Employer Alerts!

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Do Employees Have Constitutional Rights in the Workplace?

We so often hear terms like "due process," "freedom of speech," "freedom of the press," "freedom of information," etc., that we may be tempted to think those rights apply in all our relationships. Not so. The constitutional right of due process limits the ways in which the *government* can deal with us. Our free speech right only prevents *government* censorship. And federal and state Freedom of Information Acts and sunshine laws only guarantee us access to certain *government* information and proceedings.

In general, the employment relationship does not include employee due process rights. An at-will employee can be arbitrarily disciplined or fired without any right to a hearing, without any opportunity to explain or justify the supposedly offending conduct, and without any opportunity to confront the person who supposedly reported the offending conduct. (Of course, arbitrariness is seldom the best way to manage employees.)

A recent decision by the U.S. Court of Appeals for the Fourth Circuit (whose jurisdiction includes Maryland and Virginia) provides a good illustration.

A controversy arose in South Carolina beginning in January 2000 over whether to remove the Confederate flag from that State's capitol dome. In the context of that controversy, Matthew Dixon, an active member of the Sons of Confederate Veterans, placed two Confederate flag stickers on his personal toolbox. Dixon's employer, Coburg Dairy, Inc., asked Dixon to remove the stickers after another employee, who was African-American, complained. In a compromise effort, the employer even offered to buy Dixon a new toolbox for use at work, thus enabling Dixon to keep his old, flag-adorned toolbox for other use.

Dixon refused, saying that his heritage was "not for sale." Fearing that the flag display might provoke a confrontation, and mindful of its obligations under federal civil rights law to provide an harassment-free workplace, Coburg fired Dixon.

Dixon then sued Coburg in federal court, claiming that Coburg violated his First Amendment free speech

rights. Dixon also claimed that his firing amounted to a wrongful discharge prohibited under South Carolina public policy. The wrongful-discharge/public-policy claim was based on a South Carolina statute that makes it unlawful

> for a person to...discharge a citizen from employment or occupation...because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States.

The federal trial court dismissed Dixon's claims, and the Fourth Circuit Court of Appeals affirmed. The Court said that the First Amendment reaches only state action, not private conduct. Or in the words of a concurring judge, the First Amendment "does not provide individuals with a generalized right to express themselves without interference from others – it only places certain limits on attempts by the *state* to interfere with expressive activity." In fact, Dixon's First Amendment claim was so lacking in substance that the federal courts did not even have jurisdiction to rule on the merits of the claim.

Whether Dixon's discharge violated South Carolina public policy presented a somewhat thornier question. In the Court's view, the Confederate flag display *was* an expression of political opinion within the meaning of the statute, particularly in the context of the ongoing public debate over flying the flag at the state capitol. But, said the Court, Dixon wasn't fired for holding a particular political opinion. To the contrary, Coburg offered to buy Dixon a new toolbox so that he wouldn't have to remove the flags from his old one. According to the Court, this demonstrated that Coburg's actions were not based on Dixon's opinion, but only on the manner in which he chose to express them.

So the question came to this: Did Dixon have a right to express his political opinions on his employer's private property, at the risk of provoking controversy with a co-worker and creating a racially hostile work environment?

"No," answered the Court. To rule otherwise "would lead to the absurd result of making every private workplace a constitutionally protected forum for political discourse." People simply don't have the right to "propagandize protests or views...whenever and however and wherever they please."

Case reference. *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250 (4th Cir. 2003).

Employer Liability for Offensive Spam

In the old M*A*S*H television series, Radar or another of the characters would announce, "Incoming" when the unit was under mortar attack, and the cast would take cover if they could. Do employers have a similar duty to protect against incoming spam of a sexual or otherwise offensive nature?

Title VII of the federal Civil Rights Act prohibits discrimination because of sex in hiring, firing, compensation, and other "terms, conditions and privileges" of employment. What does this provision mean? Ready examples include shift assignments, fringe benefits such as vacation, sick leave, insurance programs, and access to facilities such as the cafeteria and fitness center. But the courts have also ruled that the intangible "work environment" is covered by Title VII as well.

Under those rulings, an employer who promotes or tolerates a workplace environment filled with demeaning sexual slurs can be sued by the target of those slurs and by others who find the environment offensive.

Employer liability for an offensive work environment is not limited just to harassment by a supervisor over a subordinate. Employers can also be liable for tolerating a hostile work environment created by an employee's fellow employees and even by non-employees, if the employer knows (or should know) about the offensive

work environment but fails to take appropriate remedial action. In effect, the law requires employers to make reasonable efforts to provide a working environment free from hostile or offensive harassment. The law doesn't necessarily care who is doing the harassing. Equal Employment Opportunity Commission Guidelines say, for example –

> An employer may...be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

A number of court cases over the years have upheld the concept of employer liability for harassment by non-employees –

! A female blackjack dealer at a Las Vegas casino was repeatedly harassed by male customers, who stared at her and made comments about her breasts and legs. The dealer complained, but her employer failed to take action, and eventually fired her for being rude to customers. The court refused to dismiss her complaint, citing the EEOC's guidelines.

! A manufacturer's representative for Volkswagen was assigned to a Virginia dealership to promote sales of VWs. She was repeatedly harassed by several dealership employees, but when she complained to Volkswagen and asked to be relocated, she was told to "put up with it" for the sake of the company. Eventually, she was fired after being told that she was "too cute" and would likely be harassed wherever she was assigned. The court said that Volkswagen was potentially liable, even though the harassment took place at an independent dealership.

! Occidental International, located in Florida, sold electrical and industrial equipment to Puerto Rico Electric Power Authority, its most important customer. Part of Occidental's "business strategy" was to employ attractive young women and instruct them to be "cordial" to customers. When Occidental's office manager rejected sexual advances by a high-level executive of Puerto Rico Power and complained to Occidental, she was fired. The court upheld a $200,000 damage award.

! When a waitress at a Pizza Hut franchise complained about the behavior of two of her customers, the waitress' manager instructed her to continue waiting on the customers and he took no other action. On her return trip to the customers' table, one of the customers grabbed the waitress sexually. The waitress then quit and successfully sued the franchise.

! Employees who were caregivers in a residential home for persons with developmental disabilities were sexually assaulted by one of the resident patients. Managers at the home failed to respond adequately to caregiver complaints, even going so far as to ask one of the caregivers to *allow* the patient to sexually assault her so that the managers could view the conduct. The home was held liable, since it clearly controlled the environment where the patient resided.

How do these rules apply to offensive email?

According to recent newspaper reports, something like half of all email traffic on the Internet is spam. Congress has held hearings to consider the problem, and there has even been talk of establishing a do-not-email list similar to the Federal Trade Commission's do-not-call list for telemarketers. So an employer can hardly claim ignorance of the existence of spam.

Nor can an employer be oblivious of the content of the spam. Anyone with an email account knows not only where to get the best mortgage rates and how to clean up his credit. He also knows how to enlarge vital organs, stimulate them with thousands of explicit images, and prolong their staying power with performance-enhancing drugs.

Can an employer take corrective action? An employer certainly can and should adopt a workplace policy prohibiting employees from visiting pornographic websites, downloading offensive materials, or circulating such materials about the workplace. But controlling unsolicited email from third parties presents some technical difficulties.

Current spam filters are not fully satisfactory for a number of reasons. For one thing, they sometimes block needed emails. For another, they can be circumvented by clever spammers. And what is offensive to one person may be art to another.

It is probably safe to say at this point that, given current limitations of spam filters, an employer should not be held liable for unsolicited, third-party email. But employers need to be concerned that as the technological *ability* to control spam advances, an *obligation* to do so may increase as well.

Statutory reference. 42 U.S.C. § 2000e (Title VII).

Regulatory reference. 29 C.F.R. § 1604.

Case references. *Powell v. Las Vegas Hilton Corp*., 841 F.Supp. 1024 (D.Nev. 1992); *Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500 (E.D.Va. 1992); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (1st Cir. 1998); *Lockard v. Pizza Hut, Inc*., 162 F.3d 1062 (10th Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997).

Seventeen-Year-Old Need Not Complain About Harassment

When a supervisor harasses a subordinate without taking any tangible job action against her – without, for example, demoting or firing her or assigning her to less desirable shift – the employer is only *presumed* to be liable for the harassment. The employer may rebut the presumption and avoid liability if the employer can show that he exercised reasonable care to prevent and promptly correct the harassing behavior but that the victim of the harassment unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.

An employer will be considered as exercising reasonable care if he has an effective harassment policy in place which includes procedures for victims to complain about alleged harassment. So if a victim knows about the employer's policy and about the complaint procedure, but she unreasonably fails to complain, she cannot then hold the employer liable.

Sometimes, however, a victim's failure to complain will be excused. In other words, she will be allowed to hold the employer liable despite the absence of any complaint if, example, the procedure required the victim to complain to her supervisor – the very person who was doing the harassing. Failure to complain will also be excused if the employer routinely ignored complaints in the past, leading the victim to believe that complaining would be useless.

But a case in the U.S. Court of Appeals for the First Circuit (which covers New England) goes much further in excusing an employee's failure to complain.

Bobbie-Lyn Reed began working as a telemarketer for MBNA Bank in Orono, Maine. At the time, she was 17. Her supervisor, William Appel, was 34. Almost immediately, Appel began making sexually suggestive comments to Reed. Within two months after she started, Appel asked Reed to babysit for his two-year-

old son, and Reed agreed. But when Appel returned home and Reed sought to leave, Appel "dragged her into the living room where he pressed her" to engage in sex with him. According to Reed, Appel said at the time that if she told anyone about the incident, they would both be fired. Reed also quoted Appel as saying, contrary to the risk of being fired, that the owner of the Bank was a family friend who had helped him "cover his tracks" in connection with an earlier matter.

Reed did not report the incident and, within a few days, Appel resumed his sexually suggestive behavior. After a few months Reed left MBNA to take another job, having told no one about Appel's conduct.

Within six or eight months of her departure, Reed returned to MBNA She was re-assigned to Appel's team and was promptly confronted with further babysitting requests from Appel, which she turned down.

Some three months after returning to the Bank, Reed finally complained to MBNA officials. She explained she was prompted to do so at this time because she had heard about other young women being asked to babysit for Appel and she was afraid they, too, would be assaulted. The Bank promptly investigated and decided to fire Appel. At that point Appel quit.

Eighteen months after the initial babysitting incident, Reed filed formal discrimination charges against the Bank. In those proceedings, the Bank showed that it had a policy against sexual harassment and a procedure allowing employees to submit complaints either to their managers or directly to officials in the Bank's Personnel Department.

Reed herself admitted that she had attended an orientation on MBNA's harassment policies both when she initially started and when she returned. Further, she had seen posters regarding sexual harassment in the workplace, she knew that she could go to the Personnel Department to complain of harassment, and she acknowledged that the Bank "stressed its sexual harassment policies." When she finally complained, the Bank began its investigation of Appel that very same day, and it removed him from the workplace almost immediately.

These circumstances would seem more than sufficient to protect the Bank from liability. After all, it did exactly what it was supposed to do: it had and publicized an harassment policy; it gave training to employees; it maintained several avenues to complain; and it took prompt and effective action when put on notice of harassment.

Incredibly, that wasn't good enough for the First Circuit. Pointing out that Reed "was a seventeen year old who had just been assaulted by a supervisor twice her age," the Court excused her long-delayed failure to complain. The Court said that someone of "maturity and established position" might dismiss Appel's statements about being fired and about his family connections in the Bank as "hogwash," but those statements might well have frightened Reed into silence.

In its closing paragraph, the Court conceded that the ruling was "a close call." But the Court never explained what more the Bank could have done to protect itself from liability. Should the Bank refusal to hire young and vulnerable women? Doing that would risk a gender discrimination claim, or a possible violation of state age discrimination laws.

A more reasonable conclusion, not mentioned by the Court, is that any employee who is old enough to work is also old enough to report sexual assaults.

Case references. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Reed v. MBNA Marketing Systems, Inc.*, 2003 WL 21403692 (1st Cir. 2003).

Sleeping At Work Amounts to FMLA Leave Request

Just as youthfulness may excuse a failure to complain about sexual harassment, serious illness can relieve an employee from a duty to ask for leave under the Family and Medical Leave Act.

After more than four years of highly regarded service as a stationary engineer, maintaining boilers for Avon Products, John Byrne started to read and sleep on the job. Security logs showed that Byrne had begun frequenting the on-site carpenter shop, which employees sometimes use for breaks. To investigate further, Avon installed a camera, which on the first night of operation showed that Byrne spent about three hours of his shift reading or sleeping. The next night it was about six hours.

Avon supervisors attempted to schedule time with Byrne to discuss the matter, but Byrne left early, saying he was sick. When reached at home, Byrne agreed to attend a meeting, even though a relative told Avon that Byrne was "very sick." Avon also learned that Byrne was being hospitalized. Nevertheless, when Byrne failed to appear at the meeting, he was fired.

