VEDDER PRICE

Labor Law

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

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SUPREME COURT DECIDES SCOPE OF ADA

In four recent decisions, the U.S. Supreme Court resolved several significant issues under the Americans With

Disabilities Act ("ADA"). To the surprise of many, the Court in three of these decisions substantially narrowed the scope of ADA coverage.

Eligibility for Social Security Disability Benefits Does Not Necessarily Preclude an ADA Claim

In *Cleveland v. Policy Management Systems Corp.* (May 24, 1999), the issue was whether a person who asserts she is totally disabled for purposes of receiving Social Security Disability Insurers ("SSDI") benefits may claim, at the same time, that she is a qualified disabled individual under the ADA who is entitled to work. The plaintiff in *Cleveland* had a stroke and applied for SSDI benefits, claiming total disability. She then returned to work and was denied those benefits. When her employment was terminated by her employer because of inability to perform her duties, she re-applied for and received SSDI benefits. At the same time, she sued her employer, alleging she was denied reasonable accommodation as required by the ADA. The district court granted summary judgment to the employer, holding that the plaintiff's application for and receipt of SSDI benefits estopped her from proving an essential element of her ADA claim – namely, that she could "perform the essential functions of her job."

The Supreme Court reversed. It held that an individual can pursue and receive SSDI benefits at the same time she is claiming ability to work under the ADA. The lynchpin of the Supreme Court's decision was that eligibility for SSDI benefits does not take into account the ADA duty to consider a person's ability to work by taking into account reasonable accommodations. Thus, a person with a disability may be qualified and, under the ADA, entitled to work if provided reasonable accommodation, while that same person who is not able to work without such accommodations may be eligible for SSDI benefits.

The Court recognized that in certain cases an individual's application for SSDI benefits may be inconsistent with her ADA claim. The Court stated that summary judgment will be appropriate when the plaintiff cannot sufficiently reconcile her asserted inability to work, for purposes of her SSDI application, with her asserted ability to work under the ADA. The plaintiff cannot defeat summary judgment by contradicting her statements in her SSDI application, but must offer an explanation "sufficient to warrant a reasonable juror concluding that, assuming the truth of, or plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without reasonable accommodation."

Corrective Measures Must Be Considered in Deciding Whether a Person Has a Disability

In a pair of cases decided June 22, 1999, the Supreme Court held that mitigating or corrective measures, such as glasses, medication or other aids, must be considered when deciding whether an individual has a disability. In *Sutton v. United Airlines, Inc.*, twin sisters with poor vision applied and were rejected for global airline pilot positions because they did not meet the airline's minimum requirement of uncorrected visual acuity of 20/100 or better. However, each plaintiff met that standard with eyeglasses. In the other case, *Murphy v. United Parcel Service*, a mechanic/driver was fired because his blood pressure exceeded the levels established by the Department of Transportation ("DOT"). Nevertheless, with medication, the individual was able to function normally in everyday activities. The issue in both cases was whether corrective measures should be taken into account when deciding if a person has a "disability" within the meaning of the ADA.

Rejecting the EEOC's position, the Court held that corrective measures must be taken into account. The Court reasoned that a disability exists only when an impairment 'substantially limits' a major life activity, not when it might, or could, or would be substantially limiting if mitigating measures were not taken.

Second, the Court explained that an asserted disability must be evaluated on an individual basis. To ignore mitigating or corrective measures would automatically create a class of disabled persons, regardless of whether a specific person was substantially limited by the particular condition. For example, all persons with diabetes would be considered disabled because the failure to take their medication could result in a substantial limitation of one or more major life activities, even though many of those same persons are not impaired with respect to their daily activities.

Third, the Court noted that the EEOC's approach could lead to the anomalous result that courts and employers could not consider the negative (and potentially disabling) side effects suffered by an individual whose condition is treated by mitigating measures.

Fourth, the Court noted that Congress specifically directed the ADA's protection to some 43 million Americans who have one or more physical or mental disabilities. Congress obviously had no intention of covering those persons whose impairments are largely corrected by medication or other devices, since defining "disability" in this fashion would have brought more than 160 million persons under ADA protection.

