VEDDER PRICE

Labor Law

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

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ODDs & Ends

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SUPREME COURT ESTABLISHES RULES ON SEXUAL HARASSMENT

In two long-awaited decisions, the U.S. Supreme Court has clarified the law on sexual harassment in the workplace by establishing rights and responsibilities on the issue of employer liability for supervisor harassment.

In *Ellerth v. Burlington Industries*, a female salesperson alleged that she was subjected to constant sexual harassment by her male supervisor, who threatened to alter her terms or conditions of employment but did not carry out the threats. Burlington had a policy against sexual harassment, but the plaintiff did not inform anyone in authority about the supervisor's conduct. In *Faragher v. City of Boca Raton*, a female lifeguard claimed that a sexually hostile environment was created by the repeated touching and lewd remarks of two male lifeguard supervisors. The City of Boca Raton had a sexual harassment policy but did not disseminate it among its marine safety staff.

The Court adopted the following holdings in order to decide the two cases:

1. As a general rule, employers are vicariously responsible for sexual harassment engaged in by their supervisors who have immediate or successively higher authority over the employee;
2. When the harassment results in a tangible employment action, such as discharge, demotion or undesirable reassignment, the employer's liability is absolute; and
3. When there is no tangible action, the employer can defend itself by proving:
    a. that it has taken reasonable care to prevent and promptly correct sexually harassing behavior (such as by adopting an effective policy with a complaint procedure), and
    b. that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided.

Thus, the plaintiff in *Burlington* stated a case even if the

alleged harassment did not result in job-related harm. However, Burlington would have the opportunity to prove its affirmative defense to liability. The plaintiff in *City of Boca Raton* also proved sexual harassment despite the absence of negative employment action against her. In this case, however, the City could not show that it effectively communicated a formal policy against harassment with a sensible complaint procedure.

A more detailed discussion of these two cases appears in a special bulletin which Vedder Price is mailing to clients and friends. Meanwhile, if you have any questions about the *Burlington* or *Boca Raton* cases, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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DIVIDED SUPREME COURT FINDS ADA PROTECTS ASYMPTOMATIC H.I.V. DENTAL PATIENT

After a dentist in Bangor, Maine, refused to fill a cavity for an H.I.V.-positive patient unless she agreed to have it done in a hospital, the patient sued under Title III of the ADA, which prohibits public accommodations from discriminating on the basis of disability. Although H.I.V. infected, the patient had no symptoms. A federal district court and the First Circuit Court of Appeals held that the patient was disabled because having asymptomatic H.I.V. meant she was substantially impaired in the major life activity of reproduction. The Supreme Court agreed to hear the dentist's appeal, making it the first time the high court would decide a substantive issue arising under the ADA.

In a 5-4 decision written by Justice Kennedy, the Court majority affirmed that the patient's H.I.V. infection is a disability under the ADA. *Abbott v. Bragnon* (June 25, 1998). Because the infection causes immediate abnormalities in a person's blood, with a progressively detrimental effect on the hemic and lymphatic systems, it "satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease," wrote Justice Kennedy. The Court also concluded that reproduction is a major life activity, and that conception

and childbirth, while not impossible for an H.I.V. victim, are dangerous to the public and carry serious economic and legal consequences. Indeed, Justice Kennedy suggested that, given the pervasive and invariably fatal course of the disease, H.I.V. could have a profound impact "on almost every phase of the infected person's life," all but labeling H.I.V. infection a *per se* protected disability.

The Court's ruling under Title III of the ADA could have implications under Title I as well, which bars disability discrimination in employment. With reproduction now deemed a major life activity, ADA coverage may extend to persons impaired because of sterility, impotency or infertility, and employers may have to reasonably accommodate employees who need time off from work for medical treatment of these conditions.

