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Pension Protection Act Of 2006 Significantly Changes Pension Plan Funding And Reporting



By **Kenneth M. Haneline**

The Pension Protection Act of 2006 (PPA) is newly passed by Congress and signed by the President. Although some of the new law's provisions will be effective immediately, most of the pension

funding provisions are effective in 2008. The PPA not only makes sweeping changes to the funding of defined benefit plans, but there are significant changes being made to 401(k) defined contribution plans and executive non-qualified deferred compensation plans.

This article only highlights the major defined benefit plan funding changes being introduced by the PPA. Future articles will describe the expansive scope and complexities of this new law.

Single-Employer Defined Benefit Plans: "At-risk plans"

A plan is "at risk" if its funded percentage (the percentage of pension liability that is funded) for the preceding year is (a) less than 80 percent, determined *without* regard to the new at-risk rules, and (b) less than 70 percent, determined *with* regard to the new at-risk rules.

The 80 percent test is phased in over four years beginning with 65 percent. Underfunded liabilities must be amortized over

seven years. To minimize the risk of such plans to the Pension Benefit Guaranty Corporation (PBGC), the PPA includes a number of new rules that increase the minimum required annual contributions and imposes additional PBGC reporting requirements.

Obviously, the objective is to force additional funding in order to bring plans out of "at-risk" status more rapidly than under the current rules. To facilitate the faster funding before the new rules become effective, the employer's tax deduction limits for 2006 and 2007 are increased from 100 percent to 150 percent of the plan's unfunded current liability.

Limitations on Benefits Based on Plan's Funded Status

The PPA imposes a variety of new benefit limitations on single-employer plans whose funded status falls below specified levels:

Plan Restrictions Based on Funded Status:

Less than 80 Percent of Benefit Obligations Funded	Less than 60 Percent of Benefit Obligations Funded
No amendment that increases benefits	No amendment that increases benefits
Limited accelerated forms of distribution	No accelerated forms of distribution
	No additional benefit accruals
	No shutdown benefits

Restrictions on Executive Deferred Compensation

The PPA restricts an employer's ability to set aside assets in a trust or other arrangement (e.g., rabbi trusts) to fund nonqualified deferred compensation for the company's top five executive officers during (1) the period that the employer's defined benefit pension plan is considered at risk, (2) the period that the employer is in bankruptcy, and (3) the 12-month period beginning six months before the termination of an underfunded

Most of the pension funding provisions are effective in 2008, and make sweeping changes to the funding of defined benefit plans, but there are significant changes being made to 401(k) defined contribution plans and executive non-qualified deferred compensation plans.

pension plan. If amounts are set aside in violation of these rules, the executive will be taxed on such amounts set aside. The tax will not apply to assets set aside before the restriction period. Any gross-up payment provided by the employer to defray an employee's tax liability will be treated as deferred compensation subject to a 20 percent additional tax. The PPA also makes these gross-up payments non-deductible for the employer's tax purposes.

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Multiemployer Pension Plans:**“Endangered Plans” and “Critical Plans”**

