

## Editor's Notepad

This edition of our ALFA Labor & Employment Law Newsletter is being sent to organizations that have been friends of ALFA over the years. We strive to provide useful, timely and informative articles.

Our section put on an excellent seminar in Tucson in March. We were fortunate to have presentations by experienced in-house counsel as well as by our ALFA attorneys. Our mock harassment/retaliation trial with live jury deliberations showed the potential perils and unpredictability of juries. Our breakout sections dealing with the cutting edge issues of employment law allowed in-house counsel and Alfa lawyers to discuss practical solutions to problems on the ever-changing employment law landscape. I think all who attended learned a great deal and also had a good time in a beautiful setting. Many thanks go to Jim Peterson of our San Diego firm and Ron Polly of our Atlanta firm for their work in planning this seminar.

Attendees at the seminar also received CD's of our 50 state compendium of employment-related case law and statutes and our federal case law compendium. We update these compendia annually, and many have commented on how they find the information in these compendia to be useful. Many thanks go to Sarah Lamar of our Savannah firm for a great job in updating and expanding the outlines and in editing and coordinating these efforts.

We hope you find our newsletter useful, but if at any time you want to stop receiving our newsletter, just let us know.

## Inside This Issue

- United States Supreme Court Makes Retaliation ... 2  
Claims Easier To Prove In Most Circuits**  
by Kim Moore, *Strasburger & Price, LLP, Dallas, Texas*
- Blogs Present New Pitfalls For Employers..... 3**  
by David W. Garland, *Sills, Cummis, Epstein, & Gross, P.C., Newark, New Jersey*
- Holiday Update In The UK ..... 4**  
by David Green, *Charles Russell, London, England*
- Light-Duty Policy Is Held To Be ..... 5  
Pregnancy-Blind & Not In Violation  
Of The Pregnancy Discrimination Act**  
by Marc H. Harwell, *Leitner, Williams, Dooley & Napolitan, Chattanooga, Tennessee*
- Can You Release FMLA Claims?..... 6**  
by Sarah H. Lamar, *Hunter, Maclean, Exley & Dunn, P.C., Savannah, Georgia*
- Lack Of Cooperation With An EEOC Investigation ... 6  
& The Failure To Exhaust Administrative Remedies**  
by David M. Eisenberg, *Baker, Sterchi, Cowden & Rice, LLC, Kansas City, Missouri*
- Directory of Member Firms ..... 8**

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# United States Supreme Court Makes Retaliation Claims Easier To Prove In Most Circuits

*Burlington Northern & Santa Fe Railway Co. v. White* (2006 U.S. LEXIS 4895, June 22, 2006)

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The United States Supreme Court recently ruled that Burlington Northern & Santa Fe Railway's ("Burlington Railway") decision to transfer and suspend Sheila White, a forklift operator, following her sexual harassment report and EEOC charge, was actionable retaliation. White was the only woman in her department and she reported being told by her immediate supervisor that women should not be working in the department, as well as other insulting remarks. White's report resulted in an investigation and the suspension of her supervisor. Following her supervisor's suspension, White's position as a forklift driver was given to a more senior man and she was placed into a less desirable position.

Two weeks later, White filed an EEOC charge claiming gender discrimination and retaliation. She later filed a second EEOC charge

for retaliation for being closely monitored by the same supervisor. White was thereafter suspended for 37 days for reported insubordination surrounding a truck delivery. An internal grievance process led to White's reinstatement with back pay. White filed a third retaliation charge following the suspension. After exhaustion of the EEOC administrative process, she filed suit claiming that Burlington Railway retaliated against her by placing her in a less desirable job and suspending her without pay for 37 days. The jury agreed and awarded damages. The jury award was upheld by the Sixth Circuit, en banc, but with differing views on the standard which applies in a retaliation case.<sup>1</sup>

Generally, Title VII's anti-retaliation provision protects employees who oppose a practice prohibited by Title VII or participate in conduct protected by Title VII including filing a charge, testifying, assisting in an investigation proceeding or hearing.<sup>2</sup>

