VEDDER PRICE

Labor Law

A newsletter designed to keep clients and other friends informed on labor and employment law matters

In This Issue:

Vol. 18, No. 1
March 1998

SUPREME COURT RESOLVES "SAME-SEX" HARASSMENT DEBATE

In recent years federal courts have disagreed over whether and under what circumstances "same-sex" sexual harassment — harassment by a perpetrator towards a target of the same sex — can violate Title VII of the Civil Rights Act of 1964. On March 4, 1998, the United States Supreme Court ruled in *Oncale v. Sundowner Offshore Services* that "same-sex" harassment is indeed actionable under Title VII. In a very concise opinion, the Court noted that members of one definable group, *e.g.* racial or sexual, can indeed discriminate against members of that same group. The Court identified the critical issue in all sex discrimination cases as being "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Noting that harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex, the Court rejected the argument that "same-sex" harassment requires a homosexual harasser. The Court said, however, that credible evidence that the harasser is homosexual may support an inference of discrimination.

In response to arguments that recognizing "same-sex" harassment would turn Title VII into a "general civility code," the Court denied that its ruling would outlaw "ordinary socializing in the workplace — such as male-on-male horseplay or intersexual flirtation." The Court emphasized that in all sexual harassment cases, what a "reasonable person" would find hostile or abusive "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." The Court expressed its faith that "courts and juries [can] distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."

While the dimensions of what constitutes actionable harassment need further development, the *Oncale* decision puts employers on notice that they must treat "same-sex" harassment claims as potential sources of liability and should handle them with the same care and vigilance as other sexual harassment claims.

If you have any questions about this case, please contact Vedder Price (312/609-7500).

Return to Top of Document

TERMINATING LESS PRODUCTIVE DISABLED EMPLOYEE OK EVEN IF DISABILITY IS REASON FOR LOWER PRODUCTION

The Court of Appeals in Chicago recently allowed an employer to terminate an employee during a workforce reduction because his attendance and productivity had declined after he had suffered a heart attack. *Matthews v. Commonwealth Edison Company* (1997).

In this case the employer was engaged in a reduction-in-force. When deciding whom to retain and whom to terminate, supervisors were asked to rank workers from most to least valuable. The plaintiff's supervisor ranked him least valuable because he had missed about 6 months during the prior year and had returned to work on a reduced schedule in the current year because of a heart attack. It was undisputed that he would not have been so restricted but for the heart attack.

Nevertheless the court said the plaintiff was not being discharged because of his disability. He was discharged because of a consequence of that disability. When making relative comparisons among employees, or applicants for employment, the employer may choose the best qualified and most productive, even if the persons who are passed over are less qualified or less productive because of a disability (that has been reasonably accommodated if necessary). The court gave as an example a job requiring lots of reading. A dyslexic candidate who can read can do the job, but a nondyslexic candidate could do the job better. It would not be discrimination to select the latter unless the former could prove the employer rejected him because he did not like people with dyslexia.

Matthews is a common-sense yet important decision. It makes clear that a disabled person's diminished ability to perform can be measured against the undiminished ability of a nondisabled person, even if the former's diminished capacity is the consequence of a statutory disability. As the court pointed out, the Americans with Disabilities Act prohibits discrimination; it does not require affirmative action in hiring or firing.

If you have any questions about the *Matthews* case, call Bruce R. Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

EEOC ISSUES GUIDANCE REGARDING TEMPORARY AND OTHER CONTINGENT WORKERS

The EEOC recently issued an Enforcement Guidance on the Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (the "Guidance"). The Guidance appropriately warns that using individuals hired and paid by a staffing firm does not automatically relieve a company of its obligations under the federal employment discrimination statutes. Rather, Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA") may apply.

Coverage

As an initial matter, these four laws exempt companies that have fewer than the requisite number of employees. Title VII and the ADA apply to any employer with a minimum of 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, while the ADEA applies to any employer with a minimum of 20 employees within the same time frame. The EPA applies to any employer who has more than one employee. For purposes of determining coverage, says the Guidance, a company must count every worker, including staffing firm workers, with whom it has an "employment relationship" (see below).

