

kwwlaborlaw. communicator

3480 West Market Street • Suite 300 • Akron, Ohio 44333 • Phone: (330) 867-9998 • FAX: (330) 867-3786 • E-mail: kww@kwwlaborlaw.com

Employees Have No Statutory Right to Use Employer's E-Mail for Union Activities



By *Harley M. Kastner*

On December 16, 2007, the National Labor Relations Board overturned its prior decisions that effectively blocked employers from restricting union communications in the workplace. The Board held in a 3-2 decision that employees do not have a right under the National Labor Relations Act to use their employer's e-mail system for union activities. This includes e-mails sent off company property on the company network.

For years, employers have been struggling to determine how much control they can *realistically* have over internet and e-mail use in a workforce greatly centered on computers. Employee use of e-mail during business hours is very common in the modern American workplace, as it allows for quick and efficient communication throughout the company to mass recipients. It is for this reason that the union in *The Register-Guard* asserted its right to use email for disseminating its Section 7 activities. But the Board disagreed.

In *The Register-Guard*, the company maintained a written policy that prohibited use of the company's e-mail for non-job-related solicitations. The union asserted its right to use e-mail for union-related communications and alleged that the company enforced its e-mail policy discriminatorily, as it permitted personal use of e-mail, but punished union-related communications.

In its analysis, the Board noted that for purposes of Section 7 concerted activities, an employer only must "yield its property interests to the extent necessary to ensure that employees will not be entirely deprived." While employees cannot be totally restricted from discussing union business in the workplace, the NLRA "does not require [employers to provide] the most convenient or most effective means of conducting those communications..." The Board emphasized that employers have a basic property right to control and regulate the use of company property – which includes its e-mail system. Under this framework, company e-mail is treated the same as company bulletin boards, telephones and televisions, where the Board has consistently held there is no statutory right to use the employer's equipment or media provided that restrictions are nondiscriminatory.

The Board abandoned prior precedent and its previous test for determining whether there has been unlawful discrimination. Now, under its new test, employers have broad discretion to restrict activities so long as these distinctions are not based on union activities or other Section 7 rights. In other words, employers are free to create policies that permit personal e-mail use and prohibit commercial solicitation. Even when the policy's restrictions encompass union activities, this is permissible so long as the distinction is not made along Section 7 lines.

It is worth noting that despite this favorable holding for employers and their new expansive authority to govern computer systems, employers still may not lawfully prohibit face-to-face communications by employees on company property during non-working time, even when the subject matter includes union solicitations. The Board held that union-related communication via e-mail should not be mandated unless there is strong indication that employees' face-to-face interactions had been eliminated or reduced to an insignificant level or that employees rarely saw each other.

The two dissenting members disdainfully refer to the Board as the "Rip Van Winkle of administrative agencies," accusing the majority of failing to recognize e-mail's revolutionary use both inside and outside of today's workplace. They argue that e-mail cannot and should not be treated the same as company bulletins, telephones and pieces of scrap paper. Further, the dissenting members reject the majority's property rights analysis and argue that the Board's previous balancing test is appropriate. Under that prior analysis, the Board would weigh employees' Section 7 right to communicate against the employer's right to protect its business interests.

This decision will impact existing e-mail policies for both union and non-union workplaces. It is clear that employees do not have a statutory right to use *all* forms of company communication media for purposes of Section 7 activities, and e-mail use may be restricted. The Board will enforce company policies so long as they do not discriminate along Section 7 lines. To remain compliant with the NLRA, employers must continue to enforce these policies consistently.



