LABOR & EMPLOYMENT LAW REPORT

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EEO Update

No Employer Liability for Claimed Same Sex Harassment

Because a male hotel employee could not show that the male chef's alleged offensive remarks and grabbing of his genitals was motivated by his sex, the Eighth Circuit has held on August 6, 2003 affirmed judgment for the employer on his sex discrimination and sexual harassment claims. The employee disputed the propriety of the jury instruction, which required him to prove the chef was motivated by sexual desire for the employee as a male, paid sexual attention to the employee as a male, or that the chef treated men and women differently. However, the court found the instruction appropriate, and noted the employee did not show the chef's alleged acts met any of these categories. *Elmahdi v. Marriott Hotel Servs.*, 2003 U.S. App. LEXIS 16023 (8th Cir. 2003).

Punitive Damages Overturned in Equal Pay Act Case

Because the evidence did not show the malicious or recklessly indifferent conduct necessary to support a punitive damages award, the Eighth Circuit has overturned a $200,000 punitive damages award in an Equal Pay Act case. The plaintiff, a saleswoman, claimed that decision-makers told her she was in a "woman's position" and that the employer had a scheme to pay a man who succeeded her in her position more money. Though the court affirmed the lower court's finding of discrimination, it concluded the employer's acts were not extreme enough to justify the punitive damages award. *Lawrence v. CNF Transp. Inc.*, 2003 U.S. App. LEXIS 16349 (8th Cir. 2003).

Punitive Damages Justified Where No Male Candidates Accepted for Interview

In an unpublished opinion, the Third Circuit found that the University of Pennsylvania's determination not to interview male candidates for the position of head coach of the women's crew team supported the jury's award of punitive damages in a male applicant's sex discrimination case against the University. The plaintiff was more qualified than the females interviewed, the court opined, and the athletic department's top administrator allegedly elected not to interview men for the position in clear violation of the university's EEO policy. Though the university argued that the female candidate hired had greater knowledge of fundraising, recruiting, budgeting and rules compliance, the court found that these skills were not emphasized in the job description, where actual coaching experience was highlighted. *Medcalf v. Trustees of Univ. of Pa.*, 2003 U.S. App. LEXIS 16110 (3d Cir. 2003) (unpub.).

Waiter Was Legitimately Fired for Altercation with Co-Worker

Reasoning that a restaurant's handbook contained a warning that aggression against a co-worker would justify immediate termination, the First Circuit has ruled that a 55-year-old waiter was fired because he dropped or threw a tray of glasses at a busboy and not because of his age. The court observed that the employer hired another employee at age 60, and that more than two-thirds of its male staff were over the age of 45. After the incident, in which the busboy received 12 stitches, the manager interviewed employees and came to the conclusion the plaintiff was the aggressor and therefore fired him. Though the plaintiff argued the employer's investigation was cursory, the court found that fact was irrelevant as there was no evidence of discriminatory animus. *Rivera-Aponte v. Restaurant Metropol #3, Inc.*, 2003 U.S. App. LEXIS 14927 (1st Cir. 2003).

Eleventh Circuit Criticizes EEOC's Rush to Court

The Eleventh Circuit has affirmed the dismissal of a race discrimination charge and awarded attorneys' fees to the employer, commenting that the EEOC rushed to file suit rather than conciliate the matter because of the "lurid, per-

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haps newsworthy" nature of the allegations. The EEOC gave Asplundh Tree Expert Co. only six days to conciliate, despite a three-year investigation, which the court noted "smacks more of coercion than of conciliation." A Gainsville city inspector, who was never an employee of Asplundh, allegedly placed a noose around one of Asplundh's African-American employees and made other racial remarks. The employee was thereafter terminated during layoffs, and filed a claim with the EEOC. The court noted that Asplundh never received notice from the EEOC during its investigation that the Commission believed the company to be liable for actions of a non-employee. Further, the EEOC was obligated to keep negotiations with the company open after receiving a letter from counsel requesting a time to discuss the matter and the EEOC's claimed basis of liability, which the EEOC ignored. *EEOC v. Asplundh Tree Expert Co.*, 2003 U.S. App. LEXIS 16180 (11th Cir. 2003).