Byrne, it turned out, was suffering from depression, with episodes of panic attacks, hallucinations and a suicide attempt. His illness also affected his sleep patterns, explaining his inability to stay awake on the job. Fortunately, Byrne sought treatment and, after a few months of medical attention, he was fit to resume work. When he asked to return, however, Avon refused. So Byrne brought suit under the Americans with Disabilities Act and the Family and Medical Leave Act.

The U.S. Court of Appeals for the Seventh Circuit (which covers Illinois, Indiana and Wisconsin), recognized that depression can be a disability under the ADA. But the Court rejected Byrne's ADA claim, pointing out that the only "accommodation" that would have been suitable for Byrne was extended time off. Yet the ADA only requires accommodation of persons who are otherwise able to perform the essential functions of their jobs. "Inability to work for a multi-month period," said the Court, "removes a person from the class protected by the ADA."

Byrne's FMLA claim, on the other hand, fared better. FMLA requires covered employers to grant up to 12 weeks' leave for a "serious health condition." An employer must, of course, know about the serious health condition before its obligation to grant leave is triggered, and in the usual course, the employee informs his employer about the condition and requests FMLA leave.

Here Byrne made no such request. But that did not preclude him from suing for alleged FMLA violations. The Court likened the situation to one where an employee collapses from a stroke, heart attack, or insulin deficiency. The Court reasoned that it would be "silly to require the unconscious worker to inform the employer" about the need for FMLA leave.

So it was here. According to the Court, Byrne's "unusual behavior [sleeping on the job after four years of good service] gives all the notice required."

Case reference. *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003).

Employer's Sick Leave Policy Violates ADA

The Americans with Disabilities Act has special rules for medical examinations. Prior to actually offering employment, an employer may *never* require an applicant to undergo a medical exam. (While testing for illegal drugs is not considered a medical exam and is permitted prior to making a job offer, just about every other form of pre-offer medical test, including AIDS testing and genetic testing, is illegal.)

When the employer actually *offers* employment, he may condition the offer on the results of a medical exam

if –

- all entering employees in the job category are subject to examination
- the exam requirement can be shown to be job-related and consistent with business necessity
- the resulting medical information is separately maintained and treated as confidential, and
- the results are not used to discriminate against persons with disabilities.

Closely related to medical examinations are disability-related inquiries. In general, an employer may not ask an applicant or employee about a disability and may not ask questions designed to elicit information about a disability. In the words of the statute –

> A covered entity [such as an employer] shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

A recent case before the Second Circuit Court of Appeals illustrates how this provision can be inadvertently violated.

The New York State Department of Correctional Services ("DOCS") had a sick leave policy requiring employees who were absent for more than three days to furnish a medical certification before returning to work. The certification was required to include a brief, general diagnosis of the condition that caused the employee's absence, so that DOCS could evaluate entitlement to leave and could decide whether the employee should be examined by DOCS's own Employee Health Service.

Under the DOCS policy, a physician's note that an employee is "under my care" would be insufficient. On the other hand, a note that the employee is "recuperating from minor surgery" or was "treated for a minor foot injury" would suffice.

Belinda Fountain, a corrections officer employed by DOCS, objected to the policy and sued to have it declared in violation of the ADA. DOCS responded that its policy does not amount to an "inquiry" under the ADA because it does not specifically ask about a disability. DOCS also claimed that even if its policy is otherwise covered by the ADA, it is lawful nevertheless, because it is "job-related and consistent with business necessity."

The Court ruled against DOCS on its first claim, reasoning that since some diagnoses are bound to reveal underlying disabilities, the diagnosis requirement violated the ADA. The Court left open DOCS's second claim, however, sending the case back to the trial court to determine whether DOCS could justify its policy as job-related and consistent with business necessity.

Statutory reference. 42 U.S.C. § 12101.

Case reference. *Conroy v. N.Y.S. Dept. of Correctional Services*, 2003 WL 21397740 (2nd Cir. 2003).

Voucher Program for Retirees Held Subject to ERISA

The Employee Retirement Income Security Act was passed in 1974 in response to abuses in the handling of pension funds. Before ERISA it was not unusual for employers to make grossly unwise investments with pension funds, to underfund pension plans, to adopt a drawn-out vesting schedule, or to borrow from pension plans to cover operating expenses and then be unable to pay promised benefits when the time came. Employers sometimes fired their senior workers just before those workers were to retire and

become eligible for benefits. Top-heavy plans that favored owners or upper management were also common.

To cure these abuses, Congress enacted ERISA. ERISA requires minimum participation and vesting standards, it contains detailed reporting and disclosure requirements, it imposes fiduciary (trustee) standards on plan administrators, and it requires defined benefit plans to be fully "funded," meaning that the employer must contribute sufficient amounts on a current basis so that the promised benefits will be available at retirement time. It even requires defined benefit plans to carry insurance against any shortfall in promised benefits should the plan terminate.

But ERISA goes far beyond pension plan abuses. Although it applies to "employee benefit *pension* plans," it also applies to "employee *welfare* benefit plans," defined as —

> any plan, fund or program...established or maintained by an employer...for the purpose of providing...medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

In short, it applies to almost every on-going plan or program an employer has for providing group benefits to employees. The only exceptions are plans that are maintained solely to comply with workers' compensation or unemployment insurance laws, plans maintained by tax-exempt churches or associations of churches, and certain unfunded plans.

ERISA's reach is illustrated by a recent decision of the U.S Court of Appeals for the Fifth Circuit (which hears federal appeals from Louisiana, Mississippi and Texas).

Schwegmann Giant Super Markets operated grocery stores in the New Orleans area. For a number of years it followed the practice of issuing vouchers to its retired employees, which they could use instead of cash to purchase goods at Schwegmann stores. To qualify for the vouchers, an employee had to complete 20 years of service, had to be at least 60 years of age, and had to have been in a supervisory position for at least one year before retirement. Schwegmann had no written procedure for administering its voucher program and it did not set aside any assets to fund the program. It simply told eligible employees about the program at the time of retirement.

In the mid-1990s, Schwegmann began suffering declining profits due to competition from national supermarket chains. After making a failed effort to expand, Schwegmann decided to sell the business. A week before the sale, Schwegmann's owner, John F. Schwegmann, wrote a letter to all voucher recipients informing them that, due to the sale, the voucher program was being cancelled. Since Schwegmann viewed the voucher program as a gratuity subject to termination at any time, it made no provision for continuing the program after the sale.

Upon receipt of notice of cancellation, a number of retirees filed suit, claiming that the voucher program amounted to pension benefit plan in which they had a vested interest. The Court of Appeals agreed with the retirees, ruling that the plan was covered by ERISA. As the Court pointed out, ERISA does not necessarily preclude termination of a plan, but it does impose minimum funding requirements and a requirement that plan assets be held in a trust – neither of which Schwegmann had done. Had the plan been properly funded, the retirees would not have lost their vested benefits despite a prospective termination of the plan.

Not only was Schwegmann in violation of ERISA, said the Court, but its owner, John F. Schwegmann, as administrator of the plan, had personally breached his fiduciary duties under ERISA. So he, too, could be held

liable to the disappointed retirees.

Two other cases contrast with the Schwegmann decision and help define the boundaries of ERISA.

In one case, the Supreme Court concluded that an employer policy of cashing out accrued vacation when an employee terminates was *not* covered by ERISA. There, the State of Massachusetts had brought criminal charges against the employer for violating that state's wage payment laws by refusing to pay certain employees for unused vacation. Since ERISA did not apply, the State was free to pursue its criminal charges.

In another case, the U.S. Court of Appeals for the Eighth Circuit ruled that an employer's severance plan, which called for a one-time, lump-sum payment to departing employees, was also not subject to ERISA. The Court reasoned that, in contrast to a true retirement plan, the severance arrangement did not require an "ongoing administrative program to enable the employer to meet its obligations," the employer had not assumed "responsibility to pay benefits on a regular basis," and the employer was not facing "periodic demands on its assets that create a need for financial coordination and control."

Statutory reference. 29 U.S.C. § 2509.

Case references. *Musmeci v. Schwegmann Giant Super Markets, Inc.*, 2003 WL 21221728 (5th Cir. 2003); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Eide v. Grey Fox Technical Services Corp.*, 2003 WL 21194548 (8th Cir. 2003).

Right of Self-Defense No Protection from Firing

In California, as elsewhere, an employer's right to terminate an at-will employee is largely unfettered. One limitation on this right arises when the termination violates an important public policy, in which case the termination will be deemed "wrongful" or "abusive" and the employer can be sued for money damages.

California also guarantees a right of self-defense, even when retreat is possible and when retreat might be the safer course. In other words, when threatened with physical harm, an individual may lawfully stand his ground and fight back. But is this right of self-defense of sufficient importance that an employee who does stand and fight is protected from being fired?

Wilson's Art Studio had a rule that prohibited fighting in the workplace, that required employees to avoid physical conflict whenever possible, and that required an employee to retreat – to run from a fight – when possible.

Hector Escalante violated the rule. He had been attacked once by a co-worker on a prior occasion without provocation. In a later incident, the same co-worker threatened Escalante by swinging a piece of wood at him, then picking up either a hammer or a box of screws and hitting Escalante with it. Escalante fled, and the co-worker followed. When Escalante was some 30 or 40 feet away, the co-worker threw a box of screws, hitting Escalante in the back. At that point, Escalante stopped his retreat, rushed the co-worker and grabbed him in a bear hug in an attempt to restrain him. In the process, Escalante was struck on the head and bled profusely. The co-worker was not injured.

The employer took the view that Escalante should have continued his retreat and it fired him for violating company policy. So Escalante sued, claiming wrongful discharge.

An intermediate appellate court in California ruled that there was no public policy violation and upheld the firing. Recognizing that California law *permits* an individual to stand and fight, the Court said that nothing in California law *encourages* him to do so. The Court saw

no reason why the public interest is harmed by

> a requirement that employees must avoid physical conflict, *whenever possible*, in the workplace. To the contrary, if retreat is possible it is generally the safer choice, for the victim as well as others who might be drawn into the fight. Retreat might not serve the victim's pride or assuage his anger at being attacked, but it does tend to prevent escalation of the violence, and we cannot see why an employer should not be allowed to opt for that result.

Case reference. *Escalante v. Wilson's Art Studio, Inc*., 135 Cal.Rptr.2d 187 (2003).

Time Spent "Donning and Doffing" Not Compensable Under FLSA

Barber Foods, located in Portland, Maine, is a secondary processor of poultry-based products. It purchases boneless chicken breasts in bulk and then processes them into finished products such as "chicken fingers" and nuggets.

Barber's hourly employees are paid from the time they punch in on a computerized time clock until they punch out. Depending on their specific jobs, they must wear a variety of safety- and health-related equipment, which they must have on before they can punch in and which they must keep on until after they punch out. For example, for employees who work on the production line, lab coats, hairnets and earplugs are required.

Employees sometimes have to wait while the necessary equipment is being issued and "donned." After punching out, they sometimes face similar waits while they are "doffing" the equipment and returning it to the equipment room or for laundering.

A number of current and former Barber employees filed suit against the company under the Fair Labor Standards Act, claiming that the company was forcing them to work "off the clock" by not paying them for the time they spent waiting, obtaining, donning, doffing and returning their gear.

The FLSA requires an employer to record, credit, and compensate an employee for all time an employer requires or permits the employee to work. The term "work" is commonly defined as –

> physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.

An amendment to the FLSA, known as the Portal-to-Portal Act, provides that when an activity otherwise falls within the definition of "work," it is not compensable if the activity is "preliminary" or "postliminary" to the employee's principal activity or activities, unless it is an "integral and indispensable part of the principal activities" for which the employee is employed. Finally, even if an activity is properly classified as "work" and it is not exempted by the Portal-to-Portal Act, it is still not compensable if it requires so little time that it is deemed "de minimis" (minimal or trivial).

At trial of the employees' claims, the evidence showed that the combined donning and doffing times were approximately two minutes per day, which the jury found was de minimis. Claims based on time spent waiting to pick up and return gear were dismissed by the trial court as preliminary and postliminary under the Portal-to-Portal Act.

The employees decided not to challenge the de minimis ruling on appeal, but they did appeal the waiting time decision. The U.S. Court of Appeals for the First Circuit rejected the employees' claim, ruling that waiting time is not compensable under the FLSA. The Court relied on a Department of Labor regulation providing that "activities such as checking in and out and waiting in line to do so would nor ordinarily be regarded as integral

parts of the principal activity or activities." The Court recognized that the FLSA, as amended by the Portal-to-Portal Act, draws a line between compensable and non-compensable activities. Without such a line, "an almost endless number of activities that precipitate the employees' essential tasks would be compensable."

Statutory reference. 29 U.S.C. § 201.

Regulatory reference. 29 C.F.R. § 790.1.

Case reference. *Tum v. Barber Foods, Inc.*, 2003 WL 21270602 (1st Cir. 2003).