"Employee" or Independent Contractor?

Assuming the requisite number is met, the federal anti-discrimination laws apply to a staffing firm worker when the worker is an employee as opposed to an independent contractor and the company for whom the work is performed has "the right to control the means and manner" of the individual's work performance. No shorthand formula, such as the label used to describe the worker, determines this issue. Instead, says the EEOC, all aspects of the relationship must be examined. Factors that suggest the worker is an employee of the company include the following:

- The company has the right to control when, where, and how the worker performs the job;
- The work does not require a high level of skill or expertise;
- The company rather than the worker furnishes the tools, materials, and equipment;
- The work is performed on the company's premises;
- There is a continuing relationship between the worker and the company;
- The company has the right to assign additional projects to the worker;
- The company sets the hours of work and the duration of the job;
- The worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;
- The worker has no role in hiring and paying assistants;
- The work performed by the worker is part of the regular business of the company;
- The company is itself in business;
- The worker is not engaged in his or her own distinct occupation or business;
- The company provides the worker with benefits such as insurance, leave, or workers' compensation;
- The worker is considered an employee of the company for tax purposes (*i.e.*, the entity withholds federal, state, and Social Security taxes);
- The company can discharge the worker; and

- The worker and the company believe that they are creating an employer-employee relationship.

These factors are not conclusive or exhaustive. Rather, circumstances must be examined on a case-by-case basis to determine whether an employer-employee relationship exists for coverage purposes.

The fact that the staffing agency may also have some control over the worker does not affect a company's coverage by the anti-discrimination laws. Indeed, according to the EEOC, a "client of a temporary employment agency typically qualifies as an employer of the worker during the job assignment along with the agency. This is because the client usually exercises significant supervisory control over the worker." In the event both a company and its staffing firm exercise control, they are covered as joint employers.

Liability for Discriminating Against a Nonemployee

Even if a company with the requisite number of employees under the federal anti-discrimination laws does not qualify as a worker's employer, it can still be liable for unlawfully discriminating against the worker, according to the Guidance. The anti-discrimination statutes not only prohibit an employer from discriminating against its own employees, but also prohibit it from discriminatorily interfering with an individual's employment opportunity with another employer. Accordingly, assuming a company is subject to the federal anti-discrimination laws with respect to its own employees, it is prohibited from interfering on a discriminatory basis with the worker's employment opportunities with the staffing firm. For example, even if a staffing firm worker is not a company employee, the company must assign jobs in a nondiscriminatory matter. Thus, assuming the company has enough employees to be covered under the applicable anti-discrimination law, the company that rejects or adversely treats a worker for discriminatory reasons is liable either as a joint employer or as a third-party interferer.

Liability: Allocation of Remedies

Where both a company and its staffing firm have violated any of the anti-discrimination laws, they are "jointly and severally liable" for back pay, front pay, and compensatory damages, including pecuniary loss and emotional distress. As a result, either a company or its staffing firm can be held responsible by itself for the full amount of these damages. On the other hand, punitive damages under Title VII and the ADA, and liquidated damages under the ADEA, are individually assessed against each party based on their respective degrees of malicious or reckless conduct.

Conclusion

As the EEOC Guidance makes clear, an employer who uses temporary workers cannot assume it is thereby insulated from EEO liability. The same EEO practices should be applied to all employees, temporary and regular.

If you have any questions about the EEOC Guidance, contact Vedder Price (312/609-7500).

Return to Top of Document

RECENT U.S. SUPREME COURT ACTIVITY

The Supreme Court is facing a growing backlog of appeals raising difficult employment law issues. Summarized below are a recent decision and two anticipated decisions of importance to employers.

Release of Age Discrimination Claims

Employers seeking an airtight written waiver of age discrimination claims must provide a release form meeting the requirements of the Older Workers Benefit Protection Act ("OWBPA"), says the Supreme Court in *Oubre v. Entergy Operations, Inc*. (January 26, 1998).