While the definition of retaliation is uniformly recognized, the Circuits have historically had differing interpretations of what is required to succeed on such a claim. For example, the Third, Fourth and Sixth Circuits apply the same standard to retaliation claims as other discrimination claims requiring the action to effect a term condition or benefit of employment.<sup>3</sup> The Fifth and Eighth Circuits allow retaliation cases to proceed only when there is an ultimate employment decision involved including hiring, termination, leave, promotion or compensation.<sup>4</sup> The Seventh and District of Columbia Circuits, on the other hand, require the employee to show that an employer's conduct would be material to the reasonable person.<sup>5</sup> Finally, the Ninth Circuit, following EEOC guidance, requires only that the conduct be based on a retaliatory motive and be reasonably likely to deter the protected activity.<sup>6</sup>

Relying on the specific language differences in the anti-retaliation provisions of Title VII, in comparison to the discrimination provisions of Title VII, the Supreme Court concluded the standard for retaliation cases should not be identical to the standard applied for other types of discrimination cases. Because the Court believed Congress made a distinction between the definition for discrimination and retaliation, the Supreme Court determined that employers can be liable for retaliation if an employee engages in protected activity and the employers' actions "interfere with an

employee's efforts" to avoid discrimination. The standard adopted by the Court requires a plaintiff to prove that a reasonable employee would find the action materially adverse "which in this context means it might well have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (citations omitted.) Based on the ruling, the standard for determining harm is based on the objective, reasonable employee. Further, the concept of materiality, according to the Court, is important because not every harm to an employee is actionable. However, courts must consider the context of each particular situation. The Court gives the example of a change in work schedule not being significant to most employees but being significant to a mother of school age children.

Applying the standard announced by Justice Breyer, the Court upheld the jury's decision against Burlington Railway concluding that reassignment of Sheila White's job duties to a more difficult job and a 37-day suspension, even with back pay, following protected activity, constituted retaliation.

Overall, in the majority of Circuits, the Court's decision is a departure from existing precedent which would have required a plaintiff to more closely associate the retaliation with a tangible employment decision. Now, it appears that a plaintiff can prevail if a reasonable employee would find that the challenged action would have, in some significant manner, deterred the participation in protected activity.

<sup>1</sup> 364 F.3d at 789, 795-800 (6th Cir. 2004).

<sup>2</sup> 42 USC § 2000e-3(a).

<sup>3</sup> *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Burlington Northern*, 364 F.3d at 795-800.

<sup>4</sup> *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

<sup>5</sup> *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).

<sup>6</sup> *Ray v. Henderson*, 217 F.3d 1234, 1242-1243 (9th Cir. 2000).

# Blogs Present New Pitfalls For Employers

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Personal Web logs, also known as "blogs," have become increasingly common in the United States. With an estimate of more than 8 million blogs in the country, employers who wish to protect their interests in this very public forum face unique challenges, especially as much of the conduct occurs off site and after working hours. Indeed, a recent rash of high-profile employment disputes arising from blog postings suggests that employers should evaluate their existing technology policies and, where necessary, implement new policies and strategies to adequately safeguard their interests.

## Blogging

Blogging is the expression of opinion in an online journal known as a Web log or blog. The blog provides a forum for the random musings of the author or blogger. Some blogs are devoted solely to business or politics while others are purely personal. Very often, the personal blogs focus on the discussion of bloggers' day to day activities, including their jobs and their colleagues. Blogging may occur during the workday on company computers or it may occur after

hours on the employee's personal computer.

## Typical Blogging Problems

Blogging creates numerous problems for employers. Employees are able to express their gripes about their employers, bosses or co-workers on a forum that is available to millions of people. Such comments, referred to as "cybersmeats," can poison the blogger's relationships at work and negatively impact the employer's business relations and profitability.