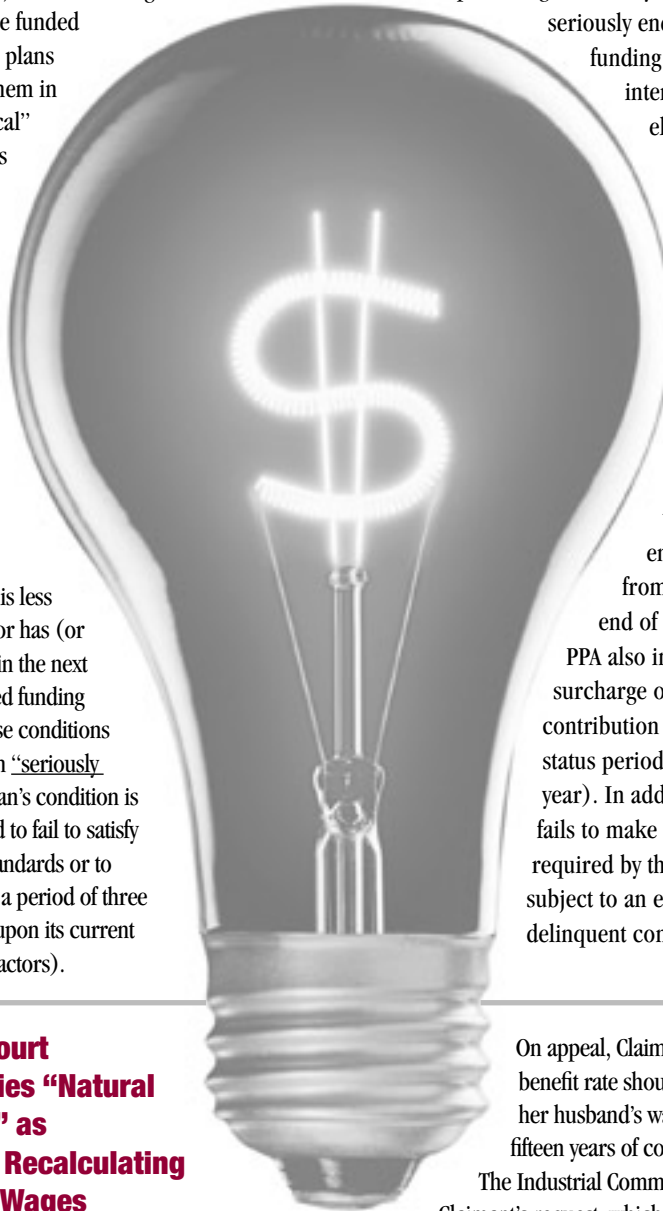
The PPA preserves the current rules for funding multi-employer plans, with some revisions. The PPA does create a temporary set of rules, effective through 2014, for shoring up the funded status of multiemployer plans whose funding places them in “endangered” or “critical” status. The PPA provides that any new unfunded liabilities arising from benefit improvements and actuarial assumption changes must be amortized over 15 years, down from the current 30 years.

In general, a multi-employer plan is considered to be in “endangered” status if it is less than 80 percent funded or has (or is projected to have within the next six years) an accumulated funding deficiency. If both of those conditions are present, the plan is in “seriously endangered” status. A plan’s condition is “critical” if it is projected to fail to satisfy the minimum funding standards or to become insolvent within a period of three to six years (depending upon its current funding level and other factors).

The PPA requires an endangered (or seriously endangered) plan to adopt and implement a funding improvement plan, including contribution increases and benefit reductions, designed to increase its funding percentage over 10 years (15 years for

seriously endangered plans). The funding improvement plan is intended to result in the elimination of one-third of the underfunding in an endangered plan or one-fifth of the underfunding in a seriously endangered plan.

A multiemployer plan in “critical” status must adopt a rehabilitation plan that sets forth actions to enable the plan to emerge from critical status by the end of a 10-year period. The PPA also imposes a 10 percent surcharge on each **employer’s** contribution during the “critical” status period (5 percent in the initial year). In addition, an employer that fails to make timely contributions required by the plan will now be subject to an excise tax equal to the delinquent contribution.



Ohio Supreme Court Specifically Denies “Natural Wage Increases” as Justification for Recalculating Average Weekly Wages

By James W. Ellis



In 1982, Charles Stevens suffered a heart attack in the course of and arising out of his employment. Stevens survived the heart attack and a workers’ compensation claim was recognized. Stevens’ average weekly

wage was set at \$408.75 based on his 1982 wages.

Stevens returned to work for fifteen years when he had a second, fatal, heart attack. Stevens widow, Claimant Tina Stevens, was granted death benefits on the grounds that her husband’s death was related, in part, to his 1982 heart attack. Therefore, Claimant received death benefits based on her husband’s 1982 average weekly wage rate.

On appeal, Claimant asserted that her benefit rate should take into account her husband’s wage increases over his fifteen years of continued employment.