Employer's Acts Lead to Affirmation of Verdict for Employee

Because the employer allegedly engaged in a cover-up rather than investigate the employee's race discrimination claim, the Seventh Circuit has ruled that the award of $75,000 in compensatory damages and $270,000 in punitive damages for retaliation was appropriate. The court based its ruling on the fact that the company produced statistics about the employee's productivity that conflicted with the employee's statistics, leading the court to find the company "doctored" its report to discredit the employee. Further, though the employer claimed it had disciplined the employee, there was no accompanying documentation. The case arose after the African American account manager reported to his supervisor's boss that he believed he was being racially discriminated against by the company's refusal to increase his lending authority and through being subjected to racially insensitive remarks. When the boss failed to respond to his satisfaction, the employee went to the EEOC, and three days later he was fired. *Lampley v. Onyx Acceptance Corp.*, 2003 U.S. App. LEXIS 16848 (7th Cir. 2003).

State Not Immune From Retaliation Claim Based on Employee's Belief of Title VII Violation

Given that Congress identified a pattern and practice of gender discrimination by the states, the Tenth Circuit found that Congress validly lifted states' immunity to Title VII retaliation claims, and therefore Kansas was not immune from a former employee's retaliation suit. The employee, who was director of employment and training in the Kansas Department of Human Resources, complained to her supervisor that two co-workers seemed to treat her differently because she was the sole female division director. One month later, she was fired. The court found that the employee could maintain her retaliation claim even though based solely on her good-faith belief that the state's behavior violated Title VII. *Crumpacker v. Kansas Dep't of Human Resources*, 2003 U.S. App. LEXIS 16314 (10th Cir. 2003).

Orthodox Jewish Couple Did Not Suffer Discrimination or Constructive Discharge

Because a married Orthodox Jewish couple quit their positions with Allstate Insurance Co. prior to the company's implementation of a policy requiring the branch they worked in to remain open until 6 p.m. Fridays and to be open on Saturdays, the Sixth Circuit ruled they did not have a constructive discharge claim against Allstate. Though the couple claimed they were discriminated against on the basis of their religion, the court found that their voluntary resignation precluded any finding of adverse action. Further, there was no evidence that the workplace atmosphere was so hostile and abusive that it forced them to quit. The court pointed out that the couple controlled the physical atmosphere of their office, not the company. *Goldmeier v. Allstate Ins. Co.*, 2003 U.S. App. LEXIS 14736 (6th Cir. 2003).

Punitive Damages Allowed for False Position Statement

Proving even a win can turn into a loss, the Seventh Circuit has upheld an award of punitive damages because the facts in a winning position statement filed with the EEOC were false. *Lampley v. Oynex Acceptance Corp*. No. 02-3201 (7th Cir. 2003). While the contents of the position statement the employer filed with the EEOC were not the sole basis for the award of punitive damages they were the centerpiece.

Lampley was denied a promotion on several occasions. Following the instructions on a notice his employer had posted, he contacted the EEOC, and thereafter filed a charge of discrimination. When this fact came to light, Lampley was terminated. He returned to the EEOC and filed a retaliation claim. (It was this second charge which resulted in the punitive damages award.)

Following an investigation and receipt of the employer's position statement, the EEOC dismissed Lampley's claim finding no evidence of discrimination. Lampley proceeded to federal court and prevailed on both the failure to promote and the retaliatory discharge claims. He also recovered the statutory maximums for compensatory and punitive damages.

Lampley's employer argued punitive damages were inappropriate because it had made a good-faith effort to comply with Title VII. This argument was derailed by a series of human resource errors. First, while it claimed it had an EEOC policy, the employer never produced a copy of the policy. Second, the employer claimed in its position statement filed with the EEOC that Lampley had received a written warning prior to his discharge. It could not pro-

duce a copy of the warning. Third, the jury determined the sales figures the employer gave to the EEOC in its position statement were false.

The Seventh Circuit determined that the misstatements in the position statement filed with the EEOC demonstrated an effort to cover-up a Title VII violation. Since a cover-up was the exact opposite of good-faith compliance, punitive damages were appropriate.

The lessons from this case are stark but simple.

- Employers should adopt a formal EEO policy and disseminate it. (An EEO policy does not have to include a directive to call the EEOC.)
- Maintaining accurate personnel records are imperative.
- Verifying the facts before submitting them to the EEOC should not be omitted. "Haste makes waste" applies even to position statements with the EEOC.
- If the employer relies on a written document, it should be attached to the position statement.