Finally and importantly, the Court considered plaintiffs' contentions that their respective employers *regarded* them as disabled because they were unable to work in the jobs at issue. However, the Court also rejected this argument, holding that a person must be unable to perform a *broad class of jobs* to be disabled or regarded as disabled. Because the plaintiffs could show only that they were regarded as unable to perform a *particular* job, they were not regarded as disabled for purposes of ADA liability.

Government Regulations Can Be Relied Upon in Setting Job Standards, Even When Waiver Is Available

In *Albertson's, Inc. v. Kirkingburg* (June 22, 1999), the issue before the Court was whether an employer that requires an employee to meet an applicable federal safety regulation as a job qualification must justify enforcing the regulation solely because the regulation can be waived in an individual case.

Kirkingburg, who suffered from monocular vision, was erroneously hired as a driver for Albertson's even though he did not meet the DOT vision standard. When the error was discovered approximately two years later, the examining physician told Kirkingburg that, under an experimental program implemented by the DOT, he could qualify to drive if he obtained a waiver of the vision standard. He applied for the waiver, but nonetheless his employment was terminated by Albertson's for failure to meet the DOT standard. After termination, he obtained the waiver, but Albertson's refused to rehire him. Kirkingburg filed an ADA lawsuit, claiming that his termination violated the ADA.

The Supreme Court affirmed summary judgment for Albertson's. The Court held that an employer that relies upon an applicable federal safety regulation as a job qualification need not justify the application of that regulation solely because it can be waived in an individual case. The Court stated that the waiver program did not modify the visual acuity standards; it was being implemented only to determine whether the standards eventually should be changed. Thus, according to the Court, the waiver was nothing more than an experiment to collect data, and the ADA could not be read to require employers to defend a decision not to participate in the experiment.

If you have any questions about these cases or the ADA in general, please call Barry Hartstein (312/6097745), Aaron Gelb (312/6097844), or any other Vedder Price attorney with whom you have worked.

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DISABILITY RELATED ABSENCES MAY JUSTIFY TERMINATION

Regular and reliable attendance is an essential job function. To employers, such a statement is basic common sense. With the passage of the Americans with Disabilities Act ("ADA") employers were forced to reexamine their attendance policies. Many employers now bend over backwards in an attempt to provide leave to employees or work with employees who, because of a health condition, find reporting for work on time every day to be too much of a challenge. Fortunately for employers, a majority of courts have come to recognize that regular attendance is a requirement of most jobs. A question many employers now face, however, is how many absences must they tolerate before taking action against the employee?

In *Nowak v. St. Rita High School*, the Seventh Circuit simply stated that "an employee who does not come to work cannot perform the essential functions of his job." Nowak was a teacher with serious heart ailments who missed nearly a year and a half of work before the School terminated his employment. Nowak had attempted to return to work, and the School provided him with a special parking place and a platform that allowed him to sit and teach. Still, he was unable to remain at work. The Court ruled that his termination did not violate the ADA. Clearly, the extent of Nowak's absences made the Court's decision simple.

A more difficult question faced the Seventh Circuit in *Haschmann v. Time Warner Entertainment Co*. Ms. Haschmann started her career with Time Warner in New York, was subsequently promoted to vice-president of finance and transferred to Green Bay, Wisconsin. She soon fell out of favor with her supervisor. Less than six months after transferring, Haschmann had a flare-up of lupus and went out on medical leave. Although Haschmann's supervisor had decided to terminate her employment, Haschmann was allowed to return to work. Several weeks later, she suffered a relapse and took additional medical leave. She was fired one week later. That same day Time Warner received a letter from Haschmann's attorney requesting medical leave of 2 to 4 weeks as an accommodation. Upholding a jury verdict in favor of Haschmann, the Court found sufficient evidence that Haschmann was a qualified individual who sought a reasonable accommodation in the form of a short medical leave. Acknowledging that "a business needs its employees to be in regular attendance to function smoothly," the Court explained "[c]onsideration of the degree of excessiveness is a factual issue well suited to jury determination." The Court's pronouncement gives pause to any employer contemplating whether or not to fire an employee with irregular attendance.

