EMPLOYER*ALERTS*

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Tax Traps for Business Owners

Virtually all business transactions have tax consequences. When those consequences are not addressed up front, during the negotiation stage, a surprise in the form of an unexpected tax bill may result. Consider the following recent cases, one involving the formation of a business, the other involving the departure of a shareholder-employee.

Littriello v. United States

Corporations have historically been the entity of choice to insulate owners from personal liability for business obligations. However, a corporation's net profits are generally taxed twice: once at the corporate level and again when they are paid to the corporation's shareholders in the form of dividends. This makes corporations unattractive for tax purposes. (The exception is an "S" corporation, which enjoys the benefit of limited liability for its shareholders while at the same time avoiding most taxation at the corporate level.)

In contrast, a partnership does not pay tax on its net profits. Instead, its net profits are deemed earned by the individual partners. But the downside of a partnership is that each partner is personally liable for the obligations of the partnership, including obligations resulting from the negligence of another partner.

In an effort to provide the limited liability benefit of a corporation and the tax benefit of a partnership, the states enacted laws allowing the formation of so-called hybrid entities, such as limited partnerships, limited liability partnerships, and the currently popular limited liability company (or "LLC"). But the IRS was not so quick to treat such entities as partnerships for tax purposes. Prior to 1997, the IRS used a four-factor test to determine whether a particular hybrid entity should be treated as a corporation. This four-factor test led to confusion and uncertainty, so the IRS eventually decided to let hybrid entities choose for themselves how they would be taxed.

Under the IRS's "check-the-box" regulations, a business entity (other than a true corporation) may elect to be taxed as a corporation by filing Form 8832. If the entity makes no election, the default rules apply. For example, if an entity has at least two owners and it makes no election, it is treated as a partnership for tax purposes. It then files returns on Form 1065, which are really only information returns to inform the IRS of its net profit and how that profit is allocated among its partners.

But here's the catch: if the entity has only *one* owner and it makes no election, it is treated by default as a *sole proprietorship* for tax purposes. Sole proprietors report their income and expenses on Schedule C of their individual income tax returns (Form 1040), and they are personally liable for any taxes due.

That was Frank Littriello's situation. Littriello was the sole owner (member) of an LLC formed under Kentucky law. The LLC in turn had employees, for whom employment taxes were withheld and due the IRS. At one point, employment tax delinquencies amounted to more than $1 million.

Because Littriello had not affirmatively elected to treat his LLC as a corporation, the IRS considered Littriello's business to be a sole proprietorship. So it went after Littriello's personal assets in an effort to collect the employment tax delinquencies. (The Internal Revenue Code already makes "responsible persons" – that is, persons who are responsible for collecting and remitting payroll taxes – personally liable for taxes withheld from employees and held in trust for delivery to the IRS. Littriello, as the sole member of his LLC, was presumably a

responsible person for these purposes. Here, however, the IRS was also going after Littriello personally for the *employer's* portion of employment taxes, which are not considered as held in trust.)

State law (in this case, Kentucky) recognizes LLCs as separate entities and it considers employees like those who worked for Littriello's LLC to be employees of the LLC, not of the LLC's owner. So Littriello argued that the check-the-box regulations were invalid because they failed to respect state law.

The U.S. Court of Appeals for the Sixth Circuit rejected Littriello's argument. It ruled that while state law may control various aspects of business relations, it does not necessarily control federal tax liability. Furthermore, the check-the-box regulations are reasonable. The Court therefore held that Littriello was personally liable for all employment taxes due on account of the LLC's employees.

It should be noted that as of this writing, the IRS has issued *proposed* regulations which, if adopted, would treat single-member LLCs as separate entities for employment tax purposes. Those regulations have not become final, however, and it remains to be seen whether they will. Even if they do become final, they will not relieve "responsible persons" like Littriello from personal liability for the trust fund portion of employment taxes.

References: 26 U.S.C. § 7701; 26 C.F.R. § 302.7701; *Littriello v. United States*, 2007 WL 1093723 (6th Cir. 2007); *Staff IT, Inc. v. United States*, 2007 WL 853170 (5th Cir. 2007); 70 Fed.Reg. 60475 (Oct. 18, 2005).

Becker v. Commissioner of Internal Revenue

William Becker was an employee and part owner of Becker Holding Corporation (BHC), a family-owned company engaged in the citrus business in Florida. When disagreements arose among the family members, Becker and BHC decided to part company. The separation took the form of a redemption agreement by which BHC terminated Becker's employment and agreed to buy back all of Becker's stock for approximately $24 million, payable over five years. The parties did not get any appraisals of the stock, but simply agreed on the $24 million figure.

The redemption agreement contained a non-compete provision, prohibiting Becker from engaging in the citrus business for three years, and it gave BHC the right to suspend redemption payments to Becker should he violate the non-compete provision. The agreement did not allocate any portion of the $24 million redemption price to the non-compete provision and there had been no prior negotiations regarding such an allocation.

When Becker filed his income tax returns, he treated all the BHC payments as capital gains from sale of his stock. BHC, however, treated $6.4 million as consideration for the non-compete provision and it took amortization deductions in that amount.

The IRS assessed tax deficiencies against both Becker and BHC. As to Becker, the IRS reasoned that if BHC properly allocated $6.4 million to the non-compete provision, then Becker should have reported that same amount as ordinary income, not as capital gains. As to BHC, the IRS reasoned that if BHC's allocation was improper, then BHC was not entitled to $6.4 million in deductions. (The IRS recognized that it couldn't have it both ways; if it won either claim it would necessarily lose the other.)

The two cases were consolidated before the U.S. Tax Court. The Tax Court first noted that the federal courts have taken a variety of approaches to resolving such allocation issues. The Tax Court concluded that it should follow the so-called "strong proof" rule adopted by the U.S. Court of Appeals for the Eleventh Circuit (which covers Florida, where the taxpayers were located and where any appeal of the Tax Court's decision would go). The strong proof rule basically says that when the parties to a transaction have themselves assigned values to the various components of the transaction, a party who attempts to treat the transaction differently for tax purposes must have strong proof, such as fraud, to overcome the agreed allocation.

The Tax Court ruled in this case that the parties had allocated the entire $24 million to the stock redemption and zero to the non-compete provision. Therefore, BHC was not entitled to a deduction and Becker could treat all his payments as capital gains.

Had Becker and BHC recognized the tax implications early on, they could have specifically addressed the allocation issue. For example, they might have agreed that a portion of the purchase price was for the non-compete provision. Since this would give BHC a tax benefit and Becker an increased tax obligation, they might have further agreed to adjust the purchase price to reflect the shifting tax burden. Once the allocation was agreed to, the parties might then have added a clause in their agreement requiring them to file tax

returns consistent with the allocation. By doing so, Becker and BHC could at the very least have saved themselves costly litigation with the IRS. And they might even have saved themselves some taxes.

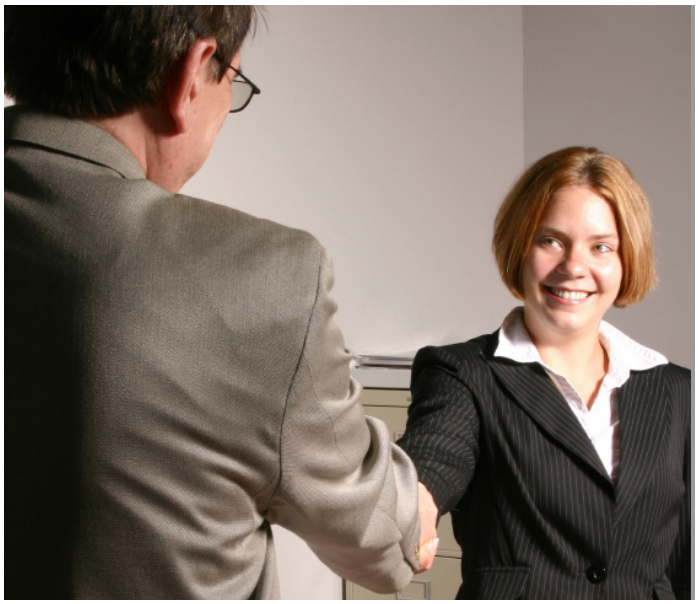
References: 26 U.S.C. § 197; 26 C.F.R. § 1.167(a)(3); *Becker v. C.I.R.*., T.C. Memo. 2006-264 (2006); *General Ins. Agency v. C.I.R.*, 401 F.2d 324 (4th Cir. 1968).

How Not to Interview

Lorraine Lettieri had worked as a sales director in New York for Global One since 1989. In 2001, Global One was merged into Equant Inc., headquartered in Reston, Virginia. Equant, as did its predecessor, provided international data and voice telecommunications services. One of Equant's customers was Sprint International.

In preparation for the merger, Equant decided to reorganize some of its employees. In the process, it created a new position called Head of Sprint Channel. A month before the merger, Lettieri interviewed for the new position with Equant Senior Vice President Sean Parkinson.

During the interview, Parkinson asked Lettieri whether she had children, what her child care responsibilities were, and how her family felt about her weekly commute between her home in New York and Equant's Reston headquarters. Specifically, Parkinson asked her how her husband handled the fact that she was away from home so much, not caring for the family. Lettieri responded that she, her husband and her children all helped each other and worked together to function as a successful family. But Parkinson persisted, saying that he had a very difficult time understanding why any man would allow his wife to live away from home during the workweek.



After the interview, Lettieri contacted her then supervisor to express her uneasiness about the gender stereotyping shown by Parkinson's questions and comments.

Shortly thereafter, Parkinson called Lettieri and told her that the new position had been given to Equant employee Michael Taylor. Parkinson explained that Taylor had experience she lacked in running a free-standing organization. He also said a key reason for Taylor's selection was that Taylor's children (unlike hers) were already raised and that Taylor's wife could make a committed move to Reston; Lettieri, on the other hand, still had child care and other family responsibilities in New York.

Lettieri then wrote to Equant's Human Resources Department, expressing shock at Parkinson's sexist presumptions and attitude, but she did not ask that any specific action be taken. None was.

When Taylor took over as Head of Sprint Channel, he followed in Parkinson's steps. He repeatedly suggested that Lettieri return to New York to be with her family. And he was generally dismissive of the females in his department. For example, he told another woman, who held an M.B.A and had management responsibilities in New York, that he wished she worked in Reston so that she could do his photocopying, and that her only value was her ability to charm male customers. Taylor also commented on a female employee's figure and attractiveness and he referred to women as bitches. Lettieri again complained to Human Resources but again no action was taken.

Faced with a business downturn in his department, Taylor suggested a restructuring plan which included a demotion for Lettieri and her reassignment to New York. Lettieri immediately complained to Human Resources about the suggestion, at the same time repeating her objection to Parkinson's earlier sexist interview. HR informed both Taylor and Parkinson of Lettieri's complaints; within weeks, Taylor stripped Lettieri of significant job responsibilities.

Sometime later, Taylor recommended that Lettieri's position be eliminated as a cost-cutting measure, a recommendation with which upper management agreed. To implement the recommendation, Taylor summoned Lettieri to New York where, upon her arrival, he commented on her attire, saying, "My, don't you look pretty in pink," and, "I like girls that are dressed in pink." He then fired her.

Despite Taylor's justifying the termination as an elimination of Lettieri's position, he asked management for authority to promote a male employee to the position. Management rejected the request, responding, "We have Lettieri on the redundant list. That means she cannot be 'replaced' for at least 6 months." Taylor himself was later demoted and then terminated. New management hired a male to run the Sprint Channel department, in effect replacing Lettieri.

Lettieri sued for sex discrimination. The federal district court in Alexandria, Virginia threw out Lettieri's claim, but the U.S. Court of Appeals for the Fourth Circuit reversed, holding that the claim was sufficient to go to trial. The appeals court ruled that Equant's explanation for Lettieri's firing – that her position was not needed – was a pretext for discrimination. The court said that Lettieri had offered powerful evidence of Equant's discriminatory attitude toward female managers, particularly those who have children at home and who commute long distances. That evidence, said the court, was sufficient to allow a jury to conclude that sexist attitudes ultimately led to Lettieri's termination.

References: 42 U.S.C. § 2000e; *Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007).

Fitness-for-Duty Medical Exams

When an employee returns to work after being out for an illness or injury, may the employer require a fitness-for-duty medical examination? The Americans With Disabilities Act prohibits such examinations "unless the examination is job-related and consistent with business necessity." So the question becomes: What does the law mean by "job-related and consistent with business necessity"?

According to the Equal Employment Opportunity Commission, it means that the employer must have a reasonable belief, based on objective evidence, either

- that the employee will be unable to perform the essential functions his or her job because of a medical condition, or
- that the employee will pose a direct threat to himself or herself or to others because of a medical condition.

