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Labor Law

Labor and employment law trends of interest to our clients and other friends.

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SUPREME COURT UPDATE

In our last issue (Vol. 22, No. 1, January 2002) we summarized five of the many employment cases on the U.S. Supreme Court's docket. The Court has since decided four of those cases. Two of them (*Ragsdale v. Wolverine Worldwide, Inc.*, 122 S. Ct. 1155 (2002), and *Hoffman Plastic Compound, Inc. v. NLRB*, 122 S. Ct. 1275 (2002)) are discussed in detail elsewhere in this issue. Two others are summarized below (*Williams v. Toyota Motor Mfg., Kentucky, Inc.,* 122 S. Ct. 681 (2002), and *EEOC v. Waffle House,* 122 S. Ct. 754 (2002)). The fifth case (*Moran v. Rush Prudential HMO, Inc.*) is still pending. We've also included in this article a couple of added starters, *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), which was decided in March, and *Echazabal v. Chevron USA*, in which oral argument was heard in February involving the "direct threat" defense under the ADA.

Toyota. An assembly line worker claimed that she was entitled to reasonable accommodation under the ADA because carpal tunnel syndrome and related impairments limited her ability to perform the range of repetitive manual tasks associated with her job. The Court concluded that the evidence was insufficient to show that she was disabled within the meaning of the Act. To prove a substantial limitation in the major life activity of performing manual tasks, one must demonstrate an impairment that prevents or restricts "activities that are of central importance to most people's daily lives." In the Court's opinion, manual tasks unique to a particular job are not as central to most people's daily lives as performing household chores, bathing and brushing one's teeth.

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Although a victory for *Toyota,* this decision may mean that in determining its obligation to provide reasonable accommodation, in some instances an employer will have to consider what an employee can do away from work as well as on the job.

Waffle House. The Court held that an employee's agreement to arbitrate employment disputes has no effect on the EEOC's right to sue the employer in federal court for injunctive or victim-specific relief (*e.g.*, back pay and damages). The Court noted that Title VII unambiguously gives the agency the right to obtain such remedies with no suggestion that this right is foreclosed by the existence of an arbitration agreement between private parties. The Court also looked at the Federal Arbitration Act and concluded that while it insures the enforceability of private agreements to arbitrate, only the parties to such agreements are bound.

Although appearing to be a defeat for employers, *Waffle House* should have little practical impact. EEOC enforcement actions are rare. They constituted less than 2% of all discrimination claims filed in federal court during fiscal year 2000.

As to the new kids on the block, the Court's recent decision in *Edelman v. Lynchburg College,* 122 S. Ct. 1145 (2002), upholds the EEOC's regulation allowing complainants to timely file an unverified charge and supply verification after the statutory time limit for filing charges has passed. The verification "relates back" and is properly treated as if it had been made on the date the charge was filed.

Lastly, the Court has heard oral argument in *Chevron USA*, which involves the "direct threat" defense to alleged discrimination under the Americans with Disabilities Act. Plaintiff Echazabal twice applied for employment at a Chevron refinery, and both times Chevron withdrew conditional job offers after medical exams showed that he had Hepatitis C and that his liver might be damaged by exposure to solvents and chemicals present at the refinery. Echazabal sued in federal district court, claiming discrimination on the basis of a disability. Chevron countered that it had acted properly because Echazabal would pose a direct threat to his own health if he worked in the refinery. The district court granted summary judgment for Chevron and Echazabal appealed. The Ninth Circuit Court of Appeals reversed, relying on the language of the ADA, which states that an employer may impose as a qualification standard that an employee not pose a direct threat to the health or safety of "other individuals in the workplace." In the appellate court's opinion, the ADA's direct threat defense means what it says and does not apply to employees for whom employment poses a direct threat only to their own health or safety.

The Supreme Court's decisions in *Chevron*, *Moran* and other pending litigation of general interest will be discussed in subsequent issues of our newsletter. In the meantime, if you have any questions about any of the cases reviewed above, call Dana Gordon in New York (212/407-7763), Katie Colvin (312/609-7872) or Jim Petrie (312/609-7660) in Chicago, or any other Vedder Price attorney with whom you have worked.

SEVENTH CIRCUIT INVALIDATES ARBITRATION AGREEMENT WHICH REQUIRED EACH PARTY TO PAY ITS OWN ATTORNEYS' FEES

Many employers have sought to limit their litigation expenses and potential liabilities by instituting mandatory arbitration agreements with their employees. In *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), the U.S. Supreme Court held that private arbitration agreements may be enforceable as to claims brought under federal statutes as long as they do not prevent a plaintiff from effectively vindicating statutory rights in the arbitral forum or interfere with the statute's remedial and deterrent purposes. Following *Gilmer*, employers have sometimes struggled to draft arbitration agreements which both protect their interests and do not impermissibly interfere with the statutory rights granted to employees by Congress.

The McCaskill Case

The Seventh Circuit Court of Appeals recently had occasion to rule on the enforceability of an arbitration agreement

which required each party to pay its own costs and attorneys' fees regardless of the outcome of the case. In *McCaskill v. SCI Management Corp.,* 285 F.3d 623 (7th Cir. 2002), the Seventh Circuit reversed the District Court's decision to compel arbitration and dismiss the federal court case, finding that the agreement's attorneys' fees provision impermissibly infringed on the plaintiff's right, granted by Congress under Title VII, to collect attorneys' fees if she prevailed on her claim.