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Lampley's win may well encourage plaintiff's attorneys to file federal claims even in the face of a no-cause finding from the EEOC, because a no-cause finding based on misstatements of fact can be a winning ticket for punitive damages.

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EEOC General Counsel Sworn In But Commission Positions Remain Open

Filling a vacancy of nearly two and one-half years, Eric Dreiband was sworn in as EEOC general counsel on August 11, 2003. Dreiband formerly worked in the Labor Department. Regarding commission members, the Senate failed to act prior to adjourning for its August recess on the nomination of Republican Leslie Silverman, who President Bush re-nominated for a second term in July. The White House has not acted on filling an existing Democratic vacancy, though Senate Minority Leader Tom Daschle (D-S.D.) has apparently lobbied the President to nominate Stuart Ishimaru, a civil rights attorney and former Justice Department official.

EEO-1 Forms Can Be Completed on the Internet

Employers can now submit EEO-1 forms to the EEOC via the Internet based on a change implemented this year. The Commission is also continuing to receive public comments on its proposed changes to the EEO-1 form, including expanding the job categories and increasing racial and ethnic categories. Further information about the new EEO-1 format can be found at the Commission's web site at http://www.EEOC.gov/eeo1survey.

EEOC to Change EEO-1 Form

The EEOC plans to increase the number of race and ethnic categories on its EEO-1 form, which private employers of 100 or more employees and some federal government contractors are required to file annually. Effective 2004 at the earliest, the changes would include two new categories, separating the currently combined Asian or Pacific Islander category and also adding a new category allowing individuals to self-designate as "two or more races not Hispanic or Latino." The EEOC strongly encourages employers to rely on employee self-identification. In addition to new racial and ethnic categories, the Commission is proposing to change the current job categories on the form. The "officials and managers" designation will be divided into: executive/senior level officials and managers; mid-level officials and managers; and lower-level officials and managers. See *Daily Lab. Rep. No. 112* (June 11, 2003), A-1.

ADA News

Reassignment Not Required For Poorly Performing Employee

Opining that "reassignment is an accommodation of last resort" that a company need not use unless it is the sole accommodation that will help a disabled employee, the Eighth Circuit has ruled that Target Corp. did not violate the ADA by refusing to reassign a transportation analyst after the employer made other efforts at accommodation. After a period of excellent performance, the employee's work suffered due to claimed stress and depression. Target attempted to assist her by reducing her hours, changing her job requirements, and, when she returned from medical leave, by giving her greater flexibility in her schedule. Despite this, the employee continued to poorly perform and she requested a transfer, which Target denied based on its policy preventing a poor-performing employee from transferring to a different department. The court found Target was not obligated to reassign the employee, reasoning that the employee could not show she could not perform the essential job functions and that therefore Target could use its established performance requirements in assessing the employee's request for transfer. *Burchett v. Target Corp.*, 2003 U.S. App. LEXIS 16592 (8th Cir. 2003).

Requested Accommodation Not Linked to Limitation

Because an employee's substantial limitation on the major life activity of procreation was not related to his request for accommodation in his truck driver position, the Eighth Circuit has found that the driver did not establish a *prima facie* ADA case. The court reasoned that an employer must only reasonably accommodate an employee's limitation, not his disability. Though the employee claimed that his nerve injuries resulted in limitations in his ability to lift, bend, stand and walk, the court found insufficient evidence that he was substantially limited in any of these major life activities. Thus, because the employee's substantial limitation only concerned procreation, which was unrelated to his request for a transfer to a non-ready mix driver position, the court affirmed summary judgment for the employer. *Wood v. Crown Redi-Mix, Inc.*, 2003 U.S. App. LEXIS 16137 (8th Cir. 2003).

Court Contemplates Standards for ADA Interference Claim

The Ninth Circuit allowed an Arizona police detective to proceed with her ADA interference case based on her allegation that a supervisor threatened to fire her if she did not give up her abstention from "on-call" duties. The court reasoned that the ADA's interference provisions should not be analyzed under Title VII "adverse action" standards, but rather are more akin to similar provisions of the federal Fair Housing Act, which required proof of an adverse employment action along the lines of coercion, threats or intimidation. The court found actionable the supervisor's alleged comments that the employee should consider going off her medication for depression or face a transfer if she did not participate in on-call duties. *Brown v. City of Tucson*, 2003 U.S. App. LEXIS 15061 (9th Cir. 2003).

