



HR CORNER

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Influence by Alleged Retaliator in Disciplinary Terminations

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In a recent case from the Eleventh Circuit Court of Appeals (11th Circuit), covering Alabama, the court provided an example of its current analysis of retaliation cases. In Corbitt v. Home Depot USA, two male store managers complained about inappropriate comments and touching from their gay regional manager. A month after formally complaining to the company about the manager's conduct, the company terminated the employees for disciplinary issues. As a result, the employees filed sex discrimination claims against the company, alleging both hostile work environment (based on the manager's conduct) and retaliation.

The 11th Circuit affirmed the trial court's decision to dismiss the hostile work environment claims. The employees presented evidence of various inappropriate comments and actions; however, the conduct was not pervasive enough to evidence a hostile work environment claim. The court refreshed its standing on hostile work environment claims, noting that federal discrimination laws are not designed to be a "workplace civility code," but instead to punish only that conduct which "is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." After reviewing the employees' allegations of harassment, the court noted that the activity was flirtatious in nature but not harassing, and that it was not sufficiently severe to constitute a hostile work environment under federal laws.

The 11th Circuit court held differently on the retaliation claim. The company argued that the employees were discharged lawfully based on violations of company rules and procedures. The company alleged that the employees provided unauthorized discounts on company products that were inconsistent with company policies, and that the employees made frequent unauthorized phone calls on their company-provided cell phones. While the manager at issue was not a decision-maker in this process, the employees alleged that he had input into the termination decision and that he later bragged about the termination to other store employees. The employees argued that, while the manager was not an official decision-maker, he influenced the decision.

The 11th Circuit determined that the employees presented a prima facie claim of retaliation, noting that the employees' complaints about their manager were "not wholly unrelated" to their subsequent termination. The employer argued that the decision to terminate the employees was legitimate based on violations of company policies. In return, the employees argued that the policy justifications were pretext for discrimination. The 11th Circuit agreed that there were sufficient facts to overturn the trial court's dismissal of the retaliation claim. The 11th Circuit based its decisions on the employee's argument that no specific rules were violated regarding the unauthorized phone use, and an affidavit that the discounts were valid.

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This decision is unusual in that the 11th Circuit avoided certain legal analyses that may have complicated its decision. There is existing case law that provides a rigorous analysis for determining whether someone influenced a company decision, despite not being an official decision-maker. The 11th Circuit avoided this analysis without analyzing the true extent of the manager's involvement under the so-called "cat's paw" precedent. Furthermore, the 11th Circuit did not assess whether retaliation was the true motive behind the employer's decision to terminate the employees. Instead, the court determined that the adverse employment action and the employees' complaints were not "wholly unrelated."

Employers should take note of this case, and assess their procedures for terminating employees, particularly where a complaint is pending against the employee at-issue. Employers should be careful to exclude biased or otherwise compromised management employees from participating, or even influencing, the disciplinary process.

The case is Corbitt v. Home Depot USA, Inc., 573 F.3d 1223 (11th Cir. 2009).

Fees & Burgess, P.C.—Calendar of Events**October 21-22, 2009 — Scottsdale, Arizona****[IPC Electronics Industry Executive Summit](#)**

This presentation will address contracts from an EMS-supplier standpoint. A few key topics included: contracts with distribution and with direct purchases including fabricated items (metal, plastics, pcbs), as well as off-shore (Asian) procurement contracts.

January 20, 2010 ~ February 17, 2010 ~ March 17, 2010 ~ April 21, 2010**Holiday Inn Research Park - Huntsville, Alabama****[International Commercial Contracting: Identifying, Avoiding, and Managing Risk Areas](#)**

This four-part course provides a practical introduction to international contracting, focusing particularly on risk identification and avoidance. Attendees will gain an understanding of the laws and provisions governing international agreements, and how international contractual relationships differ from domestic counterparts. The course will provide a solid grasp of the concepts, theories, and practical considerations necessary for drafting, interpreting, and negotiating international contracts. This course can be used toward ISM and NCMA credit.

Session 1: Introduction to International Contracting ♦ January 20, 2010; 11:30 AM - 1:00 PM CST [Click here for details.](#)

Session 2: Drafting 101 ♦ February 17, 2010; 11:30 AM ♦ 1:00 PM CST [Click here for details.](#)

Session 3: Drafting 101 Continued ♦ March 17, 2010; 11:30 AM ♦ 1:00 PM CST [Click here for details.](#)

Session 4: Special Considerations in International Contracting ♦ April 21, 2010; 11:30 AM ♦ 1:00 PM CST [Click here for details.](#)

If you would like more information on these seminars, please go to www.feesburgess.com



SPEAKERS

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