In a recent opinion, the Seventh Circuit has addressed the question of when is enough, enough? In *Waggoner v. Olin Corporation*, the plaintiff Stephanie Waggoner was hired on June 13, 1994, as a production worker at Olin's East Alton, Illinois, facility. Waggoner suffered from "visual disturbances," sometimes referred to as seizures. While employed by Olin, Waggoner was granted two medical leaves. The first leave lasted only two weeks. The second leave kept Waggoner away from work for over five months. In addition, she missed work or was late for work forty times. Finally, on February 22, 1996, Olin terminated Waggoner's employment. Following her termination, Waggoner brought suit in federal district court, claiming that her absences should have been accommodated. The district court granted summary judgment to Olin. On appeal, the Seventh Circuit was faced with the question of whether it is reasonable to require a company to allow an employee, whenever necessary, to miss work erratically, and to pay someone else to fill in as needed.

Reaffirming its earlier rulings, the Seventh Circuit noted that regular attendance is an essential job function. The Court, however, indicated that it was not establishing a "hard-and-fast rule" that no absences from work need be tolerated. To the contrary, in some cases allowing the employee to work a part-time schedule, or even to work at home (fortunately, the Court acknowledged that working at home is not an option for production workers) can be a reasonable accommodation. In the end, the issue will be whether the proposed accommodation constitutes an undue hardship on the employer. In *Waggoner*, the Court concluded the plaintiff's erratic absences imposed an undue hardship upon Olin. Notably, the Court focused on the fact that Waggoner never indicated that she required a specific period of leave to seek medical treatment that would eventually allow her to return to work on a regular basis. Instead, she simply wanted to miss work whenever she needed to, and for as long as she felt necessary. This, the Court found, was not reasonable as a matter of law.

Under *Waggoner*, an employer may now consider taking disciplinary action up to and including employment termination of an employee with erratic attendance habits, even if the employee claims to have a disability. Of course, employers must still proceed with caution and remain aware of their duty to explore reasonable accommodations with purportedly disabled employees.

If you have any questions about the *Waggoner* decision, or how to deal with employees exhibiting problematic attendance patterns, please call Bruce Alper (312/609-7890), Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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7TH CIRCUIT HOLDS

ARBITRATION AGREEMENTS ENFORCEABLE

Agreements that require an employee to arbitrate employment disputes against his or her employer, including those arising under federal antidiscrimination statutes, have come under intense judicial scrutiny in recent years. Although the United States Supreme Court ruled in *Gilmer v. Interstate/Johnson Lane Corp*., that such agreements were generally valid and enforceable under the Federal Arbitration Act, the Court nevertheless identified three instances in which arbitration agreements would not be enforceable. First, if Congress expressed an intention to preclude a waiver of judicial remedies for the statutory rights at issue, an arbitration agreement will not be enforced. Second, an arbitration agreement may be challenged if there was a defect in contract formation. Third, the Court left open the possibility that a plaintiff could challenge the adequacy of particular arbitration proceedings.

On November 21, 1991, shortly after *Gilmer* was decided, Congress passed the 1991 Civil Rights Act ("CRA"), which, among other things, gave plaintiffs asserting discrimination claims under Title VII the right to a jury trial. After its passage, numerous courts were called upon to decide whether the CRA manifested the kind of Congressional intent to preclude arbitration identified by the Supreme Court in *Gilmer* that would warrant ignoring an employee's contractual agreement. The vast majority of courts considering the issue concluded that the CRA manifested no such intent. Indeed, focusing on Section 118 of the CRA, which provided that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including…arbitration, is encouraged to resolve disputes arising under [Title VII]," most courts concluded that Congress, in fact, endorsed arbitration of Title VII claims.

