



BY CHARLES H. FLEISCHER, ESQ.

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Office Email to Attorney Not Privileged

Marina Stengart was the Director of Nursing for Loving Care Agency, Inc., a home health care services agency. She was also the branch manager for Loving Care's Fort Lee, New Jersey, office, and one of Loving Care's original employees.

As a part of management, Stengart used a company-issued laptop computer and she had a business email address provided by the company. She also maintained a personal, password-protected email account at Yahoo, which she could access from any internet-connected computer, such as her company laptop.

Loving Care's employee handbook, which Stengart helped write, had a strict policy on use of office communications equipment. While the policy did permit occasional personal use of email, it went on to specify that "technology resources are considered company assets" and that "email and voice mail messages are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee."


Stengart apparently felt that her work environment was hostile, and she hired a lawyer for advice. And despite the company's policy on use of its communications equipment, Stengart accessed her Yahoo account through her laptop during business hours, and she sent emails to her lawyer concerning her work situation. Shortly thereafter, she quit and filed suit against Loving Care.

Faced with Stengart's suit, Loving Care's attorneys did exactly what they were supposed to do – preserve evidence that may be relevant to the litigation. See "Court Sanctions Employer for Failure to Preserve Evidence," *EMPLOYER ALERTS*, Spring 2006, p. 5. Specifically, the attorneys made a mirror image of the hard drive on Stengart's laptop, and they then had a forensic examination done of the hard drive contents. In the process, they discovered temporary internet files that contained the content of Stengart's emails to her lawyer. During pretrial discovery, they informed Stengart's lawyer that they had those emails.

Stengart's lawyer accused Loving Care's attorneys of violating the attorney-client privilege (the protection from disclosure the law gives to communications between clients and their lawyers) and moved to have the attorney

disqualified from the case. The New Jersey trial court that heard the motion concluded that Stengart had waived the privilege by using company equipment to email her lawyer. The court said Stengart knew, or at least she should have known, that anything stored on the company's computer system belonged to the company. By using company equipment for her emails, she took the risk that the emails would come to the company's attention.

The existence of Loving Care's written policy was key to the court's decision. Without such a policy, Stengart would have had a far more persuasive claim that she expected her emails to be private. The bottom line for employers, therefore, is to have a clear, written policy in place in order to defeat any claim that the employer violated some privacy right or privilege protection by inspecting files on company-owned equipment.

The case has even more significant implications for lawyers. Although not addressed by the court, loss of Stengart's privilege protection might not be limited to the emails themselves. Many courts take the view that when privilege is waived as to a particular communication, the waiver covers *other communications dealing with that same subject matter*. In other words, Stengart may have lost attorney-client privilege protection as to everything she and her attorneys discussed relating to her claim of employment discrimination. This could spell disaster to client's case. And disaster for the lawyer who failed to warn his or her client not to communicate using company equipment. 

Reference: *Stengart v. Loving Care Agency, Inc.*, N.J. Super. No. BER-L-858-08 (Feb. 5, 2009)

NY Court Awards

Back Pay to Illegal Alien

In a 2002 case called *Hoffman Plastic*, the U.S. Supreme Court ruled that back pay could not be awarded to an illegal alien who was improperly fired for engaging in union organizing activities. Normally, such an improper firing would result in an order from the National Labor Relations Board to reinstate the employee and pay the employee

for wages he or she would have earned but for the improper firing. But, said the Court, to award back pay to an illegal alien on account of wages he could not lawfully have earned trivializes the immigration laws. See "Supreme Court Update," EMPLOYER ALERTS, May 2002, p. 1.

In some states, most notably New York, the rule appears to be different.

Luis Coque, an undocumented alien from Ecuador, came to the U.S. in 2000. He was hired by City Wide Building Corp. as a construction laborer in 2001 after submitting a fraudulent Social Security card to City Wide. City Wide, along with several other contractors, had a contract with Wildflower Estates Developers to build a townhouse project owned by Wildflower.

While Coque was working on the project, a bundle of shingles weighing 80 pounds fell through a skylight opening on a townhouse roof and hit Coque, causing him to fall from a scaffold he was standing on and land 25 feet below in the basement of the townhouse. Coque was severely injured and left a paraplegic.




Coque sued the roofing contractor in New York state court for his injuries, including a claim for lost wages. (He didn't sue his employer, City Wide, because New York's workers' compensation statute would have barred such a suit.) During his testimony, Coque admitted that he was undocumented and that he had submitted a fraudulent Social Security card to City Wide

at the time he was hired. He also testified that City Wide paid him in cash for his work – possibly because it knew Coque did not have a valid Social Security number.

The jury awarded Coque \$3,300,354 in damages – \$102,000 for past and future lost wages; \$1,750,000 for past and future pain and suffering; and \$1,448,354 for past and future medical expenses. In appealing the verdict, the roofing contractor argued among other things that Coque was not entitled to damages for lost wages because he was an illegal alien who obtained his job fraudulently.

A New York appellate court rejected the roofing contractor's argument and affirmed the verdict. The court concluded that limiting the ability of workers such as Coque to recover damages for lost wages would undermine the protections afforded by New York's labor laws. And disagreeing with the Supreme Court's reasoning in *Hoffman*, it concluded that disallowing such damages would thwart federal immigration policy by minimizing employers' potential liability to undocumented aliens and thus providing an incentive for unscrupulous employers to hire them. Instead, the court ruled that only where the employer's hiring decision was actually induced by the employee's fraud, would recovery for lost wages be barred, apparently feeling that City Wide participated in, or at least knew about, the fraud.

The court felt it was not bound by *Hoffman* because, while immigration issues are matters of federal law, the states have always had power to deal with local concerns, such as laws affecting occupational health and safety. The court may also have rejected *Hoffman* because that case involved a clash between two federal laws – the National Labor Relations Act and the Immigration Reform and Control Act – matters on which the Supreme Court has the final word. Here, however, the clash was between federal immigration policy and state labor law.

The decision seems to fly in the face of *Hoffman*. If, as the Supreme Court held, federal immigration policy trumps federal labor relations policy, then surely it trumps state labor laws. After all, the U.S. Constitution's Supremacy Clause makes clear that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Except in New York. 

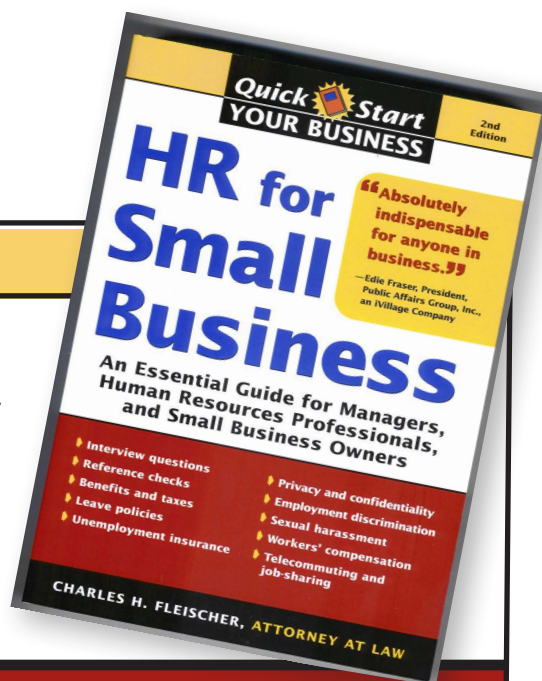
References: *Coque v. Wildflower Estates Developers, Inc.*, 867 N.Y.S.2d 158 (App. Div. 2008); *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002); U.S. Const., Art. VI.

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Maryland Legislature Clarifies Flexible Leave Law

In its 2008 session, the Maryland legislature adopted legislation requiring employers who have 15 or more employees to allow its employees to use accrued, paid leave to care for an immediate family member who is ill. See "Maryland Adopts 'Flexible Leave' Law," *EMPLOYER ALERTS*, Summer 2008, p. 7. The law offered an unhelpful definition of "immediate family member" – as *including* (but not limited to?) a child, spouse, or parent – and it left many other questions unanswered.

The legislature has now attempted to clarify the law. The law now redefines "immediate family member" to *mean* (instead of *include*) a child, spouse or parent, and it further defines "child" and "parent" as follows:

- a *child* is an adopted, biological or foster child, stepchild, or legal ward who is under 18 years, or who is 18 or older but incapable of self-care; and
- a *parent* is and adoptive, biological, or foster parent, a stepparent, a legal guardian, or a person standing in loco parentis.



Under the old law, it was unclear whether an employer whose workforce varied above and below the 15-employee threshold was covered. "Employer" is now defined as someone who employs 15 or more employees "for each working day in each of 20 or more calendar weeks in the

current or preceding calendar year." (This is the same definition used in a number of federal acts, such as Title VII of the Civil Rights Act.)

Under the 2008 enactment, a question arose as to just which employees were covered – only in-state employees, or all employees? The new law now defines *employee* as someone who is *primarily employed in Maryland*. Similarly, there were questions as to what qualified as "leave with pay." The former law defined it as including sick leave, vacation time and compensatory time. The new law adds "paid time off" to the list, but goes on to exclude the following categories from the definition:

- any benefit that is subject to ERISA;
- an insurance benefit (including a self insured plan);
- workers' compensation;
- unemployment compensation; and
- disability or similar benefits.

The new law retains the anti-retaliation provisions with some modifications.

The law was passed as emergency legislation and took effect on May 19, 2009, when Governor O'Malley signed it. 🗳️

Reference: Md. SB 562 (2009) (amending Md. Code, Labor & Employ. § 3-802).

Replacement Qualifies as "Comparator" Under Equal Pay Act

The federal Equal Pay Act prohibits an employer from discriminating by paying males and females at different rates for equal work. A rate differential is lawful, however, if it is based on a factor other than sex.

To prove an Equal Pay Act violation, normally the employee claiming discrimination must identify a "comparator" – an employee of the opposite

gender who is performing work that is equivalent in all respects, but who is paid more for that work. But who would have thought that an employee who leaves her job could use her replacement as the comparator?

Tammy Drum began working for a Missouri company, Leeson Electric, in 1990. In 1999 she was promoted to Human Resources Manager. By 2005 her salary was \$41,548. She was then promoted to another position at a salary of \$45,600. Her replacement as Human Resources Manager, a male named Crosier, was hired from outside the company at a salary of \$62,500. After Crosier was hired, Drum sued Leeson under the Equal Pay Act.

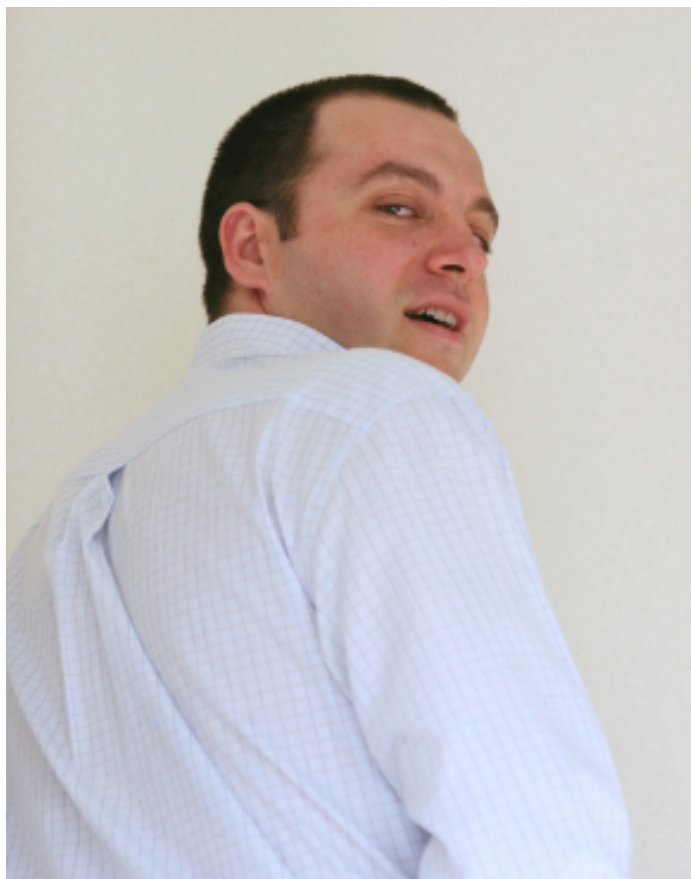
Although the federal district court in Missouri dismissed the suit, the Court of Appeals for the Eighth Circuit disagreed and upheld Drum's claim. The appellate court said it was undisputed that a pay differential existed between Drum and Crosier – his pay approximated the market rate according to the court, while hers was well below it. Since they performed equal work as Human Resource Manager, the burden of proof shifted to Leeson to show that the differential was based on a factor other than sex.

Leeson attempted to meet its burden by arguing that Crosier was the most qualified candidate, and that he required a salary of \$62,500. But the court held this explanation legally insufficient. It said that justifying Crosier's salary does not justify Drum's. It is the differential, said the court, that must be explained.

Lesson tried to explain Drum's salary by highlighting her prior salaries (presumably arguing that Drum's final salary as Human Resources Manager was simply a reflection of her salary history). But the court rejected this argument as well. It said that a "market force theory" cannot justify lower wages for females simply because the marketplace allowed an employer to pay such lower wages.



References: 29 U.S.C. § 206; *Drum v. Leeson Electric Corp.*, 2009 WL 1350737 (8th Cir. 2009).



DOT's "Direct Observation" Urine Tests Upheld

If you hold a safety-sensitive position in the transportation industry, you'd better be prepared to bare it all. Under U.S. Department of Transportation regulations, an employee in the aviation, rail, motor carrier, mass transit, maritime or pipeline industry who either fails or refuses to take a drug test must successfully complete a drug treatment program and pass a return-to-duty urine test as a condition to performing any safety-sensitive duties. In addition, during the next 12 months, the employee must also pass at least six unannounced follow-up urine tests.

Cheating on drug tests, or at least attempts to cheat, are reportedly widespread. Whole websites seem to be devoted to various techniques, from adulterating or diluting one's own urine, to using someone else's, or using animal or synthetic urine. Prosthetic devices are even available to dispense urine in what may appear to be a more or less natural way.


