

**Choice of Less Experienced White as Manager of “White” Store Could be Race Discrimination.** Most employers are aware that it is unlawful to make employment decisions based on the prejudices of customers and, yet, some companies continue to face potential liability because managers either are not sufficiently trained in human resources or in a moment of weakness may say something ill-advised. Such was the case involving a black male assistant manager who wanted a promotion to store manager and twice turned down offers from the Company because they were to stores in lower socio-economic areas with a greater percentage of black customers and less profit and, thus, were less attractive to him. When an opportunity came up in an area where more than 80 percent of the customers were white (the type of opportunity Plaintiff was looking for), the company hired a white woman who had not sought a promotion to that store and who had half the amount of experience as Plaintiff. In the lawsuit that followed, the hiring district manager failed to express a consistent rationale for why he favored the white candidate over Plaintiff. However, it was discovered that the district manager had spoken to Plaintiff’s current boss (a store manager who also had worked with the white candidate) and it further came out that Plaintiff’s boss told Plaintiff that the area in which the store was located “was possibly not ready to have a black manager” as some of the smaller surrounding towns had “racist tendencies.” She further explained that she was trying to make the Plaintiff feel better because her feeling was that “he may not have been very happy working there.” The trial court granted summary judgment for the Company, but the U.S. Court of Appeals reversed and remanded the case for jury trial. It found that a reasonable jury could determine that the district manager wanted to steer Plaintiff toward a “black” store while reserving the predominantly “white” store for a less-experienced white candidate. In addition, the remarks by the Plaintiff’s boss (whose opinion was sought by the hiring manager) suggested that Plaintiff was not offered the promotion to the “white” store because the Company believed he would not be happy working in a store where the customers were racist. In other words, he was denied the promotion because of his race, or at least it was reasonably possible for a jury to so find. Simple v. Walgreen Co., 511 F.3d 668 (7<sup>th</sup> Cir. 2007).

**Employer’s Failure to Comply with Individual Notice Requirements Can Violate FMLA.** The lesson of the U.S. Supreme Court’s decision in the *Ragsdale* case was that the Family and Medical Leave Act regulations promulgated by the Department of Labor cannot trump the requirements of the Act itself. One such FMLA regulation states that the employer is required to give individualized notice to the employee on each occasion that his or her leave will count toward the 12-week allotment the Act allows to eligible employees. A recent federal case raised the issue of whether the employer could raise a *Ragsdale*-type defense when it failed to designate the Plaintiff’s leave as required under the regulation. The court held that, in order to enforce her rights, the Plaintiff would have to present evidence that she was prejudiced by the employer’s failure to comply with the regulation. In this case, the court found that Plaintiff could and would have put off her surgery until a later date had she known that the taking of the leave would deplete her FMLA allotment for the year and leave her job unprotected. Thus, the employer’s failure to comply with the regulation caused prejudice to Plaintiff and she could maintain

her action that the employer violated her rights under the FMLA. The court went on to find that the jury's verdict was supported by the evidence, including that she was entitled to two year's front pay as a result of the employer's violation. This case shows that an employer must take its FMLA notice responsibilities seriously or it will run the risk of potentially huge damage and attorneys' fees awards. Downey v. Strain, 510 F.3d 534 (5<sup>th</sup> Cir. 2007).