

A Year in Review: The Season of Change Continues

Recent Developments in Labor and Employment Law

by

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NEWS FOR EMPLOYERS

I. **INTRODUCTION: 2009-2010 Employment Law's Season of Change Continues.**

"What we need now is a list of specific unknown problems we will encounter." Dilbert.

The last year has been a year of enormous change especially with regard to laws governing or impacting the workplace. These materials cover many of the more significant developments in this increasingly complex and contentious area of the law.

II. WORKPLACE DISCRIMINATION

A. Overview

The trends we first saw develop in 2008 and early 2009 continued in the second half of 2009 and early 2010 with yet another increase, on a national and local level, in the number of charges of discrimination filed with the EEOC. In 2008 the total number of charges filed with EEOC was 95,402. This was an increase, up from 82,792 the year before. While the numbers were down a bit in 2009 (close of Fiscal Year 2009 - September 30, 2009) with a total of 93,277 charges filed with EEOC, that is still a significant number of discrimination claims.

While sex harassment is still one of the most common charges of discrimination and it is still the leading or most common form of discrimination complaint filed each year in New Hampshire, on the national level, in fiscal year 2009, race claims (33,579) were still among the most common of all charges filed with EEOC – another record year for the number of race claims. Retaliation claims effectively tied Race claims with 33,617 charges filed with EEOC. That was an increase of more than 1,000 claims in one year, more than double the number of retaliation claims filed in FY92. Sex harassment claims followed (28,028) in 3rd position – up to 30% of all charges of discrimination. . . the highest level since 2002. Age claims then rounded out the top slots with 22,778 claims filed in FY09. Religion, national origin and disability cases followed in the ranking.

The cost of defending against these claims and the risk of liability to employers still represents a significant impact on business in the United States. Locally, the experience is much the same. Most businesses these days have anti-discrimination policies and take considerable steps to avoid or resolve any such complaints as early as possible. Those certainly help, but with a downturn in the economy, the number and frequency of claims in this area have increased, so the risk of loss and disruption to business remains a serious issue for employers.

The following section is intended to highlight recent cases and developments in the area of workplace discrimination.

B. Sexual Harassment/Gender Discrimination/Pregnancy

1. Introduction

Sexual harassment claims continue to be a challenge to employers and the courts. The U.S. Supreme Court's 1998 decisions in the Faragher (Faragher v. City of Boca Raton, 524 U.S. 775) and Ellerth (Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)) cases clarified some issues, but raised a few more questions. Likewise, one of the most recent U.S. Supreme Court case in this area, Suders v. Pennsylvania State Police (2004) provided guidance on the issue of employer liability in constructive discharge cases where sexual harassment is the claimed reason why the employee felt forced out, but still other issues remain for employers and the courts to sort out.

In fiscal year 2009 EEOC received 28,028 sex/gender charges of discrimination. Sexual harassment charges increased again in FY 2009 (following the jump in claims in 2008). A record number of sex harassment charges were filed by men (up from 2% in the early 1990's). Pregnancy discrimination claims also surged to a record high of number of charges (an increase from FY08 charge statistics which was the previous high record for such claims).

In spite of increased awareness, training and publicity, employers and the courts still struggle with issues such as: Does the conduct at issue constitute sexual harassment?; Did the employer properly address the complaint of sexual harassment; and, Whether the employer, under the circumstances, should be liable for the alleged bad acts of its employees. Decisions in cases this year and guidance from the New Hampshire Commission for Human Rights (NHCHR) and the U.S. Equal Employment Opportunity Commission (EEOC) provide some helpful insights for employers. What is also helpful is to take a longer view of trends that have developed in this area of discrimination law over the last few years.

2. Sample Cases/Decisions/Guidance

a. 2nd Circuit: Faragher/ Ellerth Can Leave Employers Vulnerable

The emergence of the *Faragher/ Ellerth* defense just over 12 years ago brought a major change to the manner in which employers handle harassment issues. Specifically, employers routinely publish the means by which employees can make complaints of harassment in order to avail themselves of this defense. However, as noted by the 2nd U.S. Circuit Court of Appeals, the rationale of *Faragher/ Ellerth* does not provide employers with blanket immunity from harassment claims. *Gorzynski v. JetBlue Airways Corp.*, 2nd Cir., No. 07-4618 (Feb. 19, 2010).

In that case, Diane Gorzynski was hired by JetBlue in January 2000 to work as a customer service agent for its operations at Buffalo International Airport. Shortly after being hired, she was promoted to customer service supervisor. Of the four supervisors working in Buffalo during her employment, two were male and two were female; all were younger than Gorzynski. In October 2001, JetBlue hired a new general manager, James Celeste, who had direct supervisory responsibility for Gorzynski. In her lawsuit, Gorzynski alleged that she was sexually harassed by Celeste. She asserted that Celeste made repeated comments about female breasts, talked about his wife's "sex toy" party, and, on other occasions, made comments over a loudspeaker that Gorzynski and another female worker had been previously employed in sexually provocative jobs.

In addition, Gorzynski alleged that Celeste treated younger employees more favorably by allowing them to forgo participation in screening training related to the Sept. 11, 2001, terrorist attacks, abuse time and attendance rules, and violate workplace policies, all without discipline. Gorzynski complained on several occasions to Celeste about the purportedly harassing and discriminatory workplace conduct. In July 2002, Gorzynski was fired. She sued JetBlue alleging age and gender discrimination as well as unlawful retaliation.

Under two 1998 U.S. Supreme Court decisions, *Burlington Industries Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, an affirmative defense was created to claims of unlawful

harassment. Specifically, in cases where an employee has suffered no tangible employment action, an employer can defeat liability for workplace harassment if it can show that it “exercised reasonable care to prevent and correct promptly any harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

JetBlue maintained a sexual harassment policy that provided, “any crewmember who believes that he or she is the victim of any type of discriminatory conduct, including sexual harassments [sic], should bring that conduct to the immediate attention of his or her supervisor, the [human resources department] or any member of management.” JetBlue argued that, by making complaints only to the alleged harasser (Celeste), Gorzynski “unreasonably failed to take advantage” of the other people to whom she could have complained.

The Appeals Court held that making such complaints only to the alleged harasser could not, as a matter of law, be deemed unreasonable. The Court noted that, based on individual facts and circumstances, it might be unreasonable to require an employee to reach out to other managers identified in a policy. As such, the Appeals Court vacated summary judgment that had been entered in JetBlue’s favor and remanded the case for trial.

b. Wal-Mart Settles Sex Discrimination Lawsuit for \$11.7 Million

Wal-Mart Stores will pay \$11.7 million in back wages and compensatory damages, among other relief, to settle a sex discrimination lawsuit, the U.S. Equal Employment Opportunity Commission (EEOC) announced March 1, 2010.

The lawsuit arose after Wal-Mart’s London, Ky., Distribution Center allegedly denied jobs to female applicants from 1998 through February 2005 to its entry-level order-filler positions. Hiring officials told applicants that order-filling jobs were not suitable for women and hired mainly 18- to 25-year-old males for the jobs, the agency said.

The consent decree settling the lawsuit requires Wal-Mart to provide order-filler jobs, as they become available to eligible and interested female class members, as determined by a claims administrator. Wal-Mart will fill the first 50 available order-filler positions with female class members. For the next 50 positions, female class members will be offered every other job. Then, every third position will be offered to female class members.

c. ‘Sexting,’ Texting and EDD Before High Court

While stories of "sexting" and cheating husbands are popular topics on daytime T.V. or in tabloid magazines, such salacious facts are a relative rarity in U.S. Supreme Court cases. It is equally unusual for the Supreme Court to issue opinions with the potential to touch upon aspects of electronic discovery. The case of *City of Ontario v. Quon*, No. 08-1332, could change all of that as the Supreme Court will address a government employee's expectation of privacy in text messages sent from his employer-issued device -- including spicy text messages sent to his wife and alleged mistress. Although *Quon* involves a public employer, the Court's ruling potentially could have far-reaching implications for workplace best practices in the private sector as well. In

addition, *Quon* has the potential to extend its reach to other forms of electronic communication beyond text messages, including other types of "outlier" electronically stored information.

Text messages are just one form of outlier ESI, data that parties are more likely to overlook during the discovery process given that it may exist "out of sight" and/or "out of mind." Common sources of outlier ESI include cellphones and personal digital assistants, voice mail systems, instant messaging systems, chat rooms and web sites. Few court decisions have addressed the preservation and production requirements of outlier ESI in litigation. Under certain circumstances, however, failure to preserve and produce outlier ESI has been held to constitute spoliation and resulted in sanctions such as an adverse inference.

Although *Quon* itself addresses the privacy of a public employee's text messages sent and received via pager, a broad ruling in *Quon* could very well collide with principles of e-discovery preservation and production of outlier ESI for private employers, as well.

The Court, which heard oral arguments in the case in April, will consider the U.S. Court of Appeals for the 9th Circuit's ruling in *Quon v. Arch Wireless Operating Co. Inc.*, 529 F.3d 892 (9th Cir. 2008), *petition for rehearing en banc denied*, 554 F.3d 769 (9th Cir. 2009), cert. granted, 130 S. Ct. 1011 (2009). The case involves Sergeant Jeff Quon, a member of the city of Ontario, Calif.'s SWAT team, who used his city-issued, text-messaging pager for personal communications. There was no official city policy governing use of the pagers, but the city's "Computer Usage, Internet and E-mail Policy" specified that e-mail and Internet usage would be monitored and that users should have no expectation of privacy. Quon signed this policy and also was later informed by his supervisors that text messages would be considered e-mail and audited under the policy.

The formal policy, however, was accompanied by an informal policy and practice that directly contradicted it. The informal policy and practice were that the supervisor would not audit the text messages of any employee who exceeded the city's 25,000-character monthly limit, as long as the employee paid the overage fees. Quon exceeded the usage limit a few times, and paid for the overages, before a supervisor (tired of being a "bill collector") requested transcripts of his text messages from Arch Wireless to determine whether the overages were work-related or personal. The city received the transcripts, without Quon's consent, and discovered that Quon's messages were often personal and sexually explicit communications sent to his wife and alleged mistress.

Quon sued the city of Ontario and Arch Wireless, which provided the text-messaging service, alleging violations of the Stored Communications Act, the Fourth Amendment and Article I, Section 1 of the California Constitution, which provides a right to privacy. The district court held that Quon had a reasonable expectation of privacy in his text messages, although the city's search was reasonable, and also held that Arch Wireless had not violated the SCA. *Quon v. Arch Wireless Operating Co. Inc.*, 445 F. Supp. 2d 1116 (C.D. Calif. 2006). On appeal, the 9th Circuit reversed and held that Arch Wireless had violated the SCA by releasing the transcripts to the city. The court also held that users of text messages have a reasonable expectation of privacy in the content of their text messages vis-à-vis service providers, analogizing text messages to letters and e-mails.

The court held that the "operational realities" of the Ontario Police Department -- whereby employees had reason to believe that their text messages would not be audited as long as they paid any overage fees -- created a reasonable expectation of privacy for Quon, despite his assent to a contrary policy. *Quon*, 529 F.3d at 907 (citing *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)). The 9th Circuit did not hold the search to be reasonable under the Fourth Amendment or the California Constitution.

In December 2009, the U.S. Supreme Court granted certiorari on the city of Ontario's appeal of the 9th Circuit's Fourth Amendment holding -- but declined to review Arch Wireless' appeal of the SCA holding.

The Supreme Court will review the following issues:

- Whether Quon had a reasonable expectation of privacy for the text messages in light of the divergent official and informal policies?
- Whether the 9th Circuit erred in considering whether the police department could have used "less intrusive [audit] methods," in contravention of existing Fourth Amendment precedent?
- Whether the senders of messages to Quon's pager had a reasonable expectation of privacy (regardless of what they knew about the police department's policies)?

The Supreme Court has never before addressed an individual's reasonable expectation of privacy in his or her electronic communications such as e-mails or text messages, either generally or within the employer/employee context. *Quon* could conceivably become a landmark case by setting precedent regarding an individual's right to privacy in his or her text messages, a ruling with potentially overlapping impact in the spheres of employment law, privacy law, e-discovery and information management. In its broadest form, *Quon* could address the right to privacy in all electronic communications, including e-mail and outlier ESI.

A broad opinion in *Quon* may provide guidance on key areas of employer best practices and principles for technology and information management that the Supreme Court has not previously touched. Although it may not explicitly control private employees, given that they are not subject to the same Fourth Amendment protections with respect to their employers, *Quon's* holding is still likely to be considered carefully by the private sector, given the similarities between the "reasonable expectation of privacy" test employed in common law privacy claims and the Fourth Amendment standard.

The opinion could influence the language of all employer technology-usage policies. Following *Quon*, a prudent employer may need to expressly include text messaging (or other forms of electronic communications) in written technology-usage policies or risk waiving its right to audit such data.

The opinion could also influence how closely employers will monitor the informal policies of lower management, notwithstanding a company's formal technology-usage policy,

given that a ruling in favor of Quon may establish that such informal policies can trump written policies.

An opinion addressing Fourth Amendment privacy rights could indirectly influence the analysis of attorney-client privilege waiver in the context of employee communications, as well as steps that must be taken by employees to preserve the underlying privilege. Although Quon itself does not address attorney-client privilege issues, the ultimate holding regarding what expectations of privacy are "reasonable" could affect future arguments about privilege waiver. See, e.g., *In re Asia Global Crossing Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (relying on Fourth Amendment privacy principles in holding that a private employee had reasonable expectation of privacy in personal e-mails sent via employer's e-mail address, thereby preserving attorney-client privilege).

Finally, an opinion holding that a broad right to privacy exists in text messages on a company-issued pager can have profound implications in the e-discovery context. Such a holding would create confusion for private employers that seek to comply with discovery obligations without offending their employees' privacy rights. In the usual course of complying with discovery obligations, an employer generally will take affirmative steps to preserve employee data, use search methodology to identify potentially responsive information, review the employee data, and ultimately produce data in litigation. All of these steps may be done with or without the employee's knowledge or consent, given the relatively limited privacy rights that are afforded to employees in the U.S. workplace.

However, should the High Court hold that employees retain a much stronger right to privacy in their communications -- even those that may be transmitted or stored on a workplace-issued device or system -- then employers could be left scratching their collective heads about how to simultaneously respect their employee's privacy rights while still fulfilling their discovery obligations. Such a holding could throw U.S. employers into the uncomfortable position of seeking guidance from their counterparts in other countries with privacy regimes weighted in favor of individual rights, such as in the European Union. Moreover, such a holding could throw the existing assumptions about how discovery should be conducted into tumult, requiring both courts and litigants to reassess what the "best practices" for preserving, collecting, reviewing and producing data in response to litigation should be.

Again, oral arguments for City of Ontario v. Quon were held on April 19th. Stay tuned!

d. Professor's Pay and Retaliation Claims Fail

Recently, the First Circuit Court of Appeals held that a professor could not show her failure to advance in the University System was a result of unlawful discrimination. Lockridge v. Univ. of Maine System, 1st Cir., No. 09-1895 (March 10, 2010).

Rebecca Lockridge, a female communications professor, claimed she was the target of a male professor's sexual remarks in the late 1980s and early 1990s, and was present for a number of sexual jokes and genital references made by another male professor from 1991 until 2006. In the early 1990s, the faculty, at the suggestion of the first male professor, voted Lockridge out as department chair.

On post-tenure review in 2006, Lockridge was denied a raise because her “scholarship” (publication record) was inadequate. She complained about gender bias in the department, was re-evaluated and again was denied a raise. Lockridge then requested and was denied the opportunity to move her office from a satellite building where many of her peers also were located to the main building.

She filed a charge with the state human rights agency and a subsequent lawsuit in federal court for sex-based pay discrimination, retaliation and sex-based hostile environment. The district court accepted the magistrate’s recommendation granting summary judgment, and the court of appeals affirmed.

As for the pay claim, the 1st Circuit explained that the male to whom Lockridge compared herself and who also had a similar publication record was on a non-scholarship track and that therefore less was expected of him. Though one school official’s testimony cast doubt on this explanation, the plaintiff herself admitted the difference.

The court found that the retaliation was flawed because the denial of the raise and an office transfer from a location where non-complaining peers had their offices was not actionable because it was not the kind of protected complaint-motivated adverse action that would dissuade a reasonable person from complaining in the future.

Finally, on the hostile environment claim, the court held that the alleged harassing acts all fell outside the statute of limitations. Though the court recognized that the entire pattern of conduct would present a timely claim if only one of the harassing acts fell within the limitations period, the court held here that none did and that the raise denial could not serve as the “anchor” within the limitations period that would bring the rest of the conduct in for a timely hostile environment claim.

e. Third Circuit Holds Claim Timely under Ledbetter Act

After resurrecting a claim it previously found untimely, the U.S. Court of Appeals for the Third Circuit, in Philadelphia, has concluded that the failure to answer an employee’s request for a raise constituted a “compensation decision” that could be an actionable event under the federal anti-discrimination laws. *Mikula v. Allegheny County*, 2009 WL2889742 (3d Cir. Sept. 10, 2009). This seems to continue the broad interpretation that courts are giving the phrase “compensation decision” following enactment of the Lilly Ledbetter Fair Pay Act.

In 2001, the Allegheny County hired Mary Lou Mikula as a grants coordinator. By 2004, Mikula discovered she was earning approximately \$7,000 less than a male manager. In 2005, Mikula requested a salary increase so that she would be paid the same or more than the male manager, but the County never responded. In 2006, Mikula filed a complaint with the County, asserting that her lower pay was due to gender and age discrimination. The County responded with a letter in August 2006 stating that Mikula’s discriminations claims were unfounded.

