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The Express Lane

OSHA Has Tips on Avoiding the Holiday (C)rush When It Comes to Serial Harassers, Spare the Rod and Face the Jury Noteworthy Numbers: Discrimination Charges, Fiscal Year 2009 Overtime Lawsuits by Retail Managers Just Keep on Comin'

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OSHA Has Tips on Avoiding the Holiday (C)rush

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Retailers expect this holiday shopping season to be busier than last year. And with many Americans heavily affected by the down economy, consumers are going to be looking for great deals during Black Friday. But, with such large crowds, retailers need to take precautions for safety of their employees and customers to prevent any accidents and possibly even fatalities resulting from crowd shoving, acts of violence, fire, and trampling.

If retailers take time to enact proper safety precautions and plan for emergencies, the holiday shopping season can be a positive experience for everyone.

OSHA has issued guidance on crowd management, with suggested precautions including the following:

- Where large crowds are expected, have trained security or crowd management personnel or police officers on site.
- Create a detailed staffing plan that designates a location for each employee. Based on the size of the crowd expected, determine the number of employees needed in various locations to ensure the safety of the event (*e.g.*, near the door entrance and throughout the store).
- Provide legible and visible signs that describe entrance locations, store opening times, and other important information such as the location of major sale items.
- When the store reaches maximum occupancy, do not allow additional customers to enter until the occupancy level drops.
- Train employees in crowd management procedures and the emergency plan. Provide them with an opportunity to practice the special event plan. Include local public safety agencies if appropriate.
- Set up barricades or rope lines for crowd management well in advance of customers' arriving at the store. Make sure that barricades are set up so that the customers' line does not start right at the entrance to the store.
- Designate employees to explain approach and entrance procedures to the arriving public, and direct them to lines or entrances.
- Consider using an internet lottery for "hot" items.
- Communicate updated information to customers waiting in line. Distribute pamphlets showing the location of entrances, exits and location of special sales items within the store.
- Make sure all employees and crowd control personnel are aware that the doors are about to open.

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- Use a public address system or bullhorns to manage the entering crowd and to communicate information or problems.
- Provide crowd and entry management measures at all entrances, including the entrances not being used. If possible, use more than one entrance.
- Provide a safe entrance for people with disabilities.

David Smith practices in the area of workplace safety and health compliance and defends employers in OSHA citations and retaliation charges.

When It Comes to Serial Harassers, Spare the Rod and Face the Jury

Three plaintiffs in a racial harassment case **will get jury trials** because the courts found that the employer was too “permissive” with a long-term co-worker whose racially offensive behavior was known by management for years.

The co-worker, who was white, allegedly used the “N-word” frequently, said that the Martin Luther King holiday should be accompanied by a “James Earl Ray Day,” honoring Dr. King’s assassin, and said that African-Americans should “stay with their own kind.” The plaintiffs also alleged that racial graffiti was prevalent in the bathroom at their facility, including the use of the “N-word” and references to Ray and the Ku Klux Klan.

