

# Workplace Watch

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## Keeping an Eye on Developments in Employment Law for Employers and Employees

### Courts Consider Discrimination, Harassment Cases

#### CIVIL RIGHTS

A wrongful termination lawsuit alleging race and age discrimination under federal and state law by an employee who was fired for allegedly making bomb threats was rejected by the 8th Circuit Court of Appeals. The African-American employee failed to make a prima facie case of race discrimination because he failed to establish the fourth prong of a prima facie case. Even if a prima facie case was established, he failed to show that the stated reason for his discharge was pretextual since the employer believed that he made the bomb threats, even if he did not do so. *Johnson v. AT&T Corp.*, 422 F.3d 756, (8th Cir. 2005).

A race discrimination claim by an African-American bank teller, who was terminated for violating bank policy by processing a transaction on her own accord failed in another 8th Circuit case. Although the claimant established a prima facie case of disparate treatment because a similarly situated white bank teller was not disciplined for violating the same policy, summary judgment was appropriate because the claimant failed to show that the bank's legitimate, nondiscriminatory reason for termination was a pretext for discrimination. The frequency and seriousness of the claimant's violations and the suspicious circumstances surrounding her violations

differentiate her from the white employee who was not terminated for a similarly situated offense. *Rodgers v. U.S. Bank, N.A.* 417 F.3d 845 (8th Cir. 2005).

The Minnesota Court of Appeals also rejected a race discrimination claim by an African-American employee who was terminated for altering his mandatory driving log. The employee's claim that white employees engaged in such conduct and were not terminated was based on conclusional allegations that his supervisor was racist, which failed to sustain a prima facie case of disparate treatment. Further, the employer had legitimate nondiscrimination reasons for discharge, which was not pretextual. *Bullard v. Penske Logistics, LLC*, 2005 WL 2129924 (Minn. App. 2005) (unpublished).

A claim of sex harassment and retaliation brought by a woman because of sexual harassment by her foreman was dismissed by the 8th Circuit. The claim was not sustainable because the foreman who committed the alleged harassment was a coworker, not a superior, and had no authority to fire, promote or reassign her, and the claimant failed to produce any evidence that the employer failed to take proper remedial action. The retaliation claim was not actionable because the employee's lay-off within a month after reporting sexual harassment was insufficient to establish a "causal connection" between any protected conduct and the

employer's adverse action because the employee missed a number of days of work and at the company was undergoing a number of lay-offs and reduced work availability, which had started before the



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claimant was laid-off. *Cheshewalla v. Rand & Son Const. Co.*, 415F.3d 847 (8th Cir. 2005).

A claim by an ordained minister and religious teacher that he was wrongfully discharged in violation of the Minnesota Human Rights Act because of his sexual orientation was barred by the 1st Amendment of the U.S. Constitution in a case decided by the Minnesota Court of Appeals. The religious organization was exempt from claims of sexual-orientation discrimination under the Minnesota Human Rights Act because of the entanglement doctrine under the 1st Amendment of the U.S. Constitution in the parallel, but broader provision of Article I, Section 6 of the Minnesota Constitution, protecting freedom of conscience. *Doe v. Lutheran High School of Greater Minneapolis*, 702 N.W.2d 322 (Minn. App. 2005).

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### WHISTLEBLOWER LAW

The complaint of a cook, who claimed that she was wrongfully terminated under the Minnesota Whistleblower Act, Minn. Stat. § 181.932, was dismissed by the Minnesota Court of Appeals. The whistleblower claim was inapplicable because the statute applies only to “current employees” and the claim was asserted against a vendor that had contractual relations to provide food services to the claimant’s employer. Since the claim was not asserted against the current employer, but against a vendor, it was not actionable under the statute. *Schmitt v. Lunchtime Solutions, Inc.*, 2005 WL 2009049 (Minn. App. 2005) (unpublished).

### WARN LAW

The continuation of a plant as a “going concern” did not activate the 60-day warning requirement under the federal Worker Adjustment & Retraining Notification (WARN) Act, 29 U.S.C. § 2101, *et seq.* The 8th Circuit Court of Appeals upheld dismissal of a claim by employees when their facility was sold but continued to operate with 44 of the same 68 employees. The decision conforms to a ruling earlier this year by the U.S. District Court for the Western District of North Carolina, *Local 2-1971 of Pace International Union v.*

*Cooper*, 364 F.Supp. 2d 546 (W.D.N.C., 2005). *Smullin v. Mity Enterprise, Inc.*, 420 F.3d 836 (8th Cir. 2005).

### UNEMPLOYMENT COMPENSATION

An employee who was terminated for testing positive for drugs was denied unemployment compensation benefits on grounds of “misconduct” in an unpublished decision of the Minnesota appellate court. The employee was properly fired after testing positive for a second time after entering a chemical dependency assessment program following a first positive test. The absence of any “threshold levels” in the company drug-testing policy did not bar the termination because the threshold levels were into the test and a positive test result indicated that the threshold detection level was exceeded by the employee. *Borland v. Bridon Cordage, LLC*, 2005 WL 2008655 (Minn. App. 08/23/05) (unpublished).

An employee who was fired after receiving a disciplinary warning for bringing pornography into the workplace was fired for violating the company’s “zero tolerance” sex harassment policy. The employee talked about sexual matters at the workplace and told offensive jokes and stories, despite an oral warning not to do so, which sustained a finding of misconduct for

sexual harassment and disqualified the employee from receiving unemployment benefits. *Smith v. Itron*, 2005 WL 20093038 (Minn. App. 2005) (unpublished).

In a separate action, an employee who quit her job because of alleged harassment was denied unemployment compensation benefits. Although there was a “personality conflict” between the employee and the supervisor, this does not constitute “good cause” for the employee to quit her job. Further, the employee did not raise complaints with the employer or file a grievance with the union, which prevented the employer from having an opportunity to correct the alleged problem before the claimant quit. 2005 WL 2008647 (Minn. App. 2005) (unpublished).

Another employee who quit because of physical harm from two coworkers was not entitled to unemployment compensation in an unpublished appellate decision. The employee was denied unemployment compensation benefits because she never complained to a supervisor or management about the harassment, which prevented the employer from having a “reasonable opportunity to correct” the working conditions. *Klingsheim v. Happyland Tree Farms, Inc.*, 2005 WL 1950208 (Minn. App. 2005) (unpublished).

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