

HUMAN RESOURCES FORUM

For In House Attorneys, Managers and Human
Resources Professionals

Tuesday, May 22, 2007

8:15 a.m. – 12:00 p.m.

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
412.566.6000 -- phone
412.566.6099 -- fax

www.eckertseamans.com

AGENDA

CONFERENCE ROOM 44A

- 8:15—8:55 a.m. Registration and Continental Breakfast
- 8:55—9:00 a.m. Introduction and Welcome
Allison L. Feldstein
- 9:00—9:40 a.m. What Did They Do Wrong? An Autopsy of Recent Cases That Employers Lost and a Diagnosis of What Killed Them!
Allison L. Feldstein and Keenan D. Holmes
- 9:45—10:25 a.m. FLSA Update: Avoidance of Claims of Working “Off-the-Clock” and Other In-Vogue Wage and Hour Money Traps.
James G. Seaman and Ryan J. Siciliano
- 10:25—10:35 a.m. Morning Break
- 10:35—11:15 a.m. Workers’ Privacy Protection Versus Workplace Safety – A Heavyweight Policy Conflict.
Christina I. Kepplinger and Kimberly A. Craver
- 11:20—12:00 p.m. News You Can Use: Review of Recent Judicial and Legislative Developments of Significance to Employers.
John J. Myers and Patrick Kilker

CONFERENCE ROOM 45M

- 8:55—9:00 a.m. Introduction and Welcome
John J. Myers
- 9:00—9:40 a.m. Workers’ Privacy Protection Versus Workplace Safety – A Heavyweight Policy Conflict.
Christina I. Kepplinger and Kimberly A. Craver
- 9:45—10:25 a.m. News You Can Use: Review of Recent Judicial and Legislative Developments of Significance to Employers.
John J. Myers and Patrick Kilker

10:25—10:35 a.m.

Morning Break

10:35—11:15 a.m.

What Did They Do Wrong? An Autopsy of Recent Cases That Employers Lost and a Diagnosis of What Killed Them!

Allison L. Feldstein and Keenan D. Holmes

11:20—12:00 p.m.

FLSA Update: Avoidance of Claims of Working “Off-the-Clock” and Other In-Vogue Wage and Hour Money Traps.

James G. Seaman and Ryan J. Siciliano

TABLE OF CONTENTS

Tab 1	What Did They Do Wrong? An Autopsy of Recent Cases That Employers Lost and a Diagnosis of What Killed Them!
Tab 2	FLSA Update: Avoidance of Claims of Working “Off-the-Clock” and Other In-Vogue Wage and Hour Money Traps.
Tab 3	Workers’ Privacy Protection Versus Workplace Safety – A Heavyweight Policy Conflict.
Tab 4	News You Can Use: Review of Recent Judicial and Legislative Developments of Significance to Employers.
Tab 5	Employment & Labor Description

**WHAT DID THEY DO WRONG? AN AUTOPSY OF RECENT
CASES THAT EMPLOYERS LOST AND A DIAGNOSIS OF WHAT
KILLED THEM!**

Presented by Allison L. Feldstein and Keenan D. Holmes
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 22, 2007

ALLISON L. FELDSTEIN

Allison L. Feldstein is a Member in the firm's Labor and Employment Department. Ms. Feldstein focuses her practice on the litigation of labor and employment-related matters before administrative agencies, state courts, and federal courts. She has significant experience in the areas of union avoidance and representation; unfair labor practices; collective bargaining negotiations; strike and picketing activity; employment discrimination; immigration; workplace violence; restrictive covenants and retaliatory discharge. Ms. Feldstein has also lectured extensively on these topics.

Ms. Feldstein received her B.A. in English and Certificate in Business Studies from Indiana University in 1995. She received her J.D., *cum laude*, from Loyola University of Chicago in 1998, where she served as Articles Editor of the Loyola Consumer Law Review.

Ms. Feldstein is admitted to practice in the states of Illinois and Pennsylvania, the Northern District of Illinois, the Seventh Circuit, and the Western District of Pennsylvania. She is a member of the American Bar Association, Illinois Bar Association and Chicago Bar Association.



Pittsburgh Office
TEL 412.566.2182
FAX 412.566.6099
afeldstein@eckertseamans.com

KEENAN D. HOLMES

Keenan D. Holmes is an Associate in the Labor and Employment Department. His employment practice covers issues arising under Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Age Discrimination in Employment Act, as well as various state discrimination laws. He also counsels clients in the administration and implementation of policies to ensure compliance with the Fair Labor Standards Act and Occupational Safety and Health Act. Mr. Holmes has represented clients before state and federal courts, and administrative agencies, such as the Equal Employment Opportunity Commission. He also has experience drafting employment agreements and employee handbooks.



Pittsburgh Office
TEL 412.566.5994
FAX 412.566.6099
kholmes@eckertseamans.com

His traditional labor practice includes counseling management and litigating issues with respect to collective bargaining disputes, labor arbitrations, union avoidance and union grievances.

Mr. Holmes serves on the Board of Governors of the Rivers Club and he chairs the Young Executive Board. He is very active in the nonprofit community and currently serves on the Board of Directors for the Pittsburgh International Children's Theater and Arsenal Family and Children's Center. He is also a member of the Firm's Pro Bono Committee and the Pittsburgh Pro Bono Partnership. He is a member of both the local and state bar associations, the National Bar Association and the American Bar Association.

Mr. Holmes earned his law degree from the University of Pittsburgh School of Law in 2006, where he participated in the civil litigation certificate program, and he received his undergraduate degree in economics from Indiana University of Pennsylvania in 2003. He is admitted to practice before all Pennsylvania state courts and before the U.S. District Court for the Western District of Pennsylvania.

WHAT DID THEY DO WRONG? AN AUTOPSY OF RECENT CASES EMPLOYERS LOST AND A DIAGNOSIS OF WHAT KILLED THEM!

Presented By Allison L. Feldstein and Keenan Holmes

Disclosure of Symptoms Sufficient FMLA Notice

Burnett v. LFW Inc., d/b/a the Habitat Company, 472 F.3d 471 (7th Cir. 2006)

Factual Background

Plaintiff sued his former employer, the Habitat Company, alleging that he was denied medical leave pursuant to the Family and Medical Leave Act (“FMLA”), despite having provided his employer with sufficient notice that he suffered from a “serious health condition” protected by the Act. During a four-month period between October 2003 and January 2004, plaintiff informed his immediate supervisor that he was having some health problems that required medical attention; however, he did not provide any details as to his medical condition. For example, plaintiff stated:

- That he did not want to transfer to a different position that had less restroom access because he had a “weak bladder;”
- That he had blood work that disclosed two problems, high PSA (prostate specific antigen) and high cholesterol;
- He had upcoming doctor’s appointments;
- That he was “feeling sick” and compared his situation to that of his brother in law who had prostate cancer;
- He had to undergo a biopsy and needed time off as a result.

In early January 2004, plaintiff’s supervisor issued him several reprimands for substandard work performance and disruptive behavior. Plaintiff filed a grievance and, upon advice of the union, did not return to work until the day of the grievance meeting. His absences resulted in more reprimands from his supervisor and a three-day suspension without pay. At the grievance meeting, plaintiff informed Company officials that his biopsy was scheduled for the following day and, if he were diagnosed with cancer, he would likely kill himself.

After the biopsy, plaintiff was given a treatment plan and was instructed that he was to refrain from heavy lifting or strenuous activity. Plaintiff’s supervisor was given a copy of the document. Plaintiff then submitted a request for time off in February 2004 because he had not been given a light duty assignment and was worried about being injured. At a meeting later in the day, plaintiff stated that he felt “sick” and wanted to go home. Plaintiff’s immediate supervisor demanded that he speak with him. However,

plaintiff repeatedly asserted that he was “sick” and wanted to go home. Plaintiff left work and was then terminated for insubordination.

Plaintiff filed a lawsuit alleging: (i) defendant deprived plaintiff of his FMLA entitlement by terminating him for insubordination on the day in question; and (ii) defendant terminated plaintiff in retaliation for his request for FMLA leave.

The district court dismissed plaintiff’s FMLA claim, concluding that he could not prove that he had provided defendant with sufficient notice that he had a “serious health condition” protected by the Act. The Seventh Circuit reversed the district court noting that “an employee’s notice obligation is satisfied so long as he provides information sufficient to show that he *likely* has an FMLA-qualifying condition” although, an employee’s bare assertion that he is “sick” is insufficient. In the instant case, the Court concluded that plaintiff’s statement that he was “sick” and wanted to go home needed to be considered in the context of his prior communications to his supervisors regarding his medical problems. In that context, plaintiff’s statement was not merely a “vague and untethered claim of sickness.” Rather, plaintiff had disclosed sufficient information to the Company to trigger its obligation to investigate whether plaintiff had a serious health condition entitling him to FMLA leave.

