



BY CHARLES H. FLEISCHER, ESQ.

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Garnishments and Unauthorized Practice of Law

One of your employees defaults on a credit card debt. The credit card issuer turns the matter over to a collection attorney, who obtains a court judgment against the employee for the unpaid balance. Next, the collection attorney serves a wage garnishment on you in an effort to collect the judgment.

Garnishment papers typically require employers to answer certain questions and file the answers in court by a specified deadline. For example, you will likely be required to state whether the employee does in fact work for you, how much he or she makes, and whether he or she is subject to any other garnishments, child support orders, etc.

Responses to garnishment papers are routinely handled by HR or the payroll department. Hiring counsel to deal with such matters seems both unnecessary prohibitively expensive. But you'd better think twice about how you handle garnishments if your business is in Georgia.

Georgia, and every other state, regulates the practice of law in its courts. An individual is always allowed to represent himself in court (known as a "pro se" party), but corporations and other legal entities must generally be represented by a licensed attorney.

This past June, the State Bar of Georgia issued an advisory opinion that a non-lawyer who answers a garnishment on behalf of his employer is engaged in the unauthorized practice of law. Then in September, the Supreme Court of Georgia, in a two-sentence decision, approved the Bar's advisory opinion, making the opinion binding law in the State. As a consequence, corporations and other legal entities must now hire a lawyer to answer garnishments. Failure to do so not only exposes the non-attorney employee to civil and criminal penalties, it could also mean the answer will be stricken from the court's records and a default judgment will be entered against the employer.

The Georgia Bar opinion does not cite a single authority from outside that State, and it is not clear at this point whether other states will follow Georgia's rule. Missouri, for example, allows non-lawyers to file garnishments, so it would seem to follow that non-lawyers in that state could also respond to garnishments.

Given the uncertain state of the law in this area, employers would do well to check with their counsel before answering the next garnishment they receive. ⚖️

References: Ga. UPL Advisory Op. No. 2010-1 (June 4, 2010); *In Re UPL Advisory Op. No. 2010-1* (Ga. No. S11U0028, Sept. 12, 2011); Mo. Un. Pr. No. 42 (Aug. 3, 1979); *Division of Employment Security v. Westerhold*, 950 S.W.2d 618 (Mo. App. 1997).

No EPLI Coverage for EEOC Suit

Prudent employers buy Employer Practices Liability Insurance coverage to protect against discrimination and wrongful discharge suits by their employees. They would no doubt be surprised to learn that their EPLI policies may not cover the same types of suits brought by the Equal Employment Opportunity Commission on behalf of the employees.

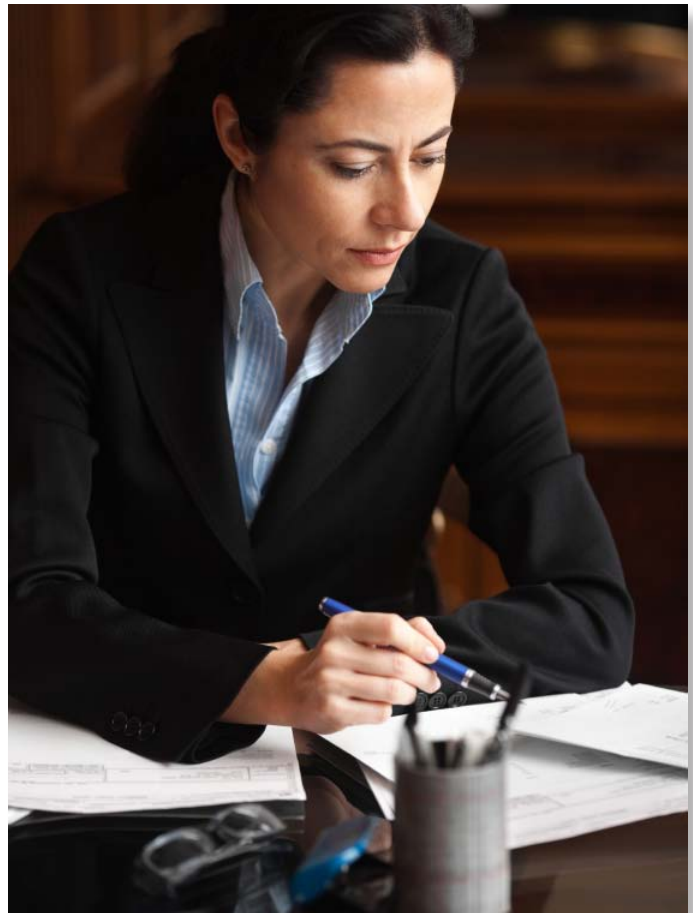
Cracker Barrel Old Country Store is a national restaurant chain that maintained EPLI coverage through the Cincinnati Insurance Company. Typical of such liabilities policies, Cincinnati was obligated to provide Cracker Barrel with a defense to any covered claims and to indemnify Cracker Barrel for losses it might suffer as a result of those claims. The policy defined a “claim” as

