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"EMPLOYEE ~~FREE~~ FORCED CHOICE ACT" MOVES FRONT AND CENTER IN CONGRESS — GET INVOLVED NOW!!

For a number of years, unions — which have been on a decline in the United States for decades — have tried unsuccessfully to modify the procedures by which workers can seek to form unions, making it easier for unions to organize employees and otherwise allowing unions to obtain through legislation successes they have not been able to obtain when required to seek their objectives in an open marketplace of information and through secret ballot elections. Now, with one party in control of Congress and about to assume the Presidency, absent a concerted lobbying effort by business organizations and the public akin to that which last year defeated the "immigration reform" legislation, unions seem poised to radically alter more than 60 years of labor management relations **and strip workers of their right to secret ballot elections regarding (1) whether to be represented by a union and (2) if represented, whether to accept or reject a proposed collective bargaining agreement**. Rather than ensuring workers' choice, the proposed legislation takes away employees' right to choose by secret ballot elections.

Ever since the 1947 TAFT-HARTLEY ACT, which amended the NATIONAL LABOR RELATIONS ACT, whether workers would be represented by a union has been determined by secret ballot voting of the affected workers in an election supervised by the National Labor Relations Board (NLRB) after 30% of the workers in a work unit appropriate for collective bargaining signed cards indicating an interest in being represented by a union. Before the 1947 amendments, the NLRB possessed the authority to decide representation questions. However, under proposed legislation, euphemistically and *falsely* called the "Employee Free Choice Act" — bargaining units could be certified *without any elections whatsoever* and collective bargaining agreements would be imposed upon employers and employees through binding arbitration, *without any opportunity for the workers to vote whether to accept or reject the proposed contract*.

Here is how the proposed legislation would radically alter the labor-management relations landscape:

- If a union collects signatures on authorization cards from 50% + 1 of the employees in a unit appropriate for collective bargaining, the NLRB would be required to certify the union— *there would be no government-supervised, secret ballot election*.
- *Thus, the legislation would establish an even more radically pro-union certification process than existed before the TAFT-HARTLEY ACT, because the NLRB would be required to certify the union if the requisite number of cards are presented.*

"EMPLOYEE ~~FREE~~ FORCED CHOICE ACT" MOVES FRONT AND CENTER IN CONGRESS — GET INVOLVED NOW!!, CONT'D

- Once a union is certified, if no collective bargaining agreement is reached within 90 days, the company and the union would be required to participate in mediation with the Federal Mediation and Conciliation Service — in contrast, under current law, if a bargaining unit is certified, the parties are left to the economic weapons of the marketplace, *i.e.*, strikes and lockouts, to determine whether an agreement will be reached and, although the parties are required to bargain in good faith, there is no requirement to reach an agreement.
- If, after 30 days of mediation, the parties are unable to reach a collective bargaining agreement, the parties would be *required* to submit to *binding arbitration*.
- The resulting collective bargaining agreement would be binding for *two years* and *workers would not have the right — as they do now — to vote whether to accept or reject the proposed contract*. Thus, under the proposed legislation, workers would be forced to surrender to an arbitrator the right to determine the terms and conditions under which they would be required to work!

Additionally, the proposed legislation provides for other significant remedies targeted against employers, including:

- The NLRB would be *required* to seek a federal court injunction against employers to prevent unfair labor practices during organization or contract drives.
- A fine of up to *$20,000 per violation* for "willful" unfair labor practices allegedly committed by an employer during an organization or contract drive — *fines which, in all probability, would not be covered by an employer's employment practices liability insurance*.
- *Treble back pay damages* in favor of any employee found to have been discharged as a result of an unfair labor practice committed during an organization or contract drive.

Text of the legislation can be found at http://edlabor.house.gov/bills/efca_billtext.pdf.