Chevron Did Not Correctly Assess Direct Threat under Supreme Court Standard

On remand from the Supreme Court, the Ninth Circuit ruled that Chevron U.S.A. did not engage in the proper assessment to determine if an employee with hepatitis C was a direct threat to himself under the ADA. Chevron relied on its own medical experts to conclude that the employee would be exposed to medical risk by working in the coker unit at Chevron's refinery. The court reasoned that Chevron did not engage in the requisite individualized assessment, pointing out that the company's physicians were not familiar with liver disease while the employee's experts, who were liver specialists, stated the risk to him was minimal. Further, the court opined, Chevron appeared to ignore the fact that the employee worked in the facility injury-free for over 20 years, commenting that an "individualized risk assessment also requires consideration of relevant information about an employee's past work history." A dissent argued that the majority's standard would require employers to seek "cutting edge" medical information and to seek outside expertise to justify their experts' conclusions. *Echazabal v. Chevron U.S.A. Inc.*, 336 F.3d 1023 (9th Cir. 2003).

ADA Does Not Require Assignment to Temporary Position

The Sixth Circuit determined that an employer did not have an obligation under the ADA to place a factory worker with severe hip and back problems into a temporary position as accommodation. After the employee received a hip replacement and was diagnosed with a herniated disc, he was released to work by his physician with a five pound lifting restriction and a seating requirement. The company did not have any suitable permanent jobs. The employee and union insisted the employee be placed in a temporary data input position, but the company refused on the basis the job was not a permanent classification. Citing precedent, the court held that an employer is not required to reassign a disabled worker to a temporary position. The dissent argued that the employer should have placed the employee in the job for the duration of the position's existence. *Thompson v. E.I. du Pont de Nemours & Co.*, 2003 U.S. App. LEXIS 14816 (6th Cir. 2003).

ADA Claim Fails Because No Limitation in Major Life Activity Proven

Granting summary judgment for the employer in an ADA suit, the Eighth Circuit has ruled that an applicant at a SuperValu warehouse could not show that the company regarded him as substantially limited in a major life activity. The court reasoned that SuperValu only considered the applicant unable to perform the position of fork lift driver based on his medical restrictions. This was insufficient, the court reasoned, to show the company "regarded him as" unable to perform in a broad class of jobs, as required to show a restriction in the major life activity of working. Even though the applicant had epilepsy, the court found there was no proof the employer knew of this condition before it withdrew the job offer. Schuler v. SuperValu, Inc., 336 F.3d 702 (8th Cir. 2003).

Employer's Interpretation of Physician's Evaluation Violated the ADA

A tire manufacturer violated the ADA by refusing to hire an asthmatic applicant, the Eighth Circuit has ruled. Though the employer alleged it relied on a physician's evaluation of the plaintiff and in believing the plaintiff would be unable to work around dust or fumes because of his condition, the court noted the evaluation stated only that the plaintiff "may have difficulty" working in such positions. This was not enough, the court held, to enable the employer to deduce the applicant could not work at the tire plant. The court therefore affirmed the lower court's award of two years of front pay for the applicant. *Ollie v. Titan Tire Corp.*, 336 F.3d 860 (8th Cir. 2003).

Traditional Labor Law Developments

Walkout in Protest of Supervisor was Protected Activity

In ruling that a walkout by six workers protesting a supervisor's acts was concerted activity, the Seventh Circuit refused to strictly identify the standard for when a walkout is protected concerted activity. The workers left their shift because of complaints about a supervisor. They returned to work the next day, but were thereafter fired. The court found it unnecessary to clarify whether it was using the standard set forth in *Bob Evans Farms Inc. v. NLRB*, 163 F.3d 1012 (7th Cir. 1998), where the court held a walkout is protected as concerted activity if it is "reasonable" in relation to the employer's goals and any injury to the employer; or the standard set forth by the Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), where the court stated the standard for unprotected activity is whether it is unlawful, violent, a breach of contract or otherwise indefensible. Here, the court opined, the employees' conduct met both standards as protected, in that it did not cost the employer much in the way of lost production and was not otherwise indefensible. *Trompler, Inc. v. NLRB*, 2003 U.S. App. LEXIS 15426 (7th Cir. 2003).

