

Winter 2007

Employment Law Update

In this Issue:

Employee Fails to Prove Retaliation Against Virginia Employer
_____ Page 2

Workplace Injury Found Not to be Direct Cause of Amputation
_____ Page 3

Prince's Guards: Employees or Contractors?
_____ Page 3

New Leadership to Change EEOC Litigation Strategy

In some cases, the Equal Employment Opportunity Commission (EEOC) not only investigates claims of discrimination, but it files lawsuits on behalf of employees against employers. In recent public statements, the new Chair of the EEOC, Naomi Earp, and the new EEOC General Counsel, Ronald Cooper, have indicated a somewhat different strategy for how the agency will choose cases to litigate in Court. Both representatives have indicated that the EEOC will focus more on systemic discrimination cases that have a broad impact on a large number of workers. Naomi Earp added in her November 15, 2006 statements before the Minnesota Bar Association that she would like the EEOC to become akin to a "strike-force" moving quickly and with more resources when evidence of discrimination is found and stepping aside when it is not found.

Given the limited resources available to devote to cases litigated by the EEOC, this strategy may lead to even fewer cases filed by the Agency, but the cases will tend to be larger cases seeking more damages. As General Counsel Ronald Cooper noted at a recent employment law conference in Washington, D.C. the EEOC rarely takes cases to trial, but it maintains a high litigation success rate when it does.

Practical Pointer

Though the new litigation strategy recently announced by the EEOC may sound ominous to employers, it should be emphasized that the EEOC rarely files cases on behalf of employees and the new strategy may cause the EEOC to file even fewer cases. The vast majority of cases filed under the federal laws prohibiting discrimination are filed by individuals after the EEOC has concluded its investigation. Unfortunately, these private lawsuits continue to proliferate.

23rd Annual Employment Law Update *A Flight Plan for Risk Avoidance*



On March 22nd, the K&C Employment Law Team will host the Richmond showing of the 23rd Annual Employment Law Update: *A Flight Plan for Risk Avoidance*, at the Greater Richmond Convention 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: Discipline/Discharge, Personnel File Access, Interviewing & Hiring, Handling Unemployment Claims and more.

Avoid standby status and reserve your seat today! For more information or to register, please contact Nicole Naidyhorski at (804) 771-5722.

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.

Employee Fails to Prove Retaliation Against Virginia Employer

Generally, when an employer discharges an employee shortly after there is an accusation of discrimination or inappropriate conduct, there is risk of a retaliation claim. But the Federal Fourth Circuit Court of Appeals recently ruled that a time lapse of three to four months between a sales manager's complaint and his termination was too long to prove retaliation by the timing of his discharge alone in *Pascual v. Lowe's Home Centers, Inc.*

In this case, Matthew Pascual, a sales manager at Lowe's Home Centers, Inc. in Sterling, Virginia complained to his store manager about being called "pretty pants" or "pretty" and a sexual harassment investigation was conducted by the company's Human Resource department. After the investigation, appropriate steps were taken to end the use of inappropriate nicknames. Three to four months later, Mr. Pascual was terminated for performance deficiencies after receiving a number of written warnings about his failures on the job. After his discharge, Mr. Pascual filed a lawsuit claiming that his performance could not have been a problem given the high sales volume of his store. He claimed Lowe's really discharged him because of the sexual harassment complaint he had filed.

The Court noted that "other than his own unsubstantiated allegations," Mr. Pasqual failed to present any evidence that the performance warnings he had received were inaccurate. All that remained of a claim of retaliation was the short time between the workplace harassment claim and the discharge and the Court found that three to four months was too much time to provide conclusive proof of causation. In so ruling, the Fourth Circuit stated, "generally speaking, the passage of time alone cannot provide proof of causation unless the temporal proximity between an employer's knowledge of protected activity and an adverse employment action was very close."

