



HUMAN RESOURCES POTPOURRI

- Retaliation claims in employment lawsuits continue to grow at an alarming rate. In all cases filed at the EEOC in 1997, 22% contained charges of retaliation. In 2007, this number increased to 32%. In the EEOC ranking of cases, retaliation claims are now second only to race and have moved ahead of sexual harassment.

Employers Beware: It is not just about being mad, it is about getting even!



- A female employee who was fired as a “voluntary quit” after she failed to notify her employer that she was extending a previously approved maternity leave has no claim under the Family and Medical Leave Act (*Morr v. Kamco Indus., Inc.*, N.D. Ohio, April 15, 2008). The Court stated that the employee failed to inform the employer that she wanted to extend the parties’ previously agreed-upon FMLA leave period extinguishes her claim under the act. An employer that grants FMLA leave may require conformity with its attendance policy. In this case, the employee was terminated as a voluntary quit after two days of unexplained absence. The Court noted that the employee failed to meet the employer’s requirements and, more importantly, failed to meet the requirements of the FMLA. “(The employee’s) failure to notify her employer that she planned to extend her leave violates the procedures outlined in the (employee) handbook.”



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Labor and Employment Team
Bradley L. Varner
Richard F. Nugent, Jr.
Christopher R. Pitt
Robert F. Conte
Erin M. Wright

4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
PH: (574) 243-4100
FAX: (574) 232-9789
www.maylorber.com

“LOVE AND MARRIAGE ARE LOSERS”

A black manager, who married a white hourly employee not under his supervision, was discharged allegedly for violating the employer’s non-fraternization policy, and failed to establish a prima facie case of discrimination based on his interracial relationship (*Ellis v. United Parcel Serv. Inc.*, 7th Cir., April 2008).

The Court observed that the plaintiff by all accounts was a good employee who, after 21 years with the company, met a woman, fell in love, and got married. According to the Court, “That’s a fairly nice story, and so is the fact that [he] and his wife were smooching at a summer concert several months after their wedding. Heck, some marriages today don’t even *last* that long. Although [the employer] . . . comes out on top in this case, love and marriage are the losers. Something just doesn’t seem quite right about that.”

Source: BNA, Labor Relations Reporter, May 2008

RETALIATION: GETTING BIGGER THAN IT USED TO BE

On May 27, 2008, the United States Supreme Court, by a vote of 7 to 2, held that 42 U.S.C. §1981—a Civil War-era statute commonly used in tandem with Title VII as a basis for race discrimination claims in the workplace—contains an implied cause of action for retaliation. The Court’s decision does not substantially change pre-existing law, but does solidify a right previously recognized by a consensus of Federal Circuit courts. (*CBOCS West, Inc. v. Humphries*, No. 06-1431)

In its decision, the Supreme Court affirmed the Seventh Circuit, which confirmed that §1981 provides a cause of action for retaliation from reporting or seeking to protect others from racial based discrimination. In its rationale, the Court determined that the text of §1981, which protects the rights of non-whites “to make and enforce contracts,” provides an implied basis for challenging employers’ decisions to terminate, demote, or otherwise discipline employees as a pretext for race-biased retaliation.

This decision will have an effect on virtually all employers, including small businesses not covered by Title VII. The likely result, businesses nationwide will continue to be exposed to retaliation claims brought by employees claiming they were improperly disciplined because they reported or complained about racial discrimination. Ironically, those claims are not subject to Title VII’s restrictions, including the obligation to seek administrative relief before filing suit or the cap on potential damages, and they have a much longer limitation period of four years.

In all cases involving a retaliation component, consultation with experienced employment counsel is highly recommended.

UNION WIN RATE DROPS—BUT DON’T GET COMFORTABLE

The union win rate in elections conducted by the NLRB decreased in 2007 from 61.4% to 60.1%, ending ten consecutive years in which unions improved their organizing win rates. The number of representation elections held also decreased. The Teamsters remain the most active union, followed by the SEIU, which was the most successful union. A sign of the time or the calm before the storm? Read on; you should find the next article interesting.

HERE IS SOMETHING THAT SHOULD CONCERN YOU

It was recently reported that delegates to the Service Employees International Union (SEIU), at its recent convention, adopted the union’s “justice for all” plan on politics that calls for spending \$150 million to mobilize its members before, during, and after the national elections this fall to elect “pro-worker” politicians. What does this mean? Well, for starters, electing a “pro-worker” president and enough members of the Senate to have 60 or more votes to pass key legislation. Translation: universal health care and the Employee Free Choice Act, which would facilitate union organizing.