DOL Issues Proposed COBRA Regs

The health care continuation provisions of the Employee Retirement Income Security Act, known as COBRA, require health plans of most employers with 20 or more employees to provide continuation coverage after a "qualifying event" such as termination of employment. The U.S. Department of Labor has now issued proposed regulations implementing the notice provisions of COBRA.

The Treasury Department already has regulations in place for determining which plans are subject to COBRA, who are qualified beneficiaries, and what constitutes a qualifying event.

DOL's proposed regs, which were published in the Federal Register on May 28, 2003, specify the timing and content requirements of the various notices that must be given under COBRA. Model forms are included in the regs. The comment period expires July 28.

Statutory reference. 42 U.S.C. § 4980B

Regulatory reference. 29 C.F.R. § 2590.606-1 (proposed), 68 F.R. 31832; Treas. Reg. 54.4980B.

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In this issue of *Employer Alerts!* ...

- G Do Employees Have Constitutional Rights in the Workplace? .... p. 1
- G Employer Liability for Offensive Spam .... p. 2
- G Seventeen-Year-Old Need Not Complain About Harassment .... p. 4
- G Sleeping At Work Amounts to FMLA Leave Request .... p. 6
- G Employer's Sick Leave Policy Violates ADA .... p. 6
- G Voucher Program for Retirees Held Subject to ERISA .... p. 7
- G Right of Self-Defense No Protection from Firing .... p. 9
- G Time Spent "Donning and Doffing" Not Compensable Under FLSA p.10
- G DOL Issues Proposed COBRA Regs p.11

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Employer ALERTS!

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Suing Employer Is Grounds for Firing

An employer can fire an at-will employee for any reason or for no reason. But under the doctrine of "abusive discharge" (sometimes called "wrongful discharge"), he cannot fire an employee in violation of a clear and important public policy. For example, since employees in most states have a statutory right to file workers' compensation claims for work-related injuries, firing an employee for filing such a claim is generally held to be abusive.

It is not always easy to determine what constitutes a sufficiently clear and important public policy to support an abusive discharge suit. In one recent case, the employee claimed that Ohio had a clear public policy in favor of permitting employees to file law suits against their employers. Fortunately, a state appellate court in Ohio disagreed.

Purcell Taylor, a Ph.D. psychologist, began working for Volunteers of America (VOA) in 1990. During the course of his employment, a dispute arose between Taylor and VOA concerning the terms of a life insurance policy that VOA had agreed to obtain for Taylor. Apparently unable to resolve the dispute to his satisfaction, Taylor filed suit. VOA responded, first by placing Taylor on administrative leave and, a few weeks later, by firing him.

After being terminated, Taylor amended his suit to add a claim that his firing was abusive.

In rejecting Taylor's suit, the Court recognized a clear public policy favoring access to legal representation. According to the Court, an employee may consult an attorney to determine his rights and remedies under the law. But actually filing suit is another matter. Employees in that situation have a choice, said the Court: they may file suit and jeopardize their employment; or they may forego litigation to protect their employment relationship. To rule otherwise, said the Court would disrupt the balance of the employer–employee relationship.

The Court based its decision in part on that fact that in Ohio (and elsewhere) the legislature has identified situations in which a suing employee is protected from being fired. For example, firing an employee in retaliation for pursuing a charge of discrimination is itself a form of illegal discrimination.

In Maryland, an employee may be fired just for talking with an attorney. In a May 2003 decision, the Maryland Court of Appeals (Maryland's highest court) ruled that the right to consult an attorney is not a matter of clear public policy that would support an abusive discharge suit. In that case the employer gave an unfavorable evaluation to one of its employees and asked the employee to acknowledge receipt of the evaluation. The employee indicated that she first wanted to consult with an attorney. The employee was terminated shortly thereafter and the termination was upheld by the Court.

Case references. *Taylor v. Volunteers of America*, 795 N.E.2d 716 (Ohio App. 2003); *Porterfield v. Mascari II, Inc.*, 823 A.2d 590 (Md. 2003).

Employees Pay Dearly for Disloyalty

All employees–even at-will employees who have not signed non-compete agreements–owe a duty of loyalty to their employers. This means, for example, that while an employee may make plans to compete with his employer once he's quit and gone out on his own, he cannot actually engage in competition while still employed.

Employees in New York and Hawaii recently received reminders of their loyalty duty in the form of substantial money damage awards against them.

The New York Case

Rohit Phansalkar was an investment banker working for Andersen Weinroth & Co. ("AW"), a small merchant banking firm in New York. AW's business consisted of finding and creating investment opportunities for itself and outside investors. Its income was derived from transaction fees, from return on its own investments, and from directors' fees paid to its employees who sat on the boards of directors of companies with which AW did business.

Employees such as Phansalkar were required to pass on to AW any directors' fees they earned, even if the fees consisted of in-kind compensation such as stock options. AW counted on these directors' fees as its only reliable source of income from year to year. To ensure that AW could track and collect directors' fees, employees were required to report all their directorships.

Phansalkar's compensation at AW included a $250,000 base salary, plus opportunities to participate in various AW investments at discounted prices.

As part of his employment duties, Phansalkar sat on the board of an Indian telecommunications company. His compensation as a director of that company included a $2,500 cash fee (which Phansalkar disclosed to AW), and shares and options of the telecommunications company (which Phansalkar failed to disclose). Phansalkar also failed to disclose directors' fees and options he received from several other companies as well.

Eventually the relationship between Phansalkar and AW deteriorated and Phansalkar left the firm. AW then removed from Phansalkar's investment account certain stock that Phansalkar had acquired at a discount as part of his compensation at AW.

When AW learned about the undisclosed directors' fees, it sued Phansalkar, and Phansalkar in turn sued AW for return of the stock.

The trial court ruled that Phansalkar had breached his duty of loyalty and good faith to AW by failing to disclose the directors' fees. Applying New York's "faithless servant" doctrine, the trial court required Phansalkar to forfeit some $4.4 million in compensation he had improperly received. The trial court did not, however, require him to forfeit the discounted stock, ruling that the stock was part of his regular compensation and was untainted by any disloyalty.

Even though AW had won a $4.4 million judgment against Phansalkar, AW appealed, claiming that under New York's faithless servant doctrine, a disloyal employee forfeits all benefits he receives after turning disloyal, not just the improper benefits. The U.S. Court of Appeals for the Second Circuit agreed with AW. It ruled that when an employee violates his duty of loyalty, not only does he lose his secret profits, he also forfeits his right to all compensation for services rendered.

The Hawaii Case

The employer in this case, Eckard Brandes, Inc. ("EBI") was in the business of repairing and maintaining sewer and storm water pipes in Hawaii. Two of EBI's employees, while still employed by EBI, formed their own partnership and successfully bid against EBI on a local government project. When EBI learned of their disloyalty, it fired them.

Apparently undaunted by being fired, the two employees sued EBI for overtime wages they claimed were due. EBI countersued. At trial, the court dismissed the employees' overtime claim, and it ruled that the employees had to disgorge the profits they had made competing against EBI. In addition, the trial court ordered the employees to pay interest on those profits, and it required the employees to reimburse EBI for EBI's attorneys' fees.

The U.S. Court of Appeals for the Ninth Circuit upheld the trial court in all respects. It said that while still employed, an employee is entitled to make arrangements to compete, but he is not entitled to solicit customers for a rival business before the end of his employment. Nor did it make a difference that the two employees here were only low-level. The duty of loyalty, said the Court, applies to all employees, not just officers and directors.

Case references. *Phansalkar v. Andersen Weinroth & Co., L.P.,* 2003 WL 22130902 (2d Cir. 2003); *Eckard Brandes, Inc. v. Riley,* 338 F.3d 1082 (9th Cir. 2003).

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Employer-Sponsored Fishing Trip Held Non-Taxable Fringe Benefit

Section 132 of the Internal Revenue Code allows an employer to exclude from an employee's wages "working condition fringe benefits," such as upscale office appointments and use of a company car for business purposes. The test for exclusion is this: if the employee had paid the cost of the benefit himself, could he have deducted the payment as an employee business expense? If the answer is yes, then the employer need not treat the benefit as part of the employee's wages. But if the answer is no, then the benefit constitutes wages subject to withholding and payroll tax obligations.

The question is a recent case was whether an employer-sponsored fishing trip was excludible as a working condition fringe benefit.

Townsend Industries, based in Altoona, Iowa, manufactures a product that allows offset printers to produce two-color documents in a single pass through the printing press. For the last forty years Townsend has gathered its salespeople for an annual, two-day meeting at its headquarters. Corporate staff and some factory workers are also invited. After the meeting, the company sponsors a four-day, expense-paid fishing trip at a resort in Ontario, Canada. Two of those days are spent traveling by bus to and from the resort. The other two days are mostly free time for the employees. Over the four-day period, on-going business discussions take place among the employees. There is also a dinner at which company officials speak.

Arguing that the employees could not have paid the cost of the trips and then taken a business expense deduction, the IRS claimed that the per-employee cost of the trips amounted to taxable wages subject to withholding. The IRS based its position on a provision in the tax regulations that imposes specific requirements on the deductibility of employee travel and entertainment expenses that have combined business and pleasure purposes.

Under the regulations, each of the following requirements must be met for travel and entertainment expense to be deductible by the employee –

- The employee must have had more than just a general expectation of deriving a benefit from the trip.
- The employee must have actively engaged in a business meeting, negotiation, discussion, or other bona fide business transaction.
- The conduct of business must be the principal purpose of the trip.
- The expenses must be allocable to the employee and the persons with whom the employee is engaged in the active conduct of business (for example, the expenses cannot be for a spouse who accompanies the employee but plays no business role).

In reviewing all the evidence, the Eighth Circuit Court of Appeals concluded that the trips here were for a business purpose and qualified for exclusion as a working conditions fringe benefit. The Court pointed out that, although the trips were voluntary, Townsend employees felt an obligation to attend and some felt that it was a part of their job. Employees also testified as to specific business discussions held during the trips, such as the need to introduce a new model of its product to meet the competition. And salespeople testified as to maintenance problems they were having and they passed along suggestions to home office personnel on ways to improve the product.

According to the Court, Townsend had a realistic expectation of gaining concrete future benefits from the trips. Thus, Townsend had no withholding or payroll tax obligations with respect to the trips, even though Townsend could deduct the cost of the trips on its own corporate tax returns.

Statutory reference. 26 U.S.C. §§ 132, 274.

Case reference. *Townsend Industries, Inc. v. United States,* 342 F.3d 890 (8th Cir. 2003).

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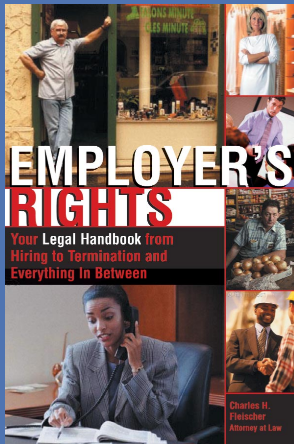

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CGL Policy Covers Negligent Hiring Claim Brought by Daughter of Murdered Customer

Tech Dry, Inc., a Kentucky carpet cleaning company, hired Fred Furnish as a carpet cleaner, but failed to perform a criminal background check on him. Tech Dry even kept him on after receiving complaints of theft from customers and after learning that Furbish had stolen money from Tech Dry itself.

While in Tech Dry's employ, Furbish performed work at the home of Ramona Williamson. Later, after Furnish's employment was terminated, he returned to Williamson's home and murdered her. Williamson's daughter, who was named as executor of her mother's estate, then brought suit against Tech Dry, claiming that Tech Dry had been negligent in hiring and retaining Furnish.

Tech Dry had purchased a commercial general liability (CGL) policy of insurance for its business from Westfield Insurance Company. Tech Dry asked Westfield, as its CGL carrier, to handle the daughter's claim.

The CGL policy covered "bodily injury" caused by an "occurrence," which the policy defined as "an accident." The policy excluded occurrences "expected or intended from the stand-point of the insured [Tech Dry]." Westfield responded to Tech Dry by filing suit in federal court, asking the court to rule that the daughter's claim was not covered by the CGL policy because negligent hiring is not an "occurrence" within the meaning of the policy. According to Westfield, the decision to hire an employee is an intentional, volitional act that cannot constitute an "accident," even if the results of that decision are unexpected or unforeseen. Further, according to Westfield, Furnish's act of murdering his former customer was certainly not accidental.

The U.S. Court of Appeals for the Sixth Circuit disagreed with Westfield, holding that the CGL policy did cover the daughter's claim. The Court pointed out that the "occurrence" in this case was not Furnish's intentional act of murder, but instead was Tech Dry's (allegedly) negligent act in hiring Furnish without performing a proper background check. And since there was no certainty that Tech Dry's negligence would in fact result in injury or death, Tech Dry could not have expected or intended the actual result.

A note of caution: the favorable result in this case depended on the specific language of Tech Dry's CGL policy. Policies differ, however, and many policies exclude employment-related claims. For example, in another recent case, the owner of an apartment building reported to the police that its former manager had withheld some of the rents she had collected. The manager was arrested, but she denied any wrongdoing and sued her former employer for false arrest. The employer then looked to his business insurance policy for coverage. Although the policy expressly covered false arrest, it had an exclusion for injury "arising out of...employment-related practices, policies, acts or omissions." The court ruled that the exclusion applied and that the apartment building owner was not covered for the manager's false arrest suit.

