EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

A recent decision by the California Supreme Court has national implications regarding employer rights to terminate the employment relationship. The case, *Cotran v. Rollins Hudig Hall International, Inc.* (January 5, 1998), involved a company vice president who was terminated after investigation regarding sexual harassment allegations against him. At trial, the company was unable to prove that "he did it." Because the employee had a contract with a company that said that he could not be terminated unless for "just cause," the jury concluded that the company did not prove just cause and awarded $1.78 million in damages.

In upholding the California Court of Appeals' decision to overturn the verdict, the Supreme Court stated that the proper question before a jury in a "just cause" case is, "Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?" The court observed that requiring employers to prove the truth of the reason for the termination "tips unreasonably the balance between the conflicting interests of employer and employee..." The court stated that the new standard is an objective one, that does not infringe "more than necessary" on an employer's right to make employment decisions.

Often employers are concerned about whether they have to prove employee misconduct or wrongdoing in order to justify termination. The California Supreme Court articulated a standard that is a useful one for employers to follow. You have the "right to be wrong" about whether an employee should be terminated, provided proper investigation is conducted.

COURT RULES THAT REFUSAL TO RETURN COMPANY DOCUMENTS MAY BE PROTECTED ACTIVITY

The case of *Lepcke v. Monsanto Co.* (8th Cir. January 1, 1998), involved a remarkable situation where a court ruled that the unauthorized removal and refusal to return company documents may be considered protected activity under the Age Discrimination in Employment Act. The employee, Darrell Lepcke, was a senior training manager for Monsanto's Global Operations Division. He was assigned to use a computer that had formerly been used by a company human resource executive. As Lepcke started to delete files from the computer's hard drive, he discovered documents which he believed formed the basis of an age discrimination claim against Monsanto. One document involved a workforce reduction plan where 59 managers, including Lepcke, were classified in four different categories ranging from "must keep" to "remove from position." Lepcke was classified as a close call and it was indicated that he probably would not survive the workforce reduction. Lepcke also discovered a letter from two Monsanto executives in which they suggested that opportunities need to be created to make room for younger employees with great potential. Lepcke asked his supervisor about these documents. The supervisor requested Lepcke to return the documents, immediately, or he would be fired. The documents were not returned and he was fired.

The district court judge who heard the case granted summary judgment for Monsanto, concluding that he was insubordinate. In reversing that award, the court stated that Lepcke was engaged in protected activity under the ADEA when he asked his supervisor about the reduction plan. Furthermore, Lepcke told his superior to contact Lepcke's attorney about returning the documents to the company. According to the Court of Appeals, a jury could conclude that since Monsanto knew Lepcke's attorney had the documents, terminating Lepcke for refusing to return the documents could be "such an extreme overreaction as to be pretextual, that it is, unworthy of credence."

This case raises several considerations for employers. First, if an employee raises a concern about discrimination, whether based upon a review of company records or otherwise, focus on that underlying issue; do not let how the employee became aware of information to be concerned override the importance of addressing the potential discrimination claim. Second, if verbal or written communications indicate potential discrimination, such as the reference of the Monsanto executive to "younger, promising employees," make the illegality of such factors known to those who communicated them. Do not be in a position of placed on the witness stand to acknowledge that you were aware of the comments, knew they were wrong, but did nothing about it. Finally, establish protocols regarding record retention and parameters concerning moving company records from the premises.

EEOC ISSUES LONG-TERM ENFORCEMENT GUIDELINE ON TEMPORARY EMPLOYEES

Noting that the temporary service industry has been one of the most rapidly expanding areas of our economy during the past ten years, the EEOC issued guidelines regarding equal employment opportunity law obligations of the temporary service and its clients. The EEOC noted that a large percentage of temporary employees are women and minorities.

According to the EEOC, if the temporary service and its client both have the right to control the actions of the employee, then both entities are considered "employers," they otherwise meet the jurisdictional requirements of the fair employment practice statutes. Furthermore, the remedies available for an individual who has been discriminated against apply to either the temporary service, its client, or both. The remedies include compensatory and punitive damages, attorney fees, back and front pay, and reinstatement. Furthermore, if a temporary service has reason to know that its client discriminated against a temporary employee, the temporary service should not provide any other employees for that client unless it has received information from the client to believe that the discriminatory practices have ceased. If the temporary service does not take such steps and that client discriminates against one of the temporary service's employees, then the temporary service may be individually or jointly liable with the client for the discriminatory actions.

WHERE HAVE ALL THE WORKERS GONE?

Employers throughout the United States continue to complaint about their inability to find highly skilled employees. In some locations, finding any employee is difficult. Recent studies by the National Association of Manufacturers and the Construction Financial Management Association clearly describe these problems. In the NAM report, "Education and training for America's future," NAM calls for the creation of national skill and education requirements. According to NAM, there are 160 different federal training programs which collectively are simply not working. The report also points to the concern that not enough high school graduates have learned basic reading, writing, and math skills.

