

Employment Law Outlook

S U M M E R 2 0 0 1

A NEWSLETTER COMPILED BY THE ATTORNEYS AT WILLCOX & SAVAGE

Checklist for Handling Layoffs

By William M. Furr, Esq.

We have seen a dramatic increase in layoffs and reorganizations among our clients. Many businesses are bracing for an economic downturn by considering reductions in force. Unless layoffs are carried out properly, they can result in months and years of litigation for employers. It is essential for employers to have a checklist in place when initiating layoffs.

1. Layoff Selection Criteria: An employer should be able to articulate a legitimate reason for selecting each individual it lays off. Some employers select entire departments to eliminate, some employers look exclusively at performance evaluations, and others base their decisions strictly on seniority. Whatever the basis is, the employer should feel comfortable articulating a legitimate business-related reason for each departing employee.

2. Nondiscrimination: Once the individuals have been selected for layoff, the employer should make sure that no group of individuals in a protected status is disproportionately represented. It is not unusual to see a disproportionate number of older employees initially selected for a layoff. When this happens, we recommend that the employer review the decisions for those older employees. Employers should carefully review the list of employees tentatively selected for layoffs so that they do not open themselves up to expensive age discrimination litigation. Employers should also make sure that no other protected class is disproportionately represented in the group selected for layoff.

3. Employment Contracts and Personnel Policies: Before actually discharging any

employees, employers should review all employment contracts with the affected employees and all personnel policies relating to job security, terms of employment, discharges and layoffs. Some employers have been surprised to see that certain employees have legally enforceable contractual rights to continued employment.

4. Severance Packages: Employers that have severance policies should make sure that they follow their policies. When laying off employees, most employers offer severance pay to departing employees in exchange for a release of all claims.

5. Release of Claims: We strongly recommend that employers offering severance pay to employees require them to sign a release in exchange for the receipt of the severance pay. Once an employee has signed a valid release, he or she is prohibited from pursuing wrongful discharge, breach of contract or discrimination claims against the employer. Employers that offer severance pay to employees without requiring them to sign releases cannot later avoid subsequent wrongful discharge claims by the same employees. For employees waiving age discrimination claims, the releases must comply with the Older Workers Benefits Protection Act. The OWBPA requires specific language to be included in the release in order for it to be effective.

6. WARN Act: The WARN Act requires employers of 100 or more employees to provide 60 days written notice to employees before a "mass layoff" or a "plant closing." Employers who do not provide the 60 days

Continued on page 5

Please mark your calendar
for the Seventh Annual

WILLCOX & SAVAGE

Employment Law Seminar
November 1, 2001

Attorney Rewarded For Small Recovery

By Wm. E. Rachels, Jr., Esq.

*One small victory for employee,
one bigger victory for employee's attorney*

In a FMLA action, a plaintiff recently recovered \$1,297.58 in damages. In spite of her modest recovery, the court awarded her attorney \$70,711.00 in attorney's fees and \$5,381.83 in costs. The attorney's fee award included a twenty percent reduction in the fee claimed. However, the point is clear that the fee award is way out of proportion to the amount of the plaintiff's recovery, as the Fourth Circuit affirmed the Alexandria District Court. *Estes v. Meridian One*, 246 F.3d 664, 2001 WL 285076 (4th Cir. Va.).

What may be more remarkable than the attorney's fee award is that the jury did not award more damages to the plaintiff. It gave her only an award for earned commissions which accrued when she was on FMLA leave. She had also sought front pay and commissions, back pay, and other damages for retaliation against her for taking FMLA leave. The record reflected statements by the company's female president in response to the plaintiff's request to take FMLA leave to undergo additional reconstructive surgery

Continued on page 3

FAQ's Re: Social Security Numbers

By Susan R. Blackman, Esq.

Q: We recently hired a foreign worker who provided a Social Security Number that begins with a nine. Is this a valid Social Security Number?