The proposed "card check" system of certifying unions would, effectively, reverse the TAFT-HARTLEY ACT, six decades of labor management relations, and impose a labor management relations framework the courts have long held to be "inherently unreliable" and which would be rife for fraud and abuse. More than forty years ago, one federal court of appeals aptly described the potential for abuse and unreliability inherent in the "card check" system which this legislation would impose. [*NLRB v. S.S. Logan Packing*, 386 F.2nd 562 (4th Cir. 1967) (emphasis added)]:

> It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check," unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. . . . Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.
>
> The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying "No." This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.
>
> That is not the most of it, however. Though the card be an unequivocal authorization of representation, its unsupervised solicitation may be accompanied by all sorts of representations. . . . [U]nsupervised solicitation of cards may also be accompanied by threats which the union has the apparent power to execute. Few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed.

"EMPLOYEE ~~FREE~~ FORCED CHOICE ACT" MOVES FRONT AND CENTER IN CONGRESS — **GET INVOLVED NOW!!**, CONT'D

> Without adequate supervision, solicitors of authorization cards may resort to a wide variety of other threats. Discrimination in the exaction of initiation fees is frequently encountered; and, particularly where untrained fellow employees are used as solicitors, use of threats of discrimination against non-signers in the compilation of seniority rosters and other conditions of employment may be a strong temptation.
>
> The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however; and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.
>
> *For such reasons, a card check is not a reliable indication of the employees' wishes.*

Precisely because of the "inherent unreliability" of signature cards, two years later the U.S. Supreme Court held [*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)]:

> [A]n employer is not obligated to accept a card check as proof of majority status, under the Board's current practice; and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status.

The proposed legislation would eliminate an employer's right to insist on an NLRB-supervised election.

Unions have amassed a substantial war chest to get the legislation adopted and have touted the legislation on their Web sites as the solution to all manner of economic woes for workers. *See, e.g.*, http://www.aflcio.org/joinaunion/voiceatwork/efca/ ("American Working Families Are Struggling . . . Corporations and CEOs Have All the Power . . . Workers in Unions Can Bargain for a Better Life . . . The Employee Free Choice Act Will Help Build an Economy that Works for Everyone.").

Rather than ensuring economic security for workers, the EFCA is more likely to cost jobs and stunt economic growth. For example, although not an excuse for poor management decisions made by the Detroit "big-three" auto-makers, a large part of the reasons for the necessity of the recent auto-industry "bail-out" are the "legacy costs" of UAW contracts, *i.e.*, pension and health care costs for retirees. *See* http://www.heritage.org/research/economy/-wm2162.cfm. When factoring in those costs, the average hourly rate of Detroit UAW members is more than $70 per hour, compared to approximately $40 per hour in largely southern, non-unionized manufacturing states, which adds approximately $2,000 per vehicle to the cost of a vehicle manufactured subject to a UAW contract. Yet, the actual hourly rate differential for the two groups of employees is insignificant.

Ford Motor Company's 2007 Master Contract with the United Auto Workers

For this reason, passage of the legislation in the Senate is not a foregone conclusion. Senators from economically successful states with significant non-unionized manufacturing operations are "on the fence." No one — neither employers, worker, nor unions— should fear a secret ballot election. It is the only legitimate process to protect workers' rights to choose without fear or intimidation.

What can you do? Contact your Congressional representatives and Senators, or pro-employer groups, such as the Coalition for a Democratic Workplace, http://www.myprivateballot.com/, and let your voice/vote/wallet be heard.

John L. Ross

OTHER PENDING LEGISLATION

"The Lilly Ledbetter Fair Pay Act of 2007"[1] The proposed legislation (H.R. 2831) seeks to legislatively overturn *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3rd 1169 (11th Cir. 2005), 127 S.Ct. 2162, 167 L.Ed.2nd 982 (2007). It would revive the continuing violation theory as applied to wage discrimination, starting a new TITLE VII/ADEA limitations period for filing an EEOC *Charge* every time a paycheck is received which pays the recipient less because of a discriminatory employment decision, even if the decision was made years earlier.

"Paycheck Fairness Act" PFA (H.R. 1338 and S.766)[2] seeks to amend the EQUAL PAY ACT OF 1963 (29 U.S.C. §206(d)(1)).[3] The EPA makes it unlawful to pay an employee of one sex less than an employee of the opposite sex who is performing substantially equal work "within any establishment" of an employer on a job the performance of which requires substantially equal skill, effort, and responsibility. To prove a violation of the EPA, a plaintiff must show that the employer is subject to the EPA; that the female employee was working in a position "requiring equal skill, effort, and responsibility under similar working conditions;" and that she was paid less than male employees. This "necessarily requires a plaintiff to compare her skill, effort, responsibility, and salary with a person who is or was similarly situated." *Jones v. Flagship International*, 793 F.2nd 714, 723 (5th Cir. 1986), cert. denied, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2nd 1001 (1987).