Contents	Page
Employees Have No Statutory Right to Use Employer's E-Mail for Union Activities	1
U.S. Supreme Court Decision Expands Recoveries for Breaches of ERISA Fiduciary Duties	2
Employer's Lawsuit Against Former Employee is Not Per Se Retaliatory	3
Considering Layoffs? Consider These Factors First	4
Congress Amends FMLA, More Changes on the Horizon	5
Company Awarded \$23,000,000 Against "Disloyal" Employees	6
NLRB Proposes New Expedited Election Procedure	6
U.S. Supreme Court Defines "Charge" and Clarifies Admissibility of "Me Too Evidence"	7
Employers Who Receive Harassment Complaints May Be Liable for Co-Worker Retaliation	8

U.S. Supreme Court Decision Expands Recoveries for Breaches of ERISA Fiduciary Duties



By **Kenneth M. Haneline, Esq.**

For 23 years, the U.S. Supreme Court has maintained that individuals could only sue for breaches of fiduciary duty on behalf of the entire plan because individual remedies were not recoverable under the Employee Retirement Income Security Act of 1974 (“ERISA”) § 502(a)(2). Back in 1985, the U.S. Supreme Court held in *Massachusetts Mutual Life Ins. Co. v. Russell*, that ERISA § 502(a)(2) limited the recoveries for breaches of fiduciary duties to plans and not to individual participants.

The Court concluded that whether a fiduciary breach diminishes plan assets payable to all participants or only to a particular individual’s account, the damages from such breaches of duty should be recoverable under ERISA.

On February 20, 2008, the U.S. Supreme Court issued its landmark decision in *LaRue v. DeWolff, Boberg & Associates, Inc.* The Court held that although ERISA § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account. The Court also held that fiduciary breaches of duty for defined contribution plans need not threaten the entire plan’s solvency to reduce benefits below the amount that participants would otherwise receive. The Court concluded that whether a fiduciary breach diminishes plan assets payable to all participants or only to a particular individual’s account, the damages from such breaches of duty should be recoverable under ERISA.

The participant in the *LaRue* decision filed his lawsuit against his former employer and its 401(k) retirement savings plan. The 401(k) plan permitted participants to direct the investment of their contributions in accordance with specified procedures and requirements. The participant alleges that in 2001 and 2002, he directed the employer to make certain changes to the investments in his individual account, but that the employer never carried out those directions. The participant claims that the employer’s failure to follow his participant directed investment changes amounted to a breach of fiduciary duty under ERISA and depleted his interest in the plan by approximately \$150,000.

Interestingly, the plaintiff neglected to make an ERISA § 502(a)(2) argument until he appealed his loss at the trial court level to the Fourth Circuit Court of Appeals. The Court of Appeals recognized that he was raising his § 502(a)(2) argument for the first time on appeal.

Nevertheless, the Fourth Circuit Court of Appeals rejected the ERISA § 502(a)(2) claim on the merits. On further appeal, the U.S. Supreme Court now has changed the ERISA landscape to allow for individual participant recoveries under defined contribution plans for breaches of fiduciary duties.

Although the decision was a unanimous 9 – 0 ruling, Chief Justice Roberts stirred up the ERISA waters even more with his concurring opinion. Chief Justice Roberts invites the district courts to consider similar cases under a different section of ERISA, ERISA § 501(a)(1) – as a claim for benefits – that may not allow for remedies in these types of situations. Under Chief Justice Roberts’ concurring opinion, a district court could order such allegations of breach of fiduciary duty to be brought as a claim for benefits under ERISA § 502(a)(1), subject to a plan’s administrative appeal exhaustion requirements.

Going Forward

It is anticipated that the *LaRue* decision will result in an increase in lawsuits filed against employers, 401(k) plans and plan fiduciaries. The new lawsuits may be based on issues similar to those raised in *LaRue* involving alleged administrative errors. In addition, such claims may allege that the fiduciaries breached their duties in maintaining the investment platform offered to participants for their self-directed investment arrangements. Some precautionary steps to take in light of the *LaRue* decision include the following:

- An employer can review its plan’s participant directed investment processes to limit administrative errors affecting plan participants’ accounts and investments. If the plan has an annual audit, it may be prudent to have the outside auditors examine the service provider’s administrative processes.
- If an administrative or investment mistake occurs, the plan can attempt to treat any participant challenge to the error as a claim for benefits under the plan. By treating these issues as a benefit claim, the plan can require the participant to first exhaust his/her administrative claim appeal remedies. This process then gives the plan the opportunity to determine whether any errors occurred and, if so, make an attempt at a correction before litigation is filed.
- An employer should consider purchasing fiduciary insurance coverage if such coverage is not already in place.
- An employer should review its existing fiduciary insurance coverage to determine whether the policy, if any, provides sufficient coverage if the number of ERISA lawsuits increases. Fiduciary insurance policies usually have coverage limits that can be quickly met if defense costs escalate because of the increased number of individual lawsuits.

Continues on page 3

- ERISA case law is clear that fiduciaries do not guarantee the investment performance results in participants' self-directed investment arrangements. However, under ERISA § 404, plan fiduciaries must discharge their duties "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of providing participants and beneficiaries with benefits. Such investment platforms must be prudent in that the fiduciary (or fiduciaries) must act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character

and with like aims." (ERISA § 404(a)(1)). Finally, ERISA § 404(a)(1)(C) imposes upon a fiduciary a duty to diversify plan investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." Based on the foregoing, regular investment reviews by a qualified investment advisor could become critically important should a participant allege a breach of fiduciary duty concerning the plan's investment platform. Such investment reviews should continue to report on the prudence of the plan's investment platform, the investment fees associated with the platform, and the platform's satisfaction with the plan's written investment policy.

Employer's Lawsuit Against Former Employee is Not *Per Se* Retaliatory



By Thomas Evan Green

Considering an issue never before addressed by the Supreme Court of Ohio, the Court recently decided that an employer's lawsuit to recover its expenses from a successful defense of a former employee's

discrimination lawsuit is not *per se* retaliation. *Greer-Burger v. Temesi*, Supreme Court of Ohio, 12/12/07.

Tammy Greer-Burger sued Laszlo Temesi, her former employer, for sexual harassment under Ohio Revised Code Chapter 4112. After trial, a jury returned a verdict for Temesi. As it always does, Temesi's vindication came at a price: over \$42,000 in attorney fees and expenses. Believing that Greer-Burger's sexual harassment lawsuit had no basis, Temesi filed a lawsuit of his own, alleging abuse of process, malicious prosecution and intentional infliction of emotional distress claims against Greer-Burger. Temesi also requested that punitive damages be awarded.

After Temesi initiated his lawsuit, Greer-Burger filed a charge of discrimination with the Ohio Civil Rights Commission ("OCRC"), alleging that Temesi's lawsuit was filed in retaliation for Temesi's pursuit of her statutorily protected rights. In response, the OCRC issued an order blocking the continued prosecution of Temesi's lawsuit against Greer-Burger, finding the lawsuit to be *per se* retaliation.

Temesi challenged the OCRC's order in court, and although the trial court and intermediate court of appeals affirmed the OCRC's order, the Supreme Court of Ohio disagreed, finding that such a claim was not *per se* retaliation. In addition,

the Supreme Court provided guidance in analyzing whether such a lawsuit is retaliation at all, stating that "an employer is not barred from filing a well-grounded, objectively based action against an employee who has engaged in protected activity."

The Supreme Court provided guidance...stating that "an employer is not barred from filing a well-grounded, objectively based action against an employee who has engaged in protected activity."

The Court instructed the OCRC to initially determine whether an employer's lawsuit is objectively based or whether it is "sham" litigation. If the lawsuit is objectively based, it "shall proceed in court while the proceedings before the OCRC shall be stayed." The Court similarly found that an employer's claim for punitive damages also does not constitute *per se* retaliation.

While this case should not encourage employers to seek retribution against former employees who have caused them great expense in defending employment-related claims, it does serve as a basis for objectively analyzing whether or not such a lawsuit would constitute prohibited retaliatory conduct.