Oubre had received $6,258 in severance pay in exchange for signing a release of all claims against her employer, but later sued under the Age Discrimination in Employment Act ("ADEA"). Entergy's release form did not comply with the OWBPA (which sets forth minimum standards for determining whether a release of ADEA claims is knowing and voluntary) because it made no specific reference to ADEA claims and did not provide 21 days for its consideration or a seven-day revocation period. Nevertheless, the federal trial court granted

Entergy summary judgment on the ground that Oubre had ratified the defective release by never returning or offering to return the severance she received. Having kept the money, under general contract law she could not avoid her agreement not to sue.

The Court of Appeals affirmed and the case went up to the Supreme Court. A majority of the high court held that the lower courts had erred: an employee cannot waive an ADEA claim unless the release satisfies the OWBPA's mandated requirements. The Supreme Court's decision notes the likelihood that a terminated employee will spend and be unable to repay separation benefits received, and that this reality might tempt employers to risk noncompliance with the OWBPA. "We ought not to open the door to an evasion of the statute by this device," said the Court.

Quid Pro Quo Sexual Harassment

Our October 1997 issue reported that the Seventh Circuit Court of Appeals had recently decided several cases (we cited *Jansen v. Packaging Corp. of America*) dealing with employer liability for sexual harassment by a supervisor. Holding employers strictly liable when a supervisor extorts or threatens to extort sexual favors in exchange for favorable workplace treatment, the Seventh Circuit found that an employer is accountable whether or not the supervisor makes good on his promise or threat.

The companion case to *Jansen* was *Burlington Industries, Inc. v. Elleth*. Neither party in *Jansen* sought Supreme Court review. Burlington did, however, and the Supreme Court has agreed to decide whether a claim of *quid pro quo* sexual harassment may be maintained where the employee neither submitted to the supervisor's sexual advances nor suffered any tangible adverse employment action as a result (January 23, 1998). Significantly, the Supreme Court will not review the Seventh Circuit's holding that strict liability (rather than negligence) is the proper standard for *quid pro quo* sexual harassment.

COBRA Insurance Coverage

The Supreme Court also has agreed to review the ERISA lawsuit of a terminated employee denied COBRA health insurance coverage because he was covered under his wife's preexisting group insurance plan with another employer. *Geissel v. Moore Medical Corp*. (January 23, 1998). In pertinent part, ERISA provides that COBRA coverage ends on the date the beneficiary first becomes covered under any other group health plan (as an employee or otherwise) which does not contain an exclusion or limitation with respect to a preexisting condition of the beneficiary. Circuit Courts of Appeal which have considered this provision are divided over whether COBRA coverage is required when the beneficiary is covered by a spouse's group health plan at the time of employment termination.

In *Geissel*, the Eighth Circuit noted this split in authority but ruled against the former employee, a cancer patient, after concluding that his wife's plan offered comparable benefits and did not exclude or limit claims relating to his preexisting condition. This decision lines up with rulings from the Fifth and Eleventh Circuits. The Seventh and Tenth Circuits have reached a contrary result. In granting review, the Supreme Court apparently heeded the Eighth Circuit's pointed suggestion that "some definite action, originating from Congress or the Supreme Court, might be appropriate."

If you have questions about any of the above cases, please contact Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

FAIR CREDIT REPORTING ACT ("FCRA") MAY REQUIRE SEPARATE NOTICES BEFORE AND AFTER TAKING ADVERSE ACTION

A recent Federal Trade Commission ("FTC") staff informal opinion letter spells out an employer's obligations when providing notice to employees (or prospective employees) of adverse action based on information in a consumer report.

FCRA Requirements for Parties Taking Adverse Action Based on Consumer Reports

Prior to last year's amendments to the FCRA, all users of consumer reports who took adverse action based in whole or in part on information contained within the report were required *after* taking adverse action to:

1. notify the consumer that adverse action had been taken based on information contained within the report;

2. provide the name, address, and phone number of the consumer reporting agency ("CRA") that furnished the report;

3. provide a statement that the CRA did not decide to take the adverse action and is unable to provide the consumer with specific reasons for the action; and

4. provide the consumer with a notice of his/her right to obtain a free copy of his/her report from the CRA within 60 days and to dispute the accuracy or completeness of any information in a consumer report.

