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WAGES

Employer may keep tips as long as employees are paid minimum wage

by Steven T. Collis

By invalidating a U.S. Department of Labor (DOL) regulation providing that tips are the property of the employee, the U.S. 10th Circuit Court of Appeals (whose opinions apply to all Colorado employers) recently rejected an employee's wage claim based on her employer's retention of all tips.

Caterer kept tips but paid more than minimum wage

Relish Catering regularly received tips from its customers in the form of a gratuity added to their final catering bill at the end of an event. Relish retained those tips for itself, rather than passing them along to its employees who worked at the events. However, Relish paid its employees at or above the federal minimum wage of $7.25 per hour, as well as time and a half for overtime.

Bridgette Marlow believed that Relish was required to turn over her share of the tips under the Fair Labor Standards Act (FLSA). Despite making $12 per hour and $18 per hour for overtime, she sued Relish and Brett Tucker, a manager and part owner of the company, alleging that Relish violated the minimum wage provisions of the FLSA by retaining the tips.

Restrictions apply only when tip credit taken

Marlow argued that by retaining all of the tips, Relish was essentially paying a below-minimum wage. For example, she suggested that if she received her $12 hourly wage but Relish retained $11 in tips for each hour she worked, the result was the same as if Relish turned over all of the tips to her and paid her a $1 hourly wage. In essence, she argued that the company could be paying less than the required amount for tipped employees.

The 10th Circuit didn't bite on Marlow's rationale. The court stated that it didn't matter where the money to pay wages came from so long as the company paid at least the minimum wage required under the FLSA. It rejected Marlow's argument that the FLSA's tip-credit provision applied to her case because Relish didn't take a tip credit.

The FLSA tip-credit provision allows employers of "tipped employees" to pay a reduced hourly wage of $2.13 so long as the employees receive sufficient tips to raise their earnings to the $7.25 hourly minimum. But this provision only applies, said the court, if the employer counts tips toward the minimum wage. The tip-credit provision doesn't apply if the employer doesn't count tips

AGENCY ACTION

EEOC marks 50th anniversary of ADEA with discussion on discrimination. Experts invited to a June meeting of the Equal Employment Opportunity Commission (EEOC) told of the continuing effects of age discrimination 50 years after passage of the Age Discrimination in Employment Act (ADEA). A 2017 AARP survey reports that nearly two-thirds of workers age 55 to 64 report their age as a barrier to getting a job. Also, a 2015 survey using résumés for workers at various ages found significant discrimination in hiring for female applicants and the oldest applicants, according to Patrick Button, an assistant professor of economics at Tulane University and a researcher with the National Bureau of Economic Research Disability Research Center. Laurie McCann, a senior attorney for AARP Foundation Litigation, called on the EEOC to strengthen ADEA protections and enforcement. John Challenger of the outplacement and career transition firm Challenger, Gray & Christmas said that older workers, particularly skilled workers, are being channeled out of the workforce, damaging the country's economic health. If more older workers stayed in the workforce, it would significantly reduce the skilled worker shortage in the United States, he said.

Obama-era guidance on joint employment, independent contractors withdrawn. On June 7, Secretary of Labor Alexander Acosta announced that the U.S. Department of Labor's (DOL) 2015 and 2016 informal guidance on joint employment and independent contractors has been withdrawn. The two guidance letters from the Obama administration—FLSA 2015-1 (dealing with independent contractors) and FLSA 2016-1 (dealing with joint employment)—narrowed the definition of independent contractor and made more employers subject to joint-employer status. Acosta's announcement said the DOL will continue to enforce both the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act even though the guidance letters have been withdrawn.

Executive Order expands apprenticeships, vocational training. Secretary Acosta in June hailed President Donald Trump's Executive Order to expand apprenticeships and vocational training. The order calls on the secretary of labor, in consultation with the secretaries of education and commerce, to propose regulations that promote the development of apprenticeship programs by industry and trade groups, nonprofit organizations, unions, and joint labor-management organizations. It also directs the DOL and the Commerce Department to promote apprenticeships to business leaders in critical industry sectors, including manufacturing, infrastructure, cybersecurity, and health care. ✤

toward the minimum and instead pays the full hourly minimum wage.

The 10th Circuit stated that the FLSA tip-credit provision doesn't require that *all* employers must give all tips to employees in all circumstances, as Marlow urged. Instead, when an employer does *not* take the tip credit, the tip-credit provision imposes no restrictions on what it may do with tips so long as it provides an hourly wage above the $7.25 federal minimum, which Relish did in this case.