Considering Layoffs? Consider These Factors First



By *John W. McKenzie*

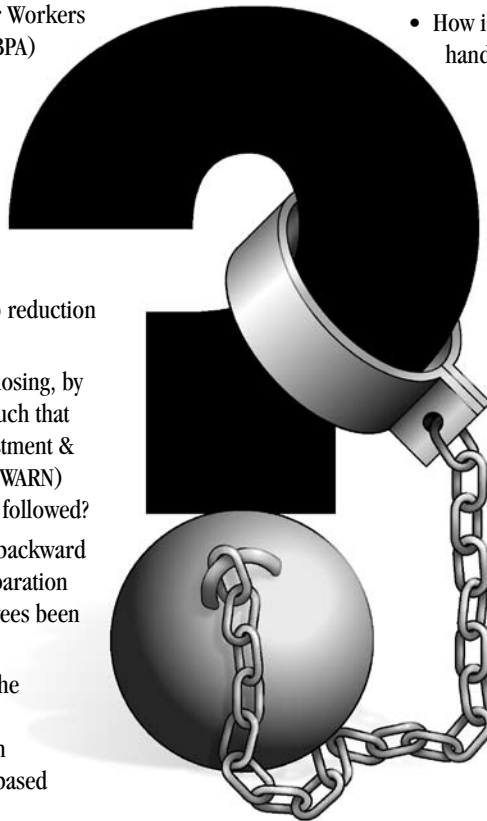
During this struggling economy with talk of recession, many employers face the task of necessary downsizing. While the task itself is uncomfortable, it can become even more uncomfortable when approached improperly and the prospect (or reality) of employee litigation is faced.

Whether reducing the workforce through individual job eliminations, a reduction in force or a few performance-based terminations over time, an employer should take into account and discuss with counsel the following considerations:

- Are positions and/or job functions being eliminated or will the latter be performed by existing employees (or new hires) in a different department?
- Is it really a layoff (i.e. reduction in force) where the company is reducing headcount versus a restructuring/reorganization?
- What rule of thumb will be used to identify/select those employees being let go? Seniority? Performance? Job functions?
- Has examination been undertaken of the selected employees' protected classes (if any)?
- Is there any adverse discriminatory impact on a particular protected class by virtue of the group of individuals selected?
- Is the legally required Older Workers Benefit Protection Act (OWBPA) waiver/release language for employees age 40 or over necessary in the specific situation?
- Should the 21-day or the 45-day OWBPA language (and required documentation) for a group reduction be used?
- Is it a mass layoff or plant closing, by federal or state definition, such that the respective Worker Adjustment & Retraining Notification Act (WARN) and/or state statute must be followed?
- When looking forward and backward 90 days from the date of separation or layoff, have other employees been separated or laid off?
- If performance-based, has the employer properly analyzed performance documentation (and is there performance-based documentation)?
- Do past performance evaluations, bonus payments, supervisor notes, etc. (especially as compared to comparable coworkers not being separated) support the employer's decision as to the selected employees?
- Does the employer have a written severance pay policy? Are all applicable handbook policies being followed?
- Has the employer established an unwritten practice as to severance pay?
- Is there a union in the workplace such that a bargaining obligation attaches?
- Does a collective bargaining agreement set forth any requirements?
- Do any of the employees have individual written contracts of employment?
- Are there any non-compete, non-solicitation or confidentiality agreements that need to be preserved in any separation or severance agreement?
- Are there any potential retaliation issues posed by virtue of recent FMLA, pregnancy or workers' compensation leaves, etc.?
- Were any promises made to any employees regarding layoff, duration of employment, bonuses, etc.?
- Is there any obligation to notify the state unemployment bureau in advance?
- Are proper COBRA notices or HIPAA certificates being issued (if applicable)?
- Are there other compensation and benefits issues to be addressed?
- How is accrued vacation or PTO being handled?
- Do any employees have unpaid loans or advances outstanding?

As you can see, there are several factors to consider when initiating an involuntary separation. Where more than one employee is involved, employers should carefully work through all issues and considerations so as to avoid unintended and undesirable adverse results.

