

Labor and Employment

Update

ALFA International's Labor and Employment Practice Group reports on legislation, regulations and decisions affecting Labor and Employment Law.

William M. Trott, Editor

Young Moore and Henderson, P.A.
Raleigh, North Carolina
Phone: (919) 782-6860
Fax: (919) 782-6753
wmt@ymh.com
www.ymh.com



William M. Trott is a shareholder in Young Moore and Henderson, P.A. in Raleigh, North Carolina. He received his A.B. and J.D. from the University of North Carolina and an LLM

with highest honors from George Washington University. He has practiced labor and employment law for over 20 years and has been recognized by *Business North Carolina* as one of the "legal elite" in labor and employment law.

Donald Sweeney, Assistant Editor

Bradley Arant Rose & White, LLP
Birmingham, Alabama
Phone: (205) 521-8405
Fax: (205) 488-6405
dsweeney@bradleyarant.com
www.bradleyarant.com.



Donald Sweeney is a member of the Birmingham, Alabama firm of Bradley Arant Rose & White, LLP, where he practices employment law and litigation. He received his

undergraduate and J.D. degrees from Alabama. He represents private and public corporations in employment cases and has appeared in matters before the United States Supreme Court, federal courts of appeal, and state supreme courts. He serves as educational advisor to the National Governor's Association. He served as President of the National Council of School Board Attorneys. He authored *Education Law: A Legal Reference*. He was selected as Lawyer of the Year for the City of Birmingham.

Editor's Notepad

Welcome to the inaugural edition of the ALFA Labor & Employment Practice Group's electronic newsletter. We hope you enjoy this publication and find it a useful tool in your legal practice. This complimentary newsletter is being sent to ALFA lawyers and clients in the United States and overseas. It is designed to produce a presentable and distributable document when printed on a color printer.

ALFA International, formerly known as the American Law Firm Association, is the oldest legal network in the world and remains one of the largest. Our membership is comprised of 120 law firms with 90 of these firms based in the U.S. and 30 firms located throughout Europe, Latin America, and the Pacific Rim. ALFA law firms maintain offices in 95 of the 100 largest metropolitan areas in the United States. Over 9,000 lawyers practice with our member firms.

The "heart and soul" of the ALFA organization are its 10 Practice Groups. One of the strongest of these subject matter working groups is the Labor & Employment Group. ALFA's labor and employment lawyers have joined together to create a strong and trusted referral network, providing clients with experienced labor law counsel throughout the United States and in many foreign locations. Members of the Labor & Employment Practice Group also publish a wide range of compendia, digests, and manuals that serve as outstanding reference sources for ALFA lawyers and clients alike. The Group presents an annual seminar that will take place this year in New Orleans on November 10th through 12th (details of this program are provided below).

ALFA's Labor & Employment Practice Group will be presenting another of its popular seminars this fall. On November 10-12, 2004, the Group will host a program entitled "Under Siege: Preventing, Remediating and Defeating Employment Claims of the Global Workforce." The seminar will take place at the Wyndham New Orleans (Canal Place). Topics will include discussions of wage and hour, privacy, liability insurance, non-competition, discrimination, hiring/termination, and trial practice issues. Break-out sessions will permit focused analysis of many of these subjects. Meals and entertainment will be designed to maximize networking opportunities. We hope you consider attending this great event. For more information, please contact ALFA's Amy Sammon at asammon@alfanet.org.

In this Issue

Page 2

DOL's New Rules For Minimum Wage And Overtime Exemptions Become Effective August 23, 2004

Page 7

Fabricated EEOC Charges—What's A Business To Do?

Page 11

Is A Request To Work From Home A Reasonable Accommodation Under The ADA?

Page 13

How To Conduct An Effective Internal Investigation

Page 15

Are Employees' Representatives Needed For Employees Working In France For Foreign Companies?

Page 16

Labor & Employment Practice Group Directory



U.S. Department of Labor's New Rules for Minimum Wage and Overtime Exemptions under FLSA Become Effective August 23, 2004

By Michael R. Buchanan

Strasburger & Price, L.L.P.
 901 Main Street, Suite 4300
 Dallas, Texas 75202
 Phone: (214) 651-4642
 Direct Fax: (214) 659-4174
 e-mail: mike.buchanan@strasburger.com
 www.strasburger.com



Mike Buchanan is a partner in the Dallas, Texas ALFA law firm of Strasburger & Price, L.L.P., where he chairs the firm's 14 lawyer labor and employment practice group. Mike is a graduate of Vanderbilt University

and the Baylor School of Law. In between studies, he served as a Surface Warfare Officer in the United States Navy. Mike represents business clients in complex labor and employment matters ranging from the defense of discrimination claims to the prosecution and defense of non-competition and trade secret disputes. He is the immediate past chair of the ALFA Labor and Employment Practice Group.

Since March of last year, the U.S. Department of Labor (DOL) has been working extensively to implement sweeping changes to the minimum wage and overtime pay exemptions under the Fair Labor Standards Act (FLSA). The changes, first proposed on March 31, 2003, were published in the Federal Register as final rules on April 23, 2004, and will become effective, to be codified at 29 C.F.R. pt. 541, as of August 23, 2004. As of presstime, efforts by both Houses of Congress to derail the new rules have proved unsuccessful.

The new rules, which the DOL has called "FairPay" rules, expand the number of

workers eligible for overtime by nearly tripling the salary threshold. Under the 50-year-old DOL regulations, only workers earning less than \$8,060 annually were guaranteed overtime. Under the new rules, workers earning \$23,660 or less—approximately \$455 per week—are guaranteed overtime. The new rules strengthen overtime protection for 6.7 million lower-wage salaried workers, including 1.3 million salaried white collar workers who were not entitled to overtime pay under the existing regulations. While employers may incur implementation costs and annual payroll cost increases, the DOL contends that the new rules are expected to free up hundreds of millions of dollars each year in litigation costs.

FLSA EXEMPTIONS GENERALLY

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Sections 13(a)(1) and 13(a)(17) of the FLSA also exempt certain computer employees. To qualify for exemption, employees generally must meet requirements pertaining to their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine an employee's exempt status. In order for an exemption to apply, an

employee's specific job duties and salary must meet all the requirements of the regulations.

Under the FLSA exemptions, an employee's "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

COMPARISON OF FLSA EXEMPTIONS

The following charts illustrate and compare the current requirements for FLSA exemptions as an executive, administrative, professional, or computer employee with the new final regulations issued by the DOL.

To Qualify For the Executive Exemption:

Management—Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances;

(continued on page 3)

EXECUTIVE EMPLOYEES	Current Long Test Analysis For Exemption	FAIRPAY Rules Analysis For Exemption (Effective 08/23/04)
	Salary \$155 per week	\$455 per week
Duties	<ul style="list-style-type: none"> ▪ Primary duty—management of the enterprise or a recognized department or subdivision ▪ Customarily and regularly directs the work of two or more other employees ▪ Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight). ▪ Customarily and regularly exercises discretionary powers ▪ Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work 	<ul style="list-style-type: none"> ▪ Primary duty—management of the enterprise or a recognized department or subdivision ▪ Customarily and regularly directs the work of two (2) or more other employees or their equivalent ▪ Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight)

U.S. Department of Labor's New Rules for Minimum Wage and Overtime Exemptions under FLSA Become Effective in August of 2004 (continued from page 2)

disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Department or Subdivision—The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Customarily and Regularly—The phrase “customarily and regularly” means greater

than occasional but less than constant; it includes work normally done every work-week, but does not include isolated or one-time tasks.

Two or More—The phrase “two or more other employees” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular Weight—Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion or any other

change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee’s recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

To Qualify for the Administrative Exemption:

Directly Related to Management or General Business Operations—To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Employer’s Customers—An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, employees acting as advisors or consultants to their employer’s clients or customers as

(continued on page 4)

EXECUTIVE EMPLOYEES	Current Long Test Analysis For Exemption	FAIRPAY Rules Analysis For Exemption (Effective 08/23/04)
	Salary \$155 per week	\$455 per week
Duties	<ul style="list-style-type: none"> ▪ Primary duty— <ul style="list-style-type: none"> a. performing office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers, or b. performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training (paid at least equal to the entrance salary for teachers in the school system ▪ Customarily and regularly exercises discretion and independent judgment ▪ Regularly and directly assists a proprietor or exempt executive or administrative employee; or performs specialized or technical work requiring special knowledge under only general supervision; or executes special assignments under only general supervision 	<ul style="list-style-type: none"> ▪ Primary duty—performing office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers ▪ Exercises discretion and independent judgment with respect to matters of significance

U.S. Department of Labor’s New Rules for Minimum Wage and Overtime Exemptions under FLSA Become Effective in August of 2004 (continued from page 3)

tax experts or financial consultants, for example may be exempt.