DOL's tip-ownership regulation invalid

Marlow relied extensively on a 2011 DOL regulation that provides:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

From the language of that regulation, it would seem that Marlow had a valid claim. But the 10th Circuit didn't agree, looking at whether the DOL had the authority to implement that regulation in the first place.

Relying on U.S. Supreme Court precedent, the 10th Circuit pointed out that federal agencies may create rules only to fill "ambiguities" or "gaps" in statutes. In a "friend-of-the-court" brief, the federal government argued that the FLSA is silent on the issue of who "owns" tips when an employer doesn't take the tip credit, and therefore, the DOL had the authority to create a tip-ownership rule to fill in that gap. Despite the 9th Circuit's acceptance of that argument, the 10th Circuit disagreed, finding that there is no statutory language in the FLSA that directs the DOL to regulate the ownership of tips when the employer isn't taking the tip credit. Consequently, because the FLSA's statutory text limits the tip restrictions to employers that take

the tip credit, the agency lacked the authority to regulate otherwise.

The 10th Circuit invalidated the DOL's tip-ownership regulation as beyond its authority. The court affirmed the lower court ruling in favor of the employer. *Marlow v. The New Food Guy, Inc.*, No. 16-1134 (10th Cir., June 30, 2017).

Bottom line on tips

At present, here is the status of what an employer may do with tips under the FLSA (at least in the states covered by the 10th Circuit's decision):

- If an employer takes the FLSA's tip credit, it may pay a reduced hourly wage of $2.13 to "tipped employees" (i.e., those who customarily and regularly receive more than $30 per month in tips) as long as the employees earn enough tips to bring their total hourly wage to the $7.25 minimum.
- If tips aren't sufficient to raise the total hourly wage to the minimum, the employer must pay the difference.
- If tips exceed the amount needed to raise the total hourly wage to the minimum, the excess tips go to the employee (or to multiple tipped employees through a valid tip pool).
- If the employer pays employees at or above the minimum wage, therefore not using a tip credit, it may do with the tips as it wishes, including retaining the tips itself.

Two important caveats: First, employers using a tip credit must notify the affected employees either orally or in writing that the tip credit will be used. Second, state laws may affect whether an employer may retain tips and under what circumstances. The *Marlow* opinion was decided under the federal FLSA requirements and

STUMP STEVE

Diabetes and spying on employees: The issues never end

by Steven T. Collis

Q *One of our employees has a diabetic condition that causes her pain throughout the day. Her doctor has completed the Family and Medical Leave Act (FMLA) application and says she will need 15-minute breaks every two hours. This gives her two extra 15-minute breaks in an eight-hour day. Do these extra breaks count as intermittent FMLA leave?*

A Yes, if the employee is eligible for FMLA leave and her doctor has provided a medical certification stating that intermittent leave is medically necessary, then the extra breaks should be counted as intermittent FMLA leave.

Remember also that your employee's diabetes generally will be considered a disability under the Americans with Disabilities Act (ADA). Consequently, you will have an obligation to provide a reasonable accommodation for her disability that allows her to perform the essential functions of her job. Additional breaks can often be reasonable accommodations that don't impose undue hardships on the company, but be sure to engage with the employee in an interactive process to discuss accommodations, especially if/when her FMLA leave is exhausted.

Q *Does an employee have the right to have someone present at his termination and/or disciplinary action?*

A If your employee is represented by a union, then he will be entitled to have a representative or coworker present at any meeting that might reasonably lead to discipline. That right doesn't extend to nonunion employees. Consequently, nonunion employees aren't entitled to have anyone else present at a disciplinary or termination meeting.

Q *We suspect some of our employees are using their office phones to make excessive personal calls. Are we allowed to record employees' conversations over our telephone system?*

A Colorado is a one-party consent state, meaning that telephone conversations may be recorded provided that one of the parties on the call consents to the recording. If you notify employees that any calls made on the company telephone system may be recorded and that their use of the system constitutes their consent to recording, you should meet the consent requirement for Colorado.

A possible issue arises if the other party on the line is in one of the 12 states that require both parties to the call to consent to recording. To avoid potential liability in those states, you should add an automatic recording stating that all calls may be recorded and continuation of the call constitutes the parties' consent to any recording.

