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The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

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Religious Accommodation

Fourth Circuit Clarifies Rules On Religious Accommodations

by Eric Paltell

One of the most confusing areas of employment discrimination law is religious discrimination. Title VII of the Civil Rights Act, and most state counterparts, require that employers make "reasonable accommodations" to employees religious beliefs, provided that the accommodations do not impose an "undue hardship" upon the employer. Applying this vague standard in practice can be quite challenging.

In a February 11, 2008 decision, *EEOC v. Firestone Fibers & Textiles Company*, the United States Court of Appeals for the 4th Circuit (which has jurisdiction over Maryland, Virginia, West Virginia, and the Carolinas) dismissed a religious discrimination lawsuit brought by the EEOC. The case involved David Wise, who worked in a testing laboratory for tire cord fabric in North Carolina. Wise was represented by the United Steel Workers Union, and his collective bargaining agreement provided a seniority based system for employees to bid on shifts.

Mr. Wise joined the Living Church of God in 2001, whose tenets prohibited him from working from sundown Friday through sundown Saturday, and on approximately 20 days of religious holidays per year. When Firestone underwent a series of layoffs, Wise was reassigned from the day shift to the 3 to 11 p.m. shift, as well as most Saturdays. The Friday evening and Saturday work requirements created a direct conflict with his religious beliefs.

Initially, Wise used annual leave, floating holidays, and unpaid leave to avoid working on the Sabbath and his religious holidays. Additionally, his supervisor helped him by allowing him to work the 7 a.m. to 7 p.m. shift on certain Fridays. After exhausting all of his annual leave and floating holidays, as well as most of his unpaid leave time, Wise requested 11 unpaid leave days for religious holidays in September 2002. Firestone denied the request on the grounds that it would impose an undue hardship.

The EEOC filed suit on behalf of Wise, and the trial court granted summary judgment in favor of the employer. The EEOC appealed, and the 4th Circuit affirmed the court's dismissal. The Fourth Circuit concluded that, although an employer is required to make "reasonable accommodations" of employees with religious observances, it "need not provide the employee with his or her preferred accommodation." The Court found that Firestone's provision of annual leave, floating holidays, unpaid leave, allowance of shift swaps, and modification of his Friday schedule clearly satisfied Title VII's reasonable accommodation obligations. The Court went on to hold that Title VII does not require an employer to violate or modify the terms of a collective bargaining agreement to accommodate religious beliefs, nor does it require an employer to "adversely impact or infringe upon the rights of other employees when it comes to religious observances." In this case, the Court found that granting Wise all of his requested time off would require other employees to work overtime to cover his shifts and would have deprived other employees of their desired shift preferences under the seniority system.

The Court's decision in *Firestone Fibers* provides valuable guidance to employers in Maryland and other states within the Fourth Circuit. When faced with employees requesting recurring time off on weekends because of religious beliefs, an employer need not automatically grant those requests. Rather, the employer must make an effort to accommodate the employees religious practices, but can draw the line when those accommodations cause significant overtime or infringe upon the rights of other employees.

Adverse Employment Actions

Fire Me Now, Or Prepare To Get Sued!

by Peter S. Saucier

In a pair of sexual harassment cases known as *Burlington Industries v. Ellerth*, and *Faragher v. Boca Raton*, the Supreme Court afforded employers protection from strict liability for misconduct by a manager or supervisor if the employee did not suffer an adverse employment action. Although adverse employment action had been essential to establishing a viable employment case before then, its relative importance as a legal consideration and point of contention has since mushroomed.

This added attention brought with it a host of creative thrusts and counter-thrusts about what constitutes adverse employment action. The Supreme Court's own description of an adverse employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," left plenty of wiggle room. And lawyers always wiggle when invited to do so.

The most interesting twist in this regard may be a trend toward plaintiffs describing continued employment with full pay and benefits as an adverse employment action. In a sense, the reasoning is a sort of reverse adverse employment action – "I wanted to be fired but they kept me employed. Isn't that terrible?" One interesting example is *Wyatt v. Occidental Petroleum Corp.*, which featured a claim of age discrimination based upon a refusal by the employer to fire a Human Resources professional during a reduction in force, but the *Wyatt* opinion is not an isolated anomaly.