Even more damaging, employees can disclose proprietary business information in this very public forum. For example, in *Immunomedics, Inc. v. Doe*, 775 A.2d 733 (N.J. Super. App. Div. 2001), an employee of a biopharmaceutical firm allegedly violated her confidentiality agreement and breached her common law duty of loyalty by posting on the Internet confidential and proprietary information. The firm served a subpoena on Yahoo!, seeking the true identity of the employee, who went by the name "moonshine\_fr." The employee moved to quash the subpoena, but was unsuccessful and Yahoo! was required to disclose her identity. On the other hand, in *Dendrite Intern., Inc. v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), decided on the very same day, the same Appellate Division panel denied an application for expedited discovery to compel Yahoo! to disclose the identity of another anonymous Internet user against whom the company had filed a claim for defamation based on postings that Dendrite "was secretly and unsuccessfully 'shopping' the company." Because the company was unable to demonstrate that it had been harmed, the user's anonymity was maintained.

Blogs can also expose employers to liability if they are used to post harassing, discriminatory, offensive, menacing or threatening messages. Finally, blogging decreases productivity if employees are updating the blog during working hours or reading new entries on the blog during work time.

## Recent Employment Cases

Recently, a number of employment disputes related to blogging have received considerable attention. Jessica Cutler, a staff assistant for U.S. Sen. Mark DeWine, was terminated, purportedly because details of her sex life and "the peccadilloes of the men she said were her six current sexual partners, including a married Bush administration official who met her in hotel rooms and gave her envelopes of cash; a senator's staff member who helped hire her, then later bedded her; and another man who liked to spank and be spanked which she had posted on her personal blog, were carried in a popular Internet gossip column. Ellen Simonetti, a flight attendant at Delta Airlines was terminated for posting on her blog, known as "Queen of the Sky," provocative pictures of herself in her uniform on an empty Delta plane. The airline deemed the pictures "inappropriate" and a misuse of her uniform.

Simonetti filed a Charge with the United States Equal Employment Opportunity Commission alleging gender discrimination in that the airline allowed male employees to post pictures of themselves in their uniforms on other Websites. She also started an on-line petition demanding that employers advise employees of their blog policies.

A blogger at the Durham Herald-Sun, Rachel Mosteller, was terminated for posting negative comments about the paper's employee morale program on her blog during work time on her company computer, even though she wrote under a pseudonym and did not identify her employer or any co-workers by name. Specifically, she posted "I really hate my place of employment," referred to the "stupid little awards" that people were receiving merely "FOR DOING THEIR JOB." Mosteller was terminated the next day. Claiming that she was "still in shock," Mosteller explained "[c]onsidering I treated the blog as a smoke break, I don't think of it as a problem."

An Atlanta blogger, who goes by the pseudonym Karsh, ultimately quit his job in connection with his blogging. Karsh's supervisors discovered his blog in which he wrote about unnamed fellow employees. In recounting his boss's instruction to apologize for what he had posted, he referred to his boss as "Skeletor" and "Wednesday Adams." Thereafter, he was told to dismantle his blog, and threatened with a demotion. He resigned instead.

Yet another blogger, Michael Hanscon, a Xerox employee working at Microsoft, was banned from Microsoft after posting on his blog a picture of a shipment of Apple computers being delivered at Microsoft's Washington headquarters. Hanscon posted the picture on his own time from his own computer.

## Blogging Policies

Employers need to respond to this sharp rise in blogging. Currently, most technology policies only address the use of company-owned equipment during work time. Employers now need to consider amending their policies to combat behavior that may occur outside of work time and off the employer's premises.

Initially, employers should review their existing acceptable use policies to ensure that they minimize the use of company equipment for non-business-related purposes and that they make it clear that they are not responsible for protecting employees' privacy or for maintaining the confidentiality of any personal business conducted on company equipment.