Weingarten Permits Employee to Select Specific Representative

A divided Fourth Circuit has ruled that the NLRB's "representative rule" allowed a brewery employee to select the exact union representative he wanted to accompany him to a disciplinary meeting. The court reasoned that absent extenuating circumstances, an employee's *Weingarten* rights encompass not only the fact of representation, but the election of which specific representative the employee wants. Because an employee is at a natural disadvantage in a disciplinary situation, the court found that the ability to choose is a means of "mitigat[ing] the inequality." In a footnote, the court opined that this right to choose might be limited by undue hardship to the employer or the unavailability of the selected representative, in which case the employer can proceed accordingly or forgo an employee interview. *Anheuser-Busch Inc. v. NLRB*, 2003 U.S. App. LEXIS 15433 (4th Cir. 2003).

Private Corporation Was Successor Employer to Public Employer

The D.C. Circuit has ruled that a private, nonprofit company which took over a California public hospital was a successor employer under the National Labor Relations Act and thus must bargain with the existing union. Further, the court ruled that the existing bargaining unit was appropriate. Though the company instituted what it deemed a new management plan and a new patient care model, the court noted that the hospital remained an acute care facility utilizing primarily the same equipment and staff. Further, the court affirmed the presumptions that an existing bargaining unit is appropriate and that a unit consisting of employees at a single facility is appropriate. The ruling affirmed the National Labor Relations Board's decision in the matter. *Cmty. Hosps. of Cent. Cal. v. NLRB*, 2003 U.S. App. LEXIS 14858 (D.C. Cir. 2003).

Seventh Circuit Rules Arbitrator Had Authority to Interpret the FMLA in Contract Dispute

Reasoning that the parties agreed to allow the arbitrator to take the FMLA into account when ruling on an issue concerning the collective bargaining agreement, the Seventh Circuit ruled that the arbitrator's interpretation of the FMLA could stand. The union and company agreed to an absence policy set forth in the collective bargaining agreement. An employee was discharged after being assigned several absences which were not deemed "compelling" under company policy. The arbitrator found that because two of the absences, one when the employee cared for her husband and one when she was caring for her sick children, qualified under the FMLA, the employee should be reinstated with one-half back pay. The court found that a CBA provision promising nondiscrimination against employees and offering equal opportunity to all qualified individuals in accordance with the law and the agreement "conferred on the arbitrator the authority to consider the FMLA." *Butler Mfg. Co. v. USW*, 336 F.3d 629 (7th Cir. 2003).

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Board Should Not Have Considered Untimely Charge

The D.C. Circuit has disagreed with the Board's conclusion that a strike was based on a foreman's threat to fire and actually transfer an employee wearing a union shirt, thus ruling the strike was not an unfair labor practice strike. The court opined that the Board did not have jurisdiction to decide that issue because the union did not include that charge in its unfair labor practice claim, nor was it substantially related to the claims the union did allege. After the employer refused to reinstate striking workers following their unconditional offer to return to work, the union filed unfair labor practice charges. Though the union claimed the employer committed several unfair labor practices during the strike, it did not include the foreman's alleged threats in its original complaint. Even though the general counsel included the

claim in a consolidated amended complaint, the court found it was not timely and thus should not have been considered. This was the sole incident the Board based its ruling finding the strike was an unfair labor practice strike. *Precision Concrete v. NLRB*, 334 F.3d 88 (D.C. Cir. 2003).

Court Upholds Board Findings of Illegal Policies and Acts Towards Union Supporters

The D.C. Circuit has concluded that a company which runs the restaurants inside the *New York New York* hotel and casino in Las Vegas violated the NLRA though its treatment of union supporters and also through maintenance of some of its employment policies. During a union organizing effort, the employer allegedly threatened, disciplined and fired employees for supporting the union, including wearing union buttons, participating in a union rally, and distributing pro-union literature. Further, the court held that a now-rescinded policy of prohibiting employees from wearing buttons, badges or emblems in work areas except those issued by the employer violated the Act. Though the employer argued that it rescinded the policy, the court concluded there was no valid rescission because the employer never admitted wrongdoing. The court also found a no-solicitation rule which banned solicitation of employees in working areas invalid. However, the court did conclude there was not substantial evidence showing that the employer's rule requiring employees to report to work no sooner than half an hour before their shifts and to leave no later than half an hour following their shifts similarly violated the Act. *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99 (D.C. Cir. 2003).