A recent case provides a good example.

Jan Thomas began working for the Kansas City Police Department in 1977. Beginning in 2000, Thomas's behavior at work became a matter of Department concern. In separate incidents she fell asleep at her desk, she reported late to a staff meeting, and she repeatedly requested vacation leave well in excess the amount allowed by Department policy. At the end of one particular work day she took herself to the emergency room, believing she was having a heart attack; instead, she was diagnosed as suffering from anxiety.

The day after her ER visit, Thomas called in sick, reporting that she had been at the emergency room the previous night for stress, and that she had an appointment with a psychologist. The psychologist, Dr. Bernard Sullivan, diagnosed Thomas as suffering from work-related stress. He initially excused her from work for 10 days, later extending this for an additional two weeks. Thomas reported this to her supervisor, but when the supervisor asked about the work-related pressures Thomas had been experiencing, Thomas refused to elaborate.

When Thomas eventually sought to return to work, the Department transferred her to its sick leave pool pending a fitness-for-duty evaluation. This was consistent with Department policy, which requires such an evaluation if an employee exhibits symptoms of a psychological or psychiatric disorder which is believed to affect job performance.

The Department sent Thomas for an evaluation by Dr. George Harris, a psychologist who regularly works with Department employees. As part of the evaluation, Dr. Harris asked Thomas to authorize him to obtain her full medical records. Thomas refused, agreeing only to release records for a limited period. Those records showed that Thomas had previously taken Prozac and Zoloft – drugs typically prescribed for depression and anxiety.

Thomas continued to refuse release of her full records, despite Dr. Harris's further request. Under these circumstances, Dr. Harris would not clear Thomas for work, saying that there were too many conflicting pieces of information, that he wasn't sure he was getting the complete truth from Thomas, and that no changes had been made in Thomas's work environment to alleviate whatever was causing her stress.

The Department in turn confronted Thomas, insisting that she release her full medical records. When she still refused, the Department fired her. Thomas then sued, claiming that the Department had violated the ADA by demanding her medical records.

The U.S. Court of Appeals for the Eighth Circuit upheld the firing. The Court first noted that an employer – in this case the Kansas City Police Department – has the burden of showing that its medical inquiries are job-related and consistent with business necessity. However, when the employer can show it has legitimate reasons to doubt that the employee can perform his or her duties, then the employer may require an exam or make the type of inquiries the Department made here.

In short, said the Court, so long as an employer's request for a fitness-for-duty evaluation is no broader or more intrusive than is reasonably necessary, employers are permitted to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA liability.

References: 42 U.S.C. §12101; EEOC Enforcement Guidance (Oct. 2000), available at http://eeoc.gov; *Thomas v. Corwin*, 2007 WL 967315 (8th Cir. 2007).

Rejecting Applicants With Criminal Convictions

Title VII – the principal federal law prohibiting discrimination in employment – bars employers from intentionally treating individual applicants and employees differently based on race, color, religion, sex, or national origin. This is known as *disparate treatment* discrimination. But Title VII also bars employment policies that have a *disparate impact* on individuals of a particular race, color, religion, etc., even if the employer did not intend to discriminate.

Examples of policies that could constitute disparate impact discrimination include a security guard company's minimum height and weight requirements that exclude almost all women applicants but almost no male applicants; and a requirement that unskilled laborers pass a written test of English, which recent immigrants are often unable to pass because English is not their first language.

Even if a particular policy is shown to have a disparate impact, it may still be lawful *if* the employer can show a business necessity for the policy and *if* there is no alternate policy that would accomplish the same business purpose but have a lesser disparate impact.

How does an employer policy of rejecting applicants with criminal convictions stack up under these disparate impact rules? While such a policy may be lawful in specific circumstances, the employer faces a significant burden when attempting to justify the policy.

Before getting to questions of business necessity and the existence of an alternate policy, the threshold question is whether a policy of rejecting candidates with criminal convictions has any disparate impact at all. The burden of proving disparate impact is on the employee, who must show by statistics that the policy has a disproportionate impact on a particular ethnic group, religious group, or gender.

In a 1975 federal case from Missouri, for example, the court found that an employer practice of automatically excluding all candidates with any convictions other than minor traffic offenses had a disparate impact on African Americans. The Equal Employment Opportunity Commission has also ruled, again relying on statistics, that an employer policy or practice of excluding candidates based on their conviction records has a disparate impact on Blacks and Hispanics.

An employer who uses criminal convictions as a hiring factor, if challenged on that policy, can reasonably expect to lose on the threshold question of disparate impact. The employer will then have to prove that, despite its disparate impact, the policy is justified by business necessity.

A recent decision by the Third Circuit U.S. Court of Appeals (which sits in Philadelphia), involved an African American who was terminated when his employer discovered that he had been convicted of second-degree murder 40 years earlier. The employer in that case was Liberty Vans, which was a contractor for the Southeastern Pennsylvania Transportation Authority (SEPTA). Liberty furnished drivers to operate SEPTA's paratransit vehicles, providing door-to-door transportation services to persons with mental and physical disabilities. The terminated employee was a driver-trainee who had been convicted in a gang-related shooting when he was 15 years old but who had no subsequent criminal history. The employee actually disclosed the conviction on his application, but Liberty Vans overlooked the information and did not become aware of the conviction until a background check was completed.

SEPTA had a policy of excluding applicants who had been convicted at any time of driving under the influence of alcohol or drugs; convicted at any time of a crime of violence or moral turpitude; or convicted within the past seven years of certain other specific offenses. That policy was reflected in SEPTA's contract with Liberty Vans, and was the basis for the employee's termination.

In considering the employee's discrimination claim, the Court skipped over the question whether SEPTA's policy had a disparate impact on African Americans and it went straight to SEPTA's business necessity defense. In support of its defense, SEPTA argued that the job of paratransit driver requires drivers to be in close contact with passengers, often being alone with them; paratransit passengers are particularly vulnerable because they have physical or mental disabilities and because they are disproportionately targeted by sexual and violent criminals; and violent criminals recidivate at a high rate and are more likely then others to commit future violent crimes.

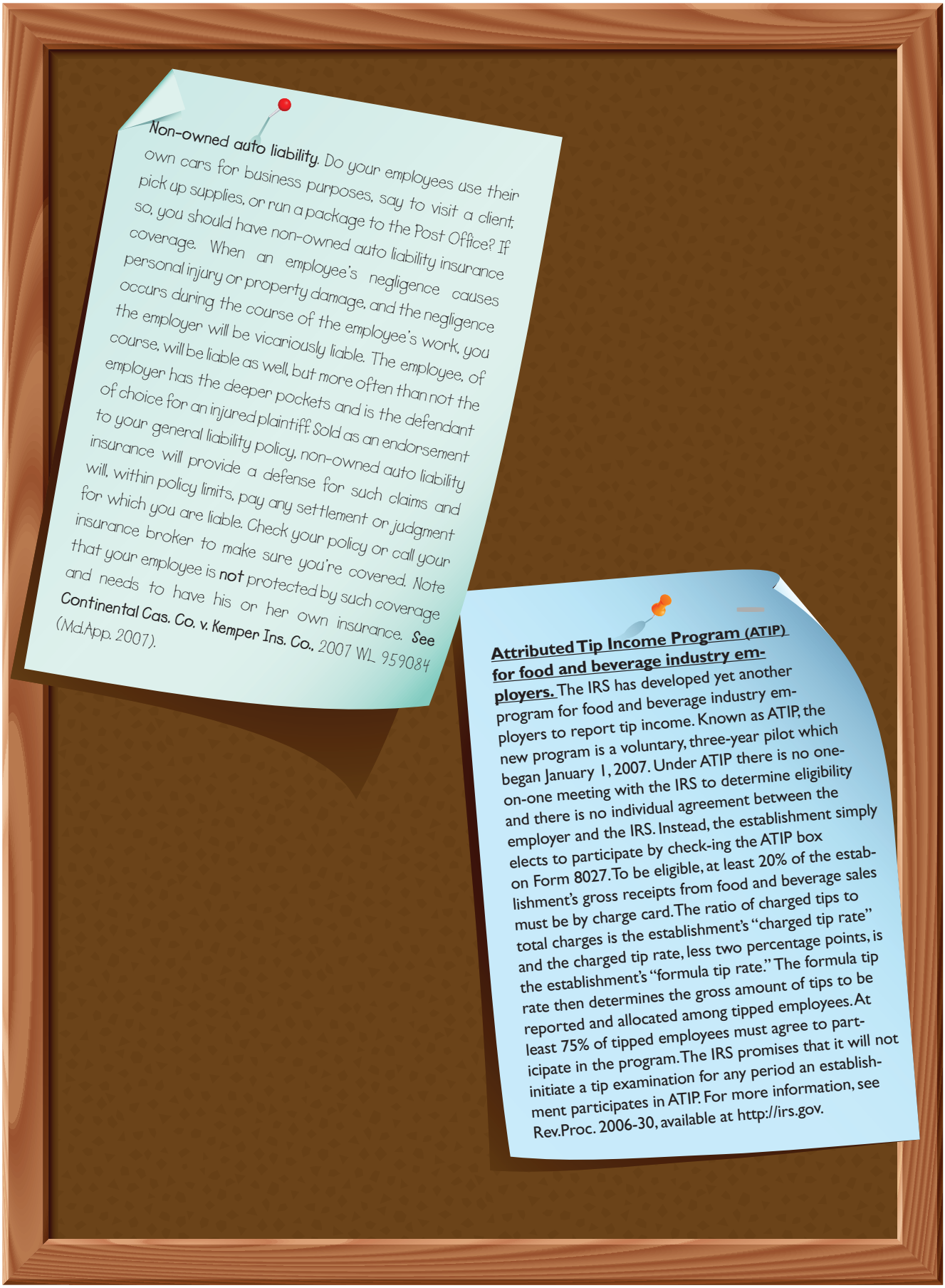
SEPTA then offered testimony from expert witnesses who relied on U.S. Department of Justice statistics showing relatively high rates of recidivism during the first *three years* after release from prison. Based on this, the experts concluded that even after 40 years there is a somewhat greater risk of recidivism. The Court was skeptical of these extrapolated conclusions, but in the absence of any contrary expert testimony from the employee, the Court had no choice but to accept them. The Court therefore upheld the termination and the SEPTA convictions policy on which it was based.

Despite its ruling in favor of SEPTA, the Court was struck by testimony from the drafter of SEPTA's policy, who could not explain why the policy was structured as it was, and who admitted that the policy was not based on any research or information. It also troubled the Court that SEPTA had taken such little care in formulating its policy. However, said the Court, Title VII does not measure an employer's care in formulating hiring policies; rather, it requires employers, when sued, to be able to show that its policies are consistent with business necessity. This SEPTA did by offering experts whose credentials and testimony went unchallenged.

SEPTA's victory in this case was by a narrow margin. The bottom line here is that a policy of excluding applicants based on criminal convictions (or, for that matter, even asking about criminal convictions during the application process) risks a charge of disparate impact discrimination. That risk can be minimized if:

- Only relatively *recent convictions* are considered;
- The policy is *crime-specific*, in only excluding applicants for crimes which, if committed during employment, would have a significant negative impact on the employer's business (for example, a financial institution asking about convictions for dishonesty, or a retail establishment asking about theft and shoplifting convictions);
- The policy is *position-specific* (in the financial institution example, only applicants who will be dealing with customers' or the employer's funds are excluded); and
- The employer has a *factual basis* for the policy, such as statistics showing that the rejected applicants, as a class, are significantly more likely than the general population to commit the crimes the employer is concerned about.

References: 42 U.S.C. § 2000e; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *El v. Southeastern Penn. Transp. Auth.*, 479 F.3d 232 (2007); *Green v. Missouri Pac. RCo.*, 523 F.2d 1290 (8th Cir. 1975); EEOC Policy State. on Conviction Records (Feb. 4, 1987); EEOC Policy State. on Conviction Record Statistics (July 29, 1987) available at http://eeoc.gov.



Non-owned auto liability. Do your employees use their own cars for business purposes, say to visit a client, pick up supplies, or run a package to the Post Office? If so, you should have non-owned auto liability insurance coverage. When an employee's negligence causes personal injury or property damage, and the negligence occurs during the course of the employee's work, you the employer will be vicariously liable. The employee, of course, will be liable as well, but more often than not the employer has the deeper pockets and is the defendant of choice for an injured plaintiff. Sold as an endorsement to your general liability policy, non-owned auto liability insurance will provide a defense for such claims and will, within policy limits, pay any settlement or judgment for which you are liable. Check your policy or call your insurance broker to make sure you're covered. Note that your employee is **not** protected by such coverage and needs to have his or her own insurance. *See* **Continental Cas. Co. v. Kemper Ins. Co.**, 2007 WL 959084 (Md.App. 2007).