The Industrial Commission of Ohio denied Claimant’s request, which was affirmed by the Tenth District Court of Appeals and Supreme Court of Ohio.

In affirming the Industrial Commission’s decision, the Supreme Court noted that the Ohio Revised Code does contain provisions for amending existing average weekly wage rates in “special circumstances.” However, the Stevens Court specifically held that a natural increase in wages, over time, is not only common but is expected. Therefore, such a wage increase cannot constitute “special circumstances” that would warrant adjusting average weekly wage rates. *State ex rel. Stevens v. Industrial Commission* (2006), 110 Ohio St. 3d 32.

Accordingly, the *Stevens* case clearly establishes that the Industrial Commission may not consider natural wage increases to later adjust existing average weekly wage rates.

U.S. Supreme Court Expands Protection Against Retaliation Under Title VII



By James P. Wilkins

The United States Supreme Court recently expanded the circumstances in which an employee can assert a claim of retaliation against an employer under federal discrimination laws such as

Title VII. *Burlington Northern and Santa Fe Railway v. White*. The Court's decision may make it harder for employers to effectively manage employees who have exercised rights under Title VII.

Like most state and federal labor and employment laws, Title VII prohibits an employer from retaliating against an applicant or employee based on certain protected activity. Such activity would include "opposing" an employment practice that is forbidden by Title VII. It would protect an employee or applicant who makes a charge, testifies, assists or participates in a Title VII investigation, proceeding or hearing.

Courts have been divided over the types of actions by employers that are sufficiently adverse to allow the affected employee to assert a claim of retaliation. Discharging an employee, demoting an employee, or reducing an employee's pay or benefits are clear-cut examples of employment actions that adversely affect terms, conditions, or benefits of employment and therefore would be retaliatory.

In *Burlington*, the Supreme Court decided that the adverse impact on an employee did not necessarily need to relate to terms or conditions of employment in order to be retaliatory. In the view of an eight-justice majority, the purpose of the non-retaliation provision is to assure that an employer takes no action that might dissuade an employee from engaging in protected activity. With this in mind, the Court ruled that any "employer actions that would have been materially adverse to a reasonable employee or job applicant" can be sufficient to support a retaliation claim, even if the harm or action is not related to employment or the workplace.

The Court opinion assures that "material adversity" is required, and thus does not encompass "trivial harms" or "petty slights." As a practical matter, the Court has made it substantially easier for employees to claim they have suffered some adverse consequence sufficient to support a claim of retaliation. The Court ostensibly establishes a "reasonable person" standard for determining whether the challenged action is materially adverse. However, the Court also acknowledged that the surrounding circumstances, expectations and relationships involved in a particular case must also be considered. By way of example, the Court observed that while a change in work schedule might make little difference to many workers, it may matter a great deal to a young mother with school age children. By engaging

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in a particularized analysis of "material adversity" for each individual plaintiff, the Court has made it easier for a plaintiff to paint a picture of why some particular decision or action by the employer was "materially adverse" to them. In short, the Court's decision will make it considerably more difficult for employers to defend claims of retaliation.

Employers should keep in mind that employees who engage in protected activity – such as filing an EEO or other administrative charge – are not "bulletproof." Such employees must still be held to the same performance and conduct standards as all other employees. However, as a practical matter due to the risk of a retaliation claim, employers should be especially cautious in dealing with such employees, should carefully document the bases for any actions they take, and should consider consulting with legal counsel to assess the risks associated with those actions.

Due Diligence – Workers' Comp Style



By Bruce H. Fahey

If your company or organization acquires or otherwise takes over an entire operation of another organization, what you don't know regarding the seller can come back to haunt you. Effective September

1, 2006, the Ohio Bureau of Workers' Compensation will institute successorship liability changes. Under the new BWC Rule, where a successor takes over an entire

operation, any and all existing and future liabilities or credits automatically will transfer to the buyer. Also, as in the past, the transfer of claims experience from the seller to the buyer likewise will occur.

