Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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Sexual Harassment Suits Can Still Generate Large Jury Awards

Failing to give sexual harassment training, and lacking policies which prohibit sexual harassment and retaliation for harassment complaints could cost employers dearly. Recently, a federal appellate court upheld a $915,000 jury verdict that had been awarded to a female police officer in 2005, in *Kreuzer v. City of Houston.* Beth Kreuzer, one of very few female police officers to serve on the Houston Police Department's elite motorcycle squad, recovered $600,000 for compensatory damages (including mental anguish from the harassment, economic loss from violation of her free speech rights, and for loss of professional reputation) and $315,000 in attorney's fees in her sexual harassment lawsuit. She claimed she had been harassed by a superior officer, Clifford Simmons, and when she complained, she experienced retaliation. The offensive action involved inappropriate touching of her hair and hips, calling her "my girl," and public humiliation by the rest of the all-male squad. Kreuzer and witnesses on her behalf testified that the department environment protected Simmons, and it was extremely difficult to bring complaints. At the time the suit was brought, 13% of the Houston Police Department was female, with Kreuzer the only female on the motorcycle force, making Houston an anomaly among police departments of comparable size that have a more balanced workforce.

WHAT'S INSIDE…

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Apparently, the jury's primary motivation for the large award was not the harassment itself. Rather, it was the discovery that the department had not given a sexual harassment course to its' employees in six years, and had no policies in place for how to handle retaliation when female police officers lodged complaints. This was the third time a female Houston police officer has sued the city.

Under Title VII of the Civil Rights Act of 1964, harassment on the

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basis of sex is prohibited. Such harassment exists in the form of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Sexual harassment also occurs when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

In order for an employee to bring a claim against an employer for a sexually hostile work environment, he or she must show: (1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

As most human resources professionals are aware of by now, the Supreme Court drastically changed sexual harassment law several years ago in the cases of *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellereth.* These cases shifted the burden of proof from employees to employers requiring, among other things, that employers take action *before* the alleged sexual harassment occurs. This action includes management training in regard to sexual harassment as well as the development and application of policies prohibiting sexual harassment and retaliation for reporting such harassment. This was apparently not done by the Houston Police Department which paid dearly for its mistakes.***

Despite EEOC's Error, Plaintiff Can Still Sue

If an employee follows the rules for filing a charge against an employer as mandated by the Equal Employment Opportunity Commission (EEOC), she will not lose her right to sue if the EEOC fails to notify her employer of the charge. This decision was recently handed down by the U.S. Supreme Court in *Federal Exp. Corp. v. Holowecki*. Back in 2001, the plaintiff and 13 other employees filed age-discrimination charges against FedEx with the EEOC, and waited two months before suing, in compliance with the requirement under the Age Discrimination in Employment Act (ADEA), that "no civil action...be commenced...until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC." The intent of this provision is to allow the EEOC time to notify employers of the charges against them, with the hope that the matter can be resolved through the EEOC's informal dispute resolution process. In this case, however, the EEOC failed to notify FedEx.

The case proceeded all the way to the United States Supreme Court because the employees' right to sue was first dismissed by a district court, and later reinstated by the United States 2nd Circuit Court of Appeals. Upon reviewing relevant EEOC provisions, the Supreme Court determined that the FedEx employees' act of filing of a charge was a "reasonable exercise of [the EEOC's] authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces." The Court dismissed FedEx's argument that one of the employees intended her affidavit to be confidential, implying she did not want FedEx to be notified, but charged the EEOC with the task of "establishing a clearer, more consistent process" for filing such claims.

It is difficult enough to deal with the EEOC and disgruntled employees only to have the Commission fail to follow its own guidelines. An important part of Title VII procedure is to allow the Commission time to notify both parties and possibly resolve the matter without going through formal litigation and possible trial. This case is another example of how courts are finding more and more ways to allow employees their day in court.***

TEN MOST COMMON HANDBOOK MISTAKES

Employee handbooks can be one of the most effective forms of communication between management and employees. They can also be one of the most effective tools to decrease the risk of litigation and can be used as effective tools in the defense of an employee lawsuit. Employee handbooks can also be used against companies if they are not prepared properly. The following is just a short list of ten common employee handbook mistakes.

