



**HUMAN RESOURCES
POTPOURRI:**

• Query: Does a settlement agreement providing for a monetary payment preclude the EEOC from likewise seeking monetary relief?

A judge in the N.D. of Illinois ruled, "The EEOC stands not just in the shoes of the individual, but as an enforcement vehicle for the public interest." . . . "Separate private agreements to which the EEOC is not a party do not necessarily vitiate the EEOC's authority to proceed in furtherance of the public interest." (*EEOC v. Continental Airlines*, Dec. 2006)

• **Union Membership rates drop:**

- Labor union membership fell to 12% in 2006, down from 12.5% in 2005.
- Union membership declined by 326,000 members.
- In the private sector, union membership was 7.4% in 2006, down from 7.8% in 2005, a loss of 274,000 members.
- The union's share of manufacturing membership dropped from 13% in 2005 to 11.7% in 2006 (Source: BNA, Labor Relations Reporter, Feb. 2007)

The above numbers have become the battle cry for unions who believe "there is no better time and need for passage of the Employee Free Choice Act immediately." Employers cannot allow this Act to pass; stand up for your rights and fight this terrible piece of legislation.

• Failing to comply with an employer's procedures for requesting an FMLA leave may not disqualify a person for sick leave, so says an Ohio federal district court judge (*Morgeson v. OK Interiors Corp.*, July 2007). Noting that federal regulations allow an employee to give informal notice by telephone of the need to take an FLMA leave for unforeseeable circumstances, the court reasoned that FMLA leave may be used to provide psychological comfort for a family member with a serious health problem. The FMLA prohibits employers from retaliating against employees for exercising their rights under the statute. (Source: BNA, Daily Labor Report, July 2007)

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SEXUAL HARASSMENT IS ALIVE, WELL AND ACTIVE

The 11th Circuit Court of Appeals upholds the severe and pervasive standard (*Myers v. Central Fla. Invs. Inc.*, unpublished opinion June 2007). The Court noted "the Supreme Court has directed us to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance" (citing *Faragher v. Boca Raton*). Harassment need not be so extreme that it produces tangible effects on job performance in order to be actionable.

• A federal jury in Ohio decided that it had heard enough evidence to justify a \$50,000 award of punitive damages against an employer (*Pankin v. Gen. Extrusions Inc.*, 6th Cir., June 2007). The jury found that the company chose to turn a "blind eye" to sexual harassment and showed a reckless disregard for the female employee's Title VII rights. Employers cannot turn away from complaints of sexual harassment and must take those complaints seriously. The Court cited the Supreme Court's 1999 decision in *Kolstad v. American Dental Ass'n*, which held that punitive damages are proper if the individuals responsible for acts of discrimination acted with reckless disregard for an employee's federally protected rights.

• The District of Columbia Court of Appeals ruled that a high-level corporate employee was individually liable for sexual harassment under the DC Human Rights Act. The company's president, chief executive officer and controlling shareholder was liable for the harassment of a female employee and the jury awarded \$165,000 against the executive and the company for sex discrimination and intentional infliction of emotional distress.

The appeals court reasoned, "While we have not had an occasion to consider the individual liability of supervisors other than law firm partners . . . the Court has decided cases in the context of other types of supervisors and has found that supervisors are subject to individual liability."

The Court looked at the statute's definition of "employer" and the "inappropriate comments" made by the executive and concluded his "actions became more bold, grossly disgusting and beyond decency . . .," "reasonable jurors could find (the plaintiff's) proof established sexual harassment severe and pervasive enough to affect a term, condition, or privilege of employment." According to the Court, a hostile environment claim "concerns a single lawful practice which is treated as an indivisible whole for purpose of the (statute of) limitations period, even if an initial portion of this claim occurred outside the limitations period."

The holding in this case should put fear into every supervisor and manager in your organization.

(Source: BNA, Daily Labor Report, Aug. 3, 2007)

• The 7th Circuit Court of Appeals held that a female employee did not need evidence of misconduct of a sexual nature to support her hostile work environment claim (*Boumehdi v. Plastag Holdings LLC*, June 2007). The 7th Circuit upheld the lower court's findings that alleged anti-female remarks alone were severe enough to establish a hostile environment under Title VII (which is consistent with the purpose of Title VII). The employee, citing 18 sex-based comments made to her, but those complaints were ignored by the employer and nothing was done. Finally, the situation had become so intolerable, the employee resigned.