Technology neutral policies should be amended or implemented to prohibit written communications by employees about their employer, superiors, or co-workers

in a public forum that could damage the company or the individuals or bring them into disrepute. Employers should be careful, however, not to prohibit employees for discussing terms and conditions of employment that could be deemed protected concerted activity as this discipline might violate the National Labor Relations Act. For example, if an employee posts a message on his blog that he is unhappy with his salary and that he and his co-workers deserve increased wages and should fight for them, discipline would be inadvisable. Similarly, such policies cannot be used to muzzle bona fide whistleblowers.

Employers should also review and modify their existing anti-harassment and anti-discrimination policies to address blogging. Under these policies, it should be a violation to harass or discriminate against an employee on a blog to the same extent it is impermissible to do so in the workplace. It is essential that employers make employees aware of these new or revised policies so that employees cannot claim ignorance and the employer can effectively discipline violators.

Finally, technology policies should be carefully drafted and regularly updated and employee education should be ongoing. In addition, it is critical that technology policies exist side-by-side with strong confidentiality agreements which make it crystal clear that confidential information may not be posted online without express authorization.

### Conclusion

Employers need to address this ever-growing form of communication. It is clear that blogging is on the rise and is going to continue to grow. Just as employers had to address the Internet and electronic mail in the workplace, it is now necessary to address blogs. Therefore, employers should evaluate existing policies and should amend them or adopt new technology-neutral policies to address blogs and to prohibit written employee communications in a public forum that could damage the company itself or the blogger's co-workers.

## Holiday Update In The UK

By David Green

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frequently appears in the national press and was highly rated by HR professionals in a survey carried out by Employer's Law.

Holidays have recently been the focus of case law, future legislation and a survey. On 13 June 2006 the UK Government's Department of Trade and Industry (DTI) published a consultation paper seeking views on the proposal to increase statutory holiday entitlement in the UK whereby all full-time workers will be entitled to 4 weeks plus 8 further days to take account of public holidays. While the government proposes to increase holiday entitlement a recent survey by the Chartered Management Institute found that 63% of managers in the UK failed to use their full holiday entitlement and that while they encourage their workforce to take holiday to cope with workplace stress, they failed to follow their own advice giving their organisations unpaid extra labour worth an estimated £3.5 billion per year!

The question of holiday entitlement has also occupied the Courts and Tribunals recently and there have been a large number of cases on different aspects of this.

### Rolled-up holiday pay

In March this year the European Court of Justice (ECJ) gave its decision in *Robinson-Steele v PD Retail Services* and others on whether it is lawful to roll-up holiday pay. It held that rolling-up is not compatible with the Working Time Directive ("WTD") and that it is not lawful for employers to attribute part of the worker's pay as holiday pay. However, the ECJ did go on to say that if a worker had been paid an amount in respect of rolled-up holiday pay it could be set off against the worker's entitlement to holiday pay for a specific period of annual leave provided the arrangement was "trans-

parent and comprehensible". Although the ECJ stated that member states should take measures to ensure that any practice which is incompatible with the directive is not continued, the DTI has decided it is not going to amend the Working Time Regulations (1998) (WTR) but has issued revised guidance instead. The practical effect of this is that many employers will probably continue the practice of rolling-up partly because of the difficulty of administering holiday pay in the case of casual workers or those who work irregular hours and also because there may be support for this arrangement from workers.

The case has been remitted back to the Court of Appeal so it remains to be seen how it will deal with the issue and whether it will take a harder line going forward than the DTI.

### Holidays and shift pay

In the recent case of *British Airways PLC v Noble* the Court of Appeal held that the arrangements for paying annualised shift pay were not in breach of the WTR. This was done by working out the amount paid in respect of shifts per week, multiplying the amount by 48 and dividing the total by 52 to take into account four weeks leave. The amount was then paid weekly in addition to basic pay throughout the year. The employees claimed that this meant they were funding their own holiday pay. The Employment Appeal Tribunal (EAT) agreed but the Court of Appeal found that this was not in breach of the WTR. The employees were paid the same amount throughout the year which distinguished this from rolled-up holiday pay arrangements where workers were not paid when they were on leave. In addition there was no disincentive from taking holiday. However, this may not be the end of the matter as the claimants have sought leave to appeal to the House of Lords.

