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HUMAN RESOURCES Insight

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Dear subscriber,

Welcome to the Winter 2010 edition of Human Resources Insight from the offices of Bourgon HR Solutions.

ASSOCIATIONAL DISCRIMINATION CLAIMS

Title VII of the Civil Rights Act prohibits employment discrimination "because of such individual's race, color, religion, sex or national origin." But in light of Title VII's broad remedial purpose of ending discrimination in the workplace, courts increasingly have construed this provision to protect employees from discrimination based on their associations with and advocacy for individuals of a different race. In these cases, courts have reasoned that this discrimination is based on "such individual's race" because the cause of the discrimination is the difference in races between the employee and the protected third party.

While courts generally agree that these associational discrimination claims may be brought on the basis of interracial spousal, romantic or familial relationships, courts are split over whether and to what extent arguably less significant relationships such as friendships or co-worker relationships support such claims. Many courts require a more finite degree of association than mere friendship or collegiality within the workplace. But not with the federal Sixth Circuit Court of Appeals. In Barrett et al v. Whirlpool Corporation, the Sixth Circuit joined the Seventh Circuit and announced that the degree of the association is irrelevant to whether a plaintiff is eligible for the protection of Title VII under an associational discrimination theory.

As a result of Barrett, the class of potentially protected employees has expanded. Employers should remain mindful that white employees, as well as non-white employees, may bring discrimination and retaliation claims under Title VII. Employers should alert supervisors to pay attention to workplace comments regarding interracial relationships and reporting behavior in particular. Employers should also train supervisors to take appropriate corrective action when these comments are brought to their attention.

With its decision in Barrett, the Sixth Circuit will potentially open the door to many more association-based discrimination claims. However, in doing so, the Court carefully limited the evidence relevant to such claims to only those remarks that attack the interracial nature of the relationship itself, as opposed to the race of the plaintiff or of the plaintiff's spouse, child, friend or co-worker. Thus, although this Court's decision arguably expanded the protection of Title VII, its judicious analysis ensures that associational discrimination claims will remain moored to Title VII's stated purpose of eliminating discrimination in the workplace "because of such individual's race."

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RETIREMENT ISN'T AN OPTION FOR MANY OLDER WORKERS.

American's older workers are facing a crisis that has eliminated retirement as an option and, instead, has forced them to find work to put food on the table and to keep a roof over head. The once aspired to hope for a relaxed retirement has been replaced by the hope that someone will hire them. After spending decades in the work force, these workers need to get back in.

According to a study conducted by Experience Works, 46% of older workers need to find jobs so they don't lose their homes or apartments and that same number sometimes has to choose between paying rent, purchasing food or purchasing medication. And of the more than 2,000 unemployed older workers (and more than 700 employers) participating in the study, approximately half have been looking for work for more than a year.

"More and more older adults do not have the option of retiring from work because they cannot make ends meet on their personal savings or social security benefits," said Cynthia Metzler, president and CEO of Experience Works. "These are low income adults, but the economy has intensified older Americans need to work whatever their income level." Metzler pointed to a nationwide survey released by the Pew Research Center in September which found that nearly 4 in 10 adults were working past age 62 or delayed retirement because of the recession. At the same time, the number of unemployed older workers jumped to 1.97 million in August 2009, an increase of 69% since the previous August.

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EMPLOYERS SEEING INCREASE IN AGE DISCRIMINATION CLAIMS.

With age discrimination claims up 29% this year, employers are taking a long look at their policies and training programs. Preventing age discrimination in the workplace requires not only that strong policies and training programs are in place but also that employees know and understand the rules, particularly in these troubled economic times.

"We're seeing an increase in age discrimination claims because of the volume of reductions in force that are occurring throughout the country," said Janine Yancey, HR Lawyer and CEO of Emtrain. "Any different group can make a claim that they are adversely affected by reductions in the workforce, but there do seem to be more age discrimination claims than others, in large part due to age being associated with disproportionately higher salaries."

It is time to update diversity programs. HR says it's a difficult challenge to balance three to four culturally different generations in today's workplace. "HR needs to issue policies in a way that whatever they are saying within the organization will not have a disproportionate effect on older workers," says Yancey. "Although diversity programs may already exist in an organization, they should be updated to include generational diversity."

AGENCY'S ISSUE REGULATIONS CLARIFYING GINA

The IRS, the Employee Benefits Security Administration and the Department of Health and Human Services have issued temporary, final and proposed regulations implementing Title One of the Genetic Information Non-discrimination Act of 2008 (GINA). The regulations are effective on December 7, 2009 for group health plan years beginning on or after that date.

Under GINA and the new regulations, group health plans and issuers in the group market cannot increase premiums for the group based on the results of one enrollee's genetic information, deny enrollment, impose pre-existing condition exclusions, or do other forms of underwriting based on genetic information.

Further, under GINA and the new regulations, group health plans and health insurance issuers in both the group and individual markets cannot request, require or buy genetic information for underwriting purposes prior to or in connection with enrollment. In addition, plans and issuers are generally prohibited from asking individuals or family members to undergo genetic tests.

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