The Seventh Circuit, for the most part, stayed out of the debate, which led to considerable uncertainty among the district courts. In two recent opinions, however, the Seventh Circuit finally set forth its view on the enforceability of agreements to arbitrate Title VII claims after the passage of the CRA, and has now joined the majority of federal courts concluding that such agreements are enforceable.

In *Koveleskie v. SBC Capital Markets, Inc.*, the plaintiff, a securities industry analyst who was required, as a condition of her employment, to sign a registration application that included an agreement to arbitrate all future employment disputes, filed a sex discrimination claim in federal court. She challenged the enforceability of her arbitration agreement, while her employer, in turn, moved to dismiss the complaint and to compel arbitration. The district court refused to compel arbitration and the employer appealed.

The Seventh Circuit reversed, concluding that "the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration."

Shortly after *Koveleskie*, the Seventh Circuit reiterated its holding in *Michalski v. Circuit City Stores, Inc.*, another Title VII case in which the plaintiff signed a predispute agreement. Like the plaintiff in *Koveleskie*, Michalski claimed her arbitration agreement was unenforceable; unlike the plaintiff in *Koveleskie*, however, Michalski was not a securities industry employee. Nevertheless, the Seventh Circuit found *Koveleskie* controlling, and rejected Michalski's argument that Title VII evinced a Congressional intent to preclude arbitration.

The Seventh Circuit's analyses in *Koveleskie* and *Michalski*, however, make clear that the two other potential challenges to the enforceability of arbitration agreements identified in *Gilmer* remain viable. In *Koveleskie*, the court considered briefly plaintiff's challenge to the adequacy of the arbitration scheme maintained by the securities industry. Finding that the plaintiff failed to show "actual bias" in the securities arbitration process, the court ultimately rejected her challenge.

More problematic for the court in both cases, however, was each plaintiff's assertion that the arbitration agreement was invalid under state contract law. Specifically, both plaintiffs asserted that their arbitration agreements failed because they were not supported by adequate consideration.

In *Koveleskie*, the court concluded that there was adequate consideration to support the arbitration agreement at issue for two reasons. First, Koveleskie signed the agreement in exchange for her employer's promise to employ her. Second, the agreement allowed either party to demand arbitration, the result of which was to be binding on both parties. *Michalski*, however, posed a closer question. In a 2-1 decision, the majority found adequate consideration in the form of a mutual promise to arbitrate, which bound both parties.

Employers maintaining or considering alternative dispute resolution schemes applicable to employees in the Seventh Circuit can distill several important lessons from *Koveleskie* and *Michalski*. Most importantly, they can be confident that agreements to arbitrate discrimination claims will generally be enforced in this Circuit because the court has unambiguously concluded that arbitration is not inconsistent with Title VII.

Employers, however, must take care in constructing and implementing their arbitration schemes. The rules and procedures must be designed to provide potential litigants a neutral alternative to the courtroom. Schemes that favor the employer ordinarily will not be enforced. In addition, employers must ensure that agreements to arbitrate are supported by adequate consideration and that this consideration is sufficiently documented. Although there are many possible forms of consideration, the form most likely to pass judicial scrutiny is a mutual promise between the employer and the employee to submit at least some claims to binding arbitration. The best way to manifest that agreement is to ensure that employees are provided with all applicable alternative dispute resolution rules and procedures, that the employee signs an acknowledgment indicating such receipt, and that the acknowledgment specifies clearly that the employee and the employer are agreeing to arbitration, the result of which is to be binding on both parties.

If you have any questions about these cases or arbitration agreements in general, please call Ed Jepson (312/609-7582), Jim Bayles (312/609-7785) or any other Vedder Price attorney with whom you have worked.