Given the potential liability if a seller has not paid its premiums or has engaged in conduct which could lead to penalties or interest upon a BWC audit, it is vitally important that buyers of entire operations perform proper due diligence regarding the seller's workers' compensation claims experience, premium payment and other related issues.

A Policy Forbidding Unapproved “Off the Clock” Work Might Not Save You From FLSA Liability



By Harley M. Kastner

An employer that allows or even knows that an employee is working overtime while off the clock may be subject to significant penalties. Even having a written or stated policy that does not allow employees to work off the clock will not protect employers from being liable when faced with employee lawsuits or claims brought by the Department of Labor (DOL).

The Fair Labor Standards Act (FLSA), among other things, requires that any employee who works more than 40 hours per week must be compensated at a rate of no less than one and one-half times his/her regular rate of pay. An employee must be paid this higher rate for all of the time worked over the 40 hour per week threshold. The FLSA overtime requirements apply to all employees with some statutory exceptions for executive, administrative, professional, computer specialist, and outside sales employees. These exceptions, however, are narrowly construed. Employers

Even having a written or stated policy that does not allow employees to work off the clock will not protect employers from being liable when faced with employee lawsuits or claims brought by the Department of Labor (DOL).

should seek legal counsel to determine if all of the requirements are met before treating an employee as exempt from the wage and hour laws. Improperly classifying an employee as exempt or allowing nonexempt employees to work overtime without compensating them at one and one-half times their regular rate can be extremely costly to employers as demonstrated in several recent FLSA cases.

On April 12, 2006, a Colorado Springs school district agreed to pay \$652,041 in back wages to 442 nonexempt support staff and student workers in a settlement with the DOL for its violations of the FLSA. Most of the wage and hour violations involved secretaries and custodians who stayed longer than their scheduled shifts in order to complete particular tasks that they had been assigned. These employees felt obligated to complete their assignments and failed to record and report the extra hours worked. The FLSA requires that these employees, even though performing regularly scheduled work assignments, must receive time and a half payment for all off the clock time worked over 40 hours per week. As part of this investigation by the DOL, the school district agreed to pay each employee at the time and a half rate to make up for these violations. Several violations were found when employees worked in two different job positions, such as

a regular staff member working overtime as a ticket-taker for school sporting events. These employees were paid for all hours worked in each separate position, but were not paid time and a half for the combined hours totaling over 40 per week. This settlement is the second of its kind in Colorado Springs within the last year as four different districts reached a back pay settlement in the summer of 2005 to pay more than \$700,000 to 433 workers.

Similar FLSA violations have been alleged in a lawsuit brought in federal district court in Florida by a former teacher. Scott Fletcher, who was terminated in part because of his use of vulgarity in the classroom, has sued his former employer, the Motorcycle Mechanics Institute in Orlando, claiming that he was never paid for the work that he did off the clock while working on improvements to his curriculum. The school has a written policy requiring all employees to obtain prior approval for any overtime work. The former motorcycle repair instructor claims he was told that the necessary overtime would not be approved and that if he did work overtime, he should not record it. Fletcher spent a substantial amount of time working extra hours from home to develop a new curriculum and grading system that would help save him time in the future. He informed his supervisor that he was working extra hours, but never recorded the time on his time sheet because he claims it was a “taboo” subject among administrators.

Judge Gregory S. Presnell ruled on June 15, 2006 that the issues of liability and damages should be heard and decided by a jury. The judge found that the employer had notice that Fletcher was working overtime and its failure to investigate and pay Fletcher time and a half may be a violation of the FLSA. Judge Presnell stated that “an employer may not escape liability for uncompensated overtime work for which the employer has actual or constructive knowledge merely by prohibiting overtime labor, because an employer’s ‘mere promulgation of a rule against such work is not enough’”. An employer’s policy against overtime or requiring supervisor approval for extra hours worked may not be sufficient to protect the employer from liability. Judge Presnell further stated that “[m]anagement has the power to enforce the rule and must make every effort to do so”. The judge ruled that a jury will decide if liquidated damages are appropriate in this particular case. Under the FLSA, once an employer has reason to believe that an employee is working overtime without being paid time and a half, the employer must make a good faith effort to investigate any violations and remedy the situation. An employer that has not investigated in good faith will be subject to liquidated damages, which imposes a penalty that may double the amount of back wages owed to the employee.