If you have any questions about the *Bragnon* decision, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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SUPERVISORS NOT LIABLE FOR RETALIATORY DISCHARGE

An Illinois employee who is discharged in retaliation for filing a workers' compensation claim, or for reasons which violate a clearly mandated public policy (*e.g.,* reporting criminal activity), may sue his employer for compensatory and punitive damages. But whether he could also sue the individual supervisor who discharged him has drawn mixed answers from lower Illinois courts. The Illinois Supreme Court recently resolved the issue: individual supervisors are *not* personally liable for retaliatory discharge.

In *Buckner v. Atlantic Plant Maintenance* (April 16, 1998), the Court held that only the employer, not individual supervisors, can be sued for retaliatory discharge. The Court noted that individual supervisory liability would represent an expansion of the retaliatory discharge tort, contrary to the Court's opposition to such expansion. The Court also found supervisory liability would add little deterrent effect to the tort because employers' existing liability for retaliatory discharge is

sufficient motivation to ensure that their supervisors act lawfully. The Court held that general agency principles do not apply in this context, because the power to fire belongs only to the employer, not to its agent.

Although this decision is good news for individual managers, it has broader implications as well. It is one more in a string of Illinois Supreme Court decisions beginning in 1991 in which the Court has rejected efforts to expand the scope of the retaliatory discharge tort. *Buckner* is thus a current reminder that Illinois' highest court will continue to resist further expansion of this limited exception to the employment-at-will relationship.

If you have any questions about the *Buckner* case, or retaliatory discharge issues in general, contact Bruce R. Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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NEW ADEA WAIVER REGULATIONS IN PLACE

Almost two years in the making, regulations defining the content of an enforceable waiver under the ADEA have been issued by the EEOC. The regulations are intended to implement the provisions of the Older Workers Benefit Protection Act of 1990 which codified minimum standards for waivers of federal age discrimination claims. The regulations were developed two years ago by a 20-member committee consisting of management, employee and EEOC representatives. They were published in proposed form in March 1997, received limited comment, and have been approved by the three standing members of the EEOC. They were published in the *Federal Register* on June 5, 1998 and became effective 30 days later.

The new regulations should not change the way most employers and attorneys now draft settlement and separation agreements. However, they do answer some unsettled questions and should eliminate some confusion that now exists, particularly in drafting group termination plans.

Highlights of the regulations include the following:

- **Plain Language:** All agreements must be in writing and drafted in plain language geared to the level of understanding of the persons who will be parties to the agreement. The agreement must refer to the ADEA.

- **Waiver of Future Rights:** A person cannot be required to waive claims that arise after the agreement is executed. However, an agreement can require future employment-related actions such as an employee's agreement to retire or terminate at a future date. It appears that an agreement precluding an employee from applying for re-employment in the future would be permissible, but the regulations are silent on this common provision.

- **Consideration:** The release must be supported by consideration in addition to that to which the employee is already entitled. However, an employer is not required to give a person age 40 or older more consideration than it gives someone under age 40, solely because the former is waiving age discrimination claims that the latter does not have.

- **Time Periods:** Persons asked to sign individually negotiated waivers must be offered 21 days to consider their decision. Persons asked to sign waivers required as part of a group termination plan must be offered 45 days. In either case the employee may sign the agreement before the mandated time period expires. The 21 or 45 days begin to run from the date of the employer's final offer. Material changes to the agreement restart the time period. Persons signing waivers who have not filed charges or lawsuits also must be given seven days to revoke their agreements. This period cannot be shortened by agreement or otherwise.

- **Informational Requirements:** Persons asked to waive ADEA claims as part of an exit incentive or other employment termination program offered to a group of employees must be provided certain demographic information describing who is and who is not (by job classification) being offered the program and their ages. The regulations go a long way toward describing the content of that information. First, they state that a "program" exists when an employer offers additional consideration

> for signing a waiver to two or more employees, typically as part of a standardized package of benefits not subject to negotiation. Second, the demographic information must be sufficient to allow an employee to make an informed decision whether or not to sign the waiver. The focus of the demographic information to be supplied is on the relevant "decisional unit," which is that portion of the employer's organizational structure from which the employer chose the persons who would and would not be offered the program. The decisional unit might be facility-wide, division-wide, department-wide, or based on reporting relationships or job categories. The fact that a decision-maker having broad organizational responsibility reviews or makes the decision within one organizational unit does not require disclosure of demographic information for units other than the specific organizational unit being affected. Further, an involuntary termination program being implemented over a period of time does not impose an obligation on the employer to supplement information given to prior terminees but does require that information be cumulative so that later terminees are provided all necessary demographic information from the beginning of the program to date.