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SUPREME COURT CLARIFIES STANDARD FOR PUNITIVE DAMAGES UNDER TITLE VII

On June 22, 1999, the United States Supreme Court addressed the type of conduct a plaintiff suing under Title VII must show to be entitled to punitive damages from an employer. In *Kolstad v. American Dental Association*, the plaintiff prevailed at trial on her gender discrimination claim that she was denied a promotion in favor of a male candidate. She was able to show that the company's selection procedure was bogus, and that the company had preselected the male candidate. The trial court refused to allow the jury to consider punitive damages, however, contending that the plaintiff had not shown extraordinary or egregious conduct. The Supreme Court overruled an *en banc* opinion by the United States Court of Appeals for the District of Columbia affirming the trial court's requirement of "egregious" conduct. The Court held that a plaintiff must only show that the employer acted with "malice" or "reckless indifference" to be eligible for punitive damages.

Prior to 1991, a Title VII plaintiff was not entitled to recover compensatory or punitive damages. The 1991 Civil Rights Act ("CRA") made compensatory and punitive damages available. According to the Court's interpretation of the CRA, Congress established a two-tiered standard for damages. If a plaintiff can prove intentional discrimination, he or she may be entitled to compensatory damages. However, for punitive damages, a plaintiff must prove malice or reckless indifference by the defendant. The focus of this standard is on the defendant's state of mind, not necessarily the severity of the illegal conduct. Therefore, the Court drew a distinction between an employer's knowledge that it may be acting in violation of federal law, which satisfies the standard, and the employer's knowledge only that it is engaging in discrimination, which does not meet the standard. Thus, an employer that knows it is choosing a man over a woman for a particular position, but believes that it is doing so using a *bona fide* occupational qualification, knows that it is engaging in gender discrimination, but does not know that it may be violating federal law. Under the standard announced in *Kolstad*, such an employer would not be subject to punitive damages.

The Court recognized that the inquiry does not end with the malice or reckless indifference standard, however. It held that an employer can avoid punitive damages by showing that it made a good-faith attempt to comply with Title VII. The Court suggested that an antidiscrimination policy implemented in good faith would help insulate employers from punitive damages because such an attempt to comply with Title VII would prevent a plaintiff from showing an intent to violate, or reckless disregard of the possibility of violating, Title VII.

The *Kolstad* decision is a mixed blessing for employers. On the one hand, it holds that a Title VII plaintiff does not have to show outrageous or egregious conduct in order to be eligible for punitive damages – a standard difficult for most plaintiffs to satisfy. On the other hand, it enables employers who make good-faith efforts to comply with the law to avoid punitive damages. Therefore, employers should maintain a comprehensive antidiscrimination and harassment policy reinforced by periodic training in order to take advantage of this good-faith defense.

If you have any questions about this case or the availability of compensatory or punitive damages under Title VII, please call Barry Harstein (312/609-7745) or any other Vedder Price attorney with whom you have worked.

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EEOC ISSUES PROPOSED REGULATIONS ON "TENDER BACK" ISSUE FOR ADEA WAIVERS

In *Oubre v. Entergy Operations*, the Supreme Court held that a former employee can sue his or her employer for age discrimination without having to return (or "tender back") the money the employer paid in exchange for a release of rights under the Age Discrimination in Employment Act ("ADEA"). The EEOC recently issued proposed regulations interpreting that holding, and those proposed regulations significantly decrease the value of such a release to employers.

The proposed regulations address various aspects of the tender back issue. Initially, they echo the Supreme Court's holding that former employees who challenge ADEA waivers in court are not required to tender back the consideration for the waiver. However, they take the holding one step further to prohibit agreements in which an employee covenants not to sue an employer for age discrimination.

The EEOC justifies this prohibition by concluding that the ADEA, as amended by the Older Workers Benefit Protection Act, requires courts to determine whether any waiver of rights under the statute is "knowing and voluntary." An agreement that prohibits a former employee from going to court in the first place would frustrate that purpose. According to the EEOC, a valid waiver under the ADEA would not allow an employer to avoid the expense of litigating an age discrimination case, but would simply give the employer an affirmative defense at trial. Thus, even if an employee signs a waiver that ultimately is determined to be valid, the employer still could lose the consideration it paid for the waiver, and be forced to pay substantial costs and attorneys' fees if the employee chooses to sue.