Drivers for Poultry Company Are Not Agricultural Workers

The Fifth Circuit has ruled that truck drivers who drove chickens from contract farms to a company facility, and then to a processing facility, were not exempt agricultural employees for purposes of the NLRA. After the employer refused to bargain with the UFCW following a representation election where the union won the right to represent the employer's "live-haul" and "pull-up" drivers, the Board ruled the employer's refusal violated the Act. Agreeing with the Board, the court found that the drivers were not employed by the independent farms, and that the employer did not regain its position of "farmer" after it originally delivered the birds to the independent farms. Thus, according to the Supreme Court's opinion in *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996), the drivers were not agricultural employees. *Sanderson Farms Inc. (Production Div.) v. NLRB*, 335 F.3d 445 (5th Cir. 2003).

Remedial Notice Posting Does Not Require Intranet Posting

In a 2-1 decision, the NLRB has ruled that an employer does not need to electronically post a remedial notice as part of the Board's traditional notice-posting compliance requirement. The majority opined that the union erred by not requesting the electronic posting before the ALJ or Board in the underlying procedure. Ruling on the substance of the matter, the majority found no authority for requiring the electronic posting despite the fact that the company used its intranet as the customary way of posting messages to its employees. However, the majority did not intend its ruling to determine the policy issue of whether the Board's standard remedial notice-posting requirement should include electronic posting, positing that the issue should be resolved through full briefing by private parties, the General Counsel and amici. The dissenting judge ruled that requiring the electronic posting was not contrary to any Board law, and that the standard remedial language's requirement to post in all places where the employer customarily posts notices to employees, which here would include the company's intranet, required the electronic posting. *IBM Corp.*, 339 N.L.R.B. No. 120 (2003).

Employee Who Raised Medical Leave Rights Was Protected Under NLRB

The NLRB has found that Phillips Petroleum violated federal labor law by firing an oil refinery worker who sought family medical leave to attend to his pregnant wife when she was hospitalized. After the employee had researched various options for leave, he had attempted to educate his co-workers as to their own leave rights. According to the Board, the employee's discussion of available state and federal leave with co-workers and a manger was protected, concerted activity because though his efforts originated with his own concerns, they also "embraced the larger purpose of obtaining this benefit for all of his fellow employees." Further, the evidence showed that the superintendent made comments about the employee being a troublesome political activist and that his termination letter referred to the employee's efforts to secure leave. *Phillips Petroleum Co.*, 339 N.L.R.B. No. 111 (2003).

Acosta Leaves NLRB for DOJ Position

On August 21, 2003, R. Alexander Acosta (R) left his position at the NLRB after just seven and one-half months in the job to take up a position as the Department of Justice's assistant attorney general for civil rights. The Senate confirmed his nomination on August 1, 2003. His absence leaves the NLRB with four members - Chairman Robert J. Battista (R), Member Peter C. Schaumber (R), Member Wilma B. Liebman (D) and Member Dennis P. Walsh (D). See *Daily Lab. Rep. No.* 163 (Aug. 22, 2003), A-4.

ERISA Law

Lump Sum Payment of Cash Balance Plan Benefits Must Include Interest

By calculating cash balance plan participants' lump-sum distributions without including the appropriate interest, Xerox Corp. violated ERISA, the Seventh Circuit has ruled. The court reasoned that by not including the interest that would have accumulated by the time the participants turned 65, the company violated the IRS's requirement that the cash balance plan be "frontloaded." According to the court, under IRS Service Notice 96-8, "frontloading" requires a plan to pay out interest to participants on the hypothetical money in their accounts for the time between when the participant leaves the employer and the time he reaches age 65. *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 2003 U.S. App. LEXIS 15427 (7th Cir. 2003).

ERISA Did Not Preempt Wrongful Discharge Claim

According to a recent Fourth Circuit ruling, ERISA does not entirely preempt an employee's wrongful discharge claim because Section 510 did not provide the employee with any protection. The employee sued under Maryland law, claiming she was fired after complaining to her supervisor about the supervisor's plan to transfer money out of the employee's health plan. Section 510, opined the court, only offers anti-retaliation protection to employees discharged for testifying in any "inquiry or proceeding" under ERISA. Here, because the complaint was made intra-company, Section 510 would not apply. *King v. Marriott Int'l Inc.*, 2003 U.S. App. LEXIS 14934 (4th Cir. 2003).