The regulations continue to place the burden on the party seeking to enforce a waiver to show that the waiver complies with the legal requirements and is "knowing and voluntary." The regulations do not address the issue of whether a person who signs a waiver, accepts money for it, and then files a claim in violation of the agreement is required to return the money to the employer. The Supreme Court decided earlier this year that no tender back is required under these circumstances. *Oubre v. Entergy Operations, Inc.* (Jan. 26, 1998). However, the Court did not decide whether a waiver agreement that expressly requires such tender-back is enforceable, and most well-drafted agreements do contain such provisions.

If you have any questions about the waiver regulations or ADEA issues in general, please call Bruce R. Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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TWO FEDERAL COURTS QUESTION EMPLOYEE RELEASES AS COERCED

Employers who obtain releases of employee claims should take extra care to ensure that the releases are given knowingly and voluntarily. Two recent decisions from federal courts in New York illustrate the broad range of circumstances in which courts will protect the employee and refuse to enforce those releases on the grounds that they are not truly voluntary.

In *EEOC v. Johnson & Higgins* (S.D.N.Y. May 11, 1998), several company directors who had retired under a mandatory retirement policy signed waivers releasing the company from liability for age discrimination after the EEOC had obtained a court ruling that the retirement policy was discriminatory. In denying the company's motion for summary judgment to enforce the releases, the court found, among other things, that the company's "all for one and one for all" corporate culture called the voluntariness of the releases into question. Specifically, the court found that this "clubby" atmosphere, in which it was "understood" that the directors would support the policies of the executive committee, entitled the retirees to assume the company was acting in their interests in drafting the releases. The court also noted that the company's legal counsel had advised the retirees regarding the releases and that communications between the company and the retirees may have been misleading. The court found that these circumstances created questions as to whether the retirees truly acted voluntarily in signing the waivers or were subject to unfair persuasion. Therefore, the court denied the company's motion for summary judgment and allowed the retirees' age discrimination suit to proceed.

Similarly, in *Livingston v. Adirondack Beverage Co.* (2d Cir. Apr. 13, 1998), the U.S. Court of Appeals for the Second Circuit reversed the district court's decision to dismiss the plaintiff's Title VII claim based on a release waiving all employment-related claims. In that case, the plaintiff alleged that he was "forced" to sign the release and that his supervisor and the company's vice president had threatened to "harass, humiliate and retaliate" against him, as well as treat him unequally and ultimately terminate him if he did not resign. Taken together, the

court found, these allegations were sufficient to create a factual issue as to voluntariness and preclude dismissal.

In sum, employers who want to obtain employee releases that will withstand court challenges should beware of circumstances that may suggest undue influence, deception or confusion. Factors used by courts to determine whether a waiver was signed knowingly and voluntarily include:

- the employee's education level and business experience;
- the amount of time the employee had to review the agreement;
- the role of the employee in negotiating the terms of the agreement;
- the clarity of the agreement;
- whether the employee consulted or was represented by an attorney; and
- whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Additionally, as these two cases make clear, employers should ensure that their supervisors, attorneys or other agents do not exert pressure or otherwise unduly influence employees to sign releases.

If you have any questions about employee releases, please call Vedder Price (312/609-7500).

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UFO's, UAW AND ULP: WHAT'S PROTECTED?

When Kay Manufacturing Company discharged Julie Osborne for refusing her supervisor's orders to remove a display she had set up in the Company's break area, the NLRB leapt to Osborne's defense. The display included UAW organizing leaflets and an array of other materials

concerning UFO's, President Clinton, Pope John Paul II, Waco, drugs and the devil. Because union materials were included, the NLRB claimed Osborne had been fired for protected activity.