The Court also permitted plaintiff to proceed with his FMLA retaliation claim. The Court found that plaintiff had engaged in protected activity on the date in question, by leaving work rather than performing one of the essential functions of his job he was not medically able to perform. According to the Court, plaintiff’s demand that he go home because he felt ill was the very act defendant labeled as insubordination, warranting his termination. Accordingly, defendant did not present sufficient evidence that it would have terminated plaintiff even absent his exercise of his FMLA rights.

Lessons:

- Train managers regarding the Company’s FMLA policy and have procedures in place for all leave of absence requests.
- Requests for FMLA and other leaves of absence should be handled centrally by the human resources department, or another designated individual or department. This will assure consistent application of procedures.
- Managers should be trained to document all employee-provided medical information and to communicate all such information to human resources or the individual administering leave policies.
- Employee statements regarding the need for time off should be considered in context of all prior medical information provided.
- Err on the side of caution. If unsure whether employee’s need for leave is FMLA-qualifying, investigate. Provide employee with FMLA paperwork and seek certification from healthcare provider.

Disparate Enforcement of E-mail Policy Violates NLRA

Media Gen. Operations Inc. d/b/a Richmond Times-Dispatch v. NLRB, No. 06-1023, 2007 WL 806023 (4th Cir. March 15, 2007)

Factual Background

Defendant, Media General, had an official e-mail policy that restricted use of the company e-mail system to matters related to company business. The policy stated that “[t]he e-mail system is provided to employees at Company expense to assist them in carrying out the Company's business” and was not to be used for non-work related reasons. However, in practice, the e-mail system was frequently used by both hourly employees and managers to convey news about employees' personal lives, to arrange social events, and to inform employees about charities. In addition, the e-mail system was used by both Company and union officials to transmit messages regarding the status of labor negotiations and particular proposals. Over the years, the Company did little to prevent these uses and disciplined only two employees for violations that involved pornography.

In July 2000, during negotiation of a collective bargaining agreement, the Company ordered union officials to cease using Company e-mail to discuss union matters, relying on its e-mail policy. The union filed a charge with the NLRB alleging that the Company violated Section 8(a)(1) of the Act, by barring such e-mail use. The NLRB held that the restriction of the union's access to this communication channel, while others were allowed unfettered access, constituted an unfair labor practice in violation of the NLRA. Although an employer is not required to permit union use of its e-mail system to communicate with employees, once the Company permits others access for reasons unrelated to the employer's business, the union must be granted the same rights.

The Fourth Circuit enforced the NLRB's order for these reasons.

Lessons:

- If going to have a policy, need to enforce it CONSISTENTLY;
- Remember, the failure to consistently apply company policies and procedures cannot only lead to claims by labor unions, but may also serve as proof of discriminatory intent in claims brought by individual employees.

Disparate Enforcement of Discount Policy

Stalder v. Fred Meyer Stores, Inc., No. 05-399-E-BLW, 2007 WL 1029020 (D. Idaho, March 30, 2007)

Factual Background

Plaintiff worked as a bakery clerk in one of the Company's stores for approximately 21 years. Store policy provided that bakery items would be reduced to half-price on the expiration date noted on a sticker on the front of the item. Pursuant to this policy, after the item is reduced to half-price, it may be purchased by store customers or employees. Plaintiff purchased a cake for half-price on February 14. However, upon investigation, the store manager discovered that plaintiff had tampered with the expiration label so that she could purchase the cake for half-price a day early. Plaintiff admitted her conduct and was then terminated in accordance with company policy, prohibiting employee receipt of unauthorized price discounts.

Plaintiff filed a lawsuit alleging that she was terminated in violation of Title VII, on the basis of her sex. Despite plaintiff's undisputed violation of the above work rule (a violation that amounted to theft), the district court denied defendant's motion for summary judgment and held that plaintiff could proceed to trial on her sex discrimination claim. Defendant lost this case because:

- On the same day plaintiff was terminated, two male workers received unauthorized price reductions on floral items, by a cashier who did not charge them for particular items.
- Although the male employees did not perform the same job as plaintiff, they reported to the same store manager and were subject to the same policies and procedures;
- The male employees only received written warnings for their conduct, while plaintiff was terminated.
- Although the male employees violated the same rule regarding unauthorized discounts, management considered their shift length and intent in deciding not to terminate them.
- Record evidence established that the Company only considered the policy, and not shift length and intent, in determining that plaintiff should be terminated.

Lessons:

- Enforce all policies consistently and apply the same factors in determining severity of penalties.
- If employees are treated differently, document justification for those differences, including mitigating and aggravating factors.

Vicarious Liability Based Upon Employee's Discriminatory Conduct

Green v. Dillard's, Inc., 2007 U.S. App. LEXIS 7801 (8th Cir. 2007)

Factual Background

Plaintiffs, an African-American couple, sued a retail department store under 42 U.S.C.S. § 1981, alleging that they were prevented from buying certain items due to the discriminatory conduct of an employee who refused to wait on them and called them a racial epithet.

Plaintiffs, who were shopping at defendant's department store, approached the counter to request assistance from two store employees. One employee was assisting another customer and the other was leaning against the wall with her arms folded. When plaintiffs asked this employee to help them she said "No." The other clerk told them that once she was finished she would help them, and she did. However, the other employee followed plaintiffs around as they were shopping, commenting "[a]re they getting that?" and "[h]ow are they paying for it?" Plaintiffs requested that the employee leave them alone; however, she refused. When plaintiffs attempted to purchase the items they had selected, with a platinum credit card, the employee stood there with a "hostile expression" on her face, and stated, "platinum. huh." At that time, she also referred to plaintiffs as, "F_ _ _ _ ing niggers." Plaintiffs decided not to purchase the watch they were looking at, returned the other items they had already purchased, and left the store. The lawsuit followed.

One of the questions presented in this case was whether defendant could be held vicariously liable for the discriminatory actions of one of its non-management sales clerks. In reversing the district court's grant of summary judgment to defendant, the Court of Appeals concluded that there was sufficient evidence in the record from which a jury could hold defendant responsible for the employee's conduct. Defendant lost this case because:

- Management could not specify any steps defendant had taken to prevent discrimination against customers;
- Defendant did not have a policy requiring that customer complaints be documented or maintained for any period of time;

- Management was not trained in, or aware of, any policy regarding investigation of discrimination complaints;
- Anti-discrimination training was limited to a one-hour videotape presentation, which included numerous other topics, during orientation;
- The employee at issue had engaged in similar prior conduct but had remained on the sales floor helping customers;
- The company did not conduct a sufficient background check into the employee's prior employment, despite certain "red flags" in her employment history.

Lessons:

- Anti-discrimination policies, enforcement and follow-up on complaint procedures are critical factors in defense of discrimination claims. Having a policy is not enough. Employees must be trained on the policy and management must follow it.
- Careful review of an applicant's prior employment record is essential to avoid liability.
- Employee discipline should be calculated to avoid potential future discriminatory conduct.

Termination for Poor Performance Inconsistent With Employment History

Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111 (2d Cir. February 16, 2007)

Factual Background

Plaintiff, a 63 year old employee, was terminated from her employment as a Supervisor of Resident Services for a Met-Life owned senior citizen housing development. Plaintiff was replaced by a 25 year old woman, and was informed at the termination meeting that the Company needed someone with "website" experience, a skill her replacement had. However, during the litigation of this matter, the Company asserted that the true reason for plaintiff's termination was her poor performance.

In reversing the district court's award of summary judgment to defendant, the Court of Appeals found that there was sufficient evidence from which a jury could conclude that plaintiff's poor performance was not, in fact, the true reason for her termination. According to the Court, defendant's claim that plaintiff was a poor performer was simply inconsistent with her employment record with the Company. This, along with other evidence, raised doubt regarding defendant's legitimate business reason for terminating plaintiff's employment. Defendant lost this case because:

- Throughout her employment, plaintiff received good performance reviews, accompanied by yearly raises and bonuses;

- Towards the end of her employment, plaintiff received a promotion with a significant salary increase;
- When performance issues were addressed with plaintiff, she was given additional time to correct problems, which she did;
- At the time of her termination, plaintiff's supervisor praised her "great skills" and "great ability" and informed her that he would provide her with a letter of reference;

The Company argued that, because plaintiff's supervisor gave her positive performance evaluations, promoted her, and granted her salary increases, he would not have fired her because of her age. In rejecting this argument, the Court concluded that these facts cut directly against the legitimate, non-discriminatory reason offered for her termination. Furthermore, plaintiff asserted that her termination was not due to her work performance, but rather because the Company wanted to attract younger employees. The Court held that evidence plaintiff's supervisor thought highly of her work did not contradict her claim.

Lessons:

- If an employee displays performance problems, address issues as they arise, and DOCUMENT;
- Be sure that an employee's performance review (and accompanying raises) are consistent with the employee's performance;
- Don't let an employee down easy. Be honest in your communication to the employee regarding the reason for the employment action at issue. Failure to be honest can raise an inference of discriminatory motive down the road.

