VEDDERPRICE®

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Labor and Employment Law

Conducting Independent Reviews of Proposed Personnel Decisions Can Reduce Litigation Risks

With ever-expanding workloads and the pressure to make decisions quickly, senior managers and human resources personnel may find it difficult to conduct independent reviews of personnel decisions recommended or initiated by first-line managers. Although tempting, giving in to the urge to "rubber-stamp" such recommendations can be costly. Using what some courts refer to as the "cat's paw" theory, the first-line supervisor's biases can be attributed to the employer, even though the final decision maker had no idea the employee at issue was a member of a protected class. Two recent decisions provide helpful guidance for employers seeking to minimize their risks in such situations.

"Cat's paw" refers to a situation where a biased employee, who lacks ultimate decision-making authority, singularly influences the employer in making an adverse employment action, such as a termination, by supplying the decision maker with misinformation or failing to provide relevant information. Under this theory, the employee can prevail in a discrimination suit even if the employer can successfully establish that the actual decision maker did not harbor any discriminatory animus or even know the affected employee was a member of a protected class. In such a case, the discriminatory bias behind the actions of a first-line manager with limited authority can be imputed to the employer, resulting in liability regardless of the intent of the ultimate decision maker.

In *Staub v. Proctor Hospital*, the Seventh Circuit Court of Appeals (Illinois, Indiana and Wisconsin) reversed a jury award in favor of the plaintiff in a military discrimination (USERRA) case, and remanded the case to the district court with instructions to enter judgment in favor of the employer. The court concluded the employer was not liable for discrimination after terminating the employee, a military reservist, even though there was evidence that the employee's supervisor had an anti-military animus. The Court explained that although the HR manager, who made the final decision to terminate, was influenced by the biased supervisor in making her decision, her decision was "not wholly dependent on a single source of information" and she conducted her "own independent investigation into the facts relevant to the decision."

Similarly, in *EEOC v. Cast Products, Inc.*, a district court

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judge in the Northern District of Illinois granted summary judgment to the defendant, despite allegations that a biased supervisor initiated termination proceedings. Effectively summarizing how employers can best protect themselves, the court explained: "Because an independent investigation absolves the employer of a subordinate's discriminatory animus, even if [the supervisor] held a discriminatory animus toward [the plaintiff], that animus would not be imputed to [the company]."

Avoiding Liability

These opinions stand as stark reminders of the important role that upper management and/or human resources can play in the decision-making process. Rather than simply taking every manager at his or her word, the ultimate decision makers and/or human resources should take care to conduct an independent inquiry of the alleged facts. If witnesses are involved, interview them. If documents are relied on, review them. At the very least, talk to the employee and get his or her side of the story. Finding the time to take these steps may prove challenging, but it may result in avoiding litigation or prevailing if a lawsuit is filed.

Vedder Price has counseled many employers through investigations and termination decisions. If you have any questions about conducting a proper investigation, please contact **Aaron R. Gelb** (312-609-7844), **Alan M. Koral** (212-407-7750), **Timothy J. Tommaso** (312-609-7688) or any other Vedder Price attorney with whom you have worked. ■

Supreme Court Update: Three Recent Decisions Affect Employers

14 Penn Plaza LLC v. Pyett

Arbitration Clause Trumps Right to Sue, But Only If Precisely Drafted

On April 1, 2009, the U.S. Supreme Court issued its decision in *14 Penn Plaza LLC v. Pyett*, No. 07-581, a case watched closely by labor unions and management alike. By a 5–4 margin, the Court held that that a collective bargaining agreement (CBA) that clearly and unmistakably requires union members to arbitrate discrimination claims under the Age Discrimination in Employment Act (ADEA) is enforceable. This decision seemingly resolves an uneven application of the law in this area since the early 1970s, although there remain significant questions about its practical impact.

