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EMPLOYMENT LAW OUTLOOK



ACCOMMODATING RELIGIOUS BELIEFS

William M. Furr



Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees because of their religious beliefs. Title VII also requires employers to accommodate the religious beliefs of their employees unless to do so would create an undue hardship.

Recently, the United States Court of Appeals for the Fourth Circuit (which covers Virginia and its surrounding states), held that Title VII's reasonable accommodation requirement does not require employers to completely accommodate all employee requests. In *EEOC v. Firestone Fibers and Textiles Co.*, the employee's religious beliefs prevented him from working sundown on Friday until sundown on Saturday. When the employee's schedule was changed because of an organizational restructuring, the employee requested a special accommodation allowing him to avoid working on his Sabbath.

(CONTINUED ON PAGE 2)

FMLA EXPANDS TO THE ARMED FORCES

Samuel J. Webster



Congress enacted the FMLA, 29 U.S.C. § 2601 *et seq.*, to provide relief to employees with serious health conditions or who are needed to care for sick family members. The Act requires employers with more than 50 employees to provide up to twelve (12) weeks of leave during any given twelve-month period for four conditions: (a) birth of a child, (b) adoption/foster care of a child, (c) care for spouse/child or parent having a "serious health condition", (d) the employee's own "serious health condition." The FMLA generally preserves employment status and benefits during the time of the leave. The Act also contains notice to employer and medical certification provisions.

For the first time in fifteen years, Congress has amended the FMLA, adding two new leave entitlements: "qualifying exigency" leave and "servicemember family" leave. The latter is effective immediately; the former purports to await Department of Labor (DOL) regulations. These new provisions impose new and expanded duties on employers, especially in our Hampton Roads region.

"Qualifying exigency" leave arises out of the fact that the spouse, child or parent of the employee seeking the leave is on active duty or has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. 29 U.S.C. § 2612(a)(1)(E). Essentially, the new provision applies in situations where the employee's relative is headed to a combat zone. Congress nowhere defined "qualifying exigency." Rather, this new leave entitlement does not become effective until DOL issues regulations defining the term. DOL has recently solicited public comments and indicated that it hopes to issue proposed regulations by Fall 2008. The comments shed some light on Congress' intention: the amendment "allows the immediate family of military personnel to use Family and Medical Leave Act time for issues directly arising from deployment and extended deployments," and provides examples: 1) wife of a recently deployed servicemember could use FMLA to arrange for child care; 2) husband of a servicemember could use FMLA to use "predeployment briefings and family support sessions";

(CONTINUED ON PAGE 3)

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REDUCTIONS IN FORCE AND “ME TOO” EVIDENCE

Thomas M. Lucas



On February 28, 2008, the U.S. Supreme Court ruled that federal trial courts may determine on a case-by-case basis whether to admit “me-too” evidence from employees other than a plaintiff challenging a reduction in force as discriminatory. In *Sprint/United Management Co. v. Mendelsohn*, the Supreme Court dealt with the recurring issue of whether plaintiffs may bring in evidence from other employees who are not parties to help make out their own claims of discrimination. The Court held that there is no *per se* rule which automatically permits or precludes the admission of “me-too” testimony, but that a jury may be permitted to hear such evidence.

Plaintiff Mendelsohn was terminated as part of an ongoing company-wide reduction-in-force, brought suit under the Age Discrimination in Employment Act, and tried to introduce testimony from five other former Sprint employees who claimed that their supervisors had also discriminated against them based on their age. Three would have testified about other managers and supervisors making denigrating remarks about older workers, although those supervisors were not involved in Mendelsohn’s selection for termination in the RIF. The trial court granted Sprint’s motion to exclude evidence of “discrimination against employees not similarly situated to plaintiff”; *i.e.*, those for whom the decision maker was Mendelsohn’s supervisor, and who were terminated close in time to Mendelsohn.