Specifically, the arbitration agreement at issue in *McCaskill* stated:

> Each party may retain legal counsel and shall pay its own costs and attorneys' fees, regardless of the outcome of the arbitration. Each party shall pay one-half of the compensation to be paid to the arbitrator(s), as well as one-half of any other costs relating to the administration of the arbitration proceeding (*e.g.*, room rental, court reporter, etc.).

Title VII, on the other hand, provides in relevant part (42 U.S.C. 2000e-5(k)):

> In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Court's Reasoning

In deciding that Title VII's attorney's fees provision rendered unenforceable the entire arbitration agreement, the Court reiterated the important policy reasons behind awarding attorney's fees to a prevailing plaintiff:

> 'In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.' . . .The right to attorney's fees therefore is integral to the purposes of the statute and often is central to the ability of persons to seek redress from violations of Title VII.

Although not cited as part of its rationale for invalidating the arbitration agreement, the Court noted in passing that the agreement required arbitration for most employment-related suits which would be brought by employees, but excluded the types of claims likely to be brought by the employer, such as enforcing noncompetition or confidentiality agreements or suits based on fraud, theft or other employee misconduct. The Court may have perceived these exclusions to be unfairly one-sided in favor of the employer.

The employer argued that, if the plaintiff were successful, the attorneys' fees provision allowed an arbitrator to award the plaintiff her attorneys' fees as long as she used the award to pay her attorneys. The Court flatly rejected this argument and stated that the provision meant that "neither party can be required to pay the attorney's fees of the other party, either directly or through the straw-man approach advocated by [the defendant]." The Court held that the attorneys' fees provision prevented the plaintiff from "effectively vindicating her rights in the arbitral forum by preemptively denying her remedies authorized by Title VII," and thus rendered the entire arbitration agreement unenforceable.

Two other points are worth noting – if only for what the Court declined to do. First, the arbitration agreement required each party to pay one-half of the arbitrator's compensation and any other costs of the arbitration. The plaintiff argued that this provision also rendered the agreement unenforceable. While noting cases in which such an argument succeeded or was considered, the Court did not rule on the issue because its determination regarding the attorneys' fees provision made further inquiry unnecessary.

Second, the Court also did not rule on whether the attorneys' fees provision was "severable" from the rest of the arbitration agreement, which would have allowed the Court to invalidate the attorneys' fees provision while enforcing the rest of the arbitration agreement. The Court

noted, however, that the Ninth Circuit had rejected a similar argument in *Graham Oil Co. v. ARCO Product Co., a Div. of Atlantic Richfield Co.*, 43 F.3d 1244 (9 Circuit 1994).

Conclusion

The Seventh Circuit's ruling likely comes as no surprise to most employers who have attempted to draft enforceable arbitration agreements. This decision is consistent with previous cases dealing with mandatory arbitration agreements. The *McCaskill* decision illustrates the following rule of thumb. Private arbitration agreements between employers and employees may be useful to employers in reducing potential exposure to unpredictable jury awards. However, if an employer drafts an arbitration agreement which attempts to gain advantages beyond the change from a judicial to an arbitral forum, and thereby limits the rights or remedies provided by Title VII or another federal statute, that agreement likely will be unenforceable in the courts.

If you have questions about arbitration agreements or any other employment-related matter, please contact Alison J. Maki (312/609-7720), James E. Bayles (312/609-7785), Barry A. Hartstein (312/609-7745) or any other Vedder Price attorney with whom you have worked.

OSHA'S "NEW" ERGONOMICS INITIATIVE?

On November 14, 2000, amid a storm of controversy, the Occupational Safety and Health Administration ("OSHA") issued its Ergonomics Program Standard. The Standard was short-lived. On March 7-8, 2001, pursuant to the Congressional Review Act, the Senate and House, respectively, voted to overturn the rule and on March 20, 2001, President Bush signed S.J. Resolution 6 formally repealing the rule.

Since its repeal, the future of OSHA's ergonomics initiative has remained uncertain. Although Secretary of Labor Elaine Chao committed to developing a comprehensive approach to ergonomics, and OSHA continued to study the issue intensely, nothing formal emerged from OSHA to address ergonomic hazards. Until now.

On April 4, 2002 OSHA unveiled what it describes as a four-pronged "comprehensive" approach to reducing musculoskeletal disorders ("MSDs") in the workplace. Its plan consists of: (1) guidelines; (2) enforcement; (3) outreach and assistance; and (4) research.

Guidelines

OSHA plans to develop industry or task-specific guidelines for a number of industries based on current incidence rates and available information about effective and feasible solutions for reducing the occurrence of MSDs. OSHA will also encourage other industries to develop their own ergonomic guidelines to meet their specific needs. OSHA declined to undertake another effort at formal rule-making, opting instead to issue and encourage guidelines, for two reasons. First, OSHA believes rule making is prohibitively difficult because:

- there are a variety of different hazards and combinations of different hazards to be addressed;
- exposure to the hazards is not readily measured in some cases;
- the exposure-response relationship is not well understood;
- cost and feasibility of abatement measures may be uncertain and may be very high in some cases; and
- it is difficult, except in the most general terms, to prescribe remedies for abating such hazards in a single rule.

Second, OSHA believes that industry and task-specific guidelines are more flexible than standards. According to OSHA, guidelines can be developed more quickly than formal standards and can be changed easily as new information becomes available from research and scientific advances. OSHA now claims that guidelines make it easier for employers to adopt innovative programs to suit their workplaces. By contrast, standards tend to be inflexible "one-size-fits-all" solutions that may not be appropriate in a certain industry or facility.