### Part timers and public holidays

As mentioned above, the DTI consultation is increasing statutory holiday to ensure that all workers will benefit from the 8 days of public holidays per year, although the additional holiday will not necessarily have to be taken on those dates. This means for part-timers they will be entitled to additional holiday but it will be pro rated.

The issue of how the pro rata entitlement should be calculated for part-timers who do not work on public holidays was considered in the recent EAT decision of *McMenemy v Capita Business Services Ltd*. This case involved an employee who did not work on Mondays and complained that he was suffering a detriment compared to full-time workers as he did not receive days off in lieu. The EAT found that although he was subject to less favourable treatment, this was because he did not work on Mondays rather than because of his part-time status.

However, this case was slightly unusual in that the business operated seven days a week and full-timers who worked Tuesday to Saturday had been treated in the same way. It remains to be seen how a tribunal would treat a part-timer's pro rata entitlement in respect of a business that operates Monday to Friday and the DTI guidance suggests that part-timers who do not work Mondays should still be entitled to days off in lieu in respect of their pro rata entitlement to public holidays.

### Payment in lieu of annual leave

Part of the DTI consultation paper seeks views on whether employers should be allowed to pay workers in lieu of the additional 8 days' leave and whether workers should be able to carry this over. The question of paying in lieu of annual leave was considered by the ECJ in *Federatie Nederlandse Vakbeweging v Dutch State*. Under a national law in Holland workers are allowed to receive a payment in lieu of annual leave which is carried over from the previous year's minimum entitlement.

The ECJ held that this was in breach of the WTD. Although there is nothing in the Directive which means that leave cannot be carried over to the next holiday year, it does specifically state that a payment in lieu is not permitted (apart from on termination). The reasoning behind this is to ensure that from a health and safety point of view the worker actually takes their holiday rather than being able to opt for a payment in lieu. However, there is nothing in the Directive to stop workers carrying over leave and taking it in the next holiday year, although this is currently specifically precluded by the WTR in the UK.

### Holiday pay and sickness

The issue of the treatment of holiday while an employee is on long term sick leave is still outstanding as the claimants have Court of Appeal found that employees on long term sick leave were not entitled to take paid holiday during that time and if they are absent for the entire holiday year are not entitled to a payment in lieu of untaken holiday if they are dismissed.

The Court of Appeal also overturned *List Design v Douglas* concerning a worker's entitlement to claim for non-payment of holiday pay and confirmed that a worker cannot claim for this as a deduction from wages and that the remedy is under WTR. This limits any claim on termination to holiday pay during the holiday year only and this part of the decision was followed by the EAT in *Apex Masonry Contractors Ltd v Everitt*. The House of Lords is due to be hear the appeal at the end of October 2006 so watch this space!

### Conclusion

These recent decisions, apart from that on rolled-up holiday pay, have tended to

favour the employer and it remains to be seen what the impact will be on businesses once all workers become entitled to 8 extra days' holiday. The DTI consultation closes on 22 September 2006 with plans for the regulations to come into force in October 2007.

One point arising from the Chartered Management Institute survey is the potential risk of stress claims from senior members of staff who are not taking holiday. In the recent Court of Appeal decision in *Hone v Six Continents Retail Ltd* a pub manager was successful in his claim for damages for psychiatric injury caused by hours worked significantly in excess of the 48-hour week. If employers visibly and positively promote and encourage all employees, including senior members of staff, to take their full holiday entitlement, this may ultimately aid in a defence to and/or minimise the risk of stress claims as a result of overwork.

## Light-duty Policy Is Held To Be Pregnancy-blind And Not In Violation Of The Pregnancy Discrimination Act

By Marc Harwell

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In *Reeves v. Swift Transportation Company, Inc.*, No. 05-5271 (W.D. Tenn. May 16, 2006) (recommended for full-text publication), the United States Court of Appeals for the Sixth Circuit confirmed the judgment of the District

Court which had granted Swift Transportation's Motion for Summary Judgment on the issue of whether Swift's termination of a pregnant employee named Reeves violated the Pregnancy Discrimination Act under a theory of disparate treatment.