As this second case illustrates, employers need to read their policies carefully, discuss them with their insurance brokers, and consider buying additional insurance to cover any exclusions.

Case references. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503 (6th Cir. 2003); *Capitol Indemnity Corp. v. 1405 Associates, Inc.*, 340 F.3d 547 (8th Cir. 2003).

Employer's Lactation Policy Upheld

After maternity leave, Kathleen Landor-St. Gelais returned to work at Albany International Corp. as a joiner machine operator. Since she was breast-feeding her new baby, she used a breast pump to express milk during the workday. She used the pump in a stall of the women's bathroom, storing her milk in a refrigerator used by other employees. She followed this procedure every three or four hours while on company time.

After her coworkers complained, the company adopted a lactation policy which required Gelais to use the breast pump in the company's medical office while on break, and to store her milk in the medical office refrigerator. Gelais claimed that the new policy discriminated against her on the basis of gender and pregnancy, and she filed suit against the company in New York state court.

The Court upheld the company's policy, pointing out that the policy did not prohibit Gelais from using a breast pump at work. Instead, said the Court, it imposed reasonable parameters on that activity in an effort to accommodate Gelais, address the concerns of coworkers, and maintain a productive work environment.

Case reference. *Gelais v. Albany International Corp.*, 763 N.Y.S.2d 369 (App.Div. 2003).

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Handling a Social Security Administration "No-Match" Notice

It is illegal for an employer knowingly to hire or continue to employ undocumented aliens who are not eligible to work in the United States. Federal law requires employers to check the documentation of every new employee and to complete and keep on file a Form I-9 (available from the Bureau of Citizenship and Immigration Services website, www.immigration.gov).

Suppose an employer does exactly as required, by filling out Form I-9, inspecting the employee's original documentation, and satisfying himself that the employee is indeed eligible to work in the U.S. In addition, for income tax withholding purposes, the employer requires the employee to furnish Form W-4 by which the employee certifies his Social Security Number (SSN). Then at year's end, the employer issues a W-2 to the employee showing taxable income paid during the year, and the employer sends a copy of the W-2 to the Social Security Administration.

Despite careful compliance with these immigration and tax requirements, the employer gets a "no-match" notice from the Administration stating that, according to the Administration's records, the employee's name and SSN don't match. How should the employer respond? Should he assume that the employee gave a fake Social Security Number on his W-4? Should he fire the employee on the assumption that the employee is an illegal alien?

Firing the employee solely on the basis of a no-match notice could be risky. The same federal law that prohibits the employment of undocumented workers also prohibits discrimination on the basis of citizenship status or national origin. The mis-match could be the result of an employer error in recording the employee's SSN on the W-2, or the result of an employee name change through marriage or divorce, or the result of an error on the employee's W-4. So any adverse action taken on the strength of a no-match notice could amount to illegal discrimination.

Instead, on receipt of a no-match letter the employer should –

- Check the employer's own records for errors.
- Provide a copy of the no-match notice to the employee and ask him to check his records.
- Promptly report any corrected information to the Social Security Administration.
- If no obvious errors in the employer's or employee's records are apparent, suggest that the employee contact the Social Security Administration for help.

The Social Security Administration even has procedures available for verifying SSNs in advance. See www.ssa.gov/employer/ssnv.htm.

The no-match issue recently came up in a peculiar way. Janice Arres was human resources administrator of IMI Cornelius Remcor, Inc., a company that manufactures soft drink dispensing machines in Illinois. In March 1999, the Social Security Administration notified Remcor that a number of the W-2s Remcor had filed contained mis-matches. Finding no error in the company's own records, Arres concluded that the employees were undocumented aliens, and she recommended to her supervisor that the employees be fired.

Arres' supervisor told Arres that he would handle the matter. He then checked with the Social Security Administration and with the company's attorney and, based on the advice he received, decided to send letters to each of the employees asking them to correct any errors. Believing that approach to be unlawful, Arres refused to process the new information submitted by the employees.

When Arres was fired for refusing to process the information, she filed suit against Remcor. She claimed that her firing was in retaliation for attempting to enforce federal immigration laws – a legally protected activity according to Arres. She also claimed that the firing was abusive in that it violated Illinois public policy.

The U.S. Court of Appeals for the Seventh Circuit rejected Arres's claims. The Court noted that Remcor did exactly what the Social Security Administration and its own legal counsel had suggested: before firing anyone, it tried to separate those who had made inadvertent errors from those who were not entitled to work in the United States. Doing this, said the Court, enabled Remcor to respect the rights of aliens who have work authorizations, while also following its duties under federal law. A human resources manager is simply not free to decide on her own what the law requires and act unilaterally based on her personal views; that is nothing more than insubordination.

Statutory reference. 8 U.S.C. § 1324.

Case reference. *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812 (7th Cir. 2003).

More on "Concerted Activities" Under Federal Labor Law

Federal labor law prohibits employers – even non-unionized employers – from interfering with employees' "concerted activities" to better their wages, hours, or working conditions. See "Labor Law Protections in Non-Union Shops," *Employer Alerts!*, Feb. 2002, p. 6. Two recent cases show how the rules in this area work.

JCR Hotel, Inc. v. NLRB

Patsy Wilson worked in the housekeeping department of a Ramada Inn in Jefferson City, Missouri, owned by JCR Hotel, Inc. On one occasion JCR told its housekeeping employees that the free meal they were customarily provided would not be available that day. While on break, a number of housekeeping employees, including Wilson, complained about the situation. One of the employees said that JCR would only pay attention to complaints if they all walked out or sat down on the job. Wilson added that a walkout should occur on a full house day, such as when the Elks organization had the entire hotel booked for a meeting.

Several days later, a supervisor overheard other employees discussing Wilson's comment about walking out on a full house day. The supervisor reported the incident to management, and Wilson was promptly fired.

Wilson later testified that she never intended to organize a walkout. Pointing to this testimony, JCR argued that it could not have interfered with concerted activity because there was no concerted activity in fact: Wilson was merely griping, not rallying fellow workers to protest working conditions.

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Both the National Labor Relations Board and the U.S. Court of Appeals for the Eighth Circuit ruled that JCR had committed an unfair labor practice by interfering with concerted activity. It didn't matter, said the NLRB and the Court, that Wilson wasn't actually planning a walkout. It was enough that her employer merely believed she was engaged in concerted activity and fired her based on its erroneous belief.

First Healthcare Corp. v. NLRB

The employer in this case owned a number of nursing homes in California. Some of its facilities were unionized, while others were non-union. The employer had a policy prohibiting employees of one facility, when off-duty, from entering other facilities where they weren't employed. While the policy did not say that it was designed to prevent unionized employees from trying to organize non-union facilities, that was its practical effect.

The question in the case was whether the policy was an unlawful interference with concerted activity.

Hoping to uphold its policy, the employer argued that as owner of the nursing homes, it had a property right which it was free to protect. According to the employer, when an employee tries to enter a facility where he isn't employed, he is the equivalent of a non-employee and can legitimately be kept out. The employer relied on the long-standing, well-recognized rule that, in general, the National Labor Relations Board cannot order an employer to grant non-employee union organizers access to company property.

The union, which was hoping to organize the non-union facilities, argued that even though off-site employees don't work at the facilities where they are seeking access, they are still employees. The union relied on the long-standing, well-recognized rule that the NLRB can order an employer to permit off-duty employees to conduct union organizing activities in non-working areas.

So, for union organizing purposes are off-site employees still "employees," or are they strangers who can be kept out?

The U.S. Court of Appeals for the Sixth Circuit ruled that they were employees who must be granted access to conduct organizing activities. The Court reasoned that although the on-site and off-site employees work at different facilities, as employees of the same employer they all share common concerns, such as wages, benefits, and other workplace issues. Those common concerns justify organizing efforts by off-site employees.

Statutory reference. 29 U.S.C. § 157.

Case reference. *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837 (8th Cir. 2003); *First Healthcare Corp. v. NLRB*, 2003 WL 22149388 (6th Cir. 2003).

False UI Report Exposes Employer to Suit

When an employee is laid off and applies for unemployment insurance (UI) benefits, the employer will be requested to submit separation information to the UI benefits office. Misrepresenting the reason for separation – saying for example that a laid off employee was fired for misconduct, in order to disqualify the employee from UI benefits – has long been criminal. Now a recent District of Columbia case says that false separation information may expose the employer to civil liability as well.

Leslie Pope applied to Romac International, a temp staffing agency, for work. Romac hired Pope and assigned her to MCI, one of Romac's clients, on a temporary basis. When Pope's assignment with MCI ended, Pope filed for unemployment compensation in Maryland. The Maryland Unemployment Office in turn sent Romac a Request for Separation Information. Romac responded that Pope had been discharged for failure to follow instructions and work to the best of her ability, and noted that she had missed a few weeks of work at MCI due to illness. Romac also noted that after having been notified her assignment at MCI would end, Pope failed to show up for two days and was told by MCI not to bother returning for the last days of employment.

Pope eventually got UI benefits from Maryland, but she sued Romac anyway, claiming that Romac has intentionally mischaracterized the reason for her termination to avoid paying unemployment insurance. The D.C. Court of Appeals agreed that Pope's claim could make out a good legal case, and it sent the matter back to the lower court for trial.

Statutory references. *Md. Code,* L&E § 8-105; D.C. Code § 51-119.

Case reference. *Pope v. Romac International,* 829 A.2d 945 (D.C. 2003).

Where Does Telecommuter Work for UI Benefit Purposes?

In another recent unemployment insurance case, the question was which state should pay benefits to a telecommuter – the state where the telecommuter lives and physically works? or the state where the employer has its place of business?

Maxine Allen worked for Reuters America, a financial information services provider, as a technical specialist. At the time she was hired, she both lived in New York and worked at Reuters' New York offices. Later, she relocated to Florida for personal reasons, and she asked Reuters to permit her to telecommute. Reuters initially agreed and installed a second phone line in her Florida home. This allowed Allen to communicate via the Internet with Reuters' main-frame computer in New York. With this arrangement in place, Allen was able to perform the same job functions as when she was physically located in New York.

Eventually, Reuters decided to end the arrangement, offering to place Allen back at its New York office. Allen declined and filed for UI benefits in Florida. Reuters objected, contending that Allen had quit without good cause. Florida agreed with that contention and denied benefits to Allen.

Allen then filed an interstate UI benefits claim form, indicating that she worked at Reuters' New York address. Pending the processing of this second claim, New York paid Allen $8,395 in UI benefits.

The New York Court of Appeals (New York's highest court) ruled that Allen was not entitled to UI benefits from New York. It determined that physical presence is the proper test for entitlement to benefits, and Allen was physically present in Florida, not New York. Florida, said the Court, is the state where Allen's unemployment will have the greater impact and where she will presumably be looking for new work. Physical presence also makes sense because each state's benefit structure is generally linked to the cost of living in that state.

Not only was Allen denied benefits in New York (having already been denied benefits in Florida), the Court concluded that Allen had made a false statement on her claim form when she said she worked in New York. Therefore, Allen had to refund the $8,395 that she had received pending resolution of her claim.

Case reference. *In Re Allen*, 794 N.E.2d 18 (N.Y. 2003).

Non-Prescription Meds Now Qualify for FSA Reimbursement

The Internal Revenue Service has recently ruled that non-prescription medicines, such as antacids, allergy medicines, pain relievers and cold medicines, qualify for tax-free reimbursement under Flexible Spending Arrangements (FSAs). According to the ruling, such medicines meet the statutory test of "expenses incurred for medical care," even though they have not been prescribed by a physician. (See "Consumer-Directed Health Plans: FSAs and HRAs," Employer Alerts!, Oct. 2002, p. 2, for more detailed information on FSAs.)

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Vitamins and other dietary supplements, however, are not for "medical care" since they are merely beneficial to good health. Therefore, they do not qualify for reimbursement under an FSA.

While this new ruling significantly expands the types of expenses that are eligible for tax-free FSA reimbursement, the ruling has no effect on the deductibility of medical expenses for taxpayers who itemize their deductions and who do not participate in FSAs. Under a separate section of the Internal Revenue Code, a medical expense is deductible only if the medication has been prescribed by a physician.

Statutory reference. 26 U.S.C. §§ 105, 213.
Regulatory reference. Rev.Rul. 2003-102.

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In this issue of Employer Alerts! . . .

