

Fall 2006

Employment Law Update

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U.S. Court of Appeals Rules Law Does Not Impose a “Code of Civility” in the Workplace

In June of this year the United States Supreme Court issued an opinion, *Burlington Northern v. White*, significantly broadening the scope of workplace decisions an employee can sue for as “retaliatory” under Title VII of the Civil Rights Act. Now, in its first major Title VII decision after *Burlington Northern*, the U.S. Court of Appeals in Richmond has reaffirmed its dedication to the principle that Title VII still does not impose liability on employers for isolated comments and remarks – even if those comments are extremely offensive. *Jordan v. Alternative Resources Corp.* (Please note: Extreme and explicit remarks are included below in a direct quote from the Court’s opinion.)

The *Jordan* case arose indirectly out of the “Washington, D.C. sniper” shootings of 2002. Mr. Jordan worked for a staffing agency, at an IBM facility in Maryland. When the arrest of the two African-American sniper suspects was announced on television in his workplace, Jordan overheard a co-worker exclaim, “They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them.” Mr. Jordan complained to management. A month later he was fired, allegedly in retaliation for his complaint. He sued both his staffing agency and IBM. The trial court dismissed his claim, and he appealed.

The Court of Appeals held that dismissal of Mr. Jordan’s retaliation claim was proper because “no reasonable person” could believe that the single – admittedly highly offensive – comment could have, by itself, created a racially-hostile environment in violation of Title VII. An employee who is fired in retaliation for a claim of harassment or discrimination does not need to prove the underlying harassment or discrimination was unlawful. However, the employee does have to show that the underlying events would have led a “reasonable person” to believe a violation of Title VII had occurred. Here, the court concluded, “no objectively reasonable person could have believed that the . . . office was . . . infected by severe or pervasive racist, threatening, or humiliating harassment.” The “single abhorrent slur,” the court held, was not directed toward any employee and was something that could be handled by the company’s internal complaint process – but not an action that gave rise to a federal civil rights claim.

Practical Pointer

The *Jordan* decision should give comfort to managers that a single slur, even a highly offensive one, does not make a hostile environment. At the same time, the court’s references to the need for effective in-house resolution of such an issue should lead human resource professionals to redouble their efforts to ensure prompt and effective remedial action – action that needs to be taken against offensive conduct whether or not that conduct rises to the level of a violation of federal law. Even though the one inappropriate comment did not create an illegal hostile environment in this case, it certainly would have been very damaging evidence of a hostile environment if more evidence existed. In any event, employers are well-advised to take a “zero tolerance” stance regarding such inappropriate language in the workplace.

PPA Provides Sweeping Changes to Pension Law

On August 17, 2006, President Bush signed the Pension Protection Act of 2006 ("PPA"), the most extensive revision of the Nation's pension laws in three decades. The PPA will require most private employers that provide traditional defined benefit pensions to pump substantial dollars into those plans over seven years while making it easier to expand 401(k) and IRA retirement plans.

The PPA is an attempt by Congress to shore up funding of defined benefit pension plans. The law requires companies to fund fully all defined-benefit pension plans over seven years, closes loopholes that allowed underfunded plans to skip payments, and forces companies that underfund their plans to pay higher premiums to the Pension Benefit Guaranty Corporation. To provide time for a transition, the funding provisions of the law will not take effect for two years.

In recognition that 401(k) plans are now the principal employer-sponsored retirement vehicle, the PPA creates incentives for employers to provide automatic enrollment in 401(k) plans to their employees. A new automatic enrollment 401(k) Safe Harbor is effective for plan years beginning after December 31, 2007. This Safe Harbor eliminates the need for non-discrimination testing with respect to elective deferrals and matching contributions. The automatic enrollment incentives should increase employee savings substantially, and some national experts feel this could be the most important legacy of this new legislation.

Designated members of the K&C Employment Team will be on hand at the Chesapeake Conference Center on November 9th for the first showing of the 23rd Annual Employment Law Update to answer any questions about the PPA or any other pressing benefits issues.

EEOC National Chair Steps Down

For five years, Carrie Dominguez served as Chairperson of the Equal Employment Opportunity Commission. On August 7, 2006, she announced her plan to resign from that position effective August 31, 2006. This announcement ended speculation that President Bush was likely to reappoint Dominguez, a Republican, to a second, five-year term.

During Ms. Dominguez's term, the EEOC's Mediation Program was substantially expanded. This program is responsible for resolving many cases and has been praised by both employee and employer groups. Ms. Dominguez also presided over the implementation of a pilot project outsourcing EEOC's call centers for responding to routine telephone inquiries. More recently, Ms. Dominguez implemented a major restructuring intended to streamline management while increasing front-line staff.