Discretion and Independent Judgment—In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employ-

ee’s particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs

work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee’s decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Matters of Significance—The term “matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

Educational Establishments and Administrative Functions—The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as cur-

(continued on page 5)

LEARNED PROFESSIONAL EMPLOYEES	Current Long Test Analysis For Exemption	FAIRPAY Rules Analysis For Exemption (Effective 08/23/04)
	Salary \$170 per week	\$455 per week
Duties	<ul style="list-style-type: none"> Primary duty—performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study Consistently exercises discretion and judgment Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time 	<ul style="list-style-type: none"> Primary duty—performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment Advanced knowledge must be in a field of science or learning Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

CREATIVE PROFESSIONAL EMPLOYEES	Current Long Test Analysis For Exemption	FAIRPAY Rules Analysis For Exemption (Effective 08/23/04)
	Salary \$170 per week	\$455 per week
Duties	<ul style="list-style-type: none"> Primary duty – performing work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee Consistently exercises discretion and judgment Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work 	<ul style="list-style-type: none"> Primary duty – performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor Work performed must be “in a recognized field of artistic endeavor”

U.S. Department of Labor's New Rules for Minimum Wage and Overtime Exemptions under FLSA Become Effective in August of 2004 (continued from page 4)

riculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities

To Qualify for the Professional Exemptions:

1) Learned Professional Exemption

Work Requiring Advanced Knowledge-

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning-Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction-The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evi-

dence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

2) Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent-This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize

and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor-

This includes such fields as, for example, music, writing, acting and the graphic arts.

Practice of Law or Medicine-An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

To Qualify for the Computer Employee Exemption:

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

OTHER FLSA EXEMPTIONS

Outside Sales Employees-To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(continued on page 6)

U.S. Department of Labor's New Rules for Minimum Wage and Overtime Exemptions under FLSA Become Effective in August of 2004 (continued from page 5)

COMPUTER EMPLOYEES	Current Long Test Analysis For Exemption	FAIRPAY Rules Analysis For Exemption (Effective 08/23/04)
	Salary \$170 per week or \$27.63 per hour	\$455 per week or \$27.63 per hour
Duties	<ul style="list-style-type: none"> ▪ Primary duty—performing work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis; programming, and software engineering ▪ Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field ▪ Consistently exercises discretion and judgment ▪ Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time ▪ Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work 	<ul style="list-style-type: none"> ▪ Primary duties – <ul style="list-style-type: none"> – Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional application specifications – Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications – Design, documentation, testing, creation or modification of computer programs related to machine operating systems – A combination of the above duties, the performance of which requires the same level of skills ▪ Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field ▪ The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employees— Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

NON-EXEMPT EMPLOYEES

Blue Collar Workers— The exemptions provided by FLSA Section 13(a)(1) apply only to “white collar” employees who meet the salary and duties tests set forth in the 29 C.F.R. Part 541 regulations. The exemptions do not apply

to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Police, Fire Fighters, Paramedics & Other First Responders— The exemptions also do not apply to “first responders” such as police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fight-

ers, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work. First responders generally do not qualify as exempt executives because their primary duty is not management. They are not exempt administrative employees because their primary duty is not the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers. Similarly, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field or learning customarily acquired by a prolonged course of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.

Other Laws & Collective Bargaining

Agreements—The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements. ■

Fabricated EEO Charges— What's A Business To Do? Burdens of Proof in Title VII Retaliation Claims

By W. David Paxton¹

Gentry Locke Rakes & Moore, LLP
Roanoke, Virginia
Phone: (540) 983-9334
Fax: (540) 983-9451
david_paxton@gentrylocke.com
www.gentrylocke.com



W. David Paxton is a partner with the Virginia law firm of Gentry Locke Rakes & Moore, LLP. Mr. Paxton chairs the firm's Labor & Employment Group, and concentrates his practice on labor,

employment and corporate governance issues.

A frequent speaker on a variety of employment-related issues, he is a graduate of University of Virginia School of Law and Hampden-Sydney College.

In a recent case out in the Tenth Circuit, two employees sued their former employer for retaliation after they were terminated for making allegations of harassment which the employer concluded were intentionally false. *Renner-Wallace v. Cessna Aircraft Co.*, 2003 U.S. Dist. LEXIS 4134 (D. Kan.), *aff'd* 95 Fed. Appx. 967 (10th Cir. 2004). The district court granted the employer's motion for summary judgment holding that the employees had failed to present any evidence that the proffered reason for the employees' termination was a pretext for discrimination. This decision highlights the dilemma faced by employers who seek to respond to fabricated EEO claims in the face of an almost certain retaliation charge.

The Fourth Circuit has not had an occasion to address the exact situation presented in *Renner-Wallace v. Cessna*. This article considers how the Fourth Circuit is likely treat a retaliation claim based on a fabricated complaint of race, sex, religion, or national origin discrimination, focusing on the burden the court is likely to impose on employers defending such claims. This article also discusses the possible impact of the United States Supreme Court's recent decision in *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003), on the treatment of such claims.

I. The Existing Framework for Title VII Retaliation Claims

Title VII's anti-retaliation provision, known interchangeably as § 704 and § 2000e-3(a), provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a) (Lexis 2003).

Cases brought under § 704, like the one contemplated here, are often resolved on summary judgment. A court faced with such a motion must first ask whether the plaintiff has made out a *prima facie* case of unlawful retaliation. To meet this burden, the plaintiff-employee must show (1) that the employee "engaged in protected activity" (opposed or made a charge of unlawful activity under Title VII); (2) that the employer took adverse employment action against the employee; and (3) that a sufficient causal connection existed between the protected activity and the adverse employment

action. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) (citing *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991)); *see also DeWitt v. Mecklenburg County*, 73 F. Supp. 2d 589, 602 (W.D.N.C. 1999).

If the plaintiff succeeds in making out his *prima facie* case, courts in the Fourth Circuit go on to apply one of two burden-shifting tests, depending upon the strength of the plaintiff's initial showing. The first test, a three-step scheme established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is applied to what are known as "pretext cases."

In pretext cases, the plaintiff has proffered only circumstantial, as opposed to direct, evidence of an impermissible motive. A presumption of unlawful retaliation then arises, and the burden of production shifts to the defendant, who may rebut the presumption by offering a legitimate, nondiscriminatory reason for the adverse employment action. Under *McDonnell Douglas*, if the defendant-employer meets this burden, "the presumption raised by the *prima facie* case is rebutted and 'drops from the case,' and [the plaintiff] bears the ultimate burden of proving that she has been the victim of retaliation." *Dowe v. Total Action against Poverty*, 145 F.3d 653, 656 (4th Cir. 1998) (internal citations omitted); *see also DeWitt*, 73 F. Supp. 2d at 597. Ultimately, the plaintiff must show that the adverse action would not have occurred "but for" the employer's consideration of the protected activity. *DeWitt*, 73 F. Supp. 2d at 602 (citing *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365-66 (4th Cir. 1985)).

The *McDonnell Douglas* proof scheme places the ultimate burden of persuasion on the plaintiff, distinguishing it from the "mixed motive" method of proof established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The "mixed motive" scheme applies when both legitimate and illegitimate considerations motivated an adverse employment action. If the plaintiff's *prima facie* case entitles him to a "mixed motive"

(continued on page 8)

¹ The author gratefully acknowledges the usual outstanding and invaluable assistance of our associate, Gregory R. Hunt, as well as assistance and work of Meghan Cloud, a former law student at the University of Virginia, and Richard Farley, a student at Marshall Wythe School of Law, at the College of William and Mary.

Fabricated EEO Charges—What's A Business To Do?

Burdens of Proof in Title VII Retaliation Claims (continued from page 7)

instruction, the burden of persuasion then shifts to the employer to establish a “same decision” defense—that is, the company must show that it would have made the same decision even absent the impermissible consideration. A defendant who successfully proves the “same decision” defense in a Title VII retaliation action can still avoid a finding of liability altogether. *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999).² See *Matima v. Celli*, 228 F.3d 68, 81 (2nd Cir. 2000); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848 (8th Cir. 2000); *McNutt v. Board of Trustees*, 141 F.3d 706 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3rd Cir.) cert. denied 522 U.S. 914 (1992).