Courts will continue to take note of the interactive process requirement when examining ADA cases. Employers would do well to take seriously and in good faith engage in the process. Documenting the process also is a key aspect of defending a claim alleging failure to engage.



Congress Amends FMLA, More Changes on the Horizon



By Jim Wilkins

Congress recently amended the Family and Medical Leave Act for the first time since the FMLA was enacted in 1993. The Department of Labor (“DOL”) is also on the verge of publishing its first revisions to its

FMLA rules that were published in 1995. In addition to the headaches that employers routinely encounter in their effort to comply with the FMLA, employers need to keep abreast of these recent and impending changes.

Amendments to the FMLA.

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (“NDAA”) for fiscal year 2008, which included several amendments to the FMLA. While the NDAA may seem like a strange legislative vehicle for amending the FMLA, it actually makes sense since all of the amendments relate to the benefits afforded to members of the Armed Forces and their families.

First, the amendment to the FMLA expands the circumstances under which an eligible employee may take up to twelve weeks of leave during any twelve month period. An eligible employee will now be permitted to take twelve weeks of leave because of a “qualifying exigency” (as defined in future regulations) arising out of the fact that the employee’s spouse, son, daughter, or parent is on active duty in the Armed Forces in support of a contingency operation or has been notified of an impending call or order to active duty. A “contingency operation” is broadly defined elsewhere under federal law as a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force, or which results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

While it remains to be seen how the term “qualifying exigency” will be defined, it presumably will not be limited to medical conditions affecting the family member who is on active duty or who has been called to active duty.

The NDAA amendment to the FMLA also provides an eligible employee who is the spouse, son, daughter, parent or next of kin (i.e. the “nearest blood relative”) of a covered servicemember with up to 26 weeks of FMLA leave during a single 12-month period to care for the servicemember. This expanded 26 weeks of leave is only available during a single 12-month period and only for a servicemember who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retirement list for a serious injury or illness. A “serious injury or

illness” is one incurred by the member in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

Employers will face some uncertainty in complying with these new amendments to the FMLA until clarifying regulations are issued by the DOL.

In addition to the headaches that employers routinely encounter in their effort to comply with the FMLA, employers need to keep abreast of these recent and impending changes.

Proposed Amendments to the FMLA Regulations.

The process of amending the existing FMLA regulations has followed a somewhat unusual path. Last summer, before publishing any proposed revisions to the regulations, DOL published a Request for Information soliciting input from the public. The response was overwhelming, with DOL reporting that it received more than 15,000 comments from the public, including extensive input from the employer community.

Not surprisingly, the chief complaint from employers focused on the use of intermittent leave by employees with chronic, serious health conditions. Employers uniformly complained that the current regulations relating to intermittent use of FMLA leave seriously impair the ability to manage business operations and attendance control issues.

Based on the comments received from the public, DOL has now forwarded to the Office of Management

and Budget its proposed revisions to the FMLA regulations. The proposed regulations will be scrutinized by OMB before being published in the Federal Register. Though the exact nature of the proposed changes is not yet known, employers are hoping, among other things, to get some relief from the burden of providing intermittent leave to employees. There is also some indication that DOL will streamline the process for certifying an employee’s serious health condition. The current process, particularly the use of the Certification of Health Care Provider form, has caused consternation for health care providers, employees, and employers.

Kastner Westman & Wilkins will keep abreast of regulatory and legislative changes relating to the FMLA and will keep you informed of developments in future newsletters and bulletins.



Company Awarded \$23,000,000 Against “Disloyal” Employees



By Keith L. Pryatel

An Ohio employer recently was awarded some \$23 million in damages against one of its chief competitors and three former employees who during their employment set up a competing business. (*Innovative Tech. Corp. v. Kenton Trace Techs*). The January 4, 2008 jury verdict in a Dayton Common Pleas Court is the largest recorded jury verdict rendered to a company against employees who absconded with trade secrets and were otherwise “disloyal” during their employment.

