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SECTION OF LABOR AND EMPLOYMENT LAW
NEWSLETTER

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Albert W. Palewicz, *Editor*

Section Officers:

Peter D. Guattery, *Chair*

Thomas J. Gagliardo, *Chair-Elect*

Jonathan R Krasnoff, *Recording Secretary*



FROM THE CHAIR

By Peter Guattery

Since the last issue of the Newsletter, the election has come and gone and the new administration of President Barack Obama has taken the helm. Already, we are seeing new momentum for employment related legislation which stalled during Congress' last session. As of this writing, the U.S. Senate has just approved the wage discrimination bill intended to overturn the U.S. Supreme Court's 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, Case No. 05-1074 (5/29/2007). Dubbed the "Ledbetter Fair Pay Act," the legislation will ease statute of limitations requirements under various civil rights statutes by clarifying that a discriminatory compensation decision or other unlawful practice recurs upon each subsequent payment of compensation. The matter had been sent back to the House of Representatives for final consideration and the bill may find its way to President Obama's desk before you receive this Newsletter.

The Ledbetter Fair Pay Act is but one piece of labor and employment law related legislation that will appear before Congress this year. Other bills likely to be on the agenda are the much debated Employee Free Choice Act, legislation prohibiting Right to Work laws, as well as laws relating to expanded leave entitlements and more work place flexibility in balancing work-life and family responsibilities, whether through changes to the Family & Medical Leave Act or otherwise. Legislation to include "sexual orientation" within the proscriptions of Title VII may also garner enough support to make the President's desk. Other issues such as plant closings, health care, executive compensation and immigration also promise to make this year an active and interesting one for all of us.

I would like to thank everyone who helped to make the Fall Dinner meeting such a success, and hope all of you will join us for our Spring Dinner meeting which is being planned. Finally, thank you also to Emmett McGee and Brooks Amiot of DLA Piper for providing the articles for this edition of the Newsletter which, as always, provide useful insight.

EDITOR'S CORNER

By Albert Palewicz

News first. Many thanks to Emmett McGee and Brooks Amiot of DLA Piper for putting together this excellent issue of the newsletter. It seems the "new developments" in labor and employment law keep coming at a furious pace. Some of the articles in this edition note that there are a lot of issues that may come before Congress and the Courts over the next few months that would noticeably change the landscape of the area in which we practice law. It makes it hard to keep up with developments, but it also insures we don't lose interest. Issues of this newsletter seem to help many members with the "keeping up" process, and we owe the authors of the various articles a sincere thank you.

The next issue will be sponsored by Semmes, Bowen & Semmes of Baltimore, with Don Burke as coordinator. As those who work directly with the newsletter will remember, it was a group of attorneys at Semmes, Bowen & Semmes in Baltimore that sponsored the very first issue of the Labor and Employment Law Section newsletter in May 1996. We can expect that this next issue will be of the same high standard found in that inaugural issue.

Now to turn to some reports of events that have taken place since the last newsletter. The first, on Tuesday, November 18, was the Forum on Maryland's Flexible Leave Act, which featured Maryland Delegate Ann Marie Doory, and other panelists in an informative session on the topic. Lunch was provided by the University of Baltimore School of Law and Adelberg, Rudow, Dorf & Hendler, LLC, whose generosity was appreciated by all who attended. The session provided a lively discussion among the various points of view present on the clarity, enforceability, and even the wisdom of the new legislation. Delegate Doory answered questions, even pointed ones, with a calm and straight forward approach that gave those present a good insight into why the legislation was enacted. The program was put together in large part by Eric Disharoon of Adelberg, Rudow, along

(continued on page 2)

EDITOR'S CORNER (continued)



This Maryland State Bar Association Newsletter is not intended to provide legal advice, but rather to provide information concerning recent developments in the field of labor and employment law. Questions concerning individual problems or claims should be addressed to legal counsel. Any opinions expressed herein are solely those of the authors, and are not those of the Maryland State Bar Association. Finally, the articles contained herein are copyrighted, all rights reserved by the respective authors and/or their law firms, companies or organizations.



with Professor Michael Hayes, of the University of Baltimore School of Law. We can hope that similar sessions will develop in the future.

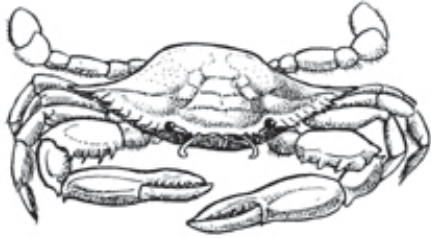
The next event was the Brown Bag Lunch at the Baltimore field office of the Equal Employment Opportunity Commission that took place on January 14, 2009. The first Section event of the new year, it was attended by more than 50 interested practitioners. Many participants had questions to ask of Baltimore Field Office Director Gerald Kiel and the group of EEOC's Baltimore managers. Beverages and dessert were provided by the Section to all those attending. It was an informative and interesting session. Many thanks to the staff of the EEOC Baltimore Field Office who arranged the event.

The Section Council will be meeting soon to plan the spring and early summer events. Anyone who has ideas of what they would like to see done should contact Section Chair Peter Guattery at pguattery@wtplaw.com.



Mark Your Calendars

MARYLAND STATE BAR ASSOCIATION ANNUAL MEETING
OCEAN CITY, MARYLAND
JUNE 10-13 2009



Sea. You. There.



ARTICLES

Obama Administration will Change the Landscape of Federal Labor and Employment Law

By Amy Beth Leasure

With the election of President Barack Obama, and with a Democratic majority in control of both houses of Congress, it is quite probable that the next few years will bring the enactment of employee-friendly reforms of federal labor and employment law. In addition to the likely passage of the Employee Free Choice Act, labor and employment law practitioners should be mindful of the following potential changes to current law. President Obama has indicated support for all these measures.

Continuing Violation Doctrine for Discriminatory Pay Claims

The Lilly Ledbetter Fair Pay Act (H.R. 2831/S. 1843), if passed, would reverse the Supreme Court's 5-4 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which narrowly interpreted the limitations period under Title VII of the Civil Rights Act (Title VII) and held that the deadline for filing a charge with the Equal Employment Opportunity Commission (EEOC) for a discriminatory pay claim is measured from the date when the employer makes the initial discriminatory pay decision.

In reversing this decision, the Ledbetter Act would amend the charge-filing periods under Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Rehabilitation Act of 1973 to provide that the limitations period for filing a pay discrimination charge runs anew *each time an employee receives a paycheck*, regardless of how much time has passed since the original discriminatory pay decision was made. If enacted, the Ledbetter Act effectively would allow employees to file timely charges under a continuing violation theory and would subject an employer to open-ended liability for years after an alleged discriminatory pay practice first commenced. As a senator, President-elect Obama was a co-sponsor of the Ledbetter Act. The House is expected to pass it in early 2009.

Elimination of Damage Caps and Expansion of Anti-Discrimination Law Remedies and Liabilities

As a senator, President Obama co-sponsored both the Equal

Remedies Act of 2007 (S. 1928) and the Civil Rights Act of 2008 (S. 2554/H.R. 5129). Both bills provide for the elimination of the \$300,000 cap on compensatory and punitive damage awards under Title VII and the ADA. In addition, the Civil Rights Act of 2008, *inter alia*, would lower the burden of proof for the recovery of attorney's fees; authorize the recovery of expert fees by prevailing parties; prohibit pre-dispute arbitration agreements, with certain limited exceptions; amend the Equal Pay Act (EPA) to provide for compensatory and punitive damages (in addition to back pay) and to require plaintiffs to opt out of class actions (instead of the current opt-in standard); and expand age discrimination liability under the ADEA by incorporating the disparate impact standard applied in Title VII claims (under Title VII, employers must demonstrate that a policy or practice that has a disparate impact on protected groups is a necessity, whereas under the ADEA, an employer only must demonstrate that the policy or practice is reasonable).

Expansion of the Family and Medical Leave Act

During his campaign, President Obama promised that his Administration will work to expand the Family and Medical Leave Act (FMLA) in a number of significant ways. First, he supports the expansion of FMLA to include employers with as few as 25 employees, as opposed to the current 50-employee standard. He also supports the expansion of the FMLA to provide protection for a broader range of reasons for leave, including (a) leave for elder care needs; (2) leave to address domestic violence and/or sexual assault; (3) leave to care for individuals who have resided in an employee's home for six months or more; and (4) leave for up to 24 hours each year to allow parents to participate in their children's academic activities.

