KAUFMAN & CANOLES
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Legal Update

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Employment Law Update

In this Issue:

$7.5 Million Employment Verdict Partially Sustained by Norfolk Federal Court

The United States District Court in Norfolk recently refused to overturn a jury verdict awarding a former sales manager at a Virginia Beach timeshare sales business over $7.5 million in compensatory and punitive damages. The Court, however, did reduce the award to the statutory damage cap under Title VII of $200,000 and awarded the plaintiff an additional $208,000 in back pay.

In this case, the plaintiff claimed that her former employer retaliated against her for filing a claim with the Equal Employment Opportunity Commission (EEOC) in which she alleged she was being subjected to age and sex discrimination. According to the plaintiff's evidence, after her EEOC complaint, her former employer engaged in practices that negatively impacted the sales team for which she was responsible, the company president stated that there would be "no lawsuits on his watch," and another supervisor told her she would have gotten a new job she was seeking within the company if she had not "started an investigation with the EEOC . . . ."

As the massive verdict in this case indicates, retaliation against an employee for filing an EEOC charge is not only illegal, it is highly inflammatory to jurors. Employers dealing with current employees who have pending (or even past) EEOC charges need to be careful to treat such employees the same as employees without pending (or past) EEOC charges.

Requested Disability Accommodations Surprisingly Inexpensive

When the Americans with Disabilities Act (ADA) first became law, many employers feared that required accommodations for covered disabled employees would be unduly expensive. However, employers have discovered that the ADA has not resulted in much expense or disruption of operations of covered employers. In fact, half of the respondents to a recent Department of Labor (DOL) survey reported that there was no cost to providing accommodations requested by disabled workers. These results were reported by the DOL's Office of Disability Employment Policy on February 28, 2006.

The results are entirely consistent with the experience of local employers, who are many times surprised at how inexpensive requested accommodations have been. Employers faced with accommodating a disabled employee under the ADA are well-advised to seek the disabled employee's input before deciding upon an appropriate accommodation. Employers need not follow the requested accommodation, but many times, the employee's suggestion is much less expensive or disruptive than feared.

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EEOC to File More Class-Wide Discrimination Cases

On April 4, 2006, the Equal Employment Opportunity Commission (EEOC) approved a comprehensive program that will shift the EEOC's emphasis to the investigation and litigation of systemic, class-wide cases over those cases involving individual claims of discrimination. According to Chair Cari Dominguez, the EEOC is "changing our fundamental priorities" and will be emphasizing cases with a broader impact. Although the EEOC will still litigate certain individual cases, it plans to devote more resources to cases that involve a pattern, practice, or policy and/or class cases where the alleged discrimination has a broader impact.

The practical result of this shift in emphasis will be that the EEOC will file fewer cases, but the cases filed will be larger and more expensive to defend. Also, claims on behalf of individuals may be filed more frequently by private attorneys after the EEOC has completed its investigation and issued a "right to sue" letter to the individual.

"One of the Best" Joins K&C Employment Law Section

The K&C employment law team is pleased to welcome its newest member, John M. Bredehoft. "John's association with the firm is quite a catch for K&C. For years, he has been one of highest rated lawyers in Virginia," said Burt Whitt, chairman of the firm's Labor & Employment Law Section.

John currently serves as Chairman of the Virginia Bar Association Section on Labor Relations and Employment Law. He has won court cases breaking new ground in employment law in Virginia and nationally. John is well-known as a dynamic speaker, and has presented hundreds of courses and seminars to lawyers and human resource professionals across the United States and in Canada.

John states, "My philosophy is simple: prevent employment claims in the first place. When problems do arise, resolve them as fairly, quickly, and efficiently as possible." John has been recognized by his clients and peers by his perennial inclusion in *The Best Lawyers In America*, *Chambers USA Best Lawyers For Business*, *The Bar Register of Preeminent Lawyers, Virginia Business Magazine*'s "Legal Elite," and similar compilations.

Woman Who Resigns to Take Care of Family Member Not Entitled to Unemployment Benefits

In Virginia, an employee who loses his or her job will generally be entitled to unemployment compensation unless he/she was fired for misconduct or quit voluntarily. If an employee voluntarily quits, he/she may still be entitled to benefits if it is determined that the resignation was for "good cause." In a recent case, *Waldemar v. Virginia Employment Commission,* the Virginia Court of Appeals dealt with what will constitute "good cause" in this regard.