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ERISA Does Not Preempt Claims of Mismanagement of Company

The Sixth Circuit has ruled, in an unpublished opinion, that a claim that company executives breached their state-law fiduciary duties by mismanaging the company was not preempted by ERISA. Vacating the lower court's decision, the court reasoned ERISA did not apply because the issue was not the directors' actions as ERISA plan fiduciaries, but rather, was the propriety of certain business decisions. Former employees who participated in the company's ERISA governed employee stock option plan sued that the executives mismanaged the company, causing a drastic reduction in the value of company stock. *Husvar v. Rapoport*, 2003 U.S. App. LEXIS 14661 (6th Cir. 2003) (unpub.).

COBRA Notice Which Did Not Define "Qualifying Event" Was Defective

A notice of continuation of health insurance benefits which did not define essential terms did not meet COBRA standards, the Third Circuit ruled, in an unpublished opinion. The notice failed to define the term "qualifying event," which, the court found, essentially rendered the notice meaningless for the average lay person. However, though the employee failed to obtain adequate coverage because of the defective notice, her husband's health plan paid for her medical expenses, and thus the court remanded the matter to determine if the collateral source rule applied. *Emilien v. Stull Techs. Corp.*, 2003 U.S. App. LEXIS 14515 (3d Cir. 2003) (unpub.).

SPD Lacking Adequate Explanation of Domestic Partner Benefits Violated ERISA

The Second Circuit ruled that a summary plan description violated ERISA because it did not tell plan participants that they had to file an affidavit in order for their domestic partner to receive pre-retirement survivor income benefits. Even though the employer's handbook and the SPD did include 16 references to the affidavit requirement, the requirement was not specifically included in the survivor benefits section, the court noted. Therefore, the plaintiff was entitled to recover survivor benefits since she proved she was prejudiced by the omission. *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003).

FLSA Bulletin

Meatpackers Must Be Paid for Time Spent Donning and Doffing Safety Gear

Reasoning that the time spent donning and doffing gloves, mesh clothing and safety boots was unique to and requisite for the position of a meatpacking employee, the Ninth Circuit has ruled that the company must pay the meatpacking employees for the time spent putting on and taking off safety equipment. Thus the court affirmed most of the $3.1 million trial court decision. The court rejected the company's argument that the employees' time spent preparing for work and leaving work fell under the "changing clothes" exception to the FLSA. Here, the employees' clothing was particularly suited to and required for their position. *Alvarez v. IBP, Inc.*, 2003 U.S. App. LEXIS 15622 (9th Cir. 2003).

Performing Line Duties Did Not Make Dairy Queen Manager Non-Exempt

Even though a Dairy Queen manager spent most of her time doing hourly line work, the Fourth Circuit has held, in an unpublished opinion, that the company properly classified the manager as an exempt executive employee under the FLSA. Using the FLSA's "short test," the court looked to the employee's $585 a week salary and her supervisory responsibilities. The employee had argued that she was not exempt because she primarily performed line-worker tasks such as cooking, cleaning and manning the cash register. However, the court found that during the time she performed these tasks she was also supervising employees, completing daily paperwork, handling customer complaints and dealing with vendors. The court observed that Dairy Queen's operations were dependent upon the employee's work, and thus she was exempt.

Upcoming Events

Workplace Realities: The 2003 Labor & Employment Law Symposium

Seyfarth Shaw LLP is hosting a one-day symposium for human resources professionals, in-house counsel, and senior management offering practical guidance in labor and employment law. These programs will provide legal updates and practical advice on how to respond to evolving issues in labor and employment law.

October 30, 2003: The Beverly Hills Hotel, Beverly Hills, California
November 5, 2003: Radisson Hotel, Sacramento, California
November 6, 2003: Sheraton Palace Hotel, San Francisco, California

For more information on the above programs, please visit our Web site at www.seyfarth.com/events.

Breakfast Briefing: Can You ather and Secure Your Employee Data? November 13, 2003

Join Seyfarth Shaw LLP and IIT/Chicago-Kent College of Law for a Breakfast Briefing addressing the growing need to secure employee data nad privacy rights in employee data (HIPAA and International Privacy Law).

For more information on this program, please visit our Web site at www.seyfarth.com/events.

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