Because it places the ultimate burden on the defendant employer to prove that the adverse employment action would have been taken even in the absence of the impermissible consideration, the “mixed motive” scheme is significantly friendlier to plaintiffs than is *McDonnell Douglas*.

In the Fourth Circuit the question of which test to apply has turned on the strength of the plaintiff’s initial showing; a plaintiff presenting “direct evidence” of discriminatory motive is entitled to application of a “mixed motive” instruction, while a plaintiff relying solely on “circumstantial evidence” must meet the more rigorous *McDonnell Douglas* standard. See *Williams v. City of Fayetteville*, 2002 U.S. Dist. Lexis 26221, *52–54 (E.D.N.C. May 13, 2002) (differentiating between the two types of evidentiary showings). The distinction is not a model of clarity; one particularly circumspect in light of a more recent Fourth Circuit

decision which has defined “direct evidence” as “evidence, be it direct or indirect, that is of sufficient strength to warrant use of the mixed-motive framework.” *Hill v. Lockheed Martin Logistics Mgmt.*, 314 F.3d 657, 665 (4th Cir. 2004).

This ambiguity is unfortunate. Whether a court chooses to apply *McDonnell Douglas* or “mixed motive” standard has significant implications for any employer contending that a plaintiff fabricated the complaints giving rise to the retaliation claim, and the fact-dependent nature of that inquiry makes its outcome difficult to predict. The uncertainty is exacerbated by the fact that the Fourth Circuit apparently has yet to face a Title VII retaliation case in which the defendant-employer discharged the plaintiff because he reasonably believed that the plaintiff had fabricated the underlying complaint.³

The Fourth Circuit has shown a strong preference for the *McDonnell Douglas* test in the context of retaliation claims under § 704. See, e.g., *Lauer v. Schewel Furniture Co.*, 84 Fed. Appx. 323, 329–330, 2004 U.S. App. LEXIS 53 (4th Cir. 2004); *Tinsley v. First Union Nat’l Bank*, 155 F.3d 435 (4th Cir. 1998) (the “series of proofs and burdens outlined in *McDonnell Douglas* apply to retaliation claims”); *Dowe*, 145 F.3d at 656; *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998); *DeWitt*, 73 F. Supp. 2d at 602; *Williams v. City of Fayetteville*, 2002 U.S. Dist. Lexis 26221, *49 n.20. *Kubicko*, did expressly note that the mixed motive proof scheme is available to Title VII plaintiffs claiming retaliation who “can establish the necessary evidentiary threshold.” 181 F.3d at 553 n.8; see *Myers v. Paxar Corp.*,

1999 U.S. Dist. LEXIS 21400, *16 n. 4 (W.D. N.C. 1999) (court sua sponte raises issue and concludes that “mixed motive” theory does not apply because no “direct evidence” of a retaliatory attitude); see also, *Medlock v. Ortho BioTech*, 164 F.3d 545 (10th Cir. 1999); *Cosgrove v. Sears Roebuck & Co.*, 9 F.3d 1033 (2d Cir. 1993).

In *Kubicko v. Ogden Logistics*, the plaintiff alleged retaliation because he supported a colleague who made a sexual harassment complaint. The lower court granted summary judgment to the employer, but the Fourth Circuit found that the facts justified the use of mixed-motive proof scheme because the former employee offered testimony of statements made by the decision maker within two days of the termination which suggested a direct connection between his protected activities and his termination. 181 F.3d at 553 (citing *Fuller v. Phillips*, 67 F.3d 1137, 1142 (4th Cir. 1995)). The court of appeals went on to hold that summary judgment was inappropriate because, “when the evidence is viewed in the light most favorable to *Kubicko*, the record supports a finding that [the employer] did not legitimately believe that *Kubicko* fabricated without foundation the allegations of sexual harassment.” *Id.* at 554–55.

A more recent case from North Carolina, *Williams v. City of Fayetteville*, 2002 U.S. Dist. Lexis 26221 (E.D.N.C. 2002), involved alleged fabrication of discrimination claims. The plaintiffs in *Williams* were African-American police officers who had voiced their concerns about workplace racism in internal interviews. Under pressure from white supervisors, they went on to name fellow officers who they believed felt similarly. The supervisors later discharged the interviewees for lying, in part because the officers they had named denied sharing their sentiments. The plaintiffs filed suit under various theories, including a retaliation claim under Title VII and an allegation that their constitutional rights to equal protection had been violated.

Applying *McDonnell Douglas*, the district court denied the defense’s motion for

(continued on page 9)

2 These decisions are based on a determination that §107 (a) of the Civil Rights Act of 1991 (which overruled *Price Waterhouse v. Hopkins* and provides that this “same result defense” does not exonerate an employer from liability; it only limits the damages that can be recovered) does not apply to a “retaliation claim” under Title VII.

3 See *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 554–55 (4th Cir. 1999) (“We have not yet had an occasion to consider whether an employer is liable under § 704’s opposition clause for retaliation if the employer took an adverse employment action against an employee in actual belief that the employee fabricated without foundation the content of his opposition activity, and the present appeal does not provide us with such an occasion.”).

Fabricated EEO Charges—What's A Business To Do?

Burdens of Proof in Title VII Retaliation Claims (continued from page 8)

summary judgment with respect to the plaintiffs' retaliation claims. In the course of so finding, however, the court noted that the city's proffered reason for the termination—plaintiffs' alleged untruthfulness—“satisfied [the defendant's] burden of producing a ‘legitimate, nonretaliatory reason’” for the adverse employment actions. *Id.* at *62. It further noted that the city's decision was entitled to a degree of deference stemming from the business judgment rule. *Id.* at *63. Nonetheless, the court held that the plaintiffs had “offered sufficient evidence to raise a genuine issue of material fact as to the pretextual nature of the City's stated reasons for its conduct and to support the inference that the City's suspension of Williams was motivated by retaliatory animus.” *Id.* at *69. The court noted that because activity protected by § 704 includes allegations of discrimination that do not turn out to be true, a termination based on lying about Title VII claims presents an unusually delicate situation. *Id.* at *62 n.23.

In a footnote, the *Williams* court noted that the plaintiffs might in fact be entitled to the less onerous “mixed motive” standard. *Id.* (citing *Kubicko*, 181 F.3d at 553). It declined, however, to choose between the two tests because the plaintiffs had met the more stringent *McDonnell Douglas* standard, and denied summary judgment on the Title VII claim. *Id.* The police chief appealed the denial of summary judgment on the equal protection constitutional claim under 42 U.S.C. § 1983, arguing that he was entitled to “qualified immunity”. The Fourth Circuit, without addressing the Title VII claim, disagreed with the district court and held the police chief was entitled to qualified immunity and remanded for the entry of

summary judgment on that issue, and a trial on the Title VII claim. *Williams v. Hansen*, 326 F.3d 569 (4th Cir. 2003).

II. Application of Current Fourth Circuit Law to the Fabrication Hypothetical

A plaintiff who fabricates the complaint of discrimination which underlies his claim of unlawful retaliation will have little difficulty making out a *prima facie* case. The first part of the three-part standard⁴ is easily met; by definition, either an internal complaint of discrimination will have been made to the company or a formal charge lodged with the Equal Employment Opportunity Commission or some other civil rights organization. To sustain a claim for retaliation the plaintiff does not need to prove that the underlying claim of discrimination is true or even meritorious. *Balazs v. Liebenthal*, 32 F.3d 151, 158 (4th Cir. 1994); *Ross*, 759 F.2d at 357 n.1. Instead, the plaintiff must merely establish that s/he “believe[d] in the validity of the claim, and that belief [was] reasonable.” *Childress v. City of Richmond*, 907 F. Supp. 934, 940 (E.D. Va. 1995), *aff'd* 134 F.3d 1205 (4th Cir. 1998) (en banc).⁵ At the preliminary stage of determining the existence of *prima facie* case, a district court is not normally willing to go into such complex factual issues as whether the plaintiff actually fabricated the underlying allegations. *See, e.g., Renner-Wallace v. Cessna*, 2003 U.S. Dist. LEXIS 4134 (D. Kan. Mar. 17, 2003) (whether the plaintiffs in fact fabricated the charges is a jury question).