In confirming the judgment of the District Court, the Court of Appeals held that Swift's light-duty policy was pregnancy-blind and did not support an inference of pregnancy discrimination without any proof from the plaintiff of discriminatory intent on the part of Swift. In reaching this decision, the Court considered the following facts:

Reeves was a truck driver for Swift Transportation and had been informed by Swift Transportation at the start of employment that her job required her to bend, twist, climb, squat, crouch, and balance. She knew that she had to use a dolly and that she had to push or pull weight weighing up to 200 pounds and that she had to occasionally push freight weighing up to 100 pounds. In completing her application for employment, she represented that she could perform such physical labor – in addition to other physical duties associated with the job.

Shortly after Ms. Reeves started work with Swift Transportation, she said that she discovered that she was pregnant. Her physician restricted her to light duty work pending her appointment with an obstetrician. Swift told Ms. Reeves that no light duty work was available, and she was sent home. Upon seeing Ms. Reeves, the obstetrician also restricted Ms. Reeves to light duty work. At all times, Swift maintained a policy providing light duty work for only employees with workers' compensation claims. Ms. Reeves did not have a workers' compensation claim pending. Her need for light duty work was wholly related to her pregnancy. Swift maintained that if Ms. Reeves had filed a workers' compensation claim for an on-the-job injury while she was pregnant, then light duty work would have been afforded her under the light duty policy that applied only to workers' compensation claimants. Swift never made any exceptions to its light duty policy.

The District Court held that Swift's policy was not a pretext for discrimination. Swift did not take into account pregnancy and did not make exceptions for non-pregnant employees while enforcing the policy against pregnant employees.

In explaining its holding, the Court stated that to rule otherwise would afford pregnant women more benefits and better treatment than other employees – instead of the equal benefits and treatment that was intended by the Act.

It is important to note that Reeves produced no direct evidence of pregnancy discrimination. She only argued that the effect of the

Swift light-duty policy was to treat pregnant employees differently from non-pregnant employees who were injured on the job. In addressing Ms. Reeves' argument, the Court stated that Ms. Reeves sought preferential medical treatment under the Pregnancy Discrimination Act rather than equal treatment. The Court held that Swift Transportation was not under any obligation to apply the same light duty work to pregnant employees that it afforded workers' compensation claimants.

Because of Ms. Reeves' failure to provide any direct evidence of discriminatory intent; because of Ms. Reeves' failure to provide any circumstantial evidence that Swift's policy was a pretext for discrimination; and because of Swift's introduction of proof of a justifiable and non-discriminatory reason for the termination of Ms. Reeves; i.e., her incapacity to perform full duty labor as an employee without a workers' compensation claim, the Court concluded that the plaintiff's claim failed as a matter of law.

## Can You Release FMLA Claims?

By Sarah H. Lamar

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Recently, the Fourth Circuit Court of Appeals, the federal appellate court covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia, held that an employee

could sue her former employer under the FMLA even though the employee had signed a general release of all claims against the employer. See *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005). In *Taylor*, the employee was terminated in a reduction in force, based in part on her extensive absenteeism. Although the employer had granted the employee FMLA leave for some of her absences, it wrongly refused to count all her absences as FMLA leave, despite the employee's repeated requests that it do so. When the employer terminated the employee it offered her severance in the amount of approximately \$12,000 in exchange for a general release of all claims against the employer. The employee signed the release, accepted the severance and then sued the employer for denying her FMLA-protected leave, terminating her for medical absences, and retaliating against her for complaining about the employer's violation of the FMLA.

The Fourth Circuit held that the employee's release of her FMLA claims was invalid and that she was not prohibited from suing her former employer. In so holding, the court relied upon a DOL regulation which states that "employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d). The court distinguished an employee's ability to release claims under Title VII and other anti-discrimination statutes, finding that the FMLA was more analogous to the FLSA in its statutory scheme than Title VII and noting that an employee cannot waive FLSA rights unless such waiver is approved by the DOL or a court.