The proposed regulations also address a point the *Oubre* Court left ambiguous – under what circumstances an employer found liable for age discrimination would be entitled to deduct the amount of consideration it paid for the age discrimination waiver from any damages awarded in an age discrimination lawsuit. The EEOC has proposed that the employer should be limited to deducting the lesser of the damages award or the amount of consideration. The proposed regulations contain several factors for a court to consider when deciding to what extent, if any, a deduction is appropriate, including whether the consideration for the ADEA waiver was apportioned separately from the waiver of other rights; the severity of the underlying discrimination; whether the failure to comply with the ADEA waiver requirements was inadvertent or in bad faith; and the financial condition of the employee and the employer.

Finally, the proposed regulations state that an employer remains bound by any obligations it undertakes in exchange for waiver, even if the waiver is found to be invalid. Therefore, for example, if an employer obtains ADEA waivers from several employees discharged in a reduction in force, and one of the discharged employees obtains a judgment that the waiver is invalid, the employer cannot breach its agreements with the other employees despite knowing that the waiver would not be enforced. The EEOC contends that any other rule would punish innocent employees for the employer's failure to develop a knowing and valid waiver.

In light of these proposed regulations, employers should be aware that general releases that include waivers under the ADEA may not avoid the expense of defending an age discrimination lawsuit. Although the regulations may not be finalized for several months, courts may look to them for guidance in assessing the validity of waivers, regardless of whether such agreements are signed prior to or after promulgation of the final regulations.

If you have any questions about ADEA releases, please call Chuck Wolf (312/609-7888), Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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SEXUAL HARASSMENT AND CREDIT HISTORY: THE SURPRISING INTERACTION OF THE FAIR CREDIT REPORTING ACT AND TITLE VII

Every employer today is well aware of the importance of promulgating an effective anti-harassment policy. Employers also understand the need to conduct comprehensive investigations whenever an employee reports alleged harassment. While many employers utilize internal human resources personnel to conduct investigations, more and more companies are turning to outside entities to handle these inquiries. Ever alert to the potential to obtain information buttressing their claims, plaintiffs' attorneys have made inroads in this area, and convinced numerous courts to override the attorney-client privilege and work-product protections when the investigation is handled by an outside law firm. Now, employers face another dilemma.

On April 5, 1999, the Federal Trade Commission ("FTC"), which enforces the Fair Credit Reporting Act ("FCRA"), issued an opinion letter that may further impact an employer's decision to rely on outside investigators, including attorneys, who conduct workplace investigations on behalf of an employer in response to a sexual harassment and/or discrimination complaint by an employee.

On September 30, 1997, amendments to the FCRA went into effect and placed certain additional obligations on employers who rely on a "Consumer Reporting Agency" ("CRA") to prepare a "consumer report" or "investigative consumer report" on an employee. A "consumer report" includes a report prepared by a CRA bearing on an individual's "character, general reputation, personal characteristics, or mode of living" that is used in relationship to a person's employment. An "investigative consumer report" involves information of a similar nature, but is obtained through "personal interviews with neighbors, friends or associates…who may have knowledge concerning such items of information." The FCRA amendments require written authorization prior to obtaining a "consumer report" (or "investigative consumer report"), and production of the report to the affected individual if an "adverse employment action" is taken based, in whole or in part, on the report. This process is mostly used by employers that obtain credit reports for applicants seeking certain types of jobs where financial background is relevant. The apparent intent of the law, at least initially, was to ensure that individuals who experienced an adverse impact due to information contained in their credit history would receive notice to that effect.

Rather surprisingly, an opinion letter issued by the FTC greatly expands the presumptive reach of the FCRA by concluding that a third party retained to assist in the investigation of harassment claims is a CRA under the FCRA, and that "reports prepared by outside organizations performing harassment investigations for employers are most likely 'investigative consumer reports'" within the meaning of the FCRA. Perhaps most troubling is the fact

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that the letter, in referring to an employer's obligation under the FCRA "to notify employees and/or supply a copy of the report to the employee," expressly states that information "cannot be redacted in those instances in which the FCRA requires that the consumer be provided a copy of a consumer report."