Despite its espousal of guidelines as an important tool to assist employers in recognizing and controlling ergonomic hazards, OSHA has not yet issued any such guidelines, except for guidelines it issued over a decade ago for the meatpacking and certain other industries. Although OSHA announced on April 18, 2002 plans to draft guidelines for the nursing home industry, and those guidelines are expected to be available for public comment later this year, employers in other industries appear to be on their own for the time being.

Enforcement

Despite having no formal guidelines to assist employers in recognizing and controlling ergonomic hazards, OSHA nevertheless intends to embark on an aggressive "enforcement" campaign. What OSHA intends to enforce, however, remains a mystery. OSHA has stated that it does not intend to use an employer's failure to follow OSHA-promulgated guidelines (whenever they become available) as the basis for citing an employer for ergonomic hazards. It emphasizes that the guidelines are tools intended to assist employers in recognizing and controlling hazards and are "voluntary."

Instead, OSHA plans to base its citation activity on the Occupational Safety and Health Act's General Duty Clause (29 U.S.C. § 654(a)(1)), a nebulous provision of the OSH Act which requires employers to furnish each of its employees "employment and a place of employment which are free from *recognized hazards* that are causing or are likely to cause death or serious physical harm" (emphasis added).

OSHA's plan to cite employers under the General Duty Clause is problematic, at least until guidelines are readily available to employers. OSHA will be hard-pressed to establish that a particular workplace condition constitutes a *recognized hazard* under the General Duty Clause when the recognition tools – the guidelines – are not yet available. Even then, case law under the OSH Act has held that OSHA produced guidelines may not be used by OSHA to satisfy its burden under the General Duty Clause to prove that a hazard is recognized in an employer's particular industry. Nevertheless, OSHA emphasizes that employers in industries with no current guidelines may be subject to citations and penalties for ergonomic hazards and that employers should avail themselves of information currently available from OSHA, the National Institute for Occupational Safety and Health ("NIOSH") and various industry and labor organizations on how to establish effective ergonomics programs.

OSHA's enforcement plan appears to be somewhat limited at this time. It has signaled that it will not focus its enforcement efforts on employers who have implemented effective ergonomic programs or who are making good-faith efforts to reduce ergonomic hazards. Thus, OSHA's primary targets at this time appear to be those employers with high injury or illness rates that have made little or no effort of their own to address the problem.

Outreach and Assistance

As part of its four-pronged approach, OSHA has also promised to provide assistance to businesses, particularly small businesses. Among other things, OSHA intends to direct some of its fiscal year 2002 training grants to the development of ergonomic training materials and the direct training of employers and employees. This training will include courses at 12 non-profit Education Centers and the development of complete and comprehensive compliance assistance tools, including Internet-based training and information. OSHA also intends to use Voluntary Protection Program (VPP) sites to help model effective ergonomic solutions and, as part of the Department of Labor's cross-agency commitment to protecting immigrant workers, OSHA's plan includes a specialized focus on helping Hispanic and other immigrant workers.

Research

The final element of OSHA's four-pronged plan is more research, particularly to address deficiencies identified by the National Academy of Science (NAS) in response to last year's failed Ergonomics Program Standard. Among other things, OSHA intends to charter an advisory committee to identify gaps in research relating to the application of ergonomics and ergonomic principles to the workplace, with the committee reporting its findings to

Assistant Secretary Henshaw and NIOSH. OSHA then intends to work closely with NIOSH to encourage research in needed areas.

OSHA's ergonomics plan has already received sharp criticism from several senators and organized labor. One criticism is that OSHA's plan is not new. To the contrary, OSHA has issued guidelines to specific industries and used the General Duty Clause to cite employers for ergonomics violations for over a decade. Thus, OSHA's current approach is nothing more than "a plan for a plan." The AFL-CIO has also dubbed the approach meaningless, commenting that OSHA has failed to identify which industries are being targeted for enforcement or come up with a definition of "work-relatedness" for purposes of recordkeeping and the issuance of citations.

Without question, OSHA's plan provides little in the way of concrete guidance for employers attempting to grapple with workplace ergonomic hazards. At most, OSHA's four-pronged approach represents the first step in what appears to be an ongoing effort to address the myriad workplace injuries and illnesses collectively referred to as MSDs. Nevertheless, OSHA's stated intention to use the General Duty Clause to cite employers for ergonomics hazards means that, even in the absence of specific guidance from OSHA, employers may once again soon find themselves facing ergonomics inspections and contesting ergonomics citations.

If you have questions about OSHA's new approach to ergonomics, or if you would like further information on how to develop your own ergonomics program, please contact James E. Bayles, Jr. (312/609-7785), Nina G. Stillman (312/609-7560) or any other Vedder Price attorney with whom you have worked.

PRESIDENT BUSH MAKES TWO RECESS APPOINTMENTS TO THE NLRB

In a previous newsletter article, we detailed the composition of the National Labor Relations Board and the process for filling vacancies (see The Bush Labor Board: Who's On First?, Labor Law Newsletter, December 2001). Since that article, President Bush has filled two of the three vacancies that existed on the Board with recess appointments. Specifically, on January 22, 2002, President Bush announced the appointment to the Board of Michael J. Bartlett and William B. Cowen, both Republicans.

Bartlett previously served as Director of Labor Law Policy at the U.S. Chamber of Commerce. Prior to that, his resume includes stints as a NLRB attorney, Eastern Airlines counsel, and service as a partner and special counsel with several management-side law firms, including Vedder Price.