The two remaining prongs of the *prima facie* showing are likewise easily satisfied; dismissal is unquestionably an adverse employment action, and causation is usually

sufficient to established simply by demonstrating temporal proximity between the complaint and the adverse employment action. *See, e.g., Karpel v. INOVA Health Sys. Servs.*, 134 F.3d 1222, 1229 (4th Cir. 1998); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989).

Once the plaintiff meets his initial burden, the question of which proof test applies will affect the defendant's evidentiary obligation significantly. If *McDonnell Douglas* is invoked, the employer in our hypothetical will be well positioned to win on summary judgment. The *prima facie* showing creates a presumption of unlawful retaliation that can be rebutted relatively easily. Any legitimate, nondiscriminatory reason for the discharge will be enough to shift the burden back to the plaintiff. *See, e.g., Causey v. Balog*, 162 F.3d at 803 (affirming dismissal of baseless claims and noting that, even if the plaintiff had made out a *prima facie* claim, the defendant had proffered legitimate, non-discriminatory reasons for its actions that rebutted plaintiff's allegations of retaliation); *DeWitt*, 73 F. Supp. 2d at 599 (“Even were the record to support a *prima facie* case of disparate treatment, defendants have articulated legitimate, nondiscriminatory reasons for each of the challenged employment actions.”). Thus, an employer who genuinely believes that the plaintiff fabricated the underlying allegations of discrimination need only cite dishonesty or breach of trust as the reason for termination in order to shift the ultimate burden of persuasion to the plaintiff, which is just what the defendant in *Renner-Wallace* did.

Under *McDonnell Douglas*, after the presumption of discrimination “drops out,” a plaintiff must present enough evidence to show that a genuine issue of material fact exists regarding whether the employer's proffered rationale is a “pretext.” If they do not, as in *Renner-Wallace*, the case can be decided as a matter of law; if they do, the question of whether the employer's legitimate rationale—falsified accusations—is a “pretext” will proceed to a jury, with the burden on the plaintiff to prove the

(continued on page 10)

⁴ *See supra* p 2.

⁵ Cases in the Fourth Circuit applying this reasonableness standard do not involve fabricated complaints; rather, they address complaints that either fall wholly outside the purview of Title VII or are clearly baseless. Such claims do not survive the summary judgment stage because the plaintiffs fail to make the *prima facie* showing. *See, e.g., Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E.D. Va. 1995) (because same-sex sex discrimination clearly is not actionable under Title VII, the plaintiff's action for retaliatory discharge was not founded on a reasonable belief that the employer had acted unlawfully); *Childress*, 907 F. Supp. at 940 (dismissing white male officers' retaliation claims because their complaints of racist and sexist remarks could not reasonably be expected to state a claim under Title VII).

Fabricated EEO Charges—What’s A Business To Do?

Burdens of Proof in Title VII Retaliation Claims (continued from page 9)

pretextual nature of the rationale by a preponderance of the evidence. *See Lauer*, 84 Fed. Appx. at 329-330 (contradictions between employer’s proffered explanation for the adverse action and the employer’s contemporaneous statements to the employee are “convincing evidence” of pretext, and reinstated the plaintiff’s retaliation claim).

In a case where an employer does in fact conclude in good faith that claims of discrimination were made for improper reasons or untruths were involved, a plaintiff should find this ultimate burden very hard to meet. Indeed, where the complaints underlying a Title VII retaliation claim are baseless or fabricated, and/or there is evidence that the claims were made out of spite, plaintiffs may find it hard to put on any evidence at all. *See Renner-Wallace* at *18-19; *Causey*, 162 F.3d at 803 (plaintiff presented “no competent evidence suggesting [that the proffered] rationale was pretextual”); *DeWitt*, 73 F. Supp. 2d at 599 (“[p]laintiff has provided no evidence to disprove Defendants’ explanations, much less to establish that gender was the true motivating factor for each of the decisions”).

Staving off liability will be more challenging if the court applies the “mixed motive” analysis. The defendant-employer will be required to make a much stronger showing during the second stage of the proceeding, because it has the burden of persuasion, and dismissal as a matter of law will be much less likely. *See, e.g., Kubicko*, 81 F.3d at 554-55. Should the case go to trial, the evidence needed by the defense will necessarily vary with the facts of the case and the strength of the plaintiff’s own showing. Ultimately, the outcome may be the same. Taking into account the Fourth Circuit’s regard for the “business judgment rule,” an employer who discharges an employee in good faith and with the reasonable belief that the employee fabricated his underlying Title VII claim has a good chance of avoiding liability altogether.

III. The Potential Impact of Changing Federal Law

Over the years, two developments have served to make methods of proof under Title VII increasingly plaintiff-friendly. The first of these was the Civil Rights Act of 1991, which overturned the holding of *Price Waterhouse* (that if a defendant in a mixed motive case could establish that the “same decision” would have been made regardless there is no Title VII liability) and held the “same decision” defense only serves to limit a plaintiff’s right of recovery. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). The second came in June 2003, when the U.S. Supreme Court blurred the already indistinct line between pretext and mixed-motive cases in *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003). In *Desert Palace*, the Court held that a plaintiff seeking a mixed-motive instruction need present only circumstantial, as opposed to “direct evidence” of an impermissible motive. Because prior to *Desert Palace* the distinction between cases calling for application of the “mixed motive” and those calling for *McDonnell Douglas* rested on the strength of the plaintiff’s showing, *Desert Palace* might thus be read as obviating *McDonnell Douglas* altogether.

Nonetheless, there is a distinct possibility that the Fourth Circuit will decline to apply the rule of *Desert Palace* to Title VII retaliation claims. For example, in *Lauer* which was decided on January 5, 2004, the Court ruled that the plaintiff had to meet the *McDonnell Douglas* scheme in retaliation claims. 84 Fed. Appx. at 329. Nowhere in the decision does the court cite *Desert Palace* or *Kubicko*; instead it relied on an earlier decision, *Karpel v Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998). The Supreme Court in *Desert Palace* was construing § 2000e-2(m). As previously noted, the Fourth Circuit in 1999 made clear its position, shared at the time by several other circuits, that this provision applies only to charges of disparate treatment discrimination, not to claims of unlawful retaliation

under § 704. *Kubicko*, 181 F.3d at 552 n.7. Thus, just as the liability-limiting facet of the 1991 amendments does not apply to claims of retaliation, it is possible that in the Fourth Circuit the lowering of the evidentiary bar for plaintiffs permitted by *Desert Palace* may not apply at least in the Fourth Circuit to those alleging a retaliation claim. Alternatively, it could simply be that the facts of *Lauer* where such that the mixed motive issue was not presented. Certainly, the *Kubicko* court noted that there was no absolute ban against the use of a mixed motive approach to a Title VII claim, and it is hard to see how the elimination of a requirement of “direct evidence” to get a mixed motive charge will not be applied to these troublesome claims.

Assuming that the Fourth Circuit does retain the distinction between circumstantial and direct evidence in Title VII retaliation claims, employers who have fired employees in good faith for fabrication will continue to enjoy the comparatively low hurdle that is *McDonnell Douglas*; where the employer’s decision was made in good faith, plaintiffs will have a difficult time finding direct evidence of an impermissible motive. The Fourth Circuit’s invocation of the business judgment rule in Title VII retaliation cases should only help. *See, e.g., DeWitt*, 73 F. Supp. 2d at 599 (“When an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for plaintiff’s termination.”) (citing *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298-99 (4th Cir. 1998)). The ultimate burden of persuasion will thus be on the plaintiff to show that the proffered reason for termination—dishonesty—is pretextual. This was the framework applied in *Renner-Wallace*, decided almost three months before *Desert Palace* was handed down, but the Tenth Circuit had no trouble affirming the district court’s rationale in April 2004, and the *Lauer* court did not hesitate in applying the requirement that the plaintiff prove “pretext” on her retaliation claim. ■

Is A Request To Work From Home A Reasonable Accommodation Under The ADA?

By David Garland

Sills Cummis Epstein & Gross, P.C.,
Newark, New Jersey
Phone (973) 643-7000
Fax (973) 643-6500
DGarland@sillscummis.com
www.sillscummis.com



David W. Garland is a partner in the Newark, New Jersey firm of Sills, Cummis, Epstein and Gross, P.C. He received a B.A. from William and Mary and a J.D. from George Washington University. He devotes

his practice to defending corporate clients and public entities in employment discrimination, wrongful discharge and other employment-related litigation including cases involving allegations of sexual harassment, age, disability, gender, pregnancy, race, retaliation, and other discrimination. Mr. Garland has defended lawsuits in courts throughout the United States. In 1997, *U.S. Business Litigation* featured Mr. Garland as one of the country's leading employment litigators. Mr. Garland has published numerous articles on employment law in the United States and is a frequent lecturer on employment law. He is a member of the faculty of the American Law Institute—American Bar Association program on “Employment Discrimination Litigation in Federal and State Courts,” and teaches at trial advocacy programs sponsored by the National Institute of Trial Advocacy.