a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, which is brought by any past, present or prospective employee(s)

for, among other things, wrongful termination of employment or violation of any federal, state or local law that concerns employment discrimination.

While the policy was in force, ten Cracker Barrel employees filed charges with the EEOC alleging racial and sexual discrimination. Cracker Barrel gave notice of the charges to Cincinnati. Thereafter, the EEOC filed suit against Cracker Barrel based on the employees’ charges. Cracker Barrel notified Cincinnati of the EEOC suit as well.

Cracker Barrel eventually settled with the EEOC, entering into a consent decree which required Cracker Barrel to pay \$2 million into a settlement fund to be administered by the EEOC. Cracker Barrel incurred some \$700,000 in legal fees in connection with the EEOC law suit.



Throughout the litigation, Cracker Barrel asked Cincinnati to defend the EEOC suit, but Cincinnati denied coverage. So Cracker Barrel sued Cincinnati for breach of the EPLI policy, claiming as damages the \$2 million settlement it had paid and the \$700,000 in legal fees it had incurred.

The court ruled that the policy definition of “claim” was clearly and unambiguously limited to suits by *employees* and did not cover suits by the *EEOC*. The court said the fact that the EEOC suit was based in part on the earlier employee charges was irrelevant.

The decision is particularly troublesome given what appears to be an increase in litigation by the EEOC. So it pays employers to read their policies carefully to make sure they have the coverage they thought they were getting. ⚖️

Reference: *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.* (U.S. Dist. Ct., E.D. Tenn. No. 3:07-cv-00303, decided Sept. 21, 2011).


Returning Airman Entitled to Same Pay, Not Just Same Pay Rate

Michael Serricchio, a member of the U.S. Air Force Reserve, was employed by Wachovia Securities as a financial advisor. Following the September 11 attacks he was called to active duty. On his return from service, he sought reemployment at Wachovia, as he was entitled to do under the Uniformed Services Employment and Reemployment Act (USERRA).

USERRA requires an employers to re-employ a returning servicemember in the position the servicemember would have had but for his or her military service. Under this so-called "escalator" provision, the employer must consider the seniority, status, and rate of pay that an employee would ordinarily have attained given his or her job history, including prospects for future earnings and advancement. See "Job Rights of Employees Called to Active Duty," EMPLOYER ALERTS, Nov. 2001, p. 1; "DOL Issues Final USERRA Regs.," EMPLOYER ALERTS, Winter 2006, p. 7.

Prior to his military deployment, Serricchio was servicing more than \$9.4 million in client assets, which generated some \$12,000 in monthly gross revenues. Serricchio's compensation, which was commission-based, was more than \$75,000 annually.

When Serricchio returned to Wachovia, he was reinstated as a financial advisor on the same commission basis as before he left. But while he was on active duty, his clients had either left the firm or were transferred to other advisors. So that when Serricchio returned, he no longer had a book of business. Wachovia offered him only a limited number of small accounts and opportunities for cold-calling clients. Basically, he had to start from scratch.