Cowen previously served as Principal Attorney for Institutional Labor Advisors, LLC, a company he founded in 1997. Prior to that, Cowen was a partner at a management-side law firm.

With the appointments of Bartlett and Cowen, Republicans now comprise a majority of the Board members. As recess appointees, Bartlett and Cowen will each serve a term of one year.

If you have any questions about the composition of the NLRB, please call Deric Bomar (312/609-7726), George Blake (312/609-7520) or any other Vedder Price attorney with whom you have worked.

EMPLOYER VIOLATED NLRA BY DISCIPLINING AN EMPLOYEE FOR DISPLAYING A UNION-RELATED COMPUTER SCREEN SAVER MESSAGE

Ruling on an issue of first impression, the National Labor Relations Board unanimously affirmed the ruling of an Administrative Law Judge that an employer violated the National Labor Relations Act ("Act") by prohibiting an employee from displaying a union-related screen saver message on her company-issued computer and by issuing a warning to her for displaying the message.

In *St. Joseph Hospital*, 337 NLRB No. 12 (Dec. 12, 2001), the employer operated a hospital with an intensive care unit ("ICU"). The ICU contained multiple computers that were available for use by the nurses in the department. At all relevant times, the employer allowed ICU nurses to display personalized screen saver messages on the computers.

After a union began an organizing campaign at the hospital, a nurse (Elalem) in the ICU department programmed a screen saver message that said "Look for the U." Elalem's supervisor, who was aware that Elalem supported the Union, interpreted the "U" in the screen saver message to mean "Union," and Elalem testified that the "U" meant "Union." On the same day that Elalem posted the message, the supervisor held a meeting with Elalem in which the supervisor showed Elalem a document entitled "Written Record of Verbal Warning." The document referred to the "union related" content of the screen saver message, and further stated: "Advised employee that bulletin boards and screen savers are hospital property and it is inappropriate to post pro union messages on hospital property or while on time clock." The supervisor told Elalem she was being "written up for union activity, using hospital equipment for union activity."

Because no other prior Board case presented a similar factual pattern, the parties presented to the Board their theories on what principles should be applied by it in resolving the case. The employer contended that the principles applicable to company bulletin boards should govern. Under those principles, an employer has the right to restrict the use of bulletin boards, but that right may not be exercised discriminatorily. Board precedent establishes that discrimination exists if the employer allows employees to post nonwork-related personal notices on bulletin boards (*e.g.,* messages for the sale of personal property, cards and thank you notes), but does not allow the posting of union-related information.

On the other hand, the General Counsel contended that the principles applicable to the wearing of union insignia should control the Board's resolution of the case. Those principles recognize that employees have a protected right to wear union insignia at work in the absence of "special circumstances."

The Board expressly declined to reach a holding on what principles should be applied to the case. Instead, the Board concluded that the employer violated the NLRA even if it applied the principles the employer urged the Board to adopt – the principles applicable to employer bulletin boards. Specifically, the Board found that the employer routinely permitted ICU nurses to display many types of screen savers containing personal messages. Because the employer prohibited Elalem from posting a personal, union-related message, the Board concluded that the employer engaged in unlawful discrimination under the NLRA. For the same reasons, the Board concluded that the employer violated the NLRA by issuing a warning to Elalem based upon the screen saver message.

St. Joseph's Hospital establishes that employers must exercise the same precautions with respect to computer screen saver messages or computer "wallpaper" as they do with respect to their bulletin boards. If employers seek to restrict the posting of personal messages on their property (including on computers), an effective and enforced policy is the best method of accomplishing that goal. If you have any questions about this issue or need assistance in crafting an effective policy, please call Deric Bomar (312/609-7726), George Blake (312/609-7520) or any other Vedder Price attorney with whom you have worked.

FIRST HIGH COURT FMLA CASE: FAILURE TO DESIGNATE TIME OFF AS FAMILY/MEDICAL LEAVE MAY BE RISKY

The United States Supreme Court, in *Ragsdale v. Wolverine*, 122 S. Ct. 1155 (2002), held that the Secretary of Labor overstepped her bounds when she promulgated a Family and Medical Leave Act regulation categorically prohibiting an employer from designating an employee's leave as FMLA, when the employer did not provide individualized written notice to the employee that the leave would be so designated.

Generally, under the FMLA an employer must provide an eligible employee a total of 12 weeks of leave in a 12-month period for the arrival of a new child, a disabling health problem, or a family member's serious illness. The Act also requires an employer to (1) maintain the employee's group health coverage; (2) grant leave on an intermittent basis when medically necessary; and (3) reinstate the employee to his or her former position, or its equivalent, upon the employee's timely return to work. An employer who interferes with, restrains, or denies the exercise of these rights may be subject to consequential damages and appropriate equitable relief.

In *Ragsdale,* Wolverine World Wide, Inc. granted plaintiff Ragsdale 30 consecutive weeks of leave when cancer treatments kept her off work. At the end of the 30 weeks, Ragsdale sought an additional 30 days of leave. Wolverine denied her request, saying Ragsdale had exhausted the seven months of unpaid sick leave available under Wolverine's leave plan. Ragsdale sued, claiming that FMLA regulations (specifically, 29 CFR 825.700(a)) entitled her to an additional 12 weeks of leave because Wolverine had failed to notify Ragsdale up front that 12 of the 30 weeks of leave she had already taken would count as her FMLA leave.