Prohibition against Discrimination on the Basis of Sexual Orientation

President Obama has pledged to pass the Employment Non-Discrimination Act of 2007 (H.R. 3685), which would amend Title VII to prohibit employment discrimination on the basis of an employee's "actual or perceived" sexual orientation. As introduced in 2007, the legislation does not apply to religious organization employers, employers with less than 15 employees, or to the Armed Forces.

Work Schedule Flexibility

The Working Families Flexibility Act (S. 2419/H.R. 4301) would require an employer to engage in good faith negotiations with an employee regarding a request for modification of the employee's work hours, schedule, or location. This proposed legislation has been referred to as the "union of one" law, based on its mandate that all employers negotiate with individuals over working conditions, even in non-unionized work environments.

As proposed in 2007, the Act sets forth a detailed interactive process between employers and employees, requiring that employers meet promptly with the employee and the representative of his or her choice regarding the requested modification, then issue a written decision within 14 days of the meeting. Pursuant to the proposed bill, if the requested modification is denied, the employer must state the grounds for the denial in detail and offer a proposed alternative. The employee would then have the right to request reconsideration and a further meeting regarding the requested modification. An employee also would have the right to file a complaint with the Department of Labor, to request an administrative hearing, and to appeal the administrative determination in a federal court of appeals.

The proposed legislation contains an anti-retaliation provision, and provides for potential penalties against employers for violations starting at \$1,000 per violation. Aggrieved employees also may be entitled to back pay and other remedies. As a senator, President Obama co-sponsored the Act; during his presidential campaign, he declared his support for the expansion of flexible work arrangements.

Invalidation of Pre-dispute Agreements to Arbitrate Employment Disputes

The Arbitration Fairness Act of 2007 (H.R. 3010/S. 1782), an amendment to the Federal Arbitration Act of 1925 (FAA), would establish new procedures and limitations related to pre-dispute mandatory arbitration clauses. If enacted, the legislation would invalidate arbitration agreements that require the arbitration of an employment, consumer, or franchise dispute, or a dispute arising under any statute intended to protect civil rights or regulate contracts between parties of unequal bargaining power, unless both parties voluntarily agree to use arbitration **after a dispute arises**. (The 2007 bill excludes from its application arbitration provisions contained in collective bargaining agreements, however.)

In addition, the 2007 bill would amend the FAA to provide that a court, as opposed to an arbitrator, determines the validity and enforceability of an arbitration agreement, thereby reversing the Supreme Court decision of *Buckeye Check Cashing Inc. v. Cardagna*, 546 U.S. 440 (2006). The proposed legislation would apply to any dispute or claim arising after the enactment of the legislation, regardless of the date on which the pre-dispute arbitration agreement was executed. Although as a senator President Obama was not a co-sponsor of the Arbitration Fairness Act, it is likely that he would support the Act if it is reintroduced.

Misclassification of Employees as Independent Contractors
President Obama has demonstrated his support for a couple of different bills related to employment classification. In September

2007, then-Senator Obama introduced the Independent Contractor Proper Classification Act (S. 2044), which would amend the Revenue Act of 1978. The proposed legislation would eliminate the defense of “industry practice” as a justification for an employer’s misclassification of workers as independent contractors. In addition, the Secretary of Labor would be required to establish a procedure for workers to petition for a determination of their legal status as either employees or independent contractors. The proposed legislation also would protect workers from employer retaliation for filing such a petition, and provide for the payment of attorney’s fees to employees who successfully challenge their classifications. Employers would have the duty to inform their independent contractors of their federal tax obligations, the labor and employment protections inapplicable to them and their right to seek a status determination. The bill also would allow the Internal Revenue Service to prospectively reclassify a worker as an employee, even if in the past it had determined that the worker was properly classified.

In September 2008, then-Senator Obama co-sponsored the Employee Misclassification Prevention Act (H.R. 6111/S. 3648), which would amend the Fair Labor Standards Act (FLSA) to increase penalties on employers who misclassify employees as independent contractors. The legislation would impose a civil penalty of up to \$10,000 per violation against an employer who repeatedly or willfully misclassifies an employee as an independent contractor. The Act also provides for double liquidated damages against an employer who violates the FLSA minimum wage or maximum hours requirements in addition to misclassifying workers.

Equal Pay for Equivalent Worth

As a senator, President Obama also was a co-sponsor of the Fair Pay Act of 2007 (S. 1087/H.R. 2019), which would amend the EPA and the FLSA to prohibit discriminatory pay practices on the basis of sex, race or national origin. The legislation provides for an “equivalent worth” pay system, which would compare dissimilar jobs for equal pay purposes. Accordingly, if enacted, this legislation would require employers to pay employees in a job dominated by employees of a particular sex, race or national origin at the same wage rate at which the employer pays employees in a different job that is dominated by employees of a different sex, race or national origin where the jobs are “equivalent.”

In addition to the current penalties under the EPA, the Act would provide for compensatory and/or punitive damages and allow for costs for expert witness fees. If enacted, the Act also would require putative plaintiffs to opt out of class action lawsuits (rather than opt-in as under current law), thereby making it easier for plaintiffs to become parties to class actions.

Paid Sick Leave

In 2007, then-Senator Obama co-sponsored the Healthy Families Act (H.R. 1542/S. 910), which would require that employers provide at least seven days of *paid* sick leave per year to each employee who works at least 30 hours per week for the employee's own medical needs or to care for the medical needs of certain family members. Part-time employees would receive paid sick leave on a pro-rated basis. Eligible reasons for paid time off would include illness and medical appointments. The Act would apply to all employers with 15 or more employees.

Narrowing of the Category of Employees Who Qualify for the Supervisory Exclusion under the National Labor Relations Act

During the 110th session of Congress, then-Senator Obama co-sponsored the Re-Empowerment of Skilled Professional Employees and Construction Tradeworkers Act (H.R. 1644/S. 969) (RESPECT Act), which would narrow the definition of the term "supervisor" under the National Labor Relations Act (NLRA), thereby reducing the number of employees who qualify for the NLRA's statutory exclusion of supervisors from union organizing and collective bargaining.

Under the law, because supervisors are considered agents of the employer, unions have no right to organize them or bargain on their behalf. At present, Section 2(11) of the NLRA provides that a "supervisor" encompasses all workers with the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action" as long as this authority involves the use of "independent judgment." The RESPECT Act would eliminate the work-related supervisory duties of "assign[ing]" work to other employees and "responsibly direct[ing]" employees. The RESPECT Act would thus reverse recent rulings of the National Labor Relations Board that held that the term "supervisor" encompasses workers who assign other employees to duties, are accountable for directing employees to undertake specific tasks, and have the discretion to do so without close direction from management (such as charge nurses or lead people).

The proposed legislation also would require that an individual must spend the **majority** of his or her working time (as opposed to the current 10-15 percent standard) on the remaining supervisory duties in order to qualify as a supervisor. If enacted, the RESPECT Act would dramatically expand the population of the workforce eligible to become union members since front-line and working supervisors would be eliminated from the NLRA's supervisory exclusion. Employers clearly would no longer be able to use such front-line working supervisors as the voice for

management in union organizing campaigns, as frequently is the case, given that these individuals generally have significant direct contact with the employees whom they assign or direct work.

Expansion of WARN Protections

Senator Obama also was a co-sponsor of the Federal Oversight, Reform and Enforcement of the WARN Act of 2007 (S. 1792/H.R. 3662) (FOREWARN ACT), proposed legislation intended to expand the protections of the Worker Adjustment and Retraining Notification Act (WARN). The proposed amendment to WARN would (1) increase the notice period for plant closings or mass layoffs to 90 days, as opposed to the current 60-day notice requirement; (2) increase the penalties for violations of the notice requirements to double the back pay for each day of the violation for up to 90 days (under current law, 60 days); (3) expand the WARN protections to apply to employers of 50 or more employees, from the current 100 employee standard; and (4) empower the Secretary of Labor and state attorneys general to bring claims on behalf of employees for certain relief under the Act.

Increase of the Minimum Wage

President Obama also has pledged to increase the minimum wage to \$9.50 per hour by 2011.



New FMLA Rules Focus on Better Communication While Providing Expanded Leave for Military Families

By Lynn Clements

New Department of Labor regulations under the Family and Medical Leave Act took effect on January 16, 2009.