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won't override potential state wage claims based on differences in state law.

In Colorado, employers of tipped employees must pay a cash wage of at least $6.28 per hour, provided that when combined with tips, the employee's pay equals at least the state minimum wage of $9.30 per hour. This is computed over a seven-day workweek in order for the employer to avoid making up any difference. In addition, Colorado wage law permits an employer to retain or "own" tips only if it posts a printed card in a conspicuous location in its business. The card must be at least 12x15 inches with one-half-inch letters and must notify the general public that tips or gratuities given by the patron aren't the property of the employee but instead belong to the employer.

Because of the split in the circuit courts on the validity of the DOL's tip-ownership regulation, the issue may be ripe to reach the U.S. Supreme Court for resolution. We will keep track of any developments and report them in future newsletters.

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PENSIONS

Supreme Court delivers sermon on ERISA 'church-plan' exemption

The Employee Retirement Income Security Act of 1974 (ERISA) generally requires private employers offering pension plans to adhere to a lengthy list of rules designed to ensure plan solvency and protect plan participants. Church plans, however, are exempt from those requirements. But what exactly constitutes a "church plan"? The U.S. Supreme Court has just ruled—unanimously—on this issue.

Church-affiliated hospital pension plans

The case involved three church-affiliated nonprofits that run hospitals and other healthcare facilities. The hospitals offer defined-benefit pension plans to their employees. The plans were established by the hospitals themselves—not by a church—and are managed by internal employee benefits committees.

The three hospitals involved in the case were Advocate Health Care Network, associated with the Evangelical Lutheran Church in America and the United Church of Christ; Saint Peter's Health Care System, which is both owned and controlled by a Roman Catholic diocese; and Dignity Health, which maintains ties to the Catholic religious orders that initially sponsored some of its facilities.

A group of current and former employees filed class actions alleging that the hospitals' pension plans didn't fall within ERISA's church-plan exemption because they weren't established by a church. The district courts agreed with the employees, ruling that a plan must be established by a church to qualify for the exemption, and the appeals courts affirmed the district court's ruling.

The U.S. Supreme Court, however, ruled 8-0 (Justice Neil Gorsuch didn't participate in the case) that a plan maintained by a principal-purpose organization qualifies as a "church plan," regardless of who established it.

Majority opinion

Justice Elena Kagan wrote the majority opinion. The definition of "church plan" came in two distinct phases, noted the Court. Initially, ERISA defined it as a "plan established and maintained . . . for its employees . . . by a church or by a convention or association of churches."

But in 1980, Congress amended the statute to expand the definition. Now, for purposes of the church-plan definition, an "employee of a church" includes an employee of a church-affiliated organization, such as the hospitals in this case.

Congress in 1980 also added a provision stating that the definition of "church plan" includes a plan established *or maintained* by an entity whose principal purpose is to fund or manage a benefit plan for the employees of churches or church affiliates.

The intent of Congress, the Supreme Court concluded, was to encompass a different type of plan in the definition—one that "should receive the same treatment (i.e., an exemption) as the type described in the old definition." And these "newly favored plans" are described by the Court as those maintained by "principal-purpose organizations," regardless of their origins.

In short, the Court stated that "because Congress deemed the category of plans 'established and maintained by a church' to 'include' plans 'maintained by' principal-purpose organizations, those plans—and *all* those plans—are exempt from ERISA's requirements." *Advocate Health Care Network v. Stapleton,* U.S. Supreme Court 581 U.S. ___ (June 5, 2017).

Sotomayor: Right decision, but a troubling one

Justice Sonia Sotomayor, in a concurring opinion, noted that the majority opinion meant that "scores of employees—who work for organizations that look and operate much like secular businesses—potentially might be denied ERISA's protections. In fact, it was the failure of unregulated 'church plans' that spurred cases such as these."

While Sotomayor joined the majority opinion because she was "persuaded that it correctly interprets the relevant statutory text," she was nonetheless "troubled by the outcome of these cases." She noted that while Congress acted in 1980 to exempt plans established by orders

of Catholic Sisters, "it is not at all clear that Congress would take the same action today with respect to some of the largest health-care providers in the country[,] . . . organizations [that] bear little resemblance to those Congress considered when enacting the 1980 amendment." ✤

EEOC ENFORCEMENT

Best practices for employers under EEOC's new SEP

The Equal Employment Opportunity Commission (EEOC) recently released its Strategic Enforcement Plan (SEP) for 2017 to 2021. The new plan replaces an earlier version issued in 2012, but it isn't a radical departure from the agency's previous agenda. Employers hoping for a more employer-friendly EEOC under the new administration may be disappointed by the 2017 SEP.