In the suit that followed, Wachovia argued that there was no USERRA violation because Serricchio's compensation was based on the same commission *rate* he had before. The U.S. Court of Appeals for the Second Circuit (headquartered in New York) disagreed. The Court said that in determining USERRA compliance, it is the returning servicemember's actual pay, not the terms under which he is paid, that counts. The Court upheld an award to Serricchio that included back pay and liquidated damages. 

References: 38 U.S.C. § 4301; 20 C.F.R. § 1001.002; *Serricchio v. Wachovia Securities LLC*, 2011 WL 4035754 (2nd Cir. 2011).

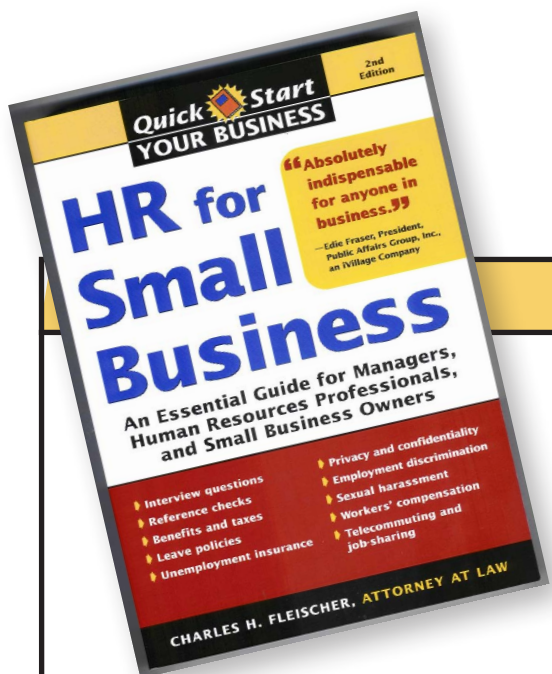
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Older Employee Replaced by Software

For employees 40 years or older, the federal Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age. One of the ways an employee can prove age discrimination is by showing that he or she was qualified for the job but was replaced by someone significantly younger. See “How Young Is Too Young Under the ADEA?” *EMPLOYER ALERTS*, April 2003, p. 3.

That’s what Thomas Gortemoller tried to prove in his ADEA suit against his former Alabama employer, International Furniture Marketing.

Gortemoller’s duties included conducting research to determine what new products to produce, creating

specifications and working with designers on products, and traveling to market to sell products and evaluate the competition. When Gortemoller was fired, his employer streamlined its product-design process by implementing a web-based computer program called Design Net, which allows salespeople to communicate directly with designers about what products are needed and allows customers to provide feedback directly to salespeople and designers. Although some of Gortemoller’s duties were given to others, the bulk of his duties were taken over by the computer program.

Based on these findings, the Eleventh Circuit U.S. Court of Appeals, based in Atlanta, ruled that Gortemoller failed to prove his age discrimination case. 

References: 29 U.S.C. § 621; *Gortemoller v. International Furniture Marketing, Inc.*, 2011 WL 2899338 (11th Cir. 2011).

Rejection of Candidate Due to Pending FLSA Suit Not Retaliatory

Most employee protection statutes, in addition to conferring specific rights on employees, also prohibit retaliation against employees who exercise their rights under those statutes. The federal Fair Labor Standards Act is no exception. Its anti-retaliation provision makes it unlawful

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding.

By a two-to-one decision, the Fourth Circuit U.S. Court of Appeals in Richmond recently ruled that this provision applies only to current employees, not candidates for employment.

In August 2009 Science Applications International Corp. offered Natalie Dellinger a job, conditioned on



her passing a drug test, completing certain forms, and transferring her security clearance from her former employer, CACI, Inc. Dellinger accepted the offer and began working on the contingencies.