Concerned about these cheating reports, DOT in 2008 issued regulations requiring transportation industry employees to use direct observation for all return-to-duty and follow-up testing. That is, the observer must actually watch the voiding process. In addition, the regulations require that immediately prior to the test, the employee being tested must raise his or her clothing above the waist, drop his or her lower clothing, and turn in a circle to assure the observer that the employee is not wearing a prosthetic device.

Several transportation industry unions and the BNSF Railway Company challenged the new regulations in court, arguing that they were arbitrary and capricious, and that they violated the Fourth Amendment to the Constitution's unreasonable searches and seizures prohibition.

In a recent decision, the U.S. Court of Appeals for the D.C. Circuit upheld the regulations. In rejecting the arbitrary-and-capricious argument, the Court summarized the considerable evidence DOT had collected in support of the regulations, including widespread reports of drug test cheating in general and evidence that employees returning to work after failing or refusing a drug test are particularly likely to cheat.

As to the Fourth Amendment argument, the Court acknowledged that most searches and seizures require a warrant issued by a judge, but also recognized a "special needs" exception to the warrant requirement. That is, a court may uphold a warrantless search if, on balance, the government's interest in conducting the search outweighs the individual's privacy interest. Here, the government's interest in transportation safety is compelling and justified the search, even when balanced against the extremely strong interest in freedom from searches as intrusive as direct observation urine testing. Furthermore, the particular employees being tested have a diminished privacy interest because they have voluntarily chosen to work in a safety-sensitive industry and they have already violated DOT's drug regulations by either refusing to take a drug test or testing positive.

Footnote: While testing for *illegal* drugs is not a medical exam covered by the Americans with Disabilities Act, a test that screens for legal,

prescribed medications is. In a recent federal case in Tennessee, the court rejected a blanket employer policy of terminating any employee, regardless of his or her job, who tested positive for any prescription medication that carried a warning against driving or using machinery. 

References: 49 C.F.R. § 40.67; *BNSF Ry. Co. v. U.S. Dept. of Transp.*, 2009 WL 1350467 (D.C. Cir. 2009); *Bates v. Dura Automotive Sys., Inc.*, 2009 WL 1108479 (2009).

False Paperwork Disqualifies

FMLA Applicant

Tanum Smith worked for the Hope School, a residential facility in Illinois for children with developmental disabilities. She served as an instructional aide, working directly with disabled children. In April 2006 and again in June 2006 she was injured in two separate incidents involving children. Her primary care physician placed her on light duty and restricted her to assignments that would not require her to be around students.

In response, Hope transferred Smith to its Dietary Department. Despite the transfer, however, Smith claimed that in August a student approached her. Smith then complained to Human Resources that the school had not provided her with a safe environment and that she could not return to work until it did so. Hope responded by writing Smith a letter saying that the Dietary Department was off limits to students, that Smith should return to work, and that if she didn't, her absence would be considered unexcused. Smith claims she never got the letter.


Smith did return to work, but only to obtain forms from Hope's HR Department for requesting leave under the Family and Medical Leave Act. That Act allows eligible employees to take up to 12 weeks of leave without pay for, among other things, a serious health condition. Believing that HR had approved FMLA leave (although she had not yet submitted the request form), Smith continued to take time off. HR, on the other hand, understood that Smith was only considering making a request for FMLA leave and it wrote her another letter reiterating that absences would be treated as unexcused.

Smith eventually submitted the FMLA request form, which included a certification from her primary doctor. But instead of submitting the certification as completed by the doctor, she added the words "plus previous depression." Smith had never been diagnosed or treated for that condition. She also backdated the form, and she filled out a separate Attending Physician's Statement listing diagnoses of muscle tension, chronic headaches, and depression.

Suspecting that Smith had made changes to the form, Hope called the doctor's office and received confirmation of the alterations. Hope then denied Smith's request for FMLA leave because of the alterations and on the lateness of her request. Hope also initiated disciplinary proceedings against Smith due to her unexcused absences from work. Hope ultimately fired Smith.

Smith's subsequent law suit claimed that Hope interfered with her FMLA rights by denying her requested leave, and it illegally fired her in retaliation for her leave request. She argued that even though she had altered the request form, she would have been entitled to leave even without the alterations, and that the alterations were merely her attempt to present a full and accurate picture.

The U.S. Court of Appeals for the Seventh Circuit, headquartered in Chicago, disagreed with Smith and upheld the firing. The Court ruled that, where an employee adds to a medical provider's certification form a condition for which she has not been diagnosed, without the knowledge or approval of her physician, an employer can deny the request for FMLA leave. In other words, intentionally submitting false paperwork disqualifies an employee under FMLA.

As to the retaliation claim, the Court concluded that Smith was fired not for requesting FMLA leave but for violating the school's policy regarding unexcused absences. The Court went on to observe that since Smith's request for FMLA leave was invalid (due to the alterations), Smith was not engaged in a statutorily protected activity and therefore her being fired could not have been retaliatory. 

References: 29 C.F.R. § 2601; 29 C.F.R. § 825, *Smith v. Hope School*, 560 F.3d 694 (7th Cir. 2009).



Barebones Release Upheld

When an employer offers a severance payment to an employee being laid off, or when the employer is settling a work-related dispute such as a harassment claim, the employer normally demands a full release in exchange for the cash payment. But just how detailed should the release be? The lawyers for Ford Motor Company got by with the briefest of documents, but good practice suggests putting a little more meat on the bone.

Collette Hampton worked on the "chassis line" at a Ford assembly plant in Chicago. In response to her claim of sexual harassment by co-workers on the line, Ford moved Hampton to the "motor line," after which she did not experience any more harassment. Nevertheless, Hampton filed a charge of sex discrimination with the Equal Employment Opportunity Commission.

While Hampton's charge was pending, Ford announced a voluntary buyout program. Under the program, an eligible employee could elect to resign and, in exchange for signing a release of claims, be paid \$100,000. Eligible employees could make the election at any time between October 16 and November 27, 2006, effective January 1, 2007. And as a practical matter, an electing employee could rescind the election at any time up to December 31, 2006.

Hampton learned of the buyout program in early August 2006. She also learned that Ford planned to lay off a number of employees, including her,

in a reduction-in-force. So the buyout program, for which she was eligible, looked attractive. In fact, it looked so attractive that she made her election and signed the paperwork on October 16 – the very first day she could do so.

The release Hampton signed on October 16 said simply:

I waive and release any and all rights and claims I may have against the Ford and agree not to institute any proceedings of any kind against Ford relating in any way to my employment or the termination of my employment. I hereby acknowledge that I am voluntarily applying for this [\$100,000] payment. I have read and reviewed this application and waiver agreement carefully and to my satisfaction.

In November 2006, a month after Hampton signed the release, she received a “right to sue” letter from the EEOC. She then filed a discrimination suit against Ford in federal court. (Discrimination claims that are based on a variety of federal laws, including sexual harassment claims under Title VII of the Civil Rights Act, must first be presented to the EEOC or a comparable state or local agency before the complaining employee can go to court.)

Apparently unaware of the suit, Ford issued a check to Hampton in early January in the amount of \$64,429 (\$100,000 less required payroll tax withholdings). Hampton promptly cashed the check.


When Ford learned of the suit, it asked for a dismissal based on Hampton’s release. Hampton responded that the release was not intended to cover the harassment claim and that in any event the release was invalid because it was not knowing and voluntary. She didn’t offer to return the severance payment, however.

The federal court of appeals in Chicago rejected Hampton’s claim that the release didn’t cover her harassment suit. It said the release was clear and not in any way ambiguous and, by its language, was intended to cover “any and all rights and claims . . . relating in any way to my employment.” The sex discrimination suit fell within the scope of that language.

The Court also rejected Hampton’s knowing-and-voluntary argument. Although Ford would not permit employees to remove a copy of the release before signing it, it did give Hampton ample opportunity on the day of signing to read and review the document and ask questions about it. Furthermore, Hampton actually did show the release to her attorney, after she signed it but while she still could have rescinded it.

Finally, the Court said that the only way Hampton could pursue her discrimination claim would be to invalidate the release, but in order to do that she must first repay Ford, or at least make an offer of repayment. Her failure to do so doomed her case for this additional reason.

While Ford did prevail here, it had to overcome arguments that should have been foreclosed by the release itself. For example, it would have been a simple matter to add a reference to “pending claims” in the release, or even make specific reference to Hampton’s harassment charge. More generally, it is good practice to describe in somewhat more detail the various types of claims covered by a release.

In addition, Ford’s policy of not providing an advance copy of the release seems risky. The decision whether to accept a buyout has major financial and social implications, and most workers would want an opportunity to consult with family, and possibly a lawyer or accountant, before making that decision. Denying employees that opportunity opened Ford up to a claim of pressuring employees into signing. 

Reference: *Hampton v. Ford Motor Co.*, 561 F.3d 709 (7th Cir. 2009).

New Tax Rules for LLC Employment Taxes. Two years ago we reported on a case involving a single-member limited liability company in which the owner was held personally liable for the company's employment tax obligations. See "Tax Traps for Business Owners," EMPLOYER ALERTS, Summer 2007, p. 1. This resulted from the fact that a single-member LLC is treated by default as a sole proprietorship for federal tax purposes unless it "checks the box" to elect treatment as a corporation. We also reported that the IRS had issued proposed regulations to treat such LLCs as separate entities for employment tax purposes, so that the LLC's owner would not have personal liability for employment taxes. The IRS has now made those regulations permanent. IRS Reg. § 301.7701-2(c)(iv). Be warned, however, that the LLC's owner is still personally liable for self-employment tax on the LLC's net income. In addition, since the LLC's owner is probably the "responsible party" when it comes to remitting taxes withheld from employees of the LLC, the owner will still have personal liability for failure to remit withheld taxes.

Arbitration Provisions in Union Contracts.

The Supreme Court has upheld a provision in a collective bargaining agreement (CBA) between an employer and one of its unions that required discrimination complaints to be arbitrated instead of taken to court. Earlier decisions by the Court had suggested that a CBA arbitration provision was insufficient to bind an individual union member. The Court's recent decision involved members of the Service Employees International Union working in the building-services industry in New York City. When certain members were reassigned to positions they felt were less desirable, they asked the union to file grievances on their behalf based on age discrimination. The union did so and requested arbitration, as provided in its CBA, but it later withdrew the request. The members then filed a charge of discrimination with the EEOC and, later, a lawsuit. The Supreme Court ruled that the members' discrimination claims were subject to arbitration, ruling that the mandatory arbitration provision of the CBA was a freely negotiated contractual term with which the courts should not interfere. 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009). But see Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156 (2009), holding that merely including an arbitration provision in a law firm's corporate bylaws is not sufficient to require an attorney-shareholder of the firm to arbitrate disputes.

Provider Refusal Rule. Just a few weeks before President Bush left office, the Department of Health and Human Services adopted the so-called "Provider Refusal Rule" prohibiting discrimination against medical providers who, for reasons of conscience, refuse to perform or participate in any lawful health service or research activity on the grounds of religious belief or moral conviction. Although the Rule specifically mentioned abortions and sterilization procedures, it was broadly worded to cover far more, such as stem cell research and the prescribing of birth control drugs and devices. The Rule applied to any entity or individual who received federal funds. 45 C.F.R. Part 88, 73 F.R. 78071 (Dec. 19, 2008). The Department of Health and Human Services under President Obama has now proposed to rescind the Rule in its entirety. 74 F.R. 10207 (Mar. 10, 2009).

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Employer Liable for Accessing MySpace Account

Brian Pietrylo, a server at a Houston's Restaurant in New Jersey, created a private, password-protected account at MySpace, dubbed "The Spectator." He thought it would be a "nice place to vent about any BS we deal with at work without any outside eye spying on us" and he invited other present and former Houston's employees to participate. Postings on the account came to include vulgar, critical comments about the restaurant and its policies, and about its managers and customers, many of whom were identified by name. The postings also mentioned drug use and suggested possible violence against the restaurant and its managers.

When a manager learned of the existence of the account, he pressured one of the participant-employees to provide her password and he then shared the password with upper management, including Robert Marano, an area supervisor.

Marano accessed The Spectator account a number of times and read the postings. He then fired Pietrylo and another employee, Doreen Marino, who had posted to the account.

Pietrylo and Marino sued Houston's on a variety of claims, including violation of the federal Stored Communications Act and invasion of privacy. A jury agreed and awarded \$2,500 to Pietrylo and \$903 to Marino. While these amounts are modest, their attorney's pending request for an award of \$120,000 in fees may turn out to be the real kicker.

This was not a case of an employer taking adverse action against employees for off-hours conduct unrelated to the job, since the postings included suggestions of drug use and violence at the workplace, and they ridiculed specific customers by name. The employer had legitimate concerns about the site – concerns that were borne out once it read the postings. And it obtained access to the site not by hacking or guessing a password, but by obtaining the password from one of the participants. Under these circumstances, it is difficult to see just what the employer did wrong. 


Reference: *Pietrylo v. Hillstone Rest. Group*, U.S. Dist. Ct., D.N.J., No. 06-5754 (June 16, 2009).

Smoker Gets Butted Out

Unlike Houston's which was held liable for accessing an employee's MySpace account, a Massachusetts employer was free to test for tobacco use and fire an employee who came up positive.

Scott Rodrigues applied for a lawn-care position with EG Systems, Inc. (which does business as Scotts Lawn Service) and received a conditional offer of employment. The condition was that he pass a urine test for drugs, including nicotine. Pending the results of the test, Rodrigues began working for Scotts. However, when the results of the urinalysis came back positive for nicotine, Scotts fired Rodrigues. This was consistent with the company's "wellness plan" to reduce smoking among its employees.