The plan makes clear that the agency will continue to aggressively investigate and litigate issues it sees as having the greatest impact on the development of the law or on promoting compliance across a large organization or industry. The EEOC expresses its intent to "focus on strategic impact" to be effective as a "national law enforcement agency," despite its increasingly limited funding and staffing.

The new plan focuses on developing substantive areas, including the "gig economy," "backlash" discrimination against Muslim and Middle Eastern employees, and discriminatory hiring and recruitment policies. It also makes clear that hot-button topics from recent years are likely here to stay. Employers are strongly urged to develop practices now to help them avoid EEOC charges and withstand the agency's scrutiny.

EEOC takes on 'gig economy'

Today, employees are more likely than ever before to be temporary, part-time, leased, employed through a staffing agency, or employed by more than one employer. These days, more workers fall in that ill-defined gray zone between true independent

WORKPLACE TRENDS

Survey finds HR gaining C-suite influence. A survey from payroll and HR software provider Paychex finds that HR leaders at small and midsize companies say they have grown beyond serving a traditional administrative function to taking on a more strategic role within their organizations. The survey of more than 300 HR decision makers from organizations with 50 to 500 employees found that 75% of respondents feel HR technology has enabled them to secure a seat at the leadership table. According to the study, 41% of respondents meet with their CEO or CFO or both on a weekly basis, while close to one-third have access to top management when they need it.

Unemployment rate for persons with disabilities stable in 2016. The U.S. Bureau of Labor Statistics (BLS) reported in June 2017 that the unemployment rate for persons with a disability, at 10.5%, was little changed from the previous year, while the rate for those without a disability declined to 4.6%. Highlights of the 2016 data show that nearly half of all persons with a disability were age 65 and over, about three times larger than the share of those with no disability. Also, for all age groups, the employment-population ratio was much lower for persons with a disability than for those with no disability. Another finding showed that for all educational attainment groups, jobless rates for persons with a disability were higher than those for persons without a disability. The report also noted that in 2016, 34% of workers with a disability were employed part-time, compared to 18% for those with no disability. Also, employed persons with a disability were more likely to be self-employed than those with no disability.

Study finds employees dissatisfied with senior leaders. A survey from advisory firm Willis Towers Watson finds that U.S. employees give their senior leadership low marks on key aspects of people management, including the ability to develop future leaders, evoke trust and confidence, and demonstrate sincere interest in employees' well-being. The Willis Towers Watson Global Workforce Study found that just 45% of U.S. employees have trust and confidence in the job being done by their organization's top leaders. That's down from 55% of those who responded similarly in 2014. Just under half (47%) believe leaders have a sincere interest in employee well-being, while just 41% think their organization is doing a good job of developing future leaders. The research found that employees give their immediate managers higher grades. Eighty-one percent say their managers treat them with respect, while 75% say managers assign them tasks that are suited to their skills and abilities. ✤

UNION ACTIVITY

Unions speak out on air traffic control initiative. Union leaders representing airline and government employees are speaking out on President Donald Trump's air traffic control reform initiative. Lee Saunders, president of the American Federation of State, County, and Municipal Employees, says his union is opposed to what he calls "inefficient and risky efforts to privatize the nation's air traffic control operations." He said the reform plan "has the potential to threaten safe and efficient air travel for many Americans, to significantly weaken the economy, and to harm the committed federal workforce that is dedicated to the safe and efficient aviation all Americans deserve and expect." Captain Tim Canoll, president of the Air Line Pilots Association, Int'l (ALPA), said the U.S. air traffic control system should operate as a not-for-profit organization, and key stakeholders, including ALPA and the National Air Traffic Controllers Association, must hold a role in its governance and oversight.

Machinists union hails Uber decision to allow tipping. The International Association of Machinists and Aerospace Workers (IAM) is taking credit for the decision by ride-hailing company Uber to allow riders to tip straight from Uber's app. "Thanks to pressure from thousands of ride-hail drivers joining together in the IAM's Independent Drivers Guild, Uber riders across the United States will soon be able to tip straight from Uber's app," a June statement from the union said. "We were proud to lead the way in this fight on behalf of drivers in New York City and across the nation," said Jim Conigliaro, Jr., founder of the drivers' group and IAM Eastern Territory chief of staff. "This is an important first step toward a fairer ride-hail industry," he said.

