

Your Monthly Legal Update – August 2009

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## **INFORMAL COMPLAINTS MAY VERY WELL CONSTITUTE PROTECTED ACTIVITY**

The Federal 7<sup>th</sup> Circuit Court of Appeals in, *07-1044 Casna v. City of Loves Park*, determined that a complaint of discrimination does not have to be formal to trigger an employer's duty not to retaliate. In this case the employee was protected by raising informal concerns to management regarding sexual harassment by co-workers. If any employee reports any allegation of sexual harassment or other discrimination, do not rely on a formal complaint but review the situation accordingly. Do not ignore the information and stick your head in the sand. Make sure that the process is documented correctly.

## **OLDER EMPLOYEES MUST MAINTAIN SKILLS**

The Seventh Circuit Court of Appeals in, *08-245 Martino v. MCI Communication Services, Inc.*, found that it is not age discrimination to terminate an older employee if his skills were becoming obsolete and his termination occurred during a reduction in force (RIF). The Court found that the employee could not find that he had met the employer's performance expectations not that the company treated younger workers any better. In this case, the facts showed that the employee only excelled regarding performance in one instance, a certain business deal, and even relevant to this his success was limited. This employee was able to earn sales credit and commissions on a transaction that he did not work much on. In the supervisor's eyes, he was not a team player, he was not available to take on work and he did not take an active role. He helped out but contributed nothing more. A key fact in the court's opinion was that the company after its merger strived to focus on managed hosting services rather than colocation services but the employee showed little promise of performance in that area – he was not showing adaptability to the new business focus. The court stated that terminating someone because they are old is not permissible but terminating someone due to an obsolete skill set is.

I would caution as to applying this case to any real life situation. Make sure that all appropriate training is reasonably provided before an older worker is concluded to not

have a particular and necessary skill set. Also, make sure the skill set is legitimate and not a requirement that sets up a disparate impact claim.

### **A SPECIAL NOTE**

It appears that we live in a very interesting time. For a while the State courts were more favorable to Plaintiffs in employment cases but now, in light of our State Supreme Court's recent activity, you may find more plaintiffs moving into federal court jurisdiction. Federal court is a much faster paced process that demands immediate litigation preparation and allows the plaintiff more solidified footing for making compensatory and punitive damage claims. It will be interesting to see how the law continues to evolve, if and when we ever get entirely past this recession. I hope everyone is having a terrific month!! I cannot believe how quickly summer has flown by!