

# Title VII Update: No Adverse Action for Suspension With Pay

## Labor & Employment Law Update

on August 20, 2015

Recently, a Federal Appellate Court held that there was no adverse action under Title VII for an employee who was suspended *with pay* during an investigation. *Jones v. Se. Penn. Transp. Auth.*, — F.3d—, No. 14-3814 (3rd Cir. Aug. 12, 2015).

The underlying facts are straight forward and typical of an employment discrimination suit:

- The supervisor suspected an employee was guilty of wage theft.
- The supervisor suspended the employee with pay.
- The employee informed the company's EEO/Human Resources Department that she intended to file a complaint against the supervisor; at the investigation meeting the next week, the employee alleged for the first time that the supervisor sexually harassed and retaliated against her.
- Separately and simultaneously, the time theft issue was investigated. The Company concluded that the employee engaged in misconduct. Her paid suspension was converted to an unpaid suspension, pending formal termination.
- The employee filed charges of discrimination against the company and supervisor with the state human rights administrative agency.

The trial court granted the Company summary judgment as to Title VII discrimination, which the Appellate Court affirmed (note: the Appellate Court did not review, and declined to opine, whether paid suspension may amount to Title VII *retaliation*). **The Appellate Court found that a paid suspension is not a refusal to hire or terminate, “by design” does not change compensation, and does not cause a “serious and tangible” alteration of employment terms, conditions, or privileges.** Further, these terms and conditions of employment ordinarily include the possibility that an employer will be subject to disciplinary policies. Other workers identified by Employee as having engaged in somewhat similar misconduct were readily distinguished and not comparable.

### Key Points for Employers

In an increasingly regulated, employee-friendly, and litigious business environment, employers must ensure that they protect the company from employee misconduct and subsequent claims by disgruntled workers and former workers. To do so, employers must:

- Treat all similarly situated employees with consistency – if there is a change in policy/enforcement, document the basis and effective date. Ensure supervisors are trained on enforcement and employees have notice of the policies.
- Permitting an employee to continue to work while suspected of gross misconduct may make later termination seem suspect to an administrative agency (including unemployment), and even a jury. Therefore, promptly remove an employee suspected of misconduct from the workplace. If the misconduct is merely suspected, suspend *with pay* pending investigation and determination.
- Conduct and document an investigation into misconduct – secure and save evidence such as timesheets, cash register tickets, or CCTV video.
- Adverse employment actions (suspension without pay, demotion, transfer, termination, and the like) should be based on good faith business reasoning.
- And, of course, involve counsel if an investigation becomes risky, an employee claims discrimination or harassment, or it appears there may be litigation on the horizon.

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