Source: BNA, Daily Labor Report, June 4, 2008

Things I Have Learned:

- That if you die broke, the timing was right.
- That the easiest way to find happiness is to quit complaining.
- That you should never say no to a gift from a child.
- That anger is an ill wind that blows out the lamp of reason.
- That sometimes a P.S. to a letter contains the most important message of all.
- That stopping at third base adds nothing to the score.
- That there should be an Eleventh Commandment: Thou shalt not whine.
- That you shouldn't let a day pass without making at least one person feel good.



SAVE THE DATE

The 2008-2009 Labor and Employment Law Update, presented by the MOL labor and employment team, will be held on October 9, 2008. You do not want to miss it, so mark your calendar and save the date. More information will follow.

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Robert F. Conte, Esq.
MAY • OBERFELL • LORBER
4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
E-mail: rconte@maylorber.com

Web sites:
www.maylorber.com
www.consultantsroundtable.org

GENETIC INFORMATION. A LAW THAT HINDERS OR HELPS?

After languishing for nearly 10 years in Congress and following a vote of 414-1, the House approved legislation (H.R. 493) that would outlaw genetic discrimination in the workplace. The bill, known as the Genetic Information Nondiscrimination Act (GINA), would prohibit employers from discharging, refusing to hire, or otherwise discriminating against employees on the basis of genetic information.

GINA would also amend the Employee Retirement Income Security Act and the Public Service Health Act to preclude discrimination by group health plans and health insurance carriers against individuals based on genetic information and would prohibit insurers from requiring genetic tests. The bill was intended to eliminate any fear of discrimination held by those who now decide to undergo potentially beneficial genetic tests. The underlying premise of the new bill: "Since no one is born with perfect genes, we are all potential victims of genetic discrimination."

Bill supporters feel that this legislation advances the principle of protecting the privacy of patients while ensuring that they have internal access for quality health care services; however, it is not without its dissenters. Several business groups have stated that this legislation creates a "new layer of regulations" and will likely add to the burden already on the legal system. Many feel that there now would exist a greater potential for more jury trials along with dangers brought about by the uncertainty concerning when an employer's acquisition of an individual's genetic information might render the more employer vulnerable to discrimination claims.

As it relates to employment discrimination, the act will:

- prohibit discrimination on the basis of genetic information in hiring, compensation and other personnel processes;
- prohibit the collection of genetic information by employers and allow workplace genetic testing only in very limited circumstances;
- require genetic information possessed by employers to be confidentially maintained and disclosed only to the employee under tightly controlled circumstances.

In regard to health insurance discrimination, the bill would:

- prohibit enrollment restrictions and premium adjustment on the basis of genetic information or genetic services;
- prevent health plans and insurers from requesting or requiring that an individual take a genetic test; and
- cover all health insurance programs.

GINA's enforcement and damage provisions will be derived directly from Title VII, the Civil Rights Act of 1991, and other federal employment laws. An individual asserting employment discrimination based on genetic information must first file an EEOC charge before proceeding to court. As in cases under Title VII and the Americans with Disabilities Act, compensatory and punitive damages for genetic bias would be capped at \$300,000 or lower. Plaintiffs also may receive other relief such as back pay and front pay. GINA does not recognize "disparate impact" claims, but recovery of attorney fees for prevailing parties under GINA is governed by the general fee-shifting statute for federal civil rights claims (42 USC §1988). GINA also prohibits retaliation against any individual "who has opposed any act or practice made unlawful" by the act's employment title or who participates in an investigation, proceeding or hearing under the act.

GINA's employment title will take effect 18 months after enactment, and the act requires the EEOC to issue final regulations within a year of its enactment.

We anticipate that this new law will cause numerous problems for employers, i.e., dealing with the disclosure of genetic information, defining what constitutes genetic information and in the area of privacy. In all such matters there is no substitute for obtaining legal advice from experienced employment counsel.

Sources: BNA, Daily Labor Report 5/2/08 and 5/22/08

QUOTES OF THE MONTH

A liar needs a good memory. ~Quintilian

In the middle of difficulty lies opportunity. ~Albert Einstein

Goals are dreams with deadlines. ~Dianna Scharf Hunt

Happiness is a perfume you cannot pour on others without getting a few drops on yourself. ~E. Joseph Cossman

Rudeness is the weak man's imitation of strength. ~Eric Hoffer

Do not follow where the path may lead. Go instead where there is no path and leave a trail. ~Unknown