As reported in our July 1997 Labor Bulletin, the FCRA amendments impose more specific obligations on *employers* using consumer reports. In particular, they require an employer to provide the employee with a copy of the consumer report and a summary of the employee's rights under the FCRA (as prescribed by the FTC and supplied to the employer by the CRA) *before* the employer takes adverse action against the employee based in whole or in part on information included within the report.

Must Employers Send Duplicate Notices?

Because these two provisions when read together require duplicative notice, many believed that the amendments for employers were intended to supersede the more general provisions for notice by consumer report "users." For example, the name, address, and phone number (or similar identifying characters) of the CRA which users are required to provide after action is taken presumably would be included on the consumer report provided by the employer before adverse action is taken. Further, after adverse action is taken there would appear to be no need to provide the employee with notice that he/she may obtain a copy of the report because the employer would have provided the report to the employee before adverse action was taken. Finally, the accompanying summary of consumer rights received from the CRA and passed on to the employee before adverse action is taken could notify the employee that the CRA did not make the adverse action decision and that the employee could dispute the accuracy of the report with the CRA.

FTC Informal Opinion Letter: Yes

Surprisingly, in its informal opinion letter, the FTC's staff stated that employers must follow *both* sections of the FCRA — in other words, the employer must provide "two-tier notice." Under the two-tier notice procedure, *before* taking adverse action the employer must:

1. provide the employee with a copy of the report; and

2. provide the employee with a summary of his/her rights in a format as prescribed by the FTC.

Then, *after* taking the adverse action, the employer must:

3. provide the employee with the name, address, and phone number of the CRA;

4. provide a statement that the CRA did not make the adverse action decision and is unable to provide the employee with specific reasons for the action;

5. provide notice to the employee that he/she may obtain a free copy from the CRA within 60 days; and

6. notify the employee that he/she may dispute the accuracy of the information contained in the report.

An obvious question that arises is how much advance notice the employer must provide. Responding to an inquiry whether five days was an appropriate waiting period, the FTC staff stated, "Although the facts of any particular employment situation may require a different time, the five day period that you proposed appears reasonable."

Conclusion

Although nonbinding on either the parties or the FTC itself, FTC staff informal opinion letters generally are good measures of the FTC's interpretation of a particular law. While the FTC may reconsider the position outlined in its staff's letter, we must assume that, for now, the FTC will take the position that the FCRA requires "two-tier notice," and that the courts will give some deference to this interpretation. Therefore, until further guidance is available, we advise that employers follow the two-tier notice procedure, including the general five-day waiting period, when taking adverse action based in whole or in part upon a consumer report.

If you have any questions about these issues, contact Vedder Price (312/609-7500).

Return to Top of Document

ILLINOIS SUPREME COURT EXPANDS RELIEF IN SEX HARASSMENT CASES

In 1994, the Illinois Supreme Court held that the Illinois Human Rights Act ("IHRA") provides the exclusive remedy for claims that are "inextricably linked" to allegations of sexual harassment (*Geise v. Phoenix Co. of Chicago, Inc.*) The court dismissed tort claims against an employer for the negligent hiring and retention of a supervisor accused of sexual harassment, stating that the claimant's remedy was solely for sexual harassment under the IHRA. Employers have been relying on *Geise* ever since to limit the number and type of claims that a sex harassment claimant can bring. That argument has been substantially undercut by a new state Supreme Court decision.

In *Maksimovic v. Tsogalis* (1997), a waitress accused her boss of threatening sexual assault, engaging in unwanted physical contact and trapping her in a room where he made sexual advances. She sued for assault, battery and false imprisonment. The employer argued that those claims should be dismissed under *Geise* because they alleged acts inextricably linked to a sexual harassment claim cognizable only under the IHRA. The Supreme Court disagreed. It stated that the "sexual harassment aspect of this case is merely incidental to what are otherwise ordinary tort claims." When the elements of a tort claim can be established independent of any legal duties created by the IHRA, that claim is not "inextricably linked" to the statute and can be asserted in addition to the statutory claim. In this case the claimant's ability to prove battery, assault and false imprisonment did not arise from obligations or duties under the IHRA, so they were not barred.

