

H.R. ALERT*

JUNE 2003

U.S. Supreme Court Approves Lesser Standard for Proving Discrimination under Title VII — Circumstantial Evidence Can Suffice

In a unanimous ruling rendered this month, the United States Supreme Court held that direct evidence of discrimination is not needed in order for a plaintiff to prevail in a Title VII “mixed-motive” sex discrimination claim. *Desert Palace, Inc., DBA Caesar’s Palace Hotel & Casino v. Costa*, 2003 WL 21310219 (U.S.). The decision affects the standard that jurors will consider when there is more than one reason for a disciplinary action. Under that standard, they may find a firing was improper because discrimination was a motivating factor. The decision will also impact other types of Title VII claims and is viewed as a defeat to the business community. The Bush administration had urged the Court against adopting the lesser standard of proof.

This case centered around Catherina Costa, the only female forklift operator in an otherwise all-male warehouse crew. She filed suit against her employer, claiming her gender caused her to be terminated. Her employer, Caesars Palace in Las Vegas, however, claimed it had a valid reason for firing her, due to escalating disciplinary problems, including a fight with a co-worker.

In such a “mixed-motive” case, an employer has an affirmative defense if it can prove that it would have made the

same decision had gender not played a role. The issue before the Supreme Court was whether the plaintiff in a “mixed-motive” case had to present direct evidence of discrimination, as opposed to circumstantial evidence, in order to get the case before a jury. Direct evidence requires proof based on personal knowledge or observation, which often can be difficult to produce.

Writing for the Court, Justice Clarence Thomas said that Costa did not have to produce direct evidence of discrimination under a federal anti-discrimination statute in order to place her type of claim before a jury. An employee “need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’” The Court noted that if Congress had intended to require direct evidence in such cases, “it could have included language [in the statute] to that effect.”

Employer Practice Tip: Since the trier of fact may use “circumstantial” evidence to support a finding of discrimination, supervisors need to be cautioned about when and how disciplinary issues are handled and documented. As many employers know, poor documentation can sometimes be worse than no documentation.

Calculating Commission Pay Owed to a Terminated Employee – More Guidance from Louisiana Courts

One of the most perplexing issues facing employers is calculating the commissions owed to a terminated employee. As our readers know, under Louisiana law, all wages (including accrued vacation and commissions) must be paid to a terminated employee by the next regular pay period or within 15 days, whichever is sooner. La. R.S. 23:631, *et seq.* Often, commission payments are in limbo when an employee is terminated and a company is hard-pressed to calculate the amount due. Recently, one Louisiana appellate court, *Patterson v. Alexander & Hamilton, Inc.*, 2003 WL 1759506, signaled a change in the law as to how commissions should be calculated. All employers who do business in Louisiana should take note of this key decision.

According to the First Circuit Court of Appeal in *Patterson v. Alexander & Hamilton, Inc.*, 2002-1230 (La. App. 1 Cir. 4/2/03), 2003 WL 1759506 at *3, “where only collection of the fee

is outstanding and collection is beyond the control of the employee, the employee has earned his commission pursuant to La. R.S. 23:634.” The Court noted, however, that if a substantial amount of time and effort are needed to complete a sale, then the right to a commission may not have been earned. In *Patterson*, the defendant stated “that its established policy and that of the entire collections industry, is that commissions and bonuses are based on actual billing and not upon placement of orders.” *Id.* at *2. The *Patterson* Court rejected that policy. Instead, the Court’s opinion relied on the fact that the commissioned employee was in the business of making sales. Under Louisiana Civil Code Article 2456, a sale in Louisiana is complete when there is an agreement on the thing sold, and the price is fixed, even if delivery has not been made or the price paid. Therefore, according to the Court, when a sale is complete, the employer should pay the commissioned employee the

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amount due under the wage agreement.

The defendant in *Patterson* tried to show that its compensation plan modified the definition of a sale for the purpose of receiving commissions; the Court disagreed, finding that the agreement made no modification to the definition of sale. Thus, the Court held that the defendant was not authorized to withhold payment of commissions until it received payment for things sold, if the bulk of work necessary for the sale was done.

Employer Practice Tip: An employer should pay a terminated employee for any sales he has completed for which a commission is owed regardless of whether you have received payment if the bulk of the work necessary for the sale is done at the time of

severance. The payment should be made under the time prescribed by Louisiana law, noted above.

New Non-Competition Legislation on the Horizon in Louisiana

Employers have reason to be optimistic that the Louisiana legislature may soon broaden the scope of permissible non-competition agreements. Employers may recall the 2001 Louisiana Supreme Court case of *Swat 24 Shreveport Bossier, Inc. v. Bond*, in which the Court held that generally, non-competition agreements that prevented former employees from going to work for a competitor were invalid. In the wake of the *Swat* case, employers could only prevent a former employee from opening his own competing business. Just this week, in response to heavy lobbying by business organizations in the state, the Louisiana Senate passed House Bill 1770, which is designed to overrule the *Swat* case in part, and permit non-competition agreements that restrict an employee from working for a competing business (as opposed to only opening a competing business). If Governor Foster signs the Bill into law, we will include a more detailed analysis of the new legislation in the next *H.R. Alert*. Stay tuned.

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