In April 2007, Mikula filed a charge of discrimination with the Equal Employment Opportunity Commission, alleging discriminated against her on the basis of gender by failing to give her a pay raise in violation of Title VII of the Civil Rights Act of 1964, and by paying

her less than a male employee who performed substantially equal work in violation of the Equal Pay Act.

Before the Ledbetter Act was passed, the district court dismissed Mikula's claim on the grounds that her 2007 EEOC charge was untimely. The court reasoned that Mikula's requests for a raise occurred more than 300 days before she filed her EEOC charge and the County's 2006 letter was not a pay "decision or other practice" because it merely provided the results of the County's investigation. The Third Circuit affirmed this decision shortly after the Ledbetter Act was passed.

In the latest development, the Appeals Court reversed its initial decision. It concluded that:

1. the County's failure to answer Mikula's request for a raise constituted a compensation "decision," as it was tantamount to a denial of such a request,
2. the decision adversely affected Mikula each time she received a paycheck, and
3. under the Ledbetter Act, Mikula's EEOC charge was timely as to each paycheck she received after June 26, 2006 (300 days before she filed her EEOC charge).

This decision is noteworthy because of the Court's reversal of its own decision regarding the interpretation of the Ledbetter Act and because it demonstrates the expansive interpretation that courts are giving the phrase "compensation decision"— here, to include even failure to respond to requests for salary increases.

f. EEOC Revises Its Compliance Manual to Conform to Ledbetter Fair Pay Act

The EEOC has revised its Compliance Manual to implement the Lilly Ledbetter Fair Pay Act. The Act, passed earlier this year, overturned the U.S. Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007), which held that a charge of compensation discrimination under Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, the Rehabilitation Act or the Age Discrimination in Employment Act must be filed within 180 or 300 days of the first alleged "discriminatory" paycheck, depending upon whether the state has a state fair employment practice ("deferral") agency. Under the Court's decision, subsequent "discriminatory" wage payments did not resuscitate the prior filing period under the "continuing violation" theory. The Act, which significantly expanded the relevant statute of limitation, is retroactive to May 28, 2007, (the day before the Supreme Court's decision) and permits suit as to pay discrimination claims pending on or after that date.

The *Compensation Discrimination* section of the EEOC's Compliance Manual denotes the period for submitting a claim of pay discrimination under Title VII, the ADA, the Rehabilitation Act or the ADEA. It explains that the period begins when any of the following occurs:

- the employer makes a discriminatory compensation decision or adopts a discriminatory practice affecting compensation;

- the charging party becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- the charging party's compensation is affected adversely by application of a discriminatory compensation decision or other discriminatory practice, e.g., each time wages, benefits, or other compensation is paid.

Courts interpreting the Act now are faced with deciding what qualifies as a compensation decision for purposes of calculating the statute of limitations. According to a recent decision by the United States Court of Appeals for the Third Circuit, the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. *Mikula v. Allegheny County of Pennsylvania*, No. 07-4023 (3d Cir. Sept. 10, 2009). However, the Court found an internal investigation into an employee's complaint relating to a pay disparity does not constitute a compensation decision or other practice.

To illustrate the change in the EEOC's enforcement position, the revised Manual provides the following example of an actionable claim:

After working for the Respondent for nearly 10 years as a production supervisor, CP [charging party] learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP's pay discrimination charge is timely.

Not surprisingly, the expanded statute of limitation for wage discrimination claims is expected to spur increased litigation. To minimize the risks of liability, employers should consider:

- auditing in a manner which preserves the attorney/client privilege current pay practices to identify and develop strategies to remedy potential pay disparities;
- developing written and precise criteria for making compensation decisions;
- revising document retention practices to ensure that the employer will have access to documentation regarding compensation decisions;
- training supervisors and managers to support objectively-based compensation decisions; and
- conducting periodic statistical analysis of compensation data to identify potential adverse impact concerns.

C. Disability Discrimination

1. Introduction

At a time when Congress was busy with a historic bailout of financial institutions in an effort to get our economy back on track, they have also finalized significant revisions to the Americans with Disabilities Act ("ADA"). These changes reminded some of the movie "*While You Were Sleeping*" as these changes have rolled along through both Houses almost unnoticed. This bill, which was signed into law by the President on September 25, 2008, clarified some aspects of the ADA and EEOC's regulations but, more significantly, these strengthened protections for disabled applicants and employees under the law.

2. Changes to Law and New Regulations

a. ADA Amended: The Definitions and Protections have Changed

The following is a summary of the changes, effective January 1, 2009, with these amendments to the ADA. The ADA now:

- **Prohibits the consideration of measures that reduce or mitigate the impact of impairment** - such as medication, prosthetics and assistive technology - in determining whether an individual has a disability under the law.

This is a significant departure from U.S. Supreme Court rulings in the late 1990's where the Court held that if an individual could take prescribed medications or use corrective devices (*e.g.* eye glasses or contact lenses), and the medication or corrective devices mitigated or significantly reduced the level of the individuals' impairment, that person may not claim to be disabled and seek protection under the ADA. Those decisions made sense when the medications didn't cause other problems (*e.g.* harmful side effects) for the individuals involved. While glasses and contact lenses were noted as exceptions in the Bill, this course change will now require employers to treat employees as impaired (even though they use mitigating medications or use corrective devices) and discuss reasonable accommodations that help them perform their job as required.

- **Covers applicants or employees who claim the employer discriminated against him/her based on the perception that he/she is disabled, regardless of whether the worker has an actual disability within the meaning of the law.**

This has been a hot button issue under the ADA for years. The question of whether a person is "perceived as" or "regarded as" being disabled (treated differently based on the perception by the employer that the person is disabled) has been the subject of guidance from the U.S. Equal Employment Opportunity Commission (EEOC) and the basis for many claims under the ADA. Courts also have interpreted this protection differently over the years. With this change in the law, regardless of whether a person has an actual disability, claims harm based on a perception of disability by his/her employer, those discrimination claims under the ADA can proceed.

With regard to "perceived as" or "regarded as" disabled claims, there are a few positive developments with this law. The first is that "perceived as" claims cannot be

based on transitory or minor impairments where the condition is expected to last less than six (6) months. The other development is a clarification that employers are not required to offer or grant reasonable accommodations to employees with those claims. That was a welcomed clarification for employers because courts have been split on this issue.

- **Now provides broader coverage to protect anyone who faces discrimination on the basis of a disability.**

This means that the definition of disability will now be broader and construed as inclusive as possible. One example provided in the Bill is that an impairment which is episodic or in remission would be considered a disability if it would substantially limit the employee in a major life activity when the impairment is active. The scope of these changes is not yet known as the law directs EEOC to now develop regulations that are consistent with these broader definitions of the term "disabled". Congress provided some direction in that regard. They instructed EEOC to effectively abandon the "substantially limits" standards as to the limitations created by a disability and adopt a less restrictive "significantly restricted" standard.

The ADA (passed in 1990 and effective in 1992) guaranteed that employees with disabilities would be judged on their merits and not on an employer's prejudices. The sponsors and supporters of this law argued that court rulings since the ADA's enactment have dramatically limited the ability of people with disabilities to seek justice under the law. Sponsors pointed to statistics that show in 2004 plaintiffs lost 97% of the ADA disability discrimination cases that went to trial. They also focused on four recent Supreme Court cases under the ADA and argued that the definition of disability so much that people with serious conditions such as epilepsy, muscular dystrophy, cancer, diabetes and cerebral palsy have been found not to be disabled within the meaning of the ADA. That may be a bit of an overstatement as each of these cases is different depending upon the nature and extent of the person's impairment, the requirements of the job and the scope of possible accommodations. The reality is that there have been many misplaced and legally deficient claims filed under the ADA over the years.

Employers, since 1992, have made great strides to tear down physical (*e.g.* correcting physical barriers such as curb cuts, stairs without ramps, narrow doors, inaccessible restrooms etc.) and institutional barriers (*e.g.* revising job applications/job descriptions and updating handbooks and other policies as well as training managers on how to deal with disabled applicants and workers and their accommodation requests). There is still work to be done, but employers may now have more of a challenge with these new, employee-favored standards.

This law became effective on January 1, 2009.

Finally, there were 21,451 ADA claims filed with EEOC in 2009. That represented 23% of all charges filed with EEOC in fiscal year 2009 but that was still an increase (which then represented the highest level of ADA claims since 1998). There will certainly be an increase in ADA claims in the next year or two given the state of the economy and the changes to the law.

b. Long-Awaited Proposed ADA Regulations Issued by the EEOC

Proposing sweeping changes to its regulations and interpretative guidance under the Americans with Disabilities Act (ADA), the Equal Employment Opportunity Commission

(EEOC) recently published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* in order to implement the ADA Amendments Act of 2008 (ADAAA).

Noting that the ADAAA retains the ADA's basic definition of "disability" as (i) an impairment that substantially limits one or more major life activities, (ii) a record of such an impairment, or (iii) being regarded as having such an impairment, the proposed regulations change how these statutory terms are interpreted in several key ways. They:

1. Interpret broadly the definition of "disability";
2. Significantly lower the threshold to establish an individual is "substantially limited," so that an impairment need not "significantly" or "severely" restrict a major life activity in order to meet the standard, and delete the terms "condition, manner, or duration" under which a major life activity is performed, in order to effectuate Congress's instruction that "substantially limits" is not to be misconstrued to require the level of limitation, and the intensity of analytical focus, applied by Supreme Court cases;
3. Expand the definition of "major life activities" by providing two non-exhaustive lists of included activities and functions:
 - the first list includes activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working;
 - the second list includes major bodily functions, such as functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions, many of which were included by Congress in the ADAAA. The EEOC has included examples of conditions deserving of coverage, such as cancer, epilepsy, HIV and AIDS;
4. Eliminate consideration of the ameliorating effect of mitigating measures, other than ordinary eyeglasses or contact lenses, in assessing whether an individual has a "disability";
5. Include an impairment that is episodic or in remission as a "disability" if it would substantially limit a major life activity when active; and
6. Significantly change the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity. Instead, the proposed regulations provide that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived impairment, or actions based on symptoms of an

impairment, will meet the “regarded as” definition of disability, unless the impairment is both transitory and minor.

Other Changes in the New Rules

The EEOC’s proposed regulatory changes also provided some relief for employers by clarifying that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation. Lastly, the EEOC proposed limitations on an employer’s ability to use selection criteria in employment decisions by prohibiting the use of qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision, unless shown to be job-related for the position in question and consistent with business necessity.

c. Court Approves EEOC’s Largest ADA Settlement Ever

A recently court-approved \$6.2 million settlement between the EEOC and Sears shows that the agency is serious about going after big cases of systemic discrimination.

The EEOC announced the settlement and noted that it was the largest Americans with Disabilities Act (ADA) settlement in a single lawsuit in the agency’s history. The settlement proceeds in the case (*EEOC v. Sears Roebuck & Co.*, N.D. Ill., No. 04 C 7282) will be shared among 235 former employees who were discharged at the end of their workers’ compensation leaves of absence.

In its lawsuit against Sears, the EEOC had alleged that Sears maintained an inflexible workers’ compensation leave exhaustion policy and terminated employees unlawfully instead of providing them with reasonable accommodations for their disabilities.

In early February 2010, the U.S. District Court for the Northern District of Illinois entered the order approving the monetary distributions, which average out to approximately \$26,300 per employee covered by the settlement.

d. Employer May Not Count Disability-Induced Absences against Employee, Federal Court Rules: Employee with Narcolepsy May Proceed to Trial on ADA and FMLA Claims

Managing workers with chronic conditions who require intermittent leave is difficult, the U.S. District Court for the District of Oregon has reminded us. The Court has denied an employer’s motion for summary judgment on an employee’s claims under the Americans with Disabilities Act, the Family and Medical Leave Act, and the Oregon Family Leave Act. It has held that the employee, who suffered from narcolepsy, had raised sufficient issues of fact for trial regarding, among other things, whether she was substantially limited in the major life activity of sleeping and whether the reason for her discharge – excessive absences – was pretextual. *Waters v. Fred Meyer Stores Inc.*, 22 A.D. (BNA) Cases 436 (D. Or. 2009). The Court further ruled that the employee could proceed on her failure-to-accommodate claim and her FMLA and OFLA claims.

Rachel Waters worked for the employer as a clerk in its warehouse from June 25, 2000, until December 7, 2006, when she was terminated for excessive absenteeism. The employer had an attendance policy under which employees are charged “points” for unexcused tardiness or

absenteeism. If an employee's point total reached 60, he would be suspended; if the total reached 80, he would be terminated.

In 2004, Waters was diagnosed with narcolepsy. In April 2005, she applied for and was granted one year of intermittent FMLA leave. In March 2006, the employer requested that she submit new paperwork from her physician supporting the leave request as her intermittent leave would expire the following month. In April 2006, Waters's physician returned paperwork that stated Waters had a "chronic medical condition requiring intermittent time off work and medical monitoring and testing," and she "may miss up to 40 hours of work time per month due to this medical condition." The employer found this insufficient as it did not describe the medical facts supporting the request for leave and requested Waters furnish a corrected certification by May 11, 2006. The employer told Waters that, if she failed to supply the requested information, it would delay the commencement of the leave until it received the certification. Before her request for leave has been approved, Waters was absent from work on three separate days in May and June. On each occasion, she telephoned the employer, saying her absence was due to narcolepsy and she needed to take medical leave. However, because it had not received the corrected medical certification, the employer noted the absences as unexcused and charged Waters, under the attendance policy, with 20 point per absence, for a total of 60 points.

On June 8, 2006, the employer received the corrected medical certification, which stated that Waters had "headaches, narcolepsy and fatigue requiring intermittent time off work when conditions flare." Waters submitted an application for intermittent leave on the same day, requesting leave effective May 2006. The employer granted her request for leave effective June 7, 2006, instead. Finally, in December 2006, Waters was absent twice for reasons unrelated to narcolepsy. As a result, her point total reached 80 points, and the employer terminated her employment. Thereafter, Waters sued the employer for, among other things, ADA disability discrimination and violations of the FMLA and OFLA. The employer moved for summary judgment.

The employer challenged Waters's ADA claim, arguing that she did not have a disability because she was not substantially limited in a major life activity. The Court rejected this argument based on Waters's detailed description of how narcolepsy interfered with the major life activity of sleeping.

The employer also argued that it terminated Waters for excessive absenteeism and not her alleged disability. Waters countered that the May and June absences and her failure to provide the requested medical certification were related to her disability. The Court found that a sufficient issue of fact existed regarding the reasons for the termination and whether those reasons were pretextual.

Waters also claimed that the employer failed to accommodate her disability by assessing her points for absences related to her narcolepsy. The employer argued that it offered Waters the same opportunity to take leave as other employees. Again, the Court sided with Waters. The Court observed that the employer knew about Waters's narcolepsy and failed to follow up on her phone calls regarding her absences. The Court concluded that an issue of fact existed regarding whether the employer could have reasonably accommodated Waters's condition by waiving the points from the May and June absences.

Addressing the plaintiff's FMLA and OFLA claims, the Court found that Waters's initial medical certification for the 2006 leave failed to comply with the laws, that the employer correctly requested additional information from Waters's physician, and that the employer could delay Waters's leave until it received the corrected certification. Nevertheless, the Court denied summary judgment based on Waters's phone calls regarding her absences. The employer "had some obligation to treat the telephone calls in May as requests for discrete instances of FMLA or OFLA leave, since leave under the April 24, 2006 application was not yet approved," the Court determined.

e. ADA Claim Dischargeable in Bankruptcy

The 1st U.S. Circuit Court of Appeals ruled late last year that an Americans with Disabilities Act (ADA) discrimination claim against a company in bankruptcy should be treated as a dischargeable bankruptcy claim. *Rederford v. US Airways Inc.*, 1st Cir., No. 09-1005 (Dec. 14, 2009).

In that case panel decision, Chief Judge Sandra Lynch affirmed the District of Rhode Island's dismissal of the plaintiff's claims, finding that Janelle Rederford's ADA suit is a "claim" covered by the federal bankruptcy code and that the remedies Rederford sought in her ADA suit were "within the jurisdiction of the bankruptcy court and so disallowed and discharged" under the bankruptcy code in her airline employer's 2003 bankruptcy.

The plaintiff's arguments that she was nonetheless entitled to relief based on the equitable doctrines of judicial estoppel and unclean hands were rejected.

Rederford, who had worked for US Airways for approximately 24 years as a customer service representative, suffered from lupus, an inflammatory connective tissue disease diagnosed in 1979 that has variable symptoms, including fever, weakness, fatigue, joint pain, arthritis and skin lesions. Rederford took a four-day, lupus-related absence from work in early January 2002. Her supervisor asked for a medical certification, which Rederford submitted. The supervisor found the certification insufficient and gave Rederford a deadline for an amended certification. Rederford did not meet the deadline, and the airline terminated her on Jan. 31.

She filed an employment discrimination claim with the Rhode Island Human Rights Commission and the U.S. Equal Employment Opportunity Commission (EEOC) in April 2002, claiming that the termination of her employment violated her rights under the ADA.

After U.S. Airways filed for Chapter 11 bankruptcy protection in August 2002, Rederford's case became part of the company's bankruptcy case.

Rederford was notified of the bankruptcy proceeding and of the Nov. 4, 2002, deadline for submitting a proof of claim. She submitted a timely proof of claim stating that the airline had discriminated against her on the basis of disability and that the estimated value of her claim was \$1 million.

US Airways in January 2003 filed a second omnibus objection to many classes of claims, listing Rederford's claim in the class and informing her that her claim would be disallowed by the bankruptcy court if she did not file a request for a hearing by Feb. 28, 2003.