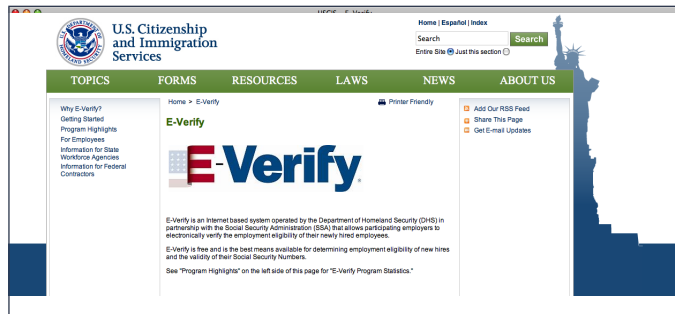
Rodrigues sued, claiming among other things an invasion of his privacy rights under Massachusetts law. In order to win under that law, he had to show that there was an unreasonable and substantial invasion of his privacy, and that the private facts were highly personal.

The court rejected Rodrigues's suit, saying that he has never attempted to keep private the fact that he is a smoker. For example, he admitted that he openly purchases cigarettes and openly smokes them in public. His supervisor at Scotts even noticed a pack of cigarettes in plain view on the dashboard of his vehicle and gave him a written warning. Therefore, Rodrigues's smoking was not a private fact and he had no claim for invasion of privacy. 

Reference: *Rodrigues v. EG Systems, Inc.*, 2009 WL 2245653 (D. Mass. 2009), appeal pending, 1st Cir. No. 09-2055.

New Rules for Government Contractors

Most companies that do business with the federal government must comply with new rules requiring use of the Government's E-Verify system, requiring self-reporting of overcharges, and policing their employees from engaging in certain off-the-job conduct.



E-Verify

As the result of an Executive Order and amendments to the Federal Acquisition Regulations, most Government contracts awarded after September 8, 2009 will contain an "E-Verify clause." The clause requires contractors to enroll in the E-Verify system operated jointly by the U.S. Citizenship and Immigrations Services of the Department of Homeland Security and the Social Security Administration, and it requires contractors to use the E-Verify system to assure that their U.S. workers are eligible to work in the United States.

Each Government contracting agency determines whether specific contracts must contain the E-Verify clause. In general, all contracts will contain the clause except:

- prime contracts valued at \$100,000 or less;
- subcontracts valued at \$3,000 or less;
- contracts for commercially available, off the-shelf;
- contracts to be performed entirely outside the U.S.; and
- contracts lasting fewer than 120 days.

The clause will require contractors to verify the eligibility of all existing employees assigned to the contract and all future employees working in the U.S., whether or not they are assigned to the contract. However, institutions of higher education, state and local governments, and certain surety companies may limit the verification process just to employees assigned to the contract.

Homeland Security has recently published a compliance guide, available at

http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf

The underlying statutory authority for the E-Verify program is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That Act specifies that participation is voluntary, and it prohibits Homeland Security from requiring anyone to use the program. Based on that prohibition, the U.S. Chamber of Commerce and others sued the Government, saying the new requirement violated the Act.

The case came before Judge Alexander Williams of the U.S. District Court in Maryland. On August 25 Judge Williams ruled that the new requirement did not violate the Act, since no one is required to be a Government contractor in the first place. The case is now before the U.S. Court of Appeals for the Fourth Circuit which, on September 9, denied an emergency motion to enjoin enforcement of the E-Verify requirement.

The E-Verify system is *not* a substitute for complying with I-9 requirements. All employers, including Government contractors, must still complete and retain Form I-9. The form, and instructions known as Manual M-274, are available at <http://www.uscis.gov>.

References: 8 U.S.C. § 1324a note; EO 13465 (73 F.R. 33285, June 11, 2008); 48 C.F.R. § 22.1800 (73 F.R. 67703, Nov. 14, 2008); FAR 22.18 and 52.222-54; *Chamber of Commerce v. Napolitano*, 2009 WL 2632761 (D.Md. 2009), *appeal pending*, 4th Cir. No. 09-2006.

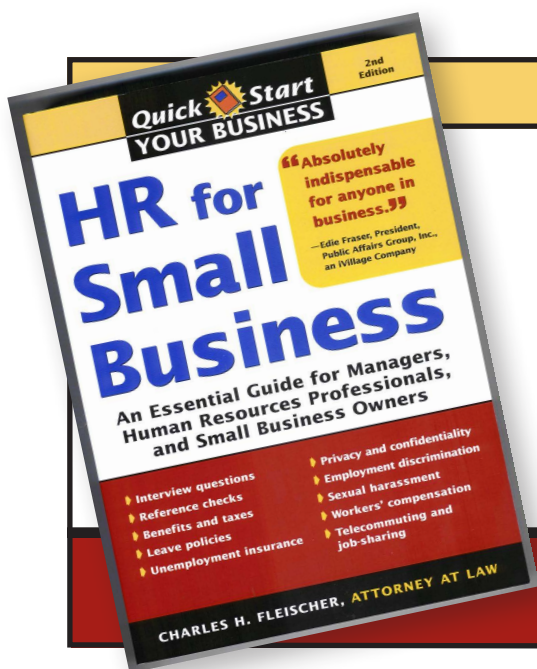
Self-Reporting

For contracts valued at \$5 million or more with the period of performance exceeding 120 days, the FARs require the inclusion of a new ethics clause. The clause has three main requirements:

- Contractors must have a code of business ethics and conduct and make copies available to each employee engaged in performance of the contract;
- Contractors must exercise due diligence to prevent and detect criminal conduct; and
- Contractors must timely disclose (self-report) in writing, to the contracting agency's Inspector General and the contracting officer, any credible evidence that a principal, employee, agent or subcontractor has violated federal criminal law involving fraud, conflict of interest, bribery or gratuity violations, or a violation of the False Claims Act.

A "principal" is defined as an officer, director, owner, partner, or a person having primary management or supervisory responsibilities.

Having self-reported an apparent violation, the contractor must offer "full cooperation" sufficient to enable law enforcement to identify the nature and extent of the violation and the individuals responsible. Full cooperation includes responding timely and com-



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pletely to Government auditors' and investigators' requests for information and access to employees with information.

Fortunately, the clause makes clear that full cooperation doesn't mean contractors have to waive their attorney-client privilege, nor do individuals lose their Fifth Amendment privilege against self-incrimination. (Entities other than individuals don't have a Fifth Amendment privilege.) Also, contractors can conduct their own internal investigations and they may defend themselves against charges of contract fraud.

References: FAR 3.1004 and 52.203-13



Human Trafficking

The Trafficking Victims Protection Act prohibits federal contractors and subcontractors from

- engaging in severe forms of trafficking in persons during the contract period,
- procuring a commercial sex act during the contract period, or
- using forced labor in the performance of the contract.

The trafficking and forced labor prohibitions are probably not significant concerns for most contractors. But the commercial sex prohibition may be.

Under authority of the Act, the Federal Acquisitions Council recent amended the FARs to prohibit *employees* of contractors and subcontractors who are directly engaged in the performance of the contract from procuring commercial sex during the contract period. The FAR defines "commercial sex act" as any sex act on account of which anything of value is given to or received by any person. This would include a one-time visit to a prostitute, even where prostitution is legal.

Remedies for violating the FAR range from removing the employee up to termination of the contract and debarment. In fashioning the remedy, the contracting officer may take into consideration, as a mitigating factor, whether the contractor had in place a Trafficking in Persons awareness program. So Government contractors now need to consider counseling their employees against obtaining sex for money. ⚖️

References: 22 U.S.C. § 7104; FAR 22.17 and 52.222-50.

Virginia's Reasonable Notice of Termination Requirement

At-will employees can be terminated for any reason, or for no reason at all. (Of course it is seldom a good idea to terminate an employee without a good business reason because it then becomes easy to conclude that the termination was for a discriminatory or other improper purpose.)

Virginia court decisions have held that even at-will employees are entitled to reasonable notice of termination. A recent decision by the U.S. District Court in Alexandria explains this requirement.

Mauricio Calquin, an at-will employee, worked for a waste removal company called Doodycalls from December 2007 to January 2009. On January 12, 2009, Doodycalls terminated Calquin and directed him to leave the company's premises. Calquin then sued, claiming he was terminated without reasonable notice.

After reviewing Virginia state decisions on the reasonable notice requirement, the Court concluded that the requirement relates only to the *manner* of notice,

not the *timing*. In other words, a notice is reasonable if it effectively communicates the fact of termination to the employee. The notice does not have to be given in advance of the effective date of the termination. 🏠

Reference: *Calquin v. Doodycalls Fairfax VA LLC*, E.D.Va. No. 09-543 (Sept. 11, 2009).



Accepting Voluntary RIF Disqualifies UI Claimants

State unemployment insurance programs are intended as safety nets for employees who lose their jobs through no fault of their own. Normally, if an employee voluntarily quits, he is not entitled to benefits. But the unemployment insurance statutes in most jurisdictions provide that the disqualification only applies if the employee leaves work without good cause. Stated another way, if an employee voluntarily quits *with* good cause, he is not disqualified and may receive benefits. See “Quitting to Take Better Job Not ‘Good Cause’ for UI Benefit Purposes,” *EMPLOYER ALERTS*, July 2002, p. 4.

“Good cause” may include an unreasonably dangerous working environment, the employer’s failure to meet payroll, and other conditions or events attributable to the work. “Good cause” does *not* include leaving to take a better job, to return to school, to move with a spouse who is being transferred, etc. But what about employees who accept a purely voluntary reduction in force at a time when they feared their jobs might otherwise be eliminated?

After Bell Atlantic and GTE merged to form Verizon, the new company conducted demographic surveys and discovered that some 18,000 of its employees were retirement-eligible. Many other employees were also contemplating leaving the company for reasons unrelated to retirement. So in order to minimize the uncertainty and disruption that would be caused by departures of large numbers of employees at unpredictable times, the company devised a voluntary, incentive-driven separation plan.

In September 2003, Verizon’s president and CEO addressed company employees by video-conference and announced the voluntary separation plan. The plan was available to almost all management-level, non-union employees, without any cap on the number of employees who could participate. Under the plan, an eligible employee could make an irrevocable election to accept a separation bonus (which varied depending on the employee’s rank), plus separation pay based on years of service. In addition, the employee’s pension benefit was increased by 5%.

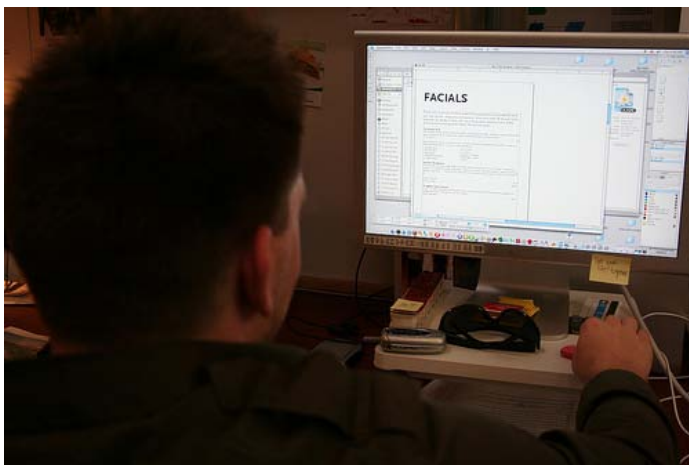
In October, the company sent a letter to all eligible employees, giving them 45 days to volunteer for the plan. By the 45-day mark, about 16,000 employees nationwide had volunteered for the plan. The company then gave these employees 5 additional days to rescind their election, and 760 employees did so.

In New Jersey, a number of employees who had volunteered for the plan and left the company filed unemployment insurance claims. One of these employees, Shirley Whitaker, had held a high-level position within Verizon, with some 500 hourly employees and 34 management employees reporting to her. In her position, Whitaker was privy to internal data showing that the company was losing revenue. At the time of her separation she believed that the company would be reducing its workforce in the coming years and, although she did not know for sure, she feared her job would be eliminated.

Another employee, Robert Norville, had failed to meet company objectives and was on a three-month performance-improvement program. He was in his third month of the program when he elected voluntary separation.

The New Jersey Department of Labor determined that the employees had left voluntarily, without good cause, and were therefore ineligible for UI benefits. On appeal, an intermediate appellate court in New Jersey agreed with the Department. The court said that volunteering to accept early retirement disqualifies an employee from UI benefit *unless* the employee can show both a well-grounded fear of imminent layoff and that the employee would suffer substantial economic harm by not accepting early retirement. Here, none of the claimants could make that showing. 🏛️

References: *Black-Melone v. N.J. Dept. of Labor*, 2009 WL 1562929 (N.J. App. 2009).



Sole Male Employee Not Singled Out for Discrimination

David Farr was a respiratory therapist for St. Francis Hospital in Indianapolis. When he was fired, he was the only male out of seven respiratory therapists in his department. He claimed he was fired because he was a male, in violation of Title VII of the federal Civil Rights Act.

All seven therapists in the department used the same Hospital-provided computer for their work. Each therapist had his or her own password, and Hospital policy required that each therapist use only his or her own password when doing computer work. In practice,

however, the first person to log on each day would stay logged on throughout the day and everyone using the computer during the day would then be using it under the original login password.

At one point, one of the female therapists discovered a number of pornography sites on the computer browser's "favorites" list. She informed her supervisor who, in turn, had a forensic examination done of the computer. The examination revealed that the offending sites were visited under Farr's password. In addition, the examination showed visits to some hacking sites. A comparison of work schedules also showed that Farr was the only employee working on a certain Saturday when there had been a substantial amount of computer activity involving both the pornography and hacking sites.

With that information in hand, the Hospital fired Farr.

In the lawsuit that followed, Farr admitted that he had visited some of the inappropriate websites. He claimed, however, that he never would have been investigated in the first place if he had not been a male.

The Court of Appeals for the Seventh Circuit didn't buy Farr's claim. The Court pointed out that Farr's argument would have more force if it were not also true that he was the person logged on to the computer when the offending sites were visited. It seemed to the Court quite sensible (and hardly discriminatory) to begin the investigation with the person who was officially logged on to the computer.