In 1974, the Supreme Court held in *Alexander v. Gardner-Denver Co.* that a CBA could not waive an individual worker's right to a judicial forum for claims under Title VII of the Civil Rights Act of 1964. Accordingly, the Court permitted a terminated employee to bring an employment discrimination claim in federal court, even though the employee already arbitrated the claim under the applicable CBA. Courts generally interpreted *Gardner-Denver* to preclude a union from agreeing in a CBA that its members must pursue statutory employment discrimination claims in arbitration rather than in court. In 1991, however, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that an employee in an individual employment contract (as opposed to a CBA) could waive his or her right to pursue an ADEA claim in a federal court. To many, this seemed at odds with the core principle of *Gardner-Denver*.

In *Pyett*, the CBA at issue contained a nondiscrimination clause that required employees to submit employment discrimination claims (including ADEA claims) to arbitration. Union members who were reassigned to less desirable jobs brought an age discrimination action in federal court. The employer petitioned the federal district court to compel arbitration of the union members' claims. The district court denied the petition, and the Second Circuit affirmed.

The Supreme Court concluded that the CBA's arbitration provision *was indeed enforceable*. The Court reasoned that *Gardner-Denver* only addressed whether the prior arbitration of contract-based claims precluded subsequent litigation of statutory claims. The Court held that a judicial forum remains available for statutory discrimination claims if there is a "less-than-explicit waiver" in the CBA of the right to go to

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court. That was not the case in *Pyett* because the waiver of the judicial forum right was "clear and unmistakable."

The four dissenting Justices in *Pyett* noted the majority opinion "may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration . . . which is usually the case." In other words, if the union (rather than the employee) controls whether grievances are taken to arbitration, then the employee still may have the right to bring his or her claims in court, notwithstanding the arbitration provision in the CBA.

This precise result was reached recently in the Southern District of New York in *Kravar v. Triangle Services*. There, the collective bargaining agreement seemingly required arbitration of employment discrimination claims. However, the arbitration clause clearly stated that only the union was empowered to proceed to arbitration on behalf of the employee. Because the "individual member does not have an unfettered right to demand arbitration of a discrimination claim," the court determined that the case fell within the "exception" to *Pyett*, and denied the employer's motion to compel arbitration. In another post-*Pyett* case, however, a federal district court in Colorado (in *Mathews v. Denver Newspapers Agency*) did not address the *Pyett* dissent when it concluded that a CBA provision that permitted bringing statutory claims to arbitration barred an employee who lost in arbitration from bringing the same discrimination claims in federal court. Lower courts' differing interpretations of the *Pyett* dissent's "exception" may well lead right back to the high court.

Every employer must determine for itself whether arbitration of statutory discrimination claims is desirable. Many believe that the availability of an arbitral forum is likely to increase the number of such claims, and that the expense and inconvenience of defending them in arbitration may not be much different from doing so in court. Also, there is limited availability of judicial review in the event of arbitrator error. On the other hand, arbitration is a more private forum, and many believe that discovery is likely to be less costly and that arbitrators will be reluctant to issue large awards. Moreover, utilizing arbitration may avoid having to defend a single claim in two arenas—first in arbitration and then in court.

Vedder Price's team of labor attorneys works closely with businesses that desire to implement alternative dispute resolution procedures, including the negotiation of collective bargaining agreements. If you have any questions about *Pyett*, please contact **Kevin Hennessy** (312-609-7868), **Lyle S. Zuckerman** (212-407-6964) or any other Vedder Price attorney with whom you have worked.

Ricci v. DeStefano

Affirmative Action and Diversity Efforts Can Breed Reverse Discrimination Claims

On June 29, 2009, in *Ricci v. DeStafano*, the U.S. Supreme Court held that the City of New Haven intentionally discriminated against white firefighters because of their race, in violation of Title VII when the City discarded the results of a promotional test that appeared to favor white employees. Title VII prohibits intentional acts of employment discrimination (disparate treatment), as well as facially neutral practices that disproportionately and adversely affect a protected class of employees (disparate impact). In a 5–4 decision, the Court reasoned that the City could not discredit promotional test results where whites performed significantly better than blacks simply because the City feared disparate impact litigation from more poorly performing minority employees. Instead, the Court articulated a new standard, stating that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious discriminatory action." The Court found that the City did not have a "strong basis in evidence" for scrapping the promotional test results,

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and it therefore violated Title VII.