On appeal, the Tenth Circuit held that the trial court erred in applying a *per se* rule concerning whether “similarly situated” employees would be permitted to testify on Mendelsohn’s behalf. The Court determined that such evidence was relevant and not unduly prejudicial to Sprint, and remanded the case for a new trial. The Supreme Court granted review to determine whether the Federal Rules of Evidence require admission of testimony by fellow employees who are not parties to the lawsuit, but who allege discrimination at the hands of supervisors or managers who played no role in the adverse employment decision affecting the plaintiff.

The Supreme Court held that whether evidence of discrimination by other supervisors is relevant in an individual age discrimination case is “fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” But no *per se* rule concerning admissibility of such evidence should be applied and the trial court should conduct a “fact-intensive, context-specific inquiry.”

Practice Pointer: This Supreme Court decision will permit plaintiffs to argue that “me-too” evidence from non-party fellow employees may be admitted to help prove a discrimination claim

in RIF situations. Risk assessment in layoff and RIF situations may require employers to be well informed about treatment of and interaction with employees who are “similarly situated” to an employee who challenges a layoff or termination. ■

ACCOMMODATING RELIGIOUS BELIEFS

(CONTINUED FROM PAGE 1)

The company accommodated the employee by allowing him to swap shifts with other employees, take vacation days or take a limited amount of unpaid leave. When the employee requested further accommodation, the company denied his request for a special accommodation.

The Court of Appeals ruled in favor of the employer stating that Title VII’s reasonable accommodation requirement does not require employers to completely eliminate all conflicts with religious schedules or religious beliefs. The Court held that “religion does not exist in a vacuum in the workplace.” In finding in favor of the employer, the Court noted that the employee had requested days off that exceeded that what could be reasonably accommodated under the circumstances. In allowing the employee to take vacation days and unpaid leave and to swap with other employees, the employer had met its duty to accommodate the employee’s religious beliefs.

The duty to accommodate religious beliefs under Title VII is less stringent than the duty to accommodate a disability under the Americans with Disabilities Act. Courts have repeatedly held that as long as the employer makes a *de minimis* effort to accommodate its employees’ religious beliefs, it has met its duty of accommodation under Title VII.

Employers who receive requests for religious accommodations should consider the various court rulings in deciding whether they must grant the particular accommodations requested by employees. ■

CONTACTS

LABOR AND EMPLOYMENT LAW

William M. Furr, Chair	wfurr@wilsav.com	757/628-5651
Wm. E. Rachels, Jr.	wrachels@wilsav.com	757/628-5568
Thomas M. Lucas	tlucas@wilsav.com	757/628-5690
Samuel J. Webster	swebster@wilsav.com	757/628-5518
Susan R. Blackman	sblackman@wilsav.com	757/628-5646
Timothy M. McConville	tmccconville@wilsav.com	757/628-5581
David A. Kushner	dkushner@wilsav.com	757/628-5668

LEGAL ASSISTANTS

Barbara M. Dean	bdean@wilsav.com	757/628-5645
Shirley M. Flint	sflint@wilsav.com	757/628-5618

EMPLOYEE BENEFITS

James R. Warner, Jr.	jwarner@wilsav.com	757/628-5570
David A. Snouffer	dsnouffer@wilsav.com	757/628-5678

WORKERS’ COMPENSATION

Stephen R. Jackson	sjackson@wilsav.com	757/628-5642
Robert L. “Bo” Foley	bfoley@wilsav.com	757/628-5547

FMLA EXPANDS TO THE ARMED FORCES

(CONTINUED FROM PAGE 1)

3) deployed servicemember's parents could use FMLA to see their deploying child off or welcome him/her back home.

"Qualifying exigency leave" is available up to the 12 weeks in any given 12-month period. While "qualifying exigency" leave is not effective until DOL promulgates its regulation, the Department nevertheless has urged employers to grant this leave.

"Servicemember family leave" is available to a FMLA-defined "eligible employee" who is the spouse, child, parent or "next of kin" providing care to a "covered servicemember." This leave provision grants expanded FMLA leave of 26 weeks during a single 12-month period. Servicemember family leave is available to employees caring for a servicemember who suffered an injury or illness in the line of active duty that may render that servicemember medically unfit to perform the duties of his or her Armed Forces position.