The statute applies to "an enterprise engaged in commerce or the production of goods for commerce." *See* 29 U.S.C. §203(r). There are no administrative prerequisites to suit. The parties are entitled to a jury trial. The EPA recognizes as defenses differences in pay rates based upon:

- a seniority system which is not based upon an employee's sex;
- a merit system which is not based upon an employee's sex;
- a system which measures earnings by quantity or quality of production; or
- a differential based upon factors other than sex.

The EPA is enforced through the remedial provisions of the FLSA. Accordingly, much like suits for age discrimination under the ADEA or for unpaid overtime under the FLSA:

- The measure of damages under the EPA is the same as under the ADEA, *i.e.*, back pay, an amount equal to back pay as liquidated damages for "willful" violations, and attorney fees; and
- Like unpaid overtime suits under the FLSA, (1) suits are subject to a two-year statute of limitations or, in the case of a "willful" violation, three years; and (2) representative actions can be brought, but they are "opt-in" actions, not "opt-out" class actions under *Fed. R. Civ. P. 23*.

The proposed legislation:

- allows prevailing plaintiff's to recover (1) compensatory damages, *e.g.*, mental anguish; and (2) punitive damages;
- does not contain any damage caps;
- allows Rule 23 class actions;

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[1] *See* http://www.govtrack.us/congress/bill.xpd?bill=h110-2831

[2] *See* http://www.govtrack.us/congress/bill.xpd?bill=h110-1338

[3] "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.]"

Other Pending Legislation, cont'd

- expressly provides for recovery of expert fees by a prevailing plaintiff;
- expands the scope of jobs which may be compared by including an expanded definition of "establishment": "[E]mployees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a State[;]"
- expressly allows the EEOC to adopt regulations which might further expand the definition of "establishment": "The preceding sentence shall not be construed as limiting broader applications of the term 'establishment' consistent with rules prescribed or guidance issued by the Equal Opportunity Employment Commission[;]"
- significantly amends the "factor other than sex" defense — changing it to a "bona fide factor other than sex" — by requiring an employer to demonstrate the factor "(i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity[;]"
- additionally, even if the employer meets these added requirements, an employee can defeat the defense by demonstrating "an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice[;]" and

". . . expands the scope of jobs which may be compared. . ."

- includes a specific anti-retaliation provision which, in addition to actions which are normally considered "protected activity," *e.g.*, filing a complaint, providing testimony, participating in an investigation, *etc.*, also defines protected activity to include discussing or disclosing wage information among employees.[4]

The bill was passed by the House of Representatives on July 31, 2008. It is pending in the Senate.

RESPECT H.R. 1644 the "Re-Employment of Skilled and Professional Employees and Construction Tradesworkers" — RESPECT — is designed to legislatively overturn the NLRB's trio of 2006 decisions which broadened the definition of "supervisor" under the NLRA, *NLRB v. Kentucky River Community Care, Inc.*, *Oakwood Healthcare, Inc.*, and *Croft Metals, Inc.* We reported on these cases in our Winter 2007 edition of the *Newsletter* (http://thompsoncoe.com/portals/0/len-08-01.pdf).

Proposals to amend the Family Medical Leave Act:

Paid FMLA leave (S.B. 910/H.B. 1542)

Coverage for same-sex spouses (H.B. 2792)

Children's/grandchildren's extracurricular activities (H.B. 2392)

John L. Ross

[4] The bill contains an exception which would not protect management or HR personnel who have access to pay information as a result of their jobs and who disclose the information to employees who otherwise would not have access to the information as part of their jobs, unless the disclosure was made as part of an investigation or proceeding which would otherwise constitute protected activity. Further, this exception does not prevent the application of other laws, such as the NLRA.