The Court's ruling in *DeStefano* is a good reminder that "reverse discrimination" claims are viable under Title VII and other anti-discrimination laws. Employers must be cautious, particularly in their affirmative action and diversity initiatives, to avoid exposing themselves to reverse discrimination claims. If you have any questions about *DeStefano* or its impact on affirmative action, diversity initiatives and other employment practices, please contact **Thomas G. Abram** (312-609-7760), **Laura Sack** (212-407-6960), **Patrick W. Spangler** (312-609-7797) or any other Vedder Price attorney with whom you have worked.

Gross v. FBL Financial Services, Inc.

Age Discrimination Claims Tougher for Employees to Prove

Mixed-motive cases arise when an employer takes permissible criteria (such as attendance or job performance) and impermissible criteria (such as sex or race) into account when making an employment decision. Under Title VII, if the employee can demonstrate at trial that impermissible criteria played "a motivating factor in the employer's decision," then the burden of proof shifts to the employer to demonstrate that it would have terminated the employee regardless of his or her protected status.

Prior to the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, it was unclear whether this same mixed-motive framework applied to Age Discrimination in Employment Act (ADEA) claims. On June 18, 2009, however, the Court held that the mixed-motive burden-shifting structure that applies to Title VII cases is not available in ADEA cases. Rather, the burden of persuasion remains with the employee to prove that the employer made its decision because of the employee's age. Consequently, an employer no longer needs to prove that it would have taken the same action regardless of the employee's age, even when age was in fact a motivating factor in the employer's decision. While *Gross*'s clarified standard may aid employers in defending ADEA claims, the long-term impact is unclear. Congress is currently considering enacting legislation that would effectively reverse the case.

If you have questions about *FBL Financial Services* and its impact on age discrimination claims, please contact **Thomas M. Wilde** (312-609-7821), **Jonathan A. Wexler** (212-407-7732) or any other Vedder Price attorney with whom you have worked. ■

Workforce Reductions Raise Questions About Severance Programs

With many employers engaging in workforce reductions and paying out record amounts of severance benefits, it is essential that employers examine the severance pay arrangements in place and determine if they are covered by ERISA, and, if not, whether they should be covered. Not every severance pay arrangement is governed by ERISA, but many are. For a severance arrangement to be covered under ERISA, maintenance of the arrangement must require an "ongoing administrative scheme." While the courts have mostly failed to offer clear definitions or provide a bright-line rule, they have made one thing clear: employer intent to avoid coverage is meaningless. Numerous courts have found severance arrangements contained in human resources policy documents, employee handbooks and employment agreements to be welfare plans, subject to ERISA.

Because many employers do not know that their existing severance pay practice qualifies as an ERISA-covered plan, they run the risk of not complying with the applicable reporting and disclosure rules. Covered plans must be reported on an IRS Form 5500 annually if the plan has over 100 participants. The plan

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must also be in writing and provide a detailed claims procedure, and summary plan descriptions must be prepared and distributed (unless the plan is exempt as a "top-hat plan" covering only a select group). Failure to meet these compliance obligations could subject the plan administrator to civil penalties of up to $110 per day for failing to file the required forms or provide documents, such as the Summary Plan Description, requested by plan participants, as well as criminal penalties, including imprisonment and up to $500,000 in fines, for willful violations of ERISA's reporting and disclosure obligations.