These cases raise concerns and issues that require greater attention by employers in dealing with the FLSA and its overtime regulations. Employers that have a policy forbidding or regulating off the clock work may not be safe from investigation by the DOL or lawsuits brought by employees. Employers must remain fully aware of any unreported overtime activity as they may not be able to rely on their overtime policies to insulate them from liability.

Healthcare Worker Who Refused Tb Skin Test Can Pursue Religious Bias Claim



By Keith L. Pryatel

A hospital employee who refused a tuberculosis test partly for religious reasons was allowed to continue to pursue her claim in a District of Columbia state court (*Lemmons v. Georgetown University Hospital*).

LaShawn Lemmons was a Technologist at the Georgetown University Hospital, and refused to take a skin test for tuberculosis partly for medical reasons, and partly for religious reasons. According to Lemmons, the Congregation of Universal Wisdom forbade tuberculosis tests, and a letter to that effect was proffered to Georgetown University Hospital at the time they demanded that Lemmons take the skin test. A federal District of Columbia court remanded the dismissal of Lemmons' religious discrimination claim back to the state court, after determining that her allegations arguably stated a claim for religious bias.

The federal court reasoned: "An employee's religious belief that conflicts with an employment requirement but that does not require the employee to miss work time for purposes of religious observance – such as an

unwillingness to take a PPD skin test –" most likely would not be covered by the District of Columbia's limited accommodations provision. However, according to the Court, such conduct would arguably fall within the general proscriptions of discrimination under a District of Columbia statute, which forbids religious discrimination "with respect to an employee's compensation, terms, conditions, or privileges of employment." Since the only federal claim advanced by Ms. Lemmons was a race discrimination claim that the court found to be subject to summary dismissal, it remanded the lone remaining claim back to state court for resolution. Because the religious discrimination claim presented "novel issues of state law," the federal court felt that the state court was better positioned to resolve the issue.

The Court's decision is noteworthy because it points out that the "accommodation" obligations under state and federal law do not always mirror each other. In states where the "accommodations" statute exceeds that of federal law, the state law will control. In states where the "accommodations" statute provides less protection to discrimination plaintiffs, federal law will control. In either case, employers are well-advised to review both federal and state laws before deciding what course of "accommodation" to take.

Even in Non-Union Environment, Employers Must Be Aware of the Protections of the National Labor Relations Act



By Thomas Evan Green

A Cleveland-area nursing home recently lost its appeal of a National Labor Relations Board ("NLRB") order that found it coerced and retaliated against employees who had engaged in protected, concerted activities. *Sunrise Senior Living, Inc. v. NLRB*.

The case was brought by several nurses aides. In early 2004, a recently-appointed nursing home supervisor assigned the nurses aides the additional duty of handling a resident's colostomy bag. After receiving this assignment, three aides presented the supervisor with a petition of protest signed by a total of 24 aides. The petition indicated, among other things, that the aides had "reached their limit."

Around the same time, a second supervisory employee overheard one of the aides planning a strike. Although the strike never materialized, nursing home management interrogated nurses aides regarding their plans for a strike. A short time later, the aide who was overheard planning the strike was terminated and another aide who was involved in the petition was demoted.

In response to the employer's actions, unfair labor practice charges were filed with the NLRB. The charges alleged that

the firing, demotion and interrogation of the nurses aides violated the National Labor Relations Act ("NLRA"). The NLRB ordered the terminated employee reinstated with full backpay. (The demoted employee had subsequently resigned). The employer appealed the NLRB's decision to the United States Court of Appeals for the Fourth Circuit.

The primary lesson is that all employees – whether represented by a union or not – are subject to the protections of the NLRA.