Union leaders criticize withdrawal from Paris climate agreement. President Trump's decision to withdraw the United States from the Paris climate agreement has drawn criticism from union leaders. AFL-CIO President Richard Trumka called the move "a decision to abandon a cleaner future powered by good jobs." He said Scott Pruitt, administrator of the U.S. Environmental Protection Agency (EPA), has given dangerous advice and following his lead "is a failure of American leadership." Mary Kay Henry, president of the Service Employees International Union (SEIU) said Trump and his political allies "are killing the creation of new industries and jobs that could give communities the boost they need to thrive in favor of corporate polluters who want to pad their bottom line on the health of our communities." She said already in the United States, clean energy jobs outnumber fossil fuel jobs, with solar and wind energy at the forefront. ✤

contractors and employees. The "gig economy" is defined by the prevalence of short-term contracts and freelance work. In its SEP, the EEOC "adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on[-]demand economy."

Employers that use those types of employment arrangements must remember that "gig" workers can also allege discrimination or harassment. Don't cut corners on training on your antidiscrimination and antiharassment policies. Temporary employees may be viewed as easy targets for harassment, discriminatory treatment, or bullying. As the recent events at Uber have made clear, companies that grow quickly need to make sure they "grow up" by timely implementing clear and consistent policies and encouraging a culture of professionalism.

Discrimination against Muslim, Middle Eastern employees

Another focus area for the EEOC is "addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups." While it's somewhat unusual for the EEOC to announce that it will specifically focus on particular religious groups or nationalities, the plan explains that strategic protection is necessary because of "backlash against [those groups] from tragic events in the United States and abroad." It's unclear how enforcement of the issue will proceed under the new presidential administration.

Remember that you must provide employees reasonable accommodations for religious observances, including breaks for prayers. Appearance and dress code standards that arbitrarily ban or restrict beards, turbans, or head coverings likely will draw increased scrutiny from the EEOC. Backlash discrimination should be specifically covered in antidiscrimination training.

Barriers in recruitment and hiring

The EEOC restated its commitment to eliminating barriers in recruitment and hiring and added new details to its goal. Specifically, the EEOC will take aim at the lack of diversity in certain industries, including technology and police work, and the increasing use and impact of data-driven employment screening tools. Employers in targeted industries should continue to focus on recruiting a diverse workforce.

Employers that use online applications, algorithms, or similar data tools to screen applicants must be particularly careful. Those tools can provide a first look at applicants and assist hiring managers. However, you must know what parameters are used in the screenings and make sure you consider how the screenings could present barriers (even unintentionally) for groups such as older workers, minorities, women, and people with disabilities. For example, a screening tool that automatically eliminates applicants with a long gap in employment may unintentionally have a disparate impact on women who left

the workforce to care for a young family. Date-of-birth inquiries could discriminate against older workers. Online application processes that aren't accessible to people with disabilities present an obvious problem.

Screening applicants by checking their social media profiles also can be risky. Social media profiles may reveal more than a potential employer should know about employees' religion or other protected characteristics.

Pregnancy discrimination, unequal pay, LGBT protections

The EEOC will continue to prioritize substantive issues such as rooting out pregnancy discrimination, preventing unequal pay, and protecting LGBT individuals from discrimination.

The EEOC has focused on accommodating employees' pregnancy-related limitations. Employers are reminded that pregnant employees should be treated the same as nonpregnant employees with a similar ability or inability to work. Remember, if a pregnant employee hasn't requested leave or a new role, you can't force her to take leave or change roles because you believe she shouldn't perform a certain job. At the same time, a pregnant employee who requests an accommodation should be treated the same as other employees who request accommodations.

The EEOC will continue to focus on equal pay. However, the SEP makes clear the agency won't focus on equal pay strictly as a gender issue: "The Commission will also focus on compensation systems and practices that discriminate based on any protected basis." The guidance reminds employers that pay differentials should be based on seniority, merit, or quantity or quality of production, not on protected characteristics.

Finally, as you likely know by now, the EEOC interprets the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 as forbidding employment discrimination based on gender identity and sexual orientation. The agency has enjoyed great success in enforcing its position. It has obtained more than $6 million in monetary relief for LGBT workers, required policy changes by employers, and convinced a growing number of courts to endorse its interpretation of Title VII.