Three employees of Innovative Technologies Corp. secretly set up a competing company, using proprietary information, while still employed with Innovative Technologies. Not only did the workers secretly set up their competitive business, they also began colluding with Innovative Technologies’ principal competitor, Advanced Management Technology, Inc. By virtue of their continued employment with Innovative Technologies, the workers “had access to confidential information and trade secrets relating to ITC’s business,” which included customer identities, suppliers, bidding strategies, and technical data. The secret competition went on for more than a year before it was unearthed by Innovative Technologies which then fired the three employees, and pursued a trade

secrets, “faithless servant” lawsuit against them. After they were fired, the three employees worked with the primary competitor, Advanced Management Technology, to take away from Innovative Technologies a major business contract with Wright Patterson Air Force Base.

Before the trial started, the judge labeled the three employees as “faithless servants,” and left for the jury to determine how much of their pay from Innovative Technologies needed to be forfeited. Ultimately, the jury decided that the duplicitous behavior of the three “permeated their service,” and ordered them to repay nearly \$300,000 in salary that was issued by Innovative Technologies. Additionally, \$6,000,000 in compensatory damages, and \$17,000,000 in punitive damages were assessed against the conspiring competitor, Advanced Management Technology.

In order to obtain their favorable jury verdict, Innovative Technologies took the necessary preventative steps to assert and protect its assets and valued business information. The workers each had signed trade secret agreements, committing to protect outside disclosure of protected information. Furthermore, once it was discovered that the three employees were secretly competing with Innovative Technologies while still employed, the Company took prompt legal action, securing an injunction from court banning the three from participating in a competitive corporation. Thus, Innovative Technologies was well positioned from a legal standpoint to ask a jury to return the multi-million dollar verdict that they ultimately received.

NLRB Proposes New Expedited Election Procedure



By Dean E. Westman

On February 26, 2008, the National Labor Relations Board (“NLRB”) issued a Notice of Proposed Rulemaking regarding a new expedited procedure for conducting union elections. This proposed new procedure is subject to public comment for a thirty-day period, expiring on March 27, 2008. After that public comment period, the NLRB will determine whether to formally adopt this new procedure.

been filed by the parties, and assuming that the described bargaining unit appears to be appropriate on its face, the NLRB Regional Director will, within three days after the filing of the petition, approve the parties’ request for an election. Within that same three-day period, the Regional Director will send official NLRB notices to the employer, which must then be posted in conspicuous places where notices to employees are customarily placed. These notices will inform employees that the petition has been filed, and indicate the date, place and voting periods for the election. In addition to posting these preliminary notices, the employer would be required to post the NLRB’s official Notice of Election at least three full working days prior to the day of the election.

The proposed new expedited election procedure would dispense with the usual requirement that the petition be accompanied by evidence that at least 30 percent of the proposed bargaining unit employees desire to be represented by the union. The proposed rule also indicates that the filing of an unfair labor practice charge would not serve to “block” the election or cause the election ballots to be impounded, as might otherwise occur in a typical representation election proceeding. Instead, any such unfair labor practice allegations would be handled after the election had been conducted.

In effect, this new procedure would provide a middle-ground approach between the standard union-filed election petition, and a voluntary “card check” recognition process conducted privately by the parties.

In its proposed form, the new procedure would permit an employer and a labor organization to jointly petition for “certification consenting to an election.” Any such petition would need to contain a host of detailed information. Once a petition containing the required information has

Continues on page 7

This newly proposed expedited election procedure would not result in any significant difference in how the actual election is conducted by the NLRB. Eligible voters would still be afforded the right to vote in a secret ballot election conducted by an agent from the NLRB, and the ballot counting procedure would be handled in the same fashion as any other NLRB election. By filing a joint petition under this proposed new procedure, however, employers and unions would empower the Regional Director to make final and binding rulings and determinations concerning challenged ballots and the results of the election, with no right to seek review of such rulings with the NLRB in Washington D.C.

