The Merits of Consistency

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In his essay "Self-Reliance," Ralph Waldo Emerson opined that " foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." It is obvious that Mr. Emerson was not a 21st century employer subject to the employment laws of the United States or he would quickly realize that consistency in the employment arena is a necessity to avoid claims of discrimination. Two recent federal court cases illustrate this point. In one case, consistency saved the employer, and in the other, a lack of consistency cost the employer.

In the first case, *Reeves v. Swift Transportation,* a pregnant truck driver asked for light duty after her doctor restricted her lifting to 20 pounds. In her job, she regularly had to push or pull up to 200 pounds. The employer had a policy that provided light-duty assignments only to employees who has sustained on-the-job injuries. The employee was new and didn't qualify for leave under the FMLA, so when she refused to return to her regular job, she was fired. She sued under the Pregnancy Discrimination Act (PDA) which requires that pregnant employees be treated "the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." The PDA does not require accommodation for pregnant employees; just that the employer be "pregnant-blind." In this case, the employer was able to show (and this is KEY) that it made no exceptions under this light duty policy for employees with other non-job-related conditions. It only granted light duty to employees injured on the job. The trial court granted summary judgment to the employer stating that the employer's limited light-duty policy did not violate the PDA. A grant of summary judgment means that the employer won before having to go to trial. The employer's consistency in the application of its policy saved it not only an adverse judgment but also significant attorney's fees for trial. Lesson for employers: Although it is often tempting to make exceptions to policies for certain employees, consistency in application will reduce potential liability for discrimination claims.

The second case dealing with consistency did not turn out so well for the employer. This case, *Staten v. New Palace Casino*, was handed down recently by our own 5th Circuit. In this case, Ms. Staten filed a charge of race discrimination with the EEOC against her former employer, New Palace. As required by the EEOC procedure, New Palace filed its response stating that all the employees in Ms. Staten's department had been laid off. Subsequently, Ms. Staten filed a suit in federal court under Title VII for race discrimination and retaliation. In the middle of the lawsuit, New Palace filed a Motion for Summary Judgment, and lo and behold, the reason they gave in the Motion for terminating Ms. Staten was different than the reason given up to that point. How did New Palace explain the inconsistent reasons given during the case? We made a mistake. While it is certainly right to admit one is mistaken when it is discovered, the best course of action would be to ensure one is right in the beginning – especially about such an important matter. The court denied the summary judgment (meaning the case goes to trial) stating that the inconsistent explanations for the employment action and the timing of the change in reason for the termination could lead a jury to conclude that the reason was not worthy of credence. Even if the employer ultimately wins this case, it has to go to the expense of a trial. Lesson for employers: When responding to an EEOC charge of discrimination (or any other administrative claim that is a pre-requisite to litigation), prepare and establish the case defense from the beginning. Consider involving your attorney in the earliest stages of the matter so that the defense presented is consistent and complete.

In "Self-Reliance" Mr. Emerson follows his admonition against consistency with the warning that "with consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall." For the busy H.R. professional who has enough to do, this consequence might be welcome. Our advice – be consistent, stay out of court and enjoy your shadow!

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