The FTC letter has very real implications for employers. While the letter is advisory and is not binding upon the courts, it may well be seized upon as yet another tool by plaintiff's attorneys to pry open the employer's internal files. The employer's failure to comply with the FCRA may be relied upon in opposing a motion for summary judgment or used to counter an invocation of the attorney-client privilege and/or work product protections.

Employers must also understand that the FCRA permits both state and private rights of action for violations of these provisions. An employer that neglects to obtain an individual's permission prior to seeking a consumer report, or who fails to provide notice to the individual before taking action adverse to that individual, may be liable for actual damages, attorneys' fees and costs. A finding of willful noncompliance can result in the imposition of punitive damages.

Perhaps most troubling is the manner in which the FTC's letter conflicts with the fundamental requirements of Title VII. In its recent decisions, the Supreme Court emphasized the importance of preventing and promptly remedying harassment in the workplace, and of carrying out a comprehensive investigation, which often is an employer's best hope to avoid liability. Now, an employer attempting to balance the conflicting obligations of the FCRA and Title VII may lose valuable time at the start of an investigation as it attempts to secure the consent of the accused, and thus will forfeit the element of surprise. Also daunting is the prospect of having to decide whether to terminate an employee simply because the employee refuses to consent to the investigation.

Until this matter is addressed by the courts, employers should exercise caution when turning to outside entities to conduct harassment investigations. If you have any questions about this article or harassment prevention and investigation, please contact Barry Hartstein (312/609-7745), Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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PERMANENTLY REPLACED STRIKERS ELIGIBLE FOR UNEMPLOYMENT BENEFITS

An Illinois appellate court, in a 2-1 decision, recently held that, for purposes of the Illinois Unemployment Insurance Act, "[p]roduction levels do not have to return to exactly prestrike levels before an employer reaches 'substantially normal business operations,'" and its "permanent replacement of striking workers" makes those employees eligible for unemployment benefits. *Bridgestone/Firestone v. Doherty* (Fourth District, May 27, 1999).

In mid-July of 1994, a strike against Bridgestone/Firestone, Inc. began that involved about 1,200 production employees. These employees applied to the Illinois Department of Employment Security for unemployment benefits. The Department initially denied benefits under Section 604 of the Act, which makes an employee ineligible to receive unemployment benefits "for any week…his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory…at which he [or she] is or was last employed."

After receiving further information that many of the employees on strike were permanently replaced and that Bridgestone's plant was resuming full production, and not receiving any contradictory information from Bridgestone, the Department issued a supplemental determination that the "work stoppage" had ended, making the employees eligible for unemployment benefits thereafter. Bridgestone appealed this determination.

Bridgestone pointed out to the Department's Director that its inexperienced workforce consisted of only 950 employees, as opposed to the prestrike level of 1,209 employees. Bridgestone contended that, as a result of this inexperience and reduced workforce, plant production was as low as 45% of the previous year's levels, and at its peak reached only 82% of the previous year's production levels. Further, it noted that machinery sat idle and preventive maintenance programs had to be put off due to the diminished workforce.

The Director rejected Bridgestone's contention that production levels had to return to prestrike levels to be considered "substantially normal," and affirmed the supplemental determination based mainly on her conclusion that as the number of employees returning to the plant approached the number of employees working at the plant prior to the strike, the employer's operations become "closer to substantially normal."

The appellate court, reversing an intervening circuit court decision overturning the Department, concluded that, for a striking employee to be found ineligible for benefits, there must be a finding of (1) a stoppage of work, (2) a labor dispute, and (3) proximate causation between the labor dispute and the stoppage of work. According to the court, a work stoppage ends when the employer regains production to a point where business operations are substantially normal. The court reasoned: "[I]t is inappropriate to consider only gross production without regard to the means by which production was achieved or the continuing disruption of the employer's normal operating methods."