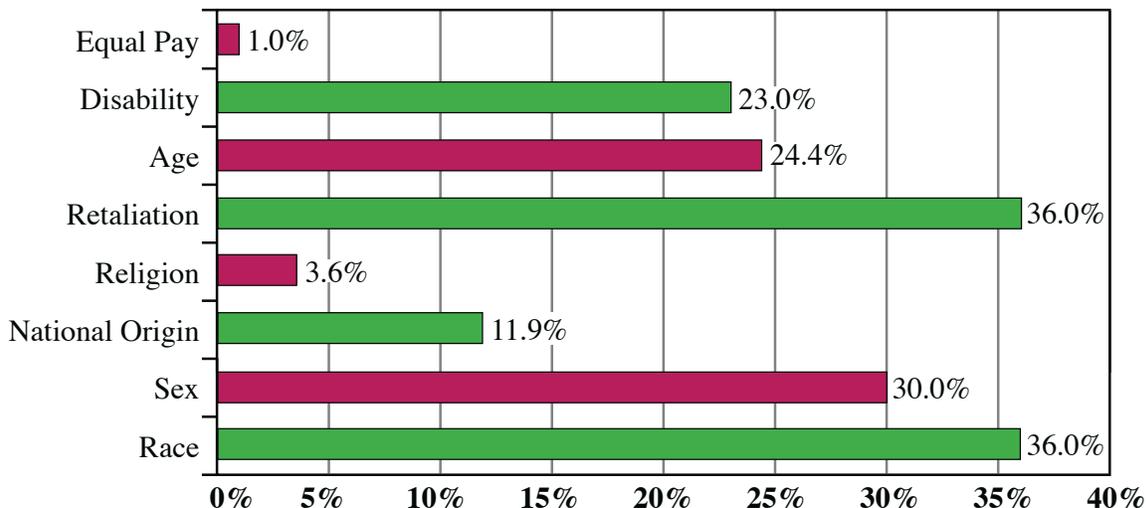
The court, in deciding that the plaintiffs were entitled to a jury trial on their racial harassment claims, said that the company knew it was dealing with a serial harasser and therefore had a heightened responsibility to deal with it. A permissive attitude can result in employer liability, the court said.

In this case, the record showed that supervisors were aware of the employee’s racial comments and that no substantive action was taken to stop the conduct. Although the alleged harasser was ultimately terminated for absenteeism, the court said that this did not show that the company had tried to stop the alleged harassment. According to the court, there was also no evidence that the company had done anything to stop the racial graffiti in the bathrooms.

This case illustrates the importance for retailers to take prompt and effective action in dealing with harassment complaints, especially when the accused has a “history” of harassment.

Noteworthy Numbers

“GONNA FIND OUT WHO’S NAUGHTY OR NICE . . .”*
Discrimination Charges, Fiscal Year 2009



*"Santa Clause Is Comin' to Town," music by J. Fred Coots, lyrics by Haven Gillespie, published by EMI Feist Catalog, Inc. and Haven Gillespie Music

Source of charge information: U.S. Equal Employment Opportunity Commission, www.eeoc.gov

Overtime Lawsuits by Retail Managers Just Keep on Comin'

Collective actions alleging that retail managers are improperly classified as "FLSA-exempt" are commonplace, and the long list of victims has included Family Dollar, CVS, and Winn Dixie. Unfortunately, there is no indication that these lawsuits will end anytime soon. On August 19, 2010, former three former managers brought suit in the United States District Court for the Eastern District of Virginia alleging that the Kroger grocery chain failed to pay them overtime wages in violation of the Fair Labor Standards Act. The plaintiffs were a grocery manager, a meat manager, and a customer service manager at a store in Richmond, Virginia, and they claim that management and managerial discretion were not integral parts of their jobs and that they performed non-managerial tasks for 80 percent of their work time. Therefore, they claim that they should have been classified as non-exempt under the FLSA. As is usual, the named plaintiffs brought the lawsuit as a collective action and seek to represent all current and former grocery, meat, and customer service managers who have not been paid overtime.

RadioShack has recently been hit, as well. On September 1, two plaintiffs filed a putative collective action against the electronics retailer in the United States District Court for the Northern District of Ohio, making similar allegations. The RadioShack plaintiffs propose a nationwide class, as well as Ohio and Indiana classes. All three classes would cover store managers who had worked for RadioShack in the last three years and who were allegedly misclassified as "exempt."

Finally (for now), paint company Valspar Corporation has been sued by its regional and territory managers who served as liaisons between Valspar and home improvement retailer Lowe's. In their suit, filed September 9 in the United States District Court for the Eastern District of California, the managers contend that they are responsible for inventory management, event and brand marketing, and product training, but that they cannot hire and fire employees, have little discretion with significant matters, and do not direct other employees. They allege that they frequently worked as much as 80 hours a week without overtime.

As these cases demonstrate, retailers are especially vulnerable to wage and hour class and collective actions: not only off-clock work cases, but also misclassification cases. Retail employers should ensure that they have processes in place to prevent off-clock work, and they should also carefully review their lower-level supervisory and management jobs to ensure that the employees in these positions are truly "exempt."

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