In a decision that reflects the reasoning of a growing majority of Circuit Courts of Appeals, in *Mason v. Avaya Communications, Inc.*, the Tenth Circuit held that the Americans with Disabilities Act (“ADA”) does not require an employer to allow disabled employees to work at home if doing so will interfere with their ability to perform their essential job functions.

Factual Background

Plaintiff Diane Mason was working for the Post Office in Edmond, Oklahoma in August 1986 when she witnessed the murder of several of her co-workers. Mason developed post-traumatic stress disorder and sought employment elsewhere.

On March 21, 2000, Mason was working as a service coordinator at Avaya Communications, Inc. (Avaya), scheduling service appointments for its technicians, when one of her co-workers drew a knife during an argument with another employee at the facility at which Mason worked. Avaya suspended the knife-wielding employee. Mason learned of the incident through co-workers, who also told her that the employee had previously threatened to “go postal,” stockpiled weapons, and compiled a “hit list.”

When Avaya notified its service coordinators that the employee was returning to work, Mason called in sick because she was physically and emotionally unable to work at the same facility as the employee. Mason requested that Avaya accommodate her post-traumatic stress disorder by allowing her to work from home.

Avaya denied Mason's request on the ground that physical attendance at Avaya's facility was an essential function of her job. Avaya discharged Mason for failing to report to work.

Mason filed a lawsuit against Avaya, alleging that it had violated the ADA by failing to accommodate her disability and terminating her employment as a result of her disability.

The ADA

The ADA bars discrimination on the basis of disability. Discrimination includes “not making reasonable accommodations” to allow an otherwise qualified individual with a disability to perform his or her job responsibilities.

In order to establish a prima facie case of discrimination under the ADA, an employee must demonstrate that he or she: (1) is disabled; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the position at issue; and (3) was discriminated against because of the disability.

In determining whether a particular job function is “essential,” courts consider: (1) the employer's judgment; (2) written job descriptions; (3) the amount of time that employees in the position spend performing the function; (4) the consequences of not requiring an employee to perform the function; and (5) the experiences of others in the position.

The Tenth Circuit

The district court dismissed Mason's claims on summary judgment. On appeal, the Tenth Circuit considered whether Mason had established a prima facie case of disability discrimination under the ADA. Because Avaya did not dispute that Mason was disabled under the ADA, the court turned to the second prong and considered whether Mason was qualified, with or without reasonable accommodation, to perform the essential functions of the service coordinator position.

Avaya presented evidence that: (1) it considered attendance at its facility, teamwork, and supervision to be essential functions; (2) all of its service coordinators worked at the facility; (3) its service coordinators were never permitted to work anywhere else; and (4) it could not adequately supervise or train service coordinators if they worked outside of the facility.

Mason responded that physical presence was not an essential function of the service coordinator position, because she could perform all of her job responsibilities from home using a computer, telephone, and fax machine. She also argued that, because Avaya's job description for service coordinators did not mention teamwork or supervision, they were not essential job functions. Mason also argued that teamwork would not suffer by allowing her to work from home, because another service coordinator could perform “teamwork” duties such as filling in for a co-worker on a break.

Avaya countered by presenting evidence that it would not be able to supervise a service coordinator who worked from home. Although Avaya would be able to

(continued on page 12)

Is A Request To Work From Home A Reasonable Accommodation Under The ADA? (continued from page 11)

monitor when such an employee was logged onto the computer, it would not be able to ascertain what he or she was doing. The court agreed, holding that it was “in no position to second guess Avaya’s desire to directly supervise its lower level employees.”

Avaya also presented evidence that teamwork was an essential function of the service coordinator position because it was a “hectic” job and, as a result, service coordinators frequently assisted and covered for one another. The court accepted this argument and held that the fact that others could perform the function instead of Mason did not mean that the function was non-essential.

Finally, the court rejected Mason’s argument that teamwork and being supervised were not essential functions of the service coordinator position because they were not listed in the job description. The court held that these were common sense requirements implicit in the description.

Having determined Mason’s physical presence at Avaya’s facility was an essential function, the court considered whether Avaya could have reasonably accommodated Mason. The court concluded that “a request to work at home is unreasonable if it eliminates an essential function of the job,” but noted that it may not be unreasonable if the

employee presents evidence that she can perform her essential job functions from home. It indicated that the determination of whether requests to work at home are reasonable should be decided on a case-by-case basis.

Conclusion

The Mason case increases the likelihood that an employer will not incur liability for

rejecting a disabled employee’s request to work at home. Because the employer’s actions will be decided on a case-by-case basis, however, employers should only reject such requests if they are able to demonstrate that working at home would prevent the employee from performing an essential job function

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter. ■

Immigration Newsflash

President Proposes Temporary Worker Program

On January 6, 2004, President Bush unveiled a proposal for a temporary worker program that would create a new nonimmigrant visa category to provide legal status to millions of out-of-status foreign nationals currently living and working in the United States. The goal of the program is to match foreign workers with employers in instances where there is no U.S. worker willing to accept the job that is being offered. The program would be open to out-of-status foreign nationals currently in the United States, estimated to be over 8 million people, as well as to foreign nationals outside the United States who have been offered such a position.

Details of the President’s proposal will need to be worked out when the measure goes to Congress. The President emphasized that the proposal is not a so-called “blanket amnesty,” and further that foreign nationals provided with status under this program will not receive preferential treatment over temporary visa holders in the United States or foreign nationals abroad who are seeking permanent residence. ■

How To Conduct An Effective Internal Investigation

By Michael W. Hawkins

Dinsmore & Shohl, LLP

Cincinnati, Ohio

Phone: (513) 977-8270

Fax: (513) 977-8141

e-mail: michael.hawkins@dinslaw.com

www.dinslaw.com



Mr. Hawkins is a partner at Dinsmore & Shohl, Cincinnati, Ohio where he practices Labor and Employment Law. His practice includes representing employers in all aspects of employment law and

labor relations and litigation. He has been a frequent speaker and writer on Labor and Employment law issues. He received his J.D. from the University of Kentucky in 1972, serving as Lead Articles Editor of the *Kentucky Law Journal* and graduating Order of the Coif.

Most modern employers make employment decisions without regard to race, color, religion, sex, sexual orientation, national origin, ancestry, marital status, medical condition, pregnancy, age, physical or mental disability, or veteran status. Equal treatment is an essential statement of most companies' values.

But no matter how hard employers try to provide equal treatment, there are going to be times when someone feels he or she has been treated unfairly or discriminated against. When an employee feels his or her rights have been trampled on or that company policies or guidelines have not been applied consistently, the company must be prepared to conduct a comprehensive, objective, and professional investigation. The investigative process permits your company to monitor itself—to ensure that its managers, supervisors, and employees comply with both the letter and the spirit of federal and state laws, as well as internal policies and guidelines.

Conducting an objective and thorough investigation minimizes the risk that an employee will be disciplined or terminated for something he or she did not do or is being treated differently than other employees. Perhaps things are not as they initially seemed, and the institution can avoid making an incorrect, devastating, and costly decision.

The purpose of an investigation is to gather facts so that the investigator can make a credible determination as to what happened in a given situation. If someone is thought to have violated a policy, guideline, or procedure, conducting an effective investigation helps reach a conclusion that is based on the best facts available. Having accurate facts leads to a sound conclusion.

A. An Employer's Burden of Proving Misconduct as Part of an Internal Investigation

For most employers faced with the decision of whether to terminate an employee for alleged misconduct, "proving" in the judicial sense of the word (i.e., by establishing "beyond a reasonable doubt" or with a "preponderance of the evidence") that the misconduct actually occurred is neither practical nor plausible. Employers conducting internal investigations generally do not have the resources, time, or experience to conduct the kind of extended discovery that occurs in court litigation. Fortunately, the majority of the courts recognize that imposing judicial-like burdens of proof on employers making decisions in the

workplace is not legally required. The same courts agree, however, that an employer's investigation and decision must be judged by some standard to ensure that its actions are not arbitrary, capricious, or illegal.

