

HR That Works! Cases of the Month November **2004**

YOU MADE ME DO IT...

In the case of Pennsylvania State Police v. Suders 124 S.Ct. 2342 decided earlier this year, the employee argued she was forced to quit her job because her environment was so hostile no reasonable person would continue to work in it. The court reasoned that the company can still avail itself of the Fragher defense, which basically gives the employer an “out” where the company has a policy, encourages employees to report, the employee fails to avail themselves of the process and no “tangible” employment action occurs. In other words, the employee was not fired, demoted, etc.

The Catch-22 here is: can the employee create a “tangible” action by quitting? The Court claimed they could if the source of the hostile environment was an “official act”. (Thereby of course adding yet one more layer of complexity to the discrimination discussion). Just what an “official act” means will be left to the attorneys and courts to decide in the decades to come. The Supreme Ct. did give us some hints. In this case, it said the sexual comments were not official but actions she complained of concerning her test taking “were less obviously unofficial”. (And you were hoping for a bright line?)

Lesson Learned: You don’t even want to get to the point where you are paying high priced counsel to make arguments of this nature. Use the [Employee Compliance Survey](#) and *force* people to speak up! It makes no sense to stay in the dark about potential exposures. Affirmatively ask if there is a problem. As the court reminds us, employees who continue to remain in their Culture of Silence should not profit thereby.

CLASS ACTION FREE FOR ALL

In June, the Northern District Federal Court in California went ahead and certified a class action lawsuit against Wal-Mart claiming it discriminated against more than 1.5 million women. You can view the plaintiffs website by going to www.walmartclass.com. It includes the court opinions and much more. The case is currently under appeal to the 9th Circuit, which many argue is the most employee friendly court in the country. While the size of the Wal-Mart claims garners much publicity, hundreds of similar class action claims have been filed against companies nationwide.

Plaintiff’s lawyers will typically hire a sociologist to ferret out some statistical imbalance in the composition of the workforce, however dubious, using “social framework analysis” or “multiple regression analysis.” Then, they will use these statistics to support either a disparate impact theory or disparate treatment theory of discrimination. (For example, refer to the expert’s report supporting the plaintiffs’ claims in the Wal-Mart case.) They will follow that up with endless depositions to uncover horror stories supporting their statistical theory, followed by an expert’s dissertation on everything the company *could have done* to avoid the “discriminatory” conduct.

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What You Can Do: If your company is big enough to interest a plaintiff's attorney (and that doesn't mean you have to be that big) you must be aware of your statistics. Are pay and promotional ratios for any one group out of balance? If so, can you justify why? (i.e. we run a restaurant where all of our customers speak Chinese). If not, do you have some real problems? How does this group feel like they are being treated? Have you ever asked them? Are they included in decision-making groups, meetings and other corporate functions?

Lesson Learned: You can keep your fingers crossed that the courts will reign in these cases or hope it doesn't happen to you. Either that or you can get on the front end of this problem, diversify your workforce and view it as strength, not a problem.

WHAT ARE YOU NUTS???

In the case of Audrey Jacques v. Dimarzio Number 03-9109, decided on October 5, 2004 by the US Court of Appeals Second Circuit, the Court grappled with just how bad somebody's personality has to be before they are considered "disabled" under the ADA. Plaintiff was fired from her job because of her rude and otherwise inappropriate conduct with subordinates and others. She claimed a violation of the ADA, claiming essential that her bi-polar disorder (she was on Prozac) made her do it and that the company wasn't accommodating enough. She even cited a lone statement by a supervisor who called her "nuts" as evidence of this discrimination. Amazingly, she won a jury verdict of more than \$190,000.00! Of course, the case was appealed.

The Court had to consider the insane question of whether one's ability to interact with others is a major life activity protected under the ADA, and if so, what sort of behavior demonstrates that a person is substantially limited in personal interaction. Ultimately, it found that in situations where impairment severely limits someone's ability to initiate contact with other people or respond to them, the behavior may fit the ADA requirements.

However, "The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited, but whose communication is inappropriate, ineffective or unsuccessful," Judge Dennis Jacobs wrote for the court.

So just what does "substantially limited" mean you ask? Good question. No body really knows. Some say the case has expanded the definition of disability and some argue the opposite. Fact is, plaintiff lost her appeal because the court felt the jury instruction was drafted too broadly. Essentially the court defined was is not a disability and left the door open to argue what is one. All we can tell you is this: Focus on the conduct and not the person! The ADA does not prevent you from having and enforcing performance standards. Remember, if a person's behavior cannot be reasonably accommodated it makes no difference if it is the result of a disability or not.