1. *Not being consistent with other employer documents.*

2. *Using the wrong terms or phrases such as "permanent employment" or termination "for cause."*

3. *Including too much detail on company procedures which can actually be used by employees' lawyers against management.*

4. *Not including catch-all language in policies such as in lists of disciplinary actions. Example: "This list includes but is not limited to . . . absenteeism, tardiness, etc."*

5. *Outlining a probationary period which implies that once the period is over with the employee is employed other than at-will.*

6. *Failing to contain an at-will statement within the handbook as well as within the written acknowledgement that the employee has received the handbook.*

7. *Using form handbooks which relate to other states' laws or which contain language that has nothing to do with your company.*

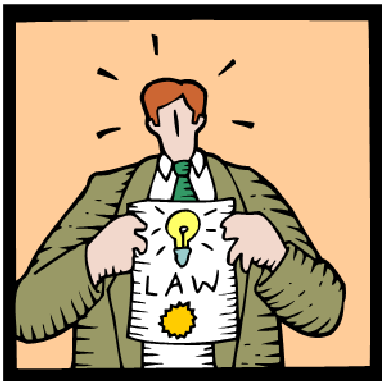
8. *If your company is in more than one state, not adapting the employee handbook to each state.*

9. *Failing to revise and update the manual at least every two to three years.*

10. *Maintaining a Progressive Discipline Policy which gives employees the idea that they will receive a verbal counseling, then a written counseling, then a suspension before they can be discharged at-will.*

These are just a few of the more common mistakes I still see in reviewing employee handbooks and of course there are many other traps for the unwary in preparing employee handbooks. There is no reason why a competent Human Resource Manager cannot prepare a policy manual for their firm, however, prior to distribution any employer will be well served by having that document reviewed by a Consultant or Board Certified Labor Lawyer.***

NEW LEGISLATION



Dangerous Bill introduced giving Labor Unions big advantage in organizing a workforce.

Representative George Miller (D-Calif.) has introduced the controversial Employee Free Choice Act (EFCA) to Congress. The Bill, which would amend sections 8, 9, 10 and 12 of the National Labor Relations Act, sets forth the following goals as summarized by the AFL-CIO: (1) establish stronger penalties for violation of employee rights when workers seek to form a union and during first-contract negotiations; (2) provide mediation and arbitration for first-contract disputes; and 3) allow employees to form unions by signing cards authorizing union representation.

Supporters of the proposed Act, which include 230 co-sponsors, seven Republicans, labor unions, religious denominations, as well as academic, civil and human rights groups, claim that roughly 60 million people would be willing to join a union if it were easier for them to do so. The Bill was also introduced to combat the alleged problem of illegal firing, intimidation or retaliation by employers against workers who wish to form a union. In response to concern that just signing cards to establish a union would jeopardize the secret ballot election process, the AFL-CIO emphasizes in a list of "10 Key Facts" about the Act that: "workers can still vote under the Employee Free Choice Act. At any time, if 30 percent of the workers want an election, they can have one. And once they have a union, workers also vote to elect their union representatives." This provision leaves the current voting rules intact, but gives workers the choice of how they want to choose union representation, instead of leaving the choice to employers.

This is an extremely dangerous Bill and a frightening trend in Congress for all employers. Under current law, a union who wants to organize a non-unionized employers' workforce generally must first obtain at least 30% of a designated group of employees' signatures on a card authorizing a legitimate vote to have a labor union. If a union is able to achieve this 30% card signing, then at a later time a vote of all the members of the collective bargaining unit will be held and if more than 50% of the collective bargaining unit agrees to have a labor union then the labor union wins. The new Bill completely bypasses the actual election by the entire collective bargaining unit and would allow as little as 30% of the employees in the unit to force a labor union on the entire unit. Sometimes, labor unions may try to sneak into workforces and get employees to sign union authorization cards without giving management the opportunity to explain to employees the various and numerous downsides to being a member of a labor union.

As many of you are aware, labor unions continue to be on the decline and this is another desperate attempt by the AFL-CIO and some Congress members to revive collective bargaining rights of employees. If you want to make sure your workforce has the opportunity to have a legitimate and free vote by an entire collective bargaining unit on whether or not a labor union will take place, contact your local Congressman.***

Check It Out!!