This decision creates a split in the circuits which have addressed whether FMLA claims may be waived. In 2003, the Fifth Circuit Court of Appeals, the federal appellate court for Louisiana, Mississippi and Texas, held that a former employee's release of a retaliation claim under the FMLA was valid and enforceable. *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316, 320-21 (5th Cir. 2003). The *Faris* court found that a cause of action for retaliation was not a "substantive" right under the FMLA and that 29 C.F.R. § 825.220(d) did not govern the post-dispute resolution of non-substantive rights under the Act. "A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims." *Id.* at 321. Two other circuits have also allowed waiver of retaliation claims under the FMLA. See *Halvorson v. Boy Scouts of America*, 2000 U.S. App. LEXIS 9648 (6th Cir. May 3, 2000); *Schoenwald v. Arco Alaska, Inc.*, 1999 U.S. App. LEXIS 20955 (9th Cir. Aug. 30, 1999).

Although the remaining Federal Courts of Appeal have not yet addressed this issue, employers should be aware that any severance agreement or other settlement agreement which includes a release of FMLA claims might not be enforceable. Moreover, under the *Taylor* case, an employee may be able to accept the severance monies in exchange for signing the release, and then sue the employer anyway.

## Lack Of Cooperation With An EEOC Investigation And The Failure To Exhaust Administrative Remedies

*Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 96 FEP Cases 1156 (10<sup>th</sup> Cir. 10/20/05)

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Davis Shikles began working for Sprint in 1997, at the age of 56. In March 2002, he was dismissed as part of a reduction in force. While Plaintiff was the oldest employee in his job classification at the time of his layoff, nearly all of the other employees laid off in his department at that time were under 40, and other co-workers over the age of 40 were retained. Shikles filed a timely charge of discrimination with Equal Employment Opportunity Commission, alleging that Sprint had violated the Age Discrimination in Employment Act.

Sprint filed a position statement with regard to Shikles' allegations, and some 91 days after the charge was filed, Sprint received a copy of Shikles' EEOC dismissal and Notice of Right-to-Sue. The EEOC notice reflected that the agency had dismissed the charge because Shikles "... failed to provide information, failed to appear or be available for

interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve [his] charge".<sup>1</sup>

Shikles sued in U.S. District Court, Kansas City, Kansas, soon after receiving his right-to-sue notice. Sprint determined that it would defend this action on the grounds that (1) Shikles was terminated for legitimate business reasons, and not because of his age; and (2) by failing to cooperate with the EEOC investigation, Shikles had failed to exhaust his administrative remedies, which barred his lawsuit.

Sprint issued a Freedom of Information Act request to the EEOC, for its investigative file regarding Shikles' charge of discrimination. The file showed that for more than three months, the EEOC senior investigator in charge of the case tried in vain to arrange a telephone interview with Shikles, and to obtain from him documentation needed to investigate his complaint. Appointments were canceled, phone messages were unreturned, and requested documents were never furnished. A warning from the Investigator that the charge would be dismissed for lack of cooperation was ignored.

Sprint asked the EEOC if it would make its investigator available for a deposition. After some negotiation with the Regional Attorney's office, the EEOC agreed to furnish an affidavit from the investigator, which spelled out the relevant facts that led to its dismissal based on Shikles' failure to cooperate.

Following discovery, Sprint moved for summary judgment. The District Court ruled in Sprint's favor, holding:

- 1 Shikles had indeed failed to cooperate in the EEOC's investigation of his discrimination charge, and thus had failed to exhaust his administrative remedies.
- 2 Alternatively, even if Shikles somehow could be excused from exhausting his administrative remedies, he raised no triable issue of age discrimination.

Plaintiff appealed to the 10<sup>th</sup> Circuit, and in the words of Kansas City Star business reporter Diane Stafford<sup>2</sup>, this is where the case became "more interesting".