The court agreed with the NLRB that drafting a petition and advocating a strike were both protected, concerted activities under the NLRA. Although the employer argued that it had legitimate business reasons for challenging the strike, the court stated: "We do not dispute Sunrise's claim that as an operator of a state-licensed assisted living facility, the company has significant duties to its residents under Ohio's health care statute, [but the employer] simply failed to prove that its duties collided with its...obligation to refrain from unfair labor practices."

The primary lesson to take from *Sunrise* is that all employees – whether represented by a union or not – are subject to the protections of the NLRA. Although nearly all NLRA unfair labor practice cases involve unionized employees, Sunrise is an excellent, but unfortunate, example as to how employers may overlook the NLRA's protections when non-unionized employee conduct is at issue.

6th Circuit Interprets FMLA



By John W. McKenzie

In a case of first impression for federal courts, the Sixth Circuit recently ruled that a company has FMLA liability as a successor employer even where no merger or transfer of assets has taken place. In *Cobb v.*

Contract Transp. Inc., Contract Transport was awarded a mail delivery contract formerly awarded to Byrd Trucking. The companies were and remained separate legal entities with separate ownership. Cobb carried mail for three years as an employee of Byrd Trucking.

The Court held that where an employee fails to give timely notice of the need for an FMLA leave extension, the leave can be “delayed” but the employee cannot be terminated.

When Byrd lost the contract, Cobb was hired by Contract Transport on the exact same route with the exact same stops – his job did not change. After Cobb worked for Contract Transport for only six months, he required FMLA leave but was denied based on his tenure with Contract Transport. The law requires an employee to have worked for an employer for 12 months to be FMLA eligible. 29 C.F.R. § 825.110.

Nevertheless, the Court found that based on Contract Transport’s performance of the same work as Byrd as well as employee Cobb’s identical work, Contract Transport was a successor-in-interest under federal labor law and Cobb was improperly denied FMLA under 29 C.F.R. § 825.107. Consequently, employers should be cautious when examining employee “eligibility” for FMLA, noting all relevant employment history.

Almost as an aside, the Court also held that where an employee fails to give timely notice of the need for an FMLA leave extension, the leave can be “delayed” but the employee cannot be terminated. Practically speaking, however, if the employee already is on leave, how is the employer supposed to “delay” the FMLA extension? It cannot very well force an employee with a serious health condition to return. It would seem that the employee winds up with an extended leave time by default under this rationale.

In another recent FMLA case, the Sixth Circuit clarified, almost as a reminder to employers, that while an employer may establish its own notice and procedural requirements for leaves, such policies and procedures do not trump the FMLA. In *Killian v. Yorozu Auto. Tenn. Inc.*, the employee unforeseeably learned from her physician that she needed additional leave time after surgery. She called and notified the company nurse, who was the wrong contact person per company policy. Nevertheless, because this notice as well as the medical certification for a leave extension had been timely provided, her termination “interfered” with Killian’s FMLA rights and was found in violation of the Act itself.

Transsexual Social Worker Unable to State Race, Sex, or Disability Discrimination



By Keith L. Pryatel

A transsexual social worker who was terminated for being rude and unprofessional to clients was not unlawfully discriminated against, even though her physician stated that her condition would likely

result in “intermittent irritability” (*Myers v. Cuyahoga County*). According to the federal Sixth Circuit Court of Appeals, such a “adjustment disorder” is not a protected disability under the Americans with Disabilities Act, and the plaintiff-employee’s admittedly rude conduct warranted her termination from employment.

Ms. Myers was a 16-year veteran of the Cuyahoga County Health and Human Services when she developed a rift with her Hispanic superior, who was promoted in her stead. Myers committed twelve separate acts of “racial and inappropriate” conduct, including being rude and unprofessional to clients and co-workers, advancing derogatory comments about Hispanic and Spanish-speaking individuals, and expressing personal opinions about her clients. To explain this conduct,

Myers produced a physician statement claiming that she suffered from a “adjustment disorder” linked to her transsexualism, and which also confirmed that she might have “intermittent irritability” with her co-workers.

