Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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Workers' Compensation Retaliation Claims Can and Should Be Avoided

Many employees' work-related injuries are due to their failure to follow proper safety procedures, and how an employer handles this may make a difference when it comes to the success of retaliation claims. Writing up an employee for failing to follow company safety procedures is allowable; however, writing up the employee for having an accident is risky. Employers must be careful with the words they choose, taking care to be precise about what they are writing employees up for. It is best to stick to the facts of the event when writing up employees who have injured themselves and to avoid including the supervisor's subjective beliefs. Furthermore, it is important to accompany a write-up with training meant to help the employee avoid the same mistake in the future.

Severing the link between workers' compensation and any bonuses managers might receive is another smart move that will help avoid having jurors believe the company likes to run off employees who file for workers' compensation benefits. While it is unlikely that a line item on your worker's compensation bill will affect a manager's bonus, it is still wise not to link the two.

Another important step to avoiding workers' compensation retaliation claims is to stop managers' comments that could hurt your case. Managers occasionally make remarks about an employee not really being injured, or just faking it, or playing the system. While this is probably true more often than it should be, managers are not doctors and should refrain from making such subjective observations. Those types of remarks can anger a jury. Managers should be trained to view workers' compensation as a benefit that is provided to employees, just like vacation pay, sick pay, and medical insurance. Just as you don't fire employees or become angry with them for taking advantage of those benefits, you should not fire them or become angry with them for utilizing the workers' compensation system.

Additionally, it is best to avoid trying to catch the employee performing activities inconsistent with his injury and then firing him. Occasionally, a suspicious workers' compensation insurance company will follow a claimant around with a video camera, filming him doing things that appear to be inconsistent with his injury. Once the employer gets word of his actions, it fires him. It may be that the employee's doctor approved the activity, and in that case, there may be no adequate defense for the employer once sued by the employee.

The best way to defend against retaliation claims is to prevent them. Start thinking about protecting yourself against workers' comp retaliation cases before they are ever filed and you will be ahead of the curve .

EEOC Restoring Focus on Race Discrimination and Other Systemic Bias

The new chair of the Equal Employment Opportunity Commission, Naomi Earp, warns that employers should anticipate aggressive investigations of systemic bias and expect litigation by the commission. The EEOC is renewing its focus on systemic discrimination and will target its litigation on cases with broad impact.

Race and color discrimination will be a priority for the agency with the advent of a campaign known as ERACE—eradicating racism and colorism in employment. Earp notes that racial discrimination continues to be the primary allegation in EEOC charges.

Since 1992, retaliation charges have doubled. While employers often prevail on unsubstantiated claims of discrimination, they frequently lose on retaliation claims. In reacting to charges of discrimination, employers often take action against the employee who made the allegation, resulting in a retaliation claim. One-third of all EEOC charges filed in 2005 included some element of retaliation.

Other trends the EEOC has noticed include an increased number of charges from immigrant workers and teenagers. Pregnancy discrimination claims are also on the rise, even in spite of a declining number of pregnancies among women in the workforce overall. Furthermore, disability and age discrimination claims are also increasing in frequency.

In its new approach to eradicating systematic discrimination, the EEOC plans to follow a "national law firm approach" after identifying a systematic discrimination case for litigation. This approach relies on expertise from EEOC lawyers across the nation. In order to avoid EEOC litigation, the agency advises that employers conduct self-audits to uncover and avoid unintentional or hidden biases. EEO training for supervisors should include not only sexual harassment issues but also race, age, and disability discrimination issues. Moreover, employers must be cognizant of retaliation claims and seek to avoid retaliatory behavior.

The Fate of Bonuses Under FMLA

While it is clear that employees who take leave under the Family and Medical Leave Act retain the right to all of their benefits, it is less clear what happens to bonuses. This issue was recently addressed in the U.S. Court of Appeals for the Third Circuit.

That court held that an employer did not violate the FMLA when it reduced the annual bonus payment of a financial administrator who missed two months of work while on FMLA leave due to an illness. Because the employer's "partnership plan" was an "hours-based" annual production requirement, the firm could lawfully reduce the employee's annual award.