Osborne had previously expressed unorthodox views on a variety of subjects to her co-workers on a one-on-one basis. When the UAW started an ultimately abortive organizing drive at Kay, she became a staunch proponent and began to distribute UAW flyers in the break area, which consisted of 5 picnic tables in the center of the plant. The break area was used by employees and outsiders, such as individuals waiting for appointments and truck drivers dropping off or picking up loads. Customers who regularly visited the plant's production area had to pass by the break area.

At first, Osborne started putting UAW flyers in front of each break table chair. Kay tolerated this practice, but when employees began to throw the materials on the floor, Osborne was warned that she had to prevent the flyers from becoming a litter problem. The shift supervisor started gathering the flyers from the tables and floor at the end of each break and putting them in a stack.

Osborne began bringing other materials into the plant each day in addition to the UAW leaflets, displaying them not only at her table, but on other break tables as well. Employees complained and some of them stopped using the break area entirely. Kay urged Osborne to limit the size of her displays, which instead kept getting bigger.

At its crest, Osborne's display included a three-by-five-foot United Nations flag draped over one of the tables, boxes of videotapes and audiotapes, six books placed open on the tables, and a variety of pamphlets. The tapes included such titles as "America Under Siege: Waco–the Actual Footage of the New World Order" and "UFO Deception of the New World Order." Her display materials included a dollar bill with a part of the bill circled and handwriting stating it was the sign of the devil; documents claiming President Clinton was a drug runner and devil worshiper; and an article asserting that the Pope was a child molester. There were also a few UAW flyers.

Kay finally told Osborne that since she could not limit the size of her display, she could not have a display at all. When Osborne defied this order and tried to set up another

display, she was terminated.

Because UAW materials were included in all of Osborne's displays, the NLRB claimed that Osborne's discharge violated her NLRA right to distribute union materials on non-working time and in non-working areas. The Board's complaint went to a hearing before an Administrative Law Judge. Kay was represented by Vedder Price.

Following several days of hearings, the Judge ruled that Osborne's discharge did not violate the NLRA. The Judge completely discredited Osborne and several current and former Kay employees called by the Board, who testified that Osborne's displays consisted mostly of UAW materials. Kay's witnesses, on the other hand, were found to be credible on all factual issues.

On the legal issue, the Judge held that mixing union organizing materials with unrelated materials does not mean that an employee loses the protection of the NLRA, as long as the organizing materials predominate over the unprotected materials. However, because Osborne's displays at the time of termination consisted mostly of materials concerning her views on issues unrelated to organizing, her activity was unprotected under the NLRA and her discharge was proper.

The Judge also held that Osborne's termination was not motivated by the content of the display but by the amount of room it took up and the disruption it caused. There was thus no evidence that her union activities were a motivating factor in her discharge.

Osborne was consistent to the end. As she was leaving the plant on the day she was fired, she loudly warned her coworkers to look for markings on the back of the street signs along a busy street near the plant, warning those markings were there to instruct NATO troops where to go when they invade the United States.

If you have any questions about the *Kay Manufacturing* case, or about NLRB issues in general, please contact Michael G. Cleveland (312/609-7860) or any other Vedder Price attorney with whom you have worked.

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BENEFIT PLANS

New IRS Compliance Program – Best Yet

It may seem like you've read this here before, but please read on. In our October 1997 and March 1998 issues, we described various IRS procedures to correct benefit plan operational problems.

Now there's a new IRS policy. It's called the Employee Plans Compliance Resolution System ("EPCRS," Revenue Procedure 98-22). It consolidates all the previous programs into one comprehensive approach. More importantly (and arguably for the first time), it encourages plan sponsors to be proactive in discovering and correcting operational problems.

Let's look at some details. EPCRS expands the type of corrections that can be successfully completed without contacting the IRS in any way. Basically, a plan sponsor with compliance procedures in place can: a) correct insignificant operational errors at any time, and b) correct significant operational errors within a two-year period. Both types of corrections can be made without payment of any fee or sanction.