- Suing Employer Is Grounds for Firing
- Employees Pay Dearly for Disloyalty
- Employer-Sponsored Fishing Trip Held Non-Taxable Fringe Benefit
- CGL Policy Covers Negligent Hiring Claim Brought by Daughter of Murdered Customer
- Employer's Lactation Policy Upheld
- Handling a Social Security Administration "No-Match" Notice
- More on "Concerted Activities" Under Federal Labor Law
- False UI Report Exposes Employer to Suit
- Where Does Telecommuter Work for UI Benefit Purposes?
- Non-Prescription Meds Now Qualify for FSA Reimbursement

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Partial Strike Not Protected Under Federal Labor Law

The National Labor Relations Act, with few exceptions, guarantees employees the right to strike. The courts have characterized this right as a legitimate economic tool which "implements and supports the principles of the collective bargaining system" and which labor unions may use as they see fit. The Greenbrier, a luxury resort in White Sulphur Springs, West Virginia, recently needed reminding of the right to strike.

In a case before the National Labor Relations Board, the Greenbrier contracted with Lynch Construction Company to perform certain work at the hotel. Lynch hired non-union employees to do the work, even though the work would normally have been done by Lynch's unionized operating engineers. When the union learned of this, it set up a picket line on public property near a gate used by Lynch to access the Greenbrier. In doing so, the union failed to obtain a permit as required by a local ordinance governing public demonstrations. The Greenbrier responded to the picketing by contacting town officials, urging them to enforce the ordinance and arrest the picketers. The Board held that the picketers were engaged in protected activity and that the Greenbrier committed an unfair labor practice by urging enforcement of the permit ordinance.

As the Greenbrier case illustrates, some types of interference with the right to strike run afoul of federal labor law. But one step an employer may take when employees are engaged in an economic strike – a strike to improve wages, benefits or other working conditions – is to hire permanent replacements, effectively firing the striking workers. (When employees are engaged in a strike to protest unfair labor practices, the employer is prohibited from hiring permanent replacements.)

Rather than risk their jobs by striking to protest working conditions, employees sometimes engage in "job actions" such as slowdowns or refusals to perform certain functions or refusals to work overtime. As shown by a recent case from the U.S. Court of Appeals for the Sixth Circuit, such job actions are not protected and expose participating employees to termination.

Vencare Ancillary Services, Inc., a non-union shop, operates nursing facilities and nursing homes at which it employs physical therapists, speech therapists, rehabilitation technicians, and aides. When Vencare announced that it would be reducing the wages of its rehabilitation employees, the affected employees established an informal group to protest the action. The group wrote a letter to management containing various demands, and it selected one of its members to represent them in a meeting with management.

The group representative told Vencare's on-site supervisor that until someone from upper management met with the group to discuss their concerns, they would refuse to see patients and would only do paperwork. The supervisor responded by instructing all employees to continue seeing patients until the supervisor received guidance from upper management. When the employees refused to see patients as instructed, they were fired for insubordination.

The National Labor Relations Board ruled that Vencare had committed an unfair labor practice by firing the employees, since they were engaged in protected "concerted activities." See *"Labor Law Protections in Non-Union Shops," EMPLOYER ALERTS!*, Vol. II, No. 9 (Feb. 2002), p. 6; "*More on Concerted Activities," EMPLOYER ALERTS!*, Vol. IV, No. 2 (Fall 2003), p. 6. The Sixth Circuit disagreed and upheld the firing. The Court pointed out that employees assume the risk of losing their jobs when they engage in an economic strike. What they cannot do is strike and, at the same time, retain the benefits of working. Partial strikes, said the Court, are not protected by federal labor law.

The Court explained that an employer has a right to know whether or not its employees are striking. Employers are entitled to a clearcut decision from employees either to join a strike or to work in accordance with the employer's instructions. Employees cannot refuse to perform certain work, either openly or secretly, while at the same time remaining on the employer's premises and demanding a paycheck.

Statutory reference. 29 U.S.C. § 151.

Case references. *CSX Hotels, Inc.*, 340 NLRB No. 92 (2003); *Vencare Ancillary Services, Inc. v. NLRB*, 2003 WL 22908487 (6th Cir. 2003).

May Employee Who Is Receiving Workers' Comp Benefits Be Fired?

Workers' compensation acts are "no fault" laws under which the employer is automatically obligated to pay compensation and benefits for any employee who suffers a work-related illness or injury. The trade-off for the employer is that workers' compensation benefits are the employee's exclusive remedy. Unless the employer deliberately intended to injure or kill his employee, the employee cannot sue the employer in court, the employee cannot demand a jury trial, and the employee cannot obtain open-ended damages for pain and suffering.

Since workers' comp benefits are the employee's only remedy, it makes sense that an injured employee who takes advantage of that remedy and files a claim for benefits will be protected from retaliation by his employer. And that is exactly what the courts have ruled: an employer cannot fire an employee or take other adverse action against him because he has filed a workers' comp claim.

But what if the employee is fired not because he filed a claim, but because he is out on temporary total disability (TTD) due to a work-related injury or illness? Suppose an employer has an across-the-board policy that any employee who is incapacitated for more than two weeks is subject to being terminated and having his position filled by a permanent replacement. Suppose also that the employer can show a legitimate business reason for such a policy and can show that the policy is applied evenhandedly, regardless of whether the incapacity is work-related. Shouldn't the employer be allowed to enforce its policy, even as to employees who are out on TTD and receiving workers' comp benefits?

For the most part, the courts have agreed with the employer on this issue and have ruled that an employer has no duty to carry an employee who doesn't show up for work, even if the reason he doesn't show up is a work-related disability.

A small minority of states – most notably, Ohio and Kansas – go the other way. In a recent Ohio Supreme Court decision, for example, the Court said that a rule prohibiting such terminations is necessary to protect the rights of employees to freely pursue workers' comp benefits without fear of reprisal. In any event, said the Court, an employee has a right to be absent from work while temporarily incapacitated as a result of a compensable injury. Under this minority view, getting terminated for being out of work is really no different from getting terminated for filing a comp claim. Either way, the employer is illegally discouraging its employee from pursuing a statutory right to benefits.

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Among the three local jurisdictions, only Virginia has expressly addressed the question. By statute in Virginia, an employee who suffers a work-related injury may be absent for up to six months before the employer can dismiss him. However, dismissal within the six-month period is permitted "if the employer's circumstances have changed during such employee's absence so as to make it impossible or unreasonable not to discharge such employee."

In both Maryland and the District, there is little doubt that firing an employee *for filing a comp claim* would be held illegal. But neither Maryland nor the District has considered the precise question whether an employee who is receiving comp benefits may be fired *for absence from work*. Presumably, Maryland and the District would follow the majority rule and permit an employer to replace an incapacitated employee, even if the incapacity arose from a work-related incident. But until the question is actually ruled on by the courts, no definitive answer can be given.

Even where dismissal is otherwise permitted, firing an employee who is out on work-related disability is fraught with peril –

- The employee may argue that the termination was abusive or in retaliation for his having filed a workers' compensation claim. In order to defeat such an argument, the employer would have to show that it has an across-the-board policy of discharging all disabled employees and that it applies the policy evenhandedly for both work-related and non-work-related disabilities.

- The employee may be entitled to leave under the federal Family and Medical Leave Act or under a state law counterpart of FMLA. (See the discussion of *Russell v. North Broward Hospital* in "FMLA Update" later in this issue.)

- If the disabling condition is not merely temporary and if it substantially interferes with one or more major life activities, the employer's duty of reasonable accommodation under the Americans with Disabilities Act (ADA) or state law may be triggered.

Statutory reference. Va. Code § 40.1-27.1.

Case references. *Coolidge v. Riverdale Local School District,* 797 N.E.2d 61 (Ohio 2003); *Ewing v. Koppers Co.,* 537 A.2d 1173 (Md. 1988); *Allen v. Bethlehem Steel Corp.,* 547 A.2d 1105 (Md.App. 1988); *Carl v. Children's Hosp.* 702 A.2d 159 (D.C. 1997); *Freas v. Archer Services, Inc.,* 716 A.2d 998 (D.C. 1998).

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Misrepresenting Job to Applicant Held Actionable

When an applicant quits his existing job, turns down other offers, or moves cross country to accept new employment, only to find out that the job is not what was promised, he can sue the employer for misrepresentation or deceit, and he may well win substantial money damages. A recent decision by the U.S. Court of Appeals for the Ninth Circuit drives home how important it is for an employer to disclose all significant aspects of the job before making an offer of employment.

Pierre Arboireau worked for the Adidas company in France. When an Adidas position in Portland, Oregon became open, Adidas encouraged Arboireau to apply. Adidas repeatedly stressed that it was looking for someone to stay in the position for at least two, and preferably three years. Arboireau in turn expressed the importance to him of job stability, particularly since he would be relocating his family and his wife would be taking leave from her existing job. Adidas failed to tell Arboireau that it was considering moving the Portland position to Germany.

After Arboireau moved to Portland and began work, he became aware of pressure within the company to move the position to Germany. Arboireau himself recognized that such a move would make good business sense. Some six months after hiring Arboireau, Adidas did in fact move the position to Germany, it hired someone else to fill it, and it fired Arboireau. Arboireau then sued for misrepresentation.

The federal trial court in Oregon dismissed Arboireau's complaint, but the Court of Appeals reversed, allowing the suit to go forward. The Court said that the stability of the position was of paramount importance to Arboireau and he would not have accepted it had he known of the pressure to move the position to Germany. Adidas, in turn, knew of the importance of locational stability to Arboireau. Adidas' failure to disclose the risk to Arboireau amounted to a misrepresentation under Oregon law.

The courts in both Maryland and the District follow the same rule. For example –

- A physical therapist successfully sued a hospital in Berlin, Maryland after the hospital's CEO made an employment offer, the therapist accepted and turned down a competing opportunity, and then found out that the CEO lacked authority to make the offer.

- After a high-level executive resigned his existing position to accept employment with another company, he was told for the first time that he would have to sign an onerous employment contract. He refused to do so, was fired, and sued for damages. The Maryland Court of Appeals upheld the executive's claim.

- A Ford Motor Company vice president was hired away from Ford by a Toyota dealership in Anne Arundel County to become the dealership's executive vice president. During pre-employment negotiations, the dealership's owner represented that his franchise with Toyota was secure. But within a few days after assuming the job, the new EVP learned that the dealership's general manager, who was largely responsible for the high level of sales at the dealership, was unhappy and had threatened to quit numerous times. If he did so, Toyota was likely to cancel the dealership's franchise. In fact, unknown to the EVP, the EVP had been hired to be a buffer between the general manager and the dealership's owner. When the situation continued to deteriorate, the EVP quit and successfully sued the dealership.

- An interpreter-translator who had worked for the U.S. Information Agency for 12 years, applied to Berlitz in the District to perform similar work under a contract that Berlitz had with the Army's Special Warfare School. The applicant was an alien and asked whether his non-citizen status would disqualify him from the job. Berlitz assured him it would not. At the same time, however, Berlitz was confirming to the Army that it would make every effort to hire only U.S. Citizens and, when unable to do so, would promptly replace non-citizen employees. The applicant took the Berlitz job, but when he was discharged shortly thereafter based on his alien status, he sued. The Court ruled that the applicant had a good claim.

Some employers have tried to escape liability by arguing that in an at-will the employment relationship the employer is free to terminate the employee at any time or to change the terms or conditions of employment. According to this argument, it doesn't matter that the job was misrepresented during pre-offer negotiations, because the employer could impose whatever new conditions it wished once the employment relationship had begun. The courts have responded by saying that an at-will relationship may affect the amount of damages a deceived employee can recover, but it does not bar him from suing in the first place.

Employers need to be mindful of the risks associated with misrepresentation and follow these guidelines when they are about to make an offer –

- Describe the job accurately by furnishing a written job description that is complete and up-to-date.

- Give accurate estimates of job features that are likely to be of interest or concern to an employee, such as overtime requirements, travel, etc.

- Allow the applicant an opportunity to review the employee handbook and other important policy statements with which the applicant will be expected to comply if hired.

- Furnish copies of all contracts the applicant will be required to sign upon hiring, such as a non-compete agreement, an arbitration agreement, etc.

- Describe the hiring process, including who makes the decision to offer a job and what further approvals, if any, are necessary. State clearly and explicitly that the offer is conditioned on ratification by the company's board of directors or by some other official, if that is the case.

- If the company is about to move its facilities, or is considering a possible bankruptcy, or is facing the loss of an important contract or some other event that could significantly affect the applicant's job, the facts should be disclosed.

- Give the applicant a firm date by which the company will make a decision. If the company has not made a decision by that deadline, contact the applicant, inform him that the decision is still pending, and ask if the applicant wishes to continue being considered.

- Once a decision is made, promptly inform the applicant.

- If the applicant is being rejected, send him a note confirming the rejection and thanking him for his interest. Do not tell the applicant that his résumé will be "kept on file" and do not encourage him to think he is still under consideration when in fact he is not.

Case references. *Arboireau v. Adidas-Salomon AG*, 347 F.3d 1158 (9th Cir. 2003); *Griesi v. Atlantic Gen. Hosp. Corp.*, 756 A.2d 548 (Md. 2000); *Weisman v. Connors*, 540 A.2d 783 (Md. 1988); *Lubore v. RPM Associates, Inc.*, 674 A.2d 547 (Md.App. 1996), *cert. denied*, 683 A.2d 177 (Md. 1996); *Andolsun v. Berlitz School of Languages of America, Inc.*, 217 A.2d 655 (D.C.App. 1966); *Tonn v. Philco Corp.*, 241 A.2d 442 (D.C.App. 1968); *Hall v. Ford*, 856 F.2d 255 (D.C.Cir. 1988).