Subordinate Bias Tainted Termination Decision

EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476 (10th Cir. 2006), cert. granted, 127 S.Ct. 852 (January 5, 2007), cert. dismissed, 127 S.Ct. 1931 (April 12, 2007)

Factual Background

BCI Coca-Cola Bottling discharged Stephen Peters, an African American merchandiser, for insubordination in connection with his supervisor's request that he report to work on his day off. According to his supervisor, Mr. Peters argued with the supervisor's directive and then failed to show up for work on the date in question. The supervisor communicated this information to the Company's human resources manager, who subsequently made the decision to terminate Mr. Peters' employment. The human resources manager worked in a different city, had never met Mr. Peters, and did not know his race. In making the termination decision, the human resources official relied almost exclusively on information provided by Mr. Peters' supervisor, who had a history of treating African American employees unfavorably and of making disparaging racial remarks in the workplace. Mr. Peters filed a

discrimination charge with the EEOC, which filed suit on the Mr. Peters' behalf. The EEOC claimed that defendant discriminated against Mr. Peters on the basis of his race, as similarly situated Caucasian and Hispanic employees were treated less harshly, under similar circumstances.

The district court granted summary judgment in favor of defendant, as the human resources manager who terminated Mr. Peters' employment was not aware of his race and, hence, could not have engaged in intentional discrimination. However, the Tenth Circuit Court of Appeals reversed the district court, concluding that there was sufficient evidence to warrant a trial on the issue of whether the supervisor's alleged racially biased reports and recommendations to the human resources manager caused Mr. Peters' termination of employment.

Defendant appealed the Tenth Circuit's decision to the U.S. Supreme Court, but later withdrew its appeal. Defendant lost this case because:

- The human resources manager based her termination decision almost entirely upon the supervisor's recommendation;
- The manager did not conduct her own investigation. She did not interview witnesses regarding the insubordination incident, nor did she inquire into the supervisor's employment history.
- The manager did not ask Mr. Peters for his version of events.
- Although she reviewed Mr. Peters' employment file, and disciplinary history, she did not investigate the propriety of prior disciplinary action he had received.

Lessons:

- Decision-makers who are not directly involved in supervising employees at issue should independently investigate/verify the events surrounding a disciplinary decision.
- Such decision-makers should, at a minimum, speak to the employee involved, obtain his/her version of events, and investigate issues raised by the employee.
- Review the employee's personnel file for disciplinary history.
- Verify supervisor's version of events, to the extent possible.

FLSA UPDATE: AVOIDANCE OF CLAIMS OF WORKING “OFF-THE-CLOCK” AND OTHER IN-VOGUE WAGE AND HOUR MONEY TRAPS.

Presented by James G. Seaman and Ryan J. Siciliano
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 22, 2007

JAMES G. SEAMAN

James G. Seaman is a Member of the firm's Labor and Employment Department, where he concentrates his practice in the area of employment and labor law litigation and counseling. Prior to joining the firm in 1990, he worked for over 20 years with Fortune 500 companies in various human resource management positions.

Mr. Seaman's employment and labor practice involves the defense of employers in cases involving claims of Fair Labor Standards Act violations, employment discrimination, wrongful discharge, breach of employment contracts, and a variety of employment-related torts. He is also experienced in administrative proceedings relating to OSHA compliance and claims under state workers' compensation and unemployment compensation laws. On the litigation-prevention side, he advises employers on a wide array of matters, including hiring and discharge practices, prevention and defense of discrimination claims, wage and hour issues, labor contract interpretation and plant closing issues, matters relating to independent contractor status, restrictive covenants, contract employees (including leased employees) and other employment-related matters. He also drafts and reviews employment policies and handbooks, employment contracts and separation agreements.

Mr. Seaman graduated *cum laude* from Duquesne University School of Law, where he was a member of the Duquesne Law Review. He also earned his undergraduate degree and MBA from Duquesne University.

Mr. Seaman is admitted to practice law in Pennsylvania and before the U.S. District Court for the Western District of Pennsylvania, the U.S. District Court for the Eastern District of Michigan and the U.S. Court of Appeals for the First District. He is a member of the American Bar Association, the Pennsylvania Bar Association, and the Allegheny County Bar Association.



Pittsburgh Office
TEL 412.566.2580
FAX 412.566.6099
jseaman@eckertseamans.com

RYAN J. SICILIANO

Ryan J. Siciliano is an Associate in the firm's Labor and Employment Department. Mr. Siciliano focuses his practice on the litigation of employment related matters before administrative agencies, state courts and federal courts. Mr. Siciliano's employment practice covers issues arising under Title VII of the Civil Rights Act, The Pennsylvania Human Relations Act, The Age Discrimination in Employment Act, The Americans with Disabilities Act, The Rehabilitation Act, as well as other federal and state employment laws. Mr. Siciliano regularly counsels clients with respect to employment related matters, and conducts training seminars for human resources and management personnel regarding employment related issues.



Pittsburgh Office
TEL 412.566.2839
FAX 412.566.6099
rsiciliano@eckertseamans.com

Mr. Siciliano earned his law degree, *magna cum laude*, from Duquesne University School of Law in 2002 and his undergraduate degree, *summa cum laude*, from Duquesne University in 1999. He is admitted to practice in Pennsylvania and before the U.S. District Court for the Western District of Pennsylvania.

FLSA UPDATE: AVOIDANCE OF CLAIMS OF WORKING "OFF-THE-CLOCK" AND OTHER IN-VOGUE WAGE AND HOUR MONEY TRAPS

I. Working "Off The Clock" and Best Practices For Avoiding Liability

- A. Basic FLSA overtime requirements
 - 1. Hours worked in excess of forty must be compensated at 1.5 times the employee's regular rate of pay (unless the employee is subject to an exemption)
 - 2. Employers are required to maintain records regarding hours worked and compensation paid
- B. What does it mean to work "Off the Clock"
 - 1. Working "off the clock" includes:
 - a. Working through lunch breaks
 - b. Coming in early and beginning work
 - c. Working late
 - d. Working from home
- C. What Constitutes Compensable Work: The U.S. Supreme Court's Decision in *IBP v. Alvarez*
 - 1. Underlying Facts in *Alvaraz*
 - a. Employees working at a meat processing plant were required to wear safety gear before working in the production area
 - b. The employees would put on ("don") the safety gear before working in the production area, and take off ("doff") the safety gear after working in the production area
 - c. The employees sought compensation for the time spent "donning" and "doffing" the safety gear
 - 2. Basic Rules Applied by the Supreme Court

- a. Compensable work is time spent performing the “principal activity or activities” comprising the employee’s job
 - b. The term “principal activity or activities” embraces all activities which are an “integral and indispensable” part of the employee’s work
 - c. Generally, compensable time is calculated from the time the employee “commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday”
 - d. Activities that are preliminary and postliminary to the principal activities are not compensable
 - e. *De Minimus* time need not be compensated
3. The Supreme Court’s Holding
- a. The time spent “donning” and “doffing” required protective gear was compensable
 - b. The time spent walking between the locker room (where the safety gear was “donned” and “doffed”) and the production line was compensable
 - c. Time spent waiting to “don” protective gear in the morning was not compensable – it occurred before the first principal activity, which was actually putting the safety gear on. However, time spent waiting to “doff” the protective gear was compensable, as it occurred prior to the last principal activity, which was taking the safety gear off.
4. Examples of Compensable vs. Non-compensable Activities
- Driving from home to the worksite is not a compensable activity – it is “preliminary” to the principal activity. *Note: Such travel time can be compensable if it is combined with an indispensable activity (such as transporting a necessary piece of equipment) or if there is a contract, custom or practice to treat such time as compensable*
 - Driving home from the worksite is not compensable – it is “postliminary” to the principal activity. *Note: If the employee is required to perform certain tasks for the employer en route home, such as regularly taking packages to a post office, the time associated with performing said tasks may be compensable*
 - Walking from the parking lot to the location of the initial principal activity is not compensable – it is “preliminary” to the principal activity

- Where employees travel from home to a central reporting location, and then travel from the reporting location to individual job sites, the time spent traveling to the individual job sites can be compensable
- Where an employee works from home, time spent traveling from the employee's home to various delivery points (to pick-up/drop-off materials, deliver finished goods, etc.) is compensable

D. Why has the "Off the Clock" issue been in the news recently?

1. The FLSA requires that employees be paid for all compensable hours worked, whether on or "off" the clock
2. Employers may fail to realize that, if a non-exempt employee is starting work early, working through lunch, or working from home, the employee is entitled to compensation for those hours worked, assuming the employer knew, or reasonably should have known, that the employee was performing the "off the clock" work. If those hours place the employee over forty for the week, the employee is entitled to overtime.
3. Many companies have been confronted with "off the clock" lawsuits recently, resulting in multi-million dollar recoveries for employees

E. Recent FLSA "Off the Clock" Cases

1. March 2007: Albertsons, Inc. (a grocery store chain) agreed to a \$53.3 million settlement to resolve "off the clock" allegations raised by current and former employees
2. February 2007: Coca-Cola Bottling Co. of L.A. (a subsidiary of Coca-Cola Enterprises) agreed to pay \$14 million to settle a class action lawsuit brought by hourly employees claiming to have worked "off the clock"
3. March 2007: Canine officers working for the Dept. of Homeland Security were entitled to overtime and liquidated damages for unpaid hours worked "off the clock." The canine officers trained dogs to detect contraband. Part of the training process involved coating towels with materials to make them smell like contraband. After each training session, the officers were responsible for washing the towels. This could result in an officer washing up to 50 towels per week. The washing had traditionally been performed "off the clock" at the officer's home. The officers brought suit under the FLSA seeking compensation for this "off the clock" work. Six officers went to trial and won \$290,000 in overtime and liquidated damages.