The Supreme Court, in its first case under the FMLA, rejected Ragsdale's claim and invalidated the regulation, holding that it impermissibly exceeded the scope of the statute by imposing a one-size-fits-all penalty on employers who fail to notify employees that their leave will count as FMLA leave.

The Court reasoned that in the statute's penalty provisions Congress intended to penalize employers who *harm* employees by interfering with, restraining, or denying an employee his or her rights under the statute. In contrast to the statute, regulation 825.700(a) penalized an employer by requiring the employer to grant more than 12 weeks of leave, regardless of whether the employee had suffered any harm.

The facts in *Ragsdale* illustrate this point. Ragsdale suffered no harm – she was allowed 30 weeks of leave, more than twice what is required by the statute. The penalty against Wolverine was not tied to any harm suffered by Ragsdale. Thus, the Court held the penalty inconsistent with, and disproportionate to, the Act itself. Importantly, the Court did not invalidate the requirement of individualized notice that an employee's leave counts towards his or her FMLA entitlement. What the Court did in *Ragsdale* was invalidate the categorical application of the penalty requiring an employer to grant additional leave when an employer fails to provide such individualized notice.

The upshot of the Court's ruling appears to be that an employer does not have to provide leave in excess of the 12 weeks mandated by the statute when an employee has not been prejudiced by the employer's failure to notify the employee that his or her leave would count as FMLA leave.

The questions remain when and how a court will determine whether an employee has been prejudiced in such circumstances. The Court gave some guidance in answering this question when it noted that in order to determine whether an employee has been prejudiced, a judge or jury must answer questions such as (1) whether the employee would have exercised his or her FMLA rights in the absence of the employer's actions, and (2) what steps the employee would have taken had circumstances been different. For example, when would the employee have returned to work after taking leave?

To be sure, the safest approach an employer can take is to continue to provide individualized written notice to an employee that the employee's leave will count towards his or her annual FMLA entitlement. This will avoid a potential after-the-fact judicial determination that an

employee was prejudiced because the employer did not provide the notice.

If you have any questions about this case, or wish to discuss the FMLA or the procedures thereunder, please call Paige Barnett (312/609-7676), Steve Hamann (312/609-7579) or any Vedder Price attorney with whom you have worked.

NO BACK PAY FOR UNDOCUMENTED ALIEN

The United States Supreme Court recently shot down the National Labor Relations Board's award of back pay to an undocumented alien who had never been legally authorized to work in the United States. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S.Ct. 1275 (March 27, 2002).

In May 1988, when Hoffman Plastics hired Mexican-born Jose Castro, he presented documents that *appeared* to verify his eligibility for employment in the United States. About eight months later, during a union organizing drive at Castro's plant, he and several other known union supporters were laid off. The union subsequently filed an unfair labor practice charge against Hoffman, claiming the layoffs were unlawful. Three years later, in January 1992, the Board found that the layoffs violated the National Labor Relations Act ("Act") and ordered, among other things, that Hoffman offer reinstatement and backpay to Castro and the other affected employees.

In June 1993, during a hearing on back pay, Castro testified that he had never been legally admitted to, or authorized to work in, the United States and that he gained employment with Hoffman after submitting a birth certificate belonging to a friend who was born in the United States. Based on this testimony, the Administrative Law Judge determined that Castro could not be offered reinstatement and was not entitled to back pay.

In September 1998, four years after the ALJ's decision (and almost ten years after Castro had been laid off), the Board reversed the ALJ and awarded back pay to Castro from the date of his layoff to the date Hoffman learned he was undocumented, 3-½ years after the layoff. Hoffman's petition for review of the Board order was denied by the U.S. Court of Appeals for the District of Columbia Circuit. However, the Supreme Court granted *certiorari*.

Under the Immigration Reform and Control Act ("IRCA"), it is a crime to tender false documents to an employer to subvert the employer verification system. Accordingly, it was undisputed that Castro's use of false documents to obtain employment with Hoffman violated IRCA. The Supreme Court was persuaded by the fact that Castro, himself, had violated the law, and that he qualified for the Board's award only by remaining in the United States illegally. Accordingly, the Court found that an award of back pay "in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 1284.

If there is any lesson to be learned from *Hoffman Plastics*, it may be just a reminder of the employer's lack of control over an agency's timetable. Thus, not only is it crucial that the employer be right in the first instance (*e.g.*, thoroughly checking all documentation submitted by employees regarding eligibility to work), but it must retain the ability to prove its case years later while potential back pay is building. In this instance, it was five years from the time Castro was hired until the hearing at which it was established that he was an undocumented alien who violated the IRCA. If you have any questions about this case or any of the issues therein, please call Katie Colvin (312/609-7872), Steve Hamann (312/609-7579), or any other Vedder Price attorney with whom you have worked.

EMPLOYERS DEALT A WILD CARD – SENIORITY SYSTEM TRUMPS A REQUEST FOR ACCOMMODATION

In a recent decision, the United States Supreme Court kept a tight reign on the Americans with Disabilities Act ("ADA") by limiting an employee's right to a "reasonable accommodation." In *US Airways v. Barnett*, 122 S. Ct. 1516 (2002), the Supreme Court considered whether a proposed accommodation which would normally be considered reasonable would become unreasonable if it would result in a violation of a company's seniority system. The

Court, after considering this conflict between the interests of a disabled worker seeking a position of "reasonable accommodation" and the interests of employees with superior rights to bid for that job pursuant to the company's seniority system, held that an employer is not required to violate its seniority system to accommodate a disabled employee.