She never filed a request, alleging at oral argument that she did not believe she needed to file the request because she thought her claims were covered by US Airways' insurance policies. On March 17, 2003, the bankruptcy court disallowed Rederford's claim.

The following day, the bankruptcy court issued an order confirming US Airways' reorganization plan, discharging all claims arising before the plan's effective date, March 31, 2003.

On May 1, 2008, after the EEOC had issued a right-to-sue letter Rederford filed a federal complaint alleging her termination violated Title I of the ADA and seeking reinstatement; compensatory, special and punitive damages; and attorneys' fees. Specifically, the complaint alleged that US Airways failed to grant Rederford reasonable accommodation for her disability, made prohibited inquiries that were not job-related or consistent with business necessity regarding the nature and severity of Rederford's disability, failed to interact in good faith with Rederford to reach a reasonable accommodation instead of terminating her employment, and engaged in acts of retaliation and coercion.

The district court in November 2008 granted the airline's motion to dismiss. The court first concluded that Rederford's claim, even if it sought the equitable relief of reinstatement, was barred by the bankruptcy court injunction because it was a claim reducible to a payment. The court then rejected Rederford's argument that US Airways was judicially estopped from invoking the bankruptcy court's injunction, finding that US Airways had not taken any positions in the bankruptcy court that contradicted its positions in the litigation. Finally, the court found that Rederford's attempt to use the doctrine of unclean hands failed because US Airways had not engaged in misconduct. Rederford appealed.

The district court's order granting dismissal was affirmed.

f. Appeals Court Dismisses Employee's ADA Claim of Denial of Accommodation during Drug Test

Reversing a jury verdict for an employee claiming that he was denied a reasonable accommodation of his "shy bladder" syndrome during a random government-mandated drug test, a federal appeals court in New York has held that because the employee was offered the opportunity but failed to qualify for his vessel's captain's license even with the accommodation he sought, he became unqualified to perform the essential functions of his job. Accordingly, there was no violation of the Americans with Disabilities Act. Kinneary v. City of New York, No. 08-1330-cv, 2010 U.S. App. LEXIS 5688 (2d Cir. Mar. 19, 2010).

Joseph Kinneary was a sludge boat captain employed by the City of New York's Department of Environmental Protection. As such, he was subject to drug and alcohol testing under federal Department of Transportation ("DOT") regulations. He alleged that he suffered from paruresis, also known as "shy bladder" syndrome, which makes it difficult for an individual to urinate on demand, as required for a drug test. Kinneary claimed that this condition constituted a disability, that the City failed to reasonably accommodate his disability, and that he was terminated unlawfully because of his disability.

Kinneary discovered that he could not urinate on demand when he was first subjected to a random drug test in 1992. Although he was able to complete that test, he was unable to do so when subjected to random drug tests in 1996 and 1998. In December 2001, Kinneary was subjected to another random drug test. Despite drinking water over a three-hour period, he could not produce a urine specimen. He was then transported to a medical clinic. According to Kinneary, as he approached the clinic, he felt an urgent need to urinate. When he arrived at the medical clinic, he was not permitted to give a urine sample, although he offered to do so.

Kinneary was then instructed by the City to get a doctor's note and was provided with specific instructions to be given to the physician. The instructions for the physician stated that: (1) Kinneary had to obtain an evaluation from a physician within five working days; (2) the physician had to make a determination of whether or not a medical condition had, or with a high probability could have, precluded Kinneary from providing a sufficient amount of urine for the test; and (3) the physician had to provide a written statement of recommendations and a basis for review by the City's Medical Review Officer ("MRO").

Kinneary's physician did not follow these instructions. Instead, the physician wrote a note saying, "This man has 'Shy Bladder Syndrome' – this is a chronic condition that can be helped by using an [alpha] blocker (Flomax) which I have given him. He is *not* a substance abuser."

Kinneary was advised by the City that the note would not be accepted and subsequently was served with misconduct charges for refusing to take a drug test. Soon thereafter, the U.S. Coast Guard filed a complaint against Kinneary, alleging he refused to submit to the drug test. (DOT drug and alcohol testing rules apply to the Coast Guard, even though that agency is now part of the Department of Homeland Security).

An administrative law judge in the Coast Guard proceeding ruled that Kinneary had refused the drug test. The Coast Guard ordered a 12-month suspension of Kinneary's license, followed by a 12-month probationary period. Kinneary appealed, and pending resolution of the appeal, he received a temporary license. The temporary license subsequently expired and Kinneary's appeal was denied as untimely. Kinneary was suspended and ultimately terminated because he did not possess the required license for his position as Captain.

Kinneary asserted in his lawsuit that the City denied him a reasonable accommodation and it was that denial that led to the loss of his license. The City argued Kinneary was not disabled within the meaning of the ADA, he was not otherwise qualified to perform the duties of a ship captain, and he was not terminated due to a disability.

Kinneary prevailed at a jury trial, asserting claims under federal, state and city disability discrimination laws. The jury awarded him \$100,000 in back pay and \$125,000 in non-economic damages. The district court denied the City's motion for judgment as a matter of law, but granted a motion for a new trial on the issue of non-economic damages unless Kinneary agreed to reduce his damages to \$25,000, which he did. Kinneary and the City cross-appealed. Continuing to argue he would not have lost his captain's license if the City had offered him a reasonable accommodation, Kinneary claimed he should have received the opportunity to have his test cancelled based upon a physician's evaluation of his "shy bladder" condition.

Under applicable DOT drug testing regulation, the employee “must obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee’s failure to provide a sufficient specimen.” 49 C.F.R. § 40.193(c). The referral physician may advise the MRO, as the City had instructed here, “A medical condition has, or with a high probability could have, precluded the employee from providing a sufficient amount of urine.” 49 C.F.R. § 40.193(d)(1).

The Court concluded that the City provided Kinneary with the accommodation he sought. The City permitted Kinneary to be evaluated by a physician and provided instructions to the physician that were consistent with the applicable DOT regulations.

The note that Kinneary’s physician provided, however, did not constitute a basis for cancelling the test because it did not say that Kinneary had a medical condition that did, or with a high probability could have, precluded Kinneary from providing a sufficient amount of urine for the test. Instead, the note simply stated the name of the condition, noted that it was chronic and could be helped by an alpha blocker that Kinneary had been given, and indicated that Kinneary was not a substance abuser.

The Court further noted that the U.S. Coast Guard also found that the doctor’s note did not meet the DOT requirements for the drug test to be cancelled. In particular, when the MRO contacted Kinneary’s physician to obtain documentation for the diagnosis of shy bladder syndrome, no supporting data was available.

The Court held that the evidence unequivocally demonstrated that the City gave Kinneary the accommodation he sought (the opportunity to have his drug test cancelled based upon a physician’s evaluation pursuant to 49 C.F.R. § 40.193), but Kinneary failed to comply with the regulatory requirements that would have allowed him successfully to cancel his test and save his license. Because Kinneary failed to retain his captain’s license despite receiving the accommodation, he was not otherwise qualified to perform the essential functions of his job and could not make out a successful claim under the ADA.

g. Local Decision: No Individual Liability Under ADA

In a recent decision from the federal court in Concord (United States District Court for the District of New Hampshire), the issue of individual liability under the ADA was addressed. In this case (*Michael Corosa v. Nashua Housing Authority and George F. Robinson*, Civil No. 09-CV-455-JD, Opinion No. 2010 DNH 053, March 24, 2010), the court held there was no individual liability under the ADA, but this case is part of a growing trend and a developing area of the law.

In that case, Michael Corosa sued Nashua Housing Authority ("NHA") and George Robinson, alleging that they violated his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 et seq. NHA and Robinson filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The court’s ruling on that motion is the subject of this article.

Corosa alleged the following facts in his complaint. He worked for NHA as a maintenance worker and electrician since October, 1993. In August, 2005, he began to

experience pain and weakness in his legs when he walked, and the pain later spread to his lower back. He began to receive medical care and, in January, 2006, his doctor gave him a note saying that he should work with restrictions. Specifically, the doctor said he should not pull or push objects while walking, and he should not shovel or rake. According to Corosa, NHA accepted the doctor's note and allowed him to work with restrictions.

Corosa's pain continued to increase and, in February, 2006, he took a medical leave of absence from his job. After lower back surgery in April, which greatly relieved his pain, he returned to work full-time in July, 2006. The pain returned, however, in May and June of 2007, when Corosa was walking and pushing a lawnmower, although he had no trouble completing his other duties, including shoveling and raking. In June or July, Corosa asked NHA to purchase a riding lawnmower, but NHA denied the request, saying that Corosa was not disabled.

In August, Corosa gave NHA a note from his surgeon stating that he should not push or pull objects while walking. NHA accepted the note and allowed Corosa to work a few more days. On August 22, 2007, Corosa met with his boss, Scott Costa, and his steward. Costa gave Corosa a letter from Robinson, the executive director of NHA, stating that Corosa could not perform his duties and that he was required to take medical leave.

Corosa returned to NHA on November 6, 2007, to give Costa a doctor's note stating that Corosa could work without restrictions beginning on November 7. On November 7, Corosa reported for work and was given two letters from Robinson. The first, dated November 6, told Corosa to return to work on November 7 at 7:30 a.m., and the second informed Corosa that he was suspended for two days for gross insubordination at the August 22 meeting. Robinson claimed that Corosa had sworn at the meeting, but Corosa states that he only "mention[ed] harassment and Robinson trying to be funny[,] but did not swear."

The Commissioners of the NHA upheld Corosa's medical leave and suspension. Corosa filed a complaint with the Equal Employment Opportunity Commission, which issued a notice that Corosa could file suit in this matter. Corosa filed his complaint on December 30, 2009, alleging that both NHA and Robinson violated his rights under the ADA.

NHA and Robinson argued that Corosa failed to allege that NHA is covered by the ADA, that he was disabled once he returned to work in July of 2006, that NHA knew of his disability when it denied his accommodation request, that the accommodation was linked to any disability, and that he was able to perform the essential duties of his job despite his condition. The defendants also argue that Corosa's allegations of disability are conclusory. As a separate ground for dismissal, Robinson argued that the ADA does not provide for individual liability, and therefore the complaint against him individually should be dismissed.

Corosa responded by pointing to specific portions of his complaint in which he made the allegations that the defendants argued were lacking. He acknowledged that the complaint did not allege that NHA is covered by the ADA, but stated that he would amend his complaint and, regardless, there is no factual dispute that NHA is covered. He also contended that the ADA does allow for individual liability.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . discharge of employees, employee

compensation, . . . and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). Corosa's complaint appeared to be suing under a "failure to accommodate" theory, which requires that the plaintiff:

- a) furnish sufficient admissible evidence that [he] is a qualified individual with a disability within the meaning of the ADA;
- b) establish that [he] worked for an employer covered by the ADA;
- c) demonstrate that the employer, despite its knowledge of the employee's limitations, did not accommodate those limitations; and
- d) show that the employer's failure to accommodate the known limitations affected the terms, conditions, or privileges of the plaintiff's employment.

Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447 F.3d 105, 112 (1st Cir. 2006). For purposes of opposing a motion to dismiss, however, the Court found that Corosa didn't need to prove his entire case in his complaint but rather must only have alleged sufficient facts to show that his claim is plausible on its face. Ashcroft v. Iqbal, 129 S. Ct. at 1949. "Specific facts are not necessary; the statement need only 'give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. 544, 555) (alteration in original).

Corosa's complaint stated that he suffered from back and leg pain, which, he alleged, constitutes a qualified disability, beginning in August of 2005 and continuing through the present. Although the complaint said that Corosa underwent surgery in April, 2006, that "greatly relieved the pain," Corosa never stated that the pain or the disability disappeared. Moreover, Corosa stated that the pain began again in May and June of 2007, before he asked NHA to accommodate him by purchasing a riding lawnmower.

Corosa did not directly allege that NHA is covered by the ADA. While being a "covered entity" is technically an element of the statute (see 42 U.S.C. 12112(a) (general rule); 12111(2) (defining "covered entity"); 12111(5)(A) (defining "employer")), the failure to allege this element is not fatal. NHA did not dispute that it is a covered entity and Corosa stated in his objection that the issue was not disputed.

The Court found that although the First Circuit has not settled the issue of whether an individual who is the employer's agent may be held liable under the ADA, it has held that such individuals may not be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which, like the ADA, governs employment discrimination. Fantini, 557 F.3d at 28-31. The First Circuit has also suggested that it would apply the same reasoning in the context of the ADA. Acevedo López v. Police Dept. of Puerto Rico, 247 F.3d 26, 29 (1st Cir. 2001) (declining to consider issue because it was undeveloped, but noting that "several other circuit courts and three district courts within this circuit have held that individuals are not subject to suit under the ADA") (internal quotation marks and citations omitted).

The Court went on to note as the First Circuit found in Fantini, several circuit courts have held that there is no individual liability under the ADA. See, e.g., Albra v. Advan, Inc., 490 F.3d 826, 830 (11th Cir. 2007); Walsh v. Nevada Dept. of Human Resources, 471 F.3d 1033, 1038

(9th Cir. 2006); Koslow v. Pennsylvania, 302 F.3d 161, 178 (3d Cir. 2002); Ford v. Frame, 3 Fed. Appx. 316, 318 (6th Cir. 2001); Butler v. City of Prairie Village, Kansas, 172 F.3d 736, 744 (10th Cir. 1999); U.S. Equal Employment Opportunity Comm'n v. AIC Sec., 55 F.3d 1276, 1282 (7th Cir. 1995). District courts within the First Circuit, including this court, have held the same. See, e.g., Orell v. UMass Mem. Med. Ctr., Inc., 203 F. Supp. 2d 52, 64 (D. Mass. 2002); Vizcarrondo v. Bd. of Trustees of Univ. of Puerto Rico, 139 F. Supp. 2d 198, 205 (D.P.R. 2001); Quiron v. L.N. Violette Co., 897 F. Supp. 18, 19 (D. Me. 1995); Miller v. CBC Co., 908 F. Supp. 1054, 1065 (D.N.H. 1995). The reasoning of each circuit court that held that there is no individual liability under the ADA was substantially similar to the First Circuit's reasoning in Fantini, regarding individual liability under Title VII. Moreover, each circuit court also noted the parallels between Title VII and the ADA, and indicated that their holdings with regard to individual liability under Title VII guided their holdings with regard to the ADA.

Based on the weight of the precedents cited, including prior holdings in this court, the court concluded that there is no individual liability under the ADA. Corosa's ADA claim against Robinson was dismissed.

h. EEOC Counsel's Guidance for Managing Employee Medical Information

The Equal Employment Opportunity Commission issued an advisory opinion recently that stated federal agencies and contractors must ensure that a medical records custodian (MRC) works in an environment that does not allow for unauthorized co-workers to have access to employee medical information. While the opinion (in response to an inquiry) addresses medical confidentiality under the Rehabilitation Act and applies specifically to MRCs, the same legal standards apply to private-sector employers under the Americans with Disabilities Act's medical confidentiality rules. The February 18, 2010, letter can be accessed at <http://www.eeoc.gov/eeoc/foia/letters/2010/ada-confident-medicalinfo.html>.

In that letter, the EEOC lists the following steps federal agencies should take to safeguard the confidentiality of employee medical information:

1. Remind all employees that medical information is confidential and only MRCs are authorized to have access to such information on a need-to-know basis.
2. Issue a memorandum informing all employees that anyone who discusses another employee's medical information with unauthorized persons or reads medical documents not intended for him or her will be disciplined.
3. To ensure that other employees, including other MRCs, cannot overhear conversations about an employee's confidential medical information, consider providing an office with a door that an MRC can use when he or she needs to discuss an employee's medical condition or history by telephone or in person.
4. A fax machine that is shared only by other MRCs also could be installed in this office, with the door kept locked except when in use by an MRC.

5. Remind MRCs to keep any employee medical information in a locked file cabinet in their cubicles or in a file cabinet in the shared office to which only other MRCs have access.
6. Periodically audit policies and procedures to ensure sufficient measures are in place to guarantee the confidentiality of employee medical information and protect against unauthorized disclosures.

The EEOC Office of Legal Counsel's letter on the confidentiality of medical information is not an official opinion of the Commission. However, it provides insights into the EEOC's view of potential safeguards to protect against unlawful disclosure of employee medical information under the ADA and Rehabilitation Act. Organizations with multiple departments reviewing employee medical information in connection with an injury or illness (such as departments for occupational health, risk management, HR and benefits) may have the greatest need to adopt recommended safeguards to protect employee medical information from unlawful disclosure.

D. Age Discrimination

A decade ago (2000-2001), with the slowdown in the economy (hardly seems like much of a slow down compared to 2007-2009), the number of age discrimination claims under State and federal employment discrimination laws increased. That trend was reversed in 2005-2006 with age claims dropping by 3,000 charges in just one year. That trend was reversed in FY 08 with a significant increase in age claims. The trend reversed again last year as age claims totaled 22,778 in 2009 (a slight decrease from FY 08 but still a significant number of claims).

Here are some sample cases and other developments in this ever-changing area of discrimination law.

1. Introduction/Overview

Age discrimination claims still represent one of the top 5 most common workplace discrimination claims. Here are some recent cases that show the most recent developments and trends in this area of documentation law.

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et se q., is an amendment to the Fair Labor Standards Act ("FLSA") The ADEA makes it unlawful for an employer with 20 or more employees, labor organizations, or employment agencies:

1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
3. to reduce the wage rate of any employee in order to comply with this chapter.

The ADEA also prohibits employers from printing or publishing any advertisements which indicates a preference, limitation or specification based on age, or from retaliating against any employee who files an age discrimination complaint.