Attributed Tip Income Program (ATIP) for food and beverage industry employers. The IRS has developed yet another program for food and beverage industry employers to report tip income. Known as ATIP, the new program is a voluntary, three-year pilot which began January 1, 2007. Under ATIP there is no one-on-one meeting with the IRS to determine eligibility and there is no individual agreement between the employer and the IRS. Instead, the establishment simply elects to participate by check-ing the ATIP box on Form 8027. To be eligible, at least 20% of the establishment's gross receipts from food and beverage sales must be by charge card. The ratio of charged tips to total charges is the establishment's "charged tip rate" and the charged tip rate, less two percentage points, is the establishment's "formula tip rate." The formula tip rate then determines the gross amount of tips to be reported and allocated among tipped employees. At least 75% of tipped employees must agree to participate in the program. The IRS promises that it will not initiate a tip examination for any period an establishment participates in ATIP. For more information, see Rev.Proc. 2006-30, available at http://irs.gov.

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EMPLOYER *ALERTS* OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

BY CHARLES H. FLEISCHER, ESQ.

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Vacations May Now Count as Wages in Maryland

Since employers have no legal obligation at all to offer paid vacation, traditional wisdom had it that an employer could have any policy it wanted regarding the accrual and forfeiture of vacation. For example, many employers have a use-it-or-lose-it-policy requiring employees to use accrued leave within a specified time.

As to cashing out accrued but unused leave on termination, the prevailing view was that an employer could flatly refuse to do so or could refuse when the employee was fired for cause. In cases of voluntary termination, the employer could condition a cash-out of accrued leave on the employee's giving two weeks' or other prescribed notice. The only requirement was that the employer announce the policy beforehand so that employees would know in advance what they were entitled to. See "Md. District Court Upholds Leave Cash-Out Policy," EMPLOYER ALERTS, Spring 2006, p. 4.

Some 10 years ago the U.S. District Court for Maryland confirmed this view, ruling that accrued leave is not a "wage" subject to Maryland's wage payment law. This is entirely logical, because under Maryland law wages must be paid in U.S. currency on regular paydays, which makes no sense when applied to vacations.

Even the Maryland Department of Labor, Licensing and Regulation seems to agree. DLLR's website, at www.dllr.state.md.us/labor/wagepay, addresses whether accrued vacation is payable at termination by saying:

> The answer to this question depends on the employer's policy, and whether this policy was communicated to the employee in advance. For example, if an employer informs employees at hiring that unused vacation leave will be lost or forfeited when employment ends, then an employee will probably not be able to claim it. On the other hand, where no policy exists or was made known in advance to a terminated employee regarding forfeiture of accrued vacation, the employee may receive the cash value of whatever unused earned vacation leave was left – provided it was otherwise usable.

All these policies are now open to question in Maryland. In a surprising decision, the Maryland Court of Special Appeals (Maryland's intermediate appellate court) ruled on August 20, 2007, in *Catapult Technology, Ltd. v. Wolfe* that leave falls within the definition of "wage" because it is promised as a part of an employee's compensation for services. Since wage payments cannot be subject to forfeiture or other conditions, an employer policy of withholding unused accrued leave when an employee fails to give two weeks' notice of termination violates Maryland law. *(continued)*

The court dismissed DLLR's view, quoted above, by saying the court could not find the passage on DLLR's website, and in any event such guidance is "certainly not law."

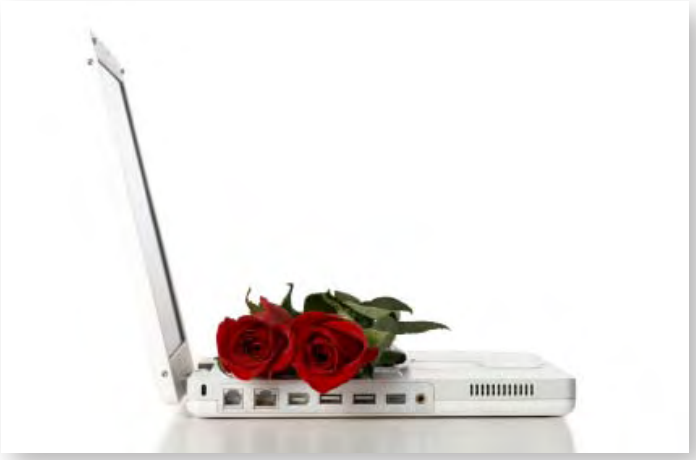
Fortunately, the Court went on to deny the employees' claims for treble damages, which can be awarded under Maryland law when an employer withholds pay in bad faith. In so ruling, the court highlighted the testimony from the employer's general counsel, who had reviewed and edited the leave policy and believed it to be consistent with Maryland law.

The decision may not be the final word if the Maryland Court of Appeals (Maryland's highest court) agrees to consider the case. In addition, the decision was designated as "unreported," meaning that it has no value as precedent and it cannot be cited in subsequent cases. Nevertheless, the decision provides some indication of judicial thinking on the matter. Since it has been widely circulated among Maryland's employment law bar, employers should expect their current leave forfeiture polices to be challenged in court. Worse, in light of this opinion, it is now more difficult for employers to claim good faith when enforcing a leave forfeiture policy.

What should you do in light of this new ruling? Read broadly, the decision puts all leave limitation and forfeiture policies at risk. Until the Court of Appeals definitively resolves the matter, however, it seems reasonable to read the decision more narrowly, by eliminating only those portions of your leave policy calling for forfeiture of leave. This would include not only a forfeiture-on-termination policy, but also a use-it-or-lose-it policy. On the other hand, a policy which simply caps the amount of leave an employee can accrue should be permitted. But given the uncertain state of the law, any policy that restricts the accrual or enjoyment of leave runs some risk of violating Maryland's wage payment law and incurring treble damages.

Because the Catapult decision is unreported, it is not available on the Maryland courts' web-site, nor is it being published by traditional law publishers. Employer Alerts will gladly provide a copy via e-mail on request directed to: ofq@ofqlaw.com.

References: Md. Code, Labor & Employ. § 3-501; *Catapult Technology, Ltd. v. Wolfe* (Md. Ct. Spec. App. No. 997, decided Aug. 20, 2007) (unreported); *Rhodes v. Federal Deposit Ins. Corp.*, 956 F.Supp. 1239 (D.Md. 1997); *National Rifle Assn. v. Ailes,* 428 A.2d 816 (D.C. 1981).



Threats Against Ex-Lovers Justified Firing

Two recent cases show that when a workplace affair ends with threats of violence, termination of one of the paramours to protect the other does not necessarily amount to sex discrimination.

Shaffer v. Potter

Victoria Shaffer was a letter carrier for the U.S. Postal Service in Iowa. In 1999 she and Keith Burnham, another letter carrier, began a romantic relationship. The affair lasted about a year and a half, apparently not ending well.

According to Burnham, on one occasion Shaffer followed him while he was on his mail route and parked behind his truck. When Burnham got out of his truck, Shaffer grabbed him by the shirt, kissed him, and then said, "Why did you do it. I don't understand." Shaffer than got in her car and drove away, but she returned a few minutes later, rolled down her window, and said: "Next time I'll put a bullet in your head." She then left a voice mail message for Burnham, "If I ever stop crying long enough to come back, you better run you m----- f-----." Burnham reported these incidents to a postal inspector. Although Shaffer denied making threats, the

inspector swore out a criminal complaint, obtained a court warrant, and arrested her. She was also placed on unpaid leave pending an investigation.

Shaffer's supervisor then interviewed Burnham and Shaffer, found Burnham to be the more credible, and terminated Shaffer for misconduct. Following her termination, Shaffer filed a complaint with the Equal Employment Opportunity Commission, claiming her arrest, suspension and discharge were unlawful employment discrimination. In essence, she claimed that she was treated differently than a similarly situated male, Burnham.

The case eventually reached the U.S. Court of Appeals for the Eighth Circuit. The court concluded that Shaffer presented no facts to support her allegation that her supervisor was motivated by gender bias. Specifically, she offered nothing to show that the supervisor terminated her for any reason other than threatening to kill a coworker. Although Burnham was not fired, Burnham was not similarly situated because, unlike Shaffer, he had not made any death threats.

Hossack v. Floor Covering Associates of Joliet

Another affair, this time between Vicki Hossack and Nick Cladis, each of whom were married to others, arose in the workplace of Floor Covering Associates of Joliet, Illinois. Hossack's husband learned of the affair and became extremely upset. In order to deal with the issue, Hossack asked her supervisor for few days off. She later returned to work and, in a meeting with her supervisor, disclosed the affair and requested additional leave. She also told her supervisor that her husband did not want her to continue to work and be in contact with Cladis.

While Hossack was still on leave, her husband called Cladis on two separate occasions and warned him on each occasion to stay away from his wife. During one of those calls, Hossack's husband told Cladis that he was going to make Cladis's life as miserable as Cladis had made his and that he would tell Cladis's wife of the affair. Cladis reported the phone calls to Floor Covering Associates' management.

Management met in an effort to resolve the situation. One possibility was to transfer Cladis to another store, but this was rejected because Cladis was a top salesman and was needed where he was. Further, there was at least some indication that Hossack herself did not intend to return to work. So, out of concern over the husband's threats and that Hossack's continued employment would be disruptive, management decided to terminate her. *(continued)*

Since Cladis was neither discharged nor disciplined for his role in the consensual affair, Hossack saw management's action as discriminatory and filed charges with the EEOC.

The Seventh Circuit U.S. Court of Appeals concluded that Hossack could not pursue a sex discrimination claim. It observed that her employer did not terminate her due to her affair but only because her continuing presence would likely be disruptive. Although the employer did not terminate Cladis, he was not similarly situated because neither he nor his spouse had made threats to disrupt the workplace.

References: *Shaffer v. Potter*, 2007 WL 2376770 (8th Cir. 2007); *Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853 (7th Cir. 2007).

Settling FLSA and FMLA Claims

Shortly after being fired for poor performance and excessive absenteeism, your former employee sends you a letter claiming (1) he worked 150 hours of overtime during that past two years which should have been paid at time-and-a-half, not as straight time, and (2) he was on protected family leave status when you fired him. He demands $7,500 in unpaid overtime and damages, threatening suit if he is not paid within 10 days.

You turn the letter over to your attorney, who contacts the former employee and negotiates a settlement of the claims for $3,000. A check and a release of claims are exchanged.

Is that the end of the matter? Maybe not.

Advance Waivers

The federal Fair Labor Standards Act (FLSA) requires employers to pay each non-exempt employee at one and one-half times the employee's regular hourly rate for every hour in excess of 40 that the employee works in any workweek. An employer who violates this overtime payment requirement is liable to the employee not only for the wages due, but also for additional, liquidated damages in the amount of the unpaid wages (unless the employer acted on a good faith belief and on reasonable grounds that he didn't owe the wages). The FLSA is enforced by the U.S. Department of Labor (DOL).

The Family and Medical Leave Act (FMLA), which is also enforced by DOL, requires a covered employer to provide up to 12 weeks of unpaid leave per year to an eligible employee who has a serious medical condition, to care for a family member who has a serious medical condition, or to care for a new-born or newly adopted child.

It has long been clear that an employee cannot waive his FLSA or FMLA rights in advance. For example, an employer cannot offer a job conditioned on the employee's agreeing to give up future overtime pay or family leave, any more than the employer could condition employment on an employee's promise never to file a discrimination claim. These rights are guaranteed by law and are simply non-waivable.

Retroactive FLSA Waivers

But what about an agreement to compromise and settle retrospectively a violation that has already occurred? In general, the law encourages disputing parties to resolve their differences rather than pursue claims in court. In the discrimination arena, for example, employers routinely offer financial incentives in exchange for releases of liability. (Note that an employee cannot waive his right to file a charge of discrimination with the Equal Employment Opportunity Commission, although the employee can give up a claim to so-called individualized relief, such as money damages. Also note that special procedures apply to releases of claims under the Age Discrimination in Employment Act.) *(continued)*

The rules for FLSA claims, however, are different. The Supreme Court first addressed this issue in 1945. In that case, an employer failed to pay overtime to his employee. Some two years after the employment terminated, the employer computed the amount due and offered the employee a check for the full amount of overtime (but not for liquidated damages) in exchange for a release. The employee took the check and signed the release. Later the employee sued for liquidated damages and the Supreme Court upheld his right to do so, despite the release. The Court ruled that liquidated damages were part of the compensation due the employee for the wrongful withholding of wages, and the employee could not waive his right to that compensation.