The number of EEOC charges based on sexual orientation or gender identity increased by 34 percent in 2015. The agency is unlikely to slow down in its strategic enforcement in this area, and you would do well to include sexual orientation and gender identity as protected characteristics in your equal employment and antiharassment policies. The Human Rights Campaign has reported that the vast majority—89 percent—of Fortune 500 companies already prohibit discrimination based on sexual orientation, and two-thirds prohibit discrimination based on gender identity.

Bottom line

The EEOC expects employers to follow not only the laws it enforces but also its interpretations of those laws. Take the time to analyze your work environment regarding the issues in the agency's SEP. Consider revising your policies and practices to more closely align them with the EEOC's strategic positions. Your efforts will prove to be invaluable if your company faces an EEOC charge or investigation. ✤

SEX DISCRIMINATION

Ethical issues, not same-sex relationship, led to Denver psychologist's demotion

The issue of pretext recently played out in a sex discrimination case before the 10th Circuit. The court had to decide whether an employer's reasons for demoting an employee were legitimate or just a ruse to cover up discrimination.

Romantic relationship leads to complaints

Dr. Tawny Hiatt worked at a counseling center operated by the University of Denver, where she supervised psychology students seeking their professional license. In late 2012, she began supervising Dr. Abby Coven in Coven's private practice, which was unaffiliated with the clinic. A romantic relationship developed between the two doctors. In early 2013, Hiatt discontinued supervising Coven's private practice while they continued their personal relationship.

By late January 2013, word about the romantic relationship between Hiatt and Coven had spread among the psychology students. Several weeks later, an open meeting was held so Hiatt and the interns could air their concerns. After the meeting, three interns elected to end their supervision with Hiatt, and another student complained about her supervisory style, stating it was more akin to therapy than teaching.

Meanwhile, Hiatt's supervisor, Dr. Alan Kent, sought ethics guidance from the university and the American Psychological Association (APA). The APA advised him that Hiatt's situation was an "ethical gray area" because psychologists are prohibited from having sexual relationships with subordinates or individuals with whom they have a professional relationship. Kent discussed the issues with Hiatt, who proceeded to blame the interns instead of taking personal responsibility for their reaction to the situation.

In late February 2013, the university asked Hiatt to resign, be demoted, or allow HR to handle the matter.

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Kent informed her of the reasons for the decision: Interns refused to be supervised by her, her actions fell within an ethical gray area, and she refused to take personal responsibility. She reluctantly chose to be demoted.

Sex discrimination and retaliation claims

Hiatt filed an internal grievance and equal employment opportunity (EEO) complaint in September 2013. The university explained that her romantic relationship with a subordinate was not the reason for her demotion. Rather, it was merely the catalyst for a series of complaints in which her questionable supervisory techniques were revealed. Hiatt resigned on May 30, 2014, after she was not reinstated to her supervisory role.

Hiatt then filed sex discrimination and retaliation claims under Title VII. The 10th Circuit found that the university provided legitimate nondiscriminatory and nonretaliatory reasons for her demotion: the upheaval among her students, the ethically gray manner in which she handled her relationship with Coven, and her inappropriate therapy-based supervisory style.

The court found that the legitimate reasons for Hiatt's demotion were not pretextual (excuses) based primarily on "consistency." The university never waivered or altered its explanation of why she was demoted at any point in the process, from the handling of the internal grievance and EEO complaint to the end of the lawsuit. The court also found that the university's investigation into the ethical considerations of Hiatt's personal relationship with Coven was substantial and bore no marks of unfairness. The fact that the revelation of Hiatt's personal same-sex relationship had the unexpected effect of shedding light on her questionable supervisory style was of no consequence. *Hiatt v. Colorado Seminary,* No. 16-1159 (10th Cir., June 2, 2017).

Takeaways

The 10th Circuit's decision is notable for a couple of reasons. As many employers know, the 10th Circuit does not consider sexual orientation a protected characteristic under Title VII. Instead, Title VII prohibits unlawful gender stereotyping. However, in Hiatt's case, no unlawful gender stereotyping was found, despite the fact that the issues that led to her demotion did not arise until her same-sex relationship was revealed. Another important takeaway is that consistency is key. In this case, the employer was able to obtain dismissal because it was consistent in its explanation of its decision throughout the entire process. ✤

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