This program provides a great incentive for early detection of operational issues. If problems are caught and corrected in these time periods, the threat of later review on audit becomes much less significant. The program does not define what are satisfactory correction methods. The IRS has promised to provide quick guidance on this issue. In the meantime, past guidance is available, and a reasonable approach should hold sway absent any guidance.

For defects not covered above, *i.e.*, significant defects extending beyond two years, the IRS has removed the threat of an indeterminate sanction and supplied a set schedule. To take advantage of this option, a plan sponsor must approach the IRS before an audit has started.

Regarding corrections once an audit has begun, the sanction for the first time is to bear a "reasonable relationship to the nature, extent and severity of the failure." This is an important step forward. In the past the IRS simply started with a substantial calculation that was the same for all plans without regard to the nature of the

problem.

In sum, the changes represented by this new IRS approach go a long way toward encouraging plan sponsors to monitor program operations in order to take advantage of this program. Prior approaches need to be reconsidered. A new approach to compliance issues is highly desirable.

Making Plan Amendments

In 1995, the Supreme Court decided the *Curtiss-Wright* case, holding that it was sufficient for a plan's amendment procedure to say simply that amendments would be made "by the company." That case then went back to the trial court to determine whether, in fact, under the circumstances in that case, the amendment procedure had been complied with.

After an extended fact-finding investigation, the trial court ruled that the persons with the necessary authority had approved the plan amendment. The Court of Appeals has now affirmed the trial court finding. The practical lessons for others from this extended litigation are twofold. First, amendments that were approved in fact can now more easily be defended even if the exact procedures were not specified in the plan. Second, it's better to avoid any debate by selecting a procedure that will be followed and can be easily confirmed. That may be easier said than done.

Directed Trustees

It has often been suggested that directed trustees for qualified plans are not ERISA fiduciaries. However, the Department of Labor has maintained consistently that even if a directed trustee has very little authority, it is still a fiduciary even though to a very limited extent. Two recent cases strengthen the argument for non-fiduciary status.

In *Beddall v. State Street Bank and Trust Co.* (1st Cir. 1998), an investment manager had misvalued certain real estate investments. In fact, the bank had questioned the valuations, engaged an independent appraiser, and threatened to report the investment adviser's practice. Nevertheless, the court agreed with the bank's argument that the bank's functions with regard to the real estate investments were mechanical administrative responsibilities, not fiduciary ones. Moreover, the court

held that the bank's gratuitous efforts to point out potential problems to the plan administrator should not be penalized (and thus discouraged) by imposing fiduciary responsibility.

Similarly, in *Grindstaff v. Green* (6th Cir. 1998), the bank was the directed trustee for an ESOP. The bank voted company stock as directed by the administrative committee. When the administrative committee voted to elect its members to the company's board of directors, certain participants objected. However, the court disagreed, stating that the bank had no duty to investigate the direction it received from the administrative committee.

Update Note

In our March 1998 issue we mentioned that the Supreme Court was considering the *Sprague v. General Motors* case dealing with a company's ability to reduce retiree welfare benefits after retirement. The *Sprague* decision adopted an expansive view of the employer's rights in that respect, provided the applicable documents supported that right. The Supreme Court has now declined to review this case, leaving the original decision intact.

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

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DOES THE DUTY TO ACCOMMODATE INCLUDE THE DUTY TO REASSIGN?

If a disabled employee cannot perform his own job, even with reasonable accommodation, must the employer offer that employee another available position? That question was recently decided by two different federal appellate courts, with differing results.

This Court Says No

In *Smith v. Midland Brake, Inc.* (Mar. 13, 1998), the Tenth Circuit Court of Appeals held that an employee who

cannot perform his current job, with or without reasonable accommodation, is not entitled as a further accommodation to another job which he may be able to perform. In that case a factory worker with a chemical sensitivity disorder could not work in his current position as a light assembler. His employer tried to accommodate his limitations by assigning him duties within the light assembly department that reduced his exposure to irritants. Those accommodations did not work, and the employee was eventually terminated. He claimed he should have been reassigned to positions in other departments that met his medical restrictions and that company policy provided for such transfers for persons who had disabilities. The court disagreed.