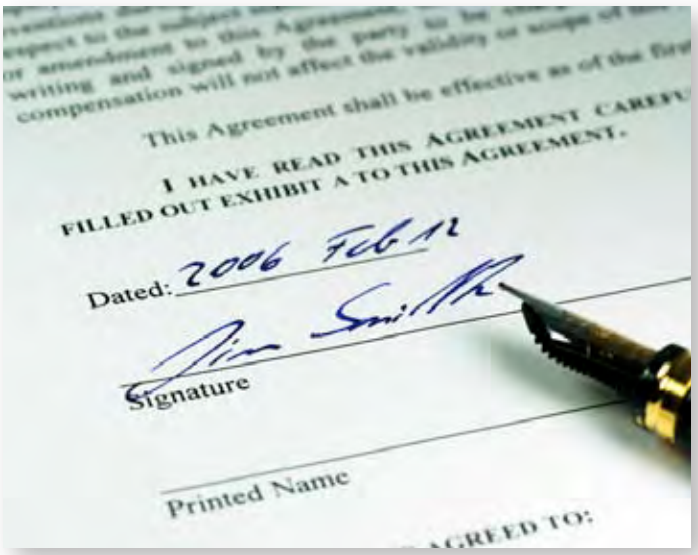
The Supreme Court's ruling placed employers in a difficult position: they must either litigate the wage dispute to conclusion, or simply pay the amount demanded. Settling the dispute would leave the employer vulnerable to a subsequent claim. Recognizing this dilemma, Congress amended the FLSA in 1949 to add a provision which now reads as follows:

> The Secretary [of Labor] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . ., and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have . . . [to] unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

The courts have interpreted the supervising of a "payment" as including the supervising of a "settlement." Thus employers now have a third choice of bringing a wage dispute to DOL's attention and inviting DOL to participate in its resolution.

Retroactive FMLA Waivers

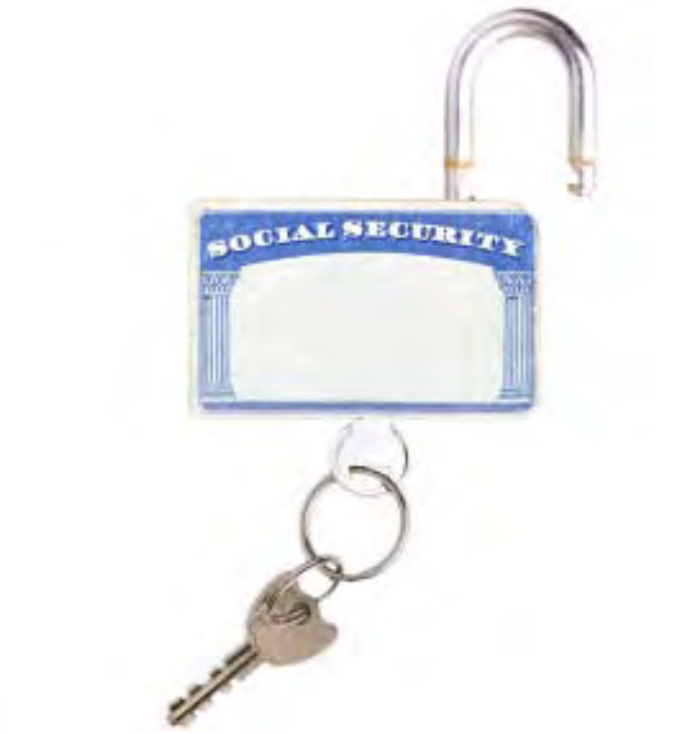
DOL's FMLA regulations state that "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." While this provision undoubtedly prohibits prospective waivers, it may or may not prohibit settlements of alleged violations that have already arisen.



DOL itself interprets its own regulation as permitting settlements of existing violations. However, the U.S. Court of Appeals for the Fourth Circuit (which hears federal court appeals from Maryland and Virginia) has rejected DOL's view and ruled that the regulation prohibits all waivers. This means that, at least for the time being, Maryland and Virginia employers who are accused of violating FMLA must choose among litigating the dispute to conclusion in court, paying the employee's demand in full, or seeking DOL supervision of a settlement.

But there is hope. At least one other court – a federal trial court in Pennsylvania – has disagreed with the Fourth Circuit and upheld DOL's interpretation of its regulation. And DOL appears to be considering a possible change in its regulations, having requested public comments on whether employees should be allowed to reach private settlements for claims of prior FMLA violations.

References: 29 U.S.C. § 216; 29 U.S.C. § 2601; 29 C.F.R. § 825.220; 71 F.R. 69504 (Dec. 1, 2006); *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697 (1945); *D.A. Schulte, Inc., Gangi*, 328 U.S. 108 (1946); *Martin v. Indiana Pwr. Co.*, 381 F.3d 574 (6th Cir. 2004); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007); *Dougherty v. Teva Pharmaceuticals USA, Inc.*, 2007 WL 1165068 (E.D.Pa. 2007); *Niland v. Delta Recycling Corp.*, 377 F.3d 1244 (11th Cir. 2004); *Dent v. Cox Communications Las Vegas, Inc.*, 2007 WL 2580754 (9th Cir. 2007).



New Rules for SSN-Name Mismatches

The U.S. Immigration and Customs Service (ICE) of the Department of Homeland Security has announced new rules for responding to Social Security Administration "no-match" letters and ICE "Notice of Suspect Documents" letters. The new rules require employers to take specific actions within limited time periods in order to avoid the presumption that the employer knew the employee involved was an illegal alien.

The new rules were to become effective September 14, 2007, but a federal district court in California has issued a preliminary injunction against their enforcement.

ICE characterizes these new rules as creating a "safe harbor" for employers. See "Safe Harbor for Employers Who Receive a No-Match Letter," available at www.ice.gov/partners/employers/safeharbor-/index.htm. In truth, the new rules impose specific new obligations.

Background

The federal Immigration Reform and Control Act prohibits employers from knowingly employing undocumented workers – aliens who are here illegally, or who are otherwise prohibited from working in the U.S. The Act requires employers to verify worker eligibility by completing an I-9 form for each new employee, which includes a review of documents showing the employee's lawful status. One way employers get caught is when ICE conducts an inspection of I-9 form files.

Another way is when ICE finds a no-match letter in the personnel file for the employee. A no-match letter is a notice from the Social Security Administration (SSA) that the name and social security number the employer provided to SSA don't match. The mis-match could be for a number of reasons, such as a typographical error or an employee's name change. It could also be because the employee provided a fraudulent Social Security card, used someone else's social security number, or just made a number up.

When an employer receives a no-match letter, he is supposed to take steps to resolve the discrepancy. But just what steps the employer should take and when has not been clear. In addition, it hasn't been clear whether the no-match letter may be used as evidence that the employer knowingly employed an illegal.

New Rules

If an employer has actual knowledge that an employee is ineligible to work in the U.S., then the employer is subject to fines and possible criminal prosecution without regard to any no-match letter and without regard to any steps the employer may have taken in response to such a letter. What the new rules address is an employer's constructive (imputed) knowledge – that is, whether an employer will be deemed to have knowledge of an employee's illegal status based on the employer's response, or lack of response, to a no-match letter from SSA or Notice of Suspect Documents letter from ICE.

The new rules say that if the employer fails to take the steps listed below, within the specified time limits, in response to such a letter, then the employer will be deemed to have constructive knowledge of the employee's illegal status. On the other hand, if the employer does timely take these steps, the fact that such a letter was received will not be used as evidence against the employer. (Other evidence of actual or constructive knowledge may, of course still be used.) *(continued)*

Upon receipt of a no-match letter the employer must, within 30 days after receipt of the letter:

- verify that the mismatch was not the result of a record-keeping error on the employer's part;
- request the employee to confirm the accuracy of employment records;
- ask the employee to resolve the issue with SSA within 90 days after receipt of the no-match letter.

If any of these steps leads to resolution of the problem, the employer must follow instructions on the no-match letter itself to correct information with SSA, and retain a record of the verification with SSA. If none of these steps resolves the problem, the employer must, within three additional days, complete a new I-9 form without using the questionable Social Security number and instead use documentation presented by the employee that conforms with the I-9 document identity requirements and includes a photograph and other biographic data.

If the employee is unable to produce appropriate I-9 documentation, then presumably he must be fired.

References: 72 F.R. 45611 (Aug. 15, 2007), amending 8 C.F.R. Part 274a; *AFL-CIO v. Chertoff*, U.S. Dist. Ct. N.D. Cal. No. 07-4472 (preliminary injunction granted Oct. 10, 2007).

False UI Reports Mean Trouble for Employers

When employer and employee part company, a claim for unemployment benefits often results. Once a claim has been filed, the employer is sent a request for separation information, which typically asks for employment dates, wage data, and the reason for termination. Failure to respond truthfully to the request could mean trouble for the employer, as the following two cases illustrate.

Williams v. W.D. Sports

Rosann Williams, a female employee of the New Mexico Scorpions (a minor league hockey team) complained to her supervisors and later to government officials about sexual harassment at the workplace. Shortly after her complaint, the team's president told Williams that there were rumors circulating about her being intimately involved with the team coach, some players, and certain season ticket holders. The president asked for Williams's resignation, offering her a severance package if she did so. Williams refused and asked him for a written explanation of why she was being fired. The president responded that she did not need a piece of paper and that she should get out of his office.

According to Williams, after she was fired the president told her not to "fight him on this" and that if she did fight him, all the rumors about her sexual activities would be made public, whether true or not. He also threatened to ruin her marriage. The team did in fact follow through on these threats by filing an opposition to Williams's application for unemployment insurance (UI) benefits, saying it had fired her for cause. The cause, according to the team's filing, was "failure to heed warnings or correct behavior regarding, among other incidents, repeated instances of sexual misconduct with peers and subordinates amounting to sexual harassment; drinking; and alcohol; and theft of company property [and] proprietary information."

The team claimed that it could back up these statements with testimony from other employees, but it never did so despite an opportunity to present evidence at a UI hearing. Even at the hearing, however, the team's lawyer supposedly said, "If you will drop your Human Rights claim, I won't fight you on your unemployment."

(continued)

Williams did get UI benefits, but she also charged the team with retaliation. (Retaliation against an employee for exercising his or her rights under the discrimination laws – in this case, Williams's initially filing of a charge of sexual harassment – is itself illegal).

The U.S. Court of Appeals for the Tenth Circuit ruled that Williams stated a sufficient case of retaliation. Applying a recent Supreme Court decision, the Tenth Circuit pointed out that the team's conduct, in publicizing apparently false accusations of sexual misconduct and opposing her UI benefits, would dissuade a reasonable person from pursuing her rights under the discrimination laws. That, said the Tenth Circuit, is retaliation.

Holland v. Washington Homes

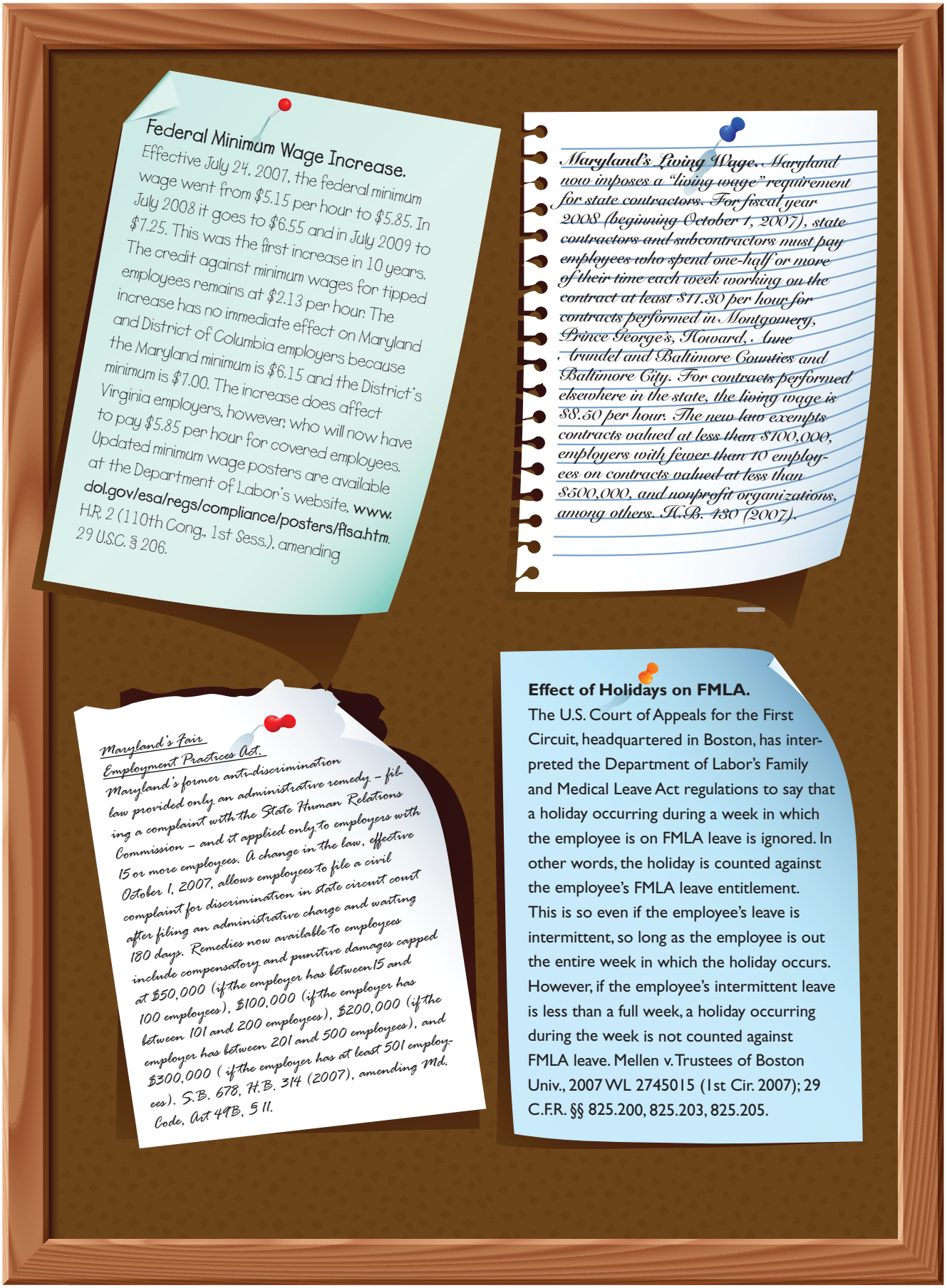
Dorn Holland, an African American who sold houses for Washington Homes, claimed that he was given undesirable assignments and ultimately fired because of his race. In response, Washington Homes offered evidence that the real reason for the termination was Holland's intense dislike for his supervisor, his comment that she was a "crazy bitch," and fear that he might harm her. Holland had even been sent to anger management class for his behavior.