This decision will increase employer liability and the cost of settling sex harassment cases in Illinois. Claimants will assert more state tort claims in sexual harassment cases, particularly those involving physical contact, and courts will be more willing to allow those claims to be decided on the merits.

If you have any questions about the *Tsogalis* case, call Bruce R. Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

BENEFIT PLANS

We have discussed the following topics before but you should be aware of the latest developments, which are generally in the employers' favor.

Changes in Retiree Welfare Benefits

Perhaps no other benefits issue has generated the amount of public debate and controversy as that surrounding an employer's right to change retiree welfare benefit plans. The issue shows no signs of going away. The most recent case involves over 80,000 former General Motors employees. Waiting in the wings is another case involving 100,000 former Sears employees. Many employers face this issue in one form or another.

In early January, the Court of Appeals for the Sixth Circuit issued an *en banc* decision in *Sprague v. General Motors Corp*. The case involved 34,000 "general retirees" who had retired in accordance with GM's normal retirement criteria and 50,000 early retirees who had retired under various special programs. The retirements covered a period of over 20 years during which there were a variety of plan documents, summary plan descriptions, and short and long form acceptance documents for the various special retirement programs.

GM had for years provided salaried retirees health benefits

Vedder, Price, Kaufman & Kammholz
A Partnership including Vedder, Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100

free of charge. Late in 1987, GM announced a change. Beginning in 1988 the health plan would, among other changes, institute an annual deductible and a 20% co-payment provision and eliminate vision and hearing aid coverages. A class action lawsuit was filed on behalf of the retirees.

In 1994 the trial court held that GM was entitled to change welfare provisions for the general retirees who had retired under the standard plan documents. However, it also held that GM made a bilateral contract with each special early retiree to vest health care benefits at retirement. Further, GM was estopped from changing the early retiree health care benefits. A three-judge panel of the Court of Appeals affirmed the trial court's rulings in favor of the early retirees. But that decision was vacated when the full Court of Appeals voted to rehear the case.

In its decision, the full Court of Appeals held for GM regarding both the general and the special early retirees. In reversing the trial court's rulings on the early retirees, the Court of Appeals held that most of the SPDs had effectively reserved GM's right to amend the benefits so that the promise to provide the benefits was at all times a qualified promise, *i.e.*, limited by GM's right to amend the plan. The fact that some SPDs were silent about GM's right to amend did not negate GM's right which was clearly set forth in the plan itself.

The theory that GM had established a bilateral contract with the early retirees was also rejected. Anything GM may have said to the early retirees was irrelevant because oral modifications to ERISA plans are without effect. Even the written "statements of acceptance" signed by the special early retirees were held to have no effect because they were not modifications to the written plan documents. Finally, the estoppel theory was also rejected. Estoppel could only be applied to an ambiguous plan document. Since the plan document here was unambiguous, estoppel could not be invoked.

This is a significant decision in favor of an employer's right to amend welfare benefit plans for retirees. In particular, the facts in this case reflect the less-than-perfect circumstances that often surround plan documents and SPDs issued over an extensive period of time. Ultimately, the fact that the plan documents and most of the SPDs had been clear was the key to a finding that the employer had

Facsimile: 973/597-9607

effectively reserved the right to change these benefits.

The issue, of course, is not yet finally settled. Five judges dissented in the *Sprague* case, and the plaintiffs have announced their intention to appeal to the Supreme Court. Meanwhile, the case of the *Sears* retirees is going forward in a different circuit. More to come!

The "Serious Consideration" Rule

In our March 1997 issue, we discussed the cases considering when a prospective benefit change must be disclosed to employees who inquire. The 1990s have seen a proliferation of "open window" programs. As a result, many employees considering retirement make repeated inquiries in an effort to make sure something better is not just around the corner. The courts in dealing with this issue have developed what has come to be called the "Serious Consideration" rule. Another court of appeals has now adopted the rule in slightly modified form.