Interpreting EEOC Guidelines under the ADA, the court stated that a person who cannot perform his current job with or without reasonable accommodation is not protected under the Act and so is not entitled to additional accommodations, such as reassignment to another position. Only when an employee can be accommodated in his current job but the accommodation will be difficult for his employer, is he entitled to be considered for reassignment as an additional form of accommodation. The court opined that "requiring employers to reassign disabled employees who no longer can perform their old jobs to substantially different positions goes beyond fighting discrimination" — it constitutes preferential treatment, which the ADA does not require.

The court also rejected the employee's claim that his employer violated the ADA by violating its own policy of reassigning disabled employees to other positions. Although the court said an employer is free to adopt such a policy in excess of ADA requirements, its occasional noncompliance with such policy does not state an ADA violation absent evidence that the policy violations constituted discrimination because of disability. Because in this case the employer had reassigned other disabled employees to alternate jobs, no inference of disability discrimination could be drawn from the employer's failure to apply that policy to the claimant.

This Court Says Yes

The federal appellate court in Chicago has a different view of the employer's obligation. In *Dalton v. Subaru-Isuzu* (Mar. 26, 1998), the Seventh Circuit Court of Appeals

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with 180 attorneys in Chicago, New York City and Livingston, New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, public sector and school law, general litigation, corporate and business law, commercial finance and financial institutions, environmental law, securities and investment management, tax, real estate, intellectual property, estate planning and administration, and health care, trade and professional association, and not-for-profit law.

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(covering Illinois, Indiana and Wisconsin) found that an employer's duty to accommodate includes a duty to disabled employees who cannot perform their current jobs, with or without accommodation. Most of the court's discussion concerned the scope of such duty.

The court stated that an employer has no duty to bump an incumbent from a position to accommodate a disabled employee. However, the court refused to limit the duty to reassign to those positions that share the same essential functions as the employee's current position, that is, those jobs that are practically the same as the person's present job. According to the court, the employer should first identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites and then determine whether the employee's own knowledge, skills and abilities would enable him to perform the essential functions of any of those positions, with or without reasonable accommodation.

Employers may establish a host of prerequisites that may limit an employee's suitability for reassignment. Employers may decide to preclude transfers or reassignments to positions for which the employee is significantly overqualified or underqualified. The employer may have a policy of preferring full-time over part-time employees for transfer to vacant full-time positions, or it may have a no-demotion policy by which employees are not entitled to demote except for poor job performance. The court stated an across-the-board "no transfer" policy would be subject to challenge but an employer's duty to consider reassignment "is bounded from above by the employer's freedom not to offer promotions and from below by its legitimate, nondiscriminatory limitations on lateral transfers and demotions."

The court examined two specific employer policies in *Dalton*. First, it upheld the employer's refusal to bump a temporary worker unless the temporary worker was simply filling in for a particular person during an absence. Second, it upheld the employer's policy of reserving temporary light duty positions for employees who were recuperating from occupational injuries for a maximum of 90 days under a program intended to coordinate with the state workers' compensation law. The court stated that the ADA does not require an employer to reduce the number

of these temporary set-aside positions by giving them to disabled employees with permanent restrictions.

What Do You Do?

Unless employers are in the Tenth Circuit or another jurisdiction that has reached the same conclusion, they should assume that the Seventh Circuit view will prevail. Certainly, they should presume that the EEOC will follow the Seventh Circuit's more employee-friendly approach. Thus, employers faced with employees whose disabilities disqualify them from performing their current jobs should consider reassigning them to vacant positions for which the employees are qualified, with or without accommodation, provided the reassignment does not violate otherwise legitimate restrictions on employee transfers. Those employers who offer "light duty" positions should make formal a policy limiting the duration of any such job and establishing priorities for filling such positions (*e.g.,* favoring employees who sustain occupational injuries over those who have other types of injuries).