Practical Pointer

While the Court found that there was not sufficient evidence of retaliation in this case, employers should be careful whenever they are accused of discrimination or other inappropriate conduct and the accuser is subsequently disciplined. When an employer is accused of being a discriminator, particularly when the claim is not true, a natural reaction may be to respond with quick disciplinary action. This impulse should be resisted and employers are well-advised to be patient to avoid any appearance of retaliation. Retaliation claims cost employers millions of dollars every year and these claims can be successful even when the underlying charge of discrimination is without merit. As noted by the new EEOC Chair, Naomi Earp, in recent public comments, retaliation charges with the EEOC have doubled since 1992 and one-third of the charges filed in 2005 included some element of retaliation. Since a recent Supreme Court decision expanded what employer reactions constitute retaliation, more such claims are expected. Given this increasing risk, supervisors should be counseled to document and report complaints, even oral ones, relating to discrimination, harassment, workplace safety, fraud, and/or abuse of corporate and/or government resources. Managers should also be careful to avoid any of the following common mistakes that have led to retaliation liability:

1. Personalizing the allegations;
2. Making knee-jerk emotional reactions to allegations whether they are true or not;
3. Failing to rely on advice from HR and/or legal counsel against shunning the complainant or otherwise treating the complainant differently in any way;
4. Failing to document performance issues both before and after receiving a complaint; and
5. Failing to recognize that the timing of discipline may appear to be retaliatory even if discipline was justified.

How Hostile Can a Work Environment Get?

One of the candidates for this year's K&C Employment Team list of the ten most outrageous employment cases involves an employee who was spied upon while using the women's restroom at her workplace. In *Cottrill v. MFA Inc.*, a supervisor spied upon Jill Cottrill through a peephole into a women's restroom for years. He also placed a substance containing poison ivy on the toilet seat in the women's restroom that caused Ms. Cottrill to suffer a serious and persistent rash that was so debilitating that she testified she had trouble walking and frequently needed medical attention.

Surprisingly, the Court found that the work environment was not so severely and pervasively hostile from the standpoint of sex to be illegal. The Court reasoned that although Ms. Cottrill was spied upon, she was not aware

continued from page 2

of the spying when it took place. Excluding that inappropriate conduct, the Court found that the evidence of the poison ivy-contaminated toilet seat did not establish an illegal hostile work environment.

Because of the outrageous conduct and the surprising result, this case is a candidate for the Employment Team's Top Ten List. Attendees at the upcoming March 22, 2007 showing of the 23rd Annual Employment Law Update will "have the last say" on which cases are the most outrageous.

Workplace Injury Found Not to be Direct Cause of Amputation

In *Molloy v. Abbeyshroul, Inc.*, there was no question that a Virginia restaurant manager, Daniel Molloy, suffered a work related injury when he slipped on ice walking out of the back door of his workplace and broke his arm. However, instead of seeing a doctor immediately, he went home, took several narcotic pain pills, and fell asleep. By the time he sought treatment, his arm had lost circulation and had to be amputated. He claimed that his workplace injury was responsible for the amputation and, accordingly, he should receive worker's comp benefits; his employer disagreed.

Mr. Molloy filed a workers' comp claim with the Virginia Workers' Compensation Commission. He argued that the chain of events that led to amputation of his arm began with an injury that was clearly work-related. However, when Mr. Molloy went to the emergency room, he determined that it was too crowded to wait to be treated and instead went home, wrapped his arm in ice and took Percocet, a narcotic used to treat moderate to severe pain, before bed. Doctors who saw Mr. Molloy believed that when he fell asleep after taking the pain medication, he slept on his arm, compressing it, and cutting off the circulation. They felt the prolonged compression was a much more likely explanation of the loss of circulation than the initial fall on the ice.

The Commission decided that Mr. Molloy's self-medication with excessive quantities of drugs not prescribed for the injury broke the chain of causation between Molloy's fall and the amputation of his arm. In other words, Mr. Molloy lost his arm because he fell asleep on it after taking too much Percocet, not because he slipped on ice at work. When Mr. Molloy appealed the Commission's denial of benefits this past summer, the Virginia Court of Appeals agreed with the Commission and found that Mr. Molloy was not eligible for benefits. This case points out that, to receive workers' compensation benefits for work-related injuries, employees must take some responsibility to obtain appropriate treatment and not take steps to exacerbate their injuries.

Prince's Guards: Employees or Contractors?