In *Vartanian v. Monsanto Co.* (December 15, 1997), the First Circuit Court of Appeals considered a situation where an employee had asked his supervisor and his personnel representative about rumors of an upcoming early retirement incentive that would cause him to delay his planned retirement. They truthfully responded that they had been unable to confirm the rumors and did not personally believe them.

So the employee retired on May 1, 1991. Within the next two months, the board of directors approved an early retirement package. Had the employee remained, his lump sum benefit under the pension plan would have been $174,000 greater. After examining these facts, the court reviewed the three factors that make up the serious consideration rule: (a) a specific proposal which would affect this employee, (b) which was discussed for implementation by (c) senior management with authority to enact it. In applying this standard to the facts, the court concluded that these three factors were not satisfied until May 28, 1991. Since that date was after the employee's May 1 retirement date, the employee was not entitled to the extra benefit.

The serious consideration rule provides significant protection to employers. But two points should be noted. First, meeting the terms of the rule requires a clear record to be kept with regard to benefit issues. If the facts are jumbled and various proposals are circulated internally in a scattered fashion, it may be difficult to establish the key date when serious consideration first occurred.

Second, these cases leave unsettled the more troubling issue of whether there is a duty to disclose when serious consideration (but not actual adoption) has occurred but no one has asked. The court in the *Monsanto* case noted that other courts were divided on this issue but that that issue was not before it on the *Monsanto* facts. Interestingly, the majority in the *Sprague* case, in *dicta*, indicated its support for the proposition that, absent an inquiry, plan changes must be adopted before a duty to disclose arises. However, more cases will certainly arise on this question in the future. Stay tuned!

Policy on Self-Correction Expanded

In our October 1997 issue, we discussed the benefits of implementing a review of a company's qualified plans in order to correct certain potentially disqualifying operational problems without any penalties and without a formal IRS filing. This self-administered relief is available under what is known as the IRS's Administrative Policy Regarding Self-Correction ("APRSC").

The IRS has now expanded the relief available. In November, the IRS stated that the self-correction period will be extended to a twoyear period for significant violations, doubling the one-year period originally provided. Thus, a plan sponsor of a qualified calendar year plan will in 1998 be able to correct significant defects which occurred in 1996 and 1997. Insignificant violations remain correctable for all earlier years. These changes give even more reason to institute a self-review of qualified plan operations at the earliest opportunity. The policy cannot be used once the IRS has announced an audit of the plans.

If you have any questions about these or any other benefits issues, please call John Jacobsen (312/609-7680) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

EXEMPT EMPLOYEES: YOU CAN PAY THEM OVERTIME BUT YOU CAN'T SUSPEND THEM

Employees exempt from the overtime requirement of the Fair Labor Standards Act (FLSA) must satisfy a "duties" test and a "salary" test. In recent years the salary test has been the subject of increasing litigation. Two issues that continue to arise are whether an employee can be exempt even if (i) eligible for overtime compensation or (ii) subject to unpaid disciplinary suspension. Two recent decisions provide further clarification on both issues.

Overtime

It is not uncommon for employers to reward salaried, exempt employees who work extra time, or on weekends or holidays, by paying some type of overtime compensation. Some employees on the receiving end of such generosity have responded by suing their employers for overtime pay for all hours worked over 40 per week on the theory that the receipt of any overtime pay nullifies their exempt status. And some courts have agreed the receipt of overtime pay is a factor to consider in deciding whether an employee is exempt. But in *Boykin v. Boeing Company* (1997), the Ninth Circuit Court of Appeals held that salaried engineers and other professional and management employees did not lose their exemptions merely because they received overtime compensation after working more than a 40-hour workweek. The court relied on a Department of Labor regulation expressly permitting exempt employees to be paid "additional compensation" over and above their guaranteed salary as well as DOL opinion letters permitting such additional compensation to be paid in the form of "straight time, time and one-half, a flat sum, or any other basis." Plainly put off by the plaintiffs' attempt to turn a benefit into a windfall, the court noted "it is difficult to perceive the alleged injury to a salaried employee who receives some form of hourly overtime compensation without fear of having compensation docked on the same basis."