FIFTH CIRCUIT INCREASES THE THREAT OF PUNITIVE DAMAGES IN DISCRIMINATION CASES

In recent years, both by tort reform legislation and by judicial decisions, the specter of large punitive damage awards has been lessened in most jurisdictions and for most types of claims. Running counter to that trend, however, the Fifth Circuit has held an award of compensatory damages is not a prerequisite to an award of punitive damages either under TITLE VII or under 42 U.S.C. §1981.

In *Abner v. Kansas City Southern R.R. Co.*, eight African American employees filed suit in federal court alleging their employer had subjected them to a racially hostile working environment, in violation of TITLE VII and 42 U.S.C. §1981. Plaintiffs alleged that over a ten-year period they were subjected to racial graffiti, a noose hanging outside a door, racially derogatory comments and threats (both written and spoken), and transfers to unwanted night and weekend shifts when the employees objected to the comments and to other racially-motivated activity. The jury found the employer liable, because it caused and/or failed to properly respond to this racially-derogatory behavior. The jury returned a verdict awarding no compensatory damages but awarding each of the eight employees $125,000 in punitive damages — a total of $1,000,000. The district court entered judgment on the verdict, adding $1.00 in nominal damages. The employer appealed after the district court denied its *Motion for Judgment as a Matter of Law and, Alternatively, Motion for New Trial*.

The Fifth Circuit affirmed the award of $125,000 in punitive damages, holding a punitive damages award under TITLE VII and Section 1981 does not require an award of compensatory damages. The court's decision was based on the court's interpretation of the plain language of TITLE VII, the existence of punitive damages caps for TITLE VII claims, the legislative history of the statutes, and the purpose of punitive damages under TITLE VII. The court concluded nothing in the text of the statutes limits an award of punitive damages to cases in which the plaintiff also receives compensatory damages. Thus, it was not necessary for the court to award $1.00 in "ceremonial" damages to each plaintiff for the punitive damages award to be upheld.

Although the Fifth Circuit held an award of compensatory damages is not a prerequisite to an award of punitive damages under federal law, the result would have been different had the lawsuit been brought under state law. In Texas, Chapter 41 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE governs the recovery of punitive damages, including recovery of punitive damages for discrimination under the TEXAS LABOR CODE. Section 41.004(a) of the TEXAS CIVIL PRACTICE AND REMEDIES CODE expressly allows recovery of punitive damages "only if damages other than nominal damages are awarded." Thus, in Texas, an award of compensatory damages is a prerequisite to any recovery of punitive damages in an employment discrimination case. The Texas Supreme Court has applied this statutory requirement of actual damages to recover punitive damages in two separate decisions.

Rachael Chong Walters

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If you would like more information about the issues discussed in this newsletter or you have a suggestion for a future article, please contact Newsletters@thompsoncoe.com.

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SUMMARY JUDGMENTS LARGELY ELIMINATED UNDER THE NEW ADA AMENDMENTS

President Bush has signed legislation which will significantly alter the Americans with Disabilities Act. These changes took effect January 1, 2009, and should have an immediate impact for companies dealing with employees claiming they have a disability. The changes are intended to restore coverage for many groups who have been interpreted by the courts to not be disabled under the ADA.

Some of the more substantial changes include the following:

- Courts are to adopt a broader standard on disability cases to follow the findings and purposes of the ADA (the House version of the ADA amendments, which, fortunately was not adopted, wanted to make this mandate even broader by redefining when a major life activity was substantially restricted);
- Major life activities are specifically defined to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working;
- Covered major life activities are also defined to include the operation of major bodily functions, *i.e.*, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions;
- Determinations of whether an impairment substantially limits a major life activity shall be made **without** regard to the effects of mitigating measures. There are some minor exceptions to this new rule. For instance, employers and courts can still consider ordinary eyeglasses or contact lenses as part of the mitigating measures determination;
- An impairment which substantially limits one major life activity need not limit other major life activities to be considered a disability;
- An impairment which is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- The burden for an individual to prove a "regarded as" disabled has been lessened. Under current law, to establish a "regarded as" claim, a plaintiff has to establish *both* that the employer regarded the plaintiff as having an impairment *and* that the employer believed the impairment substantially impaired a major life activity. Under the amendments, the employee need only demonstrate the employer perceived the individual as having a mental or physical *impairment*. It will no longer be necessary for the plaintiff to also establish the employer "regarded" him or her as being substantially limited in a major life activity, which is much more difficult. To help balance this new change for the employer, the "regarded as" prong under the ADA will not apply when an impairment is transitory and minor. A transitory impairment has been defined as an impairment with an actual or expected duration of 6 months or less.