On the form for her security clearance, she was asked about any pending civil court actions to which she was a party. She listed a suit she had against CACI in which she claimed that CACI had violated the FLSA's minimum wage and overtime provisions. When SAIC became aware of the pending suit, it withdrew the employment offer.

Dellinger then sued SAIC, claiming that in withdrawing its employment offer, SAIC had violated the anti-retaliation provision of the FLSA. But the Court rejected Dellinger's suit against SAIC, saying that the FLSA, by its express terms, only protects current employees, not prospective employees.

The dissenting judge thought the Supreme Court's 1997 decision in *Robinson v. Shell Oil Co.* required a different result. In *Robinson*, the Supreme Court found that the word "employee" in Title VII of the 1964 Civil Rights Act is ambiguous because it is used

in several different ways in that statute. Therefore, said the Supreme Court, it is reasonable to conclude that the anti-retaliation provision in Title VII protects former employees as well as current employees. The dissenting judge in the Dellinger's suit against SAIC similarly concluded that the FLSA's anti-retaliation provision should protect prospective employees as well as current employees.

Ironically, the Supreme Court's *Robinson* decision reversed the same Fourth Circuit that has now concluded the FLSA does not cover candidates for employment. Given the Supreme Court's broad reading of anti-retaliation statutes (see "Supreme Court Finds Implied Anti-Retaliation Right," EMPLOYER ALERTS, Summer 2008, p. 5; "Supreme Court Give Expansive Reading to Anti-Retaliation Law," EMPLOYER ALERTS, Winter 2009, p. 1), the same thing might well happen in Natalie Dellinger's case. 🏛️

References: 29 U.S.C. § 201; *Dellinger v. Science Applications Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Burlington No. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Crawford v. Nashville*, 555 U.S. 271 (2009).

Obesity as a Disability. In late September the EEOC filed a disability discrimination suit against BAE Systems in Houston, alleging that BAE's firing of a morbidly obese employee was illegal under the Americans with Disabilities Act, EEOC v. BAE Systems, Inc., U.S. Dist. Ct. S. D. Tex. No. 4:11-cr-03497 (Sept. 27, 2011). According to press reports, the employee, Ronald Kratz, weighed 450 pounds when BAE first hired him in 1994. At the time he was fired in 2009 he had gained an additional 200 pounds, but he claimed his weight didn't interfere with his work as a materials handler for BAE. In support of its suit, the EEOC alleges that morbid obesity is a disability under the ADA. EEOC's complaint asks the court to enjoin BAE from further discriminatory acts, re-hire Kratz, and reimburse him for lost wages. It remains to be seen how his case will be resolved, but recent amendments to the ADA, which expanded the definition of disability, make obesity claims all the more likely.

Taxation of Employer-Provided Cell Phones. The IRS has ruled that when an employer provides a cell phone to an employee for reasons related to the employer's trade or business (other than as a form of compensation to the employee), the phone will be considered a "working condition fringe benefit," the value of which is excludable from the employee's income for income tax purposes. Further, the employee's personal use of the phone will be treated as a de minimis (non-taxable) fringe benefit to the employee. Unlike mixed business and personal use of an employer-owned automobile, employees do not have to account for and substantiate the amount of business and personal use of such cell phones. IRS Notice 2011-72.

Payment for Rest Breaks.

Many employers provide brief morning and afternoon rest breaks to their non-exempt employees. When those rest breaks are no longer than 20 minutes, they must be accounted and paid for as hours worked. But what if an employee who is authorized to take, say, a 15 minute break, extends it without authorization to 20 or even 30 minutes? Is that compensable time as well? According to the U.S. Department of Labor's Field Operations Handbook, an employer need not compensate employees who take unauthorized extensions of permitted breaks if the employer has expressly and unambiguously communicated to its employees that (1) the authorized break may only last a specified length of time, and (2) any extension of such break is against the employer's rules and will be punished. DOL Field Oper. Hand. § 31a01.

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