In the final analysis, the Court concluded that Farr was fired not because he was a male but because the Hospital was convinced, as a result of its investigation, that Farr was the one accessing inappropriate websites – a fact that Farr himself admitted. 🏛️

References: 42 U.S.C. § 2000e (Title VII); *Farr v. St. Francis Hosp.*, 570 F.3d 829 (7th Cir. 2009).



Infrequent Duty Can Qualify as Essential for ADA Purposes


The Americans With Disabilities Act prohibits employers from discriminating against a qualified individual with a disability. The Act defines “qualified individual” as an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

A recent decision by the U.S. Court of Appeals for the Tenth Circuit (headquartered in Denver) held that a job function can be essential even if the function is rarely required in the normal course of the employee’s duties.

The case involved Barbara Hennagir, a physician’s assistant employed by the Utah Department of Corrections. Although Hennagir had worked successfully for several years, the Department decided to add a physical safety training requirement to its medical and clinical positions that required inmate contact. Hennagir had a number of impairments which prevented her from completing the training. She asked for a waiver, but the Department refused. Instead it offered her a choice of two other positions at different corrections facilities and it terminated her when she turned them down.

In determining whether the safety training requirement was essential, the Court of Appeals first considered whether the Department actually requires all employees in Hennagir’s position to satisfy the requirement. The undisputed evidence showed that the Department does in fact impose the requirement on everyone.

The Court then looked at the consequences of waiving the requirement, as Hennagir had asked. According to the evidence, the medical staff, just like corrections officers, had daily, direct contact with inmates and were thus exposed to myriad risks of working with an inmate population. Although such an employee may need to restrain an inmate only infrequently, the potential for physical confrontation exists on a daily basis and the consequences of an employee’s failure to perform the function when the occasion arises could be a serious threat to security.

The Court therefore concluded that passing physical safety training was an essential job function, even though an employee would rarely be called upon to utilize his or her safety training. Because Hennagir could not pass the training, she was not a qualified individual and she therefore lost her ADA discrimination suit. 

References: 42 U.S.C. § 12101; *Hennagir v. Utah Dept. of Corrections.*, 2009 WL 2883037(10th Cir. 2009).

Minimum Wage Now at \$7.25.

Back in 2007, Congress amended the Fair Labor Standards Act to increase the minimum wage in three steps over a two-year period. At that time, the minimum wage was \$5.15 per hour and it had not been raised in 10 years. As of July 2009, the third of three increases took effect, bringing the minimum wage to \$7.25. The credit for tipped employees remains at \$2.13. Fair Labor Standards Act, 29 U.S.C. § 206. A number of states have their own minimum wage requirements, so employers must also check state law to be sure they are fully compliant.

Personal Liability for FLSA Violations.

With the increase in the federal minimum wage comes a new decision holding that managers may be held personally liable under the Fair Labor Standards Act for unpaid wages. The case involved Castaways Hotel and Casino. Castaways originally filed for Chapter 11 bankruptcy, hoping to reorganize, but about seven months into the Chapter 11 proceeding it discharged its employees, converted to a Chapter 7 liquidation, and ceased business, leaving wages and accrued leave unpaid. Castaway employees then sued three managers, one of whom was Chairman, CEO, and a 70% owner of the company, another of whom was responsible for labor and employment matters and who owned 30%, and a third manager who was Castaways' CFO. The federal appeals court ruled that where an individual exercises control over the nature and structure of the employment relationship, or economic control over the relationship, that individual is an "employer" under FLSA and can be held personally liable. *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009). A similar result was reached in the Washington State case of *Durand v. HPMC Corp.*, 214 P.3d 189 (Wash. App. 2009). If there wasn't already a good reason to pay wages on time, there sure is now!

New Maryland Rules on Classifying

Workers. A new Maryland law regulates how the construction and landscaping industries classify their workers. Under the Workplace Fraud Act of 2009, companies in those industries must classify all their workers as employees (as opposed to independent contractors) unless each of the following conditions is met: (1) the worker is free from the direction and control of the employer, (2) the worker is customarily engaged in an independent trade, occupation, profession or business and (3) the work is performed either outside the employer's usual course of business or outside the employer's place of business. The new law imposes additional record-keeping requirements and substantial penalties for violations. The new law takes effect October 1, 2009. Md. HB 819 (2009), amending Md. Code, Labor & Employ. by adding new Subtitle 9.

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- Bulletin Board

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Design: KathleenKnowles.com



BY CHARLES H. FLEISCHER, ESQ.

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Employer Drug Policy Trumps Medical Marijuana Law

Some fourteen states have now adopted laws regarding the medical use of marijuana. See http://norml.org/index.cfm?Group_ID=339. In Maryland, for example, marijuana possession is still a crime. But medical necessity is considered a mitigating factor, so if the accused can show a medical need for the drug the maximum criminal penalty is a \$100 fine. Some states, such as Washington State, have completely decriminalized cultivation, possession and use of marijuana for certain specific, documented medical purposes, provided the amounts involved are consistent with personal use.

The U.S. Department of Justice has recognized that prosecutions under federal marijuana laws may be a waste of resources where possession and use is consistent with state medical marijuana rules. In a recent memorandum to U.S. Attorneys in states with medical marijuana laws, the Department recognized that while disruption of illegal drug manufacturing and trafficking networks continues to be a core priority,

as a general matter, pursuit of these priorities should not focus federal resources in your States on individuals who are in clear and unambiguous

compliance with existing state laws providing for the medical use of marijuana.

In contrast to this liberalizing trend, the Americans with Disabilities Act continues to exclude testing for illegal drugs from the definition of a medical test, freeing an employer to test for marijuana and other controlled substances without regard to ADA requirements. See “Medical Exams and Conditional Offers of Employment,” *EMPLOYER ALERTS*, Spring 2005, p. 2. Similarly, the U.S. Government still requires government contractors and grant recipients to comply with the Drug Free Workplace Act. See “Drug and Alcohol Testing,” *EMPLOYER ALERTS*, Dec. 2000, p. 4. And the U.S. Department of Transportation can require companies in the transportation sector to use direct observation urine tests for employees in safety-sensitive positions. See “DOT’s ‘Direct Observation’ Urine Tests Upheld,” *EMPLOYER ALERTS*, Summer 2009, p. 5.

In the face of these divergent trends, may an employer continue to enforce its drug policies by rejecting candidates who test positive for marijuana or by firing existing employees who fail a properly-conducted

drug screen? A recent case from Washington State held that an employer could enforce a zero tolerance policy even though medical use of marijuana is legal in that state.

Jane Roe suffered from migraine headaches which, she claimed, were not relieved by over-the-counter and traditional prescription medications. So she went to the Hemp and Cannabis Foundation Medical Clinic in Bellevue, Washington, filled out a pain inventory questionnaire, and obtained a medical authorization to possess marijuana.

In October 2006, Roe was hired by TeleTech, which provides employees to other companies, such as Sprint Nextel. Under TeleTech's drug policy, the offer of employment given to all new hires is conditioned on the employee's passing a drug test. Sprint Nextel similarly requires TeleTech to screen all employees being assigned to it.

When Roe was hired and was provided with a copy of TeleTech's drug policy, she explained that she used marijuana at home for medical purposes. She offered to provide TeleTech with a copy of her medical authorization, but TeleTech declined. Instead it fired her when her drug screen came back positive for marijuana.

Roe sued TeleTech in state court. She claimed that, even though she was an at-will employee, her termination violated state public policy as expressed in the Medical Use of Marijuana Act, and that she should be reinstated with back pay. An intermediate appellate court disagreed with Roe and upheld the termination. The court concluded that the Act did not invalidate employer drug policies and that TeleTech was therefore free to fire Roe for her positive marijuana test.



References: Md. Code, Crim. L. § 5-601; Wash. Rev. Code § 69.51A.005; U.S. Dept. of Justice Memo., Oct. 19, 2009 (available at <http://blogs.usdoj.gov/blog/archives/192>); *Roe v. TeleTech Customer Care Mgmt., LLC*, 216 P.3d 1055 (Wash. App. 2009).




GINA Has Arrived

Back in May 2008 the Congress passed and President Bush signed an amendment to Title VII of the federal Civil Rights Act known as the Genetic Information Nondiscrimination Act, or GINA. GINA became effective in November 2009. The Equal Employment Opportunity Commission has also issued proposed regulations to implement GINA.

Under GINA, it is now illegal to discriminate against an employee or applicant for employment on the basis of genetic information. Harassment and retaliation based on genetic information is also illegal. Even an employer's collection of genetic information is prohibited (with certain very narrow exceptions).

The law defines "genetic information" as information about an individual's genetic tests or about tests of his or her family members or the manifestation of disease or disorder in a family member. A "genetic test" means analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. A "family member" is an individual's dependent or anyone within the fourth degree of relationship.

An employer does not violate GINA by using, acquiring or disclosing medical information about a manifested disease, disorder or pathological condition (assuming it is otherwise lawful for the employer to do so), even if the disease, disorder or pathological condition has a genetic basis.

The law does not currently prohibit disparate impact discrimination – such as an employer policy that is non-discriminatory on its face but which has an adverse impact on individuals with genetic disorders. However, Congress has directed that a commission be formed in 2014 to report on whether disparate impact discrimination should be added to the law. 

References: 42 U.S.C. § 2000ff; 74 F.R. 9056 (Mar. 2, 2009); 74 F.R. 23674 (May 20, 2009).

Policy Exclusion Upheld Despite Poor Grammar

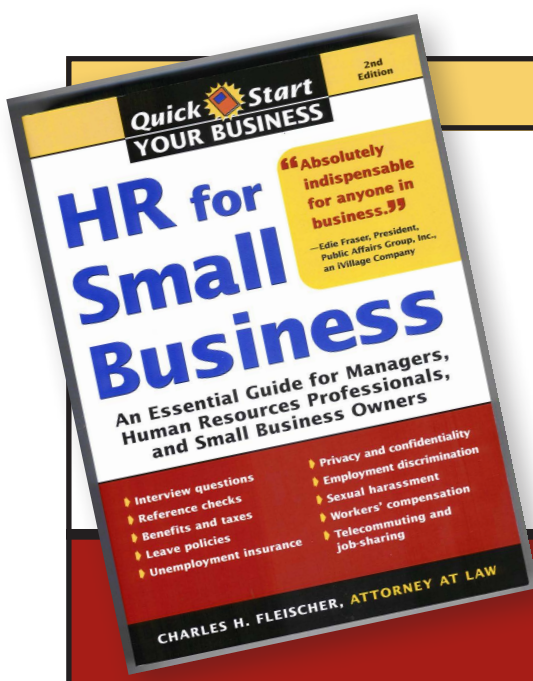
Travelers Insurance Company issued a policy of Employment Practices Liability Insurance to Payless Shoes. The policy had an exclusion for claims arising under the Fair Labor Standards Act (FLSA), various other federal statutes, “any workers’ compensation, unemployment insurance, social security, or disability benefit law,” or other “similar” state law. The FLSA requires employers to pay minimum wages and overtime to their non-exempt employees. The California Labor Code (CLC) also regulates wages and hours, but in a somewhat different way. For example, while the FLSA requires overtime pay for

work in excess of 40 hours per week, the CLC defines overtime as more than eight hours in a single day.

A group of Payless employees brought a class action against the company, alleging violations of the CLC. Payless eventually settled the suit for some \$2.45 million. It then looked to Travelers for reimbursement. Travelers denied coverage, citing the exclusion for state laws that are “similar” to the FLSA.

In the lawsuit that followed, Payless invoked the rule of grammar known as the “last antecedent,” which teaches that when a modifier is placed at the end of the long list of subjects, the modifier only applies to the last subject in the list, not the entire list. In other words, according to Payless the policy exclusion applied only to state laws that are similar to disability benefits laws, not state laws that are similar to the FLSA and the other statutes in the list. Travelers argued that, regardless of grammar rules, the meaning of the policy was clear and that claims under the CLC were excluded.

The U.S. Court of Appeals for the Tenth Circuit, headquartered in Denver, agreed with Travelers and denied coverage to Payless. The Court recognized that, despite a misplaced modifier in the policy, the interpretation urged by Payless was simply not a plausible




By Charles H. Fleischer, Esq.

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reading of the document. In addition, the Court ruled that the FLSA and the CLC were similar, even though they imposed different workplace requirements. (In explaining what it meant by a “misplaced modifier,” the Court quoted the famous Groucho Marx line: “One morning I shot an elephant in my pajamas. How he got into my pajamas I’ll never know.”)

Grammar aside, is it reasonable for an EPLI policy to exclude claims under the FLSA and similar state laws? Clearly, yes. EPLI policies typically cover damages an employer may have to pay for, say, discrimination, emotional distress, and the costs to defend such claims. But an insurer is just not going cover employee wages that the employer was obligated but failed to pay under federal or state law. 

Reference: *Payless Shoesource, Inc. v. Travelers Companies, Inc.*, 585 F.3d 1366 (10th Cir. 2009).

EEOC Sues Over Background Checks


In a past issue of EMPLOYER ALERTS we reported on a Pennsylvania case in which the employer terminated an African American employee after discovering that the employee had been convicted 40 years earlier of a murder he committed when he was 15 years old. Although the court upheld the termination, we warned that automatic exclusion of persons with criminal records could amount to disparate impact discrimination against minorities. See “Rejecting Applicants With Criminal Convictions,” EMPLOYER ALERTS, Summer 2007, p. 5.

Prior Equal Employment Opportunity Commission policy statements have made the same point.

The EEOC has now filed suit over the issue. In a case pending in the U.S. District Court for Maryland, the EEOC alleges that Freeman – a Texas-based company that does event and exhibition planning – uses criminal background checks and credit checks to discriminate against African American and Hispanic job applicants.

The EEOC claims in the lawsuit that use of credit and criminal history information has

a significant disparate impact on Black [and Hispanic] job applicants throughout the United States, is not job-related and consistent with business necessity, and for which there are appropriate, less-discriminatory alternative selection procedures.

Freeman has answered the complaint denying liability, and it has moved to dismiss the case on the ground that the EEOC’s suit was filed too late with respect to the specific discriminatory actions alleged in the complaint. The motion is set for hearing before Judge Roger Titus in March 2010. 