When it was enacted in 1967, the ADEA only protected individuals between ages 40 and 65. In 1978, the ADEA was amended to increase the protected age limit to 70. In 1986, the ADEA was again amended, and the upper age limit was removed in its entirety. As a result, any employee age 40 or older is protected by the ADEA. Discrimination against persons under age 40 is not barred by the ADEA. However, New Hampshire's law against discrimination provides protection to any employee over age 18. (See R.S.A. 354-A:7, I.)

Responsibility for investigating federal charges of age discrimination has been delegated to the EEOC. Age discrimination charges must be filed within 180 days, or, in certain circumstances, within 300 days, of the last alleged discriminatory act. After a charge is filed, EEOC will conduct an investigation and attempt conciliation in the same manner as in Title VII investigations. However, an employee need only wait 60 days after filing a charge with EEOC before filing a lawsuit, and such lawsuits are subject to the FLSA's two year statute of limitations. A successful employee can be awarded lost wages and benefits, costs, attorney's fees, and, if a willful violation is found, liquidated damages. Willful violations of the ADEA can also be prosecuted criminally.

The state agency responsible for the enforcement of the Law Against Discrimination is the New Hampshire Commission for Human Rights (the "Commission"), located in Concord, New Hampshire. A Commission investigation is initiated by filing a written charge of discrimination within 180 days of the alleged discriminatory act. The Commission does not have jurisdiction to investigate alleged discriminatory acts which occurred more than 180 days prior to the filing of the charge, unless the alleged acts are part of a continuing pattern or practice of discrimination which extends into the 180 day period. If a charge is filed after the 180 day period has expired, the Commission will forward the charge to EEOC for investigation. Conversely, a charge of discrimination filed with EEOC within 180 days of the last discriminatory event may be forwarded by EEOC to the Commission for investigation. It is not unusual for a charge to be filed at both EEOC and the Commission concurrently; however, only one of the agencies will be involved in the active investigation.

The Commission is empowered to issue injunctive relief, including the issuance of cease and desist orders and ordering employers to hire, upgrade, or reinstate an employee. The Commission may also award "make-whole" remedies, including the payment of lost wages and benefits resulting from employment discrimination, and reimbursement of a complainant's costs, and including the complainant's attorney's fees. In addition, the Commission may award compensatory damages to the complainant, and in order to vindicate the public interest, may order the respondent to pay an administrative fine of up to \$50,000 if the respondent was found to have committed two or more prior discriminatory practices.

As of June 2000, a complainant also has the right to remove his or her case from the Commission to superior court to bring a civil action for damages and to have a jury trial. See RSA 354-A:21-a. A complainant may remove a case to superior court after the case has been pending with the Commission for 180 days. A respondent may also remove a case to Superior Court. However, unlike a complainant, a respondent may remove a case to Superior Court only

after a probable cause finding by the Commission.

2. **Sample Court Decisions**

a. **Employment Decision Based on Age – The New Standard?**

Mixed Motive Standard Under the ADEA

In a case decided in June 2009 by the Supreme Court, **Gross v. FBL Financial Services, Inc.**, No. 08-441 [*Cite omitted*], the Court decided that a plaintiff must submit direct evidence of discrimination in a suit filed under the ADEA in order to obtain a mixed-motive instruction in a non-Title VII discrimination case. A mixed-motive case is one where the evidence shows that an impermissible factor - such as age - was considered in making an employment decision even if the employer also based the decision on other permissible factors. In other words, the burden shifting common to Title VII cases, the Court found that the burden of persuasion does not shift to the employer in ADEA cases even if the plaintiff presents some evidence that age was a contributing factor in the employment decision.

In that case, Jack Gross sued his former employer, FBL Financial Services, Inc. under the ADEA alleging he was demoted because of his age. A federal district court jury in Iowa found in his favor and awarded him \$46,945 in lost wages and benefits. On appeal, the United States Court of Appeals for the Eighth Circuit reversed that decision and ordered a new trial. The Court held that the jury instruction at the trial was improper because it instructed the jury that it was sufficient for the plaintiff to prove by direct or indirect evidence that age was merely a "motivating factor" in his employer's decision to terminate his employment before shifting the burden of persuasion to the defendant to establish that it would have made the same decision absent consideration the plaintiff's age.

The Eighth Circuit found that the jury instruction provided here is only permissible in cases brought under Title VII of the Civil Rights Act of 1964 (i.e., sex, race, national origin and religious discrimination claims), because of an amendment in 1991 which altered the traditional burden shifting formulas under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Court found that the 1991 amendment does not apply to cases brought under the ADEA. As a result, the Eighth Circuit ruled that Mr. Gross needed to prove his case with direct evidence to be entitled to shift the burden to the employer and receive a mixed motive instruction as provided in Price Waterhouse. Absent direct evidence, the Eighth Circuit held that the burden of persuasion should have remained with the plaintiff throughout and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in the defendant's employment action.

The Supreme Court, in a 5-4 decision, held that for ADEA disparate impact claims, the plaintiff must prove that age was the "but for" cause of the challenged employer decision. The dissent in that case invited Congress to address this issue. Congress accepted the invitation.

b. **1st Circuit: Inconsistent Explanations for Termination Cited in Reversal of Judgment**

Although the U.S. Supreme Court recently held that the federal Age Discrimination in Employment Act places the burden on the plaintiff to prove that age was the "but-for" cause for

the complained-of adverse action, plaintiffs who do not have direct evidence of age discrimination still may prove their cases by using the long-standing three-stage burden-shifting framework set forth by the Supreme Court in 1973, according to the 1st U.S. Circuit Court of Appeals. *Vélez v. Thermo King de Puerto Rico*, 1st Cir., No. 08-1320 (Oct. 16, 2009).

Thermo King de Puerto Rico hired José Vélez in 1978 and employed him until terminating him in 2002 following an internal investigation into stolen company property. When interviewed during the investigation, Vélez admitted to periodically receiving gifts of low value from suppliers and occasionally selling those items to co-workers. Vélez, who was 56 years old at the time of termination, had an unblemished employment record with Thermo King up until that time. When it terminated Vélez, Thermo King did not offer a reason for termination.

In 2002, Vélez filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) and the Puerto Rico Department of Labor's Anti-Discrimination Unit. Responding to that charge, Thermo King explained that it had terminated Vélez because he violated company policy by accepting gifts from Thermo King suppliers. Vélez disputed that the receipt of gifts violated policy. Without making a finding, the EEOC issued a right to sue letter, and in 2003 Vélez filed a lawsuit.

Responding to the lawsuit, Thermo King explained that it had also terminated Vélez because he sold the gifts from Thermo King suppliers, along with other Thermo King property, to company employees. The trial court granted summary judgment in favor of Thermo King, and Vélez appealed to the 1st Circuit.

The 1st Circuit reversed the grant of summary judgment and remanded the case to the trial court. Explaining its decision, the 1st Circuit harmonized the recent Supreme Court decision in *Gross v. FBL Fin. Servs. Inc.*, 129 S. Ct. 2343 (2009), with the burden-shifting framework previously established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In *Gross*, the Supreme Court held that a plaintiff must “establish that age was the ‘but-for’ cause of the employer’s adverse action.” The 1st Circuit explained that in the absence of direct evidence, such as an eyewitness to the age discrimination, the three-part *McDonnell Douglas* burden-shifting framework applied. Under that framework:

- The plaintiff must establish a prima-facie claim by showing that he or she was at least 40 years old at the time of termination from a position for which he or she was qualified and that the employer subsequently filled the position.
- The employer must articulate a legitimate nondiscriminatory reason for the termination.
- The plaintiff may prove that the reasons offered were not true but were instead a pretext for discrimination.

Quoting *Gross*, the 1st Circuit said that “[u]ltimately, the plaintiff’s burden is to prove ‘that age was the “but-for” cause of the employer’s adverse action.’ ”

Applying this to reverse the grant of summary judgment in favor of Thermo King, the 1st Circuit said that there was sufficient evidence for a finder of fact to rule in favor of Vélez. The appellate court noted that Vélez could establish a prima-facie case because all parties agreed that he was over 40 years old and had been terminated, the evidence—including his 24-year employment history—would allow a finder of fact to conclude that he was qualified for the position, and Thermo King replaced him.

Moreover, the Appeals Court also concluded that the evidence would allow a finder of fact to determine that Thermo King’s explanation for the termination was a pretext for age discrimination. “We find several aspects of the evidence that, taken together, are more than sufficient to support a fact-finder’s conclusion that Thermo King was motivated by age-based discrimination, and which thus raise a genuine issue of material fact that defeats summary judgment,” the court stated. “These include Thermo King’s shifting explanations for its termination of Vélez, the ambiguity of Thermo King’s company policy and the resulting uncertainty as to whether Vélez violated it, and, most importantly, the fact that in response to arguably similar conduct by younger employees, Thermo King took no disciplinary action.”

3. Changes Coming From Congress and EEOC

a. Congress Introduces Legislation to Overturn Supreme Court Age Discrimination Decision

Lawmakers in both the U.S. Senate and House of Representatives have introduced legislation to overturn a Supreme Court decision that has been criticized by politicians and advocacy groups as making it more difficult for plaintiffs to prevail on age discrimination claims. The Protecting Older Workers Against Discrimination Act (H.R. 3721 / S. 1756) would amend the Age Discrimination in Employment Act of 1967 (“ADEA”) to make clear that the plaintiff’s evidentiary burden in an age discrimination case is no different than that faced by employees in other discrimination claims, such as those based on color, religion, sex and national origin. This is the second piece of legislation introduced in Congress this year for the sole purpose of reversing a Supreme Court employment discrimination decision.

The case under attack is *Gross v. FBL Financial Services, Inc.*, in which the High Court ruled 5-4 that a plaintiff asserting a claim under the ADEA must prove age discrimination was the “but-for” cause of an adverse employment action. Prior to the Court’s decision, lower courts had interpreted the ADEA in the same way as Title VII of the Civil Rights Act of 1964, which allows plaintiffs to show that age discrimination was a “motivating factor” or “mixed motive” for an adverse employment action.

According to the majority opinion in *Gross*, authored by Justice Clarence Thomas, the ADEA, unlike Title VII, does not authorize mixed-motive age discrimination claims. In ADEA cases, the Court ruled, at all times an employee must show that “but for” age discrimination, the alleged adverse action would not have taken place. The burden of persuasion *never* falls on the employer.

Criticizing the majority’s holding, the dissenting opinion of Justice John Paul Stevens said, “[I]t is ... inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII.”

The Protecting Older Workers Against Discrimination Act would overturn *Gross* by amending the ADEA to specifically state that a plaintiff can establish an unlawful employment practice under the ADEA if he or she can “demonstrate by a preponderance of the evidence that ... [age discrimination] was a motivating factor for the practice complained of, even if other factors also motivated that practice; or... the practice complained of would not have occurred in the absence of an impermissible factor.” If the plaintiff meets this evidentiary burden, the burden would shift to the employer to demonstrate that it would have reached the same decision based on a non-discriminatory reason.

The Protecting Older Workers Against Discrimination Act was introduced by Representative George Miller (D-Cal.), and Senators Tom Harkin (D-Iowa) and Patrick Leahy (D-Vt.). Stay tuned!

b. EEOC Issues Proposed Criteria for ADEA Defense

The EEOC has proposed redefining a key defense available to employers facing claims by employees under the Age Discrimination in Employment Act by adding criteria by which courts will be asked to take into consideration. Some employment law practitioners believe the proposed amendments, if adopted, would change radically the legal landscape by making it easier for plaintiffs to prevail on “disparate impact” age discrimination claims, often requiring employers to undertake time-consuming and costly studies prior to performing reductions in force.

Most claims of discrimination are brought under a “disparate treatment” model where the plaintiff alleges that the employer *intentionally* took adverse action against him because of his protected characteristic, such as race, sex or age. In 2005, the U.S. Supreme Court ruled that the ADEA allowed claims under a “disparate impact” theory, as well. *Smith v. City of Jackson*, 544 U.S. 228 (2005).

Under a disparate impact theory, an employer may be found liable for discrimination based on its use of facially neutral policies or criteria that disproportionately affect a particular protected class in an adverse way. In *Smith*, the employer implemented a new pay plan to attract and retain qualified city employees. The new pay practice resulted in younger employees receiving higher raises than older employees. The Supreme Court, however, held that ADEA defendants need not prove a policy that disparately affects older employees was justified by the high hurdle of “business necessity” in order to escape liability. Rather, it said, the policy at issue need be based on only a reasonable factor other than age.

While the Supreme Court in *Smith* readily deferred to the employer’s discretion in determining its business practice, the proposed EEOC regulations create six factors the agency deems relevant in determining whether a practice is reasonable:

1. whether the practice is a common business practice;
2. the extent to which the practice is related to the employer’s business goal;
3. the extent to which the employer took steps to define and apply the practice accurately;

4. the extent to which the employer took steps to assess the adverse impact on older workers;
5. the potential harm to older workers; and
6. whether other options were available.

The proposed regulations are likely to burden considerably the way companies conduct a variety of business activities, including reductions in force (RIFs), compensation plans, and succession planning, among others. For example, while many larger employers conduct impact studies, which they view as prudent, prior to performing a RIF, such studies are not required by law. Under the EEOC's proposal, though, all employers, regardless of size and resources, likely will be required to perform such studies.

Disparate impact studies typically can be costly, requiring expert statisticians to perform regression analyses. These studies also can be time-consuming. If an employer utilizes multiple factors in performing a RIF, a separate analysis of each factor's effect on the workforce may be necessary.

The proposed regulations also would require employers performing RIFs to survey "common business practices." Those using a creative, but uncommon, business strategy may find themselves fighting an uphill battle for justification.

RIFs often involve contemporaneous assessments by supervisors of subordinates' skill sets and performance abilities (RIF evaluations) or measure how employees performed on their most recent performance reviews. As a practical matter, many of these assessments are subjective in nature. The proposed regulations suggest that "subjective decision making" by supervisors is based on "unconscious age-based stereotypes" and will be found to be age-based. This calls into question whether employers will need to eliminate such categories as "initiative," "drive," "flexibility" and "risk-taking" from RIF evaluations and, perhaps, performance reviews.

The EEOC apparently expects employers to train and instruct managers who perform RIF evaluations to ensure they are not utilizing age-based stereotypes. How much training would be needed is unclear. RIFs may have to be done expeditiously. Training, excessive analysis, inability to use subjective factors, and multiple levels of review would risk impeding businesses from operating with the agility needed to compete in the marketplace.

The regulations, if implemented, could restrict the ability of employers to exercise their business judgment in other ways. For example, courts may find compensation plans designed to reward highly skilled employees as having an unlawful disparate impact on older workers.

Some specialized employers may face stricter examination. Courts previously have allowed public safety employers and providers of private security services to test employees for minimum standards of physical fitness. These employers may come under greater scrutiny as to whether their tests were "common business practices" or related to the employers' "business goals."

E. Race Discrimination

1. Introduction

While race, national origin and religious discrimination cases have not traditionally been common claims filed with the New Hampshire Commission for Human Rights (NHCHR) or the U.S. Equal Employment Opportunity Commission (EEOC) in Boston, that has changed as the racial and ethnic composition of the state and the businesses located in the state have changed in recent years. This is confirmed by the increase in these types of cases filed with NHCHR and the EEOC in Boston during the last several years.

Race discrimination claims are the most common types of discrimination claims filed nationally each year.

Title VII of the Civil Rights Act of 1964 and N.H. RSA 354-A prohibit covered employers from discriminating in employment based on race, color, religion, and national origin among other protected characteristics of applicants and employees. These statutes also prohibit retaliation against persons who complain of discrimination or participate in an EEOC or NHCHR investigation. In EEOC's guidance on Race Discrimination they make it clear that everyone is protected from race and color discrimination. This includes Whites, Blacks, Asians, Latinos, Arabs, American Indians, Alaska Natives, Native Hawaiians, Pacific Islanders, persons of more than one race, and all other persons, whatever their race, color, or ethnicity.

a. Statistics

Race and color discrimination continue to be the most common type of charge received by EEOC. In 2009 EEOC received 33,579 charges alleging race discrimination. This was one of the highest levels of race claims in over 14 years.

b. What is "Race"?

Neither Title VII nor RSA 354-A contain a definition of "race." However, EEOC guidance provides that race discrimination includes discrimination on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.

c. What is "Color"?

EEOC guidance also provides that color discrimination occurs when a person is discriminated against based on his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone. Color discrimination can occur between persons of different races or ethnicities, or even between persons of the same race or ethnicity. For example, an African

American employer violates Title VII if he refuses to hire other African Americans whose skin is either darker or lighter than his own.

d. Employment actions are prohibited by Title VII and RSA 354-A.

These statutes prohibit race and color discrimination in every aspect of employment, including recruitment, hiring, promotion, wages, benefits, work assignments, performance evaluations, training, transfer, leave, discipline, layoffs, discharge, and any other term, condition, or privilege of employment. These prohibitions include not only intentional discrimination, but also practices that appear to be neutral, but that limit employment opportunities for some racial groups and are not based on business need.

Intentional discrimination occurs when an employment decision is affected by the person's race. It includes not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.

e. Some Neutral Employment Policies may be Discriminatory.

EEOC guidance suggests that some neutral employment policies or practices may exclude certain racial groups in significantly greater percentages than other racial groups. If there is a business necessity for the practice and there is no equally effective alternative, the practice will be lawful despite its impact.

f. Recruitment and Hiring Practices.

Employers may legitimately need information about their employees or applicants race for affirmative action purposes and/or to track applicant flow. EEOC suggests that one way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that it is not used in the selection decision.

EEOC also cautions that unless the information is collected and used for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.

g. Harassment on the Basis of Race.