There have also been several other changes to the ADA, although the foregoing changes are some of the more prominent ones. One of the most troubling aspects about these changes is the amendments expand an area of the law through which it is already extremely difficult and costly for companies to navigate. Some of these changes will essentially require HR professionals to make decisions on medical issues on which they have no expertise or specific training, such as determining whether someone has a "transitory" impairment and for how long under the "regarded as" prong, or whether the operation of certain body functions being impaired are major life activities given the broad language of the amendments, *etc.* While these issues can be resolved with the help of doctors, the fact-finding process will become much more expensive for companies and will almost assuredly result in an increase in ADA claims.

Equally troubling, the amendments will largely eliminate the potential for employer summary judgments in ADA cases. Currently, most ADA cases are disposed of on summary judgment either because the plaintiff's impairment can be controlled by mitigating measures, *e.g.*, diabetes controlled by insulin, *etc.*, and,

Summary Judgments Largely Eliminated under the New ADA Amendments, cont'd

therefore, does not constitute a "disability" or because the plaintiff can't prove the second element of a "regarded as" claim, *i.e.*, can't prove the employer believed the plaintiff's impairment substantially limited a major life activity. With mitigating measures largely eliminated from the consideration of whether a plaintiff has a "disability" and elimination of the second prong of a "regarded as" claim, ADA plaintiffs will be able to survive most summary judgment motions, and "regarded as" claims will be routinely made in virtually all cases. Thus, the cost of ADA litigation will rise for employers, as will the litigation risk because, if not settled, most claims will be decided by a jury.

To help clarify some of these issues, the EEOC has been charged with the task of issuing further regulations and guidance on the changes. Regardless of when that guidance is provided, there are several steps you should be taking right now to prepare for these new revisions.

First, you should review your policies and practices to make sure the ADA's interactive process considers these expansive definitions of what constitute major life activities. When confronted with a potential ADA claim, you will need to remember the categories of major life activities which have now been specifically defined. Keeping a checklist nearby of the protected categories may prove useful especially with some of the more hazy major life activities such as "thinking" and "concentrating." And remember, with the exception of eyeglasses or contact lenses, mitigating measures should not be considered. Second, you will need to exercise greater vigilance regarding an employee who can claim he or she is "regarded as" disabled because it will now be easier for the employee to establish that standard. Determining whether the employee has had a condition for more than 6 months and whether or not it is minor will be critical determinations.

As with many obstacles in the employment arena, being aware of what the law requires is the first step toward protecting the company. With some good judgment and a sharp understanding of the new changes, companies can better respond to ADA inquires in this new era.

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The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

MINNESOTA ADOPTS FEDERAL *ELLERTH-FARAGHER* STANDARDS FOR IMPOSING LIABILITY ON EMPLOYER FOR SUPERVISORY SEXUAL HARASSMENT

[Editor's Note: Given Thompson, Coe's St. Paul office, for the benefit of our Minnesota clients, beginning with this issue of the *Newsletter,* Thompson, Coe is expanding coverage of the *Newsletter* to include significant developments in Minnesota labor and employment law, in addition to our usual federal and Texas coverage.]

Ever since the U.S. Supreme Court's *Ellerth*[1]-*Faragher*[2] decisions a decade ago, federal courts have applied two different standards for imposing liability on an employer for sexual harassment, depending on whether the harasser was a co-worker of the victim or a "supervisor." When the alleged harasser is a *co-worker*, an employer is liable for the harassment *only* if plaintiff proves (1) the employer knew or should have known about the alleged harassment and (2) failed to take appropriate corrective measures to end it. When the alleged harasser is a supervisor, however, the liability analysis is more complicated. If the harassment resulted in *an adverse tangible employment action, e.g.*, an employee is discharged or passed over for a promotion because she refused a supervisor's sexual advances, *the employer is automatically vicariously liable*. If, however, there has been no adverse tangible job action — that is, if the alleged harassment "merely" created a hostile or offensive working environment — the employer is *still* vicariously liable for the harassment *unless* it can establish a two-prong affirmative defense articulated by the Supreme Court in *Ellerth* and *Faragher*.