US Airways involved an airline cargo handler with a back injury who used his seniority rights to transfer to a position in the mailroom which was less physically demanding. Several years later after Barnett learned that other employees higher in seniority intended to bid on his mailroom position, Barnett requested that US Airways accommodate his disability by permitting him to remain in the mailroom position. US Airways refused his request to make an exception to the established seniority system, and Barnett was terminated.

Barnett filed suit against his former employer, claiming discrimination under the ADA. The District Court granted summary judgment for the employer, finding that an employer discriminates under the ADA when it fails to make a reasonable accommodation for a disabled employee unless the employer demonstrates that the requested accommodation imposes an undue hardship on the business. The Ninth Circuit reversed, holding that the court must evaluate undue hardship on a case-by-case basis.

According to the Supreme Court, "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." The Court held that ordinarily an employer's showing that the requested accommodation would violate the seniority system would warrant summary judgment in favor of the employer. However, if the plaintiff can present evidence of what the Court called "more," then he can defeat summary judgment. The Court defined "more" as special circumstances in a plaintiff's particular case which would show that the requested accommodation is reasonable. For example, the plaintiff may show that the employer frequently exercises its right to unilaterally change the seniority system, or that the seniority system already contains exceptions. In those instances, the plaintiff can argue that employees have a reduced expectation that the system will be uniformly followed, and that one more departure to accommodate a disabled employee would not be an out-of-the-ordinary exception.

In so holding, the Court likened the issue presented to the context of a Title VII religious discrimination case, where an employer need not adapt to an employee's special worship schedule as a "reasonable accommodation" where doing so would conflict with the seniority rights of other employees. Similarly, with respect to the Rehabilitation Act, collectively bargained seniority trumps a requested accommodation.

Only five justices joined in the majority opinion and two of those wrote separately that the majority should have afforded more protection to employers. Four justices dissented in two separate opinions. In dissent, Justice Scalia wrote that the ruling incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation. Justice Scalia further attacked the majority's creation of a "rebuttable presumption." Specifically, he states that the majority gives plaintiffs a "vague and unspecified power whenever they can show special circumstances to undercut bona fide systems." Scalia is particularly concerned that the Court's new standard will only result in constant litigation over "special circumstances."

While the decision in *US Airways* clearly favors employers by limiting a disabled employee's ability to disrupt a seniority system in order to accommodate his disability, employers must recognize that the Court did carve out an exception which will allow the plaintiff to at least survive summary judgment. As discussed above, if the plaintiff can articulate an employer's exception to the seniority system, the employer may lose its safe harbor. In effect, this ruling discourages employers from making exceptions to the established seniority system in order to insulate employers from ADA discrimination charges. Therefore, the holding in *US Airways* should prompt employers to evaluate their current seniority systems and determine whether lenient enforcement must be curbed or regular exceptions eliminated. In any event, Justice Scalia's prediction of heightened litigation over the existence of special circumstances will likely result as the Court's new standard is potentially unclear.

If you have any questions about this case or the relationship of seniority – including your seniority system – to the ADA, please call Angela Pavlatos (312/609-7541), Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE: AN UPDATE ON THE IMPORTANCE OF COMPREHENSIVE ANTI-HARASSMENT/DISCRIMINATION POLICIES AND TRAINING

There are many things you cannot control in the workplace. Relationships blossom. Fraternization occurs. Feelings are hurt. Anger is stirred. Comments are made. Desires are pursued. More often than not, management is not aware of any of them. Fortunately, the law recognizes this fact – at least where co-workers are concerned – and provides employers with a defense to hostile environment claims.

For some employers, updating their EEO and harassment policies and providing EEO training to their employees remains at or near the bottom of the company's "to do" list. With a leaner economy, some companies may opt to save money on the legal fees associated with such steps. Other companies believe they get too little return on their investment. Still others prefer to "roll the dice," hoping that none of their employees files a charge of discrimination and/or a lawsuit.

Although "rolling the dice" is never a wise approach, in the wake of the United States Supreme Court's rulings in *Faragher v. Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998), such an approach will most likely subject employers to significantly greater liability. In *Faragher* and *Ellerth*, the Supreme Court set forth requirements under which employers can avoid liability for supervisory harassment only if the company has exercised reasonable care to prevent and remedy harassment. In order to satisfy this standard, employers must provide an effective complaint mechanism and take other steps – including regular policy updates and training – to ensure employees are aware of their rights and obligations.

The Equal Employment Opportunity Commission ("EEOC") issued an Enforcement Guidance in 1999 which included steps an employer should take in promulgating an effective harassment policy. First and foremost, employers should give every employee a copy of the company's anti-harassment policy when they begin work and should redistribute copies on a regular basis. The policy should be written in such a manner that it can be easily understood and it should contain an explanation of how to report potential violations. Furthermore, the employer should post the policy in locations where it will be seen by employees (*e.g.*, by the time clock(s)). The EEOC recommends that training be provided so the employees understand their rights as well as available remedies.

Risky Business

So, with all of these terrific judicial and agency roadmaps, where have employers journeyed lately? Well, for one thing, a number of them have risked significant monetary damage awards to employees by continuing to operate with inadequate policies and inadequate training. For example, in *Anderson v. G.D.C., Inc*., 281 F.3d 452 (4th Cir. 2002), the Court was presented with evidence that the employer never adopted any anti-discrimination policy, nor did it provide any training whatsoever on the subject of discrimination. The only affirmative step the company could point to was that a supervisor placed an EEOC poster regarding discrimination in a dispatch trailer. The Court explained that this bare-bones effort to educate employees about EEO laws "simply does not constitute a good faith effort to forestall potential discrimination." Moreover, the Court stated that such inadequate steps prevent an employer from being able to remedy any discrimination that might occur. Thus, the Court concluded that G.D.C. did not engage in good faith efforts to comply with Title VII. This ruling enabled the plaintiff, a female truck driver, to proceed to trial with her retaliation and punitive damage claims.