Disciplinary Suspension

In *Bowman v. City of Indianapolis* (1998), the court of appeals in Chicago applied another DOL regulation governing the determination of exempt status. In that case the court held that management-level police officers who were subject to unpaid suspension for less than a full week as a form of discipline could not be treated as exempt employees by the police department. The decision was no surprise, coming as it did on the heels of a U.S. Supreme Court decision upholding the regulation that prohibits exempt employees from being subject to unpaid disciplinary suspension for other than violation of major safety rules. *Auer v. Robbins* (1997). The rationale for this regulation is that an exempt employee's salary is not supposed to be subject to reduction based on quantity or *quality* of the work performed. A person suspended without pay for less than a full week for disciplinary reasons is, in effect, having his salary reduced based on work quality.

Employers should take heed of both decisions. Paying exempt employees compensation in addition to their guaranteed salary will not jeopardize the exemption. But having a disciplinary policy under which exempt employees are subject to unpaid suspension can turn your exempt staff into non-exempt employees.

If you have any questions regarding overtime issues, call Bruce R. Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

ODDs & Ends

Take a Letter and Get My Dry-Cleaning

Marilyn Galdieri-Ambrosini was fired for poor work performance after working a year as a secretary for a New York property management firm. She filed a sex discrimination lawsuit, claiming the company had tried to impose a "sexual stereotype" on her. Specifically, she had objected to doing personal tasks for her boss, such as calling his dry cleaner, handling matters regarding a house he was buying, and — once — removing a coffee cup from his desk. She claimed that two younger, more attractive female clerical employees conformed to the "sexual stereotype" and thus were given a lighter workload and held to lesser standards than she was. A federal jury voted Ms. Galdieri-Ambrosini $100,000 on her claim, but the trial judge set that verdict aside. In February, the Second Circuit Court of Appeals affirmed the judge's ruling, holding that the personal work complained of was "quintessential secretarial work." Regarding the other two, allegedly coddled, female clericals, the court stated that Title VII allows an employer to prefer an employee who chooses to make a superior's "life more pleasant in the work place, even [by] something as simple as bringing him coffee."

Did They Poll the White House?

Last month, the Society for Human Resource Management released the results of its "1998 Workplace Romance Survey," which polled 600 human resource professionals. Only 27 percent reported that their company has any policy, written or unwritten, on workplace romance. Of these, only 7 percent prohibit such romances outright, while the majority permit, but discourage, them. It would appear that most employers continue to deal with the issue on a case-by-case basis rather than set out rules and guidelines in advance.

Union Voters Vote Against Right to Vote

Last month, members of Service Employees Local 32B-32J (one of the biggest local unions in the New York City area) voted in a court-supervised election on whether they wanted to amend their constitution to make union affairs more democratic. Some of the proposed amendments would require employee ratification votes on proposed bargaining agreements and would have union stewards and business agents elected, instead of appointed. The amendments failed. Less than one-third of the local's 50,000-60,000 members voted in the referendum, and only 30 percent of those voting favored the changes. A 1997 vote which also rejected these reforms had been set aside by a federal district court because of improper behavior by local union leaders.

The "Privileges" of a Union Shop?

The AFL-CIO sponsors an affinity credit card, called "Union Privilege." Up until last year, marketing of the "Union Privilege" card was handled by Share Group (which says it is the only unionized telemarketing company in the country). However, after Share Group's founder got caught up in charges involving improper contributions to Ron Carey's Teamster reelection campaign, the AFL-CIO moved the marketing work to a nonunion Massachusetts firm, Telespectrum Worldwide, Inc. As a result, Share Group claims it had to lay off 100 union workers. To make matters worse for the AFL-CIO, this January a Communications Worker local union filed NLRB charges against Telespectrum, alleging that the firm was moving out of Massachusetts in retaliation for the fact that some 70 percent of its employees had recently signed union authorization cards. (Readers will be grateful that the original title of this piece was scrapped: "Union Charges Non-Union Union Charge Card Marketer").

- Return to: Labor Law
- Return to the Vedder Price: Publications Page.
- Return to: Top of Page.