Advantages and Disadvantages of an ERISA Severance Plan

Most practitioners agree that the advantages of an ERISA severance plan outweigh the disadvantages and advise employers to treat severance arrangements as ERISA plans even when coverage is not entirely clear. **First**, if an employer already has a severance pay practice that qualifies as an ERISA plan but is out of compliance, treating the arrangement as an ERISA plan will significantly reduce the risk of monetary penalties for failure to comply with form reporting and disclosure requirements. **Second**, if there is a dispute over benefits, the claim would have to go through the plan's claims administration process. After a participant exhausts this process, he can file a lawsuit in court, but ERISA provides removal jurisdiction for the case to be heard in federal court and preempts most claims based on severance benefits, such as contract and wage claims. **Third**, in any federal court lawsuit brought under ERISA, there is no right to jury trial (in contrast to a state court contract action), damages are limited, and the challenged benefits decisions are subject to the deferential abuse of discretion standard of review, provided the plan document contains the required discretionary language. **Fourth**, any alleged oral modifications of the policy would generally be disregarded because of the emphasis, under ERISA, on the governing plan documents.

From a practical perspective, an ERISA severance plan can provide consistency and guidance for human resources personnel and a sense of fair and evenhanded treatment for departing employees because benefit levels and eligibility criteria are spelled out in the plan document. An ERISA plan also avoids uncertainty over the right to modify the plan that could potentially arise under state contract law.

There are, however, certain disadvantages to ERISA coverage. Once the plan is established, the employer must provide benefits to qualifying participants who meet the eligibility requirements under the plan. In the absence of a written plan, the employer may or may not have a legal obligation to provide benefits. Coverage under ERISA also requires that the employer comply with various reporting and disclosure requirements, as well as requirements that the written plan requirement include a claim and appeal procedure, basic plan information (plan name, number, plan sponsor name and FEIN, plan administrator name and address, etc.), and the standard ERISA rights language. Finally, in contrast to state contract law claims, where employees usually do not receive attorneys' fees, the opportunity exists for such awards under ERISA. That said, many states, including Illinois, have wage payment laws that provide for attorneys' fee awards and that are broad enough to cover severance pay.

Vedder Price attorneys have experience reviewing and analyzing existing severance pay arrangements to determine ERISA status. We have also designed and drafted a variety of ERISA-covered severance plans and have advised and represented employers in claims for severance benefits. If you have questions, please contact **Thomas G. Hancuch** (312-609-7824), **Neal I. Korval** (212-407-7780), **Patrick W. Spangler** (312-609-7797) or any other Vedder Price attorney with whom you have worked. ■

Reducing Immigration-Related Liabilities

H-1B Employees

Companies that employ foreign nationals may have additional obligations when terminating or reducing hours for employees from other countries. Many companies employ highly educated foreign nationals in H-1B (Specialty Occupation) visa status. The regulations require that the employer compensate the H-1B employee at the prevailing wage until there is a "bona fide" termination of employment. A bona fide termination does not occur until the employer has advised the Department of Homeland Security (DHS) and Department of Labor that the employment relationship has been terminated and has provided the employee with payment for his or her travel home. A recent court decision highlights an enforcement trend in this area.

In *Administrator, Wage & Hour Division v. Itek Consulting, Inc.*, the court awarded back pay and interest to an employee due to the employer's failure to notify the government that the employment had ended more than six months earlier. The regulations also require that H-1B employees be paid the required wage for both productive and nonproductive time—no "benching" is allowed. Therefore, if an H-1B employee's hours are reduced, employers must take care to ensure that they are still in compliance with the wage attestations made to the government when the application was filed. If this is not the case, the employer should file an amended petition with DHS.

Increased Focus on Criminal Prosecutions

In a significant shift in enforcement priorities, DHS recently announced a renewed Department-wide focus targeting employers rather than employees for prosecution. In May, Immigration & Customs Enforcement (ICE) issued a press release stating that "effective immediately, ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers." This is a significant departure from the practice under the Bush Administration, where the focus was on large-scale raids designed to lead to the arrest of large numbers of unauthorized workers. Employers should also expect to see more inter-agency cooperation by law enforcement officials, including ICE, U.S. Citizenship and Immigration Services, the Department of Labor, the Social Security Administration and various other agencies and law enforcement offices. Criminal penalties include fines up to $250,000 and imprisonment of company representatives for up to ten (10) years.