Note: Basic Canine Officer Rules – Employers are required to compensate dog handlers for off-the-clock time spent caring for and maintaining the dogs. *See Albanese v. Bergen County, N.J.*, 991 F. Supp. 410, 420 (D.N.J. 1998) (“the Court finds that [the officers] off the clock time [spent] caring for and maintaining the dogs is integral and indispensable to their principal activities and was performed for defendants’ benefit”). Compensable activities include grooming, cleaning, exercising, feeding and training the dogs.

While employees must typically be compensated for the actual hours they work, special rules exist for canine officers. A canine officer may be compensated for dog care activities at an agreed-upon hourly rate (which may differ from the rate of pay received for regular law enforcement activities) and based on a reasonable approximation of the amount of time spent caring for and maintaining the dog. However, the reasonable approximation must reflect actual time spent, and cannot be a number “pulled out of thin air.” *See Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 441-42 (D.N.J. 2001); DOL Wage & Hour Opinion, 1993 WL 9011171 (Aug. 11, 1993).

F. Best Practices for Avoiding “Off the Clock” Issues

- Maintain clear policies regarding the manner in which time worked is tracked
- Instruct employees (through distribution of written policies, handbook procedures, etc.) that they are not to work “off the clock”
- Instruct employees (in writing) that all hours worked must be recorded
- Instruct employees (in writing) that overtime may only be worked if approved by management
- Have employees acknowledge (in writing) the aforementioned policies governing hours worked
- Have employees sign off on their hours worked (daily or weekly) – Include language indicating that, by verifying the recorded hours, the employee is acknowledging that he or she has not worked hours other than those recorded

II. Salary Basis Test – How Employees Lose Exempt Status under the FLSA and Best Practices for Maintaining Exemptions

- A. Big Picture. Three basic “tests” for exempt status: Salary Test (\$455 / week); Duties Test (Executive, Administrative, Professional, etc.); Salary Basis Test (how is the employee paid)
- B. Salary Basis Test. Predetermined amount not subject to reduction based on quality or quantity of work performed. 29 C.F.R. 541.602

Exceptions: Under the regulations, an employer may reduce an exempt employee’s pay without forfeiting the exemption in certain limited circumstances, including the following:

1. Full Day Absences for Personal Reasons. Deductions from pay may be made when an employee is absent for one or more **full days** for personal reasons, other than sickness or disability. 29 C.F.R. 541.602(b)(1)
2. Absences of one or more **full days** for sickness or disability where the employer has a plan, policy or practice of providing compensation for loss of salary resulting from sickness or disability. For example, if you maintain a short term disability policy that provides compensation to employees who miss work due to disability, and an employee goes out on disability leave (and is therefore compensated under the policy), you need not pay the employee’s salary for full days missed due to the disability. Also applies if salary replacement benefits are provided under state workers’ compensation law. In short, employee is not entitled to collect twice.
3. Absences due to FMLA Leave. An employer is not required to pay the full salary of an exempt employee who takes unpaid leave under the FMLA. Rather, the employer may deduct for time spent on FMLA leave. Unlike the other exceptions noted in the regulations, the FMLA leave exception allows the employer to deduct for partial day absences. For example, if an employee who usually works 40 hours per week takes four hours of unpaid leave under the FMLA, the employer may deduct 10% of the employee’s normal salary.
4. Deductions for violating workplace rules. Employers may dock an employee’s pay for violating workplace safety rules “of a major significance.” Employers may also make deductions for disciplinary suspensions of one or more full days for violating written workplace conduct rules, as long as such rules are applicable to all employees.
5. While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee for jury

fees, witness fees or military pay for a particular week against the salary due for that particular week without losing the exemption.

6. An employer is not required to pay an employee's full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of the employee's full salary for the time actually worked in the first and last week of employment.

C. What happens if the employer makes improper deductions from the pay of exempt employees? – *The employer loses the exemption.*

1. Who loses the exemption? If the exemption is lost, it is lost for all employees "in the same job classification" and working for the "same manager" responsible for the actual improper deductions. In other words, the exemption is lost for *categories of employees* – not *individual* employees. This means the exemption may be lost for individuals who never experienced a deduction in their pay – as long as they are in the same job category and working for the same manager as the individual who experienced the improper deduction.

2. For how long is the exemption lost? In terms of time period, the exemption is lost for the period of time during which the improper deductions were made. This means all the employees in the same job category and working for the same manager are now entitled to overtime pay.

3. What constitutes an improper deduction? The regulations focus on the "intent" of the employer, as evidenced by the employer's payroll practices. According to the regulations, if the employer "did not intend" to pay the employees on a salary basis, the exemption is lost. The regulations go on to explain that an "actual practice" of making improper deductions demonstrates that the employer "did not intend" to pay the employee on a salary basis.

4. What constitutes an "actual practice" depends on the facts of the case, including i) the frequency with which the improper deductions are made, ii) the time period over which the improper deductions are made, iii) the number and geographic locations of employees subjected to improper deductions, iv) the number of managers responsible for making the improper deductions, and v) whether the employer has a policy prohibiting the improper deductions.

5. Regulations focus on Intent. "Intent" is based on intention to make the deduction – not necessarily intention to violate the law.

D. Inadvertent or isolated improper deductions will not result in the loss of the exemption – provided the employer reimburses the employees.

E. The Safe Harbor Provision: Clearly Communicated Policy plus Reimbursement.

1. If the employer has a “clearly communicated policy” that prohibits improper pay deductions from exempt employees – and if that policy includes a complaint procedure – the exemption will not be lost, provided the employer reimburses the employees who are improperly docked.
2. If the employer fails to reimburse the employees or continues to make improper deductions after receiving employee complaints, the exemption is lost – *i.e.*, the employer cannot take advantage of the safe harbor.
3. The best evidence of a “clearly communicated policy” is a written policy distributed prior to the improper deduction being made (by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook, or publishing the policy on the employer’s intranet).

F. Best Practices to avoid losing the exemption.

- Adopt and maintain a “no improper deductions” policy – the policy should explain that exempt employees are to be paid their full salaries regardless of hours actually worked, subject to the exceptions noted in the regulations (*i.e.*, full day absences for personal reasons, FMLA leave, *etc.*)
- Make the policy accessible – Preferably, you should distribute the policy directly to employees (either by way of a handbook or some other publication) and the employees should acknowledge receipt of the policy
- Make sure the policy contains a complaint mechanism – the policy needs to state that, should an employee have a question about compensation, they should contact human resources or some other individual within the organization
- Train your staff – educate staff about the “salary basis” requirements for exempt employees; train managers that exempt employees should not be subjected to deductions in pay based on hours worked, especially when it comes to partial day absences
- If you discover an improper deduction, reimburse the employee and rectify the problem
- Direct the employee and/or manager to the “no improper deductions” policy

**WORKERS' PRIVACY PROTECTION VERSUS WORKPLACE
SAFETY – A HEAVYWEIGHT POLICY CONFLICT.**

Presented by Christina I. Kepplinger and Kimberly A. Craver
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 22, 2007

CHRISTINA I. KEPPLINGER

Christina I. Kepplinger is an Associate in the firm's Labor and Employment Department. Ms. Kepplinger focuses her practice on representing management clients in labor and employment matters. Ms. Kepplinger's employment practice covers issues arising under Title VII, the Pennsylvania Human Relations Act, the Americans with Disabilities Act, the Rehabilitation Act, the Family and Medical Leave Act, and the Age Discrimination in Employment Act, as well as various state employment laws.



Pittsburgh Office
TEL 412.566.2456
FAX 412.566.6099
ckepplinger@eckertseamans.com

Ms. Kepplinger has represented employers before state and federal courts and administrative agencies, such as the Equal Employment Opportunity Commission, the Pennsylvania Human Relations Commission, and the City of Pittsburgh Commission on Human Relations. Ms. Kepplinger also has significant experience representing employers at evidentiary hearings regarding claims for unemployment compensation benefits. She also has experience defending employers when unsuccessful claimants appeal to the Unemployment Compensation Board of Review and the Commonwealth Court of Pennsylvania

Ms. Kepplinger received her undergraduate degree from the University of Virginia and her law degree from the Dickinson School of Law of The Pennsylvania State University where she was a member of the National Trial Competition Team, received the Order of the Barristers Distinction and earned a Certificate in Advocacy and Dispute Resolution. She was also the Director of Records of Project S.T.A.F.F., a community service organization, and a member of the Miller Center for Public Interest Advocacy.