This volatile area remains complex, implicating not only disability issues but also issues under the Family and Medical Leave Act and state workers' compensation laws. Pending Supreme Court resolution, prudence dictates caution and thoughtfulness in addressing reassignment issues.

If you have any questions about reassignment, or the area of ADA in general, please contact Bruce R. Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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IS "OVERQUALIFIED" A CODE WORD FOR "TOO OLD"?

In March, the U.S. District Court for the Southern District of New York ruled that rejecting an applicant for being "overqualified" created an inference of age discrimination. In *Hamm v. New York City Office of the Comptroller*, a 49-year-old applicant brought a claim under the ADEA after he was rejected for employment because he was

"overqualified" for the position at issue. The court denied the employer's motion for summary judgment, allowing the plaintiff to proceed with his claim, despite the fact that the court found the employer had legitimate, nondiscriminatory reasons for its refusal to hire the plaintiff.

The *Hamm* decision is consistent with several prior decisions by the U.S. Court of Appeals for the Second Circuit, which has repeatedly ruled that the use of the term "overqualified" in the application context "may often be simply a code word for too old." *Taggart v. Time, Inc.* Even where a fact-finder could eventually conclude that the employer sincerely believed the applicant was overqualified, and acted to avoid the applicant's resulting frustration, low morale and poor performance, the Second Circuit concluded that those explanations were still potential pretexts for age bias. Accordingly, employers in New York, Connecticut and Vermont may now be justifiably concerned that they will be held liable for age bias when they deny an applicant a job based on overqualification.

Employers outside the Second Circuit's jurisdiction may still rely on the United States Supreme Court's decision in *Hazen Paper Co. v. Biggins*, which held that an ADEA violation does not exist when an employment decision is motivated by a factor other than age, even if that factor is correlated with age. Even *Hazen Paper*, however, will not prevent ADEA cases from going to trial when the plaintiff is able to show that there is conflicting evidence as to the employer's true motive. In such cases, the employer's intent is an issue for the trier of fact to decide.

If you have questions about age discrimination in hiring, please call Vedder Price (312/609-7500).

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REPLACEMENT SEVEN YEARS YOUNGER THAN FIRED ADEA CLAIMANT: NO PRESUMED DISCRIMINATION

The Seventh Circuit Court of Appeals recently ruled that a seven-year age difference between a terminated employee and his replacement is inadequate to prove age

discrimination under the ADEA. *Richter v. HOOK-SUPERX, INC., et al.* This case represents the Seventh Circuit's continued refinement of the U.S. Supreme Court's ruling that a replacement employee must be "substantially younger" than the plaintiff to establish a *prima facie* case of age discrimination. *O'Connor v. Consolidated Coin Caterers Corporation*.

To succeed in an ADEA claim, the plaintiff must prove that he would not have received adverse treatment but for the employer's intent to discriminate on the basis of age. Where the plaintiff cannot offer direct evidence of discrimination, courts apply a burden-shifting analysis, requiring the plaintiff to make out a *prima facie* case by showing that: (1) he was over 40; (2) he performed his job in a manner that satisfied his employer's legitimate expectations; (3) despite that performance, he was fired; and (4) a substantially younger employee replaced him.

In *Richter*, the terminated employee was a 52-year-old Director of Human Resources with performance problems. He was terminated after an acquisition and his replacement was 45. The Seventh Circuit, following the lead of the Supreme Court, held that the seven-year gap was insufficient to establish the fourth element. Accordingly, Richter failed to establish a *prima facie* case of age discrimination.

Even after *Richter*, employers are left asking exactly what qualifies as "substantially" younger so as to create a reasonable inference of age discrimination. In a previous case, *Hartley v. Wisconsin Bell*, the Seventh Circuit stated that the answer to that question depends on the facts and circumstances of each case, and that a line based on a specific number cannot be drawn so brightly as to allow an employer to conceal an illegally motivated employment decision. Yet the court went on to state that a 10-year gap is a "reasonable threshold." But other federal courts of appeals have reached conflicting results where there was an eight-year gap between the terminated employee and his replacement, with the Third Circuit determining that eight years was substantially younger, and the D.C. Circuit finding an eight-year age gap insufficient to make a *prima facie* case of age discrimination.