The final regulations, published in the Federal Register in November, aim to “improve communication between employees, employers, and health care providers to make the law operate more smoothly,” according to the DOL. The regulations also incorporate recent amendments to the FMLA, which expand job-protected leave to family members of those in military service.

As enacted in 1993, the FMLA provides up to 12 weeks of job-protected unpaid leave to covered employees because of their own serious health conditions or to care for a family member with a serious health condition. 29 U.S.C. §§ 2601 *et seq.* In January 2008, the FMLA was amended by provisions of the National Defense Authorization Act for FY 2008 to permit covered employees to take job-protected FMLA leave because of a “qualifying exigency” arising out of a covered military member’s active duty status or notification of an impending call or order to active duty status, in support of a contingency operation and to care for a covered service member with a serious injury or illness. Public Law 110-181 (Jan. 28, 2008).

The final regulations are the culmination of several years of work by the DOL. In December 2006, the DOL issued a Request for Information (RFI) regarding the public’s experiences with the law. After publishing a Report on the RFI in June 2007, the DOL issued a proposed rule in February 2008. The final regulations closely track the proposal, although several changes were made in response to public comments.

Practitioners who regularly provide advice regarding the taking or administering of family leave will want to familiarize themselves with all of the new requirements. This article highlights some of the more significant changes, with a special emphasis on the new military family leave entitlements.

Final Rule Retains Basic Definition of a Serious Health Condition

The DOL acknowledged employers’ frustration with the expansive application of the definition of a serious health condition and

the taking of small increments of intermittent leave by employees, but it declined to make substantial changes in either area. The final rule retains the basic definition of a serious health condition. It also provides guidance regarding the “periodic visits to a health care provider” and the “incapacity plus treatment” prongs. Under the final rule, “periodic” means two or more visits per year to a doctor for the same condition. The rule also specifies that, in order to satisfy the “incapacity plus treatment” prong, the first (or only) treatment must occur within seven days of the first day of incapacity and must be an in-person visit. When treatment involves two or more visits, rather than a single visit plus a regimen of continuing treatment, the two visits must occur within 30 days of the beginning of the period of incapacity. In addition to providing further guidance on calculating the increment of leave that may be taken, the Department also makes clear that an employee may be charged FMLA leave for overtime hours not worked if he or she would have been required to work the hours absent an FMLA-qualifying condition.

While FMLA leave is unpaid, the statute allows paid leave to be substituted by an employee or employer. 29 U.S.C. § 2612(d)(2). In the past, the DOL applied different procedural requirements to the use of vacation or personal leave than to medical or sick leave. See 29 C.F.R. § 825.207(c). The new regulations make clear that an employee’s right to substitute any form of accrued paid leave is limited by the terms and conditions of the employer’s paid leave policies, unless the employer waives the requirements. Thus, for example, an employee who wishes to substitute two hours of paid vacation leave for unpaid FMLA leave may be required to take a full day of paid leave if the employer’s policy requires that vacation leave be taken in no less than full-day increments. Employers must notify employees of any additional requirements for the use of paid leave and must make clear that the employee remains entitled to take unpaid FMLA leave if he or she does not meet the requirements of the paid leave policy.

Regulations Create Additional Notice Obligations for Employers

The regulations, which consolidate all employer notice requirements into a new “one-stop” section, create additional notice obligations for employers that will need to be incorporated into an employer’s written policies and FMLA procedures. Employers will be required to provide employees with a general notice, an eligibility notice, a rights and responsibilities notice, and a designation notice. Electronic posting is permitted under certain circumstances. The regulations also revise the time frames for providing various notices to employees, extending the time frame from two to five business days in most cases.

Employees Also Face Increased Obligations

Employees also face increased notice obligations under the new

rules, especially when leave is unforeseeable. Under the old regulations, employees were required to provide notice of the need for unforeseeable leave “as soon as practicable” – ordinarily within one or two days of when the need for leave became known. 29 C.F.R. § 825.303. In an opinion letter, the DOL interpreted this language to mean that employees could provide notice to an employer up to two business days after taking leave. See WH Admin. Op. FMLA101 (Jan. 15, 1999).

While retaining the “as soon as practicable” standard, the final rule provides that an employee needing unforeseeable FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances. The final rule also makes clear that an employer may delay or deny FMLA leave where the employee does not comply with established call-in procedures and no unusual circumstances justify the failure.

Regulations Revise Process for Certifying a Serious Condition

The final regulations also significantly revise the process for certifying a serious health condition. Importantly, employers must now provide employees with a written statement regarding what additional information is necessary to cure an incomplete or insufficient certification and allow the employee at least seven calendar days to cure the deficiency. In a change from current policy, the DOL has eliminated the requirements that employers obtain employee permission and use a health-care provider to contact the employee’s doctor to authenticate or clarify a medical certification. Under the new regulations, a human resource professional, a leave administrator, or a management official other than the employee’s direct supervisor may make such contact. The rule also eliminates the need for employee permission, although any contact between an employer and an employee’s doctor must comply with the Health Insurance Portability and Accountability Act (HIPPA) Privacy Rule. See 45 C.F.R parts 160 and 164. The regulations also explicitly allow a health care provider to provide a diagnosis, which was not previously permitted.

These Changes Seek to Improve Exchange of Information

Taken together, the changes to the notice and certification sections are clearly intended to make the exchange of information between employees, employers and health care providers work better. The DOL has provided prototype forms that can be used to satisfy these requirements, including two new certification forms – one for an employee’s serious health condition and another for a family member’s serious health condition.

Practitioners in the Fourth Circuit should note that the Department expressly states in the final rule that employees and employers may voluntarily agree to settle past FMLA claims with-

out DOL or court approval. The revised language is intended to address the Fourth Circuit Court of Appeal’s decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 2931 (2008), which held that such settlements were prohibited. The final rule also incorporates changes to the regulations required by the United States Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which invalidated a provision in the former regulations providing a “categorical penalty” for an employer’s failure to timely designate leave. The final rule permits employers to retroactively designate leave as FMLA-protected, provided that there is no individualized harm to the employee.

Rule Provides Guidance for New Family Military Leave Entitlements

The final rule provides much needed guidance regarding the new military family leave entitlements. Under the first of these entitlements, covered employees may use their 12-week FMLA entitlement to take job-protected unpaid leave for certain qualifying exigencies arising out of the active duty or call to active duty status of a covered military member. The DOL’s final rule permits leave for the following qualifying exigencies: (1) short-notice deployment; (2) military events and related activities; (3) child-care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) any additional activities agreed to by the employer and employee.

The final rule also clarifies that this leave may only be taken by employees whose family member is in the National Guard or Reserves or is a covered retired member of the regular armed forces or reserve. Employees who have family members serving in the regular armed forces are not eligible.

The second new leave entitlement permits eligible employees to take up to 26 weeks of job-protected FMLA leave in a “single 12-month period” to care for a covered service member with a serious injury or illness incurred in line of duty on active duty. Eligible employees include a service member’s next of kin – a familial relationship not recognized for other qualifying reasons under the FMLA. The DOL makes clear that employees may take this leave more than once, either to care for the same service member with multiple injuries or to care for multiple service members. The final rule also provides guidance on how to determine whether an employee is a covered service member’s next of kin. The rule provides a list of familial relationships that will qualify in order of priority, but also permits a service member to designate any blood relative as his or her next of kin for purposes of FMLA leave.

While many of the procedures used to administer other types of

FMLA leave are applicable to the new military family leave entitlements, practitioners should be aware that there are some special rules. For example, the final rule defines “son” or “daughter” differently for purposes of the military caregiver leave provisions. The certification requirements for taking military family leave are also different from those applicable to leave taken because of a serious health condition, including that no recertifications or second opinions are permitted. The final rule includes two new certification forms that may be used by employees and employers for these new leave entitlements.

For more information, including a copy of the DOL’s Final Rule, Proposed Rule, Request for Information, and RFI Report, visit the DOL’s website at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

EEOC’s New Compliance Manual Section Regarding Religious Discrimination in the Workplace

By Jill S. Distler

On July 22, 2008, the Equal Employment Opportunity Commission (EEOC) issued a new Compliance Manual Section (Section) addressing religious discrimination in the workplace. The EEOC wrote the new Section in response to several factors: the rising number of religious discrimination charges, which more than doubled between 1992 and 2007; the increased religious diversity in the United States; and at the request of employers and agency personnel who investigate and litigate religious discrimination claims. The Section, titled *Religious Discrimination*, includes what the EEOC describes as “a comprehensive review of the relevant provisions of Title VII of the Civil Rights Act of 1964 and the EEOC’s policies regarding religious discrimination, harassment and accommodation.” (*EEOC’s July 22, 2008 Press Release*, <http://www.eeoc.gov/press/7-22-08.html>.) It provides guidance to EEOC staff who are investigating religious discrimination charges and is “designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff on Title VII’s prohibition against religious discrimination.” (*Section Overview*, <http://www.eeoc.gov/policy/docs/religion.html>.)