A: No. The Social Security Administration (SSA) does not issue Social Security Numbers that begin with a nine. In most cases, a number that begins with a nine and resembles a Social Security Number in format is actually an Individual Tax Identification Number (ITIN). The Internal Revenue Service (IRS) issues ITIN's to aliens who are not eligible to work in the U.S. and cannot obtain a Social Security Number. All ITIN's begin with a nine. However, the mere possession of an ITIN does not necessarily mean that the individual is currently unauthorized for employment in the United States. It is possible that the individual recently was granted permanent resident status and is now authorized for employment but has not yet applied for a Social Security card. If so, you should advise the employee to go to the nearest Social Security Administration office and apply for a card.

Q: How does someone get a new Social Security card?

A: The individual should visit the local SSA office and submit a form SS-5 Application for a Social Security card. The form can be downloaded from the SSA website at <http://www.ssa.gov/online/ss-5.html>. The website also provides details about office locations, hours, and other helpful information.

Q: Can the employee begin working while the application for SSN is pending?

A: Yes. If the worker has presented sufficient documentation to satisfy the employer's requirements for completing Form I-9 (documentation of identity and employment authorization), the employer may begin to employ the worker while the Application for a Social Security card is pending. The Department of Justice

instructions for completing Form I-9 state that, "If employees are unable to present the required document(s) within 3 business days of the date employment begins, they must present a receipt for the application for the document(s) within 3 business days." The employees must have indicated, by checking the appropriate box in Section 1 of Form I-9, that they are already eligible to be employed in the United States. To complete the I-9 Form at that time, the employer should write the word "receipt" in Section 2 of the form, along with the document number of the receipt if it has one. The employee then must present the actual document within 90 days of the date employment begins. At that time, the employer should cross out the word "receipt" and insert the new number from the actual document presented, and initial and date the change on the I-9 Form. If the employee does not present sufficient documents showing employment authorization within 90 days, the employer may not continue to employ the worker. In most cases, an eligible applicant who applies for a Social Security card will receive the card within a couple of weeks.

Q: How do I complete a W-2 Form for an employee whose Application for a Social Security Card is pending?

A: If an employee has applied for a Social Security card but the number is not received in time for the employer to include in its W-2 filing, the IRS instructs that the employer should write "applied for" in box "d" of the W-2 form. The employer would then have to correct the initial report by filing form W-2c, providing the employee's Social Security Number, once it is received.

Q: What if an employee's name has changed and does not match the name on the Social Security card?

A: The IRS advises employers to use the name that is on the original Social Security card on all tax-related filings, until the

employee presents a corrected card. The employer should advise the employee to obtain a new card from the Social Security Administration and to present the new card when it is received.

Q: We just learned that a recently-hired employee is not authorized to work in this country. What should we do?

A: First you must end the employment, then you must pay the employee for time worked. The Immigration and Naturalization Service, the Department of Labor, and the IRS all agree that even unauthorized foreign workers must be paid for time worked. While this may pose some logistical difficulties for those who process your payroll (if the employee does not have a valid Social Security Number), you have a legal obligation to pay the employee, even though you can no longer continue the employment.

Q: Is there any way to verify the accuracy of Social Security Numbers provided by newly hired employees?

A: Yes. The Social Security Administration offers employers various methods for verifying employee Social Security Numbers. An employer may verify up to five names and numbers at a time by calling 1-800-772-6270. The employer must be prepared to provide its Employer Identification Number, the employee's name, date of birth, gender, and Social Security Number. This service may only be used for employees who have been hired; it is not available for screening job applicants. The Social Security Administration also offers other methods for verifying Social Security Numbers of employees. Additional information is available at the SSA website: www.ssa.gov/employer. These verification systems are optional for employers, and employers who opt to use them must do so in a nondiscriminatory manner. Therefore, if you decide to verify numbers of new employees, you should do so for all new employees, not just foreign-born workers. ■

Fourth Circuit Opens Door To ADA Harassment Claims

by Samuel J. Webster, Esq.

The U.S. Supreme Court has stated that “harassment in the course of employment is actionable under Title VII’s prohibition against discrimination in the terms, conditions, or privileges of employment.” Until recently, the vast majority of harassment claims in the courts have alleged sexual harassment (and, to a lesser extent, racial harassment or religious harassment). Until this Spring, no appellate court had applied the harassment or hostile work environment analysis to disability discrimination under the Americans with Disabilities Act (ADA). In April, the Fourth Circuit Court of Appeals, which governs federal law in Virginia and other Mid-Atlantic states, held that a harassment or hostile work environment claim based upon disability is actionable under the ADA.

