

## RETALIATION, FMLA, KNOWING VIOLATIONS, LOVE CONTRACTS

### Retaliation

If you choose to terminate an employee two days after you learn about a filed discrimination complaint, summary judgment will probably not be deemed to be appropriate and you will be stuck litigating the issue. *06-1252 Pantoja v. American NTN Bearing Manufacturing Corp.* (7<sup>th</sup> Circuit Court of Appeals) The timeline of this case is significant to provide a point of reference. In this case, there was an alleged incident involving the employee on August 10, 2002. Within several days of this alleged incident, management conferred about the incident but took no disciplinary action against the employee. Management then learned about the employee's discrimination complaint on August 28, 2002 and proceeded to terminate the employee the next day. Word of advice, act on disciplinary actions as they arise.

### FMLA

The Family Medical Leave Act does not require an injured employee to receive the same pay while performing light duty. *06-3637 Hendricks v. Compass Group, USA, Inc.* (7<sup>th</sup> Circuit Court of Appeals) Specifically, the Court opined that the only reason "light duty" is referenced in the statute is because of workers compensation law. It was decided in this case that while the FMLA requires an employee be able to return to the same or equivalent position and pay rate that he or she held prior to the leave, such a requirement only applies if the employee is able to physically perform the functions of the position. In this case, the employee was not able to physically return to the same position due to her long term disability and thus she was allowed to be paid the lower rate applicable to the position that the company accommodated her with.

### Knowing Violations

Finally, if a prison guard smuggles and trades cigars with prisoners his termination is not the result of national origin discrimination. *06-1637 Jennings v. DOC* (7<sup>th</sup> Circuit Court of Appeals) Rule to the wise, those that knowingly violate clear rules are going to have an uphill battle filing discrimination claims against their employers, so long as the employers acts consistently and swiftly.

### Love Contracts

Final point of the month has to do with the idea of drafting "love contracts" to protect employers from claims of sexual harassment. We all know the dangers of workplace romance and the reality that they do happen, at times resulting in hostile break ups. The idea behind a love contract is to document the consensual aspect of the relationship to preserve employer defenses for later. At a minimum the contract would state that both parties: (1) welcome and consent to

the relationship; (2) have received, reviewed and understand the company's sexual harassment policy; (3) both parties knowingly accept that either can end the relationship at any time; and (4) both parties understand that they are not allowed to act inappropriately at work during the relationship and/or at the end. This idea is probably good for further discussion but just thought I'd make you aware it is out there.