Ms. Kepplinger is admitted to practice before the U.S. District Court for the Western District of Pennsylvania; the U.S. Court of Appeals for the Third Circuit in addition to all Pennsylvania State Courts and the United States District Court for the Northern District of Ohio.

KIMBERLY A. CRAVER

Kimberly A. Craver is an Associate in the Litigation Division. She focuses her practice on labor & employment matters including defending public and private employers in employment litigation cases before federal and state courts, and representing clients before the EEOC, Pennsylvania Human Relations Commission and the Pittsburgh Commission on Human Relations. Ms. Craver regularly counsels employers on issues such as employee discipline, personnel policies, employee handbooks, wage and hour laws, harassment, and related employment issues.



Pittsburgh Office
TEL 412.566.2582
FAX 412.566.6099
kcraver@eckertseamans.com

Ms. Craver earned her law degree, *magna cum laude*, from the University of Pittsburgh School of Law in 2002 where she was elected to Order of the Coif and was a member of the *Law Review*. She earned her undergraduate degree, *summa cum laude*, in Anthropology and Psychology from the University of Pittsburgh in 1999.

Ms. Craver is a member of the Pennsylvania and Allegheny County Bar Associations. She is admitted to practice in Pennsylvania.

WORKERS' PRIVACY PROTECTION V. WORKPLACE SAFETY A HEAVYWEIGHT POLICY CONFLICT

Presented by:

Christina I. Kepplinger and Kimberly A. Craver

I. Employee Hiring- Hidden Dangers & The Importance of Background Checks

Hidden Dangers of a Bad Hire

- Possible liability for negligent hiring or retention
- Workplace violence
- Employee theft and fraud
- Replacement costs
- Damage control
- Cost of firing
- Can reflect poorly on person who recommended the hire

Importance of Background Checks

- Used by many employers and important to minimize the dangers listed above.
- Conducting a background check can provide a defense to a negligent hiring lawsuit because the employer did its “due diligence.”
- However, due to employee privacy rights, employers must be careful.

Fair Credit Reporting Act

- Fair Credit Reporting Act (“FCRA”) applies when an employer uses an outside agency known as a Consumer Reporting Agency to conduct a background check.
 - A Consumer Reporting Agency is “any person or entity, which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing reports to third parties.”
 - A Consumer Report is defined as “any report containing information about an individual’s personal and credit characteristics, character, general reputation, and lifestyle.” Consumer reports can include credit payment records, driving records, criminal histories, and reference checks.

- Penalties for violating the FCRA can be high and may include attorney's fees, punitive damages, nominal damages, and jail time.
- The FCRA in four easy steps:
 1. Employer must certify to the Consumer Reporting Agency that it will:
 - Use the information for employment purposes only.
 - Not use the information in violation of Federal or state equal opportunity law.
 - Obtain all necessary disclosures and consents.
 - Give the appropriate notices in the event an adverse action is taken.
 - Give the additional information required by law if an Investigative Consumer Report is needed.
 2. Written Release and Disclosure
 - Employer must obtain written consent from the applicant
 - Employer must provide the applicant with a clear and conspicuous written disclosure that a background report may be requested.
 - The disclosure must be given in a stand-alone document (i.e., it cannot be part of the employment application).
 3. Pre-Adverse Action Notice
 - Must give copy of consumer report to applicant; and
 - Must give copy of the FTC document "A Summary of Your Rights Under the Fair Credit Reporting Act" to the applicant.
 - This notice gives the applicant time to review, reflect, and respond to the report.
 4. Notice of Adverse Action
 - Must again give applicant copy of A Summary of Your Rights Under the Fair Credit Reporting Act."
 - Must inform them that decision was based, in part, on Consumer Report.
 - Must inform applicant that they may obtain a free copy of the Consumer Report within 60 days.
 - Must inform applicant that they have the right to dispute the information contained in the report that they believe to be inaccurate or incomplete.

Fair and Accurate Credit Transactions Act

- The Fair and Accurate Credit Transactions Act amended the FCRA to exclude from the definition of Consumer Report communications made to employers in connection with investigations of suspected employee misconduct, compliance with Federal, state, or local

- laws and regulations, preexisting written policies of employer, and/or rules of a self-regulatory organization.
 - This means that you may hire outside consultants, investigators or law firms to conduct an investigation without first notifying the target.

Criminal History

- In Pennsylvania, employers cannot inquire into arrests not resulting in conviction or records that have been annulled or expunged.
- Employers may request felony and misdemeanor conviction records only if reasonably related to job qualifications.
- Applicant must be informed if failure to hire is based upon criminal history.

EEOC's E-RACE Initiative

- E-RACE stands for Eradicating Racism And Colorism from Employment.
- As part of this initiative, the EEOC is taking a closer look at facially neutral employment criteria, such as arrest and conviction records, which may disparately impact certain individuals.

II. Electronic Communications Policies

- While it seems attractive, outright prohibition on personal use of e-mail and the internet is not a great idea.
 - It is difficult, if not impossible to enforce.
 - It may violate the National Labor Relations Act.
 - It can lead to claims of discrimination.
- Employers should adopt a carefully worded electronic communications policy that, at the very least, includes the following provisions:
 - The employer owns the computer system, including the equipment, software and operating systems, the network, and Internet related accounts providing e-mail and Internet browsing.
 - Employee communications and personal information created or stored on the employer's network is the property of the employer; employees have no expectation of privacy in any matter created or stored on the employer's network.
 - Employer reserves the right to monitor network and Internet-related systems use by employees.
 - Reasonable personal use of the network and Internet-related systems is permitted.

- The employer's harassment policy applies to the use of the employer's computer system.
- Violations of the policy can lead to discipline, up to and including discharge.

III. Employee Surveillance

- Employees have no expectation of privacy in the workplace; beyond videotaping of bathrooms and dressing rooms, any surveillance is generally permissible. **Note:** Employers may have bargaining obligations if a union is involved.
- Electronic monitoring of employees can implicate both state and Federal laws.
- Electronic Communications Privacy Act of 1986 ("ECPA")
 - Generally prohibits intentionally intercepting wire, oral or electronic communications (which include telephones, cell phones, voice mail, e-mail and Internet use), or intentionally disclosing or using any information obtained through such interception.
 - Three important exceptions:
 1. The Provider Exception- exempts from coverage employers who are the providers of their workplace e-mail system.
Note: Excludes intra-company e-mail systems unless the systems connect to a greater inter-state network.
 2. Prior Consent- gives an employer the ability to monitor if it has the consent of at least one party to a communication.
Note: In certain circumstances, consent may be implied.
 3. Business Use Exception- allows for monitoring by electronic service providers or their agents in the ordinary course of business.
Note: Can apply to monitoring of office telephone systems.
- Pennsylvania Wiretapping and Electronic Surveillance Control Act
 - Similar to ECPA in all respects except that an employer cannot apply the consent exception unless all parties to the conversation provide their consent.
- Neither the ECPA nor the Pennsylvania statute directly prohibits an employer from receiving stored data, such as e-mail or records relating to web sites visited.
- Examples of Employee Surveillance:
 - Video Cameras in the workplace.
 - Use of Radio Frequency Identification (RFID) in hospitals.
 - Use of GPS.

IV. Drugs and Alcohol in the Workplace

- Amongst employers there is a commitment to maintaining a safe and healthy work environment free from substance abuse, drugs and alcohol.
- Employers can prohibit the use, possession, sale and distribution of alcohol, drugs or other controlled substances.
- There is no central federal law controlling drug testing for private employers generally. There is federal legislation governing employees in transportation. In addition, employers who have contracts with the federal government may have to comply with the requirements of the Drug-Free Workplace Act of 1988. **Note:** For employers with organized employees, an employer must bargain with the union prior to implementing or making changes to an existing drug and alcohol policy.
- Pennsylvania does not have a statute governing drug testing by employers. Half the states do have legislation governing employment drug testing.
- The Americans with Disabilities Act (ADA)
 - Provides for the adoption and administration of reasonable policies and procedures regarding drug testing. 42 U.S.C. § 12210(b).
 - Though alcoholism is not a per se disability, the ADA may protect active alcoholics assuming there is an interference with a major life activity.¹
 - An individual “currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use” is not a “qualified individual with a disability” protected by the ADA. 42 U.S.C. § 12210(a).
 - The following individuals may be entitled to protection under the ADA:
 1. An individual who has completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or who has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;
 2. An individual who is currently participating in a supervised drug rehabilitation program and is no longer engaging in illegal use; or
 3. An individual who is erroneously regarded as engaging in the illegal use of drugs but is not.
- Drug and Alcohol Testing can be performed in Pennsylvania in the following circumstances:

¹ Employers can hold alcoholics and others impaired by unlawful drug use to the same performance standards as those expected of other employees.