The Section, which is quite lengthy, is organized by the following five topics: (1) coverage issues, including the definition

of “religion”; (2) disparate treatment in employment decisions based on religion; (3) harassment based on religion; (4) reasonable accommodation; and (5) related forms of discrimination, including discrimination based on national origin, race, or color, and retaliation.

The new Section includes “Employer Best Practices,” which are tips for employers on reducing the risk of religious discrimination claims. The Section also contains “Notes to EEOC Investigators,” which discuss lines of inquiry that EEOC investigators should follow and information they should request from employers and employees when investigating religious discrimination claims. Also included are various fact patterns that the EEOC uses to illustrate the principles it discusses in the Section.

Along with the new Section, the EEOC issued two companion documents. The first is titled *Questions and Answers: Religious Discrimination in the Workplace*. It offers a succinct description of the EEOC’s policies regarding religious discrimination. The second document, titled *Best Practices for Eradicating Religious Discrimination in the Workplace*, repeats verbatim the tips for employers that are included in the Compliance Manual Section itself. The new Compliance Manual Section, as well as the two companion documents, are available on the EEOC’s website at <http://www.eeoc.gov>.

This article highlights some of the issues addressed in the new Compliance Manual Section.

Coverage

Under the topic titled “Coverage,” the EEOC explains that there are four theories of liability for religious discrimination under Title VII: disparate treatment, harassment, denial of reasonable accommodation, and retaliation.

The Section includes a “Note to EEOC Investigators” instructing them that even if a charging party raises only one of these theories of liability, the charge should be “investigated and analyzed under all four theories of liability to the extent applicable.”

The EEOC notes that religion is defined very broadly under Title VII and includes traditional, organized religions, as well as religious beliefs that are “new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.” An employee’s belief can be “religious” even if no other people adhere to it. Determining whether a belief or practice is religious must be determined on a case-by-case basis.

Disparate Treatment

In addition to prohibiting disparate treatment based on religion in

decisions such as hiring, promoting, disciplining, and discharging employees, Title VII prohibits disparate treatment of religious expression in the workplace. For example, the EEOC states that it would be a violation of Title VII for a supervisor to allow one employee to display the Bible on her desk but to prohibit another employee from displaying the Quran on his desk.

It is also unlawful for an employer to take an adverse employment action against an employee based on the discriminatory preferences of others, including the employer's customers. For example, it would be unlawful for a coffee shop owner to discharge an employee who wears a turban as part of his Sikh religion, simply because customers may mistakenly believe the employee is a Muslim and a terrorist sympathizer. The termination of that employee based on the customers' preference not to have a cashier of the employee's perceived religion would be unlawful, the EEOC explains, regardless of the employee's actual religion. The EEOC suggests that if an employer is confronted with customer biases, the employer "should consider engaging with and educating the customers regarding any misperceptions they may have and/or regarding the equal employment opportunity laws."

Harassment

The EEOC states that religious harassment occurs when an employee is either (i) "required or coerced to abandon, alter, or adopt a religious practice as a condition of employment" ("quid pro quo" harassment), or (ii) subject to a hostile work environment that is motivated by the religious belief or observance, or lack thereof, of either the harasser or the targeted employee, or by the religious beliefs or practices of the employee's friends or relatives.

The EEOC offers a good example of how quid pro quo religious harassment may give rise to disparate treatment and failure to accommodate claims: A supervisor tells an employee that he must attend weekly prayer sessions in order to be promoted, but the employee refuses to attend the prayer sessions; then the employee, who is the most qualified applicant, is denied a promotion. In such a case, the employer would be liable for quid pro quo harassment for conditioning the employee's promotion on his adherence to the supervisor's view of appropriate religious practice. This scenario also renders the employer subject to a claim of disparate treatment, based on the failure to promote. Moreover, if the prayer sessions were mandatory and the employee had asked to be excused from them on religious grounds, the employer could also face a claim for failure to accommodate.

The Section also discusses how employers must balance their obligation to maintain a harassment-free work environment with their duty to accommodate an employee's religious expression. The EEOC states that there are some employees, or even supervi-

sors, who may be very open about their religion and try to persuade other employees that their religious beliefs are correct, *i.e.*, to proselytize. Some employees, however, may view the proselytizing as unwelcome harassment. The employer, therefore, must "balance the rights of employees who wish to express their religious beliefs with the rights of other employees to be free from religious harassment."

The employer clearly may not ban *all* religious expression in the workplace in an effort to avoid potential harassment claims, because Title VII requires an employer to accommodate employees' sincerely held religious practices and beliefs as long as there is no undue hardship on the employer. As the EEOC points out, however, if a specific employee's proselytizing or some other form of religious expression in the workplace could potentially constitute harassment, the employer is not required to accommodate the religious expression, because doing so would pose an undue hardship for the employer.

The EEOC offers a number of suggestions to employers on reducing the likelihood that employees will engage in religious expression that rises to the level of harassment. These include:

- Have a "well-publicized and consistently applied anti-harassment policy" that includes "an effective procedure for reporting, investigating, and correcting harassing conduct."
- "Once an employer is on notice that an employee objects to religious conduct that is directed at him or her, the employer should take steps to end the conduct because even conduct that the employer does not regard as abusive can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection."
- "To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of objectively abusive or insulting conduct, even absent a complaint."
- "Employers should encourage managers to intervene proactively and discuss with subordinates whether particular religious expression is welcome if the manager believes the expression might be construed as harassing to a reasonable person."
- "While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended."

Reasonable Accommodation

Title VII requires an employer to reasonably accommodate an employee's sincerely held religious beliefs. As stated by the

EEOC, a “reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs.”

An accommodation is not reasonable, however, if it only lessens, and does not eliminate, the employee’s conflict between religion and work. The duty to accommodate is subject to the undue hardship defense, which requires the employer to show that the proposed accommodation poses a “more than *de minimis*” cost or burden on the employer. The EEOC states that if “an employee’s proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.”

One of the more common requests for accommodation that employers receive concerns an employee’s religious dress or grooming practices. For example, a male employee’s religious beliefs may require that he wear a beard or wear his hair long. The employer, however, in an effort to convey a certain image to the public, might prohibit its male employees from wearing beards or long hair. While the EEOC recognizes that some courts have held that the undue hardship defense applies if the employee’s religious dress or grooming practice “conflicts with the public image the employer wishes to convey to customers,” the EEOC cautions that “an employer’s reliance on the broad rubric of ‘image’ to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called ‘customer preference’) in violation of Title VII.” Although there may be limited situations in which the need to conform to a certain image is “so important” that modifying the employer’s policies would pose an undue hardship, the EEOC states that, even in those situations, an employer should handle accommodation requests on a case-by-case basis.

The EEOC’s “Employer Best Practices” section includes the following suggestions for employers faced with reasonable accommodation requests:

- Employers should train managers and supervisors so that they know how to recognize employees’ religious accommodation requests and should develop internal procedures for handling such requests.
- Employers should not make assumptions about what constitutes a religious belief or practice or about the type of accommodation that would be appropriate.
- Although an employer is not required to provide an employee’s preferred accommodation if an effective alternative accommodation is available, the employer should consider the employee’s preferred accommodation and, if it is denied, explain to the employee the basis for the denial.
- Employers should train their managers and supervisors to

consider an alternative accommodation if the one requested by the employee would pose an undue hardship.