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FMLA Update

The Family and Medical Leave Act (FMLA) requires covered employers with 50 or more employees to grant up to 12 weeks' unpaid leave to an employee who has a "serious health condition." (FMLA is also triggered when an employee needs leave to care for a spouse, child or parent who has a serious health condition or to care for a newborn or adopted child.)

FMLA defines "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves either –

- inpatient care in a hospital, hospice, or residential medical care facility; or
- continuing treatment by a health care provider.

Department of Labor regulations expand on this definition. According to DOL regs, in order for a health condition to qualify as "serious" and involve "continuing treatment" the employee must be incapacitated (unable to work) for "more that three consecutive calendar days" and the condition must involve "treatment two or more times by a health care provider." DOL regs go on to say –

> Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

To be eligible for FMLA leave, the employee must have been employed for at least 12 months and worked at least 1,250 hours. When an employee has taken FMLA leave and is ready to return to work, the employer must offer him the same position he had before the leave or an equivalent position. See *"FMLA's 'Equivalent Position' Requirement," EMPLOYER ALERTS!,* Vol. II, No. 4 (Sept. 2001), p. 4. And an employer cannot fire an employee in retaliation for his taking FMLA leave.

Recent cases shed additional light on these FMLA provisions.

Serious Health Condition:

Russell v. North Broward Hospital

Margaret Russell worked in Patient Accounts at North Broward Hospital in Florida. Prior to the incident in question, she had been disciplined a number of times for unscheduled absences.

In May 2000, Russell fell at work, breaking her elbow and ankle and spraining her wrist. She was referred to the Hospital-approved workers' compensation health care provider for treatment. She did not return to work that day. Over the next few days she did report to work, but in each case left after a few hours, complaining of severe pain or of nausea from the painkillers she was taking. She also missed time for follow-up doctor's appointments. Eventually the Hospital fired her.

Russell sued, claiming the Hospital had retaliated against her for taking FMLA leave. To prove retaliation, however, Russell first had to show that she had a "serious health condition" and was entitled to FMLA leave. She based her proof on the fact that she was incapacitated for *portions of* more that three consecutive calendar days. The Hospital disputed Russell's claim, arguing that the regulatory language "three consecutive calendar days" means three *full* days (72 hours).

The Eleventh Circuit U.S. Court of Appeals sided with the Hospital, ruling that the period of incapacity must be continuous for more than three days and that partial days of incapacity don't count. In the Court's words –

> If we interpret [the DOL regulation] as requiring full days of incapacity, as we do, the requirement will ensure that 'serious health conditions' are in fact serious, and are ones that result in an extended period of incapacity, as Congress intended. This interpretation adds certainty to the law by reading the regulation to set forth an objective, bright-line rule defining the period of incapacity necessary to invoke the protections of the FMLA.

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Not all courts take "serious" as seriously as the Eleventh Circuit. In 2001, the U.S. Court of Appeals for the Fourth Circuit (which hears federal appeals from Maryland and Virginia), ruled that the flu can qualify for FMLA leave, even though the flu is listed in DOL regs as one of those conditions that do not meet the definition of "serious health condition." See *"Fourth Circuit Says Flu Can Qualify for FMLA Leave," EMPLOYER ALERTS!,* Vol. II, No. 1 (June 2001), p. 6.

12-Month Eligibility Requirement:

Babcock v. Bellsouth

Margaret Russell's case turned on the proper method for counting "three consecutive calendar days." Kimberly Babcock's suit against Bellsouth turned on the proper method for counting FMLA's 12-month eligibility requirement.

Babcock began work for Bellsouth as an outside sales representative on June 1, 1999. In April 2000, she began experiencing a variety of health problems, prompting her doctor to recommend that she take leave from work. She ignored that advice for a while, but on May 18 she asked to be placed on short-term disability in accordance with Bellsouth's established STD policy. The company responded that it would need supporting paperwork from her physician. Babcock left work later that same day.

On May 22, Babcock informed Bellsouth that her physician had recommended six weeks' leave and that the supporting paperwork would be furnished. Thinking that six weeks' STD leave had been approved, Babcock left town and did not return until June 9. When she returned home, she found a letter from Bellsouth stating that, based on information from her doctor, STD leave had only been approved through May 27. The letter went on to say that if she did not return to work by June 9, she could be terminated.

Babcock called Bellsouth on June 9 and asked for additional leave. The company said no, explaining that she was not eligible for FMLA because she had not worked a full year as of May 18 when her leave began. After Babcock failed to return to work as instructed, she was terminated.

In Babcock's subsequent lawsuit, the Fourth Circuit recognized that under Department of Labor regulations, the determination whether an employee has been employed by his employer for at least 12 months must be made as of the date leave commences. So the question here was whether Babcock's leave began on May 18, when she went on short-term disability, or June 9, when she requested additional leave in the face of Bellsouth's instruction to return to work. The choice was critical, because May 18 was less than 12 months from Babcock's June 1, 1999 start date, but June 9 put her beyond the 12-month threshold.

Incredibly, the Court selected June 9. It ruled that from May 18 to May 27 Babcock was on authorized STD leave and, from May 27 to June 9 she was on unauthorized leave, but she was still an employee. Therefore, when she requested additional leave on June 9, she was eligible for FMLA and her request should have been granted.

Even the Court's own opinion points out that Babcock's initial request for leave was sufficient to invoke FMLA, since an employee need not explicitly say "FMLA" to trigger the employer's obligation to offer FMLA leave. Instead of granting FMLA leave, however, Bellsouth placed her on short-term disability, a status more favorable than unpaid FMLA leave. And when that leave expired, it gave her additional time to report to work. In short, the Court seems to have punished Bellsouth for adopting policies more favorable than FMLA.

Reinstatement:

Scott v. Yellow Management, Inc.

Rodney Scott, a bus driver for Yellow Management, requested leave under FMLA for alcohol abuse and addiction. The leave was granted, but in accordance with the company's established policy, Scott was required to complete an intensive out-patient program as a condition to job restoration. Scott failed to complete the program and instead attempted to return to work with a release-to-work note from his doctor. Yellow Management reject the note and informed Scott that unless he completed the out-patient program he would be fired. When Scott still failed to satisfy the requirement, he was terminated.

The U.S. District Court for Maryland quickly dismissed Scott's subsequent suit. The Court observed that Yellow Management complied with FMLA by granting him leave. It fired him not for taking FMLA leave but for failing to comply with company policy regarding treatment. It would have been entirely irresponsible, said the Court, for the company to have reinstated Scott under the circumstances, considering Scott's job as a bus driver.

For further information on firing an employee while on FMLA leave, see *"Disciplinary Action Against Employee on FMLA Leave," EMPLOYER ALERTS!*, Vol. I, No. 12 (May 2001), p. 4; *"Firing for Misconduct Upheld Despite FMLA Leave," EMPLOYER ALERTS!*, Vol. III, No. 12 (June 2003), p. 2.

Statutory reference. 29 U.S.C. § 2601.

Regulatory reference. 29 C.F.R. § 825.100.

Case references. *Russell v. North Broward Hosp.*, 346 F.3d 1335 (11th Cir. 2003); *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001); *Babcock v. Bellsouth Advertising & Publishing Corp.*, 348 F.3d 73 (4th Cir. 2003); *Scott v. Yellow Mgmt., Inc.*, 2003 WL 22297775 (D.Md. 2003), *appeal filed* (4th Cir. No. 03-2495, Nov. 19, 2003).

Detours and Frolics – When Is Employer Vicariously Liable?

As a matter of social policy, the law has long held employers liable to pay damages suffered by third parties due to an employee's negligent conduct that occurs within the scope of employment. (The term "third party" as used here means someone outside the employment relationship, such as a customer or an innocent bystander.) This type of indirect or vicarious liability to third parties is based on the legal doctrine known as respondeat superior, or "let the employer respond" (by paying money damages). It doesn't matter that employer himself is guiltless or even that the employee acted contrary to the express instructions of his employer when the negligent conduct occurred.

The policy of imposing vicarious liability is based in part on the notion that, as between the employer (who has the right to control his employee's conduct) and an innocent third party, the employer should bear the cost of the third party's injuries. The policy also recognizes that, for the most part, the employer is in better position to pay damages, or at least to assess the risks involved in his business and carry appropriate insurance.

An employee who departs from his duties to attend to a personal matter may or may not be acting within the scope of his employment. If the departure is only a slight deviation from duty, then the employee will be considered to be on a mere "detour" and his employer will be liable for any damages caused by the employee's negligence. On the other hand, an employee who so departs from his duties as to be on a "frolic" of his own will not impose vicarious liability on his employer.

Several recent cases show how this works.

O'Shea v. Welch

Anthony Welch was a store manager for the Osco Drug Store chain. At the time of the incident, he was driving his own vehicle from his store to an Osco District Office to deliver football tickets given him by a vendor for distribution among Osco managers. During the drive, Welch remembered that he needed to have some routine maintenance done on his car. He made a spur-of-the-moment decision to pull into a service station for an estimate, but while making a left turn into the service station, he failed to yield and collided with a car driven by John O'Shea.

O'Shea sued both Welch and Osco for his injuries. The trial court, applying Kansas law (where the accident occurred), dismissed the case against Osco, ruling that Welch was not acting within the scope of his employment at the time of the accident.

The U.S. Court of Appeals for the Tenth Circuit disagreed, saying that O'Shea's claim against Osco should have been decided by a jury and not dismissed out of hand by the trial court. The Court of Appeals pointed out that Welch frequently used his personal vehicle for company business, he was still on the road to the District Office when the accident occurred, and the time interval between Welch's departure from his specific duties and the accident was very brief. Given all these factors, said the Court, a jury could reasonably conclude that Welch's departure was only a slight deviation – a mere detour – and not a personal frolic of his own.

Booker v. GTE.NET LLC

Jarmilia Booker, a long-time employee of the Kentucky Attorney General's office, was threatened with discipline for an e-mail she had apparently sent in response to a consumer complaint about GTE's Internet service. The e-mail said in part –

> I would just like to take a moment and tell you how disgusted I am that someone would waste so much time over INTERNET ACCESS! You sir are pathetic and I would greatly appreciate it if you would take me OFF of your ridiculous email list! If you are having this much trouble getting INTERNET ACCESS, then go through another company. This is not a difficult thing to understand. The whole reason we de-regulate such things is to give you, the customer, the opportunity for more selection.
>
> I sympathize with you over your troubles, but come on ..., why don't you put on your pampers and ask for your bobba OR cancel the service altogether! Your repeated emails lambasting people for doing the job for which they were trained to do is baseless and petty. You sir are a grumpy, horrible man who needs to grow up and realize that you are on earth, not some crazy place where everything works out . . .
>
> Sincerely,
>
> Mrs. Booker

It turned out that Booker had not sent the e-mail. Instead, it had been written by a GTE employee and falsely attributed to Booker. When the facts came out, Booker was not disciplined. Nevertheless, she claimed that the incident was upsetting to her and that she had suffered emotional and psychological injuries. She brought suit against GTE, alleging that the company was vicariously liable for its employee's misconduct.

The U.S. Court of Appeals for the Tenth Circuit, applying Kentucky law, dismissed Booker's claim, ruling that the GTE employee's intentional misconduct was outside the scope of employment. The Court began its analysis by recognizing that, in general, an employee's intentional misconduct will not result in vicarious liability. However, when the misconduct is closely related to the employment, it can be within the scope of employment. The Court looked to the following elements in considering Booker's claim against GTE –

- whether the conduct was similar to that which the employee was hired to perform;
- whether the conduct occurred at work during working hours;
- whether the conduct was in furtherance of the employer's business; and
- whether the conduct, though unauthorized, could reasonably be expected in view of the employee's duties.

The GTE employee's conduct here – responding to a customer complaint by sending a demeaning e-mail that encouraged the customer to terminate e-mail service, and then falsely attributing the e-mail to someone else – satisfied the first two elements, but it failed the last two. On balance, the Court concluded that an employer simply cannot be held liable under the doctrine of respondeat superior unless the intentional wrongs of the employee were calculated to advance the cause of the employer or were appropriate in the normal scope of the wrongdoer's employment.

Case references. *O'Shea v. Welch*, 350 F.3d 1101 (10th Cir. 2003); *Booker v. GTE.NET LLC*, 350 F.3d 515 (8th Cir. 2003).

Recent Substance Abuse Decisions Under the ADA

The Americans with Disabilities Act prohibits discrimination against persons with disabilities. When it comes to substance abuse, the ADA walks a fine line between promoting the employment of disabled persons on the one hand without, on the other hand, forcing employers to tolerate drug abuse. While employers may discriminate against current, illegal drug users and persons who traffic in drugs at the workplace, whether or not they are addicted, drug addiction itself is considered an impairment that may trigger ADA coverage. Further, having a record of addiction may give rise to ADA protection even if the employee or applicant is not currently addicted.