- Pre-employment
- Post-accident
- When reasonable suspicion exists
- On a random basis
- Good employer practices:
 - Have a written policy that is distributed to all employees and ensure that all employees acknowledge receiving the policy in writing.
 - The written policy should cover on or off the job usage of drugs or being at work with a detectable trace amount of drugs or alcohol in their systems.
 - Treat employee incidents with confidentiality.
 - Managers should document any employee incident.
 - Treat all employees equally and consistently, do not drug test on the basis of stereotypes or prohibited classifications.
 - If utilizing random drug testing, actually test randomly.
 - If you offer Employee Assistance Programs or rehabilitation services, offer them to all employees consistently.
- Drug and Alcohol Policies should contain the following:
 - The employers position on drug and alcohol abuse. For example:

The Company is committed to maintaining a safe and healthy work environment free from substance abuse.
 - An explanation of the consequences for an employee using, selling, or possessing drugs or alcohol in the workplace. For example:

An employee found violating this policy will be subject to immediate termination.
 - Circumstances under which an employee may be tested.
 - Written acknowledgment of receipt by the employee.
 - Consequences for refusal to undergo testing.
- Employee Assistance Programs (EAPs) are employer-sponsored programs offered to employees to help employees resolve personal problems that may adversely impact their work performance, conduct, health and well-being.
 - An EAP can assist employees in identifying the proper source of treatment.
 - Some employers offer EAP services to their employees as part of their Substance Abuse Policy.

VI. Workplace Searches

- Employees have no expectation of privacy in the workplace. **Note:** Members of a bargaining unit have different rights and protections than an unrepresented employee.
- The United States Constitution provides for a right to privacy and prohibits unreasonable searches, but these protections do not extend to the workplaces of private employers.
- Nonetheless, courts balance the employer's justification for the search against the worker's reasonable expectation of privacy.
 - An employer with a valid, strong, and work-related reason for searching has the best chance of prevailing in the challenge to the search.
 - The more steps an employer takes to diminish workers' expectations of privacy and the stronger the employer's reason to search, the more likely an employer is to prevail.
 - An employee who legitimately expects, based on the employer's policies, past practice, and common sense, that the employer will not search certain areas has the strongest chance of prevailing when challenging a search.
- Considerations when deciding whether to search:
 - Search only if necessary and have a justifiable, legitimate business reason to do so.
 - If possible, before searching rule out alternatives and narrow the possibilities.
 - Have a written policy which sets forth what areas could be subject to search. This lowers employees' expectation of privacy in these areas.
 - Except in unusual circumstances, do not conduct random searches.
 - Do not search an employee's body.
 - Restrooms and changing rooms should not be monitored.
 - Do not hold employees against their will.

**NEWS YOU CAN USE: REVIEW OF RECENT JUDICIAL AND
LEGISLATIVE DEVELOPMENTS OF SIGNIFICANCE TO
EMPLOYERS.**

Presented by John J. Myers and Patrick Kilker
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 22, 2007

JOHN J. MYERS

John J. Myers is a Member of the firm and Chairman of the Labor and Employment Department and member in the Litigation Division. Since joining Eckert Seamans in 1976, Mr. Myers has focused his practice on labor and employment litigation and counseling. He has defended employers throughout the country in cases involving claims of employment discrimination, wrongful discharge, ERISA violations, breach of employment contracts, minimum wage and overtime pay violations, and a variety of employment-related torts. He is also experienced in restrictive covenant and trade secret misappropriation litigation.

On the litigation prevention side, Mr. Myers counsels employers regarding employee terminations, EEO compliance, wage and hour issues, plant closings and other employment related issues. He also drafts and reviews employment policies and handbooks, employment contracts, welfare benefit plans, and individual or group exit incentive programs.

Mr. Myers is a member of the labor and litigation sections of the Pennsylvania, Allegheny County and Federal Bar Associations. He is a panelist for the American Arbitration Association and a member of the Bars of the U.S. Supreme Court, the Pennsylvania Supreme Court, the U.S. Courts of Appeal for the Third, Fourth and Seventh Circuits and several U.S. District Courts.

Mr. Myers received his law degree from Tulane University in New Orleans, Louisiana, where he was associate editor of the Tulane Law Review and an honors graduate. He is a member of the Order of the Coif. A native of Lancaster, Pennsylvania, he received his undergraduate degree from Franklin & Marshall College in Lancaster.

Mr. Myers holds an AV[®] rating from Martindale-Hubbell.



Pittsburgh Office
TEL 412.566.5900
FAX 412.566.6099
imyers@eckertseamans.com

PATRICK F. KILKER

Patrick F. Kilker is a Member in the Labor and Employment Department. He has represented private and public sector clients in state and federal courts, arbitration and before federal and state agencies in all aspects of labor and employment law.

Mr. Kilker has defended management clients against hundreds of employment discrimination claims in federal and state courts and before federal, state and local enforcement agencies including, but not limited to disability discrimination and claims of sexual and racial harassment. Additionally, he has defended employers against "Section 1983" claims, constitutional civil rights claims, workers' compensation and unemployment compensation claims, employee benefits claims and common law claims, including claims for breach of express or implied employment contracts, wrongful discharge, defamation, intentional infliction of emotional distress and invasion of privacy.

Pittsburgh Office
TEL 412.566.6050
FAX 412.566.6099
pkilker@eckertseamans.com

On a daily basis, he provides counseling to clients to address matters involving potential discrimination claims with an eye toward avoiding costly litigation, where possible. Mr. Kilker also devotes a great deal of his practice to conducting employee training for clients to prevent claims of racial and sexual harassment and in the area of union avoidance and to conducting compliance reviews of clients' employment practices.

Mr. Kilker also has broad experience in matters involving labor unions. He regularly assists employers in combating union-organizing efforts and in unfair labor practice proceedings before state and federal labor boards and courts. He also has extensive experience representing clients in collective bargaining negotiations.

He received his law degree from Duquesne University School of Law. He graduated from John Carroll University with a B.A. in Classics, and received an M.B.A. degree from Youngstown State University.

Prior to completing his law degree, Mr. Kilker gained experience in the human resources and labor relations field while employed with several Fortune 500 corporations. He is a member of the Pennsylvania and Allegheny County Bar Associations and their respective Labor and Employment Law Sections.

Employee suffered an injury which now requires her to use a wheel chair. This did not affect her work, as she had a desk job which did not require that she be mobile. However, after returning to work from medical leave, she was given an overall rating on her performance evaluation of “Meets Expectations.” She had always been rated as “Exceeds Expectations” before her injury. Assuming that this employee can prove that her evaluation was lower because of her disability, does she have a viable disability claim under the ADA?

Probably not. The ADA prohibits discrimination based upon disability in an employee’s “compensation, terms, conditions, or privileges of employment.” An adverse action about which an ADA plaintiff complains must be sufficiently serious as to affect a term or condition of employment. Most of the courts that have considered the issue have held that a less than favorable performance evaluation is not, in and of itself, an “adverse employment action.” *Tuttle v. Metropolitan Government of Nashville*, 474 F. 3d 307 (6th Cir. 2007); *Hughes v. Stottlemire*, 454 F. 3d 791 (8th Cir. 2006). A poor evaluation must be directly related to some more tangible harm, such as a reduced pay raise, to amount to an adverse employment action. *Gillis v. Georgia Dep’t of Corrections*, 400 F. 3d 883, 888 (11th Cir. 2005) (“an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII.”).

Courts have held that written reprimands or warnings do not constitute adverse employment actions. *Davis v. Town of Lake Park*, 245 F. 3d 1232, 1238 (11th Cir. 2001); *Krause v. City of La Crosse*, 246 F. 3d 995 (7th Cir. 2001)(Letter of reprimand is not adverse employment action). Transfers or relocations without loss of pay are often held not to amount to an adverse employment action. *Mackey v. Shalala*, 360 F. 3d 463 (4th Cir. 2004); *Williams v. R.H. Donnelley Corp.*, 368 F. 3d 123 (2d Cir. 2004) (denial of transfer not adverse employment action); *Policastro v. Northwest Airlines, Inc.*, 297 F. 3d 535 (6th Cir. 2002)(transfer necessitating long commute was not an adverse employment action); *Currier v. Postmaster General*, 304 F. 3d 87 (D.C. Cir. 2002). Shift changes are not adverse employment actions. *Griffin v. Potter*, 356 F. 3d 824 (7th Cir. 2004). Being put on a paid leave pending an investigation is not an adverse employment action. *Joseph v. Leavitt*, 465 F. 3d 87 (2d Cir. 2006); *Singletary v. Mo. Dep’t of Corrections*, 423 F. 3d 886, 889 (8th Cir. 2005). Being given the “cold shoulder” treatment is not an adverse employment action. *McKenzie v. Milwaukee County*, 381 F. 3d 619 (7th Cir. 2004)

Same facts, but after returning to work, Employee complained that her disability was not being accommodated, causing her to work harder. After making this complaint, Employee receives a lower evaluation. Assuming that she can prove that her evaluation was lower in retaliation for her complaint, does she have a viable retaliation claim under the ADA?