- An employer should not simply assume that a requested accommodation will conflict with the terms of a collective bargaining agreement or seniority system; rather, the employer should check to see whether the CBA or seniority system includes any exceptions for religious accommodation. Even if a requested accommodation would interfere with a CBA or seniority system, the employer should determine if an alternative accommodation is available and should keep in mind that it is “free to seek a voluntary modification to a CBA in order to accommodate an employee’s religious needs.”
- Employers should encourage employees of substantially similar qualifications to voluntarily swap shifts with one another in the event that an employee has a religious conflict. An employer can facilitate this by publicizing its policy allowing such swaps and by providing a means, such as a bulletin board or group e-mail, for an employee with a religious conflict to solicit volunteers for a swap.
- If there is no accommodation that would permit an employee to remain in his or her position absent undue hardship, and a lateral transfer is unavailable, an employer should offer to the employee an available lower-paying position if that position would enable the employee to abide by his or her religious beliefs.
- If an employer is concerned about the appearance of an employee who wishes to wear religious garb and whose position requires interaction with the public, it may be appropriate to consider whether the employee’s religious beliefs would allow him or her to wear the garb in the company’s uniform colors.
- Employers should be careful not to unintentionally pressure employees to attend social gatherings after the employees have stated that they object to attending on religious grounds.

Related Forms of Discrimination

The EEOC notes that religious discrimination may overlap with discrimination based on national origin, race, and color. For example, “[a]ll four bases might be implicated where, for example, co-workers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his religion, national origin, race, and/or color.” In addition, the EEOC states that it has taken the position that requesting religious accommodation is protected activity for purposes of a retaliation claim.

Conclusion

Although allegations of religious discrimination constitute only a small portion of the total number of charges filed with the EEOC each year, it is clear that the EEOC takes such charges seriously and will thoroughly investigate them all. For any lawyer who

counsels employers or employees regarding religious accommodation requests, investigates and responds to charges of discrimination, or litigates religious discrimination suits, the EEOC's new Compliance Manual Section provides valuable guidance.

Sometimes “Retaliation” Does Not Require A New Charge

By Larry Seegull

When does an allegation in a lawsuit of a new form of retaliation relate back to a previously filed charge of discrimination? A recent Fourth Circuit case answers this question in at least one set of circumstances. See *Jones v. Calvert Group* (No. 07-1680, decided January 5, 2009).

Linda Jones brought suit against Calvert Group, alleging discrimination on the basis of her age, sex and race, and claiming unlawful retaliation for her having filed a charge of discrimination with the Maryland Commission on Human Relations.

Ms. Jones was employed as a computer operator and technical analyst. On May 1, 2003, Ms. Jones filed her charge of discrimination with the MCHR (Charge 1) alleging only age, sex and race discrimination in the selection of another employee for a position she was seeking. Ms. Jones did not, at that time, make any claim of unlawful retaliation. Calvert Group and Ms. Jones subsequently resolved her claims of discrimination in Charge 1 by an agreement to provide her with training and assistance to allow her to qualify for a promotion.

Soon thereafter, Ms. Jones was issued a negative performance evaluation. She then filed a second charge of discrimination with the MCHR (Charge 2), this time specifically asserting that she was issued the negative performance evaluation in retaliation for her having filed the prior charge of discrimination. Within a few months, Calvert Group terminated Ms. Jones for alleged performance deficiencies.

Ms. Jones filed suit in the District Court of Maryland claiming she was terminated on the basis of her age, sex and race, and in retaliation for her having engaged in protected conduct under Title VII. Calvert Group immediately moved to dismiss the complaint (which was converted into a motion for summary judgment), claiming that Ms. Jones had failed to exhaust her administrative remedies.

The District Court granted summary judgment for Calvert Group, finding that Ms. Jones's claims of age, sex and race discrimination in her termination were not properly before the court because they had never been the subject of an administrative charge of discrimination. Because Charge 1 only related to alleged age, sex and race discrimination *prior* to her termination, the District Court found her discriminatory termination claims had never properly been the subject of an administrative proceeding. Similarly, regarding the retaliation charge, the District Court granted summary judgment for Calvert Group, ruling that the alleged retaliation had never properly been the subject of an administrative procedure. Even though Ms. Jones had brought a separate claim of retaliation, she brought Charge 2 while a current employee; therefore, Charge 2 did not relate to her termination. Accordingly, the District Court ruled Ms. Jones had failed to exhaust a prerequisite to bringing the claim.

Ms. Jones appealed the District Court's rulings to the Fourth Circuit. With respect to the claims of age, sex and race discrimination, the Fourth Circuit agreed that Ms. Jones had not exhausted her administrative remedies. Nevertheless, the Fourth Circuit ruled that the District Court should have dismissed these causes of action, rather than granting judgment for Calvert Group, because Ms. Jones's failure to exhaust deprived the court of subject matter jurisdiction.

More significantly, with respect to the granting of judgment to Calvert Group on her claim of retaliation, Calvert Group continued to argue that Ms. Jones had failed to exhaust her administrative remedies, because she had never filed a charge of discrimination asserting she had been terminated in retaliation for filing a prior charge of discrimination. Since Charge 1 only claimed discrimination, and Charge 2 only claimed retaliation in being provided with a negative performance evaluation, the issue of Ms. Jones's termination was never investigated before the administrative agency, and no efforts at conciliation were undertaken.

Relying on the prior Fourth Circuit case of *Nealon v. Stone*, the court found that the retaliation alleged in the lawsuit, giving rise to her termination, was sufficiently related to the retaliation alleged in Charge 2, such that there was no need for a third charge to have been filed. The court referred to language in Charge 2, which it asserted was an allegation that the retaliatory conduct was ongoing: “I *am* being forced to work in a hostile environment and subjected to differential treatment in retaliation for filing [Charge 1.]” The use of the term “*am*” indicated, according to the court, that the retaliation was “continuing.” Accordingly, the court concluded that “the alleged retaliatory termination was merely the predictable culmination of Calvert Group's alleged retaliatory conduct, and, accordingly, we conclude that

the claim of retaliatory termination was reasonably related to the allegations of the second charge.”

Therefore, it appears, a new and independent charge of retaliation will not need to be filed when the retaliation relates back to a prior charge. And, further, relation back will likely be found if the prior charge contains language suggesting an ongoing pattern of retaliation.

OSHA Amends its Personal Protective Equipment and Training Standards to Clarify that Violations Can be Assessed on a Per-Employee Basis

By Clifton R. Grey

The Occupational Safety and Health Administration (OSHA) has issued its final rule implementing certain amendments to the rules and regulations concerning personal protective equipment (PPE) and employee training related to the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 651 *et seq.* Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee, 73 Fed. Reg. 75,568 (Dec. 12, 2008). OSHA determined that the final rule, which became effective on January 12, 2009, was needed to “make it unmistakably clear that each covered employee is required to receive PPE and training, and that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty.” *Id.* at 75,568, 75,569.

The clarification imposes significant obligations on employers under the OSH Act. This article reviews the impetus of the clarification and its effects.

OSHA’s PPE and Training Requirements

OSHA focuses on improving workplace safety and minimizing the dangers employees may be required to be exposed to due to the nature of their employment. For this reason, the OSHA regulations have long implemented PPE and training standards as an extension of the OSH Act’s “general duty”

clause, which requires employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). The OSHA regulations provide general standards for PPE whenever necessary to protect employees from workplace hazards. *See, e.g.*, 29 C.F.R. § 1910.132(a) (stating that “[p]rotective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact”).

The OSHA regulations are more explicit for certain types of employment, specifically detailing the types of PPE that employers are required to furnish. For example, the regulations require that employers involved in “logging operations” provide to their employees operating chainsaws “leg protection constructed with cut-resistant material, such as ballistic nylon. The leg protection shall cover the full length of the thigh to the top of the boot on each leg to protect against contact with a moving chainsaw.” 29 C.F.R. § 1910.266(d)(1)(iv). Likewise, when employment presents the danger of exposure to “blood-borne pathogens,” the regulations provide that the employer is to provide “appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices.” 29 C.F.R. § 1910.1030(d)(3)(i). A number of other types of employment are specifically covered by the regulations, each addressed by particular PPE requirements as delineated by the regulations. *See, e.g.*, 29 C.F.R. § 1910.1029(h) (PPE requirement for employees exposed to “coke oven emissions”); 29 C.F.R. § 1910.1025(g) (PPE requirement for employees exposed to lead above the permissible exposure limit).

Just as with its PPE standards, the OSHA regulations also require that training be given to employees exposed to certain hazards. *See, e.g.*, 29 C.F.R. § 1910.95(k)(1) (“The employer shall institute a training program for all employees who are exposed to a noise at or above an 8-hour time weighted average of 85 decibels, and shall ensure employee participation in such a program”); 29 C.F.R. § 1910.1043(i)(1)(i) (“The employer shall provide a training program for all employees exposed to cotton dust”).