References: 42 U.S.C. § 2000e; EEOC Policy State. on Conviction Records (Feb. 4, 1987); EEOC Policy State. on Conviction Record Statistics (July 29, 1987); *EEOC v. Freeman*, U.S. Dist. Ct. for Md. No. 09-2573 (filed Sept. 30, 2009).

Exclusionary Rule Doesn’t Apply to Disciplinary Proceedings

Everyone has seen a TV show where the arresting officer reads the suspect his rights: “You have the right to remain silent; anything you say or do can and will be used against you in a court of law; you have the right to consult with an attorney . . .” Known as the Miranda warning, after the 1966 Supreme Court case of *Miranda v. Arizona*, these rights must be announced to an arrestee before any interrogation. Without the warning, anything the arrestee might say to the officer, such as, “I didn’t know the gun was loaded,” generally can’t be used as evidence of guilt in court.

Similarly, the Constitution’s Fourth Amendment protects against unreasonable searches and seizures. So when a police officer conducts an illegal search of a person, or his home or car, any evidence he might find – drugs or weapons, for example – will be excluded from a later criminal trial.



The purpose of the exclusionary rule is to deter law enforcement authorities from coercing confessions and from conducting warrantless or otherwise improper searches. After all, if the evidence can't be used in court, there's no point in gathering it illegally.

But what about the employment context? Can an employer impose disciplinary action or even terminate based on improperly obtained evidence?

In general, the protections guaranteed by the Bill of Rights apply only to the government, not private parties. See "Do Employees Have Constitutional Rights in the Workplace?" EMPLOYER ALERTS, Summer 2003, p. 1. But the issue can become clouded when the employer is a public entity.

Lee Kendrick was employed by the California Department of Transportation (Caltrans). When Kendrick's supervisor instructed him to remove his tools from a Caltrans vehicle, Kendrick responded in an angry way. The supervisor took the angry response as a threat and had another employee call the police.

When a police officer arrived, he first interviewed the supervisor, who indicated that Kendrick was capable of physical violence, he had made previous job-related threats, and he had previously been arrested on a weapons charge.

In the meantime, Kendrick walked to his personal vehicle and began retrieving objects from it. Concerned that Kendrick might be getting a weapon, the officer

arrested Kendrick for making criminal threats, and then proceeded to search his vehicle. During the search, the officer found a 9-millimeter handgun; two loaded magazines; 23 loose rounds of ammunition; a glass vial containing a white, crystalline substance which Kendrick admitted was methamphetamine; marijuana; and a \$20 bill rolled into a straw. The officer asked whether Kendrick used the straw to ingest meth, and Kendrick replied, "Only when I'm not smoking it."

Kendrick was terminated from his job with Caltrans on, among other grounds, possessing a weapon and drugs on state property in violation of Caltrans and California policy. Kendrick was also prosecuted criminally on weapon and drug charges. Those charges were dismissed, however, because Kendrick's angry response to his supervisor did not amount to a criminal threat, so that the resultant arrest and search of his vehicle violated the Fourth Amendment.

Not satisfied with dismissal of criminal charges, Kendrick appealed his termination by Caltrans. He argued that the exclusionary rule applied not only to his criminal case, but also to the state's disciplinary proceedings. Caltrans, in turn, argued that invoking the exclusionary rule in this context would serve no purpose: since the state police, not Caltrans employees, conducted the illegal search, suppressing the evidence would have no deterrent effect on Caltrans. Nor would suppression of evidence in a disciplinary proceeding deter the police, since the police conduct criminal investigations; they don't gather evidence for use in personnel matters.

An intermediate appellate court in California agreed with Caltrans and refused to apply the exclusionary rule in this circumstance. The Court reasoned that the public generally, and Kendrick's fellow employees in particular, are entitled to protection from a state worker who uses illegal drugs and carries a concealed weapon. Balancing this consideration against the minimal, if any, deterrent effect of extending the exclusionary rule to disciplinary proceedings, the Court upheld use of the illegally seized evidence.

An interesting point, not explicitly discussed by the Court, is that Caltrans *is* the government, to whom constitutional protections usually *do* apply. And while the Court did recognize that both Caltrans and the state police are both entities of the same state government, the Court emphasized that they are “wholly distinguishable and independent of each other.” In effect, the Court treated Caltrans as a private employer who was free to use evidence, obtained contrary to Fourth Amendment requirements, to discipline its employee.

Another point is whether there are any limits on a private employer’s right to search and use resultant evidence against the employee. We reported earlier on a case where a private employer authorized a *police* search of the employee’s computer, which turned up child pornography. See “Employer May Consent to Police Search of Employee Workspace,” EMPLOYER ALERTS, Spring 2007, p. 7. In that case the evidence was allowed in court and the employee was convicted. But it’s possible that a search could be lawful under the Fourth Amendment for criminal prosecution purposes, yet still violate the employee’s privacy rights as a civil law matter. Would such an employee have a right to reinstatement or money damages because his termination was based on evidence obtained contrary to a reasonable expectation of privacy?

Stay tuned. 

References: *Miranda v. Arizona*, 384 U.S. 436 (1966); *Dept. of Transportation v. State Personnel Bd.*, 100 Cal. Rptr. 3d 516 (Cal. App. 2d Dist. 2009).

New EEOC Poster

The Equal Employment Opportunity Commission has recently revised its “EEO Is The Law” poster to reflect current federal employment discrimination law, including the Americans with Disabilities Act Amendments Act of 2008 and the Genetic Information Nondiscrimination Act of 2008. The poster is available in English, Spanish, Arabic and Chinese at

Equal Employment Opportunity is
THE LAW

Private Employers, State and Local Governments, Educational Institutions, Employment Agencies and Labor Organizations


Applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under Federal law from discrimination on the following bases:

<p>RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN Title VII of the Civil Rights Act of 1964, as amended, protects applicants and employees from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex (including pregnancy), or national origin. Religious discrimination includes failing to reasonably accommodate an employee's religious practices where the accommodation does not impose undue hardship.</p> <p>DISABILITY Title I and Title V of the Americans with Disabilities Act of 1990, as amended, protect qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship.</p> <p>AGE The Age Discrimination in Employment Act of 1967, as amended, protects applicants and employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.</p> <p>SEX (WAGES) In addition to sex discrimination prohibited by Title VII of the Civil Rights Act, as amended, the Equal Pay Act of 1963, as amended, prohibits sex discrimination in the payment of wages to women and men performing substantially equal work, in jobs that require equal skill, effort, and responsibility, under similar working conditions, in the same establishment.</p>	<p>GENETICS Title II of the Genetic Information Nondiscrimination Act of 2008 protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.</p> <p>RETALIATION All of these Federal laws prohibit covered entities from retaliating against a person who files a charge of discrimination, participates in a discrimination proceeding, or otherwise opposes an unlawful employment practice.</p> <p>WHAT TO DO IF YOU BELIEVE DISCRIMINATION HAS OCCURRED There are strict time limits for filing charges of employment discrimination. To preserve the ability of EEOC to act on your behalf and to protect your right to file a private lawsuit, should you ultimately need to, you should contact EEOC promptly when discrimination is suspected. The U.S. Equal Employment Opportunity Commission (EEOC), 1-800-669-4000 (toll-free) or 1-800-669-8200 (toll-free TTY number for individuals with hearing impairments). EEOC field office information is available at www.eeoc.gov or in most telephone directories in the U.S. Government or Federal Government section. Additional information about EEOC, including information about charge filing, is available at www.eeoc.gov.</p>
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<http://www1.eeoc.gov/employers/poster.cfm>

Every employer who is subject to Title VII of the federal Civil Rights Act must display the poster prominently in the workplace. Failure to comply could result in a fine. Worse, failure could strip the employer of defenses it might otherwise have to a discrimination suit, as a recent case shows.

Hau Wai Yip and Kan Mei Chan worked at a hotel restaurant in Atlantic City. Claiming employment discrimination based on race, sex and national origin, they filed claims with the New York State Division of Human Rights and later sued in federal district court. Their employer raised a number of defenses, including that the Title VII claim was barred by the Statute of Limitations. The employees conceded that their Title VII claims were filed out of time, but they argued the employer lost that defense by failing to post the required notice.

The Court agreed that the employees’ suit could go forward. The Court said an employer’s failure to post notices of anti-discrimination laws will stop the Statute of Limitations from running until the employee learns or reasonably should learn of his rights. 

References: 42 U.S.C. § 2000e-10; 29 C.F.R. § 1601.30(a); *Zheng v. Wong*, 2009 WL 2601313 (E.D.N.Y. No. 07-CV-4768 (2009)).

Boss's Favoritism Toward Paramour Not Discriminatory

Charles Anderson was employed by Oklahoma State University as the Assistant Director of the Center for Local Government Technology. His supervisor was Michael Hughes, the Director of the Center. In 2003, Anderson told several OSU officials that he believed Hughes was having an affair with another employee, a Ms. Kiner, and that Hughes was treating Kiner more favorably than others.

OSU investigated and concluded that Hughes and Kiner were not having an inappropriate relationship in the workplace.

Anderson then complained that after he reported the affair, he was not included in managerial meetings and felt excluded from involvement in department matters. In July 2006 Anderson was terminated, ostensibly as part of a reduction-in-force triggered by a loss of State funding. According to Anderson, however, the termination was actually for reporting the Hughes-Kiner affair. So Anderson sued, claiming that Hughes' favoritism toward Kiner amounted to sex discrimination against him and his co-workers under Title VII of the federal Civil Rights Act, so that Anderson's complaints about the matter were protected under the anti-retaliation provisions of Title VII.


Anderson's suit was dismissed by the federal district court in Oklahoma, and Anderson appealed. The U.S. Court of Appeals for the Tenth Circuit upheld the lower court's dismissal. The appellate court said that preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not sex discrimination. This is so, said the Court, because Title VII's reference to "sex" means a *class delineated by gender*, rather than *sexual affiliation*.

From that, it follows that Anderson's complaints about the relationship did not constitute protected activity and any retaliation Anderson suffered did not violate Title VII.



While the Court's decision makes sense, it may not reflect the views of the EEOC. The Commission's regulations include the following provision:

Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

Employers should also keep in mind that romantic relationships between supervisors and subordinates – even wholly consensual ones – are fraught with peril. Apart from their effect on workplace morale and productivity, they can and do turn sour, resulting in acrimony, threats and harassment claims. And some experts in the field claim that supervisor-subordinate relationships are inherently coercive and can never be consensual. 

Reference: 42 U.S.C. § 2000e; *Anderson v. Oklahoma State Univ. Bd. of Regents*, 2009 WL 2488158 (10th Cir. 2009); 29 C.F.R. § 1604.11(g).

No-Match Rules Withdrawn. Back in August 2007, the U.S. Immigration and Customs Service (ICE) announced new "safe harbor" requirements for responding to letters from ICE and the Social Security Administration that an employee's name and social security number do not match, or that his documentation does not appear to be valid. See "New Rules for SSN-Name Mismatches," EMPLOYER ALERTS, Fall 2007, p. 6; "Handling a Social Security Administration 'No-Match' Notice," EMPLOYER ALERTS, Fall 2003, p. 5. The rules were supposed to take effect in September 2007, but a court in California enjoined the Government from enforcing them. On October 7, 2009, the Department of Homeland Security formally withdrew the rules. 74 F.R. 51447 (Oct. 7, 2009).

New Bicycle Commuter Benefit. Section 132 of the Internal Revenue Code excludes from an employee's gross income certain fringe benefits, including "qualified transportation fringe" benefits. A recent amendment to the Code expanded transportation fringes to cover employer reimbursements for bicycle commuting expenses. For each month that an employee uses a bicycle for a substantial portion of the travel between the employee's residence and place of employment, the employer may reimburse the employee up to \$20.

EEOC Technical Guidance on Flu Preparedness.

The Equal Employment Opportunity Commission has issued technical guidance for employers in connection with H1N1 flu preparedness, available at www.eeoc.gov/facts/pandemic_flu.html. In trying to determine the possible effect of a pandemic on its workforce, an employer may not ask an employee whether he or she has a health condition, such as a compromised immune system, that makes the employee particularly susceptible to the flu. But employers may ask whether an employee is likely to be unavailable for work in the event of a pandemic, even though one of the reasons the employer may be unavailable is an underlying health condition. The EEOC has included an employee survey form as part of its technical guidance.

COBRA New Hire Notice Requirement. Did you know that employers whose group health plans are subject to the continuation coverage requirements of COBRA are required to notify each new employee and his or her spouse about COBRA continuation coverage within 90 after becoming covered under the plan? That requirement is imposed by U.S. Department of Labor regulations, 29 C.F.R. § 2590.606-1. DOL has prepared a model notice form in Word format available at www.dol.gov/ebsa/forms.html.

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Cover Photo: "Snowy Day" by Charlie Fleischer

Design: KathleenKnowles.com



BY CHARLES H. FLEISCHER, ESQ.

VOLUME X, NO. 4 – SPRING 2010

Refusal to Work Not Gross Misconduct in DC

As in other states, when an employee is fired in the District of Columbia he or she may be entitled to collect unemployment insurance (UI) benefits, depending on the circumstances surrounding the firing. A firing for misconduct, however, usually disqualifies the employee for benefits, at least temporarily.

Also like some other states, the District recognizes degrees of misconduct. In D.C. for example, there is “gross” misconduct and “other” (sometimes called “simple”) misconduct. Gross misconduct is defined as

an act which deliberately or willfully violates the employer’s rules, deliberately or willfully threatens or violates the employer’s interests, shows a repeated disregard for the employee’s obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.

Acts that may constitute gross misconduct include sabotage, unprovoked assault or threats, arson, theft or attempted theft, dishonesty, insubordination, repeated disregard of reasonable orders, intoxication,

use or possession of a controlled substance, willful destruction of property, and repeated absences or tardiness following warning.

Examples of simple misconduct, by contrast, are “acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.” These could include minor violations of employer rules, conducting unauthorized personal activities during business hours, occasional absences or tardiness, and use of profane or abusive language.