The standard that has been adopted by most jurisdictions for judging an employer's decision to terminate an employee for alleged misconduct is one that derives from the notion of "good cause".¹ The standard can be paraphrased as follows: in order for an employer to terminate an individual for alleged misconduct, the employer must make a good faith determination that sufficient cause existed based on reasonable grounds.

The rationale behind this standard is best explained by the California Supreme Court's decision in *Cotran v. Rollins Hudig Hall International, Inc.*² Relying on decisions from California and other states that define "just cause," the Cotran court held that "good cause" for termination does not depend on a jury finding that the fired employee actually engaged in the misconduct, but merely requires that the employer act with "a fair and honest cause or reason, regulated by good faith." To require the employer to be correct about the facts would interfere with the wide latitude an employer needs to make decisions involving high-ranking employees. Other wrongful termination cases prior to Cotran articulated similar standards for judging an employer's decision to terminate an employee for misconduct.³

(continued on page 14)

- 1 See, *Pugh v. See's Candies, Inc.*, 203 Cal. App. 3d 743 (1988). In a wrongful discharge action by an employee based on breach of contract, good cause for termination means a fair and honest cause or reason regulated by the good faith of the employer, *Crozier v. United Parcel Service, Inc.*, 150 Cal. App. 3d 1132 (1983). The good cause determination needs to balance management discretion against the interest of the employee in maintaining employment.
- 2 17 Cal. 4th 93; 69 Cal. Rptr. 2d 900 (1998).
- 3 See *Southwest Gas v. Vargas*, 111 Nev. 1064 (1995) ["allowing the jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of 'good cause' for discharge, made in good faith and in pursuit of legitimate business objectives, is a highly undesirable prospect."] *Maietta v. United Parcel Service, Inc.*, 749 F. Supp. 1344, 1363 (D. N.J. 1990), in which a United Parcel Service employee was terminated for allegedly falsifying and directing other employees to falsify production records; *Crimm v. Missouri Pacific R. Co.*, 750 F.2d 703 (8th Cir. 1984); *Rulon-Miller v. International Business Machine*, 162 Cal. App. 3d 241, 253 (1984), in which the court held that "probable cause" would have been some reasonable basis for assuming that a significant company interest was at stake; *Kestenbaum v. Pennzoil*, 108 N.M. 20, 27 (1988), in which the New Mexico Supreme Court foreshadowed the ruling in Cotran, and upheld the termination of a manager for sexual harassment because the employer "had reasonable grounds to believe that sufficient cause existed to justify the defendants' actions in discharging the plaintiff"; and *Simpson v. Western Graphics Corporation*, 293 Or. 96, 643 P.2d 1276 (1982), in which employees were terminated for allegedly threatening violence against another employee.

How To Conduct An Effective Internal Investigation (continued from page 13)

B. Practical Steps for Conducting A Legally Sound Investigation

While there are some cases that appear to impose merely the good faith standard (*Benisbek v. Cody*, 441 N.W.2d 399, 401 [Iowa, 1989]) or a standard based on mere suspicion (*Caldor, Inc. v. Bowden*, 330 Md. 632, 646, 625 A.2d 959 [Md. 1993]), only one case was found endorsing a higher standard than “good faith based on reasonable grounds.” In *Scherer v. Rockwell Int’l.*, 975 F.2d 356, 359-360 (7th Cir. 1992), the employee’s contract stated the company could terminate him only if he was found guilty of gross default or misconduct, thus the court refused to apply the good faith based on reasonable grounds standard. The court implied, however, that absent the employment contract provision provided for proof of actual guilty, the good faith based on reasonable grounds standard would have applied.

The majority of the cases surveyed indicate that, in order to justifiably terminate an employee for misconduct, an employer need not prove that an employee actually engaged in the misconduct. Rather, the employer need only make a good faith determination that good cause existed based on reasonable grounds. Reasonable grounds is analogous to a “reasonable

basis,” and/or a “reasonable investigation” and should be supported by “credible support” or “substantial evidence.”

An institution that wants to ensure that its investigations are carried out in good faith and that all determinations are supported by objectively reasonable grounds should at minimum:

1. Develop and implement thorough investigation procedures;
2. Identify and train all individuals who may carry out an internal investigation;
3. Require thorough and complete documentation of the investigative process; and
4. Ensure that the investigation contains:
 - a. Thorough interviews of the complainant, accused, and necessary witnesses;
 - b. The who, what, when, where, why and how as related to the facts;
 - c. An analysis of all relevant evidence;
 - d. An assessment of the credibility of the witnesses and strength of the evidence; and
 - e. A rational and defensible conclusion.

The most important aspect of these guidelines is the training of those who will be responsible for responding to an employee complaint and investigating the

employee conduct in question. The authors have found that the most proactive and preventative step is to use in-house training of supervisors and managers in all aspects of employment law and on how to conduct an effective investigation. The end result of this training and the conducting of an effective investigation is that good decisions are made and the likelihood of a successful claim against the employer is reduced or entirely eliminated.

C. The U.S. Supreme Court Recognizes The Value Of An Effective Investigation.

In its recent decisions of *Ellereth* and *Faragher*⁴, the U.S. Supreme Court emphasized that when an employer receives an employee’s complaint of sexual harassment, that an affirmative defense will be available to the employer if, among other steps, a prompt and effective investigation is conducted and proper remedial action is taken by the employer. This approach has been followed by other courts in other cases⁵ involving complaints of discrimination. Conducting effective investigations is essential to managing complaints and employee misconduct. ■

⁴ 524 U.S. 775.

⁵ By adopting the strategies set forth above, employers can better protect their operations and have confidence in the investigations and the actions taken as a result of the investigation.

Are Employees' Representatives Needed For Employees Working In France For Foreign Companies?

By **Nicolas C. Sauvage**

Courtois Lebel
Paris, France
Phone: 33 (0) 158 449 292
Fax: 33 (0) 158 449 258
nsauvage@courtois-lebel.com
www.courtois-lebel.com



Nicolas C. Sauvage is a specialist in labour and employment law and is head of the Labour and Employment Law Department of Courtois Lebel in Paris, France. He assists employers with the various aspects

of human resource management. He handles matters regarding both individual and collective working relationships, and social security disputes. He has published articles and regularly contributes to conferences on both general and specific labour and employment law topics in France and Europe.

Campana CFTC -v- Agio Sigarenfabrieken (French Supreme Court, January 14, 2004)

Many foreign companies carry out their sales activities on French territory. As both tax and employment rules mainly apply to companies established in France, these foreign companies try to develop their business through a sales force, without opening any establishment on French territory. However, in *Campana CFTC -v- Agio Sigarenfabrieken*, the Supreme Court stated that, although a Dutch company had not opened an establishment in France, it was bound to appoint an employees' representative.

Pursuant to the general principle of territoriality, the provisions of French labour law regarding employees' representatives apply to every company established in France, regardless of the place of effective management.

This principle was first stated in "*Compagnie des Wagons-lits*" (French Administrative Supreme Court, June 29, 1973) for public companies and extended to private companies in "*Thorensen*" case (French Supreme Court, March 3, 1988).

According to this trend, there is an establishment if evidence could be brought of the existence of a work community with a particular interest and of the presence of an employer's representative entitled to settle claims (for instance *SNCF -v- Brus*, French Supreme Court, March 17, 1993).

In *Campana CFTC -v- Agio Sigarenfabrieken*, the Dutch company had its head office in the Netherlands and employed about 30 employees (only salesmen) in France, without any establishment there. The company argued that, as it did not have a permanent structure nor employer's representative in France, it was not established in France and, therefore, was not subject to French rules regarding employees' representatives. Such an argument was consistent with the *SNCF -v- Brus* case. Surprisingly, the French Supreme Court ruled that the sole fact that a foreign company had employees in France was sufficient to characterise the existence of an establishment.

Undoubtedly, this decision will raise a number of practical questions for foreign companies, as far as employees' representatives are concerned (for example, the question of the place where the employees' representatives are going to meet).