EEOC has applied the standards of sexual harassment to other forms of discrimination including race. In their guidance EEOC provides that racial harassment is unwelcome conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Examples of harassing conduct include: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. An employer may be held liable for the harassing conduct of supervisors, coworkers, or non-employees (such as customers or business associates) over whom the employer has control.

The elements of racial and sexual harassment claims often are intertwined since the federal courts have applied the principles pertinent to the latter to the former and vice versa. Courts typically review racial harassment claims under an objective and subjective standard just as they do with sexual harassment claims under *Harris* and *Meritor*. The federal district courts and circuit courts have applied various, although similar, standards and analyses for racial harassment claims.

4. **Sample Cases**

a. **State Immune from Promotional Exam Challenge**

The 1st U.S. Circuit Court of Appeals reversed a district court's denial of immunity for state defendants in a disparate impact race claim against a state agency that administers promotional exams. The state defendants did not qualify as the plaintiffs' employers under Title VII, the court determined. In addition, the state defendants were not the plaintiffs' de facto employers, as they exercised no control, direct or indirect, over the factors relevant to the common law agency test. The plaintiffs' alternate theories for why the state defendants should be considered their employers under Title VII also were rejected. *Lopez v. Commonwealth of Massachusetts*, 1st Cir., No. 09-1164 (Dec. 3, 2009).

The plaintiffs were minority police officers who did not achieve the promotions to police sergeant they sought. The promotional exams for police sergeant were prepared and administered by the Commonwealth of Massachusetts through a third-party state agency (HRD). The plaintiffs brought a disparate impact race claim under Title VII against the state defendants. The plaintiffs also sued their direct employers, various cities and the Massachusetts Bay Transportation Authority (MBTA) as the appointing authorities who make the police promotion decisions.

The state moved to dismiss on the grounds that, solely as the administrator for the tests, it was not an "employer" as defined under Title VII. The district court denied the state's motion.

On appeal, the 1st Circuit noted that for the plaintiffs to succeed on a Title VII disparate impact claim, the state would have to be an "employer" of the officers. The 1st Circuit concluded that the state did not constitute an "employer," stating that "it is clear that plaintiffs are not HRD's employees, and HRD is therefore not their 'employer' for Title VII purposes." It enumerated the following factors in its decision:

HRD has no control over the plaintiffs' day-to-day job performance and no right to exercise such control.

Municipal police officers do not work on HRD's premises and have no continuing relationship with HRD. Instead, HRD affects the plaintiffs only indirectly, and only to the degree that the plaintiffs' local employers decide to involve HRD in various processes.

HRD has no right to assign the plaintiffs any projects, nor does HRD set the hours of the plaintiffs' employment.

The plaintiffs' work is not part of HRD's regular business.

HRD is a state regulatory body concerned with the administration of the civil service system, whereas the plaintiffs, as police officers, are concerned with maintaining public safety.

HRD does not provide the plaintiffs with any benefits, such as insurance or workers' compensation, nor does HRD consider the plaintiffs its employees for tax purposes.

HRD has no role in termination decisions.

"Neither HRD nor plaintiffs could have reasonably believed that they ever established an employer-employee relationship," the court stated.

The 1st Circuit also rejected an "interference theory" of employment whereby "a party that significantly participates in and with an employment relationship may be subject to liability as an employer," and another theory whereby the state could be considered an "employer" for purposes of Title VII liability if it controls even one significant aspect of the plaintiffs' employment.

The district court's denial of the state defendants' motion to dismiss was **reversed**, and the case was remanded to the district court for entry of an order of dismissal under Title VII with prejudice with respect to the state defendants.

The court noted that its holding that the state defendants were not the plaintiffs' "employers" for purposes of Title VII meant that it dismissed the plaintiffs' suit only against those defendants. The plaintiffs' claims against the city defendants and the MBTA were therefore allowed to proceed.

b. Race-Based Comment Found Not To Be "Hostile." Court Rejects Harassment Claim, Noting Worker's Inaction

A federal appeals court held late last year that an employee who claimed he was subjected to 14 months of racially-motivated comments cannot succeed on his Title VII racial harassment claim. According to the Seventh Circuit Court of Appeals, the case must be dismissed because the alleged behavior was not "severe and pervasive" and the employee failed to adequately pursue his complaint with his supervisors. *Ford v. Minteq Shapes and Services, Inc.*, No. 09-2140, Seventh Circuit Court of Appeals (November 24, 2009).

Dennis Ford was employed by Min-teq Shapes and Services, Inc. (MSS) at its Portage, Indiana facility. Ford, who had worked at MSS as a forklift operator for 13 years, was the only African-American employee on site.

Ford claimed that over a 14-month period a co-worker, Joseph Wampler, often referred to him as "black African-American" or "black man." The behavior stopped when his supervisor, Steve Smith, and co-worker Miguel Altieri overheard Wampler's comments and reprimanded him.

Ford claimed that he reported Wampler's comments and several other concerns to Laura Beemsterboer, the Manager of Human Resources. Specifically, Ford alleged: that his supervisor, Ronald Humphreys, once told him that he didn't have to worry about his job because MSS "wanted to appear integrated"; that another supervisor, Lee Nuzzo, once called him a "gorilla";

and that MSS barred Ford but not others from bringing their grandchildren to the company's Christmas parties.

On May 5, 2007, Ford filed suit alleging that MSS had racially harassed him, paid him a discriminatory wage, and retaliated against him in violation of Title VII of the Civil Rights Act. The trial judge granted summary judgment to MSS and Ford appealed.

The Seventh Circuit first noted that to succeed on his racial harassment claim, Ford must show that his employer's conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment." The court considered each incident and found that Wampler's comments were not severe enough to alter Ford's working conditions and constitute racial harassment.

In reaching this conclusion, the Seventh Circuit found it relevant that although Ford reported Wampler's comments to Beemsterboer, he did so only once in 14 months. Moreover, the court found that during this conversation with Beemsterboer, Ford's main concerns seemed to be the raise he was seeking and his treatment at the Christmas party (not Wampler's comments). According to the court, even when no apparent action was taken on his complaint, Ford did not follow up with Beemsterboer or with his supervisor.

Because Ford did not take reasonable steps to inform MSS of Wampler's comments, the court rejected his claim that the comments created a hostile work environment or rose to the level of illegal harassment.

The Seventh Circuit also concluded that neither Humphreys' affirmative action comment nor the gorilla remark constituted harassment. According to the court, both incidents occurred only once, "did not impair Ford's job performance, and were insufficiently severe to rise to the level of a hostile work environment."

Finally, the Seventh Circuit concluded that Ford's treatment at the Christmas party did not constitute racial harassment because it did not impair Ford's job performance, happened only occasionally and occurred outside the normal workday. The court also noted that Ford had not presented any evidence that his treatment at the party was because of his race. Thus, the Seventh Circuit ruled that without regard to whether Ford's claims were considered separately or in the aggregate, they did not support a legal claim for harassment.

c. New Hampshire Race Case: Failure to Hire Case

In a recent decision, the federal court in Concord issued a ruling on an interesting failure case. (*Lara v. NH DHHS*, United States District Court; District of New Hampshire; 08-CV-362-SM 03/05/10; Opinion No. 2010 DNH 042). In that case, the pro se plaintiff, Jannery Lara, a former employee of the New Hampshire Department of Health and Human Services, sued the Department for racial discrimination in violation of Title VII of the Civil Rights Act of 1964. Before the court were the parties' cross motions for summary judgment.

In December of 2004, Lara was hired by the Department of Health and Human Services ("HHS" or "Department") to fill the position of Secretary II in the Manchester Juvenile

Probation and Parole Office. From the outset, her goal was to “step[] up the ladder within the agency.” When hired Lara held a bachelor of arts degree with a major in economics and a minor in French. About two years after she began working at HHS, she earned a master's degree in Human Services and Community Counseling Psychology. She earned that degree to enhance her prospects for advancement within the Department. During her nearly four years of employment with the Department, Lara applied for twenty-one other HHS positions. She was not successful in obtaining any of those positions.

Lara worked as one of three secretaries assigned to the Manchester Juvenile Probation and Parole Office. Stacy Colby held the title of Executive Secretary. Lara and Colby had a difficult working relationship. Lara's 2005 performance evaluation listed three areas for improvement, including: "Communicating with the JPPO assigned Executive Secretary with regards to accepting tasks, requesting clarification when there is not a clear directive." Similar notations were made on her evaluations for 2006 and 2007. On October 23, 2006, Lynne Tewksbury, the Department's District Office Manager of Operations for Manchester, met with Lara and Colby, in an effort to resolve difficulties they had in working together.

In September of 2006, the Manchester Juvenile Probation and Parole Officers (“JPPOs”) and their clerical staff moved from 195 McGregor Street to the Stark House, on the campus of the Youth Development Center. According to Tewksbury:

Although Jannery [Lara] and Stacy had complained about each other while they were directly under my supervision at McGregor Street, their conflict seemed to escalate after the move to the Stark House as there was no one from outside to watch [t]hem or to mediate. Sandra Ziegler, the JPPO Field Supervisor, and my Supervisor, Penny Caldwell, asked me to bring both women back to work at McGregor Street under my direct supervision. Stacy and Jannery were reassigned by me to McGregor Street at the same time. Both were treated the same way.

Following the reassignment I also had a meeting on April 10, 2007 with Stacy and Jannery both present at the same time, as well as Frank Nugent and my supervisor, Penny Caldwell. Both women were told exactly the same thing about the need to get along with each other, to work cooperatively, to stop the constant negative comments and inappropriate raised voices. Both were given as a written follow-up exactly the same memo of counseling.

As a result of her dissatisfaction with the way she was treated while employed by the Department, Lara filed suit in this court. In an order dated February 6, 2009, the magistrate judge construed Lara's pro se complaint as raising the following claims of racial discrimination:

[E]mployees of the defendant agency discriminated against [Lara] because she is Hispanic, by creating a hostile work environment, failing to timely address and resolve the hostile work environment on a management level, denying her promotions or desirable positions within the agency, and taking adverse actions in her work environment in order to deprive her of contact with other staff members.

Based upon the magistrate judge's order, the court construed Lara's complaint as claiming that, because she is Hispanic, the Department refused to promote or to hire her for the various

positions she sought, subjected her to disparate treatment by transferring her from the Stark House back to McGregor Street, and subjected her to a hostile work environment.

Lara claimed that the Department discriminated against her, because of her Hispanic heritage, by refusing to hire her for any of the positions she sought within the Department. The Department moved for summary judgment on grounds that Lara was either unqualified for the positions she sought, or was rejected in favor of candidates with superior qualifications.

Lara has produced no relevant evidence, much less evidence sufficient to establish a prima facie case. Therefore, the court found that the Department was entitled to judgment as a matter of law on Lara's claims.

F. Religious Discrimination

Title VII and RSA 354-A prohibit covered employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment.

1. Introduction: What this means for employers.

- Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices - except to the extent a religious accommodation is warranted. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.
- Employees cannot be forced to participate -- or not participate -- in a religious activity as a condition of employment.
- Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his religion. An employer might accommodate an employee's religious beliefs or practices by allowing: flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.
- An employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employers' legitimate business interests. An employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.

- Employers must permit employees to engage in religious expression, unless the religious expression would impose an undue hardship on the employer. Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency.
- Employers must take steps to prevent religious harassment of their employees. An employer can reduce the chance that employees will engage unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting, investigating and correcting harassing conduct.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on religion or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII or RSA 354-A.

2. Sample Court Cases

a. Employment Agency Didn't Violate Title VII By Not Referring Woman in Khimar for Job

Employment agency Kelly Services Inc. did not discriminate against a Muslim woman when it decided not to refer her to a client because she wears a khimar, the U.S. Court of Appeals for the Eighth Circuit held March 25 (*Equal Employment Opportunity Commission v. Kelly Services Inc.*, 8th Cir., No. 08-3880, 3/25/20).

A khimar is a traditional garment worn by Muslim women that covers their hair, forehead, sides of the head, neck shoulders, chest, and sometimes extends down to their waist. Kelly's client, Nahan Printing Inc., operates an industrial plant with large machines that have fast-moving parts that pose a safety risk to workers wearing loose-fitting clothing or headwear. For that reason, Nahan has a strict policy that prohibits employees from wearing head war and loose-fitting clothes to work.

In keeping with Nahan's policy, Kelly did not refer Asthma Suliman, a Muslim woman who wears a khimar, to Nahan. The Equal Employment Opportunity Commission argued that Kelly violated Title VII of the 1964 Civil Rights Act by not making the referral.

In an opinion by Judge Lavenski R. Smith, the court said that the EEOC did not show that Nahan had a position available at the time in question, and, even if it did, Kelly had a legitimate, nondiscriminatory reason for not making the referral that was not shown to be pretext for discrimination.

Suliman wears her khimar as part of her religion. Kelly is an employment agency that places workers in temporary positions with its clients.

When Suliman came to Kelly for help finding work, it spoke to her about Nahan, which uses large machines to pull paper into printing presses using conveyor belts with rollers, sorting

and jogging machines, binding machines, and packaging machines. Nahan requires all temporary workers to work on the assembly line, which places them near all the moving parts. For their safety, the company has a policy prohibiting loose-fitting clothing and headwear at work.

A staffing supervisor at Kelly considered Suliman's khimar to be headwear under Nahan's policy. Suliman told the supervisor that she could not remove the khimar because her religion required her to wear it.

Although Suliman was not offered a job with Nahan, she was offered at least seven other temporary jobs, which she turned down. The EEOC investigated Suliman's complaint and sued Kelly for religious discrimination under Title VII. The district court granted Kelly's motion for summary judgment.

On appeal, the EEOC argued that Title VII required Kelly to refer Suliman to Nahan without reference to the khimar unless Nahan could not reasonably accommodate Suliman's religious need to keep her head covered. It said that Kelly's Title VII obligations as an employment agency were independent of Nahan's generalized statements about safety precluding the possibility of a religious accommodation for a particular individual. It also argued that Kelly had a duty to investigate whether Nahan's generalized rules could be safely modified to accommodate Suliman.

It is illegal under 42 U.S.C. § 2000e-2(b) "for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his...religion.

The court noted that an employment agency's referral obligation under the statute presented a question of first impression for it. Nevertheless, it adopted the same test used for cases involving alleged religious discrimination by an employer. Under that test, a plaintiff must show that she (1) had a bona fide religious belief that conflicted with an employment requirement, (2) that the employer knew about the conflict, and (3) that she suffered an adverse employment action. Once proven, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse action, which the employee may then show is pretextual.

The only question in this case was "whether an employment agency's failure to refer an applicant may constitute an 'adverse employment action,'" the court said. Under Section 2000-2(b), "the plaintiff must show that the employment agency discriminated against her 'based on her [religion] in relation to referrals,'" it said, quoting a 1997 federal district court case.

The court determined that it was not required to "decide whether an employment agency's failure to refer a plaintiff for employment qualifies as an 'adverse employment' action to resolve this case. The EEOC has failed to show that Nahan had an available position to which Kelly could actually refer Suliman when she applied for available temporary work through Kelly."

Even if the EEOC established a prima facie case of religious discrimination, “Kelly would still be entitled to summary judgment, as it provided a legitimate, non-discriminatory reason for its failure to refer Suliman to Nahan for employment, and EEOC failed to show that this reason was pretextual,” the court said.

The court explained that there is no reason to vary the burden-shifting scheme “simply because the claim is against an employment agency instead of an employer.” Nevertheless, it said that the inquiry is complicated by 42 U.S.C. § 2000e(e)’s requirement that an employer accommodate a worker’s religious beliefs unless doing so would create an undue hardship.

The court said that “the EEOC sued Kelly in its capacity as an ‘employment agency,’ not an ‘employer,’ and nothing in § 2000e(j) suggests that an ‘employment agency,’ in defending itself against a claim of religious discrimination, must demonstrate that *the employer* to which it would be referring the temporary worker would suffer an undue hardship if it had to accommodate that worker. Therefore, the only question before us is whether Kelly has provided a legitimate, nondiscriminatory reason for declining to refer Suliman to Nahan for employment.”

The court continued by finding “Kelly’s legitimate, nondiscriminatory reason for not referring Suliman to Nahan was Nahan’s facially neutral, safety-driven dress policy prohibiting all employees – permanent and temporary – from wearing loose clothing or headwear of any kind,” the court said. It also said that there was “no evidence in the record that Nahan’s safety-driven dress policy was a pretext for discriminating against employees requiring religious discrimination or that Kelly had knowledge of such pretext.” It added that “[n]othing in § 2000e-2(b) suggests that an employment agency should be held liable if the agency has no reason to believe that the ‘employer’s claim of bona fide occupations qualification is without substance.’”

b. What Happens When Religious Beliefs and Job Requirements Conflict?

In this case, *Abraham v. Woods Hole Oceanographic Inst.*, 105 FEP Cases 367 (January 22, 2009) an employee’s religious beliefs conflicted with his job duties and that conflict later resulted in a job loss.

In that case, Abraham, a citizen of the Republic of India, began employment at Woods Hole Oceanographic Institute in mid October 2004 as a Postdoctoral Investigator and expert on zebrafish developmental biology. Approximately one week after his paid employment status began, Abraham told his supervisor that he was a Christian who did not believe in the theory of evolution. This disbelief created a conflict with how his supervisor believed his work should be carried out and interpreted. As a result, Abraham was asked to either resign immediately and accept a severance package or continue working at the Institute until he found another post doctoral position, but no longer than January 31, 2005. Abraham did not resign and was terminated on December 14, 2005.