Raytheon v. Hernandez

A recent Supreme Court case involved Joel Hernandez, a 25-year employee of Raytheon (formerly, Hughes Missile Systems). Hernandez's appearance and behavior at work one morning suggested that he might be under the influence of drugs or alcohol so, pursuant to company policy, he was required to take a drug test. The test results were positive for cocaine, and Hernandez then admitted that he have been up late the previous night drinking beer and using cocaine. Because this violated Raytheon's workplace conduct rules, Hernandez was forced to resign.

More than two years later, Hernandez applied to be rehired by Raytheon. He stated in his application that he had previously been employed by the company. He also attached two reference letters to his application, one from his pastor stating that he was a "faithful and active member" of the church, and the other from Alcoholics Anonymous, stating that Hernandez attended AA meetings regularly and was in recovery.

Hernandez's application was reviewed by an employee in Raytheon's Labor Relations Department. Noting that Hernandez had previously been employed there, the employee pulled Hernandez's earlier personnel file. The file indicated that Hernandez had been terminated for workplace misconduct so, consistent with company policy, the employee rejected Hernandez's application. The employee later testified that she did not know Hernandez was a former drug addict and she did not see anything in the file that would indicate a record of addiction.

After his rejection, Hernandez filed suit, claiming that Raytheon had treated him in a discriminatory manner by rejecting him because of his record of addiction. The only question before the Supreme court was whether Raytheon's no-rehire policy amounted to a legitimate nondiscriminatory reason for rejecting Hernandez's application. (Hernandez attempted to raise an alternative theory of "disparate impact" discrimination under which even a neutral no-rehire policy would violate the ADA because of its effect of excluding persons who had been addicted. This alternative theory came too late in the case, however, and was rejected as untimely.)

The Supreme Court ruled that in a "disparate treatment" case such as Hernandez's (that is, a case in which an individual or group of individuals claim they were mistreated simply because of their race, gender, disability, or other protected characteristic), Raytheon's neutral no-rehire policy was indeed a legitimate basis for rejecting Hernandez.

Longen v. Waterous Co.

Ira Longen had worked for the Waterous Company in Minnesota for more than 26 years prior to being discharged. During that time he had recurring substance abuse battles. When the company learned about Longen's problem, it agreed that if Longen successfully completed treatment he could retain his job.

Longen did complete the treatment program, but after returning to work he relapsed and entered another program. This pattern of return-to-work, relapse, treatment and return to work repeated itself several times. Finally, the company entered into a "last chance contract" with Longen, requiring him to complete a two and one-half month program and refrain from all drug and alcohol use. Longen was subject to immediate termination if he violated any terms of the last chance contract.

Although Longen lived up to the contract for a few months, the company learned that he had begun using cocaine. The company suspended him for five days with the intention of terminating him, but as a result of intervention by Longen's union, the parties entered into another last chance contract.

Four years later, while absent from work because of a workers' compensation injury, Longen was arrested for driving while intoxicated. When the DWI came to Waterous's attention, Waterous fired him per the terms of the second last chance contract.

In Longen's subsequent ADA suit, the U.S. Court of Appeals for the Eighth Circuit ruled that the company's basis for terminating Longen – that he had violated the terms of his last chance contract – constituted a legitimate, nondiscriminatory reason for taking an adverse employment action. The Court pointed out that Longen had voluntarily entered into the contract to preserve his job and that his violation of the contract provided justification for termination.

Statutory reference. 42 U.S.C. § 12101.

Case references. *Raytheon Co. v. Hernandez,* 124 S.Ct. 513 (2003); *Longen v. Waterous Co.,* 347 F.3d 685 (8th Cir. 2003).

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In this issue of Employer Alerts! . . .

- Partial Strike Not Protected Under Federal Labor Law
- May Employee Who Is Receiving Workers' Comp Benefits Be Fired?
- Misrepresenting Job to Applicant Held Actionable
- FMLA Update
- Detours and Frolics – When Is Employer Vicariously Liable?
- Recent Substance Abuse Decisions Under the ADA

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Employer ALERTS!

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By Charles H. Fleischer, Esq.

OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

Supreme Court Allows Reverse Age Discrimination

The federal Age Discrimination in Employment Act protects workers who are 40 years of age and older. If, for example, a covered employer fires a 55-year-old and replaces him with someone who is only 30, *on the basis of age*, then the employer has violated the ADEA. But there has been doubt about just how the ADEA works when both workers are at least 40 and therefore within the protected class. Is favoring a 45-year-old over someone who is 60 illegal? How about favoring the 60-year-old over a worker aged 45?

In 1996 the Supreme Court answered the first question, ruling that when an older worker is replaced by someone younger because of age, it does not matter that the younger worker is also in the 40-and-older protected class. A case of age discrimination can be based just on a significant age difference, said the Court, even though both workers are over 40. See, "How Young Is Too Young Under the ADEA?", EMPLOYER ALERTS!, Apr. 2003, p. 3.

The Supreme Court has now answered the second question as well. In a decision announced February 24, the Court said that an employer practice that *favors older workers* is permitted under the ADEA, even though it discriminates against younger workers who are in the 40-and-over protected class.

The case involved a group health insurance plan sponsored by General Dynamics Land Systems under a collective bargaining agreement the company had with one of its labor unions. The collective bargaining agreement obligated General Dynamics to provide full health benefits to retirees who had accumulated 30 years of seniority. When the company negotiated a new collective bargaining agreement, it obtained union approval to delete the health benefit requirement for retirees. Under the new agreement, however, employees who were then 50 years of age were "grandfathered" – they still got full benefits when they retired.

After the new collective bargaining agreement was finalized, a group of General Dynamics workers who were between 40 and 49 years old brought a class action against the company, claiming age discrimination. The company acknowledged that while the new agreement appeared on its face to discriminate by creating two classes of employees based solely on age, nevertheless there was no discrimination here. That was so, claimed the company, because the ADEA is intended to protect *older* workers, not those who suffer age discrimination because they are too *young*.

A six-justice majority agreed with General Dynamics and upheld the grandfather provision of the new plan. Justice Souter, writing for the Court, acknowledged that the ADEA's prohibition of discrimination because of an individual's age "could be read to look both ways," protecting younger as well as older workers so long as they were at least 40. But, said Justice Souter, it is the older, not the younger worker who stands to be victimized by age discrimination, and the purpose of the ADEA is to prohibit discrimination against older workers.

The decision permitting reverse age discrimination makes the ADEA unusual among discrimination laws. As the dissenting justices pointed out, other discrimination laws have been held to look both ways, to use Justice Souter's phrase. Title VII of the federal Civil Rights Act, for example, was passed to end discrimination against blacks, other minorities, and women. But Title VII has since been read as protecting whites as well as blacks and minorities, and men as well as women.

Even Equal Opportunity Employment Commission regulations had interpreted the ADEA as covering younger as well as older workers in the protected class. Those regulations are now invalid under the Court's ruling.

References: 29 U.S.C. § 621; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *General Dynamics Land Systems, Inc. v. Cline,* 124 S.Ct. 1236 (2004).

Employers May Discipline for Groundless, Bad Faith Discrimination Claims

Virtually all federal workplace laws contain non-retaliation provisions. Title VII of the federal Civil Rights Act, for example, not only prohibits discrimination in employment because of an individual's race, color, religion, sex, or national origin, it also prohibits retaliation against an employee who has complained about discrimination, or who has assisted another complainant, such as by testifying on his behalf.

Whenever a discrimination charge is pending, even an informal one that is still at the internal investigation stage, employers should exercise extraordinary caution in making personnel decisions that affect the complaining employee or others involved in the matter. Any adverse action taken after the initial charge has been made is likely to generate a charge of retaliation.

Retaliation claims often become the tail wagging the dog. An employee may have a weak or improbable claim of race or sex discrimination. But when he complains and the employer responds by firing him, the employer has effectively converted a claim that the employee would probably have lost into a strong claim of retaliation that the employee will likely win.

Despite the need for extraordinary care, employers may in extremely limited circumstances discipline an employee following a charge of discrimination.

Thomas Mattson worked as an electrician at a Caterpillar manufacturing facility in Illinois. Mattson apparently did not like taking instructions from one of his supervisors, a woman named Beth Cone.

The relationship was further strained when Cone reported him for sleeping on the job and again for leaving some equipment unattended. Several days after the second incident, Mattson complained that one of Cone's breasts had touched him while he and Cone were having a conversation in a work area. He also complained that Cone had reached around him to retrieve a tool, although no actual touching occurred that time.

When Caterpiller's EEO Coordinator investigated Mattson's complaints, Mattson told the investigator that he did not know whether Cone had touched him in a suggestive way, that the contact might have been inadvertent, and that he did not believe Cone was attracted to him. Based on these statements, the investigator concluded that the complaint was without merit. Caterpiller then issued a warning letter to Mattson stating that false accusations of sexual harassment could lead to discipline. Caterpiller also counseled Cone to be careful about how closely she stood to people.

Three months later, Mattson filed charges of sexual harassment with the Equal Employment Opportunity Commission and the Illinois Department of Human Rights. Those charges triggered a further investigation by Caterpiller, during which another employee stated under oath that Cone's breast had not touched Mattson, but that Mattson had told the other employee his goal was to get Cone "out of here any way possible."

With this additional information in hand, Caterpiller fired Mattson for dishonesty. So Mattson sued, claiming sexual harassment and illegal retaliation.

The case eventually reached the federal Court of Appeals in Chicago, which dismissed the suit. Dealing first with the harassment claim, the Court pointed out that harassment is actionable only if it is so severe or pervasive as to alter the conditions of the victim's employment. Here, the two incidents Mattson complained about did not amount to sexual harassment.

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Turning to the retaliation claim, the Court said that an employee who complains of discrimination is protected from retaliation if he reasonably believes in good faith that he has suffered discrimination. Protection is not lost just because the complaint cannot be proved. But in this case Mattson could not reasonably have believed he had been harassed. In fact, Mattson's complaint was, in the Court's words, "utterly baseless," "completely groundless," "frivolous," and "motivated by bad faith." In those circumstances, Mattson lost protection from retaliation and was justifiably fired.

References: 42 U.S.C. § 2000e; *Mattson v. Caterpillar, Inc.* 359 F.3d 885 (7th Cir. 2004).

Catholic Organization Must Provide Contraceptive Coverage in California

In 1999 the California legislature enacted the Women's Contraceptive Equity Act (WCEA) to eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives. The legislature sought to accomplish these goals by requiring employer-sponsored group health insurance policies to include benefits for contraceptives if the policy also provided benefits for prescription drugs generally. The WCEA has an exclusion for "religious employers," allowing them to request policies without contraceptive coverage "if contraceptive methods are contrary to the religious employer's religious tenets."

Employer's Rights

By Charles H. Fleischer, Esq.

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Catholic Charities of Sacramento, a California non-profit corporation with some 183 employees, provides social services and private welfare programs to the public generally. Although it considers its mission to be part of the social justice ministry of the Roman Catholic Church, and it operates in connection with the Church, it is independently incorporated and not formally a part of the Church.

Feeling morally bound to provide the best benefits it could to its employees, Catholic Charities wanted to offer health insurance with coverage for prescription drugs. At the same time, however, it did not want to offer contraceptive coverage, because contraception is contrary to Catholic religious doctrine. Since Catholic Charities does not qualify as a “religious employer” under the narrow definition of that term in the WCEA, it found itself obligated to provide contraceptive coverage as a condition to providing drug coverage generally. So it sued in California state court to enjoin enforcement of the WCEA against it, on the basis that the WCEA violated the freedom of religion provisions in the U.S. and California Constitutions.

The lower courts in California refused to issue an injunction, and the California Supreme Court affirmed. In a lengthy, carefully written opinion, the Court stated that a law that is otherwise valid, that is neutral (in the sense that it is not aimed at a particular religion or religious belief), and that is generally applicable to all members of the public, is not invalidated just because it regulates conduct that a particular religion requires or prohibits. Quoting an earlier U.S. Supreme Court decision, the Court said:

> To permit religious beliefs to excuse acts contrary to law would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

References: U.S. Const., Amend. I; *Catholic Charities of Sacramento, Inc. v. Superior Court,* 85 P.3d 67 (Cal. 2004).

Anti-Gay Employee’s Religious Views Need Not Be Accommodated

Richard Peterson was employed in the Boise, Idaho office of Hewlett-Packard for almost 21 years prior to his termination. Problems arose, however, when the company began displaying posters in the workplace as part of its diversity campaign. One set of posters contained photographs of five HP employees, which were captioned, "Black," "Blonde," "Old," "Gay," and "Hispanic." Another set featured the same photographs, a description of the employees’ personal interests, and the slogan, "Diversity is Our Strength."

Peterson, who describes himself as a devout Christian, believes that homosexual activity is immoral. In response to the posters, he put up on an overhead bin in his cubicle various Biblical passages condemning homosexuality. One, from Leviticus, read:

> If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them.