But above all, this decision is likely to have financial consequences for foreign companies which have already made redundant employees working in France. Should a court decide that the foreign company should have appointed employee's representatives, the redundancies would be automatically judged null and void, because no employee's representatives could be consulted. In such a case, the foreign company would have either to reintegrate or to indemnify the redundant employees, but above all to pay their salary back to the date of their redundancy. ■

LABOR AND EMPLOYMENT PRACTICE GROUP

Directory of Member Firms

Domestic Firms

ALABAMA**Bradley Arant Rose & White LLP**

Birmingham, Alabama
(205) 521-8000

Donald B. Sweeney, Jr.
dsweeney@bradleyarant.com

ALASKA**Delaney, Wiles, Hayes, Gerety, Ellis & Young, Inc.**

Anchorage, Alaska
(907) 279-3581

Cindy L. Ducey
cld@delaneywiles.com

ARIZONA**Renaud Cook Drury Mesaros, PA**

Phoenix, Arizona
(602) 307-9900

William W. Drury, Jr.
wdrury@rcdmlaw.com

James L. Blair
jblair@rcdmlaw.com

Charlie S. Hover III
chover@rcdmlaw.com

ARKANSAS**Wright, Lindsey & Jennings, LLP**

Little Rock, Arkansas
(501) 371-0808

John D. Davis
jddavis@wlj.com

Kathlyn Graves
kgraves@wlj.com

William Stuart Jackson
wjackson@wlj.com

John G. Lile
jlile@wlj.com

Rogers, Arkansas
(479) 986-0888

Eva Madison
emadison@wlj.com

Greg Muzingo
gmuzingo@wlj.com

CALIFORNIA**Haight, Brown & Bonesteel, L.L.P.**

Los Angeles, California
(310) 215-7100

Peter A. Dubrawski
pdubrawski@hbblaw.com

Kenneth G. Anderson
andersok@hbblaw.com

Margaret J. Grover
mgrover@hbblaw.com

Livingston & Mattesich Law Corporation

Sacramento, California
916/442-1111

Carol Livingston
clivingston@lmlaw.net

Rex D. Berry
rberry@lmlaw.net

Rebecca M. Cenicerros
rceniceros@lmlaw.net

Higgs, Fletcher & Mack, L.L.P.

San Diego, California
(619) 236-1551

James M. Peterson,
Practice Group Chair
peterson@higgslaw.com

Steven J. Cologne
scologne@higgslaw.com

Alexis S. Gutierrez
alexisg@higgslaw.com

Hancock Rothert & Bunshoft LLP

San Francisco, California
(415) 981-5550

Andrew K. Gordon
agordon@hrblaw.com

Lorraine P. Ocheltree
lpoeltree@hrblaw.com

COLORADO**Hall & Evans, L.L.C.**

Denver, Colorado
(303) 628-3300

Thomas Lyons
lyonst@hallevans.com

Kevin E. OBrien
obrienk@hallevans.com

CONNECTICUT**Halloran & Sage LLP**

Hartford, Connecticut
(860) 522-6103

James M. Sconzo
sconzo@halloran-sage.com

Westport, Connecticut
(203) 227-2855

Stephen P. Fogerty
fogerty@halloran-sage.com

Thomas P. O'Dea, Jr.
odea@halloran-sage.com

FLORIDA**Fowler White Burnett PA**

Miami, Florida
(305) 789-9210

Christopher E. Knight
cknight@fowler-white.com

Don Kubit
dkubit@fowler-white.com

GEORGIA**Hawkins & Parnell, LLP**

Atlanta, Georgia
(404) 614-7400

T. Ryan Mock, Jr.
rmock@hplegal.com

Ronald G. Polly, Jr.
rpolly@hplegal.com

Hunter, Maclean, Exley & Dunn, P.C.

Savannah, Georgia
(912) 236-0261

Wade W. Herring, II
wherring@huntermaclean.com

Shawn A. Kachmar
skachmar@huntermaclean.com

Sarah Lamar
slamar@huntermaclean.com

ILLINOIS**Brown & James, P.C.**

Belleville, Illinois
(314) 421-3400

Charles E. Reis IV
CREis@bjpc.com

Johnson & Bell, Ltd.

Chicago, Illinois
(312) 372-0770

Joseph R. Marconi
marconij@jbtld.com

Kathryn R. Hoying
hoyingk@jbtld.com

INDIANA**Beckman, Kelly & Smith**

Hammond, Indiana
(219) 933-6200

Melanie D. Dunajeski
mdunajeski@bkslegal.com

KANSAS**Baker Sterchi Cowden & Rice L.L.C.**

Overland Park, Kansas

David M. Eisenberg
eisenberg@bscr-law.com

James Scott Kreamer
kreamer@bscr-law.com

Klenda, Mitchell, Austerman & Zuercher, L.L.C.

Wichita, Kansas
(316) 267-0331

Alexander B. Mitchell II
amitchell@kmazlaw.com

KENTUCKY**Woodward, Hobson & Fulton, L.L.P.**

Louisville, Kentucky
(502) 581-8025

Kathryn A. Quesenberry
kquesenberry@whf-law.com

LOUISIANA**Leake & Andersson, L.L.P.**

New Orleans, Louisiana
(504) 585-7500

George D. Fagan, Program Chair
gfagan@leakeandersson.com

MARYLAND**Semmes, Bowen & Semmes, P.C.**

Baltimore, Maryland
(410) 539-5040

Donald F. Burke
dburke@semmes.com

MASSACHUSETTS**Morrison Mahoney LLP**

Boston, Massachusetts
(617) 439-7500

Lee Stephen MacPhee
lmacphee@morrisonmahoney.com

Charles A. Cook
ccook@morrisonmahoney.com

MICHIGAN**Plunkett & Cooney, P.C.**

Bloomfield Hills, MI

Mary P. Cauley
mcauley@plunkettcooney.com

Theresa Smith Lloyd
tlloyd@plunkettcooney.com

MINNESOTA**Rider Bennett, LLP**

Minneapolis, Minnesota
(612) 340-7925

Gary J. Gordon
gigordon@riderlaw.com

John D. Thompson
jdthompson@riderlaw.com

MISSISSIPPI**Daniel Coker Horton & Bell, P.A.**

Jackson, Mississippi
(601) 969-7607

Silas McCharen
smccharen@danielcoker.com

MISSOURI**Baker Sterchi Cowden & Rice L.L.C.**

Kansas City, Missouri

Thomas E. Rice
rice@bscr-law.com

Kara Trouslot Stubbs
stubbs@bscr-law.com

Brown & James, P.C.

St. Louis, Missouri
(314) 421-3400

Charles E. Reis IV
CREis@bjpc.com

(continued on page 17)

LABOR AND EMPLOYMENT PRACTICE GROUP

Directory of Member Firms

(continued from page 16)

NEBRASKA

Baylor, Evnen, Curtiss, Grit & Witt, L.L.P.

Lincoln, Nebraska
(402) 475-1075

Randall L. Goyette
rgoyette@baylorlaw.com

Dallas D. Jones
djones@baylorlaw.com

Gail S. Perry
gperry@baylorlaw.com

Walter E. Zink II
wzink@baylorlaw.com

NEVADA

Alverson, Taylor, Mortensen, Nelson & Sanders

Las Vegas, Nevada
(702) 384-7000

Diane Carr
dcarr@alversonstaylor.com

Monica L. Pierce
mpierce@alversonstaylor.com

NEW JERSEY

Sills Cummis Epstein & Gross

Newark, New Jersey
(973) 643-7000

David W. Garland
dgarland@sillscummis.com

Linda B. Katz
lkatz@sillscummis.com

NEW MEXICO

Butt Thornton & Baehr PC

Albuquerque, New Mexico

Agnes Fuentevilla Padilla
afpadilla@btblaw.com

NEW YORK

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.

Albany, New York
(518) 465-3484

Michael J. Murphy
mmurphy@carterconboy.com

Lester Schwab Katz & Dwyer, LLP

New York, New York
212-964-6611

Richard Granofsky
rgranofsky@lskdnylaw.com

NORTH CAROLINA

Young Moore And Henderson P.A.

Raleigh, North Carolina
(919) 782-6860

William M. Trott
wmt@ymh.com

OHIO

Dinsmore & Shohl LLP

Cincinnati, Ohio
(513) 977-8200

Michael W. Hawkins
michael.hawkins@dinslaw.com

Mark Kingseed
mark.kingseed@dinslaw.com

Charles M. Roesch
croesch@dinslaw.com

Crabbe, Brown & James

Columbus, Ohio
(614) 228-5511

Jeffrey M. Brown
jbrown@cbjlawyers.com

Christina L. Corl
ccorl@cbjlawyers.com

Vincent J. Lodico
vlodico@cbjlawyers.com

OKLAHOMA

Whitten, Nelson, McGuire, Wood, Terry & Roselius

Oklahoma City, Oklahoma
(405) 239-2522

Philip Anderson
panderson@whitten-nelson.com

Reggie N. Whitten
whitten@whitten-nelson.com

OREGON

Cosgrave Vergeer Kester LLP

Portland, Oregon
(503) 323-9000

Kathleen J. Hansa
khansa@cvk-law.com

Jeffrey A. Johnson
JJJohnson@cvk-law.com

PENNSYLVANIA

McNees Wallace & Nurick LLC

Harrisburg, Pennsylvania
(717) 232-8000

Schaun D. Henry
shenry@mwn.com
Brian F. Jackson
bjackson@mwn.com

German, Gallagher & Murtagh

Philadelphia, Pennsylvania
(215) 545-7700

Bernard E. Jude Quinn
quinnj@ggmfirm.com

Meyer, Darragh, Buckler, Behenek & Eck, P.L.L.C.