The problem was that when Washington Homes later received a request from the Maryland Department of Labor, Licensing and Regulation (DLLR) for UI separation information, it responded that Holland was dismissed for lack of work, on the theory that it did not want to deprive him of unemployment compensation.

Two of the three judges on the Fourth Circuit Court of Appeals panel who heard the case ruled that Washington Homes's response to DLLR was not sufficient to overcome evidence of its real reason for the termination – Holland's gross misconduct. The third judge on the panel dissented, arguing that the response to DLLR conflicted with the evidence Washington Homes presented in court and that this conflict was enough to warrant a jury trial on the discrimination claim. The dissenting judge characterized Washington Homes as mendacious and a liar.

While the panel's two-to-one vote meant that Washington Homes prevailed, it won by the narrowest of margins. In an effort to secure UI benefits for its former employee, it came perilously close to losing the discrimination case. Worse, it may have exposed itself to criminal charges, since Maryland law requires employers, when requested, to provide separation information and it prohibits making false statements. The penalty includes both fines and imprisonment.

References: *Williams v. W.D. Sports,* N.M., Inc., 2007 WL 2254940 (10th Cir. 2007); *Holland v. Washington Homes, Inc.*, 487 F.3d 208 (4th Cir. 2007); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006); Md. Code, Labor & Employ. §§ 8-627, 8-1302, 8-1304.



Federal Minimum Wage Increase.

Effective July 24, 2007, the federal minimum wage went from $5.15 per hour to $5.85. In July 2008 it goes to $6.55 and in July 2009 to $7.25. This was the first increase in 10 years. The credit against minimum wages for tipped employees remains at $2.13 per hour. The increase has no immediate effect on Maryland and District of Columbia employers because the Maryland minimum is $6.15 and the District's minimum is $7.00. The increase does affect Virginia employers, however, who will now have to pay $5.85 per hour for covered employees. Updated minimum wage posters are available at the Department of Labor's website, www.dol.gov/esa/regs/compliance/posters/flsa.htm. H.R. 2 (110th Cong., 1st Sess.), amending 29 U.S.C. § 206.

Maryland's Living Wage. Maryland now imposes a "living wage" requirement for state contractors. For fiscal year 2008 (beginning October 1, 2007), state contractors and subcontractors must pay employees who spend one-half or more of their time each week working on the contract at least $11.30 per hour for contracts performed in Montgomery, Prince George's, Howard, Anne Arundel and Baltimore Counties and Baltimore City. For contracts performed elsewhere in the state, the living wage is $8.50 per hour. The new law exempts contracts valued at less than $100,000, employers with fewer than 10 employees on contracts valued at less than $500,000, and nonprofit organizations, among others. H.B. 430 (2007).

Maryland's Fair Employment Practices Act. Maryland's former anti-discrimination law provided only an administrative remedy – filing a complaint with the State Human Relations Commission – and it applied only to employers with 15 or more employees. A change in the law, effective October 1, 2007, allows employees to file a civil complaint for discrimination in state circuit court after filing an administrative charge and waiting 180 days. Remedies now available to employees include compensatory and punitive damages capped at $50,000 (if the employer has between 15 and 100 employees), $100,000 (if the employer has between 101 and 200 employees), $200,000 (if the employer has between 201 and 500 employees), and $300,000 (if the employer has at least 501 employees). S.B. 678, H.B. 314 (2007), amending Md. Code, Art 49B, § 11.

Effect of Holidays on FMLA.
The U.S. Court of Appeals for the First Circuit, headquartered in Boston, has interpreted the Department of Labor's Family and Medical Leave Act regulations to say that a holiday occurring during a week in which the employee is on FMLA leave is ignored. In other words, the holiday is counted against the employee's FMLA leave entitlement. This is so even if the employee's leave is intermittent, so long as the employee is out the entire week in which the holiday occurs. However, if the employee's intermittent leave is less than a full week, a holiday occurring during the week is not counted against FMLA leave. Mellen v. Trustees of Boston Univ., 2007 WL 2745015 (1st Cir. 2007); 29 C.F.R. §§ 825.200, 825.203, 825.205.

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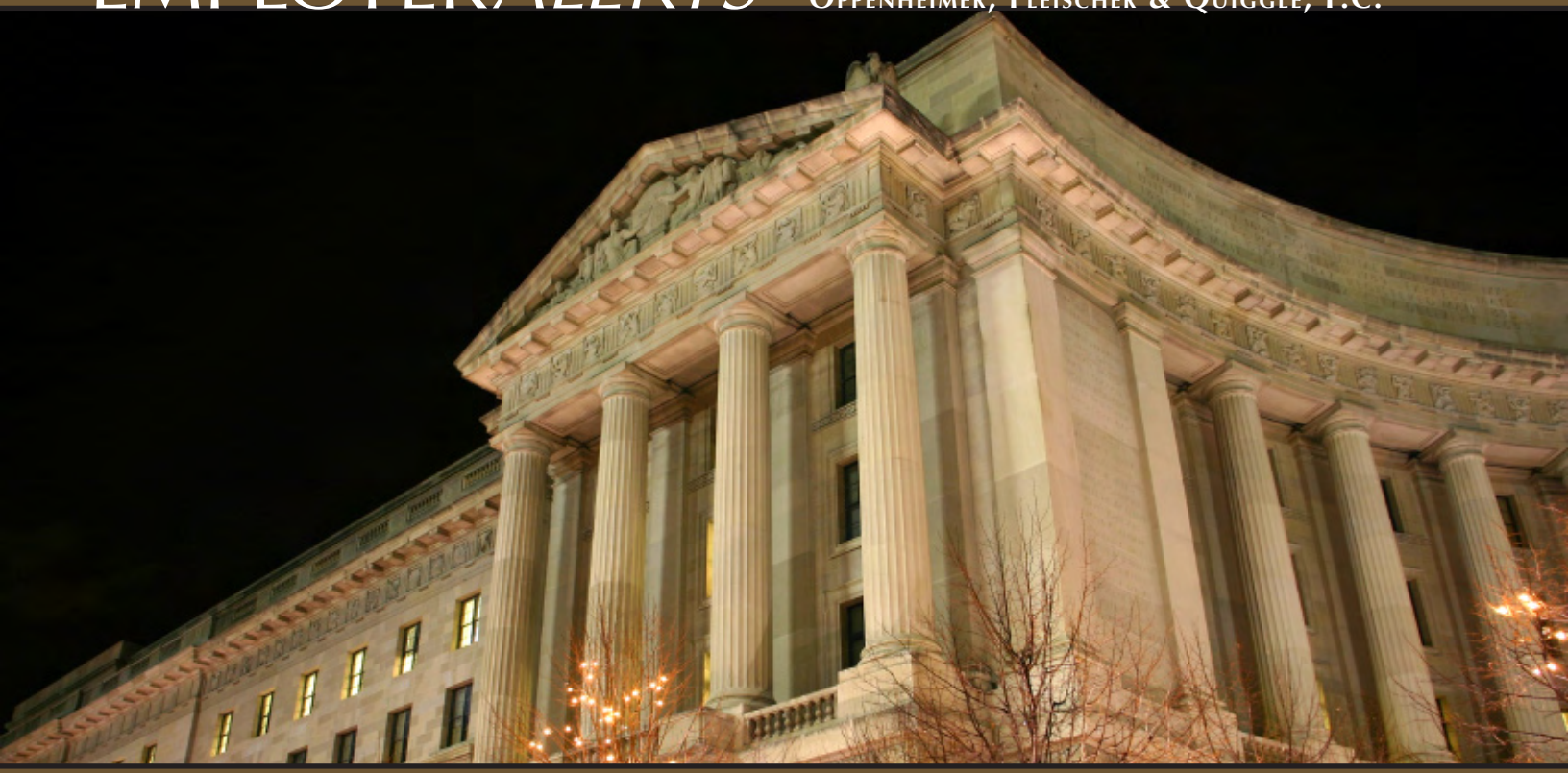

BY CHARLES H. FLEISCHER, ESQ. VOLUME VIII, NO. 3 – WINTER 2008

After-Hours Partying Not Covered by Workers' Comp

Workers' compensation laws cover employees who suffer accidental injuries *arising out of and in the course of employment*. Sometimes it is difficult to tell whether an injury is work-related.

Take, for example, an employee who is injured while commuting to or from work. The general rule (sometimes called the *going-and-coming rule*) is that employees are not covered while commuting. See "Workers' Compensation: The Going-and-Coming Rule," EMPLOYER ALERTS, June 2001, p. 1. But there are exceptions. Despite the going-and-coming rule, coverage will be provided when:

- an employee is going from one of the employer's places of business to another during the workday;
- an employee is exposed to a special hazard, which the public-at-large is normally not exposed to, while gaining access to the employer's place of business;
- the means of transportation are provided by the employer, or the employee is being paid while commuting; or
- the employer requires the employee to commute in a specified way or to follow a specified route.

When an employee is on travel for the employer, he or she generally is covered, even if not specifically engaged in work at the time of the injury. This includes hotel bathroom falls, choking on a meal, suffering a criminal assault, or being injured in a hotel fire. Only if the employee is injured while on a *distinct departure* from work and on a personal errand will there be no coverage.

A recent decision by the D.C. Court of Appeals provides a good example of a distinct departure.

Joseph Murphy, a professional hockey player with the Washington Capitals, was sidelined due to injuries suffered in a game. Nevertheless, he traveled with the team to New York in December 2000 to attend a game with

the New York Rangers. After the game he accompanied about 20 of his teammates to a dinner at a restaurant paid for by the employer, where he drank a substantial amount of beer and vodka.

After dinner was finished, some of the players, including Murphy, went to a club where they drank more beer and vodka. When the club closed and the group was out on the street near the club, Murphy tried to persuade a woman to accompany him in a limousine. The woman's companion responded by hitting Murphy over the head with a bottle, causing injuries that required medical treatment.

Shortly after the incident, Murphy's contract with the Capitals was assigned to a minor league team in Lowell, Massachusetts. Murphy was told to report to Lowell but he refused, claiming he was physically unable to play. Murphy was then suspended and later terminated.

Murphy filed a claim for workers' compensation relating to the incident, but an administrative law judge denied benefits, concluding that Murphy's "venture to the lower east side to patronize a bar after dinner was not an activity incidental to his employment."

References: D.C. Code § 32-1501; *Murphy v. D.C. Dept. of Employment Services*, 935 A.2d 1066 (D.C. 2007).

Company Officer Personally Liable for Wage Violations

The Fair Labor Standards Act (FLSA) requires, among other things, that employers pay minimum wages to their employees and time and a half for overtime worked by their non-exempt employees. Failure to do so can result not only an award of the unpaid wages, but an equivalent amount in liquidated damages and a requirement that the employer pay the employee's attorney's fees.