The FMLA allows an employee to combine regular FMLA leave (12 weeks) with servicemember family leave (26 weeks) for no more than 26 weeks in a single 12-month period, but it does not restrict the employee's entitlement to regular FMLA leave during any other 12-month period. Both of these new leaves may be taken intermittently or on a reduced leave schedule.

An employer may request certification from the employee for "qualifying exigency" leave. The new provisions also limit servicemember family leave for husband and wife having the same employer to an aggregate of 26 weeks in a single 12-month period, whether the leave is pure servicemember family leave or combined with regular FMLA leave (12 weeks/any 12-month period).

Finally, and perhaps most importantly, these two new provisions provide the same employment and benefits protection for employees utilizing the two new leave entitlements that exist under the original FMLA. Problems will continue to arise on such issues as intermittent leave, medical certification, and maintenance of employment and benefits. The servicemember family medical leave will compound those problems because it may last up to half a year.

The new statute is silent as to its retroactivity. We advise employers to treat January 28, 2008, as the effective date for servicemember family leave. Until DOL issues regulations applicable to these new provisions, we further recommend that employers act in good faith by following their current FMLA policies and practices, applied to servicemember family leave.

While DOL has not yet issued "qualifying exigency" regulations and therefore the provision is not technically effective, DOL has encouraged employers to grant this leave. We recommend that employers do so on a case-by-case basis, reserving total discretion to the employer. ■

IMMIGRATION VIOLATIONS COSTLY FOR EMPLOYERS

Susan R. Blackman



The Bush Administration continues to increase the consequences to employers who employ illegal aliens. In February, the U.S. Attorney General announced an increase in civil fines against employers who knowingly employ unauthorized aliens. The fines jump from \$2,200 to \$3,200 per unauthorized employee, for a first violation, and from \$11,000 to \$16,000 for subsequent violations. Federal officials may also seek criminal penalties against employers who violate immigration laws.

The Department of Homeland Security (DHS) has continued making headlines with raids, arrests, and convictions of immigration violators and new regulations governing employers. In March, federal prosecutors in Norfolk obtained 14-month prison sentences against a Virginia cable contractor and his wife for harboring and employing 14 illegal aliens. Their son was sentenced to 13 months for his role in the conspiracy to transport and harbor illegal aliens. The defendants were also ordered to forfeit \$250,000 from the proceeds of their criminal offenses. In another Virginia case, U.S. Immigration and Customs Enforcement (ICE) uncovered a multi-state conspiracy to obtain unlawful state identification cards and sell them to illegal aliens. The investigation triggered grand jury indictments against eight defendants who are charged with aggravated identity fraud and conspiring to violate federal immigration laws.

ICE recently issued a notice to employers to beware of fraudulent documents presented by new employees during the employment verification process. The process requires every employer in the United States to review documents establishing the identity and work eligibility of each new employee in order to complete an I-9 Employment Eligibility Verification Form. In a Worksite Enforcement Advisory issued in February, ICE informed employers that they must be vigilant in determining whether the documents appear to be genuine and to relate to the person presenting them. The Advisory notes that many illegal aliens obtain fraudulent documents from "document mills" and that employers should be alert to suspicious factors. For example, if an employer notices that all its new employees are presenting documents of identification from the same state or territory, this may warrant further inquiry by the employer. According to the ICE Advisory, employers must investigate any factors that suggest the documents are not genuine or do not relate to the individual presenting them.