These passages were in large type, visible to customers and other employees. Peterson told the company his hope was that his gay and lesbian co-workers would read the passages, repent, and be saved.

Hewlett-Packard insisted that Peterson remove the passages as contrary to the company’s harassment policy. After a number of meetings, Peterson and the company failed to reach any accommodation, and Peterson was fired for insubordination. Peterson then sued, claiming religious discrimination and failure to accommodate his religious observance and practice.

The U.S. Court of Appeals for the Ninth Circuit rejected Peterson’s claims. It found, contrary to Peterson’s contention, that HP’s diversity campaign was not aimed at discrediting Peterson or his religious views, but instead had a benign goal of promoting mutual respect in the workplace.

As to accommodating Peterson's religious views, the Court concluded that the only accommodations acceptable to Peterson were removal of the "gay"posters, or allowing Peterson to post his own anti-gay messages. Both these accommodations would impose undue hardships on HP. The first accommodation would have infringed on the company's right to promote diversity and encourage tolerance and good will among its workforce. And the second accommodation in effect would have permitted Peterson to demean and degrade fellow workers, contrary to the company's diversity campaign.

Reference: *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

Temp Agency Not Liable for Supplying Ex-Con

VTech Communications does business in Oregon. Accountemps is a temporary employment agency that furnishes temporary accounting and other financial personnel to businesses in Oregon. VTech entered into a written contract with Accountemps to be provided with a payroll clerk as a possible temporary-to-permanent hire. Accountemps sent Teena Rodriguez, who stated on her employment application to VTech that she had never been convicted of a crime. In fact, she had pleaded guilty one month earlier to embezzling funds from her previous employer.

After Rodriguez had worked as a temp for 90 days, VTech hired her as a permanent employee. Over the ensuing two years, Rodriguez managed to embezzle $1.3 million from VTech. VTech eventually fired her for unrelated reasons. VTech later received a call from Rodriguez's probation officer informing it of Rodriguez's prior conviction. VTech then performed an internal audit and discovered the embezzlement.

Claiming that Accountemps had breached its contract with VTech and had been negligent in furnishing Rodriguez, VTech sued. VTech contended that, as part of its contract, Accountemps had orally promised to check references of temps it furnished. But the Court ruled that a promise to "check references," if in fact such a promise were ever made, was too vague to be enforceable.

The Court also rejected VTech's negligence claim, saying that Accountemps did not owe any duty of care to VTech independent from the parties' contract.

Although the Court did not say so in its opinion, one cannot help but wonder whether the Court felt reluctant to come to the aid of a company that acted so imprudently in managing its financial affairs. Not only did the company place a payroll clerk in a position to steal $1.3 million, apparently with no or inadequate internal controls, it also was oblivious of the loss until alerted by a probation officer.

Reference: *VTech Communications, Inc. v. Robert Half, Inc.*, 77 P.3d 1154 (Or.App. 2003).

Wal-Mart Can't Speculate on Employees' Lives

To purchase a life insurance policy on someone else, the purchaser must have an "insurable interest" in that person's life. Close relatives, for example, are considered to have insurable interests in each other. So are creditors, which is why some lenders are allowed to require life insurance as a condition to making a loan. More generally, a person who has an expectation of financial gain from a person's continued life has an insurable interest in that person. So co-owners of a small business will often take out "key man" insurance on each other.

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The reason for the insurable interest rule is obvious: the law does not want persons who otherwise have no connection with each other speculating on whether they will live or die. A close relative, a creditor, and a business partner presumably want the person they've insured to stay alive. But someone who owns a policy on another person without having an insurable interest in that person may be more interested in collecting on the policy.

That was the problem Wal-Mart faced when it purchased corporate-owned life insurance (COLI) policies on its rank-and-file employees. It did so to obtain certain tax advantages, which have since been eliminated from the tax code. Upon elimination of the tax benefits, Wal-Mart discontinued its COLI program, surrendering the last of its policies in 2000. Over 300,000 employees were covered under the COLI program before it was discontinued.

Douglas Sims, a Wal-Mart employee, died in 1998 while the COLI program was still operative. Sims was insured under a COLI policy held by Wal-Mart, and upon his death Wal-Mart collected the policy proceeds. When Sims's estate learned of the policy, it sued, claiming that Wal-Mart had no insurable interest and that the proceeds should have been paid to Sims's estate.

The U.S. Court of Appeals for the Fifth Circuit, applying Texas insurance law, agreed and allowed the estate to collect on the policy. The Court pointed out that under Texas common law, the mere existence of an employment relationship between an employer and an "ordinary" employee like Sims is not sufficient to give the employer an insurable interest.

Sims, of course, was in no position to complain about his being characterized as merely an ordinary employee of no special importance to Wal-Mart. And apparently his estate didn't mind either, as the serendipitous beneficiary of a life insurance policy.

Reference: *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004).

Severance Packages and Releases: Sometimes It Pays to Pay

In general, employers are under no obligation to offer severance to departing employees, even those who have worked loyally for many years or who are being terminated for lack of work. Sometimes, however, a severance package or some other benefit of value may be just the way to avoid a costly lawsuit.

Monica Kroll v. Equinox Fitness Clubs

Monica Knoll, an employee of Equinox Fitness Clubs in New York City, was diagnosed with breast cancer in October 2000, after having been on the job for about six months. She underwent surgery and chemotherapy treatment beginning in December and continuing through May of 2001. She was originally scheduled for reconstructive surgery on September 11, 2001, but the events of that day caused a postponement to November. On October 1, 2001, Kroll was fired. Arguably, the termination violated the Americans with Disabilities Act and the Family and Medical Leave Act.

Sometime thereafter, Equinox sent Kroll a notice of rights under COBRA to continue her group health insurance. At the same time, Equinox offered to pay the first six months of Kroll's COBRA premium in exchange for a general release of all claims relating to her employment. (Normally, a departing employee must pay his own COBRA premiums, plus a 2% fee to cover the employer's administrative costs.) Kroll and Equinox exchanged several drafts of the release to clarify some points, and Kroll even had her father-in-law, an attorney, review the document. Eventually, Kroll signed the document.
Kroll apparently had a later change of heart because,

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despite having released Equinox from all employment-related claims, she sued, alleging violations of the ADA and the FMLA. The Court dismissed her claims on the basis that she had voluntarily given up any right to sue. The Court observed that as a general matter an employee may waive employment discrimination claims as long as the waiver is made knowingly and voluntarily and is supported by adequate consideration -- something of value passing to the employee in exchange for the waiver. Here, all the circumstances pointed to a knowing and voluntary waiver, and the consideration -- payment of COBRA premiums -- was certainly adequate.

Clark v. Riverview Fire Protection District

Elijah Clark was fired from his job as a Missouri firefighter for sleeping through a fire call. Through his union he grieved the termination and secured several hearings over the matter before the board of directors of the fire protection district. Five days prior to the last scheduled hearing, the board sent Clark a written offer to convert the termination to a one-year disciplinary suspension without pay, after which he would be eligible to return to work. In exchange, Clark was required to execute a release of any employment-related claims he might have against the district.

Clark reviewed the offer with union officials and then attended the scheduled hearing. At the hearing, the board told Clark that if he did not accept the offer that day, the termination would stand. The board recessed to give Clark a further opportunity to consider the offer. At this point, Clark agreed to sign the release.

Later, Clark brought a race discrimination charge against the fire protection district, claiming that the release was invalid because he was forced to sign it involuntarily and under duress. The Court, applying Missouri law, upheld the release and dismissed the suit. The Court said that the test of duress is whether the person claiming duress has been so acted upon by threats as to deprive him of the mental state necessary to the making of the contract. (Examples might include signing a contract at gunpoint or in the face of threatened harm to a loved one.) Here, however, any pressure Clark felt was the result of his unfavorable bargaining position and knowledge that his future employment was in the hands of a less-than-hospitable board. The fact that the choice confronting Clark was difficult did not mean that he lacked the necessary free will to make a decision.

References: *Knoll v. Equinox Fitness Clubs*, 2003 WL 23018807 (S.D.N.Y. 2003); *Clark v. Riverview Fire Protection District,* 354 F.3d 752 (8th Cir. 2003).

Non-Discrimination Rights of Former Employees

Employment discrimination laws certainly protect existing employees and candidates. Title VII of the federal Civil Rights Act, for example, makes it unlawful for an employer to discriminate against any of his employees or applicants for employment. But they also protect former employees in a variety of ways, as the following cases illustrate.

Robinson v. Shell Oil Co.

Shell Oil fired Charles Robinson who, shortly thereafter, filed a race discrimination charge with the Equal Employment Opportunity Commission. While that charge was pending, Robinson applied for work with another employer, who in turn contacted Shell for a reference.

Robinson claimed he got a negative reference from Shell in retaliation for his having filed the EEOC charge. Shell's position was that Title VII was irrelevant here because Robinson was neither an employee nor an applicant (to Shell) for employment. Two lower level federal courts agreed with Shell, but the U.S. Supreme Court upheld Robinson's claim.

Justice Thomas, writing for a unanimous Court, said that at first blush, the term "employees" as used in Title VII would seem to refer to those having an existing relationship with the employer in question. However, Title VII uses the term in various contexts, sometimes referring to current employees and sometimes referring to former employees. In short, said Justice Thomas, the term is ambiguous.

Looking beyond a narrow parsing of Title VII, Justice Thomas concluded that including former employees would further the purpose of the laws. In contrast, excluding former employees from protection would undermine the effectiveness of Title VII, since former employees would be deterred from complaining of discrimination, knowing that employers could retaliate against them without risk.

Raytheon Co. v. Hernandez

Raytheon fired Joel Hernandez when he failed a drug test conducted by the company. When Raytheon refused to re-hire him some two years later, it was not because Hernandez had been a drug addict (considered a disability under the ADA), but because he, like anyone else who is fired for violating company rules, is automatically ineligible for re-hire. The Supreme Court upheld Raytheon's position, as reported in "Recent Substance Abuse Decisions Under the ADA," EMPLOYER ALERTS!, Winter 2004, p. 10

Despite the favorable result for the employer, a troublesome aspect of the case deserves mention. Hernandez's suit was based on theory of "disparate treatment" discrimination, which says that an employer may not take adverse action against an employee for a discriminatory reason. In Hernandez's case, the company's refusal to re-hire was not motivated by discrimination, but was based on a neutral, uniformly applied company policy of not hiring former employees who had been fired for violating company rules.

Had Hernandez brought suit under a theory of "disparate impact" discrimination, the result might well have been different. In disparate impact cases, a neutral employer policy – a minimum height and weight requirement, or a requirement that a candidate pass a difficult written test, for example – does not appear to discriminate on its face, but it could nevertheless be unlawful if it has no business justification and it has an unfavorable impact on a protected group. In the above examples, the weight and height requirement might tend to exclude females, and the test requirement might tend to exclude minorities with limited educational opportunities.

If Hernandez had been able to prove that Raytheon's facially neutral no re-hire policy actually had a disparate impact on persons with disabilities, then it's possible he would have won his ADA suit.

Flannery v. Recording Industry Association of America

Thomas Flannery had worked for the Recording Industry Association of America for 22 years before he was fired. At the time of his termination, RIAA offered Flannery a severance package consisting of cash, continuing health benefits, and a consulting arrangement.

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Flannery believed he was terminated because of his age (63), and because he was disabled by heart disease, complicated by sleep apnea, so he filed discrimination charges with the EEOC. When the RIAA learned of those charges, it withdrew the offer to enter into a consulting arrangement. Flannery then filed an additional charge of retaliation.

In analyzing Flannery's retaliation claim, the U.S. Court of Appeals for the Seventh Circuit began with the proposition that the Age Discrimination in Employment Act and the ADA do not protect independent contractors, which is what Flannery's status would have been as a consultant to RIAA. However, said the Court, Flannery was not suing as an independent contractor, but as a former employee, and former employees, in so far as they are complaining of retaliation that impinges on their future employment prospects, do have a right to sue their former employers.

Here, it was unquestionable that the consultant arrangement Flannery was initially offered grew out of his employment relationship with RIAA. The investigative consultant work he would have done involved some of the same cases he had been working on as an employee. Even more important, the independent consultant arrangement was part of the severance package RIAA had offered. So when it withdrew that offer, allegedly for filing a discrimination claim, it could be sued for unlawful retaliation.

References: *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997); *Raytheon Co. v. Hernandez,* 124 S.Ct. 513 (2003); *Flannery v. Recording Ind. Ass'n of America,* 354 F.3d 632 (7th Cir. 2004).

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- Supreme Court Allows Reverse Age Discrimination
- Employers May Discipline for Groundless, Bad Faith Discrimination Claims
- Catholic Organization Must Provide Contraceptive Coverage in California
- Anti-Gay Employee's Religious Views Need Not Be Accommodated
- Temp Agency Not Liable for Supplying Ex-Con
- Wal-Mart Can't Speculate on Employees' Lives
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