The distinction is important, because a termination for gross misconduct completely disqualifies the employee for UI benefits until he or she has worked in covered employment with another employer. Simple misconduct, on the other hand, only disqualifies the employee temporarily.

Henry Odeniran worked for Hanley Wood, LLC, a real estate consulting firm in the District. Odeniran was unhappy with his job because he did not receive an anticipated promotion and salary increase, and because he felt that the company’s travel expense

reimbursements were inadequate. He asked for a raise and permission to work from home, but those requests were denied. So he took a day of sick leave.

When he returned to work the next day he sat in his office, but tended to personal matters and performed none of his assigned duties. His supervisor counseled him several times that day, urging him to get to work, all without success. When his supervisor asked him what he was doing, he refused to provide details. When Human Resources called him and questioned him about what he'd been working on and whether he would be reporting his time as work hours, he would not respond.

It is no surprise that Odeniran was fired at the end of the day. He later applied for UI benefits, but a District administrative law judge (ALJ) denied benefits on the basis that he was fired for gross misconduct. Odeniran then appealed to the D.C. Court of Appeals.

The appellate court agreed with the ALJ's factual finding that, on the day Odeniran was fired, he was not performing his assigned duties, he acted intentionally, and he failed to do his work even though his supervisor spoke to him about it several times.

But the appellate court concluded that these facts did not amount to gross misconduct. The court recognized that Odeniran's conduct could be construed as insubordination, dishonesty, and repeated disregard of reasonable orders – all examples of gross misconduct. Yet, according to the court, those examples are part of a list of much more serious matters, including arson, theft, etc., and one day's refusal to work just wasn't serious enough. As the court said, "A word is known by the company it keeps."

As further justification for its decision, the court equated Odeniran's conduct with "poor work performance," which is not on the list of gross misconduct examples. But the equation does not hold up. Here Odeniran did not perform poorly, he intentionally refused to perform at all. 🗡️

References: D.C. Code § 51-101; 7 DCMR 300; *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421 (D.C. 2009).



Prank Call Costs McDonald's

On April 9, 2004, eighteen-year-old Louise Ogborn had just finished her afternoon shift as an employee of a McDonald's restaurant in Mt. Washington, Kentucky. Her manager asked her to work a second shift to fill in for an absent employee, and Ogborn agreed.

Shortly thereafter, the restaurant's assistant manager, Donna Summers, received a telephone call from someone who identified himself as a police officer. He said he was investigating a recent purse theft at the restaurant and he described the suspect. The description fit Ogborn. Ogborn was then summoned to the manager's office and told she was under investigation.

At the caller's instructions, Summers told Ogborn that she had two choices: she could be searched in the office by her managers, or she could be searched at the police station after her arrest. Ogborn chose to be searched in the office. In accordance with the caller's further detailed instructions, Ogborn was methodically searched as she gradually disrobed. Summers took her clothes, cell phone and other belongings out of the office and left Ogborn only with an apron to cover herself.

The caller then instructed Summers to summon a male employee to sit with Ogborn during the investigation. Summers left and returned with a cook who, after several minutes, left saying the situation was unacceptable.


The caller then asked Summers if she was married. Summers said no, but that she was engaged. At the caller's instruction, Summers had her own fiancé come to the office. Summers left her fiancé largely alone with Ogborn, who was naked but for the apron. At the caller's encouragement, the fiancé forced Ogborn to perform a series of humiliating acts, he conducted a cavity search, and he ultimately sexually assaulted her. After nearly two hours, the fiancé left the restaurant and Summers resumed control.

Summers then brought a maintenance employee into the office to sit with Ogborn. That employee spoke with the caller and assessed the situation as a hoax. The call was then terminated and the police were called.

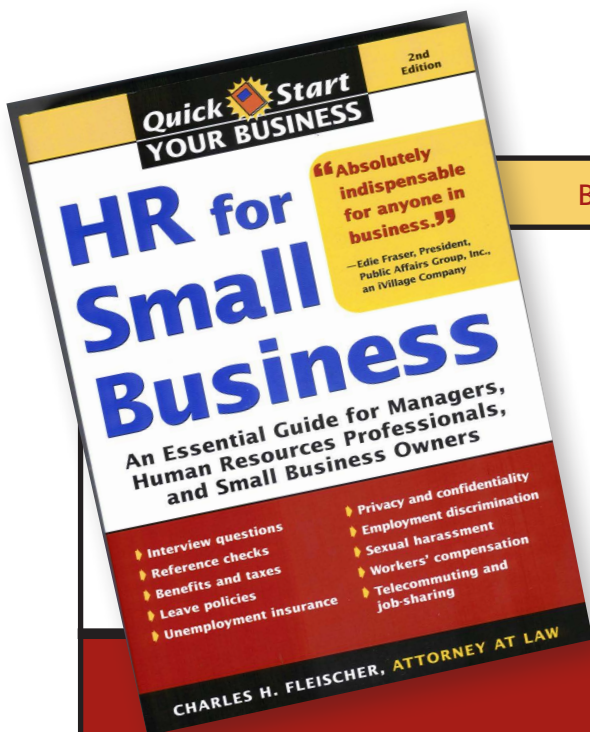
Throughout the three-hour episode, Ogborn continuously and strenuously expressed her objections, she asked for her clothes back, and she requested permission to leave. These requests were denied.

Following conclusion of the episode, McDonald's fired Summers. Her fiancé was later convicted on three felony charges. A suspect was identified as the caller, but was eventually acquitted.

Ogborn then sued McDonald's. During pretrial discovery, she learned that during the period 1994-2004 an unknown caller had placed numerous hoax calls to McDonald's and other fast food restaurants, convincing restaurant managers and employees to conduct strip searches and even sexual assaults. McDonald's corporate legal department was fully aware of these hoaxes and had documented them. But McDonald's corporate management made a conscious decision not to train or warn store managers or employees about the calls.

The jury awarded Ogborn \$1.1 million in compensatory damages and \$5 million in punitive damages. 

Reference: McDonald's Corp. v. Ogborn, __ S.W.3d __, 2009 WL 3877533 (Ky. App. 2009).



By Charles H. Fleischer, Esq.

HR for Small Business


“Absolutely indispensable for anyone in business”



Watch Out for Medicare's Secondary Payer Rules

When an employee is covered by both Medicare and private insurance, Medicare is, by law, the secondary payer. See “Medicare Pursues Employer for its Own Mistake,” *EMPLOYER ALERTS*, Summer 2005, p. 5. This means that the private insurer pays first, with any unpaid balance subject to Medicare reimbursement.

But the secondary payer rules go farther. Under the Medicare, Medicaid and SCHIP Enforcement Act, primary plans must report to CMS (Center for Medicare and Medicaid Services) any loss payment that is made to a Medicare beneficiary that “does” or “could” include compensation for medical treatment.

Suppose, for example, that your company is sued by a 66-year-old former employee for alleged age discrimination. The employee’s complaint claims back wages, front pay, and pain and suffering damages, which include treatment by an internist and psychologist for anxiety and sleep and eating disorders. You eventually settle with the employee by paying \$150,000 in exchange for a full release and dismissal of the suit. Is the payment reportable to CMS? Yes, and failure to do so could result in fines of up to \$1,000 per day. 

Reference: 42 U.S.C. §§ 1395b, 1395y.

Alcoholism No Excuse for Misconduct

Charles Budde, police chief for the Kane County, Illinois Forest Preserve District, decided to drive home after drinking at the local Moose lodge. In the process, he rear-ended another car, sending both the driver and a passenger to the hospital. Budde was found to have a blood-alcohol level of 0.23, nearly three times the legal limit in Illinois. As a result, Budde’s driver’s license was suspended.

When the incident came to the attention of Budde’s supervisor at the Forest Preserve, she first placed him on paid administrative leave, and then terminated him. In her termination letter she said the decision was based on a number of factors, including inability to perform his duties due to the suspension of his driver’s license, and conduct below the standard expected for his position.

Budde then filed suit against the Forest Preserve, saying the termination violated the Americans with Disabilities Act because his employer failed to accommodate his alcoholism. Both the federal district court in Illinois and the U.S. Court of Appeals for the Seventh Circuit rejected Budde’s claim. The appellate court held that violation of a workplace rule is no defense to discipline, even if the violation is caused by a disability.

Furthermore, said the court, Budde was not a “qualified individual with a disability,” since one of his essential job functions was driving and he could not do so without a license.

The lesson here is that drug addiction and alcoholism may well qualify as disabilities. But a violation of company rules – for example, being under the influence of controlled substances or alcohol at work – warrants discipline regardless of their connection to a disability.



References: 42 U.S.C. § 12101; 29 C.F.R. § 1630; *Budde v. Kane Cnty. Forest Preserve*, 2010 WL 724140 (7th Cir. 2010).



New York's Faithless Servant Doctrine

Most courts take the view that when an employee shows up for work in a reasonably fit condition and otherwise willing and able to perform, he or she is entitled to be paid even if the quality of the employee's work is below par. Poor performance merits termination or other discipline; it doesn't permit the employer to withhold the employee's pay.

But under New York's faithless servant doctrine, a disloyal employee forfeits his or her pay for the period of the disloyalty. In a recent Massachusetts case, the court applied New York law (because that's where the employment relationship was centered) and ordered a high-level employee to forfeit some \$5 million in salary and another \$1 million in bonuses.

Lars Bildman, a Swedish national, worked for Astra USA in New York from 1981 to his termination in 1996. His position was President and CEO of Astra and he also served on its board. Astra in turn was a wholly-owned subsidiary of Astra AB, a publicly-traded pharmaceutical company headquartered in Sweden.

Bildman and other members of Astra's senior management had a long and sordid history of sexual harassment of female employees, which Bildman managed to cover up for several years. For example, Bildman had authorized and personally signed a \$3,164 per month "consulting agreement" with his former secretary (who claimed Bildman had forced sexual relations with her); he authorized a settlement payment of \$25,000 to another female employee who had filed a complaint with the Massachusetts Discrimination Commission; he ordered Astra's general counsel to pay \$50,000 to settle another sexual harassment complaint and \$95,000 to settle a retaliation claim; and in early 1996 he authorized payment of \$100,000 to settle yet another harassment claim. All these settlement arrangements were confidential and were kept from Astra.

Harassment wasn't Bildman's only problem. He also used Astra vendors to work on his homes in Massachusetts and Vermont, charging the cost to Astra; he chartered personal yacht trips at Astra's expense; he hired female "escorts" for himself and others with company money; he used Astra employees during business hours to maintain his antique automobile collection and give private tennis lessons to his family; and he charged Astra \$16,000 in legal costs to defend a \$66 speeding ticket.


Bildman's coverups began to unravel when the magazine *Business Week* began working on a story of harassment problems at Astra. As *Business Week*'s investigation progressed, senior management in Sweden became aware of employment issues in the U.S. In April 1996 Astra's board suspended Bildman with pay, asking him to cooperate fully with Astra's own internal investigation and not to contact current or former Astra employees. Bildman did neither. He repeatedly refused to be interviewed by Astra's counsel who was leading the internal investigation, and he asked current and former employees to deny any harassment. He also set up a satellite office where he shredded corporate documents; he removed financial records from his office; and he erased company computers.

The harassment problems resulted in an EEOC complaint against the company. Astra and the EEOC eventually entered into a consent decree which called for Astra to establish a \$9,850,000 fund to compensate victims at the company. Bildman was later convicted of filing false federal income tax returns because he had failed to report as income the various goods and services he had stolen from Astra.

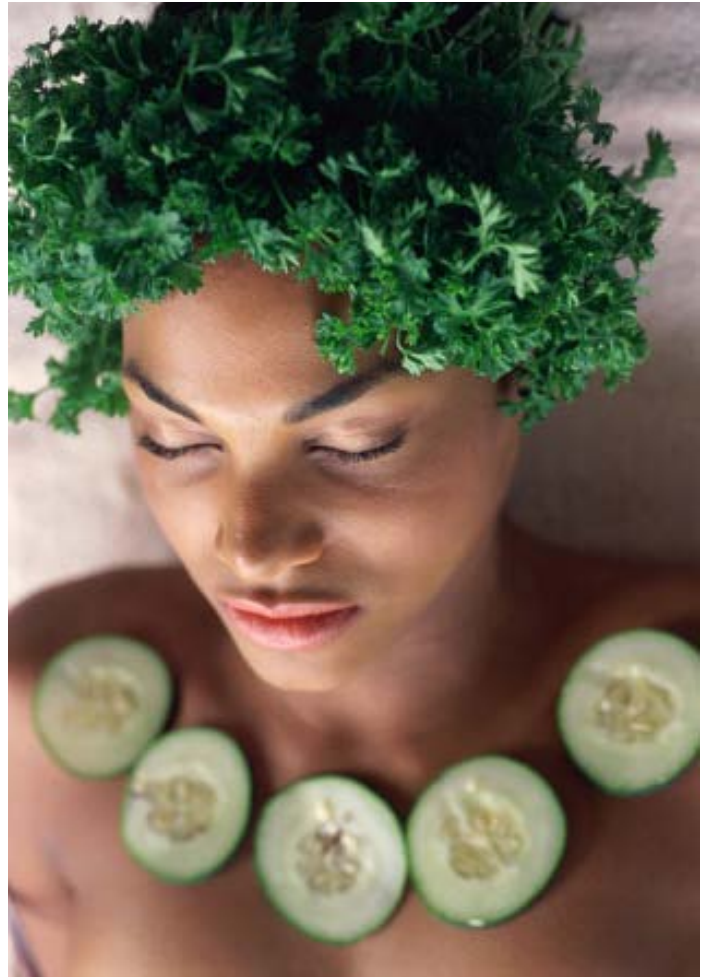
In June 1996 Astra's board voted to rescind Bildman's employment contract and terminate him for cause. But Astra wasn't finished with Bildman. In 1998 it filed suit against him for, among other things, fraud, breach of fiduciary duty, and waste of corporate assets. After a seven-week trial, the jury awarded Astra damages of more than \$1 million. Astra then asked the trial judge to order a forfeiture of Bildman's pay for the period 1991-1996 under New York's faithless servant doctrine. When the judge declined to do so, Astra appealed.