Experience in the Plains States

It likely is just coincidence, but the bulk of the reported cases that address the failure to fire as adverse employment action theory arise in the plains states. One of the earlier cases to tackle the issue was *Cooney v. Union Pacific R. Co.* Following the merger of two freight lines, the new entity developed a plan to reduce the workforce in zones of operation that were overstaffed. In those discrete areas, employees were offered cash buyouts where the number of available employees exceeded the number of remaining positions, and only to the extent that was necessary to balance the numbers. A group of employees over age 58 in one zone were not offered cash buyouts while younger employees in another zone were paid and terminated. Essentially, the older group was in the wrong place to get fired.

Professing outrage and hurt feelings at the railroad's failure to offer termination with cash, the group brought an action for age discrimination. Relying upon the Supreme Court's definition of adverse employment actions in *Ellerth*, the group argued that the failure to offer termination with a buyout was a significant change in benefits, and consequently, an adverse employment action. The court rejected that argument, leaving the door ajar for future advocates to return to the theme by qualifying the ruling, "In the facts of this case, we disagree."

Predictably, the theory reappeared before the court later in *Jones v. Reliant Energy – ARKLA*. Bridget Jones, who is African-American, was a customer service representative for an energy supplier at a time of reorganization. There was at least one other customer service representative at the time – Beverly Terry, who is white. Essentially, Jones was trained to do a new job just before reorganization and she continued to be employed. Meanwhile, Terry's job was abolished and she was terminated with a severance package. Jones alleged that she was discriminated against on the basis of race for not having been fired, trotting out the theory from Cooney.

This time, a different panel of the court tried to close the opening left in *Cooney*. Using more definite language, the court wrote, "Jones contends she suffered an adverse employment action because she was not permitted to take advantage of a benefit provided by Reliant, i.e., severance pay. We disagree. . . . An employer's failure to award severance benefits, however, is not an adverse employment action." The court concluded its decision with clear, direct words:

We recognize that Jones would have preferred termination with severance instead of transfer. We will not, however, interfere with Reliant's decision to maintain Jones's employment even if it offered other employees a choice. Any other holding would lead to the absurd result that Jones suffered an adverse action because she was not fired.

Some eight months later a similar case arose. The appellant in *Curby v. Solutia*, Inc., was retained after a merger and given a new position with a similar title, as well as a $15,000 raise. Sometime later, Curby submitted a document that she and her lawyer styled a "notice of termination," claiming that it triggered a severance benefit due from a pre-merger agreement, but was not a resignation from her present employment.

The legal wordsmithing proved to be a measure too clever for Curby's employer and the court. Solutia accepted the notice of termination as a resignation, and refused to make any severance payments. The court upheld dismissal of the case on several grounds. Having no trouble at all finding the notice of termination to be a resignation, the court held, "Because she resigned, Curby also cannot show she suffered an adverse employment action. An employee cannot submit a resignation and then claim the employer's acceptance of the resignation is an adverse employment action." With Reliant freshly in their minds, and cited for authority, the court added that the failure to give severance to Curby when she retained a job precluded a finding that she suffered an adverse employment action.

Related Theories of Adverse Employment Action

Besides those cases that directly address failure to terminate as an adverse employment action, there are published decisions describing a similar train of post-Ellerth thought. One of the more novel cases is *Currier v. Postmaster General*. The Postmaster undertook a reorganization and reduction in force, part of which required Kenneth Currier to perform work for his paycheck. In the words of the court, Currier "went from a position before the RIF with no duties to a position after the RIF with some duties." Currier's deposition testimony on this point is worth reciting:

Q So you stayed at Merrifield. What were your duties at Merrifield?
A None.

Q None? Did you work while you were out there?
A No.

Q What did you do all day?
A Occupied an office.

With monumental hubris, Currier nonetheless claimed that the action of forcing him to work was evidence of race discrimination. The court gave him no solace, holding that requiring work from a paid employee is proper, does not make him worse off, and cannot be an adverse employment action. The court concluded its decision, "To state the obvious, the employee must be

worse off after the personnel action than before it; otherwise, he has suffered no objectively tangible harm."