EEOC Vice Chair, Naomi Earp, also a Republican, will become Acting Chair on September 1, 2006. Ms. Earp's term will expire July 1, 2010.

Uncooperative Employee Loses Workers' Comp Benefits

On April 25, 2006, the Virginia Court of Appeals ruled that an employee who refused to fill out forms containing his medical history was not entitled to ongoing workers' compensation benefits. The employee, Jason England, was hurt on the job while working for Sherwin-Williams and was out on workers' comp. The nurse assigned to handle his case arranged for him to go to an independent medical examination. When Mr. England appeared at the orthopedic clinic for the exam, he refused to complete a form that the clinic required all patients to complete. Mr. England claimed he wanted legal advice from his attorney, so the nurse sent the clinic's form to his attorney for review. Despite raising no objections, Mr. England again refused to complete the form at his next appointment. This examination, like the earlier one, did not proceed.

The full Workers' Compensation Commission decided that Sherwin-Williams had not proven that Mr. England's refusal to fill out the form was the reason the medical examination did not occur. However, the Court of Appeals of Virginia reversed, ruling that it was entirely reasonable to require an employee to fill out the forms containing his medical history, which was highly relevant to the medical examination in question. The Court went on to rule that Mr. England's refusal to fill out the paperwork prevented not one, but two possible examinations from proceeding and denied Mr. England ongoing benefits.

Wage-Hour Claims Continue to Proliferate

The Fair Labor Standards Act (FLSA) imposes strict rules on employers regarding payment of minimum wage and overtime for any non-exempt employee who works more than 40 hours in a work week. The overtime rules in particular have brought the FLSA into the public eye with the recent redefinition of the "White-Collar Exemptions." For a variety of reasons, the number of FLSA claims has risen sharply in recent years. Many lawyers who sue employers now include FLSA claims at the top of the list of claims they like to file.

Not only have the number of FLSA lawsuits increased, but the sizes of settlements also are on the rise. The number of FLSA collective action lawsuits outpaced employment discrimination class action filings in 2005 and four of the ten largest employment law settlements in 2005 involved wage and hour claims.

There are a number of reasons why FLSA claims are perhaps the most popular employment claim. This law presents a number of technical requirements which present difficult compliance challenges. Also, many times the records employers are required to keep become an employee's best evidence of a claim. If the employer does not maintain adequate records, the employee is presumed to have been underpaid. If an employer makes a mistake in this area, an employee, or group of employees, may recover back wages for a period of up to two or three years depending upon the circumstances. Add to that the availability of liquidated damages and attorneys' fees, and it is no surprise that so many of these claims are being filed.

FYI

The K&C Employment Team is helping employers proactively protect against this ever-increasing risk. Our lawyers are available to help employers audit their pay practices to ensure that employees are being paid properly. To help provide direction and answer any questions employers may have, the former District Director for the Wage-Hour Division of the DOL, Gilbert Parker, and Pamela Champ of the Virginia Department of Labor and Industry will be on hand at the 23rd Annual Employment Law Update. As part of the same program, a lawyer who specializes in suing employers will present his views on what he looks for in suing employers over wage-hour and other employment matters.

Search For New Outrageous Cases Continues

The K&C Employment Team's Top Ten Most Outrageous Cases for 2005 includes some extremely wacky and humorous real-life employment disputes. That list can be viewed on the K&C website at www.kaufmanandcanoles.com. The search for candidates for this year's Top Ten List is in full swing. If you come across some employment case that you feel is particularly funny or just downright outrageous, please contact any member of our Employment Team and your candidate just may make our Top Ten.

One candidate for the 2006 list is a Florida hospital employee who was fired when she cheered the sudden death of her supervisor and proclaimed to co-workers that "today she's in the judgment" and "the Lord's will has been done." The employee felt that discharge was too strong a reaction to her inappropriate comments and sued her employer. However, the judge found that her conduct was "outrageous" enough to justify her firing.

23rd Annual Employment Law Update

A Flight Plan for Risk Avoidance

On November 9th, the K&C Employment Law Team will host the first showing of the 23rd Annual Employment Law Update: *A Flight Plan for Risk Avoidance*, at the Chesapeake Conference Center. This year's program is designed to provide employers with the travel guidelines for navigating the employment law maze.

Seminar highlights include: Several employment agency representatives, a lunch presentation by an attorney who specializes in suing employers, and an ice cream social to wrap up the day! Topics to include: Workplace Safety, Personnel File Access, Interviewing & Hiring, Handling Unemployment Claims and more.

Reserve your seat today! For more information or to register, please contact Nicole Naidyhorski at (757) 624-3232.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.