In order to prove a harassment case under the ADA, the plaintiff must prove:

1. He/she is a qualified individual with a disability;
2. He/she was subjected to unwelcome harassment;
3. The harassment was based on his/her disability;
4. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment;
5. Some factual basis exists to impute liability for the harassment to the employer.

In the most recent cases, actionable harassment included ostracism of the disabled employee, criticism of the employee for his inability to perform certain tasks,

increased frequency in evaluations, increased drug testing and unjustifiable probations. Juries returned significant verdicts against employers who engaged in this conduct.

Employers should take the same care and training with regard to disability harassment as they do with sexual or other kinds of harassment. Because courts are showing an increased willingness to find harassment or hostile work environment for all forms of discrimination, employers should review their harassment policies to make sure they cover all forms of harassment. Additionally, harassment training should cover harassment based on any protected status under Title VII or the ADA. ■

Fourth Circuit rules FMLA covers flu despite regulations

Flu Covered By FMLA

By Timothy M. McConville, Esq.

The United States Court of Appeals for the Fourth Circuit ruled last month that an employee’s case of the flu was a “serious health condition” that qualified her for leave under the Family and Medical Leave Act (“FMLA”). The Court’s ruling surprised human resource professionals because language in Labor Department Regulations provides that “[o]rordinarily, unless complications arise, . . . the flu [and other minor conditions listed] do not meet the definition of a serious health condition and do not qualify for FMLA leave.”

The ruling makes clear that, in determining whether a particular condition is covered by the FMLA, employers should not rely on the listing in the regulations of the conditions which do not “ordinarily” trigger FMLA coverage. The listing includes the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental and orthodontia problems and periodontal disease. Instead, employers should apply the technical criteria for determining coverage.

In *Miller v. AT&T*, a physician diagnosed the employee with the flu and directed her to take over-the-counter medications and return three days later for re-evaluation. The physician examined the employee three days later and again two weeks after that. AT&T denied the employee’s FMLA leave request after concluding that the flu was not covered by the FMLA. AT&T fired the employee for excessive absenteeism.

The appellate court rejected AT&T’s argument that the flu was not a “serious health condition” under the FMLA. The court held that the language in the FMLA regulations indicating that “ordinarily” the flu will not qualify as a serious health condition is an indication merely that common ailments such as the flu normally will not qualify for FMLA leave because generally they will not satisfy the regulatory criteria for a serious health condition. Where, however, the flu does satisfy the regulatory criteria, *e.g.*, the employee is incapacitated for more than three consecutive calendar days and receives treatment two or more times, the flu qualifies as a serious health condition under the FMLA. ■

Reward

Continued from page 1

following a mastectomy. The president’s statements included “[D]on’t lay that on me, I am not here to care about your health, I don’t care about your health . . .” Further, when the president learned of the lawsuit she announced to other employees that the plaintiff was “done.” Among the lessons here is “the less said the better.” The company demoted the plaintiff from sales to dispatcher and while she was recuperating from her reconstructive surgery, the company required her to clean her own offices although the company had a janitorial firm. ■

Employer Wins Discrimination Case

By Susan R. Blackman, Esq.

As we reported in the Summer 2000 issue of Employment Law Outlook, the United States Supreme Court’s ruling in *Reeves v. Sanderson Plumbing Products, Inc.* made it more difficult for employers to win summary judgment in employment discrimination claims. However, a recent interpretation of *Reeves* by the United States Court of Appeals for the Fourth Circuit suggests that this Circuit will read last year’s landmark ruling narrowly.

The summary judgment process requires the trial court to examine the available evidence in a case and determine whether it is sufficient to justify submitting the case to a jury in a full-blown trial. If the court finds insufficient evidence of discrimination and grants an employer’s summary judgment motion, the employer wins the lawsuit without the expense, disruption, and risk of a jury trial. The *Reeves* case determined how much evidence an employee must present to support a discrimination claim and defeat an employer’s motion for summary judgment.