In May 2005, Abraham filed a charge of discrimination with the Massachusetts Commission Against Discrimination (“MCAD”) alleging religious discrimination. This charge was dismissed and forwarded to the EEOC, which adopted the finding of the MCAD and also

dismissed the charge. On December 3, 2007, Abraham filed a single count complaint against the Institute based on Title VII of the Civil Rights Act in the U.S. District Court for the District of Massachusetts. The district court found that there was no basis for individual liability under Title VII. Abraham then appealed the District Court's further decision to refuse to apply equitable tolling to his Title VII claim.

The First Circuit Court of Appeals held that the District Court did not abuse its discretion in rejecting application of equitable tolling doctrine. It explained that Abraham's religion-based discrimination termination claim was untimely, since it was filed more than a year after the EEOC mailed its initial notice of the dismissal of his administrative charge to address from which he had previously moved. Further, Abraham's lack of diligence precluded application of equitable tolling, since he never filed a change of address with the EEOC.

c. Employer's Reasonable Accommodation Doesn't Have to be Exactly What Employee Requests.

There are limits to accommodations and, as noted in *EEOC v. Serrano's Mexican Restaurants, LLC*, No. 07-16017, *unpublished memorandum* (9th Cir. January 5, 2009), the accommodation offered doesn't have to be exactly what the employee requested.

In that case, Ms. Naeve, a former manager of Serrano's Mexican Restaurant chain, led an after hours bible study group that included three of her subordinates. Serrano's code of conduct prohibited supervisors from socializing with subordinates outside of work in an effort to avoid sexual harassment and unfair treatment of employees. After Ms. Naeve and her employers could not reach a compromise about the participation of Ms. Naeve's subordinates in her bible study group, she was discharged.

The EEOC sued Serrano's in the U.S. District Court in 2002 on behalf of Ms. Naeve, alleging that her religious beliefs were not accommodated under Title VII of the Civil Rights Act. The jury found for Serrano's noting testimony that Ms. Naeve was offered a job transfer that would have allowed her to continue teaching her Bible study group to restaurant employees. After the verdict, a new trial was ordered and in 2007, and the original order was vacated but then reinstated. The EEOC appealed and requested a new trial.

The Ninth Circuit rejected the EEOC's request for a new trial, affirming the lower court decision. It stated that it agreed with the District Court's final determination that the clear weight of the evidence did not support a finding that no unconditional accommodation was offered.

G. Retaliation Cases

Retaliation cases are among the top or most common charges of discrimination both as stand-alone claims but also as claims attendant to other charges or allegations of discrimination. In fact, last year retaliation claims rose to their highest level ever (33,613 charges filed in 2009) and became the highest or most common number of claims filed nationally.

1. EEOC Helps Define Retaliation.

In its guidance on retaliation, EEOC provides:

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

There are three main terms that are used to describe retaliation. Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**. These three terms are described below.

a. Adverse Action

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

- employment actions such as termination, refusal to hire, and denial of promotion,
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

b. Covered Individuals

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

c. Protected Activity

Protected activity includes:

- **Opposition to a practice believed to be unlawful discrimination**

Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- *Actions that interfere with job performance so as to render the employee ineffective; or*
- *Unlawful activities such as acts or threats of violence.*

2. **Participation in an Employment Discrimination Proceeding**

Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in an EEO investigation or litigation.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

For more information about Protected Activities, see EEOC's Compliance Manual, Section 8, Chapter II, Part B – Opposition and Part C – Participation.

3. **Clarifying Standards for Retaliation**

Rather than lead off with a typical case involving claims of employer liability for the misdeeds of its employees or for mishandling a sex harassment complaint, I wanted to start this section with a retaliation case. Retaliation is a great danger, especially in sex harassment cases.

Crawford v. Nashville and Davidson County, TN, 555 U.S. ____ (2009). In this case, a witness in a corporation's internal investigation of sexual harassment claimed she was protected by the retaliation provisions of Title VII. The Court's decision held that because there was no pending EEOC charge, and because the employee had not "*spoken out on her own initiative*," but had answered questions posed by her employer, there was no violation of 42 U.S.C. §2000e-3(a), which makes it unlawful "for an employer to discriminate against any employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter" (known as the "opposition clause"), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (known as the "participation clause"). The court was clear:

"The statement Crawford says she gave to Frazier is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense. Crawford's description of the goings-on would certainly qualify in the minds of reasonable jurors as "resist[ant]" or "antagoni[stic]" to Hughes's treatment, if for no other reason than the point argued by the Government and explained by an EEOC guideline: "When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication" virtually always "constitutes the

employee's opposition to the activity... It is true that one can imagine exceptions, like an employee's description of a supervisor's racist joke as hilarious, but these will be eccentric cases...” Slip Opinion, 6.

Crawford was but the most recent in a series of U.S. Supreme Court cases finding actionable retaliation under Title VII. (See *Gomez-Perez v. Potter*, 553 U.S., 128 S.Ct. 1931 (2008) (federal employees' retaliation rights under ADEA); *CBOCS West, Inc. v. Humphries* 533 U.S., 128 S.Ct. 1951 (2008) (plaintiffs can bring race-based retaliation claims under 42 U.S.C. 1981); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) (Reassignment of duties, monitoring of activities and suspension constituted retaliation even though the suspension was lifted and Ms. White received all her back pay. Retaliation need not be an adverse employment action).

4. EEOC Report on Charge Statistics Shows Continued Rise in Retaliation Claims

Introduction

In January 2010, the EEOC posted its charge statistic report for fiscal year 2009. Once again, the statistics show a near record number of charges filed, with only a slight decrease from a record setting 2008. While filings for race, sex, religion, and national origin discrimination have all remained fairly constant, the report shows an upward trend in retaliation and disability charges. In 2009, there were 10,000 more, retaliation charges filed than in 2006, with disability charges increasing by 5,000 over the same period. Recent amendments to the Americans with Disabilities Act and favorable court rulings, together with the overall aging of the population, are the most likely cause for the increase in disability claims. But what are the reasons for the increase in retaliation claims? This alert focuses on some likely reasons for this trend, the components of a retaliation claim, the risks presented by such a claim, and offers employers suggestions on how to avoid claims for retaliation.

In 2006, the United States Supreme Court decision in *Burlington N. & Santa Fe Ry. Co. v. White* significantly lowered the standard claimants must prove to win a retaliation claim. Prior to *White*, employees in most courts could only recover when they established an adverse and “ultimate employment decision,” such as being fired or demoted. In *White*, the Court expanded this definition of “adverse employment action” to include not only “ultimate employment decisions” but also any action which would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” As a result, the scope of actionable conduct now allows employees to recover with evidence of minor changes in the terms and conditions of their employment.

In addition, last year, the United States Supreme Court again expanded the scope of retaliation claims that may be brought under Title VII. In *Crawford v. Metro. Gov't of Nashville and Davidson County*, the Court held that Title VII protects an employee from retaliation when the employee speaks out about his or her own discrimination and when the employee speaks out about discrimination during an employer's investigation into another employee's complaint of discrimination. Accordingly, if the employee who participated in a sexual harassment or other discrimination investigation is later subjected to an adverse employment action, he or she can

claim the employer retaliated against him or her for disclosing the information in response to questioning during the investigation.

As a result of these high-profile decisions, it is not surprising to discover claimants and their attorneys are filing an increased number of retaliation claims. It is now common for an employer to receive a charge alleging both discrimination and retaliation. With the lower standards of proof, retaliation claims are much easier for claimants to sustain and make them a much more attractive option for purposes of litigation.

H. Family And Medical Leave Cases

1. Introduction

Later in this program and in these materials, Diana Wieland will review recent court decisions and the recent amendments to the FMLA. While these claims too are on the rise, and like ADA issues, FMLA matters are often difficult to sort out and resolve. Just as with the ADA, there have been many recent changes to the FMLA. By contrast, the FMLA has new regulations that clarify long-standing issues whereas there still is no guidance on the amendments to the ADA. Employers and employees still struggle with and stumble through the FMLA. Time and care should be taken with matters that could be covered under the FMLA to avoid confusion and other problems down the road. Just as we have said in the past, an orderly approach to these cases can help identify important issues as well as set the course for proper resolution.

2. Sample Court Cases

a. 1st Circuit: FMLA Claim Barred Even if Employer Erroneously Represented Eligibility

A school district official's mistaken misrepresentations that an employee was eligible for leave when she had not worked the required 1,250 hours in the preceding year did not prevent—or in legal terminology, “estop”—the school district from asserting her ineligibility for Family and Medical Leave Act (FMLA) leave. Though noting that it would have reversed based on estoppel if the employer had been a private-sector employer, the court held that precedent made clear that it was too hard on the government to meet private-sector standards, at least when no deliberate misrepresentation was involved. *Nagle v. Acton-Boxborough Regional School District*, 1st Cir., No. 08-2374 (July 30, 2009).

Kathleen Nagle asked off in January of 2004 to care for her ill husband, and stated that the deputy superintendent approved her leave as FMLA leave. The superintendent denied this and said he allowed her off on non-FMLA leave because she was ineligible for FMLA leave. She again took leave in the late winter and early spring of 2005 for the same reason, and again said the same individual treated the leave as FMLA (again, the same individual denied her account). She was terminated at the end of the school year in June of 2005 and filed suit.

The district court granted summary judgment, reasoning that she was not eligible for FMLA leave and therefore not protected by the FMLA from discharge because she took leave. She contended that the deputy superintendent's statements stopped the school district from raising her ineligibility for FMLA protection as a defense to her discharge claim. The court of appeals affirmed.

The court rejected her claim that the deputy superintendent's alleged representations to her prevented the school district from relying on her ineligibility. The court reasoned that equitable estoppel normally applied under federal law, which the court assumed governed, when:

- An individual made a misrepresentation with reason to believe that another will rely on it.
- The individual seeking to claim estoppel relied on the misrepresentation to his or her detriment.
- The person relying on the misrepresentation did not have reason to believe it was true.

Based on the foregoing, the court stated that the plaintiff's evidence would have created an issue for the jury if she had been employed in the private sector. The government, however, was different.

Relying on the Supreme Court's decision in *OPM v. Richmond*, 496 U.S. 2 (1990), the court held that it would be very hard on the government to hold it responsible for everything its agents said. Under the *Richmond* decision, the employee of a public-sector employer had to show that the employer engaged in "affirmative misconduct" and not simply a mistaken representation anticipating the reliance of others. Absent any such evidence here, the court held that the district court properly found there was nothing for a jury to decide and granted summary judgment.

b. Third Circuit: Lay and Medical Evidence Sufficient to Show a "Serious Health Condition" Under FMLA

A federal appeals court in Philadelphia ruled recently that an employee may use a combination of lay and medical testimony to establish that she has a "serious health condition" under the Family and Medical Leave Act, even though lay testimony alone (her own) would not suffice to establish that such condition resulted in her incapacitation. *Schaar v. Lehigh Valley Health Servs. Inc.*, No. 09-1635 (3d Cir. Mar. 11, 2010). The Third Circuit Court, in this case of first impression for the court, reversed summary judgment in favor of the employer and ruled that the employee could proceed with her claim that the employer interfered with her FMLA rights and terminated her in retaliation for taking protected leave.

The employer, a medical practice, employed the plaintiff, Rachel Schaar, as a receptionist from December 2002 to October 2005. On September 21, 2005, Schaar was treated for low back pain, fever, nausea, and vomiting. Schaar's physician, who also worked for the employer, diagnosed her with a urinary tract infection, prescribed antibiotics, an anti-inflammatory, and

gave her a note stating that her illness would prevent her from working on September 21 and 22. Schaar taped the note on her supervisor's door and went home.

Schaar had previously scheduled vacation days on September 23 and September 26. Schaar claims that she was sick in bed with pain, fever, and vomiting on September 21, 22 and 23. Schaar began to feel better slowly over the next three days and returned to work on September 27.

Upon returning to work, Schaar told her supervisor that she had been sick all weekend. She did not request that the employer convert her vacation days into paid sick days or FMLA leave. Schaar claimed that her supervisor threatened to fire her for violating the company policy requiring her to call off on her two sick days. Schaar told her supervisor that she did not believe she needed to so because she had left a note.

Thereafter, on October 3, 2005, the employer terminated Schaar for failing to call off from work and for performance issues. Schaar sued the employer for interference with her FMLA rights and retaliation, and the employer moved for summary judgment. The district court granted the motion, holding that Schaar failed to present medical evidence that she had a serious health condition. Schaar appealed.

On appeal, the Court first reviewed the FMLA's language and its regulations. The FMLA defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider."

"Continuing treatment by a health care provider" is defined as a "period of incapacity . . . of more than three consecutive calendar days . . . that also involves . . . [t]reatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider."

Schaar argued that her physician's statement and her testimony were sufficient to establish that she had a serious health condition, i.e., that she experienced a period of incapacity of more than three days.

The Court reviewed the decisions from other federal appeals courts regarding proof of incapacitation to establish a "serious health condition." It found, for example, the Courts of Appeals for the Fifth and Ninth Circuits have held that lay testimony alone is sufficient to establish incapacitation, while the Eighth Circuit has allowed lay testimony only to supplement medical evidence.

Relevant FMLA regulation provides that "continuing treatment by a health care provider can be satisfied by showing at least three days of incapacitation." 29 C.F.R. § 825.144. The Court observed that the regulation is silent as "to whether medical testimony is required." Based on the regulation's language, the Court found "no support . . . to exclude categorically all lay testimony regarding the length of an employee's incapacitation."

However, the Court disagreed with the position that lay testimony alone could raise fact issues on incapacitation. "Some medical evidence is still necessary to show that the incapacitation was 'due to' the serious health condition," the Court stated. This position, in the

Court's view, did not place an undue burden on employees because "they must present some medical evidence anyway to establish the inability to perform the functions of the position." By contrast, allowing lay testimony alone "would place too heavy a burden on employers to inquire into an employee's eligibility for FMLA leave based solely on the employee's self-diagnosed illness." Accordingly, the Court held that Schaar may satisfy her burden of proving three days of incapacitation through a combination of expert medical and lay testimony.

Because Schaar had presented both expert and lay testimony regarding her illness, she had raised a material issue of fact regarding whether she suffered from a "serious health condition" to qualify for FMLA protection. Thus, the Court vacated the trial court's judgment and remanded the case for further proceedings.

c. Employee Demoted Following Maternity Leave Had No FMLA Claim

Affirming the dismissal of an employee's Family and Medical Leave Act claims, the federal appeals court in Atlanta, Georgia, has held that an employer did not violate the law by demoting an employee when she returned from maternity leave for performance deficiencies discovered while the employee was out on leave. *Schaaf v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline*, No. 09-10806 (11th Cir. Apr. 6, 2010). The Court also rejected the employee's retaliation claim for failure to demonstrate that the employer's reason for her demotion – her poor performance – was a pretext for retaliation.

Beginning in 1999, Ellen Schaaf worked as a Regional Vice President in the employer's southern Georgia and Florida region. In July 2002, three District Sales Managers complained to the employer's human resources department that Schaaf had an "antagonistic and inflexible management style," was inaccessible, had poor communications skills, tended to play favorites, and failed to give feedback on performance. Consequently, morale in the region was poor.

In response, the employer issued Schaaf a verbal warning, and Schaaf's supervisor, Lisa Gonzalez, directed Schaaf to complete a Performance Improvement Plan ("PIP"). Among other things, the PIP required Schaaf to issue previously uncompleted written performance reviews and to attend management-training programs. At about the same time, Schaaf informed Gonzalez that she was pregnant and would take maternity leave in early 2003. Schaaf also expressed her concern that she would be unable to complete the PIP before her leave.

Schaaf, true to her prediction, failed to complete the performance evaluations or take any training, and failed to meet the PIP's deadline. Gonzalez subsequently extended the deadline until after Schaaf returned from leave.

During Schaaf's leave, an interim RVP assumed Schaaf's duties, and the region functioned significantly better – productivity increased, communication improved, and morale was higher. The interim RVP also discovered and corrected several significant administrative problems that had occurred under Schaaf's watch.

Shortly before Schaaf's return, the DSMs met with Gonzalez to express their concerns that the region's increased morale and productivity would end if Schaaf resumed her RVP

position. When Schaaf returned to work in April 2003, she met with Gonzalez, who gave her a choice of either accepting a demotion to DSM or leaving the company. Schaaf accepted the demotion to DSM and sued the employer for interference with her FMLA rights and retaliation.

The employer moved to dismiss Schaaf's claims as a matter of law, and the district court granted the employer's motion. Schaaf appealed.

The FMLA permits covered workers to take up to twelve weeks of unpaid leave each year to attend to the birth and care of the new child. When an employee returns from leave, she must be reinstated to her original or an equivalent position. However, the right to reinstatement is not "absolute." The FMLA permits an employer to deny reinstatement if it can demonstrate it would have discharged the employee if she had not been on leave. The employer must prove the employee was discharged for reasons unrelated to the leave.

The parties agreed that Schaaf presented a *prima facie* case of FMLA interference because the employer did not restore her to her position as RVP. The employer argued it demoted Schaaf for reasons unrelated to her FMLA leave and she would have been demoted even if she had not taken leave. Schaaf argued that, because the employer learned of certain performance issues while she was on leave, her leave caused her demotion.

The Court flatly rejected Schaaf's argument, finding it "legally incorrect" and "logically unsound." It found that in an FMLA interference case, the employee must prove the failure to restore her to her position was the "proximate cause" of the action, i.e., the employer took the action *because of* the leave. It is not enough to simply show that "but for" the employee's use of leave she would not have been demoted.

The Court explained, "[T]he statute's purpose is not implicated in the least if an employee's absence permits her employer to discover past professional transgressions that then lead to an adverse employment action against the employee."