If the NLRB's proposed new expedited election rule is adopted, it would not displace the traditional procedures by which unions seek an election to become the representative of an employee group. The new rule would simply add an alternative to existing procedures, an alternative that would only be available if a union and an employer, for whatever reason, agreed to obtain an expedited election without having to supply evidence that any significant number of employees in the proposed

bargaining unit supported the union. In effect, this new procedure would provide a middle-ground approach between the standard union-filed election petition, and a voluntary "card check" recognition process conducted privately by the parties. As such, it is somewhat difficult to imagine the circumstances under which this new procedure would be utilized. If an employer has little or no objection to a union becoming the representative of its employees, a voluntary card check procedure would presumably afford an even quicker means for establishing the union's status as the employees' collective bargaining representative. On the other hand, if an employer opposes the unionization of its workforce, it is doubtful that an employer would agree to this new expedited election process, particularly because it alleviates the requirement that the union demonstrate support among at least 30 percent of the bargaining unit employees. Thus, even if this new NLRB election procedure is adopted, following the public comment period, it will, in all likelihood, become a little used alternative to the election procedures already available under the NLRB's current rules and regulations.

U.S. Supreme Court Defines "Charge" and Clarifies Admissibility of "Me Too Evidence"



By **Jaime M. Umerley**

In two recent decisions, the U.S. Supreme Court tipped its hat to employees bringing discrimination claims. In *Federal Express Corp. v. Holowecki*, the Court held that a request-to-act standard is appropriate

when determining if a charge has been filed with the Equal Employment Opportunity Commission (EEOC). The Court likewise held that it is not necessary that the EEOC take any action on a charge before an employee can file a lawsuit. In *Sprint/United Management Company v. Mendelsohn*, the Court held that the admissibility of "me too" evidence offered to substantiate systemic discrimination is a fact-based determination which is not "per se admissible or per se inadmissible."

In order to file a lawsuit alleging age discrimination in federal court, an individual must first file a charge with the EEOC. At issue in *Federal Express Corp. v. Holowecki*, was whether the employee had filed a charge with the EEOC when she completed the EEOC's intake questionnaire and submitted an affidavit to report the alleged discriminatory conduct, but the EEOC dropped the ball and failed to take any action in response to her submissions.

The Age Discrimination in Employment Act (ADEA) does not define a "charge," so the Court looked to the EEOC's internal directives for guidance. The Court decided that the proper test to determine whether a charge has been filed is whether the documents submitted can reasonably be interpreted as a request by the employee for the agency to take some action to assert his or her rights.

This decision is problematic for employers because if the EEOC is not required to act, then it is not required to give employers notice of the charge. Without notice, employers are essentially deprived of an investigation and cannot remedy alleged discrimination prior to the commencement of litigation.

The purpose of employees offering "me too evidence" in support of claims of unlawful discrimination is to establish that discrimination pervaded the workplace. In *Sprint/United Management Company v. Mendelsohn*, the plaintiff sought to introduce testimony from non-party former employees alleging that they too were discriminated against. Sprint argued that this testimony should be excluded since none of these individuals had the same supervisor as Ms. Mendelsohn and were not similarly-situated. The District Court agreed with Sprint's position and sought to exclude all testimony from the non-similarly situated individuals, but the Tenth Circuit Court of Appeals reversed.

...if the EEOC is not required to act, then it is not required to give employers notice of the charge... employers are essentially deprived of an investigation and cannot remedy alleged discrimination prior to the commencement of litigation.

The Supreme Court clarified that admissibility of "me too" evidence should be decided on a case-by-case basis, affording great deference to the District Courts for such evidentiary determinations. While this decision does not set a clear standard, employers should be aware of the likelihood that plaintiffs' attorneys will attempt to introduce similar "me too" testimony from former disgruntled employees, regardless of whether the purported witnesses are similarly situated.