But who is the "employer" for FLSA purposes? The statute defines the term to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." And "person" means an individual, as well as a corporation or other entity. This broad definition recently allowed the U.S. Court of Appeals for the First Circuit, headquartered in Boston,

to hold the president of a corporation personally liable for unpaid wages.

Hotel Oasis, Inc., owned and operated a hotel and restaurant in Puerto Rico. Lionel Lugo-Rodriguez was president of the corporation and, as such, he ran the hotel and managed its employees. Following an investigation by the Wage and Hour Division of the U.S. Department of Labor, the Secretary of Labor sued the hotel corporation and Lugo personally for a variety of wage and hour violations, including failure to pay minimum wage, failure to pay for training and meeting time, and failure to pay overtime. The hotel also paid in cash. And it maintained two sets of books – one for internal use, showing many hours at a sub-minimum wage rate, and the other for wage and hour compliance purposes, showing fewer hours at a higher rate.

The trial court held both the hotel and Lugo personally liable for some $141,000 in unpaid wages due 282 current and former employees, plus an equal amount in liquidated damages. On appeal, the First Circuit affirmed the judgment. The Court ruled that a corporate officer with operational control over the corporation is considered an "employer" for FLSA purposes. Here, in particular, Lugo was not just any officer. He had ultimate control over the hotel's day-today business, he was principally in charge of the corporation's employment practices, and it was he who set employee wages and schedules. In short, Lugo was instrumental in causing the corporation to violate the FLSA, so he, along with the corporation, could be held personally liable for the violation.

References: 29 U.S.C. § 201 (FLSA); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26 (1st Cir. 2007).

FMLA Now Protects Caregivers of Injured Service Members

The Family and Medical Leave Act, passed in 1993, requires employers with 50 or more employees to grant up to 12 weeks of unpaid leave to eligible employees in connection with their own or a family member's serious health condition, or to care for a newborn, newly adopted, or newly placed foster child. The National Defense Authorization Act for Fiscal Year 2008, signed by President Bush on January 28, 2008, dramatically expands FMLA coverage, allowing up to 26 weeks of leave for a spouse, daughter, parent or next of kin to care for a member of the Armed Forces (including a Reservist or National Guard member).

The right to take leave applies when the service member is undergoing medical treatment, recuperation, or therapy, is in an outpatient status, or is on the temporary disability retired list, for a serious injury or illness. A "serious injury or illness" is an injury or illness incurred by an active duty service member in the line of duty that renders the member medically unfit to perform his or her service. "Next of kin" means the service member's nearest blood relative.

This new provision became effective on January 28.

The NDAA also amends the FMLA to permit an employee to take up to 12 weeks of FMLA leave because of any "qualifying exigency" arising out of the fact that a spouse, son, daughter or parent of the employee is on active duty or has been called to active duty. The term "qualifying exigency" is not defined in the law, but will be defined in regulations to be issued by the U.S. Department of Labor. The provision for leave based on a qualifying exigency is not effective until the Department actually issues final regulations defining the term.

In addition to issuing regulations defining qualified exigency, DOL is expected to issue more general regulations interpreting this new leave requirement. Until those regs are out, employers must act in good faith to comply with the law, using existing FMLA-type procedures as guidance.

References: 29 U.S.C. § 2601 (FMLA); National Defense Appropriations Act, Pub. L. 110-181, § 585.

Ineffective Harassment Policy Exposes Employer to Liability

For an employer to defend against a claim that one of its supervisors harassed a subordinate, the employer must have a policy prohibiting harassment and the employer must show that the complaining employee unreasonably failed to take advantage of the policy. But not just any policy will do. As a Burger King restaurant in Milwaukee found out, the policy must be reasonable under the circumstances – that is, not just a paper policy, but one truly designed to prevent and remedy harassment.

Tony Wilkins, manager of the Burger King, was having affairs with several female employees at the restaurant. When the restaurant hired a high school student named Samekiea, Wilkins made advances to her as well, inviting her to a hotel and even offering to pay her for sex. Samekiea rejected Wilkins's advances, but Wilkins persisted. (continued)

Samekiea complained repeatedly to her shift supervisor and to the assistant manager (Wilkins's subordinate), all to no avail. She then asked the assistant manager for a phone number she could call to complain. The assistant manager first responded that he wasn't sure there was such a number. He eventually did giver her a number but it turned out to be wrong, and when Samekiea pointed this out, he replied, "Well, I don't know then."

Samekiea's mother then went to the restaurant to complain, speaking with a shift supervisor about the harassment. The supervisor promptly reported the complaint to Wilkins, whereupon Wilkins fired Samekiea.

At the time, restaurant had an employee handbook which addressed harassment, saying that complaints should be lodged with a "district manager." The handbook did not say, however, who that person was or how to communicate with him. The list of corporate officers at the beginning of the handbook did not even name any district manager. The only other mechanism for complaining was to speak with a shift supervisor who in turn reported to the restaurant manager – the very person doing the harassing in this case.

The U.S. Court of Appeals hearing the case ruled for Samekiea. It concluded that when a company's business plan includes hiring part-time, teen-age workers, who are often entering the workforce for the first time, the company is obligated to suit its policies to such inexperienced, youthful employees. Here the company had a policy that neither Samekiea nor her mother, for that matter, could navigate. Moreover, a policy against harassment that included no assurance a harassing supervisor could be bypassed in the complaint process is unreasonable on its face.

In short, an employer has the burden of proving that it has established and implemented an effective complaint process. Burger King failed to do so in this case, and could therefore be held liable for Wilkins's harassment.

References: 29 U.S.C. § 2000e (Title VII); EEOC v. V & J Foods, Inc., 507 F.3d 575 (7th Cir. 2007).

Google's Youth Culture No Defense to ADEA Claim

Brian Reid held a Ph.D. degree in computer science and had been an associate professor of electrical engineering at Stanford University in California. Google hired Reid in June 2002 as its Director of Operations and Director of Engineering. Reid was 52 at the time.

The other high-level employees with whom Reid dealt at Google were its CEO (age 47), Vice President of Engineering (age 55), Google's two founders (age 28 and 29) and another employee (age 38).

In Reid's only written performance review while employed at Google, the VP of Engineering described Reid as having an extraordinarily broad range of knowledge; as projecting confidence when dealing with fast-changing situations; as having an excellent attitude; as being very intelligent, creative, and a problem solver. Reid's overall performance rating indicated he "consistently meets expectations." From February 2003 to February 2004 he received bonuses including 12,750 stock options.

But, ominously, the performance review also said: "Adapting to the Google culture is the primary task for the first year here. Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment."

During his employment, Reid was subject to a number of age-related, derogatory comments by colleagues and fellow employees. He was told, for example, that his ideas were "obsolete" and "too old to matter;" that he was "slow," "fuzzy," sluggish" and "lethargic;" and that he did not display a sense of urgency and lacked energy. They joked that the CD jewel case on his office placard should instead by an LP jacket.

After about 16 months on the job, Reid was removed from his position as Director of Operations and given a new assignment to develop and implement a night school master's degree program for Google engineers. Reid's former duties were assumed by two persons, one 15 years his junior, and other 20 years younger.

In January 2004, upper management decided to terminate Reid. By mid-February, the VP for Engineering met with him, telling him he was not a "cultural fit" and that there was no place for him in the Engineering Department. Reid's last day of work was February 27.

A state trial court in California dismissed Reid's subsequent suit for age discrimination, but an appeals court reversed, ruling that Reid had presented enough evidence to warrant a trial on his claim. In addition to the discriminatory atmosphere at Google, shown by the numerous age-related comments to which Reid was subjected, Reid also offered statistical evidence of age discrimination.

Specifically, a statistician Reid hired as an expert witness compiled birth dates, performance ratings, position, education and salary for some 1,718 Google employees. Using multiple regression analysis, the expert concluded that there was a statistically significant, negative correlation between age and performance review. According to the expert, for every 10-year increase in age, there was a corresponding decrease in performance rating.

That, said the appeals court, was enough to get Reid's case to trial.

References: 29 U.S.C.§ 621 (ADEA); *Reid v. Google, Inc.*, 66 Cal. Rptr. 3d 744 (Cal.App. 6th Dist. 2007).

Drug-Addicted Nurse Not Entitled to ADA Accommodation

Nurse Jeanne Dovenmuehler had a history of chemical dependency. She admitted that while employed by a hospital in Minnesota, she diverted Vicodin intended for patients to her own use. Hoping to continue her nursing practice, she reported herself to the Minnesota Health Professional Services Program (HPSP) and HPSP in turn issued her a plan that she needed to follow in order to practice nursing safely. She then took a job with St. Cloud Hospital.

Six weeks into her new job, Dovenmuehler told St. Cloud that she had been terminated from her prior position for alleged theft of Vicodin. She also revealed

the plan HPSP had put her on as a result of her drug use. Under the terms of the plan, St Cloud would have to supervise Dovenmuehler's access to controlled substances for 2000 hours of professional practice or for one year of continuous abstinence from alcohol and drugs and until HPSP lifts the restriction.

Dovenmuehler met with St. Cloud's Human Resources Department to discuss possible ways to implement the plan. For example, Dovenmuehler's duties could be limited such that she would have no access to controlled substances; or a buddy system could be put into effect with a nurse from another unit; or another nurse could be hired to shadow her during her shifts.

After considering these options, St. Cloud concluded that it could not reasonably accommodate Dovenmuehler's disability and it terminated her. Its conclusion was based on the fact that, given Dovenmuehler's duties, her particular patient population, and the private room layout of the unit where she worked, the only feasible accommodation was to hire another nurse to shadow her at all times.

The U.S. Court of Appeals for the Eighth Circuit upheld the termination. It first pointed out that drug addiction that substantially limits one or more major life activities is a recognized disability under the Americans With Disabilities Act. And, in general, an employee who has a disability is entitled to a reasonable accommodation if, with such accommodation, the employee can perform the essential functions of his or her job. (continued)

But the ADA does not protect current illegal drug users. Nor does it protect persons who, because of their addiction, commit crimes such as stealing drugs intended for patients. In addition, Dovenmuehler did not prove that she was disabled, since to be disabled the employee must be substantially limited in a major life activity, such as walking, talking, eating, etc. Here, the HPSP plan that St. Cloud considered unreasonable – constant monitoring – stemmed directly from the risk of illegal conduct, not from her status as chemically dependent.

References: 42 U.S.C. § 12101 (ADA); *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435 (8th Cir. 2007).

DLLR Implements Vacation Pay Ruling

Last quarter we reported on a decision by the Maryland Court of Special Appeals (Maryland's intermediate appellate court) that vacation pay must be treated just like wages earned during employment. As a result, the employer in that case had to cash out a departing employee's accrued but unused leave, even though the employer had a policy requiring forfeiture of unused leave when an employee quits without giving at least two weeks' notice. See "Vacation May Now Count as Wages in Maryland," Employer Alerts, Fall 2007, p. 1. Even though the decision was designated as "unreported," meaning it has no value as precedent and cannot be cited in subsequent cases, the Maryland Department of Labor, Licensing and Regulation has changed its published policy in light of the case. DLLR's website used to say the duty to cash out accrued vacation on termination "depends on the employer's policy, and whether this policy was communicated to the employee in advance." DLLR's website now reads:

> When an employee has earned or accrued his or her leave in exchange for work, an employee has a right to be compensated for the unused leave upon the termination of his or her employment regardless of the his or her employment, regardless of the employer's policy or language in the employee handbook.

See www.dllr.state.md.us/labor/wagepay. According to DLLR, sick leave remains unaffected and need not be cashed out when employment ends.