Schaaf's reading of the statute, the Court observed, would "effectively protect deficient employees from adverse employment actions, such that those workers could actually attain job security by seeking leave under the FMLA." The Court found such a result "laughable" and unsupported by policy, common sense, or the FMLA itself. The evidence established that Schaaf was demoted because of her performance deficiencies, not the leave itself. Accordingly, the Court affirmed the dismissal of Schaaf's FMLA interference claim.

Addressing Schaaf's retaliation claim, the Court found that, although Schaaf presented a *prima facie* case of retaliation, she failed to establish that the employer's stated reason for her demotion – poor performance – was a pretext for retaliation.

Schaaf argued that the employer departed from its usual progressive discipline by demoting her rather than issuing a written warning. However, even if true, Schaaf did not present any evidence showing that the employer was motivated by a discriminatory animus or the stated reasons were improper. Indeed, Schaaf did not dispute that she was an "aggressive, insensitive leader with poor communication skills." The Court concluded, "Even drawing all inferences in favor of Schaaf, there is nothing on which a reasonable jury could base a finding

that the employer demoted Schaaf for anything other than poor performance.” Accordingly, the Court affirmed the dismissal of Schaaf’s retaliation claim.

III. WAGE AND HOUR ISSUES

A. New Hampshire Wage and Hour Issues

The news here is the increased statute of limitations for wage claims, the powers of the commissioner and the increased civil penalties assessed by the Department for wage violations. Later in these materials we outline the top wage and hour violations from 2009 and how to avoid them. We will also review state and federal wage law compliance tips and how to handle workplace audits. In the meantime, here are some recent developments in this always-challenging area of workplace law.

B. Federal/Class Action Claims

1. 2009 Increase in FLSA Lawsuits Likely Driven by Weak Economy

The number of lawsuits claiming violations of the Fair Labor Standards Act swerved up again after a dip in 2008 from the 2007 record high, an indication that relief is not yet in sight for employers on the wage and hour front.

During the 12-month period ending March 31, 2009, 5,644 FLSA lawsuits were filed in federal district courts nationwide, indicate statistics from the Administrative Office of the United States Courts. This number is a 7.5 percent increase from the prior comparable year and the second highest on record.

The 2009 number adds to a near decade-long trend, in which the number of federal wage and hour lawsuits has tripled. After averaging between 1,000 and 2,000 during the 1990s, the number of lawsuits filed under the FLSA each year started to rise in the early 2000s, peaking in the year ending March 2007, when 6,786 lawsuits were filed.

C. Recent Cases

1. Hidden Costs: Non-Exempt Employees’ Class Action Complaints for Time Spent on Work-Related Messages

Employers providing personal data assistants (“PDAs”), such as BlackBerries, as well as cell phones and pagers, to non-exempt employees may face unexpected costs: liability for wages and overtime. A recent increase in complaints filed on behalf of non-exempt workers illustrates potential risks for employers who provide PDAs to workers. The complaints seek wages and overtime pay for workers’ time spent reviewing and responding to text messages, e-mails and other communications received through company-issued PDAs.

The complaints allege the employers distributed PDAs to non-exempt workers (e.g., maintenance workers and salespersons) and required them to review and respond to electronic communications after work hours. They allege: (1) the employers failed to compensate a class of employees for time spent reviewing and responding to electronic communications after normal work hours; (2) the additional time resulted in working in excess of 40 hours per workweek and thus entitling the workers to overtime pay under wage and hour laws; and (3) the employers failed to accurately record or maintain records on the employees' after-work-hours communications activities. Providing non-exempt employees remote access to company computer systems may raise similar concerns for employers.

Employers should review their policies and procedures concerning the use and distribution of PDAs and other devices and providing remote access to non-exempt employees. Determine the benefits and risks of providing these employees with the ability to work outside normal work hours. Consider whether exempt management-level employees or supervisors can respond to emergencies or other work-related matters outside of normal work hours. If non-exempt employees must have access to perform their job responsibilities outside normal work hours (e.g., if a maintenance worker needs a PDA to respond to emergencies), company policies should specify expectations with respect to the use of PDAs and the recording of time spent reviewing and responding to messages.

2. Appeals Court Focuses on Academic Requirements of FLSA Professional Exemption

The federal appeals court in New York has held an employer incorrectly classified an employee as a professional exempt from overtime pay under the Fair Labor Standards Act where the employee, though hired into an exempt position, did the work of a non-exempt employee. *Young v. Cooper Cameron Corp.*, No. 08-5847 (2d Cir. Nov. 12, 2009). The Court of Appeals determined the employee was entitled to overtime. According to the Court, for a position to qualify as exempt under the learned professional prong of the professional exemption, the job should ordinarily require at least a four-year college degree, if not something more advanced, in a specific field directly relevant to the performance of the job.

The Court also found the employer's conduct willful, thereby entitling the employee to three, rather than two, years of back pay. Summary judgment for the employee was affirmed and the case was returned to the trial court for determination of appellate fees and costs.

The FLSA requires employers to pay covered employees not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek, unless the employees are exempt. Employees "employed in a bona fide ... professional capacity" are exempt from overtime. To qualify for this exemption, the employee must meet a number of tests, including:

- The employee's primary duty must be the 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;
- The advanced knowledge must be in a field of science or learning; and

- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Andrew Young worked for three years as a Product Design Specialist II (PDS II) for the employer. His work involved complicated technical expertise and responsibility. When Young was hired, he had approximately 20 years of experience in the engineering field as a draftsman, detailer and designer. He was a member of the American Society of Mechanical Engineers, a membership that required the recommendation of three engineers. He is a high school graduate and had enrolled in some course at various universities, but did not obtain a degree.

Young originally had applied for a job in the spring of 2001 and was offered the position of Mechanical Designer. The position paid \$26 an hour and was classified as non-exempt under the FLSA, meaning the position was subject to overtime pay. Young declined the offer and the employer thereafter offered him a PDS II position, which paid an annual salary of \$62,000 (an effective hourly wage of \$29.81) and which the employer had determined, “through multiple internal and external analyses,” was exempt from FLSA overtime provisions. Applicants to the PDS II position were required to have 12 years of relevant experience, but no particular kind or amount of education, and no PDS II working for the employer had a college degree. Young accepted the PDS II position on July 23, 2001, understanding it was exempt from the FLSA’s overtime provisions.

After Young lost his job in a reduction-in-force in 2004, he sued in federal court, alleging that he was improperly and willfully misclassified as an exempt professional, and thus was not fully paid for overtime worked. The district court granted summary judgment for Young on the exemption issue. It held, as a matter of law, that the work of a PDS II did not satisfy the FLSA professional exemption as it was “not of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.”

Furthermore, the court found the employer’s FLSA misclassification violation was willful. It determined that the employer hired Young into the PDS II position instead of the Mechanical Designer position “to avoid paying him overtime, even though his responsibilities did not change based on the different titles.” Because the violation was willful, the court applied the three-year period for back pay, rather than the two-year period applicable to non-willful violations.

The employer appealed both determinations. It argued that Young was an exempt professional under the FLSA. The Second Circuit disagreed. Relying heavily on FLSA regulations, the Court held that an employee is not an exempt professional unless his work requires knowledge that is customarily acquired after a prolonged course of specialized, intellectual instruction and study. Moreover, the Court continued, “If a job does *not* require knowledge customarily acquired by an advanced educational degree ... then, regardless of the duties performed, the employee is not an exempt professional under the FLSA.” (Emphasis in original.)

The Court noted that other Courts of Appeals also have tied the professional exemption analysis to a position's academic requirements (pointing particularly to decisions of the Fifth and Eighth Circuits).

The Court also held that where most or all employees in a particular job lack advanced education and instruction, the professional exemption is inapplicable. In this case, no PDS II with the employer had more than a high school education. Accordingly, the Court determined that, as a matter of law, Young is not an exempt professional.

An employer willfully violates the FLSA when it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by" the Act. The lower court had rejected the employer's argument that it exercised due diligence and good faith in classifying the PDS II position as exempt. The appellate court found no error in the lower court's conclusion that Young was offered the PDS II position because the employer wanted to avoid paying him overtime and Young did the work of a non-exempt Mechanical Designer. Thus, the Court agreed that the employer's act was willful, entitling Young to three years' back pay for withheld overtime.

The FLSA provides that a court may allow reasonable attorney's fee and costs. Thus, the Court of Appeals returned the case to the lower court to determine the appellate fees and costs owed to Young.

3. Job Duties, Not Titles Matter in FLSA Exception Analysis

The 3rd U.S. Circuit Court of Appeals held earlier this year that a senior pharmaceutical sales representative was an administrative employee who was exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). *Smith v. Johnson and Johnson*, 3rd Cir., Nos. 09-1223, 09-1292 (Feb. 2, 2010).

Patty Lee Smith was employed at a Johnson and Johnson (J&J) subsidiary as a sales representative. Her position required her to travel to various doctors' offices and hospitals where she extolled the benefit of one of J&J's pharmaceutical drugs to the prescribing doctors. J&J gave Smith a list of target doctors that it created and told her to complete an average of 10 visits per day. Smith enjoyed a great deal of freedom and responsibility in her position as she was unsupervised 95 percent of the time. She earned a base salary of \$66,000 but was not paid overtime.

Smith filed suit seeking overtime pay under the FLSA. The lower court granted J&J summary judgment. Smith appealed.

Under the FLSA, employees who work more than 40 hours per week are entitled to overtime pay unless they fall within one of the FLSA's exemptions. Under the administrative employee exemption, anyone employed in an administrative capacity is exempt from the FLSA's overtime requirements.

The 3rd Circuit concluded that the administrative employee exemption applied to Smith because she executed nearly all of her duties without direct oversight. In particular:

Her non-manual position required her to form a strategic plan designed to maximize sales in her territory. We think that this requirement satisfied the “directly related to the management or general business operations of the employer” provision of the administrative employee exemption because it involved a high level of planning and foresight, and the strategic plan that Smith developed guided the execution of her remaining duties.

In fact, Smith described herself as the manager of her own business who could run her own territory as she saw fit. The 3rd Circuit noted, however, that court rulings in FLSA cases are highly fact-specific. The 3rd Circuit stated, “Consequently, we recognize that based on different facts, courts, including this court, considering similar issues involving sales representatives for other pharmaceutical companies, or perhaps even for J&J, might reach a different result than that we reach here.”

4. No Notice Required Before Taking Advantage of Public Safety Exemption

Municipal employers need not provide notice prior to establishing a work period longer than seven days under the public safety exemption to the Fair Labor Standards Act (FLSA), according to the 1st U.S. Circuit Court of Appeals. *Calvao v. Town of Framingham*, 1st Cir., No. 09-1648 (March 17, 2010).

In 1986, the Town of Framingham, Mass., circulated a memorandum that invoked a public safety exemption (7(k) exemption) to the FLSA, an exemption that permitted the establishment of a 24-day work period for its police officer employees. Establishing the 24-day work period under the public safety exemption reduced the town’s overtime liability to the police officers.

While private employers generally must pay nonexempt employees at a rate not less than one and one-half times their regular rate for any time worked in excess of 40 hours in a seven-day period, municipalities may adopt a longer work period, between seven and 28 days for public safety employees.

By adopting the 24-day work period, the town ensured that it would not incur liability for overtime unless a police officer worked more than 147 hours in a 24-day period.

At the time the town adopted the 24-day work period, the police officers worked a “four days on, two days off” schedule and did not raise any objections to the change.

However, in 2000, the police officers successfully negotiated a “five days on, three days off” work schedule, and some officers expected to receive increased overtime eligibility after the scheduling change. Instead, the town simply paid the officers in accordance with the previously established 24-day work period permitted under the public safety exemption. This meant the police officers were paid only their regular wages unless they exceeded 147 hours in a 24-day period.

Several frustrated police officers brought a class-action suit against the town in 2005. The police officers sought a declaratory judgment that the town was ineligible for the FLSA’s public safety exemption by arguing that the town had not “established” the 24-day work period, since it was not clear whether the 1986 memorandum had been circulated to the police officers or their

union. The trial court granted summary judgment against the police officers in 2008, and the police officers appealed.

On appeal, the 1st Circuit reviewed the legislative history and the history of the Department of Labor's regulations and affirmed the trial court's decision. The court of appeals concluded that neither the legislation nor the regulations require municipal employers to notify employees in order to establish a longer work period in accordance with the public safety exemption. Therefore, the town's adoption of the extended work period was lawful.

The 1st Circuit then turned to and rejected the police officers' argument that the trial court should have struck evidence of the memorandum because of a discovery dispute. The police officers claimed the town was required to "provide detail as to several alleged locations" of copies of the 1986 memorandum. The court held that the town complied with its discovery obligations by providing a copy of the memorandum as part of its initial disclosure, and that even if the town was required to detail the location of all the copies of the memo, any omission was either justified or harmless.

5. 1st Circuit: Unambiguous Contract Foils Employee's Claim to Bonus

The 1st U.S. Circuit Court of Appeals found earlier this year that the plain terms of an employment agreement supported excluding a former general counsel's \$1 million bonus from the calculation of his severance compensation. *Bukuras v. Mueller Group LLC*, 1st Cir., No. 08-2160 (Jan. 20, 2010).

George Bukuras entered into an employment agreement with Mueller Group LLC in 2003 to serve as its general counsel. Under the agreement, Bukuras would receive "an annual bonus, payable at the conclusion of each fiscal year." In every year of his employment, Bukuras received his annual bonus following the conclusion of the fiscal year to allow time for Mueller's auditors to review its earnings. The agreement also provided that if Mueller terminated Bukuras for any reason other than cause, he would be entitled to severance compensation that included in its sum "150 percent of the bonus paid or payable to the employee for the fiscal year immediately preceding the fiscal year in which termination occurs."

Mueller merged with Walter Industries on Oct. 3, 2005, the first day of Mueller's fiscal year (FY) 2006, and Bukuras was wired a \$1 million transaction bonus for his involvement in "bringing the transaction to a successful close." In November 2005, Bukuras was terminated without cause. When Bukuras received his severance payment, he realized that it included 1.5 times his FY 2005 annual bonus without factoring in the \$1 million transaction bonus.

Bukuras alleged a breach of the contract claim based on Mueller's failure to include the transaction bonus in the calculation of his severance payment. Bukuras contended that the transaction bonus was paid or payable for FY 2005 because all of his work toward the successful merger occurred in FY 2005. Furthermore, Bukuras contended that the parties left the term "bonus" in the severance provision undefined and therefore to its plain and ordinary meaning, which he defined as any additional funds over and above his salary that were paid or payable to him for that year.

Mueller countered that the transaction bonus was properly excluded due to the fact that payment of the bonus was contingent on the closing of the merger, which did not occur until FY 2006. Moreover, the agreement, read as a whole, made clear that the drafters intended “the bonus” to refer to the annual bonus described in the bonus provision.

The district court concluded that the contract was unambiguous and that the bonus described in the severance provision referred exclusively to Mueller’s annual bonus and not the transaction bonus.

The 1st Circuit rejected Bukuras’ contention that the transaction bonus could reasonably be understood as “for” anything but the closing of the merger transaction in FY 2006, and affirmed that Mueller did not breach the terms of the agreement when it excluded Bukuras’ transaction bonus from the calculation of his severance payment.

Had the deal collapsed prior to closing, the 1st Circuit reasoned, regardless of Bukuras’ FY 2005 efforts, the bonus would never have been paid or become payable. Since the closing occurred in the same year in which Bukuras was terminated, the transaction bonus was not “paid or payable for the fiscal year immediately preceding” his termination and was, therefore, outside the scope of the severance provision.

The 1st Circuit further emphasized that the agreement contained an express “bonus provision” obligating Mueller to pay an “annual bonus, payable at the conclusion of each fiscal year.” As the district court noted, the severance provision referenced “the bonus” in the singular, and the reasonable inference is that by doing so the parties intended to incorporate the only other bonus, Bukuras’ annual bonus, described within the four corners of the agreement.

Against this backdrop, the 1st Circuit maintained that Bukuras’ contention that “the bonus” was a collective noun capable of comprehending the payment of multiple bonuses was “a stretch too far.”

D. News from USDOL

1. Department of Labor Abandons Opinion Letters for "Administrator Interpretations"

After decades of issuing opinion letters to answer wage-hour questions submitted by employers, individuals and organizations involving their unique circumstances, the Department of Labor has announced it will no longer do so, and will issue “Administrator Interpretations” instead. These new pronouncements are described as “general interpretation[s] of the law and regulations, applicable across-the-board to all those affected by the provision in issue.” The Wage and Hour Division (“WHD”) maintains this new process for offering guidance is a “more efficient and productive use of resources” and will provide clarity for an entire industry or group of employees, rather than relate to only one individual scenario.

While requests for an opinion still may be submitted, the WHD will not provide definitive letters to any fact-specific requests. Instead, it merely will provide reference to the statutes, regulations, caselaw and other interpretations it deems relevant. Requests for opinion

letters will continue to be retained by the WHD in order to assist in the Administrator's "ongoing assessment of what issues might need further interpretive guidance."

In its first Administrator Interpretation, the WHD reasoned that mortgage loan officers do not qualify as "administrative" employees who are exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"). Because the "primary duty" of such employees was the sale of financial products, meaning that the mortgage loan officers "perform[ed] the production work of their employer," rather than directly related to the management or general business operations of the employer's customers, they were deemed not exempt under section 13(a)(1) of the FLSA. This Interpretation was contrary to Opinion Letter 2006-31, dated September 8, 2006, which included a lengthy consideration of the topic. That Opinion Letter, therefore, was withdrawn by the WHD.

The WHD's announcement does not address potential ramifications of this decision, such as whether it changes or seeks to alter a company's right to rely on actions made in "good faith" reliance on prior wage-hour opinions, as allowed by the Portal to Portal Act of 1947. (A company can defend itself in wage and hour litigation by showing it acted in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the WHD).