In its decision, the Court made some noteworthy determinations, namely, claims asserting a sexually hostile work environment do not require evidence of sexual desire (citing *Smith v. Sheahan*, 7th Cir.), and 1st, 6th and 8th Circuit cases which upheld the proposition that anti-female comments can support a finding of a hostile work environment. Noting that there is "no magic number of incidents necessary for a hostile environment finding," the Court determined "a jury could conclude that a reasonable person in (the plaintiff's) position could feel she had no choice but to resign."

In circumstances like those described above, courts will look at the cause for separation, the close timing between the complaints and the alleged adverse job acts to determine if it was sufficient to get the case to trial. **Employers Beware!** Claims of sexual harassment can have a very negative and long-lasting impact on your organization and are very costly to defend. Take all complaints seriously, and when they arise, prompt action, which includes a call to experienced employment counsel, is highly recommended.

(Source: BNA, Daily Labor Report, June 2007)

SURFING DATING WEBSITES AT WORK

Employees Beware! Your employer is likely watching!

Lovesick employees who visit online dating services could be setting themselves up for a big problem. Information from the dating website Match.com recently indicated that about 26% of employers have fired employees for inappropriate e-mail use, and another 26% have terminated employees for Internet violations. (2006 Workplace E-mail, Instant Messaging and Blog Survey, ePolicy Institute and the American Management Association)

The executive director of the ePolicy Institute made the following observations:

“In the age of e-mail and the Web, ‘kiss and tell’ has taken on a new meaning.” “Hit the wrong key, and your hot message could land on the cold screens of supervisors, colleagues, or customers.” “Send a romantic e-mail to an indiscreet lover, and your private message could become the subject of public ridicule. Engage in steamy IM chat, and you could trigger a workplace lawsuit. Visit an on-line dating site, and you could land on the unemployment line.”

Employees using these electronic sites should not expect privacy. In fact, it is estimated that 62% of employers monitor employee Internet activity, and 47% review employee e-mail.

(Source: BNA, Labor Relations Reporter, Feb. 2007)

FMLA AND THE 12-MONTH ELIGIBILITY PERIOD

The Family and Medical Leave Act with its numerous legal entanglements can be an employer’s (and lawyer’s) worst nightmare.

In an interesting case, the First Circuit Court of Appeals ruled that an employee with a five-year break in service who then worked more than 1,250 hours in the seven-and-a-half months after he returned to work may proceed with his claim that he was fired in violation of the FMLA. The Court found that the FMLA is ambiguous as to whether previous periods of employment count toward the 12-month eligibility requirement, but DOL regulations do establish that previous periods of employment do count toward that requirement (*Rucker v. Lee Holding Co.*, 1st Cir., Dec. 2006).

The Court reasoned that the preamble to the DOL’s regulation makes it clear that the agency did not intend for nonconsecutive months to count only if the employee maintained a continuing relationship with the employer. While the preamble does not explicitly state that a five-year gap in employment would not be disqualifying, there is no intention that the agency would distinguish between the two-year gap explicitly described as permitted and a five-year gap.

Clearly, not an employer-friendly decision. This case supports the proposition that bad facts make bad law.

POINT OF INTEREST

When an employer makes comments that reflect on a protected category, i.e. age, sex, race, does this constitute direct proof of bias? In *Arismendez v. Nightingale Home Health Care Inc.* (5th Cir., July 2007), the Court noted that stray remarks were not direct proof of bias. Remarks are sufficient as evidence of discriminatory intent if they were related to the protected characteristic at issue, made close in time to the challenged job action, made by a person with authority over the job decision and related to the decision.

(Source: BNA, Daily Labor Report, July 2007)

QUOTES OF THE MONTH

“It’s choice—not chance—that determines your destiny.” —Jean Nidetch

“The way I see it, if you want the rainbow, you gotta put up with the rain.” —Dolly Parton



“Kindness can become its own motive. We are made kind by being kind.” —Eric Hoffer

“When we seek to discover the best in others, we somehow bring out the best in ourselves.” —William Arthur Ward

“Before you build a better mousetrap, it helps to know if there are any mice out there.” —Yogi Berra

“The greatest test of courage on the earth is to bear defeat without losing heart.” —R. G. Ingersoll

“Whatever you are, be a good one.” —Abraham Lincoln

Things I Have Learned:

- That whenever I decide something with kindness, I usually make the right decision.
- That a 6.8 earthquake makes all your other problems seem trivial.
- That you don’t really know a person until you’ve made him mad.
- That you should never carry your lunch tray with only one hand.
- That the best classroom in the world is at the feet of an elderly person.
- That it’s not what you have in your life but who you have in your life that counts.