The court upheld the Department's decision based on the percentage of the workforce that returned to the plant – 90% – and on newspaper articles in which Bridgestone's spokesperson stated that Bridgestone was not seeking any new employees for its plant, denied the 50% production estimate, and indicated Bridgestone's satisfaction with both production and the replacement employees. The court speculated that because 1994 production levels may have been attributable to a period of stockpiling in anticipation of a strike, the Director did not have to accept those levels as standard business operations.

The court then addressed the issue of whether Section 604 applies if an employer permanently replaces striking workers and notifies them of their permanent replacement, on the theory that a "labor dispute" no longer is the cause of the replaced employees' unemployment.

The court held that "Section 604 of the Act is applicable only to those employees whose unemployment is due to a stoppage of work existing because of a labor dispute and is inapplicable when an employer terminates an employee involved in a labor dispute, even though the labor dispute continues… [A]n employer's permanent replacement of striking workers terminates the employment relationship and removes the section 604 disqualification [from receipt of unemployment benefits]."

The appellate court failed to recognize that under Federal labor law, employees who have been permanently replaced, but who have not obtained other employment, are not "terminated." They maintain their employment relationship, and are entitled to be placed upon a preferential reinstatement list when the strike ends. Accordingly, to the extent that this decision is based on a misunderstanding of the legal status of replaced workers, it may not be upheld. Nonetheless, for now at least, Illinois employers must realize that permanently replacing a substantial portion of their striking workforce may result in those employees qualifying for unemployment compensation benefits.

If you have questions regarding this decision or the temporary or permanent replacement of strikers, please call Larry Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

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ODDs & Ends

Of Fainting Spells …

On returning to work after suffering a heart attack, railroad engineer Charles Donahue passed out and fell eight feet to the ground from a train. He was diagnosed with a condition that could cause him to pass out at any time without warning. On his doctor's advice, Donahue was moved to a conductor's job, but shortly after starting in that position, he passed out again, this time while walking on the train tracks. He was removed from the conductor's job and subsequently fired. A Pennsylvania district court recently ruled that Donahue's ADA suit against his employer would not go to a jury because Donahue could not point to a vacant, nonpromotional position for which he was qualified, and which could tolerate a sudden loss of consciousness without causing great danger. While not a factor in its decision, the court noted that Donahue was receiving total disability benefits for being unable to perform any substantial gainful activity.

…and Tainting Smells

After working for several years in a clerical job involving use of a telephone and computer, Douglas Buckles was diagnosed with acute recurrent rhinosinusitis. Severe allergy attacks could be brought on by exposure to such things as glue, perfume, nail polish, smoke and various adhesives. His employer, First Data Resources, Inc., gave Buckles a work station with enhanced ventilation and banned the use of nail polish in his department. The company also told Buckles that he could sign off his telephone whenever he felt there was an actual or potential exposure to an irritant, and could leave the area while his complaint was investigated. Buckles implemented this policy, not just by leaving his work area but by going home whenever he detected a potential allergic stimulus. After he was fired for poor attendance, a federal jury awarded him almost $100,000 on his ADA claim against First Data. The Eighth Circuit Court of Appeals recently vacated those damages, finding that the employer had acted reasonably. The Court noted that a company does not have to provide even an allergic employee with a "bubble" to work in, or to give an employee the "[u] nfettered ability to leave work at any time."

But Do I Get My Choice of Color?

Mirronex Technologies of Princeton, New Jersey, announced last January that it would give BMW Z3 sports cars to qualified IT professionals joining the company during a specified two-week period that month. (The last time O & E shopped for a Z3, it was in the $40,000 range. We didn't buy one because we couldn't get a good enough trade-in price for our Yugo.)

We're Going to Need a Larger EEO-1 Form

The Office of Management and Budget will allow individuals to identify themselves as members of more than one racial group in the 2000 census and for other governmental surveys. This probably will also be applied thereafter to EEO-1 and similar federal employment reports. Paul Bayless, assistant affirmative action officer at Indiana University/Purdue University at Indianapolis, recently noted that this will create 126 possible racial/ethnic categories (63 possible combinations of the six established racial categories, multiplied by two for Hispanic vs. non-Hispanic).

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