In any event, it is clear that a plaintiff can no longer establish an age discrimination claim (in the absence of direct evidence) by showing that the replacement is merely

younger than the plaintiff. Even a seven-year gap is not enough in Illinois, Indiana and Wisconsin. However, if the plaintiff can show by direct evidence (such as age-related remarks by a decision-maker) that age was a factor in the employment decision, the plaintiff will likely survive any attempt by the employer to dismiss the claim in the early stages of the litigation, regardless of how "insubstantial" the age gap may be.

If you have any questions about the *Richter* decision or age discrimination standards in general, please call Vedder Price (312/609-7500).

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LAID-OFF EMPLOYEES WITH RECALL RIGHTS ENTITLED TO WARN ACT PLANT CLOSING NOTICE

The Worker Adjustment and Retraining Notification ("WARN") Act requires 60 days' notice to "affected employees" of a plant closing or mass layoff. The Sixth Circuit Court of Appeals has now held that laid-off workers with a reasonable expectation of recall are entitled to notice of their plant's closing.

Late in 1989, many workers at Electro-Wire's plant in Owosso, Michigan, were laid off indefinitely due to declining production needs. Under Company policy, laid-off employees retained seniority status for a period equal to the lesser of one year or their length of service. Early in 1990, the Company issued WARN Act notices to all its "active" employees that the plant would close permanently. Employees on layoff sued Electro-Wire, contending that they, too, should have received notice because they had a reasonable expectation of recall. The Company argued that its laid-off workers were not "affected employees" under the Act; they had already suffered an employment loss when they were laid off, and could not reasonably expect to be recalled since the layoffs were of an indefinite duration.

Affirming the trial court's decision, the Sixth Circuit Court of Appeals rejected the Company's argument. Under the Act, an "affected employee" is one who suffers an employment loss as a result of a plant closing or mass

layoff, and the definition of "employee" in the Act's regulations includes an individual "temporarily laid off … with a reasonable expectation of recall." The appeals court concluded that employees on layoff with a reasonable expectation of recall experience a job loss when the plant at which they worked shuts down, and thus are "affected employees" under the Act. As to recall expectations, the court noted evidence that management itself considered the layoffs to be routine and anticipated that the idled workers would be recalled before losing their seniority status. *Kildea v. Electro-Wire Products, Inc.* (May 13, 1998).

The *Electro-Wire* lesson for employers facing possible WARN events is clear: Don't forget employees on layoff who still have recall rights.

If you have any questions about the WARN Act, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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ODDs & Ends

Jury Duty Is Tough Work, But…

A woman juror sued in federal court for minimum wage and overtime pay, claiming that jury members should be treated as county employees under the federal wage and hour laws. However, the U.S. Court of Appeals in Atlanta recently agreed with a lower court that jurors are not "employees" for such purposes, and the woman would have to be content with her daily juror's stipend.

No Bargaining Rights for President's Protectors

Under a 1979 Executive Order, the Uniform Division of the U.S. Secret Service (among other groups) does not have collective bargaining rights afforded to many other federal employees. The Fraternal Order of Police and various employees of the Uniform Division are pressing to have that ban reversed. On June 16, however, White House Press Secretary McCurry announced that President Clinton cannot support this drive. McCurry noted that a strike or work stoppage by Secret Service officers could

place the President, and thus national security, at risk.

Maybe the Doctor Prescribed Prison

A Chicago Public Schools boiler engineer was recently suspended from his $47,000-a-year job pending possible dismissal after the employer found out that he had spent a year-long medical leave in a federal prison camp in Marion, Illinois. According to the *Chicago Tribune* (May 25, 1998), the employee pleaded guilty to racketeering conspiracy charges in 1995, for which he served 15 months at Marion. He took an unpaid medical leave from work to cover 12 of those months, and returned to work on his release from prison. (A tip of the hat to Tom Hancuch for spotting this story).

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