Interesting But Useless Information

• Over his/her lifetime, the average person will spend two weeks waiting for traffic lights to change and five years eating.

• “Second string,” meaning “replacement or backup,” comes from the Middle Ages. An archer always carried a second string in case the one on his bow broke.

• The first Harley-Davidson motorcycle used a tomato can as a carburetor.

• The normal static electricity that zaps your finger when you touch a door knob is between 10,000 and 30,000 volts.

• The Boston University Bridge is the only place in the world where a boat can sail under a train driving under a car driving under an airplane.

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A t t o r n e y s

News Alert!

*“Following
the regulation
will give the
employer a
'safe harbor'
...”*

Final Rule Issued on No-Match Letters

Effective September 14, 2007, in a new rule published in The Federal Register, employers are provided guidance on what they should do when they receive notification that calls into question the immigration or employment authorization status of their employees.

The published rule provides:

An expanded definition of “constructive knowledge” that an employee might not be authorized to work, including failure to take “reasonable steps” to address the following:

- A request for the employer to sponsor the employee for a labor certification or work visa petition when the employee admits to being unauthorized to work or the request is inconsistent with the information provided on the I-9 form at the time of hire. (An admission by the employee that he/she is not authorized to work gives the employer actual knowledge of the unauthorized status.)
- Receipt of a no-match letter from the SSA.
- Receipt of a notice from DSH that the employee’s employment authorization documents listed on the I-9 form do not match DHS records.

The final rule also extends the period of time an employer has to resolve the discrepancy from 63 days to 93 days. Following the regulation will give the employer a “safe harbor” from a charge of constructive knowledge if all the appropriate steps have been taken but the employee is later found to be unauthorized.

Reasonable Steps to Be Taken Within 30 Days of Receipt of the Notification

A. Social Security No-Match Letters:

Check records to determine whether the discrepancy was caused by a clerical error. If an error is found, correct the error with SSA, and verify that the corrected name and social security number now match SSA’s records. It is advisable to make a note to the file regarding the steps taken and to update the I-9 form or complete a new I-9 and attach it to the original document in the file.

If no clerical error is found, the employer must ask the employee to confirm that the name and social security account number in the employer’s records are correct. If the information is incorrect, the employer must make corrections, inform the SSA of the correction and verify a match on the corrected information, and make a record of its actions. If the employee confirms that the information initially provided is correct, the employer must promptly advise the employee of the date of receipt of the no-match letter and advise the employee to resolve the discrepancy with the SSA no later than ninety (90) days after the receipt date. The employer is under no legal obligation to advise the employee regarding the means or manner of resolving the discrepancy with the agency.

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B. Records Discrepancy Notice from the DHS

This notice is generally issued following an audit of the I-9 forms. The employer must contact the local DHS office in accordance with the written notice instructions and attempt to resolve the issues raised by DHS within the time frame provided.

Steps That Must Be Taken Within 93 Days of Receipt of Notification

If the no-match issue cannot be resolved with the SSA or DHS within 90 days of receipt of the written communication from either agency, the employer has an additional three days to re-verify the worker's employment eligibility by completing a new I-9 employment verification form.

The new I-9 form must be completed and signed by the employer and employee within 93 days of receipt of the notice from either SSA or DHS.

Documents that were the subject of the not-match letter from either agency cannot be used to prove employment eligibility for the new I-9 form. The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization. The old I-9 form should be retained along with the new form.

If the employee's work eligibility cannot be verified through completion of a new I-9 form and the employer continues to employ the employee, the employer may be deemed to have constructive knowledge of the employee's unauthorized status.

Termination

Taking action against an employee based on nothing more than the receipt of a "no-match" letter is unlawful.

An affected employee must be given the opportunity to correct the discrepancy within the time frame provided by the regulation. An exception is the employee's admission that he/she is unauthorized, in which case the employer has actual knowledge. Failure to terminate and to knowingly continue to employ an unauthorized alien can give rise to civil and criminal penalties.

This rule must be applied uniformly to all employees in order to avoid a potential charge of document abuse and/or unlawful discrimination on the basis of citizenship status and national origin.

Questions regarding the new regulation should be directed to our Labor and Employment Team:

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