In *Waldemar*, a woman with a sickly infant took a job as a food service worker for McDonald's. Within a month after starting work, her babysitter announced that she was quitting. This forced the employee to quit to take care of her child and she applied for unemployment benefits, claiming that her child's health was "good cause" for her quitting her job. When the Virginia Employment Commission (VEC) denied her application, she sued.

While the VEC believed that the employee's concerns about her child were legitimate and may have caused her to resign, it determined that she had not made a good faith effort to resolve the situation before quitting. The VEC noted several courses of action the employee could have taken, including searching harder for a new sitter or requesting a leave of absence. Without evidence of a more diligent search, the VEC held that the employee had not proven she quit her job with "good cause."

The trial Court and ultimately, the Appeals Court, agreed with the VEC that Ms. Waldemar did not have "good cause" under the circumstances.

Friends Staff "Off the Hook" for Sexual Harassment

Generally, an employer who exposes female employees to daily sexual banter, dirty jokes, and inappropriate sexual horseplay can expect trouble in court when sued for sexual harassment. Add to that the fact the employer is located in California where the laws are very "employee-friendly" and one can only wonder how the employer could possibly escape liability for such an inappropriate workplace. But that is what happened when a comedy writers' assistant sued her employer in *Lyle v. Warner Bros. Television Productions*.

Amaani Lyle was forewarned when she applied to work with the writers of the television sitcom *Friends* that the show dealt with sexual matters. She was also told that, as an assistant to the comedy writers, she would be listening to their sexual jokes and discussions about sex on a regular basis. But after four months of employment, she was fired because of problems with her typing and transcription skills. Ms. Lyle then filed a lawsuit against three of the male comedy writers and others complaining of being exposed to regular sexual and anatomical language, innuendo, wordplay, and other inappropriate sexual conduct which she described in detail for the Court. She claimed this was beyond what she expected and that it constituted sexual harassment.

Although Ms. Lyle lost her claim at the trial Court, she appealed. On April 20, 2006, the California Supreme Court found that, under the circumstances, the employer was not liable for workplace harassment. The Court came to this decision despite numerous admitted examples of inappropriate and sexually coarse and vulgar language and conduct on the part of the writers who worked with Ms. Lyle. The Court also noted that the *Friends* production was a creative workplace, focused on generating scripts for an adult-oriented comedy show featuring a sexual theme. The Court found that no reasonable jury could conclude that the comments and conduct involved were severe enough to create a hostile or abusive environment from the standpoint of sex. In the process, the Court emphasized that Ms. Lyle was forewarned of the sexually-charged environment before she was hired.

Practical Pointer

Whether in California or any other state, normally an employer who allows the type of sexually-charged work environment that existed in the writers' room for *Friends* will ultimately lose in Court. This was a very unusual set of circumstances, which is why it was cited as one of K&C's Top Ten Outrageous Cases when it was first filed back in 2004. Generally, any time an employee can show she was subjected to sexual advances, conduct, or comments that were (1) unwelcome, (2) because of sex, and (3) sufficiently severe and pervasive to create an abusive work environment, the employee will prevail in Court. This is why most employers continue to monitor their workplace for illegal harassment and train supervisors on how to avoid liability for workplace harassment.

22nd Annual Employment Law Update: *Rules of the Game*

Last March, the K&C Employment Law team held its Richmond showing of the 22nd Annual Employment Law Update at the Greater Richmond Convention Center. This year's game show theme features K&C's very own game, The Prize is Right. Our game show theme was well-received and even a little entertaining! The final showing of the 22nd Annual Employment Law Update is scheduled for July 20th, at the Hampton Roads Convention Center from 8:30 a.m. – 4:45 p.m. Reserve your seat now! 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.

2006 *On the Job:* Supervisory Training Clinic

The *On the Job:* Supervisory Training Clinic is designed to provide focused training for supervisors. Our final showing of the 2006 Clinic features two topics: Employee Time Management & Compensation Issues for Supervisors and Effective Employee Communication and Documentation Strategies. These topics will be presented in Norfolk on Thursday, September 14th. For further information, please contact Nicole Naidyhorski at (757) 624-3232 or visit www.kaufmanandcanoles.com.

Labor & Employment

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Inside This Issue

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