In this case, the court distinguished between the two classifications of company bonus programs for the purpose of an FMLA interference action. The court found that the employer's focus in its policy was to provide an incentive for employees to contribute to the employer's performance and production by meeting a predetermined hours goal. The court concluded that in a production bonus program, proration of payments for those who take FMLA leave is permitted. (*Sommer v. Vanguard Group*, 3d Cir., No. 05-4034, 8/24/06).

While the FMLA does not require employers to compensate employees while on leave, employers may allow workers to apply accrued vacation, personal, or annual leave toward their otherwise unpaid FMLA leave. Furthermore, employers must permit employees to apply paid sick leave to FMLA leave if the sick leave policy covers the condition for which the employee is on leave.

Under the FMLA, even if an employee does not elect to apply company-paid leave to the unpaid FMLA leave, his or her employer can force the employee to do so as long as the employer has a written policy to this effect. Upon applying paid leave toward FMLA leave, the leave period runs concurrently. If neither the employee nor the employer applies paid leave to the FMLA leave, then the employee will be entitled to all paid leave accrued before the start of the unpaid FMLA after returning to work.

All benefits accrued before leave are retained by an employee who takes FMLA leave. These benefits include group life insurance, health or disability insurance, annual leave, sick leave, pensions, and educational benefits. If an employer requires an employee to forfeit accrued benefits, then that act may be considered unlawful retaliation under the law. While the law is clear that employees on FMLA leave retain the right to their benefits, the Third Circuit Court of Appeals tells us that bonuses are a different story.

Hepatitis C: A Disability for Cooks under the ADA

The Tenth Circuit Court of Appeals ruled that the firing of a nursing home cook with hepatitis C was a violation of the Americans with Disabilities Act. The appellate court upheld a jury award of $21,240 after it concluded that the employee was fired because her employer viewed her as being substantially limited in her ability to perform her job and other jobs requiring similar training.

Hepatitis C is a viral disease transmitted by blood-to-blood contact. The plaintiff started treatment for the disease in 2000, and it was considered to be in remission by January 2001. However, the plaintiff continued to receive treatment through July 2003 because there is no known cure. She was hired by the nursing home as a dietary aide and cook in August 2001 after she had responded "no" to a question on her application asking whether she was under a doctor's care or currently taking medication. While at work in 2002, the plaintiff cut her hand, and her sister, also an employee of the nursing home, told the nursing director that the plaintiff had hepatitis C. The plaintiff employee was told that she could not return to work without a doctor's authorization, but was terminated before she could bring her letter of authorization to the director. The nursing home administrator advised her that she was fired for falsifying information on her application and not for having hepatitis.

The plaintiff filed a discrimination claim with the EEOC. During the EEOC investigation, a nursing home representative told the investigator that there would be a mass exodus from the nursing home if its clients learned that their cook had hepatitis. Subsequently, the EEOC sued the nursing home on the plaintiff's behalf in district court and won.

The appellate court recognized that the EEOC had to prove that the nursing home treated the plaintiff's hepatitis as significantly restricting her ability to perform the job from which she was discharged and a class of jobs requiring similar training within the geographic area. The court held that this burden was met. The nursing home had treated the plaintiff as though she was disabled, and therefore, she was protected under the ADA.

As some of you are aware, ADA charges are continuing to rise with the most common claim being that the employer regarded the employee as being disabled. Remember that even if an employee is not actually disabled, if the employer treats the employee as being disabled the employee may still have a claim under the law. The problem in this case is that the employer had never fired another employee for falsifying an application. Obviously, employers must be very careful when firing an employee for violation of a policy if no other employee has ever been fired for violation of that policy.

Both Adverse Action and Timing Key in Retaliation Case

Three months after complaining of sexual harassment from her supervisor's husband to the HR department at Collin County Community College District, Audrey Newsome was promoted to assistant director by her supervisor, Norma Johnson. Though Newsome never filed a formal complaint with the district regarding the alleged harassment, Johnson learned of the complaint and may have had a discussion with her husband because there was no further contact between Newsome and the husband.

When Johnson recommended Newsome for the promotion, which included a pay raise and increased job responsibilities, Newsome accepted. Shortly thereafter, however, Johnson began giving Newsome written warnings. Between October 2000 and December 2002, Newsome was written up for failing to communicate with Johnson and others, including students she was advising. Newsome was eventually fired in April 2004 and filed suit on July 21, 2004, claiming retaliation.