Pittsburgh, Pennsylvania
(412) 261-6600

Marie Milie Jones
mjones@mdbbe.com

J. Michael Klutch
mklutch@mdbbe.com

RHODE ISLAND

Higgins, Cavanagh & Cooney LLP

Providence, Rhode Island
(401) 272-3500

Gerald C. DeMaria
gdemaria@hcc-law.com

James A. Ruggieri
jruggieri@hcc-law.com

SOUTH CAROLINA

Young Clement Rivers LLP

Charleston, South Carolina
(843) 577-4000

Carol B. Ervin
cbe@yrcrlaw.com

Shawn D. Wallace
sdw@yrcrlaw.com

Nelson Mullins Riley & Scarborough, L.L.P.

Columbia, South Carolina
(803) 799-2000

Sue Erwin Harper
corky.harper@nelsonmullins.com

Sheryl Blenis Ortmann
sheryl.ortmann@nelsonmullins.com

Jim O. Stuckey, III
jim.stuckey@nelsonmullins.com

Greenville, South Carolina
(864) 250-2300

Andreas N. Satterfield, Jr.
andy.satterfield@nelsonmullins.com

Steven M. Wynkoop
steve.wynkoop@nelsonmullins.com

Kenneth E. Young
ken.young@nelsonmullins.com

Myrtle Beach, South Carolina
(843) 448-3500

Amy Y. Jenkins
amy.jenkins@nelsonmullins.com

TENNESSEE

Leitner, Williams, Dooley & Napolitan, PLLC

Chattanooga, Tennessee
(423) 265-0214

Marc Harwell
marc.harwell@leitnerfirm.com

Steven W. Keyt
steven.keyt@leitnerfirm.com

Kelly P. Kirkland
kkirkland@leitnerfirm.com

Lewis, King, Krieg & Waldrop, P.C.

Knoxville, Tennessee
(865) 546-4646

Richard W. Krieg
dkrieg@lewisking.com

Janet Hayes
jhayes@lewisking.com

Neely, Green, Fargason, Brooke & Summers

Memphis, Tennessee
(901) 523-2500

Darryl Gresham
dgresham@neelygreen.com

James B. Summers
jsummers@neelygreen.com

TEXAS

Strasburger & Price, L.L.P.

Dallas, Texas
(214) 651-4300

Michael R. Buchanan
mike.buchanan@strasburger.com

Kimberly Moore
kim.moore@strasburger.com

Mounce, Green, Myers, Safi & Galatzan

El Paso, Texas
(915) 532-2000

Mark D. Dore
dore@mgmsg.com

Lorance & Thompson, P.C.

Houston, Texas
(713) 868-5560

Brian T. Coolidge
btc@lorancethompson.com

David J. Escobar
dje@lorancethompson.com

Naman, Howell, Smith & Lee, L.L.P.

Waco, Texas
(254) 755-4100

John T. Hawkins
hawkins@namanhowell.com

VIRGINIA

Morris And Morris, P.C.

Richmond, Virginia
(804) 344-8300

Mark D. Dix
mdix@morrismorris.com

Philip B. Morris
pmorris@morrismorris.com

Gentry Locke Rakes & Moore LLP

Roanoke, Virginia
(540) 983-9300

Todd A. Leeson
todd_leeon@gentrylocke.com

Paul G. Klockenbrink
paul_klockenbrink@gentrylocke.com

W. David Paxton
david_paxton@gentrylocke.com

Michael A. Taylor
michael_taylor@gentrylocke.com

WASHINGTON

Merrick, Hofstedt & Lindsey, P.S.

Seattle, Washington
(206) 682-0610

Tyna Ek
tek@mhlsattle.com

(continued on page 18)

LABOR AND EMPLOYMENT PRACTICE GROUP

Directory of Member Firms

(continued from page 17)

WEST VIRGINIA

Robinson & McElwee PLLC
Charleston, West Virginia
(304) 344-5800

Joseph M. Price
jmp@ramlaw.com

William E. Robinson
wer@ramlaw.com

David S. Russo
dsr@ramlaw.com

WISCONSIN

Whyte Hirschboeck Dudek S.C.
Milwaukee, Wisconsin
(414) 273-2100

Nathan A. Fishbach
nfishbach@whdlaw.com

William E. Hughes III
whughes@whdlaw.com

WYOMING

Murane & Bostwick, LLC
Casper, Wyoming
(307) 234-9345

Roger E. Schumate
res@murane.com

International Firms

AUSTRIA

Law Offices Dr. F. Schwank
Vienna, Austria
43-1-533-5704

Friedrich Schwank
schwank@schwank.com

AUSTRALIA

TressCox Lawyers, Australia
Sydney, New South Wales, Australia
61-2-9221-2744

Timothy Unsworth
tju@tresscox.com.au

BELGIUM

Marx, Van Ranst, Vermeersch & Partners
Brussels, Belgium
Rafael Claes
rafael.claes@mvvp.be

CANADA

Parlee McLaws
Calgary, Alberta, Canada
(403) 294-7000

Bruce Churchill-Smith
bchurchill-smith@parlee.com

Gregory D. Stirling
gstirling@parlee.com

Edmonton, Alberta, Canada
(780) 423-8500

Robert J. James
rjames@parlee.com

Walter Pavlic
wpavlic@parlee.com

**Fasken Martineau
Dumoulin LLP**

Toronto, Ontario, Canada
(416) 366-8381

David N. Corbett
david_corbett@fasken.com

ENGLAND

Charles Russell
London, England
44-20-7203-5000

David Green
david.green@charlesrussell.co.uk

Brian Palmer
brian.palmer@charlesrussell.co.uk

Michael Powner
michael.powner@charlesrussell.co.uk

FRANCE

Courtois Lebel
Paris, France
33 (0) 1 58 44 92 92

Nicolas Sauvage
nsauvage@courtois-lebel.com

MEXICO

Von Wobeser y Sierra, S.C.
Mexico City, Mexico
(52-55)-5258-1000

Javier Lizardi
jlizardi@vwys.com.mx

PUERTO RICO

Reichard & Escalera
Hato Rey, Puerto Rico, Puerto Rico
(787) 758-8888

Emmalind Garcia

SWEDEN

Delphi & Co
Gothenburg, Sweden

Leif Ramberg
leif.ramberg@delphilaw.com

Linköping, Sweden

Erik Fock
erik.fock@delphilaw.com

Malmö, Sweden

Hanne Mannheimer
hanne.mannheimer@delphilaw.com

Stockholm, Sweden

Anna Gustafsson
anna.gustafsson@delphilaw.com

Martin Lundquist
martin.lundquist@delphilaw.com

Fredrik Nordlof
fredrik.nordlof@delphilaw.com

ALFA®INTERNATIONALSM

980 N. Michigan Avenue
Suite 1180
Chicago, Illinois 60611

312/642-ALFA (642-2532)

FAX: 312/642-5346

www.alfanet.org

© 2004 AMERICAN LAW FIRM ASSOCIATION. ALL RIGHTS RESERVED.

DISCLAIMER The materials contained in this newsletter have been prepared by ALFA® (American Law Firm Association) member firms for informational purposes only. The information contained is general in nature, and may not apply to particular factual or legal circumstances. In any event, the materials do not constitute legal advice or opinions and should not be relied upon as such. Distribution of the information is not intended to create, and receipt does not constitute, an attorney-client relationship. Readers should not act upon any information in this newsletter without seeking professional counsel. ALFA® makes no representations or warranties with respect to any information, materials or graphics in this newsletter, all of which is provided on a strictly "as is" basis, without warranty of any kind. ALFA® hereby expressly disclaims all warranties with regard to any information, materials or graphics in this newsletter, including all implied warranties or merchantability, fitness for a particular purpose and non-infringement.