Another risk involves the possibility that you will be unable to rely on certain defenses otherwise available to employers faced with harassment lawsuits. In *Miller v. Kenworth of Dothan*, 277 F.3d 1269 (11th Cir. 2002), the Court ruled that the employer could not claim that it was not aware that the plaintiff-employee was being subjected to constant harassment. When an employer has a "comprehensive and effective" policy which is aggressively and thoroughly distributed, it can avoid liability for harassment claims where the employee failed to complain. Here, however, Kenworth neglected to post a harassment policy in the workplace and could not produce a managerial employee who was aware of the company's policy. Kenworth's ability to prove that the plaintiff was aware of the company's policy was further hampered by the fact that the purported acknowledgment page was inexplicably missing from her personnel file.

In *Hill v. Children's Village*, — F. Supp. 2d —, 2002 WL 505923 (S.D.N.Y. 2002), the Court explained that an employer may be held liable under Title VII for a hostile work environment if the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it. However, the Court explained, merely possessing a written sexual harassment policy does not enable an employer to demonstrate reasonable care in preventing sexual harassment. The policy must also be reasonably promulgated. The Court refused to dismiss the plaintiff's claim because she raised a question of fact over whether this policy was regularly distributed to employees, claiming that she did not see it until after she was fired. Moreover, the Court noted that the plaintiff had produced evidence from which a jury could find that several managers had insufficient training to recognize sexual harassment when they saw it.

The importance of current policies and training extends beyond harassment issues to managerial decisions. Managers have a lot on their mind – from keeping an eye on the bottom line to ensuring a quality product is produced or service provided. In some instances, compliance with EEO laws may be overlooked. Certainly, today's employers know they cannot discriminate. But are you confident that your managers can effectively articulate their obligations if questioned about them in a deposition or at trial? The Seventh Circuit issued a stark warning to employers that fail to train their managers as to such obligations in a recent opinion. In *Mathis v. Phillips Chevrolet*, 269 F.3d 771 (7th Cir. 2001), the Court stated: "[l]eaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make." Because Phillips Chevrolet made such a mistake, the Court upheld a $100,000 compensatory and liquidated damages award.

A Few Good Ideas

What can an employer do to get back on the right road? There are a number of things that should be done to better protect an employer from discrimination and harassment claims.

(1) ***Update***: First, make sure your policies are current and legally sufficient. Do they cover the various types of discrimination? Is the harassment reporting mechanism easily understood? Does it provide an avenue of redress for employees who may work odd hours and may not have ready access to the persons designated to receive complaints? Also, consider whether your workforce has employees not proficient in English. You may want to provide them with copies of your harassment policy translated into their language(s).

(2) ***Distribution/Acknowledgement***: Once your policy has been reviewed and updated, it should be redistributed to your employees. In doing so, you should obtain acknowledgments signed by each employee and place them in the personnel files or some other central repository. These acknowledgments can be tailored to reflect more than the mere receipt of the policy; they can confirm that the employee understands the policy and was given the opportunity to ask questions.

(3) ***Training***: A comprehensive approach to ensuring compliance with EEO laws includes training your managers and employees. As noted above in *G.D.C. Inc*., employee training is one step that employers should take in demonstrating a good-faith effort to comply with federal (and state) discrimination laws. This is particularly true when it comes to harassment. It is essential that your employees understand what is prohibited conduct and what to do if it happens to them. Indeed, an employee may not realize that Title VII prohibits harassment because of gender (*e.g.*, assembly plant workers harassing a female co-worker because they do not want a woman in the shop) as well as sexually motivated harassment (*e.g.*, groping). And when the training is completed, make sure to have your employees sign a form acknowledging that they attended the training and that the reporting mechanism was discussed and understood. Managers should be made aware of their obligation to report and respond to harassment complaints, as well as the EEO laws with which they must comply. All employees should be informed as to what the laws prohibit and how they can notify the company when they believe the laws have been broken.

If you have any questions about this article, or wish to pursue a review of your harassment/discrimination policies or begin employee/manager training, please call Aaron Gelb (312/609-7844), Bruce Alper (312/609-7890) or any Vedder Price attorney with whom you have worked.

SEVENTH CIRCUIT RULES MUNICIPALITIES CAN BE SUED UNDER THE FALSE CLAIMS ACT BUT STAYS DECISION PENDING APPEAL

Under federal law, state and local government employers are generally immune from punitive monetary damage awards, primarily because punitive damages are meant to punish and deter future illegal behavior, and if a public employer were required to pay punitive damages, the punishment would be borne by the taxpayers who did not benefit from and certainly had no involvement in the illegal behavior of a few government employees.

The False Claims Act ("FCA") establishes civil penalties for "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Such persons are liable for a civil penalty between $5,000 and $10,000, plus three times the amount of damages the Government sustained because of the person's act. The FCA also provides relief to any employee who suffers retaliation after filing a good faith claim under the FCA on behalf of the Federal Government against his or her employer, or one who assists such an employee.