Noncompliance with PPE and Training Requirements – The OSHRC and the Fifth Circuit Do Not Agree with OSHA’s “Per-Employee” Basis for Violations

As explained above, the OSHA regulations provide that for certain hazardous types of employment, an employer is required to furnish to its employees PPE and training so as to enable employees to recognize the hazards of the employment and to best protect themselves from those hazards. That much was clear prior to OSHA’s issuing of its final rule on December 12, 2008. What was not entirely clear, however, was how violations of the PPE and training standards would be assessed. In other words, would an employer in violation of the OSHA PPE and training standards be cited on a “per-employee” basis, or would violations be assessed in the aggregate, *i.e.*, as a single violation for instances where more than one employee was not provided with proper PPE or training?

This uncertainty was directly at issue after an OSHA investigation involving Erik Ho, a Texas businessman cited for multiple violations of OSHA PPE and training standards. Ho’s utter disregard for the safety of his employees is a perfect example of the need for the workplace safety standards required by OSHA. Ho purchased a defunct hospital and medical office building that he was planning to develop into residential housing. He knew that the site was contaminated with asbestos, but when he hired 11 undocumented Mexican employees to perform asbestos removal, he did not provide any of them with appropriate protective equipment, including respirators, and he did not provide any of them with any training on the hazards of asbestos. Citing the possibility of exposure to asbestos, a city building inspector issued a stop-work order. Ho then surreptitiously ordered the employees to work at the site at night to elude detection. The clandestine work was revealed one night when the workers tapped into what they believed was a water line. It was, in truth, a gas line. In the resulting explosion, two of the workers were injured.

Subsequent to the OSHA investigation, Ho was charged by the Secretary of Labor with 11 separate violations of the regulation relating to the PPE required to be furnished to employees whose employment exposes them to asbestos (specifically, respirators), 29 C.F.R. § 1926.1101(h)(1)(i), as well as 11 separate violations of the regulation requiring training of employees on the hazards of asbestos and safety precautions, 29 C.F.R. § 1926.1101(k)(9)(i) and (viii). When the charges were before the ALJ, Ho conceded that he had violated the asbestos respirator and training standards but challenged the “per-employee” citations of those violations. While the ALJ upheld all 22 violations, on review the Occupational Safety and Health Review Commission (OSHRC) disagreed, instead holding that such violations were to be cited on a per-instance, not a per-employee, basis, because it felt that the regulations plainly imposed a duty on employers

to have a single training program and to provide respirators to the employees as a group. Therefore, the OSHRC vacated all but two of the citations.

On appeal of the OSHRC decision to the United States Court of Appeals for the Fifth Circuit, the Secretary of Labor argued that the language of the PPE regulation requiring the provision of respirators when employees are exposed to asbestos permitted a per-employee penalty when violated. *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). The Fifth Circuit, in a 2-1 decision, rejected the Secretary of Labor’s position and concluded that the language of the respirator provision did not support a per-employee penalty for Ho’s failure to provide a respirator for each employee who performed covered asbestos work. *Id.* at 373-74. The Fifth Circuit did agree with the Secretary of Labor’s argument that the asbestos training provision did permit per-employee penalties but still found that the Secretary’s assessment of 11 separate violations, based upon a per-employee penalty, was unreasonable, because the court did not believe there to be sufficient evidence that there were any “unique circumstances” present to indicate that the 11 employees would have needed any “individual training sessions” in asbestos removal, and that “one training session, if all 11 workers had attended, would have been sufficient to meet the training standard here.” *Id.* at 373.

OSHA Reacts to the OSHRC and Fifth Circuit Decisions by “Clarifying” the PPE and Training Regulations

In response to the decisions made by the OSHRC and the Fifth Circuit in the Ho matter, OSHA initially proposed changes to the regulations related to PPE and training requirements in August 2008 and then held a public hearing on the proposed changes in October 2008. As stated above, the final rule was issued on December 12, 2008, and it went into effect on January 12, 2009.

Before the Ho matter, OSHA had believed that it was clearly authorized to assess PPE and training violations on a per-employee basis. OSHA concluded that both the OSHRC and the Fifth Circuit had misinterpreted the rules, and therefore saw the need to add new sections to those regulations.

In its final rule, OSHA explained the import of these new sections as follows:

“OSHA has added a new section to Subpart A of Parts 1910, 1915, 1917 and 1918, and to subpart C of Part 1926. . . . The proposed new sections contain two paragraphs, which are identical for each new section. The first paragraph expressly states that, for standards in the part requiring employers to provide PPE, employers must provide PPE to each employee required to use the PPE, and *each failure to provide PPE to an employee imposes*

a separate compliance duty, and thus may be considered a separate violation. . . . The second paragraph expressly states that standards in the part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. Each failure to adequately train an employee may be considered a separate violation.”

73 Fed. Reg. 75,568, 75,577 (emphasis added). The actual language of the new sections, which are titled “Compliance duties owed to each employee,” all read as follows:

“(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.”

See 29 CFR §§ 1910.9, 1915.9, 1917.5, 1918.5 and 1926.20.

**The Impact of the Amended PPE and Training Standards:
Each Employee is Individually Protected**

As explained by OSHA in its final rule, “[t]he amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify that the standards apply to each employee.” 73 Fed. Reg. 75,568, 75,568. Thus, if the Ho matter were decided with the amended “clarified” standard for PPE and training, there can be no doubt that the 22 separate violations would have been upheld on review.

Under these amended PPE and training standards, employers must make an effort to ensure that “each and every” employee performing work covered under the OSHA regulations is provided with the required PPE and also receives training on recognizing the specific hazards of the employment and how to best protect against any such dangers. It is not enough for the employer to have such a training program that most, but not all employees, attend. It is now clear that each employee must be trained, or the employer risks a per-employee penalty for all employees who did not receive training. Likewise, a failure by the employer to provide PPE to all employees to whom PPE is required to be provided can no longer be argued to be a “single act” in violation of the PPE standards, subject to a single penalty. With the amended PPE standards, a separate violation will be found to have occurred for every employee who was not provided with the required PPE, thus occasioning a separate penalty.

It is therefore imperative for employers to understand that each one of their employees who performs work covered by the OSHA regulations is protected as an individual. Failure to comply will subject employers to separate penalties for each and every employee not receiving the required PPE and/or training. Employers who ignore this clarification may face significant penalties, especially since the OSH Act provides that employers may be assessed a civil penalty of “up to \$7,000 for each such violation.” 29 U.S.C. § 666(c).



ERISA Standard of Review: Fourth Circuit Applies *Glenn*, Finding That Conflict Of Inter- est Is Only One Factor

By Emmett F. McGee, Jr.

In litigation under the Employee Retirement Income Security Act of 1974 (ERISA) involving the denial of disability, health or other benefits, the first and most important question generally is what standard of review the court will apply. Will the court review the benefit eligibility decision de novo, will it reverse the plan administrator's decision only if it was arbitrary and capricious, or will the court apply some intermediate standard of review? As a practical matter, the standard of review the court applies generally determines the outcome of the litigation.

Applying a recent Supreme Court decision, the Fourth Circuit ruled in December 2008 that a deferential standard of review in cases brought under ERISA will not be modified or heightened when an employee benefit plan administrator operates under a conflict of interest. (*Champion v. Black & Decker* (U.S.) Inc., 4th Cir., No. 07-1991, 12/19/08).

Lisa Champion was an employee of Black & Decker when she began to experience seizures. In 2002, she had a seizure at work that required emergency room care, and she never returned to Black & Decker. Numerous doctors examined Champion but reached different conclusions on the cause of her seizures. While some physicians determined that Champion suffered from epilepsy, others said she suffered from pseudoseizures brought on by depression and anxiety.

Champion applied for disability benefits under the Black & Decker Disability Plan (the Plan). Black & Decker both funded and administered the Plan. As authorized by the Plan, Black & Decker employed CIGNA Integrated Care as its claims administrator, but Black & Decker retained ultimate authority to decide whether to pay disability benefits.

Under the terms of the Plan, benefits were limited to 30 months if the disability was attributable to a mental health disability. Champion initially was awarded benefits, but after 30 months, CIGNA terminated the benefits, concluding that Champion's disability resulted from mental illness. After conducting at least two administrative appeal reviews, the Plan decided to terminate Champion's benefits under the 30-month limitation for mental disabilities. Champion then filed a lawsuit under ERISA, con-

tending that Black & Decker had abused its discretion by classifying her disability as a mental illness.