Mary Wyatt's Claim For Severance

Occidental Petroleum reorganized its human resources function, eliminating one position, and restructuring a second job. Mary Wyatt, age 70 and with 24 years of seniority, was retained in employment, with no loss in pay or benefits, to perform the remaining, restructured job. Wyatt asked Occidental to allow her to retire and collect severance, but they refused to do so. Once more the concept of adverse employment retention surfaced, this time in a different jurisdiction. In Oklahoma, United States Magistrate Judge Joyner succinctly described the issue:

Defendant moves to dismiss arguing that Plaintiff is seeking to expand employment law by making an employer liable for deciding not to fire an employee. Defendant asserts Plaintiff has not alleged an adverse employment action, and that a decision to retain an employee, rather than offer an employee severance, is not actionable.

Magistrate Judge Joyner said that it did not matter that Wyatt would have preferred retirement with a severance bonus. He concluded that severance pay is for those who truly are terminated (no continued employment) and that continuation of employment cannot be adverse employment action.

Harbinger of Future Efforts

It is tempting to relegate this line of cases to the bin for curious anomalies, but that well may be a mistake. There is a certain persistence to novel ideas of this type that allows them to resurface until they gain some acceptance. Courts and judges have signaled that they may be amenable to at least some part of the argument. In a decision not formally reported, a group of employees was covered by a severance plan policy that afforded payment upon involuntary termination. The employer sold stock, following which there was a consolidation. Michael LaFata, the named plaintiff, and others were retained in employment. Necessarily, the new company had different benefits.

Although the panel held that severance was not due in this situation, Circuit Court Judge Julio M. Fuentes wrote a concurring opinion in which he seemed to set an easier standard for claiming adverse employment action despite keeping one's job. In particular, Judge Fuentes wrote that a substantial change in "indirect compensation" can be an adverse action. In this case, the employees, who had worked for Raytheon before the sale no longer could avail themselves of the "Raytheon Scholars Program," and similar Raytheon specific benefits. Judge Fuentes wrote that a properly pleaded complaint might be able to posit a case that "termination took place despite continued employment.

Conclusion

The willingness of plaintiffs to search for new avenues of relief, the ingenuity of lawyers looking to meet that same goal, and the possibility of judicial acceptance, make theories of liability based upon continued employment as adverse employment action a fertile plain for sowing this novel approach.

FMLA

New FMLA Regulations Announced

by Darrell VanDeusen

Over five years ago the Supreme Court struck down an FMLA regulation in *Ragsdale v. Wolverine Worldwide, Inc.*, joining many lower courts that had rejected some of the 1995 regulations as an overbroad interpretation of the Act. The Department of Labor immediately promised revisions to the regulations. It looks like we are on the verge of seeing that promise kept.

The DOL published proposed changes to the FMLA regulations in the Federal Register on Monday, February 11. The changes to the regulations include revisions to the rules on what constitutes a serious health condition and use of the medical certification process

The new regulations contain more employer notice requirements regarding employee qualification for leave and designation of leave. There is also a clarification in the rules relating to substitution of paid leave. The proposal does not change the period of time an employee can take incremental leave of less than a day, but the proposal does include a change requiring employees to comply with the employer's call-in procedures before taking unscheduled, intermittent leave.

The March newsletter will have an extensive review of the proposed changes to the regulations. In the meantime, if you have any questions, please contact one of the attorneys at Kollman & Saucier, P.A.

Immigration

New Employment-Based Immigration Enforcement on the Horizon

by Ken C. Gauvey

In a recent move in the declining days of the current administration, the Department of Homeland Security ("DHS") announced new fines, new rules and stricter enforcement of employment-based immigration issues. This announcement was made in a joint statement by the Justice Department as well as DHS.

The new fines will increase the current fines for civil violations of employment eligibility requirements by about 25%. This increases the fines by $1,000 for the first violation and from $11,000 to $16,000 for repeated violations. These increases have been attributed to "inflation adjustments" which exempts DHS from proposing new rules and going through a review process.

The second part of these new rules is the mandatory use of E-Verify for all federal contractors. E-Verify is an internet-based system which compares the information provided on the I-9 form with records at the Social Security Administration and DHS. To participate in E-Verify, a company has to sign a Memorandum of Understanding. This memorandum gives federal agents access to the employer's facilities without a warrant. In addition, the memorandum requires the employer to allow agents of DHS and SSA to interview the employer's employees without a warrant. While this may make sense in terms of dealing with government contractors, everyone else should be wary of participating in a program that gives unfettered access to the employer's files and employees to any governmental agency.