In addition to this renewed focus on criminal prosecution of employers, the Director of ICE's Office of Investigations recently testified that ICE has restructured the worksite administrative fines process to build a "more vigorous program" and that she expects that increased use of the administrative fines process will result in meaningful penalties for those who engage in the employment of unauthorized workers. Civil administrative penalties for simple "paperwork violations" for authorized workers range from $110 to $1,100 per employee; civil fines for unauthorized workers range from $375 to $16,000 per employee.

Each of these trends highlights the importance of having an immigration compliance policy in place to avoid civil and criminal liability.

If you have any questions regarding immigration issues, please contact **Gabrielle M. Buckley** (312-609-7626) or any other Vedder Price attorney with whom you have worked.

Update on Federal Contractor Regulations Requiring E-Verify

New Federal Acquisition Regulations were scheduled to go into effect on June 30, 2009, requiring most federal government contractors to use E-Verify, an electronic employment eligibility verification system operated by the U.S. Department of Homeland Security (DHS). E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) allows employers to electronically confirm the biographical data of employees

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pursuant to a memorandum of understanding entered into by the employer, the DHS and the Social Security Administration. Due to pending litigation involving these regulations, implementation has been **delayed until September 8, 2009**. In the meantime, federal contractors should remember that they are not obligated to fulfill the E-Verify requirements unless and until they become parties to federal contracts that specifically require use of E-Verify. ■

Significant Changes to Illinois Victims' Economic Security and Safety Act (VESSA) Merit Review by Illinois Employers

The Illinois General Assembly recently approved SB 1770, amending the Victims' Economic Security and Safety Act (VESSA), broadening the scope and coverage of the Act. VESSA provides victims of domestic and sexual violence with certain rights to take time off from work. The amendatory legislation now awaits signature by the governor. The legislation will become effective upon signing.

Eligible Employees and Reasons for Leave

VESSA grants leave rights when an employee or the employee's family or household member is a victim of domestic or sexual violence. Like the federal Family and Medical Leave Act (FMLA), VESSA leave can be taken intermittently or by means of a reduced work schedule until the entitlement is exhausted. However, unlike FMLA, VESSA provides leave to employees immediately and does not require a minimum length of service. VESSA leave may be taken to: (1) permanently or temporarily relocate; (2) seek medical or psychological attention; (3) obtain victim services; (4) participate in safety planning or other actions to increase the safety of the victim; and (5) seek legal assistance or remedies to ensure the victim's safety, including time off for civil or criminal hearings.

SB 1770 expands the definition of "family or household member" to include any person who is related by blood or by present or prior marriage, and any other person who shares a relationship through a son or daughter. The current definition is limited to the employee's spouse, parent, son, daughter and any person who jointly resides in the same household.

Change in Covered Employers

Perhaps most significantly, SB 1770 expands coverage of the Act to include small private employers. In the past, VESSA applied to all public employers, but private employers were only covered if they had 50 or more employees. SB 1770 reduces the threshold number of employees in private industry from 50 or more employees to 15 or more. As a result, many small employers will be required to comply with VESSA for the first time.

Length of Leave

SB 1770 provides that employees working for an employer with 15–49 employees are entitled to 8 weeks of unpaid leave during any 12-month period. The leave entitlement remains 12 weeks for employees working for a public entity or for a private employer with 50 or more employees. Additionally, under the amendment, employers may not require employees to substitute available paid or unpaid leave for VESSA leave. As a result, the employee could take his or her VESSA leave and then "tack on" any earned vacation or PTO time.