Under the *Ellerth-Faragher* affirmative defense, an employer can escape liability only if the employer proves (1) it undertook reasonable care to prevent and promptly correct harassment and (2) the employee unreasonably failed to take advantage of the employer's anti-harassment policy and complaint procedure, or otherwise failed to avoid harm. To establish the first prong, normally the employer must have established, disseminated, and enforced an anti-harassment policy and complaint procedure and taken other reasonable steps to prevent and correct harassment. The employer's harassment policy and complaint procedure should contain "at a minimum" (1) a prohibition against harassment; (2) a prohibition against retaliation for making complaints; (3) an effective complaint process (*e.g.*, employees must not be required to report complaints to immediate supervisors, *etc.*); (4) assurances of confidentiality; (5) an effective and prompt investigative process; and (6) assurances of immediate and appropriate corrective action. *See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice 915.002, EEOC Comp1. Man. (CCH) ¶3116 (June 18, 1999), Part V.

Until amended in 2001 — three years *after* *Ellerth-Faragher* — the Minnesota discrimination statute expressly defined hostile environment sexual harassment to require proof the employer knew or should have known about the harassment and failed to take timely, appropriate, corrective action, regardless of whether the harasser was a co-worker or supervisor. In 2001, however, the Minnesota Legislature amended the definition of hostile environment sexual harassment by deleting the knew-or-should-have-known-and-failed-to-take-timely-and-appropriate-action language. Recently, in a four-to-three split decision, a majority of the Minnesota Supreme Court held the effect of the amendment was the adoption under Minnesota law of the federal *Ellerth-Faragher* standards of employer vicarious liability.

In *Frieler v. Carlson Marketing Group, Inc.*[3], the plaintiff sued her employer, contending she had been subjected to sexual harassment and assault and battery when she sought promotion from her part-time position to a full-time position in the shipping department. She alleged the shipping department manager had grabbed, groped, and tried to kiss her on several occasions, as well as making a number of sexually suggestive remarks to her. She did not immediately complain about the conduct; but, after later being offered and having accepted the promotion, she complained about the alleged harassment. The trial court granted summary judgment to the employer, in part, because there was no evidence the company knew or should have known about the alleged harassment; and the court of appeals affirmed. In a split decision, a majority of the Minnesota Supreme Court reversed dismissal of the sexual harassment claim but affirmed dismissal of the assault and battery claim.

The majority held the Legislature's 2001 amendments were presumed to intend a change in the law and in the definition of sexual harassment. The issue then

MINNESOTA ADOPTS FEDERAL *ELLERTH-FARAGHER* STANDARDS FOR IMPOSING LIABILITY ON EMPLOYER FOR SUPERVISORY SEXUAL HARASSMENT, CONT'D

became *how* the law was changed. The majority rejected *Frieler's* contention the Legislature intended to impose strict liability on an employer for supervisory sexual harassment. Instead, the majority concluded the intent of the amendments was to bring Minnesota law into conformity with the federal *Ellerth-Faragher* standards for supervisory harassment. Applying the *Ellerth-Faragher* analysis to the facts in the case, the majority concluded *Frieler's* summary judgment evidence raised genuine issues of material fact regarding whether the shipping department manager was plaintiff's "supervisor" for purposes of the *Ellerth-Faragher* analysis and, therefore, reversed the summary judgment on the sexual harassment claim.

Because *Ellerth-Faragher* is an affirmative defense to employer liability, Minnesota employers will now have to take care in sexual harassment cases to affirmatively plead the defense in their responsive pleadings and prove the defense at trial.

Jodee McCollum

PROGRESSIVE DISCIPLINARY POLICIES NEED TO BE DISCRETIONARY

Progressive discipline policies can be an effective personnel management tool, useful in coaching under-performing employees into successful performance and, thereby, salvaging the substantial hiring, training, and management investment employers have in its employees. If an employer decides to adopt such policies, however, the employer needs to be very careful and clear that its progressive disciplinary policy is optional and that the employer retains full discretion to take whatever the employer deems to be appropriate disciplinary action at any time. If the employer does not, the existence of a progressive discipline policy can be used against the employer as evidence of discrimination, if the employer deviates from the stated policy. A recent case from a Texas federal court illustrates the potential problem.