Employers Who Receive Harassment Complaints May Be Liable for Co-Worker Retaliation



By Thomas Evan Green

A federal appeals court recently issued a stern reminder to employers that a failure to take sufficient remedial steps when confronted with allegations of sexual harassment and retaliation for sexual

harassment complaints, even when the complainant's co-worker is the retaliating party, will not be overlooked. *Hawkins v. Anheuser-Busch, Inc.*

Hawkins involved the claims of four plaintiffs, all Anheuser-Busch employees working at the company's Columbus, Ohio plant. These employees alleged that, at different times, they were sexually harassed by a co-worker named Bill Robinson, and when they complained about the harassment, Robinson retaliated against them. The allegations against Robinson are disturbing.

One of the plaintiffs, Jackie Cunningham, complained about seeing Robinson near her home, and that he was harassing her at work. These complaints were in 1999. Cunningham requested a transfer, and was moved to another production area. Thereafter, in January 2000, one of the other plaintiffs, Cherri Hill, alleged that Robinson verbally harassed her at work. Shortly after she complained to management, her car was set on fire while it was parked at her home. She complained about this incident to Anheuser-Busch, and stated that she suspected it was Robinson. According to the court, her employer did not investigate the incident, and added that she could be sued for slander. Hill was transferred to a different production line so that she did not have to work by Robinson.



Anheuser-Busch received an anonymous letter at corporate headquarters criticizing the investigation. The company did not reopen its investigation, warn Hill, or take any other action, according to the court.

In 2003, another plaintiff, Amanda Hawkins complained that Robinson "forcefully poked" her in the breast. Additionally, Hawkins complained that someone had "keyed her car." While investigating Hawkins' complaint, the employer received a report from the fourth plaintiff, Kathryn Jackson, that Robinson had "stared intently" at Hawkins right after she went to management. After this investigation, Robinson was suspended and terminated. During the grievance process, the company offered security to Hawkins and Jackson. Jackson declined, and during the grievance process, someone set fire to her house. A month after the discharge was upheld, Robinson killed his girlfriend, and himself. Thereafter, all four plaintiffs sued.

While the court's recent opinion touched on many issues, two of them are particularly notable. First, the court ruled that based on the multiple complaints of harassment, the employer's sexual harassment policy and investigations, it was not enough that the employer merely transferred two of Robinson's accusers away from him.

This case once again drives home the importance of a well-drafted policy prohibiting harassment and retaliation, and providing a mechanism for reporting policy violations.

Second, in an issue before this court for the first time, the court ruled that, under some circumstances, an employer can be liable for retaliation by a co-worker. To find liability for such retaliation, a plaintiff must prove that (1) the retaliatory conduct is severe enough to dissuade complaints, (2) management has actual or constructive knowledge of the retaliation, and (3) management has condoned the retaliation, or responded so inadequately that the response shows indifference.

This case once again drives home the importance of not only a well-drafted policy prohibiting harassment and retaliation, and providing a mechanism for reporting policy violations, but also prompt, remedial action that can be reasonably expected to bring an end to the harassment and retaliation. Although the court found that the employer in this case had an appropriate policy in place, in the court's view, the employer's insufficient response to complaints of harassment and retaliation landed it in protracted litigation, with potentially high liability exposure.

The *kwwlaborlaw.communicator* is published by the law firm of Kastner Westman & Wilkins, LLC as a service to its clients. The information contained in the newsletter is neither designed nor intended to be relied upon as specific legal advice to any individual or organization and is not a solicitation to provide legal services. Past issues of the newsletter are archived at the law firm's website www.kwwlaborlaw.com. Under the CAN-SPAM Act of 2003, this newsletter could be considered an advertisement. You may elect to not receive future newsletters by sending a letter in writing to Kastner Westman & Wilkins, LLC attention Lisa Kainec or send an email to lkainec@kwwlaborlaw.com. Readers always should consult with an attorney about specific legal matters. Copyright 2008 by Kastner Westman & Wilkins, LLC, 3480 West Market Street, Suite 300, Akron, Ohio, 44333.