The district court initially ordered a remand to the Plan to consider additional evidence, but after the case made its way back to the district court, the court concluded that the Plan had not abused its discretion in denying further benefits. Champion then appealed the decision to the Fourth Circuit.

The central question on appeal was what standard of review the court should apply in reviewing the Plan's decision to terminate Champion's benefits after 30 months. The Plan gave the plan administrator discretion to make benefit determinations, but Champion argued that the Plan operated under a conflict of interest because Black & Decker both funded and administered the Plan and, therefore, the standard of review should be modified to give the Plan less deference.

In June 2008, after the district court decided the case and Champion appealed, the United States Supreme Court decided *Metropolitan Life Insurance v. Glenn*, 128 S. Ct. 2343 (2008), which clarified when a conflict of interest exists and how a conflict is to be taken into account. The *Glenn* Court held that when the employer or plan administrator serves the dual role of evaluating claims for benefits and paying the claims, the dual role itself creates a conflict of interest. *Id.* at 2346, 2348. The Court held, however, that the presence of a conflict of interest did not change the standard of review from the deferential abuse of discretion standard to a *de novo* review or some other hybrid standard of review. Rather, the Court held that when reviewing an ERISA plan administrator's discretionary determination, a court must review the determination for abuse of discretion and, in doing so, take the conflict of interest into account only as "one factor among many" that are relevant in deciding whether the administrator abused its discretion.

In the Champion case, the Fourth Circuit acknowledged that *Glenn* required the court to alter its previous approach to reviewing discretionary determinations made by ERISA administrators allegedly operating under a conflict of interest. Before *Glenn*, when the Fourth Circuit found a conflict of interest, the court applied a heightened or modified abuse-of-discretion standard that reduced deference to the administrator to the degree necessary to neutralize any untoward influence resulting from the conflict of interest.

On appeal, the Fourth Circuit first concluded that the Plan operated under a conflict of interest, because the Plan sponsor, Black & Decker, served in the dual role of both evaluating and paying Champion's claims. Applying *Glenn*, however, the Fourth Circuit then held: (1) that the court nonetheless must review the

Plan's determination under the abuse-of-discretion standard, rather than modifying the standard of review as Champion urged, and (2) that the conflict should be considered as only one factor, among several, in determining whether the Plan's determination was reasonable.

Before considering the conflict arising from Black & Decker's dual role, the Fourth Circuit first considered a number of other factors in deciding whether the Plan's decision to terminate benefits was reasonable: (1) the language of the Plan; (2) the purposes and goals of the Plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the plan fiduciary's interpretation was consistent with other provisions in the Plan and with earlier interpretations of the Plan; (5) whether the decision-making process was reasoned and principled; (6) whether the decision was consistent with procedural and substantive requirements of ERISA; and (7) any external standard relevant to the exercise of discretion. Taking into consideration those first seven factors, the Fourth Circuit found no evidence to support Champion's claim that the Plan abused its discretion. The Fourth Circuit then considered whether the Plan's decision was rendered unreasonable by the effects of its conflict of interest.

The Fourth Circuit found no evidence that Black & Decker, as the administrator and sponsor of the Plan, allowed its conflict of interest to interfere with its decision to terminate Champion's disability benefits after 30 months. The court said that any conflict of interest by Black & Decker was undercut by the fact that when the Plan's claims administrator initially recommended that Champion be denied short-term disability benefits, Black & Decker overruled that decision and awarded her benefits. According to the court, that manifested an approach by Black & Decker demonstrating an "unbiased interest that favored Champion, making the conflict factor 'less important (perhaps to the vanishing point).'" The court also noted that the Plan voluntarily granted Champion a second administrative appeal after she hired a lawyer, allowing her to present further evidence. "This second appeal, which was not required by the Plan language, increased the likelihood of an accurate final decision, thereby also reducing the conflict factor 'to the vanishing point,'" the court said, citing *Glenn*.

As a result of this review, the Fourth Circuit found that the Plan did not abuse its discretion and, accordingly, affirmed the decision to terminate disability benefits to Champion after 30 months.

As illustrated by the *Champion* case, courts in the wake of *Glenn* will be more likely to find a conflict of interest; indeed, any time the same entity is responsible for paying benefits claims and also making benefits eligibility determinations the courts will find a

conflict of interest. The existence of such a conflict of interest, however, will be less consequential, at least when the plan administrator has taken active steps to reduce bias and promote accuracy in the benefits determination process.

Severance Agreements: Recent Guidance Regarding Waiver of Discrimination Claims

By Eric Lawrence Sherbine

Many Maryland employers are aware that, by law, a severance agreement that requires an employee to waive his or her right to file or participate in an Equal Employment Opportunity Commission (EEOC) discrimination charge is unenforceable. But does an employer who offers a severance package conditioned on such a waiver thereby engage in unlawful retaliation?

The United States District Court for the District of Maryland, in *Equal Employment Opportunity Commission v. Nucletron Corp., D. Md.*, No. 07-2644, recently provided employers with guidance on this issue, ruling that the "mere offer" of such an agreement does not constitute "facial retaliation." The court also ruled, however, that the denial of standard severance benefits to an employee who refuses to waive or release such rights may constitute retaliation under the Age Discrimination in Employment Act (the ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Equal Pay Act of 1963 (the EPA).

The court's guidance on this issue is timely, given the current economic downturn and merits careful consideration by employers offering severance packages to discharged employees.

Background

In December 2005, Nucletron informed a 61-year old manager, Peter Dove, that it intended to terminate his employment and offered him its standard severance agreement, which required Mr. Dove to waive his rights under the ADEA, Title VII, and the EPA in order to receive severance benefits. The severance agreement provided that:

Employee further covenants that she/he will neither file, participate in, nor cause nor permit to be filed on his/her behalf . . . any . . . claims, grievances, complaints, or any charges with any . . . federal, and/or local agency,

concerning or relating to any dispute arising out of his/her employment relationship with [Nucletron], alleging . . . unlawful employment discrimination

After consulting with his attorney, Mr. Dove refused to sign the standard agreement on the ground that it constituted discrimination under the ADEA. Nucletron then terminated Mr. Dove's employment without providing him with severance benefits. Nucletron also terminated the employment of 11 other employees, all of whom signed the severance agreement and thus received severance benefits.

Mr. Dove thereafter filed a charge of discrimination with the EEOC, which then filed a lawsuit against Nucletron on Mr. Dove's behalf. In its lawsuit, the EEOC claimed that Nucletron had unlawfully terminated Mr. Dove's employment based on his age, in violation of the ADEA, and that Nucletron had retaliated against Mr. Dove and other employees in violation of the ADEA, Title VII, and the EPA. The EEOC based its retaliation claim on two separate theories. First, it argued that Nucletron had engaged in "facial retaliation" merely by offering a severance agreement that conditioned the receipt of severance benefits upon the employee's agreement to not file a discrimination charge or participate in EEOC proceedings. Second, it argued that Nucletron had retaliated against Mr. Dove when it denied him severance benefits based specifically on his refusal to waive his statutory rights.

Ruling on opposing motions for summary judgment on July 2, 2007, the court, Judge Benson Everett Legg presiding, addressed the EEOC's retaliation argument, rejecting its first theory but accepting its second with qualifications. The court noted that, under the ADEA (and, by extension, Title VII and the EPA), a severance agreement that requires an employee to waive his or her right to file or to participate in an EEOC discrimination charge is unenforceable. *See* 29 U.S.C. § 626(f)(4).

The court nevertheless rejected the EEOC's argument that merely offering such an agreement constituted "facial retaliation." Citing with approval the Sixth Circuit's decision in *EEOC v. Sundance Rehab Corp.*, 466 F.3d 490 (6th Cir. 2006), the court reasoned that the mere offer of the severance agreement was not sufficient to dissuade a "reasonable worker from making or supporting a charge of discrimination" and, therefore, could not constitute retaliation. The Court agreed with the EEOC, however, that denying severance benefits to an employee based specifically on his or her refusal to waive his or her statutory rights could constitute retaliation if such benefits had been offered "as a matter of course to all terminated employees." On the other hand, the court reasoned, if the severance agreement involved "a benefit over and above what is promised employees generally," there would be no basis for a retaliation claim. The court thus denied Nucletron's

motion for summary judgment in part, ruling that the EEOC was "entitled to discovery on this issue." The court also indicated that it would issue an injunction prohibiting Nucletron from enforcing the invalid release in its severance agreement.

