' body" and such touching was sufficiently severe to preclude the granting of the employer's summary judgment.

In the course of its opinion on appeal, the Fifth Circuit cited to the United States Supreme Court's case of *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), where the Court stated that to establish a hostile work environment claim based on workplace harassment, an employee must produce evidence that (1) he or she belongs to protected class; (2) he or she was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term condition or privilege of employment; and, (5) the employer knew or should have known of the harassment and failed to take prompt and remedial action. The district court had concluded that factor (4) was lacking, finding the conduct was neither severe nor pervasive so as to affect a term condition or privilege of employment. The Fifth Circuit disagreed, finding that the district court had erred in concluding that the plaintiff's evidence was not severe enough to establish a hostile work environment.

As reiterated by the Fifth Circuit in *McKinnis*, a Title VII plaintiff need not establish that the conduct was severe *and* pervasive but rather only that it was either severe or pervasive. In *McKinnis*, the Court concluded that factual situation presented was similar to the fact pattern in *Harvill v. Westward Communications*, 433 F. 3rd, 428 (5th Cir., 2005), where the circuit court determined that the deliberate and unwanted touching of intimate body parts can constitute severe sexual harassment. In *McKinnis*, the appeals court determined that based on the record evidence before it, while it was a "close call," the district court had erred in finding that the plaintiff's evidence was not severe enough to establish a hostile work environment.

Employer Tip: The Fifth Circuit's recent decisions in *McKinnis v. Crescent Guardian* and *Staten v. New Palace Casino* demonstrate that more and more employment related disputes are proceeding to trial before a jury. Aside from the costs of litigating such cases through trial, the risks of huge damage awards before juries in emotional and hotly contested cases under Title VII underscore the need for prompt and remedial action by employers at the earliest possible moment if and when a complaint comes to management's attention. Having comprehensive workplace related policies prohibiting workplace harassment, discrimination and retaliation, training pursuant to those policies at both the employee and supervisory levels and, consistent application and interpretation of these policies are critical to ensure that employment related disputes can be resolved before they ripen into full blown lawsuits.

ICE Publishes an Interim Rule Permitting the Electronic Signing and Retention of I-9 Forms

On June 15, 2006, the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security ("ICE") published an interim rule which permits employers who are required to complete and retain I-9 forms to sign and retain these forms electronically. This interim rule appears in the Federal Register at: 71 FR 34510 - 34517 and became effective on June 15, 2006. The rule allowed for written comments and responses through August 14, 2006. This interim rule is welcome news for employers who are required to complete and retain I-9 forms for it allows for the electronic retention of I-9's and sets forth standards both for electronic signatures and electronic retention. The interim rule does not mandate that employers use one system for the electronic storage of I-9's nor does it specify any particular method for acceptable electronic signatures; rather, the interim rule merely sets forth minimum acceptable standards for employers who opt to electronically retain their I-9 forms. As stated in the Federal Register, the standard set forth in the interim rule merely provides a baseline for proven practices.

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With respect to electronic signatures, the interim rule specifically provides that electronic signatures can be achieved through the utilization of various technologies including, but not limited to, electronic signature pads, personal identification numbers (PIN), biometrics and "click to accept" dialogue boxes. *See*, 71 FR 345133. The interim rule also makes clear that any electronic system adopted must produce legible and readable information when displayed.

Basic Essentials that an I-9 Electronic Storage System Must Contain Under the Interim Rule:

(i) Reasonable controls to insure the integrity, accuracy and reliability of the system;

(ii) Reasonable controls designed to prevent and detect unauthorized or accidental access;

(iii) An inspection and quality assurance program evidenced by a regular evaluation system including periodic checks of the electronically stored I-9's;

(iv) A retrieval system that would include an indexing system that permits searches and the ability to reproduce legible and readable hard copies;

(v) A system for capturing electronic signatures that would contain a method to acknowledge the attestation to be signed has been read by the signatory; affixes the electronic signature at the time of the transaction; creates and preserves a record verifying the identity of the person producing the signature and provides a printed confirmation of the transaction at the time of the transaction to the person providing the signature; and,

(vi) A prohibition that any system used may not be subject to an agreement such as any contract license that would limit access and/or usage by a governmental agency.

Caveat to Employers: Any electronic retention system and record security program must be considered in light of the technological and communication aftermath created by Hurricanes Katrina and Rita in which many information systems were interrupted and in some instances, documents and data destroyed.

Employer Compliance - You Have Options

In the interim rule, ICE made clear that an employer that is complying with the current recordkeeping and retention requirements of retention and storage of I-9 forms as set forth in 8 CFR 274.2 is *not* required to take any additional or different action to comply with the interim rule; on the contrary, the interim rule simply offers an additional option. In the interim rule, ICE specifically notes that businesses will be permitted to adopt one or more of a number of different methods of electronic record keeping, attestation and retention that are compliant with existing Internal Revenue Service standards. As an example, the interim rule points out that a small business may wish to download and retain .pdf versions of the employment verification record which is already available on the USCIS web site.

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