According to the Sixth Circuit, which affirmed the summary dismissal of Ms. Myers’ sex, race, and disability discrimination claims, the purported “intermittent irritability” that Myers suffered from did not rise to the level of an ADA-protected disability. Moreover, Myers’ claims of race and sex discrimination were discounted by her own admissions that she engaged in “insulting and unprofessional behavior.” A stray comment that Myers’ Hispanic supervisor once referred to her as a “he/she,” while deeply insulting, was insufficient to establish that the County’s legitimate reason for terminating Myers was false, and merely a ruse to accomplish race or sex discrimination.

The Sixth Circuit’s decision reemphasizes the notion that on-the-job conduct attributable to one’s purported “disability” will not always serve as a defense to an employment discharge. Additionally, doctors cannot automatically justify and excuse their patients’ actions by producing rote notes which document unacceptable conduct as being the offspring of a physical or mental ailment.

U.S. Supreme Court Decision Favors Health Plan Reimbursement Recoveries



By Kenneth M. Haneline

The U.S. Supreme Court's recent decision in *Sereboff v. Mid Atlantic Medical Services, Inc.* may restore the ability of ERISA-regulated group health plans to recover plan-paid medical expenses through reimbursement provisions. Pursuant to a reimbursement provision, the group health plan attempts to recover its paid medical expenses from a third party who caused the injuries incurred by the plan's participant. This decision revisits an issue raised after the 2002 decision in *Great-West Life & Annuity Insurance Co. v. Knudson* ("Great-West"). In the *Great West* decision, the Supreme Court held that a similar reimbursement provision could not be enforced under the facts of that case. Since the *Great-West* decision, federal courts have been routinely denying group health plans the ability to recover on reimbursement claims, viewing such actions as requesting legal damages as opposed to equitable relief as required by ERISA.

The reimbursement provisions in both *Sereboff* and *Great-West* are similar, and both cases involve health plans seeking to enforce the provision against participants who receive a settlement in their personal injury lawsuit after the plan has advanced funds to pay medical bills.

The crucial distinction between the two cases centers on the possession of the lawsuit settlement proceeds. The participant's personal injury settlement proceeds in *Great-West* were placed in a "Special Needs Trust" (a trust established under California law for the sole purpose of paying future medical bills), whereas the participant's settlement proceeds in *Sereboff* were placed in a segregated investment account pending the outcome of the *Sereboff* litigation.

The Sereboffs participated in an ERISA covered group health plan that paid their medical expenses after an auto accident. The Sereboffs received a \$750,000 settlement for their injuries from the driver and his insurance company. Thereafter, the group health plan sought to recover from the Sereboffs the medical expenses it paid. The Sereboffs' health plan provided that it had a claim against "all recoveries from a third party" for "that portion of the total recovery which was due" to the health

plan for benefits paid. Essentially, the group health plan imposes a constructive trust or equitable lien on that specific portion of the personal injury settlement that is equal to the amount of benefits paid.

The Court held that the nature of the recovery sought by the plan is equitable because the health plan is seeking "specifically identifiable funds" that were "within the possession and control" of the Sereboffs. It did not matter that the group health plan sought an equitable remedy based on the terms of contract (e.g., the plan document). ERISA permits fiduciaries and participants to seek equitable remedies to enforce plan terms, "so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable."

The decision rebuts the conclusion reached by many federal courts that all reimbursement provisions seek impermissible legal, rather than equitable, relief. This greatly strengthens a health plan's ability to recover previously advanced medical expenses.

Importantly, the Court also held that no "tracing requirement" applies to equitable liens by agreement. To impose the lien, the funds sought did not have to "be in existence when the contract containing the lien provision is executed." It was sufficient that the contract (e.g., the

plan document) identified the source and amount of money owed to the group health plan.