Protections from Discrimination

Like FMLA, VESSA requires that an employee be restored to the same or an equivalent position upon return from leave. Equivalent benefits, pay and terms of employment must be restored, although benefits need not continue to accrue during the leave. As is the case under the FMLA, health care coverage must be provided to an employee on VESSA leave. VESSA also prohibits discrimination against employees who exercise their rights or oppose unlawful

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actions under the Act. SB 1770 expressly prohibits retaliation in the form of constructive discharge.

Addition to Reasonable Accommodations

As is true with the Americans with Disabilities Act (ADA), an employer is affirmatively required to provide reasonable accommodations under VESSA, unless it shows undue hardship. Reasonable VESSA accommodations include "adjustment to a job structure, workplace facility, or work requirement, including transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a safety procedure" in response to an actual or perceived threat.

Under SB 1770, a reasonable accommodation must be made in a timely fashion and employers must consider exigent circumstances and any danger facing the employee in determining whether an accommodation is reasonable. Further, the list of VESSA accommodations deemed reasonable is expanded to include "assistance in documenting domestic or sexual violence that occurs at the workplace or in a work-related setting."

Enforcement and Compliance

Every employer is required to conspicuously post and maintain documentation provided by the Illinois DOL summarizing VESSA rights and responsibilities. Employers may face challenging decisions and compliance issues as they attempt to implement the new VESSA changes. Employers should review the new amendments and their FMLA and other leave policies to determine what additions or modifications should be made. If you have any questions about VESSA, please contact **James A. Spizzo** (312-609-7705), **Katherine A. Christy** (312-609-7588) or any other Vedder Price attorney with whom you have worked. ■

Summary Judgment More Difficult under New York City Human Rights Law

Several recent court decisions have significantly increased the ability of employment discrimination plaintiffs to survive summary judgment motions attacking their claims under the New York City Human Rights Law (NYCHRL). One federal court has even questioned whether the *Faragher/Ellerth* defense in sexual harassment cases is applicable to NYCHRL claims and has certified that question for resolution by the Second Circuit.

As a result of the decision in *Williams v. NYC Housing Authority*, 872 N.Y.S.2d 27 (App. Div. 1st Dep't 2009), employers with New York City employees must be on the lookout for an increase in employment actions filed under the NYCHRL, as reported in our February 4, 2009 LABOR LAW BULLETIN. In *Williams*, the New York State appellate court with jurisdiction over Manhattan rejected, for purposes of the NYCHRL, the "severe and pervasive" standard governing hostile work environment claims under Title VII and the New York State Human Rights Law (NYSHRL) in favor of a broader standard under which evidence of any allegedly discriminatory conduct constituting more than "petty slights or trivial inconveniences" could be sufficient to defeat summary judgment. Indeed, the court declared that the NYCHRL is "explicitly designed to be broader and more remedial" than its federal and state counterparts.

Several courts have since analyzed the effect of the *Williams* decision on employment litigation under the NYCHRL. The results suggest that there will be an increase in NYCHRL claims.

In *Dixon v. City of New York*, No. 03 Civ. 343, 2009 U.S. Dist. LEXIS 35096 (E.D.N.Y. Apr. 24, 2009), the Eastern District reversed an earlier grant of summary judgment to the employer in a hostile work environment claim on the grounds that the plaintiff's allegation that a supervisor grabbed his arm and threatened that her "ex-con" husband would hurt him was sufficient under the NYCHRL, even though the action was insufficiently severe or pervasive under federal standards.

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The Southern District lately interpreted *Williams* to mean that the NYCHRL employs a broader standard for evaluating whether a claim qualifies as a "continuing violation" than the standard set by the U.S. Supreme Court in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Some courts, however, continue to grant summary judgment to employers in discrimination cases that include NYCHRL claims. For example, in *Ibok v. SIAC and Sector, Inc.*, No. 05 Civ. 6584, 2009 U.S. Dist. LEXIS 32534 (S.D.N.Y. Mar. 25, 2009) and *Wilson v. N.Y.P. Holdings, Inc.*, No. 05 Civ. 10355, 2009 U.S. Dist. LEXIS 28876 (S.D.N.Y. Mar. 31, 2009), the judges acknowledged the different standards governing NYCHRL claims, but nonetheless granted summary judgment and dismissed the lawsuits in their entirety.