E-Verify has a reported 12 million errors in its database. States that have implemented mandatory E-Verify usage has reported U.S. citizens being terminated because of these errors. It is a common view that providing unfettered access to government agents along with a forced usage of an error ridden database is generally a bad deal for employers.

The third part of this triumvirate of harsh regulation is the introduction of new "No Match" rules. DHS attempted to introduce "No Match" regulations early in 2007. This initial attempt placed

new burden's on employers to engage in a step-by-step process of investigating their employees whenever the SSA sent a no match letter. Those regulations required strict compliance with the process initiated by DHS with the failure to do so resulting in liability on the part of the employer. A coalition of employers, labor unions and civil rights advocates was able to get an injunction on the enforcement of this rule.

There are no details available right now as to what the new "No Match" regulations will entail. However, it is a forgone conclusion that they will be initiated before the current administration is done.

Finally, DHS announced that Immigration and Customs Enforcement has secured more than $30 million in criminal fines, restitution and civil judgments in work-site enforcement efforts in 2007. In addition, ICE made 863 criminal arrests and 4,077 administrative arrests in 2007. This is up from 716 criminal and 3,667 administrative arrests in 2006 and 25 criminal and 485 administrative arrests in 2002.

Arbitration Follies

Its Only Serious If It's A Felony?

by Peter S. Saucier

Pamela Mastropaolo, a reporter for a Richmond newspaper, used her credentials to gain free admission to a quilt festival that she was not assigned to cover. There, she spent two days stealing quilting fabric and supplies valued at over $900. After being caught, and consulting an attorney, Ms. Mastropaolo pled guilty to one misdemeanor and one felony, although the judge later reduced the felony to a misdemeanor. Apparently, her employer disapproved of Ms Mastropaolo's using her status as a member of the fourth estate to foster pilfering, so they fired her. The Arbitrator decided to reduce the penalty to a 30-day suspension. On review, a federal appeals court wrote that the arbitrator's opinion was "not a model of clarity." It appears that the arbitrator reasoned (using a term loosely) that because the court reduced the felony to a misdemeanor, and the termination was for the commission of a crime by misappropriating credentials, termination was too severe. On appeal, the federal court held:

If this court were deciding the propriety of Media General's termination of Mastropaolo in the first instance, we likely would have interpreted the collective bargaining agreement quite differently than did the arbitrator, and we likely would have concluded that Mastropaolo's conduct amounted to gross misconduct warranting discharge. But this court . . . may not refuse to enforce an arbitration award simply because we believe the arbitrator's decision to be wrong.

Kollman's Corner

Independent Contractors

by Frank L. Kollman

Our accountant sent me an email last week about a seminar being sponsored by one of our competitors, a big Maryland law firm, concerning independent contractors. He thought we should do a similar seminar, which purported to show businesses how to make sure persons working for them be deemed independent contractors by courts and government agencies.

I wrote our accountant and said that I could not, in good conscience, do such a seminar. Essentially, I told him that our firm had, in the past, successfully defended businesses on the grounds that people doing work for the business were not employees, but independent contractors (IC's for short). On the other hand, if a company is trying to create a class of IC's for its business, rather than hire employees, I told him that we generally tell our clients not to try to fool the IRS, the government in general, and the insurance companies that provide benefits to its employees. If a company hires a person to paint its offices, that person is probably an independent contractor. If a company hires a person to do the work that employees normally perform, that person is probably a employee, no matter how many affidavits the person signs swearing he is an independent contractor.

So, here is the rule of thumb, which should save you the money you would invest in going to a seminar about creating IC's. If you are just trying to get around IRS withholding and labor laws, you will probably not be able to prove that the individuals affected are IC's. Stated more simply, if you need to call a lawyer to find out whether the person is an independent contractor, he is probably an employee. Basically, an independent contractor is someone who tells you he is going to show up between 8 and 12, but shows up at 2, and you let him do the job anyway.

You will not be seeing a seminar by K&S on this subject, but stay tuned. We may have more worthwhile seminars in the future. Save your money for now.

That does not mean, however, that we cannot create positions with your company that will be deemed IC's. We can. We just want you to know that the odds favor acting according to the above "rule of thumb."

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs

Kollman & Saucier, P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
P. 410.727.4300
F. 410.727.4391

To be added to our mailing list or if you have comments or questions, please email us at kgauvey@kollmanlaw.com.