She might have. In the case of *White v. Burlington Northern & Santa Fe Railway Co.*, 126 S. Ct. 2405 (2006), the Supreme Court held that the provision in Title VII that prohibits retaliation is

broader in scope than the provision that prohibits discrimination based upon a protected classification.

Whereas the substantive provisions of Title VII, the ADEA, the ADA and other employment discrimination laws prohibit discrimination in a term or condition of employment, the retaliation prohibition in those statutes state that it is unlawful:

“for an employer *to discriminate* against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[emphasis added] The words “to discriminate” are not limited to discrimination in a term or condition of employment, the Court noted, and so it is incorrect to limit claims to those that involve an “adverse employment action” as the courts had defined that term. An actionable wrong, according to the Supreme Court is *anything that would dissuade a reasonable employee from asserting his or her rights, considered in the context of the particular employment situation*. Ms. White suffered adverse employment actions, the Court held, in that she was moved to a less desirable job and suspended without pay for 37 days, even though she was reinstated with back pay. On the other hand, the Court said that the law is not intended to provide a remedy for “petty slights, minor annoyances, and simple lack of good manners.” Since the ADA and other laws prohibiting retaliation are wording similarly to Title VII, the *White v. Burlington* decision will affect retaliation claims under those laws as well as Title VII.

What does this mean to you as an employer? If you are unfortunate enough to be the defendant in a retaliation case, it will be more difficult for you to have the case thrown out on the ground that the plaintiff did not suffer an adverse employment action. The issue of whether the employer’s action was something that would dissuade a “reasonable employee” from engaging in protected conduct is going to be decided in most cases now by a jury after a trial. In terms of what you should do in dealing with a problem employee who has engaged in protected activity, however, there is no change. You still win or lose your case based upon the plausibility and provability of your explanation as to why you acted as you did. As has always been the case, having a clear and believable explanation for your actions, with appropriate documentation, is the key to defending claims of retaliation.

May an employer require an employee to substitute accrued paid vacation, personal, or family leave for FMLA leave where the employee is receiving disability benefits from a health and welfare benefit plan while on FMLA leave?

An employer is not required under the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601, *et seq.*, to pay an employee while the employee is on FMLA, and the employer is free to

require the employee to substitute accrued paid vacation leave, personal leave, or family leave for unpaid FMLA leave.

In the case of *Repa v. Roadway Express, Inc.*, 477 F.3d 938 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit addressed the employer's right to require an employee to substitute accrued paid leave for FMLA leave. In that case, Roadway employee Alice Repa suffered a non-work-related injury that required surgery and a six-week absence from work. She applied for, and was approved for, disability benefits in the amount of \$300 per week for six weeks from the administrator of the multiemployer health and welfare fund, to which Roadway was required under the terms of a collective bargaining agreement to make contributions. At the same time, Repa requested, and was granted, FMLA leave by Roadway. Roadway notified her that she was required to substitute her accrued paid sick and vacation leave for her FMLA leave. When Repa returned to work following her leave of absence, Roadway paid her for five days of sick leave and two weeks of vacation. Repa was paid this amount in addition to the \$300 per week which she had received from the multiemployer health and welfare fund.

Repa filed a lawsuit against Roadway, claiming that Roadway had violated the FMLA by requiring that she substitute accrued paid sick and vacation leave for her FMLA leave. Based on FMLA Regulation 29 C.F.R. § 825.207(d)(1), Repa argued that, because she was receiving disability benefits from the multiemployer fund while she was on leave, the FMLA provision which permits employees to require substitution of accrued paid leave for unpaid FMLA leave did not apply to her situation.

In response, Roadway argued that the Regulation which Repa relied upon did not apply because it prohibited the substitution of paid leave only where an employee was receiving disability benefits for the birth of a child. Roadway also argued that the substitution of paid vacation and sick leave, which Repa had accrued under Roadway's policies, for unpaid FMLA leave was permitted under the FMLA Regulation because the disability benefits which Repa had received were not from an employer disability plan.

The Court determined that Roadway was not permitted to require that Repa substitute her accrued paid vacation or sick leave for her FMLA leave. The Court explained that the right of an employer to require substitution of accrued paid vacation, personal or family leave for FMLA leave was limited in this case by an FMLA Regulation, 29 C.F.R. § 825.207(d)(1), which provides:

Disability leave for birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer

may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

That same Regulation also provides: "As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable." 29 C.F.R. § 825.207(d)(2).

The Court rejected Roadway's first argument, that the Regulation applied only to disability leave for the birth of a child, since only the first sentence of the Regulation referenced disability leave for the birth of a child, and the remaining sentences in the Regulation referenced temporary disability plans. The Court rejected Roadway's second argument, that the Regulation also applied only to benefits paid by an employer's temporary disability plan and not to those paid by a third-party plan. The Court found no language in the Regulation providing for any such limitation.

Finally, the Court rejected Roadway's argument that the Regulation at issue was invalid because the effect of the Regulation was to provide an employee with more than twelve weeks of FMLA leave in one year, since Roadway had failed to raise that argument previously before the District Court.

The FMLA Regulations may be found on the Department of Labor's website at <http://www.dol.gov>.

ABC Corporation hires Sally Pinhead as a computer analyst, an exempt "computer professional job under the Fair Labor Standards Act." Ms. Pinhead is paid \$40.00 an hour for her services. She hears through the grapevine that the Company hired Joe Nerdlinger, a male, as an exempt "computer analyst" doing the same job as she was doing in the same office and is paying him \$45.00 an hour. Does Sally Pinhead have a viable Fair Labor Standards Act Claim against ABC Corporation?

No. Exempt computer professional employees are not covered by the federal Equal Pay Act. *Downes v. J.P. Morgan Chase & Co.*, ___ F. Supp. 2d ___ (S.D.N.Y. May 18, 2007)

The Equal Pay Act is codified in a section of the federal Fair Labor Standards Act (“FLSA”) which prescribes a minimum wage. 29 U.S.C. § 206 (d) The FLSA mandates minimum wages and premium pay for employees who work more than forty hours in a week, with several exemptions. The commonly cited and longstanding exemptions are, of course, of employees employed in executive, professional, administrative or outside sales capacities. In setting forth the exemption of these categories of jobs from the minimum wage and overtime pay provisions of the FLSA, the statute, 29 U.S.C. § 213 (a), specifically states that the exemption of these jobs does not apply to the Equal Pay Act provision in section 206 (d)(1). When Congress enacted the exemption for certain computer professionals, however, it simply stated that “[t]he provisions of section 206 ... shall not apply with respect to ... any employee” whose primary duty is to perform certain computer-related work. 29 U.S.C. § 213 (a)(17)

While the plaintiff in the case argued that this must have been an inadvertent omission by Congress, and that an employee’s right to gender equality should not depend upon the nature of her profession, the district court held that it was bound to apply the plain language of the statute.

Does an employer’s policy of not hiring applicants who have a criminal record of violent offenses violate Title VII of the Civil Rights Act of 1964 by having a disparate impact on minority applicants?

Title VII of the Civil Rights Act of 1964 prohibits employers from treating applicants for employment differently because of their membership in a protected class. Usually, the theory of liability relied upon by applicants to establish discrimination prohibited by Title VII is disparate treatment, which requires the plaintiff to demonstrate that the employer was motivated by discriminatory intent. Even where an employer is not motivated by discriminatory intent, however, Title VII prohibits an employer from using a policy which is “neutral” on its face but has an unjustified adverse impact on members of a protected class.

Facially neutral policies that prohibit hiring individuals with criminal convictions do not necessarily discriminate on the basis of race. In *El v. Southeastern Pennsylvania Transportation Authority* (“SEPTA”), 479 F.3d 232 (3d Cir. 2007), the United States Court of Appeals for the Third Circuit recently held that SEPTA’s policy against hiring applicants who have a record of violent criminal convictions did not violate Title VII.

In that case, King Paratransit Services (“King”) had a subcontract with SEPTA to provide paratransit services to passengers having mental and physical disabilities. King’s subcontract with SEPTA included a prohibition against King hiring anyone with a violent criminal conviction. King had conditionally hired Douglas El as a paratransit bus driver. One of the conditions of the employment offer which King made to El was the completion of a satisfactory criminal background check. King’s subcontract with SEPTA under which King provided paratransit services for SEPTA disallowed hiring anyone with a violent criminal conviction.

Shortly after El began his employment with King, King discovered that El had a criminal record involving a 40-year-old conviction for second-degree murder. On the basis of this conviction alone, El's employment with King was terminated.