On November 7, 2008, Nucletron entered into a settlement agreement with the EEOC under which Nucletron agreed to pay \$295,000 in back pay and liquidated damages and to implement other non-monetary relief.

Offering Severance Packages: The Bottom Line

This case provides valuable and timely guidance for employers intending to offer severance packages to employees. First, of course, it reaffirms the unenforceability of severance agreements that require an employee to waive his or her right to file or participate in an EEOC discrimination charge. It makes clear, however, that merely offering such an agreement to an employee is not sufficient to support a discrimination claim. An employer considering this course of action should ensure that those employees who refuse to sign such agreements are not denied severance benefits that have been promised to all discharged employees. Instead, employers should tie such offers to additional severance benefits, above and beyond that which it has offered to its discharged employees in general, in order to avoid possible retaliation claims in the future.



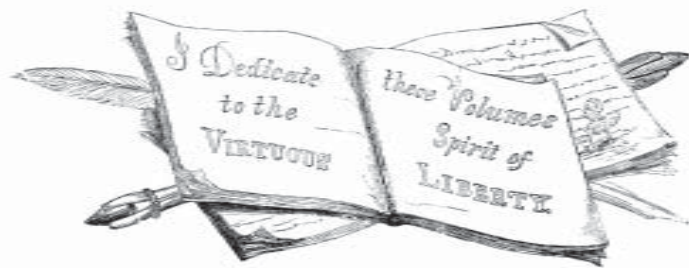
Employer Action Against a Whistleblower Does Not Amount to a Title VII Discrimination Claim

In *Lightner v. City of Wilmington*, 545 F.3d 260 (4th Cir. 2008), the United States Court of Appeals for the Fourth Circuit refused to extend Title VII protection to a police officer who claimed that his suspension was an attempt by the police department to cover up the employer's own wrongdoing.

Lieutenant Lightner commenced an ethics investigation against certain officers for allegedly failing to report automobile accidents in order to improve the city's public image. Some of the officers he was investigating then claimed that Lightner himself had committed ethics violations by ticket-fixing. When a basis was found for these claims, Lightner was suspended without pay for one week.

Lightner filed suit, claiming a Title VII violation and charging that the city had treated a younger, female African American officer less harshly for the same act, ticket-fixing, thereby discriminating against him based on his race, gender and age. The district court granted the defendants' motion for summary judgment on all counts and Lightner appealed.

The Fourth Circuit noted that the plaintiff had repeatedly admitted that the real reason for his suspension was to cover up department wrongdoing. He emphasized this both in his trial court and appellate briefs, as well as in his deposition. In offering this explanation, the court stated that "the plaintiff has undone his case." Title VII is not a general whistleblower statute, and the court affirmed the district court's summary judgment.



Cat Already Out of the Bag Says Fourth Circuit

In *Technology Partners, Inc. v. Hart*, 2008 U.S. App. LEXIS 22903 (4th Cir. Nov. 4, 2008), the United States Court of Appeals for the Fourth Circuit upheld the refusal of the district court to issue a preliminary injunction to prevent a former employee from working for a competitor.

Technology Partners, Inc. (TPI) develops financial management software for radiology practices. In January 2008, TPI promoted an employee, Brian Hart, to vice president, and he signed a new employment agreement. The agreement contained a one-year post-termination prohibition on accepting employment from a competitor.

In the year preceding the agreement, TPI had negotiated with a competitor, AMICAS, to sell TPI. AMICAS had conducted extensive due diligence, during which it became familiar with many sensitive aspects of TPI's business. Though an outright sale never occurred, AMICAS did purchase an interest in TPI's software. AMICAS became familiar with Hart during this process.

In the spring of 2008, AMICAS contacted Hart with an employment offer, which he accepted in early April. In late April, TPI filed suit and moved for a preliminary injunction. Applying the familiar *Blackwelder* "balance of hardships" test, the district court found that TPI's prior dealings with AMICAS had already disclosed, or would result in the disclosure of, much of the confidential information that TPI claimed that Hart could reveal. The court balanced this against the harm to Hart of loss of increased compensation and employment for a significant period of time. The court concluded that the balance of hardships did not tip decidedly in favor of either party.

The court then evaluated the likelihood that TPI would succeed on the merits, concluding that there were serious doubts concerning the enforceability of the non-compete covenants, both because of a possible absence of consideration and because of overbreadth. TPI argued that the application of North Carolina's "blue pencil" rule, which allowed a court to invalidate but not rewrite unenforceable terms, could ameliorate the problem of the overbroad covenant. The Fourth Circuit countered that if the "blue pencil" were used to strike the time limitation or the description of competing businesses, it would void the covenants, because there would have been no time constraints and no reference to any organization for which Hart could not work.

Finally, the Fourth Circuit affirmed the district court's finding that the public interest was best served if the parties were left to

the “normal litigation process” in such a “sharply disputed case.” The *Blackwelder* standards were properly applied, and the district court’s decision to deny the preliminary injunction was sustained.

The opinion in the case is unpublished, which limits its precedential value under Fourth Circuit rules.

Sarbanes-Oxley Whistleblower Provision Does Not Protect Employee for Reporting Reimbursement Abuses

In *Platone v. U.S. Department of Labor*, 548 F.3d 322 (4th Cir. 2008), the United States Court of Appeals for the Fourth Circuit upheld a DOL Administrative Review Board ruling denying the plaintiff whistleblower protection under the Sarbanes-Oxley Act.

Platone, an employee of Atlantic Coast Airlines, noticed discrepancies in the airline’s procedure by which the pilot’s union reimbursed the airline when pilots had to miss flights to attend union meetings. She met with airline management to report her findings. Rather than act upon them, management suspended and then fired Platone, ostensibly because of a personal relationship between her and a pilot. Platone then filed a Sarbanes-Oxley whistleblower action with OSHA. Though an ALJ initially upheld her claim, the Administrative Review Board (ARB) reversed the decision. Platone appealed.

The Fourth Circuit refused to reinstate Platone’s complaint. It held that, to avail herself of whistleblower protection, Platone had to present allegations to management that “definitively and specifically” related to one of the areas accorded protection (in this case, mail or wire fraud). The ARB had concluded that Platone’s advice to management was little more than alerting them to an internal billing issue. Her allegations, the ARB said, did not amount to sufficiently definitive and specific information of fraud.

The Fourth Circuit emphasized that it was making no change in the standards for a prima facie whistleblower case or application of the burden-shifting requirements under Sarbanes-Oxley. Rather, it was holding only that “a complainant must alert management to more than the fact that the company’s near-term profits were affected by billing discrepancies in order to meet the standard of definitively and specifically alleging mail or wire fraud.”

Improper Application of Preemption and Jury Instruction that Raised the Plaintiff's Burden to High Results in New Trial for Harassment Plaintiff

In *Gasper v. Ruffin Hotel Corporation of Maryland, Inc.*, 2008 Md. App. LEXIS 147 (Dec. 2, 2008), the Maryland Court of Special Appeals revived a plaintiff’s harassment case after a Montgomery County jury defense verdict.

Gasper claimed she was forcibly kissed by a manager, and that, when she complained, her employer retaliated against her.

Prior to trial, the circuit court granted a defense motion to dismiss the plaintiff’s negligent hiring and retention claims based on a finding of preemption by the Maryland Human Rights Act, the anti-discrimination provisions of the Montgomery Code and the Maryland Worker’s Compensation Act. The Court of Special Appeals agreed with Gasper that the gravamen of her tort claim was not exclusively the discrimination and retaliation prohibited by the Human Rights Act and the County Code. Rather, her allegation was one of abusive discharge for reporting an assault and battery, a claim which would have pre-existed, and is therefore independent of, the anti-discrimination statutes. As for the asserted workers’ comp bar, the Court of Special Appeals simply found no authority for its application in connection with a claim of negligent hiring and retention.

At trial, the circuit court instructed the jury regarding Gasper’s retaliatory discharge claim--that the plaintiff needed to prove the plaintiff’s opposition to harassing conduct was a “determining factor” in the decision to fire her. Citing the United States Supreme Court’s decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) and its own decision in *Magee v. Dansources Technical Services*, 137 Md. App. 527 (2001), the Court of Special Appeals noted that the proper standard was whether the employee’s complaints were a “motivating factor,” not the “determining factor” in discharging her. The improper instruction was reversible error.

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Maryland State Bar Association, Inc.
520 West Fayette Street
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