Employers are tempted at times to classify individuals as independent contractors as opposed to employees to avoid certain laws that only protect the rights of employees. A Saudi diplomat discovered last August that this can be a risky decision. Prince Faisal bin Turki bin Nasser Al-Saud, is a member of the Saudi royal family who maintains a residence in McLean, Virginia where he and his family are guarded by security agents. His security agents were provided by a series of three different companies, reimbursed by the Saudi government for the cost of guarding the Prince. However, the Prince became dissatisfied with the first company and the second company quit because of slow payments from the Saudi embassy.

The Prince's chauffeur formed the third company calling it Capital International Security, or CIS. He ordered the agents to get their own business licenses and liability insurance, but did not enforce the order. A few, but not all, of the agents who failed to obtain licenses and insurance were reclassified as employees and were paid reduced wages. However, five of the agents who were not reclassified as employees sued CIS in Federal Court claiming they were employees who were owed overtime payments. Initially, a Judge ruled that the Prince, not CIS, actually controlled the agents' activities so they were independent contractors. On appeal, the Fourth Circuit Court of Appeals disagreed, ruling that the Prince and CIS *both* controlled the agents' pay and responsibilities. Therefore, they are joint employers and since the agents were not exempt from overtime, they were entitled to overtime pay.

This case points out that a key consideration in determining whether someone is an employee or an independent contractor is how much control is asserted over the worker. To the extent that an entity or individual asserts control over workers may dictate that they be treated as employees despite attempts to classify them as independent contractors.

Kaufman & Canoles, P.C.

P. O. Box 3037

Norfolk, VA 23514

Inside This Issue

- New Leadership to Change EEOC Litigation Strategy
- Workplace Injury Found Not to be Direct Cause of Amputation
- 23rd Annual Employment Law Update
- Employee Fails to Prove Retaliation Against Virginia Employer

PRSRT STD
US POSTAGE
PAID
PERMIT #2
NORFOLK, VA

Visit us on the web at www.kaufmanandcanoles.com
for timely updates or to register for our seminars.

K&C LABOR AND EMPLOYMENT SECTION

[Contact Us](#)

Burt H. Whitt, Chairman	(757) 624-3275	bhwhitt@kaufcan.com
David N. Anthony	(804) 771-5710	dnanthony@kaufcan.com
Stanley G. Barr, Jr.	(757) 624-3274	sgbarr@kaufcan.com
Robert J. Barry	(757) 624-3268	rjbarr@kaufcan.com
Daniel F. Basnight	(757) 873-6309	dfbasnight@kaufcan.com
R. Barrow Blackwell	(757) 259-3833	rbblackwell@kaufcan.com
John M. Bredehoff	(757) 624-3225	jmbredehoff@kaufcan.com
Marie D. Carter	(804) 771-5755	mdcarter@kaufcan.com
Ann S. Dodson	(757) 624-3226	asdodson@kaufcan.com
Frank A. Edgar, Jr.	(757) 873-6304	faedgarjr@kaufcan.com
Shad C. Fagerland	(757) 259-3828	scfagerland@kaufcan.com
Laura Geringer Gross	(757) 624-3308	lggross@kaufcan.com
Kevin D. Holden	(804) 771-5730	kdholden@kaufcan.com
Scott W. Kezman	(757) 624-3008	swkezman@kaufcan.com
James S. Kolan	(757) 624-3135	jskolan@kaufcan.com
Richard C. Mapp, III	(757) 624-3285	rcmapp@kaufcan.com
Heather A. Mullen	(757) 624-3312	hamullen@kaufcan.com
L. Scott Seymour	(757) 624-3113	lsseymour@kaufcan.com
Anna Richardson Smith	(757) 624-3288	arsmith@kaufcan.com
Matthew W. Smith	(757) 259-3888	mwsmith@kaufcan.com
David J. Sullivan	(757) 624-3249	djsullivan@kaufcan.com
Shepelle Watkins-White	(757) 546-4135	swwhite@kaufcan.com

Copyright © 2007. Kaufman & Canoles. All Rights Reserved. The contents of this publication are intended for general information only and should not be construed as legal advice or a legal opinion on specific facts and circumstances.

If you would like to be added to the Kaufman & Canoles mailing list or if your name, title, company, or address needs to be revised, please notify Nicole Naidyhorski, Kaufman & Canoles, P.O. Box 3037, Norfolk VA 23514 (757) 624-3232 FAX (757) 624-3169 e-mail njnaidyhorski@kaufcan.com