Prior to the Supreme Court’s ruling in *Reeves*, the Fourth Circuit and several other circuits required what was referred to as “pretext plus.” If an employer presented “a legitimate nondiscriminatory reason” for the employment action it took against the plaintiff, then the employer could win summary judgment unless the plaintiff presented two things: first, evidence that the employer’s stated reason was false (pretext); and second, evidence that discrimination was the real reason for the employer’s action.

The plaintiff in the *Reeves* case had presented evidence that the employer’s stated reason was false. However, he did not present additional evidence showing that discrimination was the real reason. Therefore, the lower courts found in favor of the employer because the plaintiff had shown pretext but not “pretext plus.” The Supreme Court reversed the judgment and sent the case back for further proceedings, holding that it is “permissible for a jury to infer the ultimate fact of discrimination from the

falsity of the employer’s explanation.”

The Supreme Court’s ruling in *Reeves* thus appeared to establish that evidence of pretext would always be sufficient for a plaintiff’s case to survive summary judgment. Employment lawyers then cautioned that employers would lose summary judgment motions any time a plaintiff could show that the employer’s stated reason for its action was untrue or incorrect. However, the Fourth Circuit’s

...it is still critically important for employers to be accurate and objective in explaining and documenting the reasons for disciplinary action against an employee.

most recent opinion analyzing *Reeves* indicates that a plaintiff’s case will not always survive summary judgment just because there is evidence of pretext. The Fourth Circuit recognized that sometimes an employer’s stated reason may be disproved, but other evidence nonetheless makes it clear that discrimination was not the real reason.

The Fourth Circuit’s latest opinion states that when a plaintiff shows that his employer’s explanation is pretextual, “this does not automatically create a jury question, but it *may* do so.” According to the Fourth Circuit, such claims should not be submitted to a jury if there is “evidence that precludes a finding of discrimination.” The court explained that if “no rational fact finder could conclude that the action was discriminatory,” then the employer may still win summary judgment despite purported evidence of pretext.

This recent ruling by the Fourth Circuit makes it possible for an employer to prevail on summary judgment even if the stated reasons for the employer’s actions are

disputed. If there is some other compelling factor that shows the absence of discrimination, the employer can still prevail.

Consider this example: An employer says it fired a female employee because she had ten unexcused absences. The female employee sues for gender discrimination and proves she had only five unexcused absences. Thus, she arguably has shown that the employer’s stated reason is false and has satisfied her burden of proving pretext. However, other evidence shows that the employer also fired every male employee who had four or more unexcused absences and that the employer hires as many females as males for this job position. The employer can use this other evidence to argue that no rational juror could conclude the plaintiff was fired because of her gender, as every similarly-situated male employee was also fired. Under the Fourth Circuit’s latest pronouncement, this other evidence could enable the employer to win summary judgment.

While this ruling brings some good news for employers, it is still critically important for employers to be accurate and objective in explaining and documenting the reasons for disciplinary action against an employee. Even if the Fourth Circuit interprets *Reeves* in a limited fashion, the *Reeves* ruling still makes it harder for employers to win summary judgment if an employee casts doubt on the legitimacy of the employer’s stated reasons for the action. ■

We want to hear from you.

Written questions and comments are welcome. Please send to:

**Willcox & Savage
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
Attn: Wendy McGrady
or e-mail wmcgrady@wilsav.com**

Ultimate Employment Decision Not Required For Retaliation

by Wm. E. Rachels, Jr., Esq.

In March the Fourth Circuit concluded in *Von Gunten v. Maryland* that an employer can violate the anti-retaliation provisions under Title VII with less than an “ultimate employment decision.” While such a decision—to hire, discharge, refuse to promote, etc.—can constitute the necessary adverse employment action in support of a retaliation claim, retaliatory harassment can also comprise sufficient adverse employment actions for such claim. Evidence that the challenged discriminatory acts are harassment which adversely affect the terms, conditions, or benefits of the employment supports the claim.

The Appellate Court upheld the District Court’s granting of summary judgment. It found that the withdrawal of the employer’s car which had been assigned to the employee, downgrading her year-end evaluation, reassigning her job functions, requiring her to provide documentation for all prior and future sick leave, placing her on administrative leave with pay while investigating a complaint against her, and denying her requests to attend seminars were neither retaliatory “adverse employment actions” nor “ultimate employment decisions.” ■

Outlook is published for the clients, friends and associates of Willcox & Savage to encourage and promote communication about labor and employment law development.