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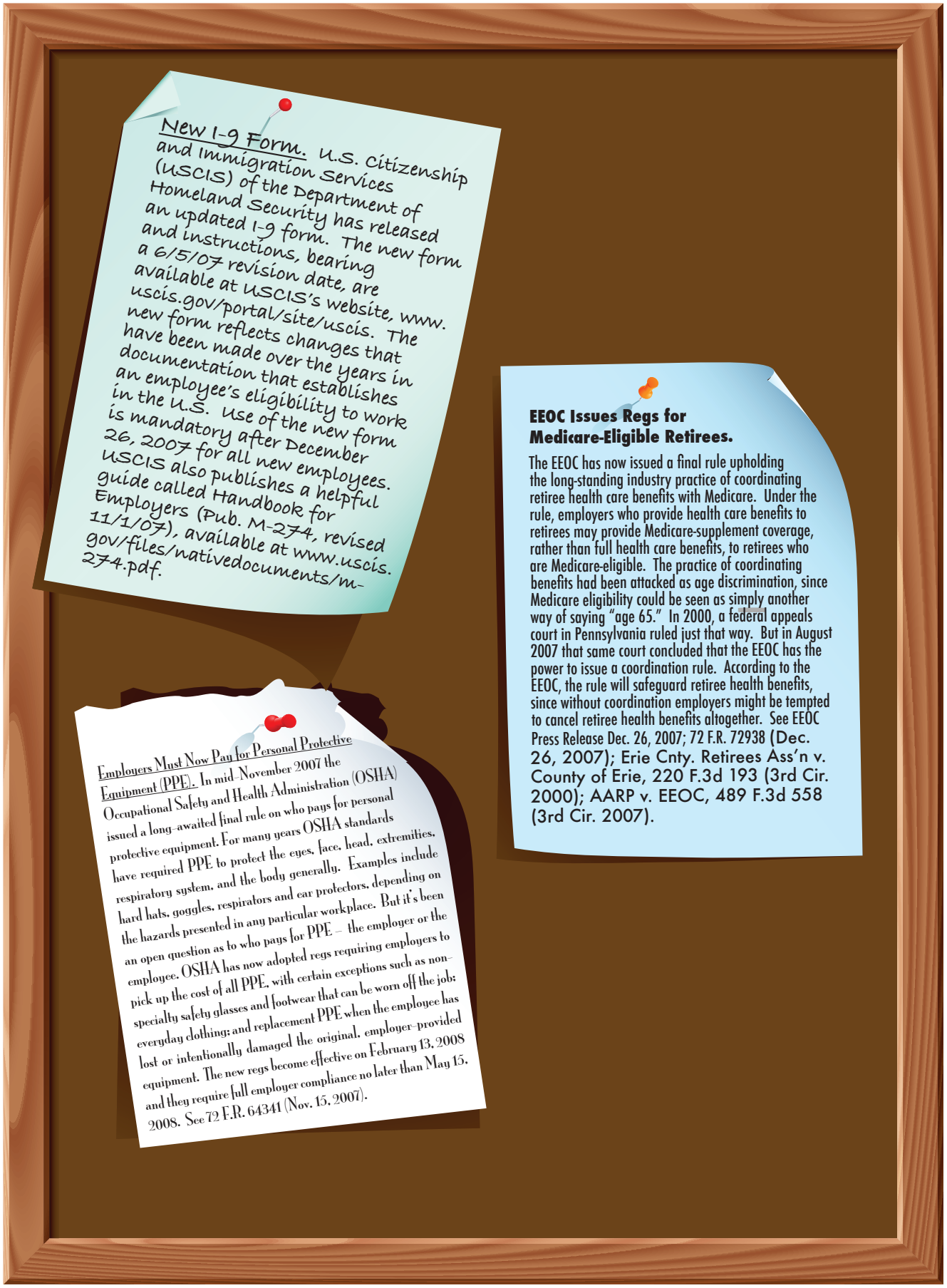

New I-9 Form. U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security has released an updated I-9 form. The new form and instructions, bearing a 6/5/07 revision date, are available at USCIS's website, www.uscis.gov/portal/site/uscis. The new form reflects changes that have been made over the years in documentation that establishes an employee's eligibility to work in the U.S. Use of the new form is mandatory after December 26, 2007 for all new employees. USCIS also publishes a helpful guide called Handbook for Employers (Pub. M-274, revised 11/1/07), available at www.uscis.gov/files/nativedocuments/m-274.pdf.

EEOC Issues Regs for Medicare-Eligible Retirees.

The EEOC has now issued a final rule upholding the long-standing industry practice of coordinating retiree health care benefits with Medicare. Under the rule, employers who provide health care benefits to retirees may provide Medicare-supplement coverage, rather than full health care benefits, to retirees who are Medicare-eligible. The practice of coordinating benefits had been attacked as age discrimination, since Medicare eligibility could be seen as simply another way of saying "age 65." In 2000, a federal appeals court in Pennsylvania ruled just that way. But in August 2007 that same court concluded that the EEOC has the power to issue a coordination rule. According to the EEOC, the rule will safeguard retiree health benefits, since without coordination employers might be tempted to cancel retiree health benefits altogether. See EEOC Press Release Dec. 26, 2007; 72 F.R. 72938 (Dec. 26, 2007); Erie Cnty. Retirees Ass'n v. County of Erie, 220 F.3d 193 (3rd Cir. 2000); AARP v. EEOC, 489 F.3d 558 (3rd Cir. 2007).

Employers Must Now Pay for Personal Protective Equipment (PPE). In mid-November 2007 the Occupational Safety and Health Administration (OSHA) issued a long-awaited final rule on who pays for personal protective equipment. For many years OSHA standards have required PPE to protect the eyes, face, head, extremities, respiratory system, and the body generally. Examples include hard hats, goggles, respirators and ear protectors, depending on the hazards presented in any particular workplace. But it's been an open question as to who pays for PPE – the employer or the employee. OSHA has now adopted regs requiring employers to pick up the cost of all PPE, with certain exceptions such as non-specialty safety glasses and footwear that can be worn off the job; everyday clothing; and replacement PPE when the employee has lost or intentionally damaged the original, employer-provided equipment. The new regs become effective on February 13, 2008 and they require full employer compliance no later than May 15, 2008. See 72 F.R. 64341 (Nov. 15, 2007).

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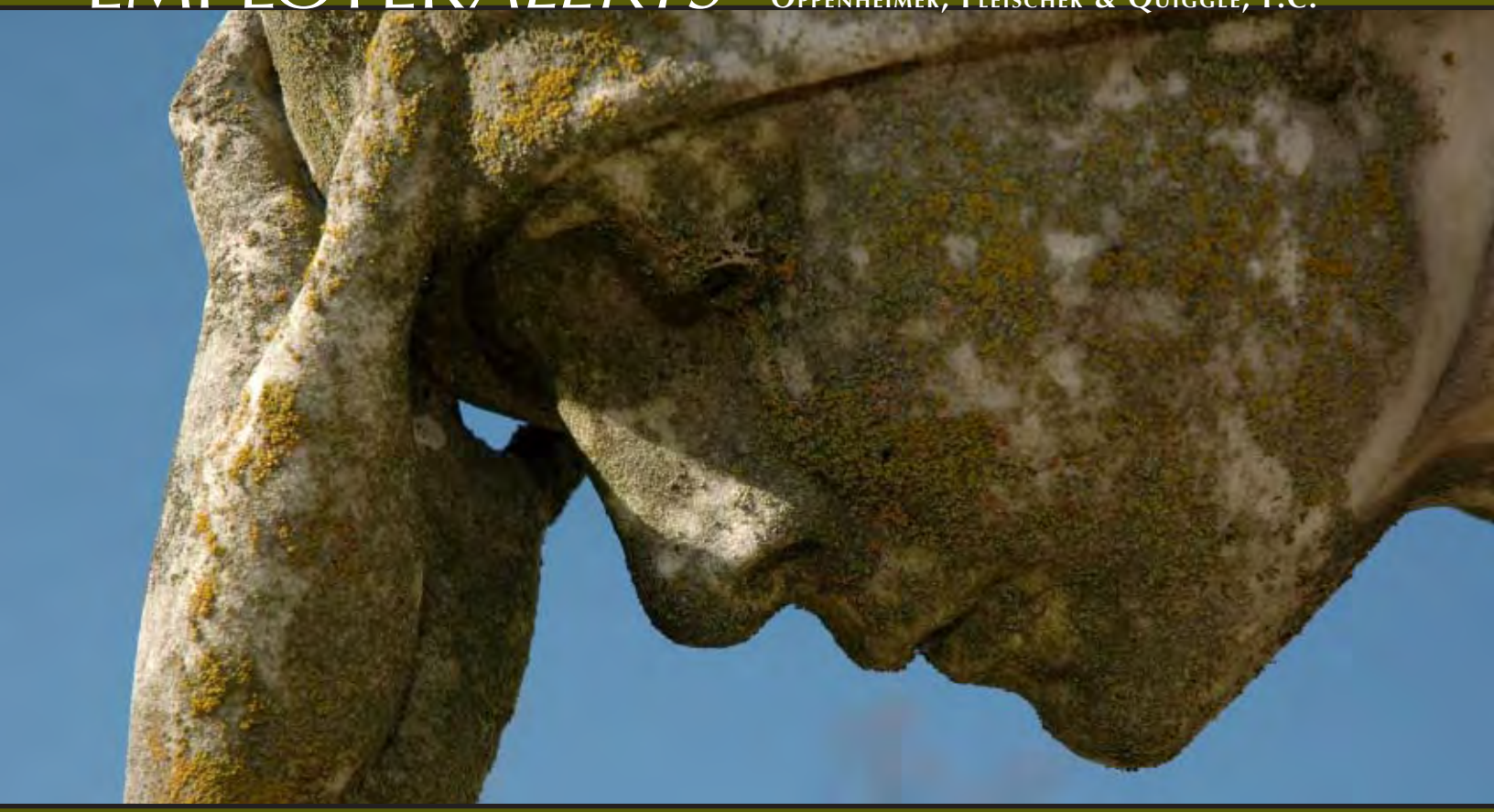


BY CHARLES H. FLEISCHER, ESQ.

VOLUME VIII NO. 4 – SPRING 2008

Staring Victim Gets Jury Trial

Nancy Billings worked as secretary for Russell Conner, the Town Administrator of Grafton, Massachusetts. Within a few months of her taking the job, Billings began to notice that Connor looked at her chest during their conversations. According to Billings, Connor would first make eye contact, but then his gaze would shift downward.

Billings complained about Connor to the Town's sexual harassment officer, Nancy Hazen. Hazen had heard similar accounts about Connor from other women, so she brought the matter to the Town's Board of Selectmen. The Board in turn instructed Billings to contact the Town's law firm. Billings and two other women met with the Town attorney and each of them reported Connor's proclivity for leering at their chests.

After the attorney submitted a report to the Town's Board, the staring became less frequent, but according to Billings it soon returned to its former level. Again the Town's attorneys became involved, but based on a limited investigation they reported that Connor simply didn't maintain eye contact when conversing with others and that no sexual harassment was involved. A follow-up investigation by another outside attorney resulted in the same conclusion. The second attorney even wondered whether Connor had a eye problem. That thought prompted Connor to visit an ophthalmologist, who diagnosed him with alternating intermittent exotropia – a condition in which one eye or the other will lose fixation and drift.

In the meantime, Billings filed a discrimination charge with the Equal Employment Opportunity Commission, followed by a lawsuit against the Town in federal court. While that suit was pending, Connor suffered a heart attack, necessitating a prolonged absence from work. When he returned, he asked the Town to accommodate his heart condition by reducing his stress. Specifically, he asked that Billings be transferred to another position so that he wouldn't have to deal with her each day.

The Town Board agreed and moved Billings to another secretarial position – a job with less prestige, but at the same pay, benefits and hours. When Connor finally retired, Billings asked for her old job back, but the Town refused, saying it had been filled with a permanent employee. *(continued)*

The lower court dismissed Billings's harassment suit without trial and she appealed. The U.S. Court of Appeals for the First Circuit reversed and sent the case back for trial. The appellate court first pointed out that Connor's behavior did not include touching, sexual advances, or overtly sexual comments. Nevertheless, said the Court, for a male supervisor to stare repeatedly at a female subordinate's breasts is inappropriate and offensive, not just unprofessional. Such conduct could, in the appellate court's view, give rise to a sexually objectionable environment.

Reference: *Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008).

Memorizing Customer List Violates Trade Secrets Act

Most states have adopted the Uniform Trade Secrets Act, which prohibits the misappropriation of trade secrets by improper means. A trade secret is defined by the Act as information that has economic value because it is not generally known to others and that the employer makes reasonable efforts to keep secret. Examples include a closely-guarded process like the formula for a soft drink, or a computer operating system's source code.

"Improper means" includes theft, bribery, misrepresentation, breach of duty to maintain secrecy, and espionage. So if an employee, in anticipation of going with a competitor, e-mails his current employer's business plan to his prospective new employer, or surreptitiously photocopies sales reports, his company will have a claim against him under the Act.

Conventional wisdom teaches that the general knowledge an employee acquires simply by working at a particular job is not a trade secret and may be used later in competition with the employer. A recent Ohio case may have changed that.

Al Minor & Associates (Minor) is an actuarial firm that designs and administers retirement plans. Minor employs several pension analysts who work with Minor's approximately 500 clients. In 1998 Minor hired Robert Martin as a pension analyst, but it did not require him to sign a noncompete agreement.

In 2002, Martin formed his own pension consulting company and left Minor's employment. Although he did not take any of Minor's documents, he did memorize at least a portion of Minor's client list. Based on that memorized list, he then successfully solicited 15 of Minor's clients.