U.S. Supreme Court Holds the FCA Does Not Apply to States

In 2000, the United States Supreme Court definitively held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000), that states are not subject to the provisions of the FCA. The *Stevens* Court reasoned, in part, that states, as sovereign entities within the federal union, are not included in the FCA's term "person," which is not defined in the Act.

Other U.S. Circuit Courts of Appeals Rule Municipalities Also Exempt From FCA Claims

Soon after *Stevens*, the United States Court of Appeals for the Third Circuit (Pennsylvania, New Jersey and Delaware) and Fifth Circuit (Texas, Louisiana and Mississippi) addressed the next logical step: whether local governments are also exempt from the FCA. In *United States ex rel. Dunleavy v. County of Delaware,* 279 F.3d 219 (3d Cir. 2002), and *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486, 493 (5th Cir. 2001), the Third and Fifth Circuits, respectively, held that the treble damages provision of the FCA, added in 1986 to replace a less burdensome remedial damages scheme, renders the Act punitive in nature, and therefore the FCA does not apply to local governments because they enjoy a common law immunity from punitive damages. Both Circuits relied heavily upon the following passage in the Supreme Court's decision in *Stevens*: "[T]he current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities."

Seventh Circuit Hears a Different Drummer . . .

Despite the FCA's mandatory punitive damages provision, the Court of Appeals for the Seventh Circuit (Illinois, Indiana and Wisconsin) recently took a different approach and held that local governments can be sued under the FCA. In *United States ex re. Chandler v. Cook County*, 282 F.3d 448 (7th Cir. 2002), an FCA action was brought against the Hektoen Institute for Medical Research ("Hektoen") and Cook County, Illinois, alleging misconduct by Hektoen and Cook County Hospital in their handling of a $5 million federal research grant they received from the National Institute of Drug Abuse to study the treatment of drug-dependent pregnant women. The District Court dismissed Cook County from the case, holding that a municipality could not be sued under the FCA. Chandler appealed, and the Seventh Circuit reversed, allowing the FCA claim to proceed against Cook County.

. . . But Stays Its Decision

However, recognizing the impact of its ruling, particularly to Cook County if it were required to go to trial on the FCA claims brought against it, the Seventh Circuit has issued a stay in the *Chandler* case, effectively halting further proceedings while the County appeals the ruling to the U.S. Supreme Court. The County filed its petition for *certiorari* with the Supreme Court on April 19, 2002.

Seventh Circuit Disagrees with Other Circuits; Takes Economic Approach

In its *Chandler* decision, the Seventh Circuit rejected the reasoning in *Dunleavy* and *Garibaldi*, instead finding that Cook County can be sued under the FCA, including its provision allowing for the award of punitive damages.

The Seventh Circuit framed the issue as whether Cook County is a "person" within the meaning of the FCA. It held that common law immunity from suit for local governments is "inconsistent with Congress' purpose in adopting the FCA." The Court noted that the definition of "person" has remained the same since the FCA was adopted in 1863, when municipalities were considered "persons" under the Act. Significantly, the Court found that Congress failed to specifically exempt municipalities from coverage under the FCA in 1986 when Congress increased the FCA's damages provisions to a level considered to be punitive.

Focusing on the economic reasoning behind municipality immunity from punitive damages in other contexts, the Seventh Circuit reasoned that in the context of the FCA, "at least a portion of the recovery will come from the monies taken by the municipality through its false claims." Moreover, "even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit" under the presumption that "any ill-gotten gains from the federal government produce more services and lower taxes."

Outcome Uncertain

There is no guarantee the Supreme Court will choose to hear the *Chandler* appeal. The Supreme Court denied *certiorari* of the Fifth Circuit's *Garibaldi* ruling in early January 2002 and denied rehearing in *Garibaldi* in February 2002, after the Seventh Circuit's *Chandler* decision was issued. If the Supreme Court declines to hear the County's appeal, the Seventh Circuit's stay will be lifted and the *Chandler* case will proceed against Cook County. Precedent will then exist for future FCA claims for punitive damages to be brought against municipalities within this Circuit.

If you have any questions about this case or the principles involved therein, please call Charis Runnels (312/609-7711), James Spizzo (312/609-7705) or any Vedder Price attorney with whom you have worked.

ODDS & ENDS

WERE THEY REALLY THE "GOOD OLD DAYS"?

A client's CFO was recently housecleaning and ran across the first contract covering its Detroit Plant. The one-year agreement with the United Steelworkers of America was dated **MARCH 3, 1937**, and it called for a $.10 per hour general increase and a $.70 per hour maximum. New hires started at $.55 per hour (currently minimum wage is $5.15 per hour). Truck drivers were paid a straight weekly rate of $35.00 for all hours.

The workweek was 48 hours, after which time and one-half would be paid. (Remember, this predated the enactment of the Fair Labor Standards Act's forty hour week by about a year.) So, a plant employee at the top rate could gross about $33.60 a week. Just how good a contract was this some 65 years ago?

Well…

The average income was $1,368 per year at that time. Our client's top plant income was $1,747.20.

What did things cost?

Milk - 14¢ a quart
Butter - 24¢ a pound
Coffee - 19¢ a pound
Bread - 9¢ a loaf
Round Steak - 42¢ a pound
Winter Coat - $28.00
Doll - $1.95
Electric Washing Machine - $33.50
Gas Stove - $19.95
Chevy Sport Roadster - $485.00
4 Goodyear Tires - $6.35
Parking all day - Downtown Indianapolis - 9¢
Ticket to a Movie - 25¢
Ticket to the Circus - 25¢
Haircut - 25¢

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