Ominously, however, as noted above, in *Zakrzewska v. The New School*, 598 F. Supp. 2d 426 (S.D.N.Y. Jan. 26, 2009), the Southern District ruled that the *Faragher/Ellerth* defense is likely inapplicable to the NYCHRL, which appears intended to "create[ ] vicarious liability for the acts of managerial and supervisory employees even where the employer has exercised reasonable care to prevent and correct any discriminatory actions and even where the aggrieved employee unreasonably has failed to take advantage of employer-offered corrective opportunities." The court, however, acknowledged that "[its] conclusion is not free from doubt," and certified an immediate appeal to the Second Circuit to decide the issue.

What This Means for You

The favorable reception accorded to *Williams* in the federal courts sitting in New York will undoubtedly cause plaintiffs' lawyers to file more employment discrimination and harassment lawsuits under the NYCHRL. Thus, it is more important than ever to prevent situations that give rise to complaints. Anti-harassment and nondiscrimination policies, and internal complaint procedures should be reviewed to ensure that they reflect best practices in the area which, we believe, is a zero-tolerance policy. It is essential that these policies be thoroughly publicized. They should appear in the employee handbook, be featured in postings and in articles in employee newsletters and be addressed in new employee orientation and in periodic EEO training. It is desirable that employees acknowledge in writing their understanding of the contents of these policies. Finally, we strongly recommend that supervisors receive regular, in-depth training on these policies and on their obligation to respond appropriately to complaints or to any evidence of policy violations. These preventive measures are effective in forestalling legal complaints and in limiting a company's liability, since they tend to create and maintain a workplace in which employees are required to treat others in a professional and respectful manner, and in which complaints are addressed quickly and meaningfully.

If you need assistance in exploring the best way for your organization to prevent discrimination/harassment/retaliation complaints from employees, please contact **Alan M. Koral** (212-407-7750), **Roy P. Salins** (212-407-6965) or any other Vedder Price attorney with whom you have worked. ■

Ask the Editor: USERRA Q&A

During the past year, newsletter editor Aaron Gelb participated in a 3-week jury trial involving a number of claims under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). With many persons currently serving in the Armed Forces and Reserves, Aaron fields many questions about military leave rights. Some recent issues are:

Q Many companies, although not required to do so by law, offer additional benefits to employees with military obligations. With the state of the economy, many companies are looking to cut back and may consider rescinding these types of extras. Can they do so without violating USERRA?

A Yes, an employer can discontinue an employment benefit extended only to

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employees with military obligations without running afoul of USERRA. Recently, the Seventh Circuit Court of Appeals (Illinois, Indiana and Wisconsin) held that the City of Mt. Vernon did not violate USERRA when it ceased allowing police officers who missed shifts because of National Guard training to work on scheduled days off and, thus, receive a full week's pay. *Crews v. Mt. Vernon*, No. 08-2435 (7th Cir. June 2, 2009). As explained by the court, an employee can establish a violation only if he can show that he or she was denied benefits that were otherwise made available to other employees. Accordingly, Mt. Vernon would be liable only if the employee could show that employees absent for other reasons, such as FMLA leave, were allowed to make up time missed where employees who missed work due to their military obligations were not.

Q Most employers understand that as veterans return from extended tours of duty, they must be returned to the same position they held before being called to duty, provided they return in the time frame required by USERRA. How closely will courts scrutinize changes to an employee's job duties?