Minor sued Martin under the Ohio Uniform Trade Secrets Act and won a trial court judgment against him for $25,973, representing the fees Minor would have earned from the clients Martin had solicited away. On appeal, Martin argued that an employer should have no right to control an employee's memory and that memorized information should therefore not qualify as a trade secret. In addition, Martin contended that Minor could have protected its customer list with an appropriate employment agreement, but Minor chose not to do so.

The Ohio Supreme Court rejected Martin's arguments and affirmed the trial court's $25,973 judgment against him. The Court said that the Trade Secrets Act does not depend on the form in which confidential information is maintained – whether on paper, in electronic form, or in a person's head.

Reference: *Al Minor & Asso., Inc. v. Martin*, 881 N.E.2d 850 (Ohio 2008).

Abusive Discharge Exception Expanded

Many states recognize an *abusive discharge* exception to the employment-at-will doctrine. Under that exception, even though an employee is at will and may be fired for any reason or no reason at all, he may not be fired for an *abusive* reason. The exception comes into play when, for example, an employee is fired for refusing to commit an illegal act, such as falsifying a government report or operating a motor vehicle in violation of a state compulsory insurance law. Discharging an employee for filing a workers' compensation claim or exercising some other protected right will also be considered abusive. In abusive discharge cases the courts typically award the employee back pay and they may order the employee reinstated. *(continued)*

In what may amount to a significant expansion of the exception – and thus a further limitation on an employer's ability to control its own workplace – the Nebraska Supreme Court has now recognized an abusive *demotion* exception to at-will employment.

Kimberlee Trosper worked as a deli manager for Bag 'N Save. During her employment she suffered a work-related injury that required medical treatment. When she reported her injury, her employer demoted her to deli clerk and reduced her annual salary from $30,100 to $22,500. In Nebraska, as in many other states, *discharging* an employee for filing a workers' comp claim triggers an exception to the employment-at-will doctrine. So the question before the Nebraska Supreme Court was whether an abusive *demotion* triggers the exception as well.

In a split decision, the Court ruled that, in Nebraska at least, an abusive demotion will be treated the same as an abusive discharge, since in each case the employee involved suffers retaliation for exercising a protected right.

Only a handful of other state courts have addressed the specific issue. A 1997 Kansas decision also permitted a suit for retaliatory demotion. In contrast, Illinois (in 1994) and Utah (in 2006) rejected those claims.

Employers should expect that more of these cases will be filed, that at least some other states will recognize such claims, and that in those states the courts will inevitably become more and more involved in regulating workplace minutia.

References: *Trosper v. Bag 'N Save*, 734 N.W.2d 704 (Neb. 2007); *Brigham v. Dillon Companies*, 935 P.2d 1054 (Kan. 1997); *Zimmerman v. Buchheit of Sparta, Inc.*, 645 N.E.2d 877 (Ill. 1994); *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945 (Utah 2006).

Loss of Funding No Basis to Terminate Employment Contract

Suppose you are a nonprofit organization dependent on grants to fund your operations. When those grants dry up, you have no choice but to eliminate, or at least trim, your staff. Is the loss of a grant a sufficient excuse for early termination of an employment contract with one of your employees?

When Denean Robinson went to work for East Capitol View Community Development Corporation in the District of Columbia, she signed a one-year contract. The contract stated that continued employment was "contingent on successfully achieving all performance goals and outcomes," but it said nothing about loss of East Capitol's funding.

However, when East Capitol's grant was revoked before expiration of Robinson's one-year employment term, East Capital terminated Robinson for lack of funding.

Robinson sued East Capitol for breach of her employment contract. East Capitol responded, invoking the doctrine of "impossibility of performance." In effect, East Capitol argued that with loss of its grant, it became impossible to continue paying Robinson.

The D.C. Court of Appeals rejected East Capitol's argument and found for Robinson. The Court adopted the view that impossibility will excuse non-performance of a contract only when an unforeseen event has occurred that makes performance *objectively* impossible. It is not enough that a particular party to a contract can no longer perform, particularly if the reason is the party's lack of financial resources. This is so because when a party enters into a contract, that party assumes the risk of its own financial inability. *(continued)*

Parties to a contract can, of course, allocate the financial risk differently if they wish. Here, East Capitol could have offered Robinson an employment contract that was contingent on continued grant funding. By not doing so, East Capitol assumed the risk the grant might end prematurely.

The case is significant not only for grant-dependent nonprofits, but also for government contractors and others who depend on cash flow from a third party. If interruption of that cash flow would likely have a direct and immediate impact on staffing, it makes sense not to promise long-term employment contracts to those staff members, or at least add a provision allowing early termination for loss of funding.

Reference: *East Capitol View Community Devel. Corp. v. Robinson*, 941 A.2 1036 (D.C. 2008).

Retaliation Against Fiancée Held Actionable

Most federal and state discrimination laws prohibit employers from retaliating against an employee for filing a claim under the law, or giving testimony or otherwise participating in a discrimination case. Sometimes, the retaliation is not directed at the employee himself, but at someone else.

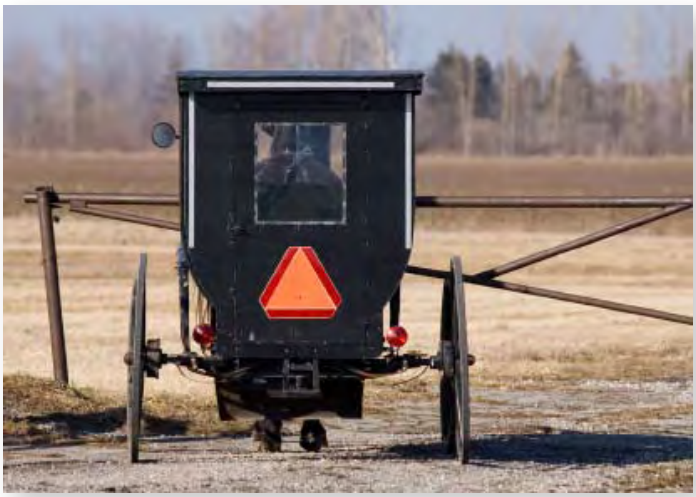
Indirect retaliation can have the same chilling effect on an employee's exercise of his statutory rights as direct retaliation. So, for example, a 2002 decision by the federal appeals court in Philadelphia held that an employer violated the anti-retaliation provisions of the Americans with Disabilities Act and the Age Discrimination in Employment Act when it fired a son in retaliation for his father's filing ADA and ADEA claims against the employer. See "Like Father, Like Son – ADA Protects Kin from Retaliation," Employer Alerts, May 2002, p. 8.

Now, in a case arising in Kentucky, the U.S. Court of Appeals for the Sixth Circuit has applied the same rule to a fiancée.

From February 1997 through March 2003, Eric Thompson worked as a metallurgical engineer for North American Stainless. Thompson met Miriam Regalado when she was hired by the company in 2000 and they became engaged. Regalado later filed a charge of gender discrimination against the company under Title VII of the federal Civil Rights Act. Three weeks later, the company fired Thompson. Thompson then filed his own charge against the company.

The federal trial court in Kentucky dismissed Thompson's suit, but the appeals court reversed and sent the case back for trial. The higher court agreed that the plain language of Title VII's anti-retaliation provision does not protect someone in Thompson's position. But it ruled that courts should go beyond the literal language of a statute if reliance on that language would defeat the purpose of the statute. The court also cited the Equal Employment Opportunity Commission's Compliance Manual, which states that the person claiming retaliation need not be the one who engaged in protected activity. According to the EEOC Manual, Title VII prohibits retaliation against someone "so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."

References: *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir. 2002); *Thompson v. North American Stainless, LP*, 2008 WL 834005 (6th Cir. 2008).



"Libation Ceremony" No Violation of Religious Accommodation Duty

Title VII of the federal Civil Rights Act generally prohibits workplace religious discrimination. Discrimination in this context includes an employer's failure to reasonably accommodate an employee's religious beliefs and practices. See "Dress Code Trumps Duty of Religious Accommodation," Employer Alerts, Winter 2005, p. 4. So, for example, an employee's request for a work schedule that allows him or her to attend services must be accommodated unless it causes an undue hardship to the employer. *(continued)*

In a failure-to-accommodate case, a complaining employee must show that:

- he or she has a sincere religious belief that conflicts with a job requirement;
- he or she told the employer about the conflict; and
- the employer failed to accommodate the belief, where doing so would not have imposed an undue hardship.

The employee cannot assume that his or her employer is familiar with the doctrines of a particular religion. Simply announcing that the employee is a member of a certain faith, or wearing a religious symbol like a crucifix or a Star of David, is not enough, because employers are not charged with possessing knowledge of the beliefs and practices of various religious sects. Instead, the employee must give the employer *fair warning* that a particular employment requirement interferes with the employee's belief or practice.

This principle is well illustrated in a recent federal appeals case from Pennsylvania.

Jessica Wilkerson was employed as a teacher for New Media Technology Charter School. When she applied for the job, she disclosed to New Media her Christian ministry activities and made New Media aware of her Christian faith.

A few months after beginning work, Wilkerson was required to attend an employer-sponsored banquet. Wilkerson did not know prior to the banquet that the banquet would include a "libation ceremony" – a ceremony during which wine or other liquid is drunk in honor of a god or ancestor. Wilkerson refused to participate in the ceremony, viewing it as anti-Christian ancestor worship. Only after the banquet, however, did Wilkerson complain, claiming that New Media should have been aware that the ceremony would offend her religious beliefs. A month or so later, Wilkerson's employment was terminated.

In Wilkerson's subsequent law suit, the U.S. Court of Appeals for the Third Circuit ruled that New Media was not on notice of any conflict between Wilkerson's beliefs and the libation ceremony. Merely knowing that Wilkerson was a Christian did not, in the Court's words, "sufficiently satisfy Wilkerson's duty to provide fair warning to New Media that she possessed a religious belief that specifically prevented her from participating" in the ceremony. Therefore, the duty to accommodate those beliefs did not arise.

Unfortunately for New Media, however, the Court went on to say that Wilkerson presented a plausible claim for retaliation, which entitled her to a trial.

References: *Wilkerson v. New Media Technology Charter School Inc.*, 522 F.3d 315 (3d Cir. 2008); *Cloutier v. Costco Wholesale Corp.*, 2004 WL 2731496 (1st Cir. 2004).

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D.C.'s Breast-feeding Law. A recent amendment to the D.C. Human Rights Act redefines sex discrimination to include discrimination against mothers who are breast-feeding. Specifically, the law requires employers to provide reasonable, daily unpaid break periods, as needed by the employee, to allow her to express milk. The only exception is if providing such break periods would create an undue hardship on the employer's operations. Employers must also provide a nearby sanitary area – other than a bathroom or toilet stall – where the mother can express milk in privacy and security. Another provision of the law gives mothers the right to breast-feed in any location, public or private, where she has a right to be with her child, even though her breast may be exposed during the process. The law became effective at the end of last year. D.C. Law 17-0058.

Genetic Discrimination. New federal legislation will make it illegal for employers to discriminate against an employee based on genetic information. With certain exceptions, it is also illegal for employers to request or obtain genetic information about an employee or an employee's family member. The law defines "genetic information" as information about an individual's genetic tests, information about genetic tests of an individual's family members, or information about the manifestation of a disease or disorder in an individual's family members. A "genetic test" is any analysis of DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. H.R. 493 (110th Cong.). At this writing the legislation has been sent to the White House and is expected to be signed by the President. It will become effective 18 months after enactment. (Executive Order 13145, issued by then President Clinton in 2000, prohibits all executive departments and agencies of the federal government from collecting "protected genetic information" about its employees or basing employment decisions on such information. The Americans with Disabilities Act has long prohibited most pre-employment medical testing, including genetic testing.)

More on Leave Forfeiture in Maryland. On April 24, 2008, Maryland Governor Martin O'Malley signed Senate Bill 797 – emergency legislation permitting employers to adopt a policy of forfeiting unused leave on termination of employment. The policy must be in writing and must be communicated to employees at time of hire. Absent such a written policy, employees are entitled to have unused leave cashed out on termination. An earlier, unreported decision of the Maryland Special Court of Appeals had struck down such a policy as contrary to then-existing Maryland law. It remains unclear how the new law affects existing employees.

Paid Leave in D.C. *Another new D.C. law requires all employers to provide paid leave to their employees. For employers with 100 or more employees, the requirement amounts to 7 days per year. Employers with between 25 and 99 employees must provide up to 3 days per year, and employers with fewer than 25 employees must provide at least 1 day per year. The leave may be used when the employee is sick or injured, to care for a sick or injured family member, or to obtain social or legal services when the employee is a victim of stalking, domestic violence, or sexual abuse. Any unused leave may be carried over from year to year, but it need not be cashed out on termination of employment. Notice of the new law's provisions must be posted in the workplace. D.C. Act 17-324, due to become effective in mid-May 2008.*

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