THE FIRM'S WEBSITE

www.hollandfirm.com

INTERESTING SURVEYS

20 Percent of Workers Allegedly Steal

According to a recent survey, nearly one in five workers, or 19%, are stealing from the workplace. In a study concerning employee theft, conducted by a staffing and recruitment firm, the items stolen were usually office supplies such as pens, pencils, rulers, paper, post-its and file folders. Out of the $2,000 plus employees surveyed, only 21% said they felt guilty and regretted doing it. When asked why they steal, the survey indicates: "the primary reason office supplies were taken for personal use was because they needed them (41%). Nearly one-third (32%) said it was because their boss/office manager said it was alright to do so, and 15 percent claimed the company will never miss them."

Interestingly, workers earning $75,000 per year or more were more likely to take office supplies home, and the vast majority of older workers were more inclined to find the practice was wrong. As usual, successful companies have managers who lead by example. Obviously, pilfering post-it notes, pens and pencils and the like will not break a company. However, if top management not only condones such behavior but actually participates in it , this is not a good example for lower level and especially new employees to experience. If top management condones this type of behavior then what else will they condone? Employers are well advised to, at a minimum, prohibit management from participating and/or condoning this type of behavior.

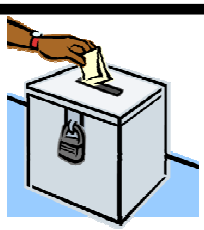
About One in 12 Full-Time Workers Reports Using Illicit Drugs

8.2% of full-time workers use illicit drugs and 8.8% drink alcohol heavily, according to a report by the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Administration. The statistic represents workers who admitted using illicit drugs or engaging in heavy alcohol consumption over the previous month. For purposes of the survey, illicit drugs included marijuana, cocaine, heroin, hallucinogens, inhalants, or prescriptive psychotherapeutics used non-medicinally. Ranking highest in admitted drug use were food service workers (17.4%), followed by construction workers (15.1%), and those in the arts, media, and recreation industries (12.4%). Lowest rates of use (around 4%) were reported from those working in education, training, and library occupations, community and social services, and protective service occupations. The findings were similar for heavy alcohol use.

The report also asked those surveyed about access to workplace information policies and programs concerning drug and alcohol abuse. 43% had access to education information on the subject, 78% were aware of written policies regarding drug and alcohol use in the workplace, and 58% reported the existence of an employee assistance program (EAP) in their workplace.

Although illicit drug use in the workplace has declined in the past decade, it still remains a problem and alcohol use and abuse in the workplace has always been a problem. It is a known fact that employers who advertise the fact they test all applicants for illegal drug use and randomly test employees for drug and alcohol use in the workplace have a statistically significant lower incident of drug or alcohol use in the workplace. Obviously, individuals who use illegal drugs or abuse alcohol know which employers test and which do not and they will of course go to the employer who does not test. Management is well served by having in place written policies and procedures advising applicants and employees that they will be tested for illegal drug use and alcohol abuse depending upon the circumstances.***

WHEN DO YOU HAVE TO PAY EMPLOYEES THEIR NORMAL WAGES TO VOTE?



Texas has a state law which reads as follows:

§276.004, Unlawfully Prohibiting Employee from Voting:

(a) A person commits an offense if, with respect to another person over whom the person has authority in the scope of employment, the person knowingly; (1) refuses to permit the other person to be absent from work on election day for the purpose of attending the polls to vote; or (2) subjects or threatens to subject the other person to a penalty for attending the polls on election day to vote. (b) It is an exception to the application of this section that the person's conduct occurs in connection with an election in which the polls are open on Election Day for voting for two consecutive hours outside of the voter's working hours. (c) In this section, "penalty" means a loss or reduction of wages or another benefit of employment. (d) An offense under this section is a Class C misdemeanor.

What this means is that if an employee does not have two consecutive nonworking hours in which to vote we must give them time off with pay to vote. The term "election day" has been interpreted to mean the actual day of the election and not during absentee voting. If an employee waits until "election day" to vote and they have to work so many hours on that day so that they do not have two nonconsecutive working hours in which to vote, you must give them time off with pay to vote on that particular day.***

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Keeping Employers Out of the Courtroom for over 20 Years

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenant not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.