El then brought a lawsuit, alleging that SEPTA's hiring policy discriminated on the basis of race in violation of Title VII. El argued that King's hiring policy had a disparate impact upon African Americans and Hispanics, because African Americans and Hispanics are more likely than Caucasians to have criminal records. SEPTA moved for summary judgment. The District Court granted SEPTA's motion and dismissed El's claims finding that SEPTA had proved that the hiring policy was justified by business necessity and that El had not proposed a satisfactory alternative policy. The District Court declined to grant SEPTA's motion for summary judgment on the grounds that El had not produced sufficient evidence that the policy at issue did, in fact, have a disparate impact. El then appealed the District Court's decision to grant summary judgment in favor of SEPTA to the Third Circuit Court of Appeals.

The Third Circuit Court of Appeals explained the two-step analysis which is to be followed in disparate impact cases. First, the plaintiff is required to show that the challenged policy discriminates against members of a protected class. If this requirement is met, then the employer can overcome the showing of such a disparate impact by demonstrating a manifest relationship between the policy and job performance. In other words, the employer must show that there was a valid business necessity for the policy. The Court requires employers to show that the discriminatory hiring policy accurately, even if not perfectly, ascertains an applicant's ability to perform the job in question.

The Court of Appeals also noted that, under Title VII, a plaintiff can still prevail despite an employer's successful assertion of business necessity, if the plaintiff can demonstrate that, despite the employer's successful assertion of business necessity, there is an "alternative employment practice" which serves the employer's legitimate goals as effectively as the challenged practice and which results in less of a disparate impact.

Perhaps because the District Court granted SEPTA's motion for summary judgment on other grounds, the Court of Appeals did not address SEPTA's argument before the District Court that El had failed to meet his burden of producing sufficient evidence that the policy did, in fact, have a disparate impact. Instead, the Court of Appeals focused on whether SEPTA had demonstrated that the policy was consistent with business necessity and whether El had produced evidence that there was an alternative policy which would have served SEPTA's goals but had less adverse impact.

In support of its summary judgment motion before the District Court, SEPTA had submitted the reports of three experts on recidivism of criminals. Two of the experts stated that former violent criminals who have been crime-free for many years are at least somewhat more likely than

members of the general population to commit a future violent act, thus supporting SEPTA's argument that a lifetime ban on individuals with violent criminal records was justified by business necessity. Expert testimony also included statements that disabled individuals are more likely than members of the general population to be victims of violent crimes, and, so, barring individuals with violent convictions is necessary to protect SEPTA's paratransit passengers, who include people with physical and mental disabilities.

El neither took the deposition of SEPTA's experts nor did he submit expert testimony to rebut their testimony. The Third Circuit concluded that a reasonable juror would necessarily find, based on the un rebutted expert testimony, that SEPTA's policy was consistent with business necessity and, therefore, did not violate Title VII. The Court also found that El failed to produce any evidence demonstrating that any alternative policy would have less of a disparate impact. The Court noted, however, that if El had produced evidence rebutting SEPTA's experts, the Court may have ruled otherwise. Had he, for example, hired an expert who testified that there is time at which a former criminal is no longer any more likely to recidivate than the average person, then there would be a factual question for the jury to resolve. Similarly, had El deposed SEPTA's experts and thereby produced legitimate reasons to doubt their credibility, there would be a factual question for the jury to resolve.

XYZ Company implemented a rotating-shift schedule for all warehouse employees, which consisted of two daily 12-hour shifts, one from 6:00 a.m. to 6:00 p.m. and the other from 6:00 p.m. to 6:00 a.m. Employees worked two days on and two days off, and worked alternating weekends. Every two weeks, the first and second shift workers rotated. Fred Smith has diabetes, and recently recovered from heart bypass surgery. He wears a pacemaker. His doctor advised XYZ that, in order to facilitate control of his blood sugar level, Fred had to work a straight day shift schedule. Accordingly, Fred asked that he be excused from shift rotation as an accommodation of his disability. The Company refused, so Fred lost his job rather than work rotating shifts. Does Fred have a viable ADA claim?

In the case of *Rehrs v. Iams Co.*, 2007 WL 1412316 (8th Cir. May 15, 2007), the court of appeals held that the ability to work a rotating shift was an essential function of the plaintiff's job, and that, since he could not rotate shifts, Rehrs was not a qualified individual and could not prevail on a claim of violation of the Americans With Disabilities Act.

An individual must be qualified for a job, despite his disability. To be qualified, the individual must be able to perform the essential functions of the job, with or without accommodation. An employee who cannot rotate shifts where the job requires rotating shifts clearly cannot do all of the functions of the job. There is no accommodation except permitting the person to work straight day shifts. So, the legal issue in this case was whether the ability to rotate shifts was an essential function of the Warehouse Technician job.

Essential functions are the fundamental job duties, not the marginal functions of a particular job.

Common considerations include: (1) the employer's judgment as to which functions are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement;² (6) the work experience of past incumbents in the job; and (7) the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2 (n)(3)

The decisive consideration in the *Rehrs* case was that, if the plaintiff were permitted to work straight days, another employee would have to work straight nights, or at the least other employees would have to work more night shifts. There were, however, other factors that went into the mix, such as the integral part that shift rotation plays in the employer's High Performance Work Team regimen.

The Company had allowed Rehrs for two months to work straight day shifts while he was recovering from heart bypass surgery. Rehrs used this temporary accommodation to argue that rotation is not an essential function. The Court held, however, that "an employer does not concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation." This is consistent with other decisions. *E.g.*, *Shiring v. Runyon*, 90 F. 3d 827, 831 (3d Cir. 1996)

The Court of Appeals in *Laurin v. Providence Hospital*, 150 F. 3d 52 (1st Cir. 1998) also held that shift rotation was an essential function of a nurse's job in a maternity ward at a hospital, based on reasoning similar to the *Rehrs* case. In *EEOC v. Union Carbide Chemicals and Plastics Co.*, 1995 WL 495910 *3 (W.D. La. 1995), the district court held that it was a jury issue to decide whether shift rotation was an essential function of the job.

What changes have been made to the ethnic and racial categories and to the job categories in the new EEO-1 Report form?

The EEO-1 Report -- formally known as the "Employer Information Report" -- is a federal government form requiring certain employers to provide a count of their employees by job category and by ethnicity, race and gender. The EEO-1 report is submitted to both the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP).

The EEO-1 Report must be filed by employers with federal government contracts of \$50,000 or more and 50 or more employees, and by employers which do not have a federal government contract but which have 100 or more employees.

² If a requested accommodation would conflict with a collective bargaining agreement, the accommodation is almost always unreasonable as a matter of law. *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)

The EEO-1 report must be filed annually with the EEOC by September 30. It must reflect employment numbers from any pay period in July through September of that year.

On November 16, 2005, the EEOC approved a revised EEO-1 Report form. Employers must begin to use the revised EEO-1 Report form for the reporting period beginning September 30, 2007.

Racial and Ethnic Categories

The new EEO-1 Report form contains the following changes to the racial and ethnic categories:

- Adds a new category entitled “Two or more races.”
- Divides “Asian or Pacific Islander” into two separate categories: “Asian” and “Native Hawaiian or other Pacific Islander.”
- Renames “Black” as “Black or African American.”
- Renames “Hispanic” as “Hispanic or Latino.”

Although the EEOC will not require that employers “resurvey” their current employees for the September 30, 2007 EEO-1 Report, the EEOC encourages employers to resurvey their current employees as soon as possible.

The EEOC strongly encourages employers to use self-identification of race and ethnic categories, as opposed to visual identification by employers. For example, an employer that periodically asks its employees to update their personal information may use these periodic requests to ask employees to confidentially self-identify using the new EEO-1 race and ethnic categories. Alternatively, an employer could provide a page on its internal (private) website, where employees could voluntarily and confidentially self-identify. Other methods that achieve the same result would also be acceptable.

What is the current status of the deferred compensation tax changes under Section 409A of the Internal Revenue Code?

The Internal Revenue Service recently released final regulations under section 409A of the Internal Revenue Code. Code Section 409A provides that unless certain requirements are met, some types of deferred compensation may be includible in an employee’s gross income even though not yet received. In addition, an employee whose arrangement violates these rules must pay interest on any unpaid taxes, plus 20 percent of the compensation that is required to be included in gross income. A violation of Code section 409A will raise tax reporting and withholding issues for employers.

Code section 409A applies to any arrangement that provides for the deferral of compensation (i.e., a right to compensation that is or may be payable in a later year), other than tax-qualified plans and bona fide vacation, sick, compensatory, disability, or death benefit plans.

Arrangements subject to Code section 409A include severance pay, bonuses, change-in-control agreements and plans linked to tax-qualified plans. Employment contracts containing these provisions are also subject to Code section 409A.

In addition to requiring that such arrangements be in writing, the regulations prohibit distributions except upon the occurrence of certain specified events. The regulations include special rules regarding the timing of deferral elections and subsequent elections that delay or change the form of benefit payments. In addition, the regulations require a delay in distributions to key employees of publicly traded companies.

Nonqualified deferred compensation plans and employment contracts must be amended to comply with Code section 409A no later than December 31, 2007.

If you have any questions about this particular matter, or any other issue relating to employee benefits, please call Kathryn English at 412-566-1226 or Paul Yenerall at 412-566-1944.