"The EEOC submitted a friend-of-the-court brief for the plaintiff — the very man who had failed to help the agency

<sup>1</sup> Sprint learned from a Freedom of Information Act request that in the year 2001-02, only 12 of 1,394 charges were closed by the Kansas City office on the basis of the charging party's failure to cooperate. Another 24 cases were closed based on charging party's failure to respond.

<sup>2</sup> *Kansas City Star*, October 28, 2005, page C-1, "At Work: It's Better to Stay in the System".

gather information about his case.

The EEOC argued in its brief that it 'does not agree that a charging party's failure to cooperate during the administrative process precludes him from later proceeding against his employer in court.'"<sup>3</sup>

It may strike the casual observer as odd for the EEOC to argue that a charging party is free to thumb his nose at the EEOC investigative process, and still have his day in court. The 10th Circuit was apparently somewhat perplexed as well, and it held that Shikles' lack of cooperation constituted a failure to exhaust administrative remedies, which is a jurisdictional prerequisite to suit under the ADEA, and that the District Court therefore lacked subject matter jurisdiction over his claim. *Shikles v. Sprint/United Management Company*, 426 F.3d 1304, 96 FEP Cases 1156 (10<sup>th</sup> Cir. Oct. 20, 2005). In so holding, the Court concluded that:

- 1 Consistent with its prior holdings that a plaintiff must cooperate with the EEOC to exhaust administrative remedies under Title VII and the ADA, there is also a duty to cooperate under the ADEA.
- 2 Even though a number of reported cases on failure to cooperate/failure to exhaust involve federal employees, the duty to cooperate applies in the private sector, as well.
- 3 Plaintiff's duty to cooperate is not unduly onerous, and does not require "perfect cooperation". Rather, "[i]t is only when a plaintiff's non-cooperation effectively prevents the EEOC's investigation and conclusion efforts that the EEOC proceeding essentially becomes a sham or meaningless proceeding that a charging party's non-cooperation will amount to a failure to exhaust administrative remedies."
- 4 Public policy favors a requirement of good faith participation in the administrative process by the charging party. "...[C]ooperation by the charging party is indispensable to the EEOC's processing of a charge...This is because the time is intended to be used for meaningful dialogue and conciliation efforts, not just as a cooling-off period, and the EEOC cannot engage in conciliation without the active engagement of both sides to a dispute."
- 5 The EEOC's "interpretation" that cooperation is not a prerequisite to suit is not entitled to special deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), because that interpretation was articulated only in the course of litigation (e.g., in an amicus brief) rather than in a deliberative exercise of interpretive authority (e.g., in regulations or formal enforcement guidelines).

<sup>3</sup> Following the EEOC's appearance as *amicus curiae*, the U.S. Chamber of Commerce and Equal Employment Advisory Council entered amicus appearances in support of Sprint's position.

- 6 In deciding whether a plaintiff has failed to exhaust administrative remedies, a district court must review the conduct that gave rise to the agency's decision to dismiss, not the agency's decision itself.

**Practice tips for employers:** Should you receive an EEOC (or state EEO agency) dismissal letter indicating that the charge was dismissed for lack of cooperation, make sure you assert this as a defense in any subsequent lawsuit. Because the court will not simply "adopt" an EEOC finding of non-cooperation and must conduct its own examination of the underlying facts, you must obtain the EEOC's investigative file, and get either an affidavit or deposition testimony from the investigator, to make sure that these facts are properly placed on-the-record.

**Possible future developments:** The EEOC has similarly appeared as *amicus curiae* in a Title VII case currently pending before the 7<sup>th</sup> Circuit, entitled *Doe v. Oberweis Dairy* (cases no. 04-3680, 05-1998, and 05-3770). Here too, the EEOC is arguing against a district court's dismissal based on failure to cooperate/failure to exhaust. The *Oberweis Dairy* case was argued on May 30, 2006, in front of Circuit Judges Posner, Kanne and Wood, and is awaiting decision.

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