In *Longoria v. U.S. Liquids of Louisiana, LP (USLL), et al.*, the plaintiff, Oscar Longoria, was employed as a site manager with U.S. Liquids of Louisiana, LP, a company which focuses on the treatment and disposal of non-hazardous oil field waste. Longoria was terminated on April 11, 2006. He was age 52 when terminated and was replaced by his former assistant, a 37-year-old male. Longoria filed suit, claiming that U.S. Liquids of Louisiana, LP and ERP Environmental Services, Inc. (collectively "USLL") terminated his employment because of his age, in violation of the TEXAS COMMISSION ON HUMAN RIGHTS ACT.

USLL argued Longoria was terminated for "performance deficiencies." These alleged deficiencies included his: (1) failure to process materials fast enough; (2) conflict with a "major" customer which resulted in the temporary withdrawal of the customer's business; (3) calculated absence from a meeting with supervisors; and (4) deficiencies with handling customers and vendors. In his deposition, Longoria acknowledged two employees had verbally counseled him about his failure to process materials fast enough; and his supervisor, Gonzalez, had counseled him about being too aggressive with vendors. Additionally, Gonzalez testified he and the two other employees had also counseled Longoria about various issues in addition to the processing of materials, including Longoria's decision-making capabilities and insufficient communication with supervisors.

USLL's Employee Handbook contained a progressive discipline policy which required oral warnings ***"for infractions that are considered minor in nature" and written reprimands "for repeated minor infractions or for infractions of a more serious nature."*** Gonzalez had never issued any

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written reprimands to Longoria, nor was he aware of any written documentation indicating he or others had counseled Longoria regarding performance deficiencies. In fact, the only written memorandum listing Longoria's alleged performance deficiencies was prepared *after* the decision was made to terminate Longoria, two (2) days before the actual termination. Longoria argued, under the employer's progressive discipline policy, the fact he had only received oral counselings and warnings indicated his infractions were minor in nature and, therefore, did not warrant discharge.

The United States District Court in the Southern District of Texas denied USLL's motion for summary judgment, holding Longoria's evidence could reasonably lead a jury to conclude any performance issues raised in verbal communications between Longoria and his supervisors were minor and isolated in nature and, thus, pretextual. Thus, the Court denied the summary judgment motion and let the case proceed to trial.

To avoid this result, if an employer adopts a written progressive discipline policy, care should be taken to be clear the policy is not mandatory. Where the policy is not mandatory, other courts have held "[t]he mere fact an employer failed to follow its own internal procedures does not necessarily suggest that . . . the substantive reasons given by the employer for its employment decision were pretextual." *Randle v. City of Auora*, 60 F.3rd 441, 454 (10th Cir. 1995). *See also, e.g., Matthews v. Euronet Worldwide, Inc.*, 271 Fed. Appx. 770, 2008 WL 822461, at 5 (10th Cir. Mar. 10, 2008) (summary judgment for employer affirmed despite the fact employer did not follow all steps in its discretionary progressive discipline policy, including a written warning). Progressive discipline policies should be phrased in a manner to make it clear suggested disciplinary steps are discretionary, for example:

- "Employees with unsatisfactory job performance *should* be cautioned by the Manager, in writing . . ."
- "Employees are *usually, but not always, given a written warning from the Supervisor* describing the Company's requirements and expected results from the employee . . ."
- "The disciplinary steps stated above are suggested steps only. Nothing stated in this policy/handbook creates any procedural or substantive right or expectation on the part of any employee. The Company at all times retains the right to impose whatever disciplinary action it deems appropriate for a particular violation, without regard to whether any preceding form of discipline has been taken with an employee."

Finally, in addition to making a progressive disciplinary policy discretionary, employers should nevertheless generally follow the steps outlined in the policy and, of course, should be consistent in disciplinary actions by imposing similar discipline on similarly-situated employees.

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