



## PREVAILING PLAINTIFF IN TITLE VII RETALIATORY DISCHARGE CASE AWARDED SIGNIFICANT COMPENSATORY DAMAGES AND ATTORNEY'S FEES

In a recent unpublished decision from the federal Fifth Circuit Court of Appeals, a “high end” compensatory damage award was affirmed, and the district court’s failure to award attorney’s fees was reversed. In *Tureaud vs. Grambling State University*, 294 Fed. Appx 909, 2008 WL 4411438 (5th Cir.), a black plaintiff alleged that his termination as campus police chief for Grambling State University was in retaliation for his attempt to hire a white assistant police chief. A jury found in favor of plaintiff and awarded \$140,000 in compensatory damages. Plaintiff moved for an award of attorney’s fees which was denied by the trial court. Defendant sought a remittitur of the jury award which was likewise denied. On appeal, Grambling State argued that plaintiff failed to satisfy the “oppositional requirement” of a Title VII retaliation claim, failed to produce sufficient evidence that his discharge was retaliatory, and even if so, that the compensatory damage award was excessive.

Tureaud was a black alumnus of Grambling. He worked in federal law enforcement for more than twenty years prior to being hired by Grambling as its Police Chief in 2002. Although the position included many management responsibilities, the authority to make ultimate hiring decisions was not one of them. Recognizing the need for an Assistant Police Chief, Tureaud sought approval to hire Wesley Harris, a white male, for the position. During the vetting process, Tureaud’s supervisor recommended his termination. Grambling terminated Tureaud, allegedly for various incidents unrelated to the hiring of Harris. Tureaud claimed his termination was the result of his opposition to Grambling’s unlawful hiring

practice, i.e., the failure to hire Harris because he was white and Grambling was a historically black university.

The Fifth Circuit first determined that Title VII anti-retaliation protections cover opposition to discriminatory employment practices directed against job applicants as well as employees. The court then found that there was sufficient record evidence to support the jury’s decision that Tureaud satisfied the opposition requirement of his Title VII retaliation claim, especially given the broad scope generally afforded the opposition clause by courts. The court then noted that while the \$140,000 jury award for “emotional distress” was at the “high end of the spectrum” for a compensatory damage award, that there was enough record evidence to support that the award was not clearly excessive. The court completed its analysis by noting that although an award of reasonable attorney’s fees to the prevailing party in a Title VII case was discretionary pursuant to the statute; U. S. Supreme Court decisions state that prevailing plaintiffs should receive such an award absent special circumstances. Finding no such special circumstances, the Fifth Circuit reversed the district court on this issue and remanded for an award of attorney’s fees and costs.



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## FAMILY MEDICAL LEAVE ACT REGULATIONS BECOME EFFECTIVE

The final revised FMLA regulations issued by the DOL on November 17, 2008 became effective January 16, 2009. The regulations address the FMLA military family leave entitlements and also include other, significant changes to prior regulations. Some of the changes involving employer notices are described in 29 C.F.R. §825.300 and include:

### *General Notice*

29 C.F.R. §825.300(a). A covered employer must post on its premises "in conspicuous places where employees are employed" a general notice explaining the FMLA's provisions and providing information about procedures for filing complaints of violations with the Wage and Hour Division. The general notice also must be provided to each employee of a covered employer with any eligible employees "by providing the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring." *Id.* Electronic posting and distribution may be sufficient to meet the posting and distribution requirements. At Appendix C of the regulations, the DOL has provided a prototype notice meeting the requirements of the content of the general notice.

### *Eligibility Notice*

29 C.F.R. § 825.300(b). An employer must notify an employee who requests FMLA leave within five business days whether the employee is eligible and, if not eligible, the notice to the employee must provide at least one reason for the ineligibility. Notice may be oral or in writing. For subsequent requests by the same employee during the applicable 12-month period, the employer need not provide another eligibility notice unless the employee's eligibility status has changed. A prototype written notice form is provided at Appendix D of the regulations.

### *Rights and Responsibilities Notice*

29 C.F.R. § 825.300(b). Also, "each time" an eligibility notice is provided to an employee, a Rights and Responsibilities Notice must be provided. This notice is incorporated into the

prototype *Notice of Eligibility and Rights and Responsibilities* at Appendix D of the regulations. If certification forms will be required by an employer to substantiate the need for leave, the notice may attach the required forms.

### *Designation Notice*

29 C.F.R. § 825.300(d). When an employer has enough information to determine whether the leave is being taken for an FMLA-qualifying, the employer must provide written notice to the employee within five business days as to whether the leave will be designated and counted as FMLA leave. The notice must state whether a fitness for duty certificate will be required at the end of the leave. Though the regulations provide that generally, only one designation notice must be given to an employee for each qualifying reason within a twelve-month period, the regulations also provide that if the information changes (such as when leave is exhausted), the employer must issue a written notice of the change within five business days of the employee's request for leave subsequent to the change. The employer must notify the employee of the amount of leave counted against the employee's leave entitlement. If the amount of leave is unknown at that time (because, for example, the leave will be unforeseeable intermittent leave), then an employer must provide notice of the amount of leave counted against the employee upon the employee's request, but no more than one in a 30-day period and only if leave was taken in that period. A prototype designation notice form is provided by the DOL at Appendix E.

Failure to comply with the posting or notice requirements may subject an employer to civil money penalties or other civil liability. A complete copy of the regulations and prototype forms are available at the DOL website, at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.



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