The *Sereboff* decision rebuts the conclusion reached by many federal courts after the *Great-West* decision that all reimbursement provisions seek impermissible legal, rather than equitable, relief. This *Sereboff* holding greatly strengthens a health plan's ability to recover previously advanced medical expenses. However, properly drafted language in a health plan's summary



plan description and plan documents will be required. While the Supreme Court is clear that funds held personally (*Sereboff*) are recoverable, funds held in trust (*Great-West*) may not be as easily recoverable. The exact bounds of ERISA recoveries are still not well settled. Because gray areas still exist that may frustrate a health plan's reimbursement attempt, early intervention in the participant's lawsuit against the third party remains key to successful enforcement of a health plan's reimbursement provision.

Sixth Circuit Rejects Sexual Discrimination Claims And Retaliation Claim Based On EEOC Charges

Karen Martin v. General Electric Co., 6th Cir. NO. 05-3834.



By James W. Ellis

Plaintiff Karen Martin was an employee of General Electric's Euclid Lamp Plant since 1979. This case started when Martin's overtime was terminated while working second shift in 2001. GE claimed that the denial of overtime was due to a lack of work at that time. However, Martin claimed that a specific male first-shift group leader was given preferential treatment for overtime. Based on her allegations, Martin's union filed a grievance on her behalf.

The following year, Martin's union filed a second grievance based on perceived sexual discrimination. This time Martin alleged that she was not given the same training opportunities as her male counterparts. In addition to the grievance, Martin filed a complaint with the EEOC, alleging sexual discrimination in training practices at GE. However, after an investigation, the EEOC issued a "right-to-sue letter," indicating that it would not pursue charges against GE on Martin's behalf.

Approximately eleven months after the EEOC charge, in September 2003, Martin applied for a promotion to group leader in GE's 9007 department. GE initially stated that it would like to promote someone from within the 9007 department to minimize training, but the union insisted that the position be open to all company employees. Therefore, GE developed the "matrix" system, where points were assigned to candidates based on experience in the 9007 department, seniority, supervisory experience, auditing experience and an interview. Based on the matrix system, the promotion was given to a Caucasian male who had supervisory experience in the 9007 department. Martin had never worked in the 9007 department, but had more seniority than the promoted employee.

Thereafter, Martin sued GE alleging that she was denied overtime and training opportunities based on sexual discrimination and denied a promotion because she filed discrimination charges with the EEOC.

In affirming the lower court's award of summary judgment for the employer, the Sixth Circuit Court of Appeals first reviewed the threshold showing a plaintiff must make

to maintain a sexual discrimination cause of action. The Court noted that, in part, a female plaintiff needed to show that she was treated differently than a similarly situated male employee. The Court held that Martin could not establish that she was treated differently than her male coworkers with regard to overtime or training.

With regard to overtime, the Court held that Martin's allegation, that a group leader on a different shift was given preferential treatment for overtime, could not support a claim for sexual discrimination. Specifically, the Court noted that the male allegedly receiving preferential treatment was not a similarly situated employee, as he had different job duties as a group leader and was on a different shift. Likewise, the Court held that Martin had no evidence to support her allegation that male employees were given preferential training options. In fact, the Court noted that Martin provided no evidence that any employee was given preferential treatment with regard to training – she only offered evidence that she had not received the training she requested.

This case illustrates how a perceived discriminatory action can balloon from a union grievance to multiple grievances, EEOC charges and litigation and serves as an important reminder to have policies and clear documentation in place regarding overtime, training and promotions decisions.

Finally, the Court rejected Martin's alleged retaliation claim, holding that there was no evidence that Martin's lack of promotion was motivated by her filing sexual discrimination charges with the EEOC. Martin asserted that the fact that she was denied promotion eleven months after filing the EEOC charge supported her claim. The Court disagreed, holding that eleven months was not a short enough time period, by itself, to establish a connection between the filing of an EEOC charge and an adverse employment action.

This case illustrates how a perceived discriminatory action can balloon from a union grievance to multiple grievances, EEOC charges and litigation. It serves as an important reminder to have policies and clear documentation in place regarding overtime, training and promotions decisions to prevent, or adequately defend, these types of claims.

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