The Massachusetts Supreme Court ruled that Bildman should forfeit his pay for the years in question. Citing New York law, the appeals court observed that an agent such as Bildman is held to the utmost fidelity in his dealings with his principal (Astra), and if he acts adversely to his employer, or omits to disclose important information to his principal, it amounts to a fraud upon the principal. This in turn requires a forfeiture of all compensation for his disloyal services.

It doesn't matter, said the appeals court, that the employee might otherwise have performed valuable

services. Under New York law, a disloyal employee must completely and permanently forfeit his compensation. 

References: *Astra USA, Inc. v Bildman*, 914 N.E.2d 36 (Mass. 2009); *William Floyd Union Free Sch. Dist. v. Wright*, 877 N.Y.S.2d 396 (App. Div. 2009).



Travel Assistance Doesn't Satisfy FMLA's "Care For" Requirement

"My doctor said I needed a vacation. Can I deduct that cruise to the islands as a medical expense?" The answer of course is no. And that's the same answer Maria Tayag got when she claimed leave under the Family and Medical Leave Act to accompany her ailing husband, Rhomeo, to the Philippines to participate in a faith-based healing program. (Both Maria and Rhomeo were originally from the Philippines and both are practicing Roman Catholics.)

Maria worked as a clerk for Lahey Clinic in Massachusetts. She consistently received positive performance reviews. Throughout her employment, her husband suffered from a number of debilitating medical conditions. Maria routinely requested intermittent leave under Lahey's FMLA leave policy to take her husband to doctors' appointments and to help with household activities when he was having a bad day. Lahey always granted these requests.

In early summer 2006, Maria requested seven weeks FMLA leave to care for her husband, who was recovering from recent cardiac angioplasty. Lahey's FMLA administrator told Maria that she needed to provide a new medical certification from her husband's cardiologist to support the request. But all Maria provided was a record of the angioplasty, which Lahey said was insufficient. Maria then provided a statement from her husband's internist stating that Rhomeo's medical problems significantly affected his functional capacity and that Maria should be given leave for medical reasons "to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis." Again Maria was told that the certification was inadequate and that she needed to provide a statement from the cardiologist who did the angioplasty.

Despite the fact that Lahey had not approved FMLA leave, Maria and Rhomeo left for the Philippines. While the Tayags were in the Philippines, the cardiologist submitted a statement to Lahey to the effect that Maria did *not* need to take FMLA leave to care for her husband. On receipt of that statement, Lahey attempted to contact Maria at home, unaware that she had left the country. When Maria did not respond to Lahey's telephone messages, Lahey sent her a letter informing her that she was terminated for taking unapproved leave.


The evidence presented in Maria's subsequent lawsuit showed that Rhomeo cannot travel without his wife, who carries his bags, pushes his wheelchair, provides psychological support, and gives medications. However, the travel itself was not for medical treatment. Instead, the Tayags spent three and a half weeks attending a Pilgrimage of Healing Ministry at St. Bartholomew Parish, a Roman Catholic church

in the Philippines. At no point during the entire trip did Rhomeo receive medical treatment or visit a health care professional. Aside from attending St. Bartholomew, the Tayags visited friends, family, and other churches. Of the forty-seven days spent in the Philippines, nineteen of them – just over forty percent – were spent away from St. Bartholomew Parish and with family and friends.

The court recognized that FMLA allows time off for an employee who is needed to care for a seriously ill spouse. See "FMLA's 'Care For' Provision," EMPLOYER ALERTS, Summer 2005, p. 4. According to U.S. Department of Labor regulations, the "needed to care for" provision

encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

But, said the court, the novel question here is whether FMLA allows leave to care for a spouse with a serious health condition who seeks to travel abroad for the purpose of faith-based healing. The court concluded that FMLA does not permit employees to take time off to vacation with a seriously ill spouse, even if caring for the spouse is an incidental consequence of taking him on vacation.

This makes good sense. Maria was needed on a full-time basis not because of Rhomeo's medical condition but because they decided to travel. Had they stayed home, the intermittent leave Maria had routinely been allowed would have sufficed. 

References: 29 U.S.C. § 2601; 29 C.F.R. § 825.124; *Tayag v. Lahey Clinic Hosp., Inc.*, 2010 WL 26217 (D. Mass. 2010).

Take Your ~~Child~~ Gun to Work.

According to press reports, a number of states have now passed legislation allowing employees to bring guns to work, notwithstanding an employer policy to the contrary. Most recently, Indiana joined Alaska, Arizona, Florida, Georgia, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Oklahoma and Utah in adopting such legislation. The typical statute requires the employee to be appropriately licensed to carry a weapon, and it requires the weapon to be locked out of sight in the employee's vehicle. The Indiana act also exempts certain employers, including schools, prisons, child care centers, domestic violence shelters, and utility companies.

The Franken Amendment.

Al Franken (D-Minn.) may be new to the Senate, but he hasn't wasted any time sponsoring legislation. The 2010 Defense Appropriations Act, signed into law on December 19, 2009, includes the Franken Amendment which prohibits Department of Defense contractors and subcontractors with contracts over \$1 million from requiring mandatory arbitration of discrimination and sexual harassment claims. The amendment appears to apply to all employees of covered contractors and subcontractors, not just employees working on the DOD contracts.

Medicaid/CHIP Model Notice.

Some 40 states, including Virginia but not Maryland or the District, use Medicaid and/or Children's Health Insurance Program funds to subsidize premiums for employees who cannot afford to participate in their employers' group health insurance plans. Recent legislation requires the U.S. Departments of Labor and Health and Human Services to develop a model notice for employers to inform their employees about the availability of the premium assistance program. The notice is available at www.dol.gov/ebsa (search for CHIP notice) at that site). Employers with eligible employees are required to provide the notice annually. Note that eligibility depends on where the employee resides, not on the location of the employer's business. So an employer located in a non-participating state will be required to provide the notice if it has employees living in a participating state.

EEOC Ordered to Pay Millions in Attorney Fees.

When the Equal Employment Opportunity Commission files a lawsuit on behalf of discrimination victims, it is supposed to investigate first, make a "reasonable cause" determination, and attempt to conciliate the matter before going to court. It didn't do so in a class action filed in Iowa federal court. Of the 270 women originally named in its sex discrimination complaint against CRST Van Expedited, Inc., it failed to make 120 available for deposition, so the court dismissed them from the case. The court later dismissed claims as to the remaining 150 and, as to 67 of them, the court found that "the EEOC did not conduct any investigation of the specific allegations . . . let alone issue a reasonable cause determination as to those allegations or conciliate them." For those failures, the court ordered the EEOC to pay CRST's attorney fees of \$4.56 million. *EEOC v. CRST Van Expedited, Inc.*, N.D. Iowa No. 07-CV-95.



BY CHARLES H. FLEISCHER, ESQ.

VOLUME X, NO. 4 – SPRING 2010

Refusal to Work Not Gross Misconduct in DC

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Examples of simple misconduct, by contrast, are “acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.” These could include minor violations of employer rules, conducting unauthorized personal activities during business hours, occasional absences or tardiness, and use of profane or abusive language.

The distinction is important, because a termination for gross misconduct completely disqualifies the employee for UI benefits until he or she has worked in covered employment with another employer. Simple misconduct, on the other hand, only disqualifies the employee temporarily.

Henry Odeniran worked for Hanley Wood, LLC, a real estate consulting firm in the District. Odeniran was unhappy with his job because he did not receive an anticipated promotion and salary increase, and because he felt that the company’s travel expense

reimbursements were inadequate. He asked for a raise and permission to work from home, but those requests were denied. So he took a day of sick leave.

When he returned to work the next day he sat in his office, but tended to personal matters and performed none of his assigned duties. His supervisor counseled him several times that day, urging him to get to work, all without success. When his supervisor asked him what he was doing, he refused to provide details. When Human Resources called him and questioned him about what he'd been working on and whether he would be reporting his time as work hours, he would not respond.

It is no surprise that Odeniran was fired at the end of the day. He later applied for UI benefits, but a District administrative law judge (ALJ) denied benefits on the basis that he was fired for gross misconduct. Odeniran then appealed to the D.C. Court of Appeals.

The appellate court agreed with the ALJ's factual finding that, on the day Odeniran was fired, he was not performing his assigned duties, he acted intentionally, and he failed to do his work even though his supervisor spoke to him about it several times.

But the appellate court concluded that these facts did not amount to gross misconduct. The court recognized that Odeniran's conduct could be construed as insubordination, dishonesty, and repeated disregard of reasonable orders – all examples of gross misconduct. Yet, according to the court, those examples are part of a list of much more serious matters, including arson, theft, etc., and one day's refusal to work just wasn't serious enough. As the court said, "A word is known by the company it keeps."

As further justification for its decision, the court equated Odeniran's conduct with "poor work performance," which is not on the list of gross misconduct examples. But the equation does not hold up. Here Odeniran did not perform poorly, he intentionally refused to perform at all. 🗡️

References: D.C. Code § 51-101; 7 DCMR 300; *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421 (D.C. 2009).



Prank Call Costs McDonald's

On April 9, 2004, eighteen-year-old Louise Ogborn had just finished her afternoon shift as an employee of a McDonald's restaurant in Mt. Washington, Kentucky. Her manager asked her to work a second shift to fill in for an absent employee, and Ogborn agreed.

Shortly thereafter, the restaurant's assistant manager, Donna Summers, received a telephone call from someone who identified himself as a police officer. He said he was investigating a recent purse theft at the restaurant and he described the suspect. The description fit Ogborn. Ogborn was then summoned to the manager's office and told she was under investigation.

At the caller's instructions, Summers told Ogborn that she had two choices: she could be searched in the office by her managers, or she could be searched at the police station after her arrest. Ogborn chose to be searched in the office. In accordance with the caller's further detailed instructions, Ogborn was methodically searched as she gradually disrobed. Summers took her clothes, cell phone and other belongings out of the office and left Ogborn only with an apron to cover herself.

The caller then instructed Summers to summon a male employee to sit with Ogborn during the investigation. Summers left and returned with a cook who, after several minutes, left saying the situation was unacceptable.


The caller then asked Summers if she was married. Summers said no, but that she was engaged. At the caller's instruction, Summers had her own fiancé come to the office. Summers left her fiancé largely alone with Ogborn, who was naked but for the apron. At the caller's encouragement, the fiancé forced Ogborn to perform a series of humiliating acts, he conducted a cavity search, and he ultimately sexually assaulted her. After nearly two hours, the fiancé left the restaurant and Summers resumed control.

Summers then brought a maintenance employee into the office to sit with Ogborn. That employee spoke with the caller and assessed the situation as a hoax. The call was then terminated and the police were called.

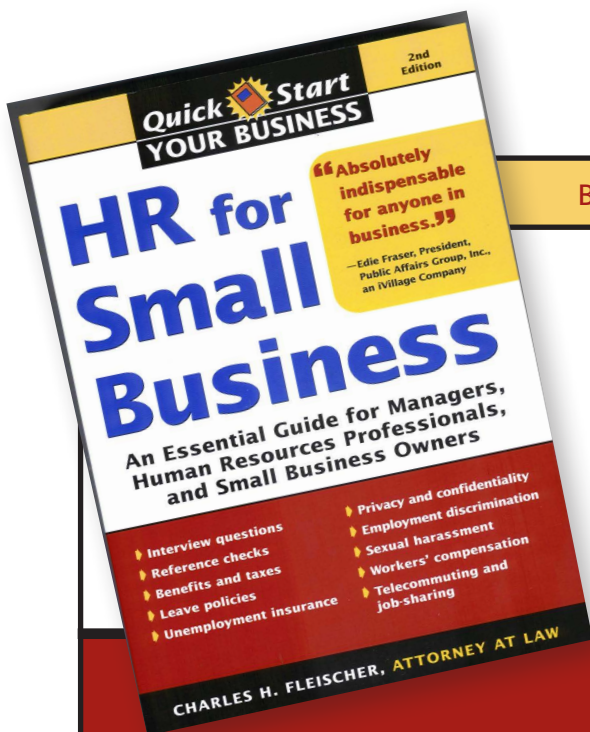
Throughout the three-hour episode, Ogborn continuously and strenuously expressed her objections, she asked for her clothes back, and she requested permission to leave. These requests were denied.

Following conclusion of the episode, McDonald's fired Summers. Her fiancé was later convicted on three felony charges. A suspect was identified as the caller, but was eventually acquitted.

Ogborn then sued McDonald's. During pretrial discovery, she learned that during the period 1994-2004 an unknown caller had placed numerous hoax calls to McDonald's and other fast food restaurants, convincing restaurant managers and employees to conduct strip searches and even sexual assaults. McDonald's corporate legal department was fully aware of these hoaxes and had documented them. But McDonald's corporate management made a conscious decision not to train or warn store managers or employees about the calls.

The jury awarded Ogborn \$1.1 million in compensatory damages and \$5 million in punitive damages. 

Reference: McDonald's Corp. v. Ogborn, __ S.W.3d __, 2009 WL 3877533 (Ky. App. 2009).



By Charles H. Fleischer, Esq.

HR for Small Business


“Absolutely indispensable for anyone in business”



Watch Out for Medicare's Secondary Payer Rules

When an employee is covered by both Medicare and private insurance, Medicare is, by law, the secondary payer. See “Medicare Pursues Employer for its Own Mistake,” *EMPLOYER ALERTS*, Summer 2005, p. 5. This means that the private insurer pays first, with any unpaid balance subject to Medicare reimbursement.

But the secondary payer rules go farther. Under the Medicare, Medicaid and SCHIP Enforcement Act, primary plans must report to CMS (Center for Medicare and Medicaid Services) any loss payment that is made to a Medicare beneficiary that “does” or “could” include compensation for medical treatment.