DHS also issued new supplemental regulations in March advising employers to take action in response to "No-Match" letters from the Social Security Administration (SSA). If an employer receives a letter indicating that SSA records do not match the names and Social Security numbers listed in the

(CONTINUED ON PAGE 4)

WHAT CONSTITUTES A “CHARGE” OF DISCRIMINATION UNDER THE ADEA? SUPREME COURT DECISION CLEARS PATH TO PLAINTIFF LAWSUITS

David A. Kushner



The Age Discrimination in Employment Act (“ADEA”) requires an alleged victim of age discrimination to wait 60 days after submitting a “charge” of discrimination to the Equal Employment Opportunity Commission (“EEOC”) before the would-be plaintiff is allowed to file a lawsuit in federal court. Moreover, a would-be plaintiff is required to file this “charge” within 300 days of the allegedly discriminatory act for this charge to be considered timely. (In some jurisdictions, a would-be plaintiff must file a charge of discrimination within 180 days.) Unfortunately, when Congress passed the ADEA it failed to define exactly what constitutes a “charge.” Not surprisingly, courts throughout the country have failed to adopt a uniform approach as to what constitutes a “charge” under the ADEA.

On February 27, 2008, the United States Supreme Court attempted to clear up this confusion when it decided *Federal Express Corp. v. Holowecki*. In this case, Plaintiff Paul

Courts throughout the country have failed to adopt a uniform approach as to what constitutes a “charge” under the ADEA.

Holowecki submitted an “intake questionnaire” form to the EEOC along with an affidavit in which he claimed that Federal Express discriminated against its older couriers. During the next two months, Holowecki did *not* fill out or submit the formal EEOC charge of discrimination form. Moreover, the EEOC never notified Federal Express about Holowecki’s allegations. Nevertheless, Holowecki filed suit in federal court alleging that Federal Express had discriminated against him based on age.

Federal Express asked the district court to dismiss the case because it believed Holowecki had not filed a charge, and therefore had not waited the requisite sixty days after filing a charge before bringing his lawsuit. On the other hand, Holowecki argued that his intake questionnaire and affidavit satisfied the ADEA “charge” requirement even though he never submitted a formal charge and the EEOC never gave Federal Express notice of his allegations.

The Supreme Court agreed with Holowecki, and held that his intake questionnaire and affidavit satisfied the ADEA’s ‘charge’ requirement, and that he was therefore free to file a lawsuit even though Federal Express never received notice that Holowecki had filed a claim with the EEOC. In its decision, the Supreme Court stated in the new rule that any document filed with the EEOC that can reasonably be construed as a request for the EEOC to take remedial action will be considered a “charge.”

The *Holowecki* decision creates significant problems for employers. First, after this ruling it is now possible for employees to bring a lawsuit in federal court without the employer ever knowing about the charge of discrimination at the EEOC. This deprives an employer of the chance to prepare its defense early in the matter, as well as the opportunity to pursue early mediation of the dispute.

Moreover, it will now be more difficult for an employer to determine if an employee has submitted his or her charge within the time limits provided by the ADEA. In gauging timeliness, it is now essential to determine the date on which the employee submitted an intake questionnaire to the EEOC. Unfortunately, the EEOC does not usually provide the employer with a copy of the intake questionnaire. It is now probable that an employer won’t definitively know if a lawsuit is timely until it submits a Freedom of Information Act request to the EEOC, a process that can take months. ■

IMMIGRATION VIOLATIONS COSTLY FOR EMPLOYERS

(CONTINUED FROM PAGE 3)

employer’s W-2 wage report, the employer should investigate the discrepancy. The regulations outline steps and time frames for responding to “No Match” letters. If an employer complies with these steps, the employer will be protected against a charge that the employer knowingly continued to employ an illegal alien. If the discrepancy is not resolved within 90 days, the employer must go through the I-9 verification process again (this time, without the suspect Social Security card) to verify that the employee is authorized to work in the United States. If the employment authorization cannot be verified through such action, the employer must either terminate the employee or run the risk that DHS will find the employer had constructive knowledge of the employee’s lack of authorization to work in this country.

The legal consequences for violating work eligibility laws can affect not only the illegal aliens, but also the employers and managers who hire them. For example, a Human Resources Director who was arrested in an ICE raid at a Utah factory last month now faces a potential 10-year sentence and over \$250,000 in fines. These enforcement initiatives illustrate that employers should take action now to ensure compliance. This is a good time for employers to audit their own I-9 Forms to make sure they have proper documentation-before ICE shows up for an I-9 inspection or a raid. ■

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