One Commercial Place, Suite 1800
Norfolk, Virginia 23510

One Columbus Center, Suite 1010
Virginia Beach, Virginia 23462

EEOC Chair urges employers to “refocus” on harassment training in the workplace

“Stale” Policy Is No Defense

By John T. McDonald, Esq.

The Chairwoman of the Equal Employment Opportunity Commission, Ida Castro, recently told a group of management attorneys that she has seen a “very disturbing trend” in the growth of harassment retaliation charges over the past decade. At the March 31, 2001 American Bar Association Equal Employment Committee Meeting, Castro stated that the Agency was spending “significant resources on investigating and litigating claims on actions that have no place in the year 2001.” Castro urged employers to “refocus” on harassment training in the workplace, stating that the affirmative defense established by the U.S. Supreme Court’s *Faragher/Ellerth* decisions does not allow employers to escape liability by simply “[having] a [harassment] policy on the shelf.”

In the *Faragher/Ellerth* decisions, the Supreme Court held that an employer may escape liability in a harassment case if it can demonstrate: (1) that it “exercised reasonable care to prevent and correct promptly any harassing behavior;” and (2) that the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Employers with an established harassment policy have successfully asserted this defense by demonstrating that the plaintiff-employee failed to take advantage of the procedures in the policy or that they promptly responded to any harassing behavior in accordance with the policy.

Castro emphasized that these defenses would not protect employers whose harassment policies were not effective. She stated that “[a] policy that was innovative ten years ago is probably stale and bureaucratized by now – and should be looked at again.” She pointed out that in many of the recent cases before the Commission, “[h]arassment of a lesser degree had been ignored for years,” demonstrating that the employer’s policy

was ineffective. In such cases, Castro stated that the employer would not be able to take advantage of the *Faragher/Ellerth* defense.

Castro urged employers to take affirmative steps to update their harassment policies. Effective policies can provide the basis for successfully employing the *Faragher/Ellerth* defense in a harassment claim, especially if employees receive training in accordance with the policy. We recommend that employers periodically review their harassment policies and training procedures in order to ensure that they conform to the current state of the law. ■

Layoffs

Continued from front cover

notice may pay the employees in lieu of notice. The WARN Act generally defines a mass layoff as a layoff at a single site of employment of at least 50 employees and at least 33% of the workforce or a layoff at a single site of employment of at least 500 employees. The WARN Act requires notices to be provided to the employees, to the State Dislocated Worker Unit and to the highest elected official in the locality where the facility is located.

7. Hiring Decisions in the Midst of a Layoff: Employers will be particularly vulnerable if they hire employees at the same time as a layoff. If an employer hires employees during a layoff, it should document the reasons why the workers being laid off cannot perform the jobs being created. Employers should be particularly cautious if they are hiring younger workers at the same time they are laying off older workers.

Most employers who run into problems with their layoffs are ones who take actions before thinking through the legal issues of a layoff. A well-organized plan to implement the layoff can drastically reduce the risk of expensive litigation. ■

Employment Law Outlook

SUMMER 2001



Willcox & Savage received the 2001 Corporate Volunteer Award presented by VOLUNTEER Hampton Roads. In one of our community service projects, twenty-eight team members led by Employment Section Head Billy Furr participated in the recent Multiple Sclerosis Walk.

WILLCOX & SAVAGE

Labor, Employment & Employee Benefits Group

LABOR AND EMPLOYMENT LAW

Wm. E. Rachels, Jr.
wrachels@wilsav.com 757/628-5568

William M. Furr
wfurr@wilsav.com 757/628-5651

Samuel J. Webster
swebster@wilsav.com 757/628-5518

Susan R. Blackman
sblackman@wilsav.com 757/628-5646

Timothy M. McConville
tmconville@wilsav.com 757/628-5581

John T. McDonald
jmcdonald@wilsav.com 757/628-5502

Rebecca V. Goldbach, Legal Assistant
rgoldbach@wilsav.com 757/628-5645

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

SINCE 1895

WILLCOX & SAVAGE

ATTORNEYS AT LAW

One Commercial Place, Suite 1800
Norfolk, Virginia 23510

Return Service Requested