Suppose, for example, that your company is sued by a 66-year-old former employee for alleged age discrimination. The employee’s complaint claims back wages, front pay, and pain and suffering damages, which include treatment by an internist and psychologist for anxiety and sleep and eating disorders. You eventually settle with the employee by paying \$150,000 in exchange for a full release and dismissal of the suit. Is the payment reportable to CMS? Yes, and failure to do so could result in fines of up to \$1,000 per day. 

Reference: 42 U.S.C. §§ 1395b, 1395y.

Alcoholism No Excuse for Misconduct

Charles Budde, police chief for the Kane County, Illinois Forest Preserve District, decided to drive home after drinking at the local Moose lodge. In the process, he rear-ended another car, sending both the driver and a passenger to the hospital. Budde was found to have a blood-alcohol level of 0.23, nearly three times the legal limit in Illinois. As a result, Budde’s driver’s license was suspended.

When the incident came to the attention of Budde’s supervisor at the Forest Preserve, she first placed him on paid administrative leave, and then terminated him. In her termination letter she said the decision was based on a number of factors, including inability to perform his duties due to the suspension of his driver’s license, and conduct below the standard expected for his position.

Budde then filed suit against the Forest Preserve, saying the termination violated the Americans with Disabilities Act because his employer failed to accommodate his alcoholism. Both the federal district court in Illinois and the U.S. Court of Appeals for the Seventh Circuit rejected Budde’s claim. The appellate court held that violation of a workplace rule is no defense to discipline, even if the violation is caused by a disability.

Furthermore, said the court, Budde was not a “qualified individual with a disability,” since one of his essential job functions was driving and he could not do so without a license.

The lesson here is that drug addiction and alcoholism may well qualify as disabilities. But a violation of company rules – for example, being under the influence of controlled substances or alcohol at work – warrants discipline regardless of their connection to a disability.



References: 42 U.S.C. § 12101; 29 C.F.R. § 1630; *Budde v. Kane Cnty. Forest Preserve*, 2010 WL 724140 (7th Cir. 2010).



New York's Faithless Servant Doctrine

Most courts take the view that when an employee shows up for work in a reasonably fit condition and otherwise willing and able to perform, he or she is entitled to be paid even if the quality of the employee's work is below par. Poor performance merits termination or other discipline; it doesn't permit the employer to withhold the employee's pay.

But under New York's faithless servant doctrine, a disloyal employee forfeits his or her pay for the period of the disloyalty. In a recent Massachusetts case, the court applied New York law (because that's where the employment relationship was centered) and ordered a high-level employee to forfeit some \$5 million in salary and another \$1 million in bonuses.

Lars Bildman, a Swedish national, worked for Astra USA in New York from 1981 to his termination in 1996. His position was President and CEO of Astra and he also served on its board. Astra in turn was a wholly-owned subsidiary of Astra AB, a publicly-traded pharmaceutical company headquartered in Sweden.

Bildman and other members of Astra's senior management had a long and sordid history of sexual harassment of female employees, which Bildman managed to cover up for several years. For example, Bildman had authorized and personally signed a \$3,164 per month "consulting agreement" with his former secretary (who claimed Bildman had forced sexual relations with her); he authorized a settlement payment of \$25,000 to another female employee who had filed a complaint with the Massachusetts Discrimination Commission; he ordered Astra's general counsel to pay \$50,000 to settle another sexual harassment complaint and \$95,000 to settle a retaliation claim; and in early 1996 he authorized payment of \$100,000 to settle yet another harassment claim. All these settlement arrangements were confidential and were kept from Astra.

Harassment wasn't Bildman's only problem. He also used Astra vendors to work on his homes in Massachusetts and Vermont, charging the cost to Astra; he chartered personal yacht trips at Astra's expense; he hired female "escorts" for himself and others with company money; he used Astra employees during business hours to maintain his antique automobile collection and give private tennis lessons to his family; and he charged Astra \$16,000 in legal costs to defend a \$66 speeding ticket.


Bildman's coverups began to unravel when the magazine *Business Week* began working on a story of harassment problems at Astra. As *Business Week*'s investigation progressed, senior management in Sweden became aware of employment issues in the U.S. In April 1996 Astra's board suspended Bildman with pay, asking him to cooperate fully with Astra's own internal investigation and not to contact current or former Astra employees. Bildman did neither. He repeatedly refused to be interviewed by Astra's counsel who was leading the internal investigation, and he asked current and former employees to deny any harassment. He also set up a satellite office where he shredded corporate documents; he removed financial records from his office; and he erased company computers.

The harassment problems resulted in an EEOC complaint against the company. Astra and the EEOC eventually entered into a consent decree which called for Astra to establish a \$9,850,000 fund to compensate victims at the company. Bildman was later convicted of filing false federal income tax returns because he had failed to report as income the various goods and services he had stolen from Astra.

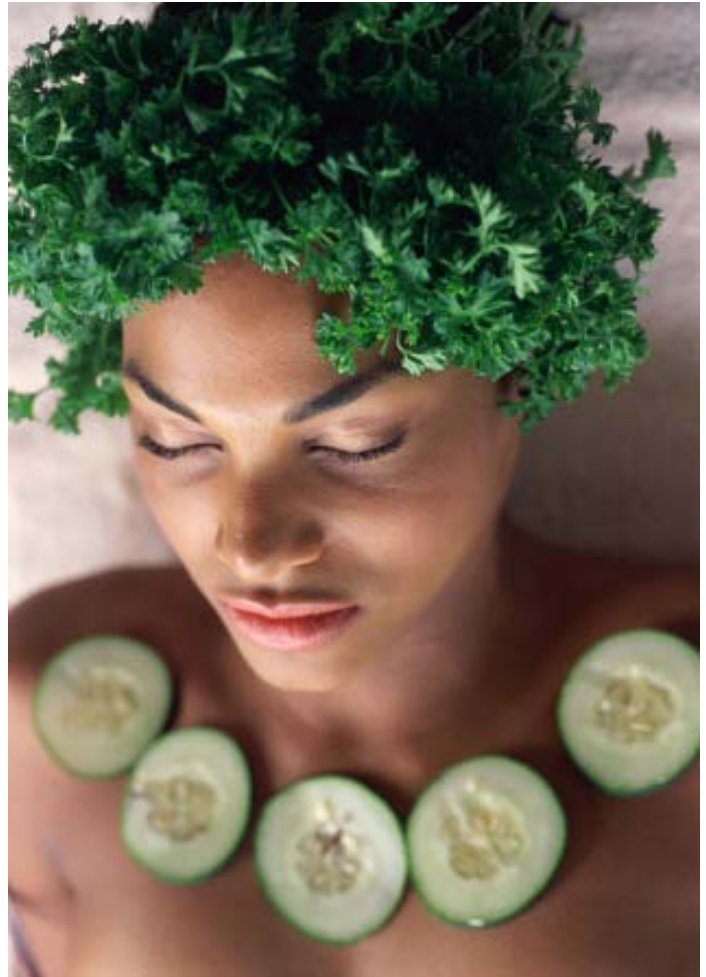
In June 1996 Astra's board voted to rescind Bildman's employment contract and terminate him for cause. But Astra wasn't finished with Bildman. In 1998 it filed suit against him for, among other things, fraud, breach of fiduciary duty, and waste of corporate assets. After a seven-week trial, the jury awarded Astra damages of more than \$1 million. Astra then asked the trial judge to order a forfeiture of Bildman's pay for the period 1991-1996 under New York's faithless servant doctrine. When the judge declined to do so, Astra appealed.

The Massachusetts Supreme Court ruled that Bildman should forfeit his pay for the years in question. Citing New York law, the appeals court observed that an agent such as Bildman is held to the utmost fidelity in his dealings with his principal (Astra), and if he acts adversely to his employer, or omits to disclose important information to his principal, it amounts to a fraud upon the principal. This in turn requires a forfeiture of all compensation for his disloyal services.

It doesn't matter, said the appeals court, that the employee might otherwise have performed valuable

services. Under New York law, a disloyal employee must completely and permanently forfeit his compensation. 

References: *Astra USA, Inc. v Bildman*, 914 N.E.2d 36 (Mass. 2009); *William Floyd Union Free Sch. Dist. v. Wright*, 877 N.Y.S.2d 396 (App. Div. 2009).



Travel Assistance Doesn't Satisfy FMLA's "Care For" Requirement

"My doctor said I needed a vacation. Can I deduct that cruise to the islands as a medical expense?" The answer of course is no. And that's the same answer Maria Tayag got when she claimed leave under the Family and Medical Leave Act to accompany her ailing husband, Rhomeo, to the Philippines to participate in a faith-based healing program. (Both Maria and Rhomeo were originally from the Philippines and both are practicing Roman Catholics.)

Maria worked as a clerk for Lahey Clinic in Massachusetts. She consistently received positive performance reviews. Throughout her employment, her husband suffered from a number of debilitating medical conditions. Maria routinely requested intermittent leave under Lahey's FMLA leave policy to take her husband to doctors' appointments and to help with household activities when he was having a bad day. Lahey always granted these requests.

In early summer 2006, Maria requested seven weeks FMLA leave to care for her husband, who was recovering from recent cardiac angioplasty. Lahey's FMLA administrator told Maria that she needed to provide a new medical certification from her husband's cardiologist to support the request. But all Maria provided was a record of the angioplasty, which Lahey said was insufficient. Maria then provided a statement from her husband's internist stating that Rhomeo's medical problems significantly affected his functional capacity and that Maria should be given leave for medical reasons "to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis." Again Maria was told that the certification was inadequate and that she needed to provide a statement from the cardiologist who did the angioplasty.

Despite the fact that Lahey had not approved FMLA leave, Maria and Rhomeo left for the Philippines. While the Tayags were in the Philippines, the cardiologist submitted a statement to Lahey to the effect that Maria did *not* need to take FMLA leave to care for her husband. On receipt of that statement, Lahey attempted to contact Maria at home, unaware that she had left the country. When Maria did not respond to Lahey's telephone messages, Lahey sent her a letter informing her that she was terminated for taking unapproved leave.


The evidence presented in Maria's subsequent lawsuit showed that Rhomeo cannot travel without his wife, who carries his bags, pushes his wheelchair, provides psychological support, and gives medications. However, the travel itself was not for medical treatment. Instead, the Tayags spent three and a half weeks attending a Pilgrimage of Healing Ministry at St. Bartholomew Parish, a Roman Catholic church

in the Philippines. At no point during the entire trip did Rhomeo receive medical treatment or visit a health care professional. Aside from attending St. Bartholomew, the Tayags visited friends, family, and other churches. Of the forty-seven days spent in the Philippines, nineteen of them – just over forty percent – were spent away from St. Bartholomew Parish and with family and friends.

The court recognized that FMLA allows time off for an employee who is needed to care for a seriously ill spouse. See "FMLA's 'Care For' Provision," EMPLOYER ALERTS, Summer 2005, p. 4. According to U.S. Department of Labor regulations, the "needed to care for" provision

encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

But, said the court, the novel question here is whether FMLA allows leave to care for a spouse with a serious health condition who seeks to travel abroad for the purpose of faith-based healing. The court concluded that FMLA does not permit employees to take time off to vacation with a seriously ill spouse, even if caring for the spouse is an incidental consequence of taking him on vacation.

This makes good sense. Maria was needed on a full-time basis not because of Rhomeo's medical condition but because they decided to travel. Had they stayed home, the intermittent leave Maria had routinely been allowed would have sufficed. 

References: 29 U.S.C. § 2601; 29 C.F.R. § 825.124; *Tayag v. Lahey Clinic Hosp., Inc.*, 2010 WL 26217 (D. Mass. 2010).

Take Your ~~Child~~ Gun to Work.

According to press reports, a number of states have now passed legislation allowing employees to bring guns to work, notwithstanding an employer policy to the contrary. Most recently, Indiana joined Alaska, Arizona, Florida, Georgia, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Oklahoma and Utah in adopting such legislation. The typical statute requires the employee to be appropriately licensed to carry a weapon, and it requires the weapon to be locked out of sight in the employee's vehicle. The Indiana act also exempts certain employers, including schools, prisons, child care centers, domestic violence shelters, and utility companies.

The Franken Amendment.

Al Franken (D-Minn.) may be new to the Senate, but he hasn't wasted any time sponsoring legislation. The 2010 Defense Appropriations Act, signed into law on December 19, 2009, includes the Franken Amendment which prohibits Department of Defense contractors and subcontractors with contracts over \$1 million from requiring mandatory arbitration of discrimination and sexual harassment claims. The amendment appears to apply to all employees of covered contractors and subcontractors, not just employees working on the DOD contracts.

Medicaid/CHIP Model Notice.

Some 40 states, including Virginia but not Maryland or the District, use Medicaid and/or Children's Health Insurance Program funds to subsidize premiums for employees who cannot afford to participate in their employers' group health insurance plans. Recent legislation requires the U.S. Departments of Labor and Health and Human Services to develop a model notice for employers to inform their employees about the availability of the premium assistance program. The notice is available at www.dol.gov/ebsa (search for CHIP notice) at that site). Employers with eligible employees are required to provide the notice annually. Note that eligibility depends on where the employee resides, not on the location of the employer's business. So an employer located in a non-participating state will be required to provide the notice if it has employees living in a participating state.

EEOC Ordered to Pay Millions in Attorney Fees.

When the Equal Employment Opportunity Commission files a lawsuit on behalf of discrimination victims, it is supposed to investigate first, make a "reasonable cause" determination, and attempt to conciliate the matter before going to court. It didn't do so in a class action filed in Iowa federal court. Of the 270 women originally named in its sex discrimination complaint against CRST Van Expedited, Inc., it failed to make 120 available for deposition, so the court dismissed them from the case. The court later dismissed claims as to the remaining 150 and, as to 67 of them, the court found that "the EEOC did not conduct any investigation of the specific allegations . . . let alone issue a reasonable cause determination as to those allegations or conciliate them." For those failures, the court ordered the EEOC to pay CRST's attorney fees of \$4.56 million. *EEOC v. CRST Van Expedited, Inc.*, N.D. Iowa No. 07-CV-95.

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