A Although there is no hard-and-fast rule, the short answer is: the courts will scrutinize any changes very closely. Two recent federal district court decisions provide some insight into the issues employers should consider when reemploying returning service members. In *Middleton v. City of Sherwood*, No. 08-604 (D. Or. 2009), the City's Police Chief returned to work after 18 months on active duty and was asked to accept a demotion to Deputy Chief where he reported to the individual who had been serving as Acting Chief in his absence. When he refused, the City reinstated him as the City's Police Chief, but created a new position, Director of Public Safety, for the individual who had been serving as Acting Chief. Not surprisingly, the court seized on the fact that the City's Police Chief was no longer the top law enforcement officer in the City, and found that he could state a claim for constructive demotion. Meanwhile, the court's opinion in *Reed v. Honeywell Int'l*, No. 07-0396 (D. Ariz. 2009), reinforces the adage that timing is everything. Following Reed's return to work, Honeywell convened a reassimilation meeting at which Reed was made to respond to various complaints about the manner in which she managed her employees. Reed then contends that she was forced out of the loop since her employees began reporting to Honeywell Human Resources, rather than to her. These cases illustrate that restoring a returning service member to a position with the same salary, benefits and basic job duties is not necessarily sufficient. Changes in reporting relationships, removal of certain tasks or even a notable loss of status may be enough to state a claim under USERRA.

If you have any questions about USERRA and military leave, or if you have a question you would like included in *Ask the Editor*, please contact **Aaron R. Gelb** (312-609-7844). ■

Odds & Ends

Further confirming the dangers of e-mail, particularly the "Reply All" button, a federal court in Idaho recently denied an employer's request for summary judgment in an age discrimination case where the plaintiff received an e-mail from the CEO, intended for someone else, who wrote: "Damn... Check it out—I don't know what I think. He must be old—and just looking for something to do." Just a friendly reminder to refrain from such comments in general, never put such comments in an e-mail, and think twice before hitting reply all! ■

Recent Vedder Price Accomplishments

Kevin Hennessy and **Angela Obloy** obtained a favorable ruling from the Fifth Circuit in New Orleans. The Fifth Circuit affirmed summary judgment in favor of a manufacturing company in a race discrimination case where the plaintiff salesperson was terminated for performance reasons within months of being awarded salesperson of the year. The lower court's ruling was reported in our March newsletter.

Ed Jepson and **Elizabeth Hall** obtained a favorable decision from the Seventh Circuit, affirming summary judgment in favor of a large milling company. The plaintiffs were current employees who claimed race discrimination because they were disciplined and denied certain promotions.

Thomas Wilde and **Elizabeth Hall** obtained a favorable decision from the Seventh Circuit, affirming summary judgment in favor of a retail grocery chain. The plaintiff was a former employee who claimed gender, age and religious discrimination after he was terminated for multiple policy violations.

Bruce Alper, **Tom Hancuch** and **Patrick Spangler** obtained summary judgment in the Northern District of Illinois in an ERISA lawsuit alleging that the plan administrator improperly denied benefits under the terms of an ERISA severance plan.

Neal Korval, **Jonathan Wexler** and **Michael Goettig** won summary judgment in an age discrimination case in the Southern District of New York for a large cosmetics and direct sale company. The plaintiff challenged the validity of an ADEA release signed in connection with a RIF, and followed that by filing an EEOC charge and then a federal age discrimination lawsuit.

Alan Koral and **Michael Goettig**, on behalf of an international airline company based in Europe, defeated a motion to sever, add a new corporate defendant, and continue the litigation against two individual defendants. They obtained an order staying the entire action, in line with the stay imposed by the bankruptcy court with respect to the corporate defendant, effectively ending the litigation against all parties.

Kevin Hennessy and **Sara Kagay** obtained summary judgment for a distributor in the Northern District of Illinois. The plaintiff was a warehouseperson who alleged age discrimination and retaliatory discharge after he was terminated following a positive drug test.

Thomas Wilde and **Elizabeth Hall** obtained summary judgment on behalf of an international manufacturing company in the Northern District of Illinois. The plaintiff was a former supervisor who claimed race discrimination after he was terminated for violating the company's harassment policy.

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