2. Health Care Reform Act Requires Employers to Provide Breaks for Breastfeeding

Under the Patient Protection and Affordable Care Act, employers covered by the Fair Labor Standards Act are required to furnish "reasonable" breaks to mothers to express milk for their infants who are up to one year old. This was provided in an amendment to the FLSA in the Act signed by President Barack Obama on March 23, 2010.

The newly enacted section (29 U.S.C. 207(r)(1)) of the FLSA also requires employers to furnish a private space, other than a restroom, for mothers to express milk. However, the provision does not apply to employers with fewer than 50 employees if its requirements would "impose an undue hardship by causing the employer significant difficulty or expense."

The amendment provides that such time can be unpaid. This is contrary to the general FLSA mandate that employers pay employees for breaks of less than 20 minutes. However, state laws may limit an employer's ability to treat the time as unpaid.

While a number of states already impose requirements on breaks, employers operating in states without such a state law now must ensure that such breaks and private space are provided.

Of course, in states where such requirements have been enacted, employers must adhere to the standard (either federal or state) which will be more beneficial to the employee.

IV. MISCELLANEOUS

A. COBRA Subsidy Extended...Again...and May not Be for the Last Time

The period of eligibility for the federal subsidy of COBRA premiums under the American Recovery and Reinvestment Act (ARRA) was extended again on April 15, 2010, when President Barack Obama signed into law an extension of unemployment benefits and the COBRA premium assistance. This extension provides a COBRA premium subsidy for eligible individuals who are involuntarily terminated from employment **through May 31, 2010**

Since the last extension covered certain involuntary terminations of employment through March 31, 2010, the new law provides retroactive eligibility for individuals who lost their jobs after that date. Employers that sent basic COBRA notices (notices without subsidy information) to qualified beneficiaries who became eligible for COBRA on account of a qualifying event that occurred after March 31, 2010, should send an updated notice to those persons concerning the extended subsidy eligibility.

Stay tuned. There is a bill in Congress to extend the COBRA subsidy to December 31, 2010.

B. Military Leave: Noncomplying Employer gets Orders to Shape Up

One of the main requirements of USERRA is that employers must place employees returning from military leave into the position they would have held if they had been continuously employed. A recent U.S. District Court decision from Massachusetts provides employers with greater clarity regarding their reemployment obligations. See *Fryer v. A.S.A.P. Fire and Safety Corporation*, ___ F. Supp.2d, ___, 2010 WL 286630 (D.Mass. Jan. 25, 2010).

In *Fryer*, the District Court of Massachusetts upheld a jury award in favor of an employee who claimed that his former employer violated USERRA by failing to re-employ him in his pre-service position, retaliating against him because of his military service, and ultimately terminating him because of his military service. The employee also alleged discriminatory and retaliatory treatment on the basis of his military service under Massachusetts state law chapter 151B. The jury awarded the plaintiff more the \$436,000 in damages, including back pay (\$42,234), front pay (\$105,000) and emotional distress damages (\$289,000).

C. Workplace Privacy: No Unfettered Telephone Privacy for Public Safety Employees

The 1st U.S. Circuit Court of Appeals vacated jury verdicts in favor of police and fire department employees who claimed that the city's recording of all telephone calls violated their privacy rights, where the jury treated each employee as having the same expectation of privacy for all calls regardless of their purpose. *Walden v. City of Providence*, 1st Cir., No. 08-1534 (Feb. 23, 2010).

An automatic recording system recorded all telephone calls at the city of Providence, R.I.'s new Public Safety Complex, which housed the police and fire departments. The employees

asserted a general right to privacy in all phone conversations at the complex, whether they were emergency calls, police or firefighter business calls, or personal calls, without differentiating between police and fire department employees or among the individuals within those groups. Specifically, the employees alleged that the recordings violated the state wiretap and privacy laws, among others.

The city contended that the telephone system was installed to address legitimate law enforcement needs and that the employees' assertion that their rights were violated simply because they used the telephone system was insufficient. Because each employee made calls under different circumstances, their expectations of privacy would have varied.

Therefore, the city argued that the employees needed to introduce evidence about specific calls. The district court overruled the city's objection that the jury verdict forms required separate findings as to each employee for the state wiretap act and state privacy act claims.

Concluding that there was "a clearly established general right of privacy in phone conversations," the district court's instructions to the jury and verdict forms made no distinctions between types of calls or callers. The jury eventually found the city liable on all counts and awarded more than \$1 million in damages.

The 1st Circuit disagreed that there was a clearly established law providing public safety employees a right not to have calls recorded at work, noting the recognized exception for recording by law enforcement officers in the ordinary course of their duties. The 1st Circuit further stated, "if all the lines are tapped, as is the ordinary practice of police departments, then the recording of personal as well as of official calls is within the ordinary course." As such, the 1st Circuit examined the verdict forms and the jury instructions to determine whether the issues were fairly presented to the jury.

The state wiretap act required "each" employee to demonstrate that telephone calls had been intentionally intercepted. Yet, the verdict forms required the jury to find for all police or fire department employees if "any" in either group met the burden of showing that their calls were intentionally recorded. As a result, the jury could not make findings on the city's law enforcement defense even though the employees' use of the telephone system varied. The jury, the 1st Circuit observed, could have found that some lines or calls were being recorded in the ordinary course of law enforcement, but that others were not.

With respect to the state privacy act, each employee had to establish an objectively reasonable expectation of calls being private and that the recording actually violated that expectation. The employees in each group used the phones to make widely differing types of calls under differing circumstances, and the jury could have found that their expectations of privacy differed accordingly. Yet, the verdict forms asked the jury to find for "all" employees against the city, forcing the jury to treat all police and all fire department employees as having the same expectations of privacy.

The 1st Circuit concluded that the jury verdict forms repeatedly failed to differentiate between employees, constraining the jury to choose between finding for all or none of the

employees. The “all-or-nothing structure of the verdict forms” relieved individual employees of the burden of proving their own cases.

Consequently, the 1st Circuit held that these errors were not harmless and thus prevented the wiretap and privacy claims from being fairly presented to the jury.

D. Workplace Safety: OSHA Fines Franklin, NH Foundry for Lead Hazards

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) Oct. 23, 2009, cited a Franklin N.H. foundry for 17 alleged willful and serious violations of workplace health and safety standards. Franklin Non-Ferrous Foundry Inc. faces a total of \$254,000 in fines.

OSHA, which began inspecting the foundry in April, determined that it did not provide the required monitoring for workers exposed to lead in the course of their employment and did not properly fit-test and ensure adequate respiratory protection for those workers. In addition, it did not provide mandated benefits for a worker who was removed from work due to lead overexposure.

The foundry has been cited several times over the past 10 years for similar violations. These latest findings resulted in the issuance of three willful citations with \$210,000 in proposed fines. OSHA defines a willful violation as one committed with plain indifference to or intentional disregard for employee safety and health.

OSHA also issued the foundry 14 serious citations, with \$44,000 in fines, for damaged and lead-contaminated respirators and an erroneous and outdated lead compliance program, as well as for various confined space, forklift, machine guarding and electrical hazards. OSHA issues serious citations when death or serious physical harm is likely to result from hazards about which the employer knew or should have known.

The foundry has 15 business days from receipt of its citations and proposed penalties to comply, participate in an informal conference with the OSHA area director or contest the citations before the independent Occupational Safety and Health Review Commission.

E. Tax Break for Employers: Forms Now Ready. IRS Developed Form Affidavit for Qualified Employees Under HIRE Act

The Internal Revenue Service (IRS) has developed a form (Form W-11) for use by employers to confirm that an employee is a qualified employee under the Hiring Incentives to Restore Employment (HIRE) Act.

While it is acceptable to use a similar statement, such alternate statement will only be acknowledged by the IRS if it contains the information set forth in Form W-11, and if the employee signs it under penalties of perjury.

As set forth in the version of the act signed by President Barack Obama last month, an employer may not claim HIRE Act benefits, including the payroll tax exemption or the new hire

retention credit, unless the newly hired employee completes and signs an affidavit or statement under penalties of perjury, and is otherwise a qualified employee.

According to the Employer Instructions that accompany Form W-11, a “qualified employee” is an employee who:

- Begins employment with the employer after Feb. 3, 2010, and before Jan. 1, 2011.
- Certifies by signed affidavit, or similar statement under penalties of perjury, that he or she has not been employed for more than 40 hours during the 60-day period ending on the date the employee begins that employment.
- Is not employed to replace another employee unless the other employee separated from employment voluntarily or for cause (including downsizing).
- Is not related to the employer. An employee is considered to be “related” if he or she is the employer’s child or a descendent of the employer’s child, a sibling or stepsibling, a parent or an ancestor of a parent, a stepparent, niece or nephew, aunt or uncle, or in-law of the employer. An employee is related to the employer if he or she is related to anyone who owns more than 50 percent of the outstanding stock or capital and profits interest of the company, or is a dependent either of the employer or of anyone who owns more than 50 percent of the outstanding stock or capital and profits interest of the company.

The text of the IRS’ affidavit simply states: “I certify that I have been unemployed or have not worked for anyone for more than 40 hours during the 60-day period ending on the date I began employment with this employer.” The affidavit must be signed, dated and a Social Security number must be indicated, as well as the first date of employment. The signature line should follow a statement that “Under penalties of perjury, I declare that I have examined this affidavit and, to the best of my knowledge and belief, it is true, correct and complete.” The form is not submitted to the IRS, but must be kept by the employer to document the information.

F. Layoffs and RIFs: Mass Layoff or Plan Shut Down in New Hampshire? Consider Yourself *WARNed!*

New Hampshire Adopts a New Mini-WARN Act

Large-scale layoffs and mass terminations usually occur in the late fall or early winter. This is when companies look at 4th quarter or year-end numbers or otherwise want to make personnel adjustments to start the new year. That has traditionally been the busiest season for layoffs and terminations. In a slow economy, however, layoffs or large-scale terminations occur at other times of the year as well. Sometimes these personnel actions happen without much forewarning. A number of factors may lead to such decisions and trimming payroll or shutting down a facility may be in the organization’s best interest, but there can be significant fall out from such large-scale job losses. In addition to the obvious increases in unemployment claims, costs associated with benefit conversions and subsidies, and the potential for more individual

claims for wages, wrongful termination or discrimination, as well as the negative publicity and impact on moral for those who remain, there are other potential pitfalls for struggling employers. One is the potential liability for violations of federal and state laws related to notices due in advance of the layoffs or terminations.

There were several workplace bills considered by the New Hampshire legislature last session. Some died, others went to study committees and still others were signed in to law. The most noteworthy bill for employers last session was SB40. This bill was patterned after the federal Worker Adjustment Retraining and Notification (“WARN”) Act and was proposed in response to several sudden plant closures or mass layoffs in New Hampshire. Those employers were not covered by the federal WARN Act and the affected employees received little or no notice before their jobs were eliminated. The Governor and other State officials responded with harsh criticism of the employers at the time and later with a legislative solution: SB40. This law establishes new notice requirements and reporting guidelines for covered employers who are shutting down operations in New Hampshire or who conduct mass layoffs here.

On August 10, 2009, Governor Lynch signed SB40 into law. This law, is now known as the New Hampshire Worker Adjustment and Retraining Act (“NH WARN Act”). While it is modeled after the federal WARN Act, there are some important differences for employers to note.

NH WARN Act Differs from the Federal WARN Act

The federal WARN Act requires covered employers to give employees 60 days advance notice when there is going to be a plant closure or mass layoff (involving more than 1/3 of the workforce but at least 50 employees). Under the NH WARN Act, like the federal WARN Act, the threshold for notice for a mass layoff is a reduction in force which results in an employment loss at a single site in New Hampshire involving job losses of at least 250 employees (excluding seasonal and part time employees). The NH WARN Act’s notice threshold is lower than the federal WARN Act: at least 25 affected employees (excluding part time or seasonal employees) if they constitute at least 33% of the employer’s full time employees. The federal WARN threshold is at least 50 affected employees. The other important difference between the NH WARN Act and the federal WARN Act is the threshold number of employees for the employer to be covered by the Act. Under the federal WARN Act it is 100 employees. Under the NH WARN Act the threshold is 75 employees.

Employers who fail to give the required notice, as outlined below, would be responsible to provide wages and benefits to those employees. In addition, the potential civil fines and penalties that could be imposed on employers are much steeper under the state law.

The federal WARN Act has several exceptions and exemptions built in to the law. The NH WARN Act has many of those same carve outs. There are two important distinctions. First, as outlined above, the thresholds are lower under state law. Sponsors of the legislation suggested that these lower thresholds would cover at least 300 more employers in New Hampshire than would have been covered under the federal WARN Act. Second, the NH WARN Act includes a first of its kind corporate liability piece that provides the New Hampshire

Department of Labor the ability to make the corporation and its parent company responsible for fines and civil penalties associated with a violation of the NH WARN act. While this provision is much better than the earlier version of SB40, which held business owners and decision makers individually or personally liable, this provision has still caused some concern in the business community because of the impact the law might have on foreign and out of state investment in businesses in New Hampshire.

What Job Losses are Covered?

The NH WARN Act applies only to a “plant closing” or a “mass lay-off”) in New Hampshire. A “plant closing” is defined in this act as a “permanent or temporary shutdown of a single site of employment in New Hampshire, of one or more facilities or operating units, if the shutdown results in an employment loss at the single site at that occurs during any 30-day period for 50 or more employees, excluding any part-time employees.” A “mass lay-off” means a reduction in force which is not the result of a plant closing and which “results in an employment loss at a single site of employment in New Hampshire during any 30-day period for at least 250 employees, excluding any part-time or seasonal employees, or at least 25 employees, excluding any part-time or seasonal employees, if they constitute 33 percent of the full-time employees of the employer.” An “Employment loss” under this law includes employment terminations, or a layoff of greater than 6 months or a reduction in work hours of more than 50% during each month of any 6-month period. However, “Employment Loss” does not include a plant closing/layoff if before the closing/layoff the employer offers to transfer the employee to a different site within a reasonable commuting distance with no more than a 6-month break in employment, or if the employer offers to transfer the employee to any other site, regardless of distance with no more than a 6-month break in employment and the employee accepts the transfer within 30 days of the offer, closing or layoff, whichever is later.

Notice Requirements

The NH WARN Act requires that at least 60 days before a plant closing/mass layoff a covered employer give notice to the: affected employees; their representative(s), if any, the Commissioner of the New Hampshire Department of Labor; the state Attorney General; and, the chief elected official of each municipality in New Hampshire in which the plant closing/mass layoff occurs.

Exceptions

The NH WARN Act doesn’t include notices to seasonal workers and other employees who were hired understanding that their employment was limited to the duration of a particular project or undertaking.

Covered employers are also excused from the 60-day notice requirements if:

- The company was faltering and was actively seeking capital or business which if realized would have enabled the company to avoid or postpone the layoff/closing

AND the employer had a good faith belief that giving notice of a layoff/closing would have precluded the employer from getting the needed capital or business;

- The need for a mass layoff/plant closing was not reasonably foreseeable;
- The plant closing is of a temporary facility;
- The mass layoff/plant closing is necessitated by a physical calamity, natural disaster, or act of terrorism or war; or
- The mass layoff/plant closing constitutes a strike or lockout not intended to evade the requirements of this law.

These exceptions are very similar to exceptions under the federal WARN Act. Just as with the federal WARN Act, the NH WARN Act provides that any employer relying on an exception(s) to the 60 day notice requirement must provide as much notice as practicable and at that time must also provide a complete statement of the basis for not giving the full 60 days notice.

Potential Penalties for Noncompliance

The law empowers the Commissioner of the New Hampshire Department of Labor to determine whether a plant closing/mass layoff comes under this law; whether any exceptions to the notice requirement are applicable; and to determine and assess liabilities and penalties for the employer's failure to comply. An employer who fails to comply with these notice requirements may be ordered to pay:

- Back pay to each affected employee that didn't receive the required notice, and the value of the cost of any benefits to which employee would have been entitled including the cost of any medical expenses incurred that would have been covered under an employee benefit plan; and all associated costs and reasonable attorneys fees.

The New Hampshire Department of Labor is also permitted to place a lien on the employer's revenues as well as all real and personal property of the employer to pay these assessments.

In addition, an employer who fails to give notice of a mass layoff/plant closing, as required by this law, can be assessed a civil penalty of up to \$2,500 and up to \$100 per employee for each day of noncompliance. An employer cannot, however, be assessed these penalties if it pays all applicable employees the amounts for which it is determined by the Department to be liable within 3 weeks of the date the employer commences the mass layoff/plant closing. The Commissioner of the Department of Labor can also reduce civil penalties if he/she is satisfied that the employer's act or omission was in good faith based on a reasonable belief that the act/omission was not in violation of this law.

This new law went into effect January 1, 2010. While mass layoffs or plant closings that occur before that date would not be subject to the NH WARN Act, the federal WARN Act might still apply to those job losses. In either case, the exceptions to notice requirements are narrow and the penalties for noncompliance are steep. A careful review of these and other legal issues with legal counsel is advised.

G. Healthcare Reform: Health Care Reform Law: What Employers and Their Group Health Plans Need to Address Now

[See Attached Article - *Highlights of the New Federal Healthcare Reform Legislation*]

V. CONCLUSION

It has been a challenging year. Courts and legislatures continued to change the legal landscape, especially in the area of employment law. Some issues have been clarified. Some regulations have been updated and refined. New legal theories have been introduced. Other legal boundaries have been tested and changed. Employers must stay on top of the developments in this ever-changing area of the law. We hope this outline has helped alert you to important developments in employment law.

Acknowledgment

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***Thank you.
Jim Reidy***

Disclaimer

Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.