Newsome claimed that Johnson knew about her sexual harassment complaints regarding Johnson's husband. She also argued that she had a good record before the harassing behavior and only began receiving warnings after complaining about the husband's behavior. The court held that when there is close timing between an employee's protected activity and an adverse employment action, the employer must provide a legitimate reason for both the adverse action *and* the timing.

In this case, the district was able to provide legitimate explanations for both. The new position required communication skills, which Newsome apparently did not have. Each warning mentioned that Newsome needed to improved her communication skills and that failure to comply would result in termination. These written warnings were given only after the promotion. The fact that Newsome had a good record beforehand was irrelevant to the court's analysis, considering the change of job position and requirements.

The court also employed a "but for" analysis, holding that even if retaliation was a motivating factor, there is no liability for unlawful retaliation if the employee would have been terminated even in the absence of the protected conduct.

The moral of this story is that whenever you deal with situations involving discipline being imposed in the context of a good record, it is wise to ask why. If there was some intervening event or the employee has engaged in some kind of protected activity, make sure that there is a good reason that discipline is being imposed *now*. Additionally, as a general rule, managers should not make adverse decisions on the terms and conditions affecting an employee when that employee has complained about discrimination or harassment from the manager or the manager's close family members. While in this case the opposite situation took place when Johnson promoted Newsome, decisions like this should be either audited or given to someone else to make.

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Age Discrimination Claim Survives

After a veteran lab analyst at a Celanese chemical plant was denied a promotion in favor of a much younger and less experienced coworker, the U.S. Court of Appeals for the Fifth Circuit reversed a trial court ruling in favor of the chemical producer and allowed the analyst's age discrimination claim to proceed. The court concluded that the analyst, Hazel Conner, had submitted sufficient evidence to warrant a trial on her claim under the Age Discrimination in Employment Act. In spite of the chemical company's presentation of legitimate, non-discriminatory reasons for its promotion decision, the court held that the evidence showing that Conner was clearly better qualified than the younger employee who got the promotion was sufficient to withstand dismissal of the claim. (*Conner v. Celanese Ltd.*, 5th Cir., No. 05-41487, 11/29/06).

SEXUAL ORIENTATION BILL ADVANCES

The Employment Non-Discrimination Act was easily passed recently by the House of Representatives and is now headed to the Senate for a vote. This is the first federal law to protect gays, lesbians and bi-sexuals against all forms of employment discrimination ranging from hiring decisions to promotion, pay and discharge decisions. It appears the law will have the same enforcement mechanism as Title VII with the filing of an EEOC charge being a requirement to begin the process of seeking relief under this Act. The law at this time does not protect transsexuals, cross-dressers and others whose outward appearance does not match their gender at birth. Churches and the military are exempt from application of this new law.

If you wish to express your opinion on this Act you are urged to contact your local Congressman or Congresswoman as soon as possible. It is this firm's opinion that this Bill is very likely to be approved by the Senate and will be headed to President Bush's desk in the very near future.

LEGAL LAUGHS

THE HALF-WIT

There was an old cowhand who owned a small ranch in Montana. The Montana Wage & Hour Department claimed he was not paying proper wages to his help and sent an agent out to interview him.

"I need a list of your employees and how much you pay them," demanded the agent.

"Well," replied the rancher, "There's my ranch hand who's been with me for 3 years. I pay him $600 a week plus free room and board."
"The cook has been here for 18 months, and I pay her $500 per week plus free room and board."
"Then there's the half-wit who works about 18 hours every day and does about 90% of all the work around here. He makes about $10 per week, pays his own room and board and I buy him a bottle of bourbon every Saturday night."

"That's the guy I want to talk to, the half-wit," says the agent.

"That would be me," replied the rancher.

ANNOUNCEMENTS

- The firm is pleased to announce the hiring of **Larry Gee**. Larry is a Board Certified labor lawyer who has extensive experience in litigating employment related cases in state and federal court. Larry also has years of experience providing advice and counsel to employers on a wide variety of employment law matters. Please feel free to contact Larry at his e-mail address: lgee@hollandfirm.com.

- **Susan Stone** has decided to join forces with her husband, Bob Stone, at his firm here in San Antonio, Texas. If you would like to reach Susan you may contact her at 210-832-9626; or you may e-mail her at this time at her current e-mail address: sstone@hollandfirm.com.

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Keeping Employers Out of the Courtroom for over 19 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.