According to the Construction Financial Management Association, nearly 80 percent of those contractors surveyed identified the lack of a school workforce as one of their top five problems, and 40 percent identified it as the number one challenge. Over half of those who responded to the survey indicated that the lack of a skilled workforce has caused them to fall further behind on completing jobs.

Historically, federal funding has not linked education and training. The NAM report suggests that linking the two together is essential in order to address employer needs for skilled employees and to provide greater opportunities for the unskilled worker.

". . . LABOR WILL CEASE TO BE A FACTOR," SAYS AFL–CIO DIRECTOR

Ron Blackwell directs the corporate campaign initiative of the AFL–CIO. The principle behind corporate campaigns is to exert pressure on a corporation through its board of directors, customers, stockholders, and the public to take a neutral position toward union organizing. On January 4, Blackwell gave a talk to the Industrial Relations Research Association where he outlined how organized labor has lost its power base in nearly half of the nation. According to Blackwell, as of 1993, North Carolina and South Carolina were the only states where union members comprised less than 10 percent of the total workforce. As of 1995, nineteen other states had union membership of less than 10 percent. Such a low figure according to Blackwell diminishes the power of unions to organize and to exert pressure on state government and business.

Blackwell outlined the AFL–CIO plan to gain new members. First, he described this as the core of the organization's mission, above its historical emphasis on legislative and political activity. He also stated that unions need to continue to appeal to youth and to develop alliances with community activists covering such matters as environmental concerns. Furthermore, he stated that organized labor needs to use the clout of its vast pension resources by investing in unionized companies, only.

EMPLOYER REACTION TO MERITLESS HARASSMENT CLAIM LEADS TO MERITORIOUS RETALIATION CLAIM

James Ford sued his employer, Rigidply Rafters, Inc., claiming that he had been sexually harassed on several occasions by another male employee who was also a manager of the company. The jury rejected Ford's harassment claim, but concluded that the company retaliated against Ford because of the type of reference it provided after Ford's termination.

The contact person for the reference was the same individual Ford accused of sexually harassing him. Ford was diligent in seeking other employment. However, reference requests were sent to the individual Ford accused of sexual harassment. That individual told potential employers to "be careful." He also admitted at trial that the reason why he told potential employers to "be careful" is because Ford was "suit happy." The jury did not let Ford leave the courtroom empty-handed. It awarded him $72,280.00 based upon the retaliation claim.

Remember that when providing references, there is no such thing as "off the record." Employers have the right to communicate facts, but "be careful" if you provide your opinions about former employees. Above all else, do not imply to a potential employer that a former employee filed a claim against the company, even if the claim was meritless.

DID YOU KNOW. . .

. . .that on January 7, the International Brotherhood of Teamsters, a model of law-abiding behavior, was elected to represent the 4,000 prison guards comprising all corrections officers for the State of Washington, Department of Corrections?

. . .that according to a survey conducted by Towers Perrin, health care benefits will cost employers 4 percent more in 1998 than in 1997? Last year's increase was 3 percent over the 1996 cost. According to Towers Perrin, "Most of our survey respondents expect even faster cost growth in 1999.

. . .that the Mothers' and Newborns' Health Protection Act became effective for plan years beginning on or after January 1, 1998? This law requires group health plans to provide a 48-hour hospital stay for normal child birth and 96 hours for a Caesarian delivery. The Department of Health and Human Services will issue regulations within a few weeks coordinating the impact of this Act on HIPAA.

. . .that a recent survey concluded that workers' compensation costs dropped by 6 percent during the past two years? According to the National Academy of Social Insurance, employer costs, including plan administration, dropped from $60.8 billion in 1993 to $57.1 billion in 1995. The reasons for the drop are attributed to tougher state requirements for medical conditions to be considered job-related injuries, a reduction in benefits received, and effective employer back-to-work programs that reduce workers' comp costs. Only six states were responsible for nearly half of all workers' compensation costs from 1993 through 1995: California, Florida, New York, Ohio, Pennsylvania, and Texas.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and David C. Skinner. Please contact Mr. Lehr, Mr. Skinner, or another member of the firm if you have questions or suggestions regarding the Bulletin.

Robert L. Beeman, II	205/323-9269
Kimberly K. Boone	205/323-9267
Brent L. Crumpton	205/323-9268
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Terry Price	205/323-9261
R. David Proctor	205/323-9264
David C. Skinner	205/226-7124
Steven M. Stastny	205/323-9275
Albert L. Vreeland, II	205/323-9266
Sally Broatch Waudby	205/226-7122
Cinda R. York	205/323-9278