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Reviewing Recent Developments in the Employer-Employee Relationship

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**UDDY WATERS: Ohio Supreme Court Announces
New Standard for Public Policy Claims**
*by Michele L. Jakubs**

The Ohio Supreme Court recently refused to recognize a common law wrongful discharge claim based on a Family Medical Leave Act ("FMLA") violation. In *Wiles v. Medina Auto Parts*, the Court held that the FMLA contained a comprehensive remedial scheme that adequately compensated employees for an employer's wrongful actions.

In this case, the employer worked as a store manager for the employer. The employee requested and received permission to take a two-week leave of absence to care for his father. The employer granted this request, but lowered the employee's pay rate and demoted him upon his return.

The employee sued the employer, claiming he was constructively discharged for exercising his FMLA rights. The employee's complaint, while mentioning the FMLA, did not seek recovery under the statute. Rather, the employee asserted a wrongful discharge in violation of public policy claim.

In making its determination, the Court recognized that Congress expressly intended to the FMLA to balance the needs of the workplace with the needs of families and entitle employees to reasonable leave to care for a family member with a

The Court applied a four-part test to determine whether the employee could base his claim solely on the public policy of the FMLA. According to the Court, a public policy tort claim consists of four elements: clarity, jeopardy, causation and overriding justification.

The clarity issue requires that a federal or state constitution or statute manifest a clear public policy. The jeopardy element examines whether dismissing employees under the circumstances of the case would jeopardize the public policy. The

causation element requires that conduct related to the public policy motivated the employee's dismissal. Finally, the overriding justification element requires that the employer lacked a legitimate business justification for the dismissal.

Applying these elements to the employee's case, the Court found that a public policy claim could not arise from a violation of the FMLA. Although the FMLA articulated a clear public policy, the absence of a public policy claim would not jeopardize the public policy expressed within the FMLA.

serious health condition. The FMLA guarantees 12 weeks of leave in a one-year period following for a serious health condition (e.g. the employee's own disabling health problem, a family member's illness or the arrival of a new son or daughter). The FMLA

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flatly prohibited the employer's alleged actions in this case.

The Court held, however, that the absence of a cognizable common law claim would not seriously compromise the FMLA's objectives. The Court simply saw no need to recognize a common law action where the statute itself adequately protected societal interests.

According to the Court, the FMLA already contains a comprehensive remedial scheme. The FMLA entitles an employee to compensation for any wages, salary or benefits lost as a result of an employer's violation of the act. The employee may also recover a like amount as liquidated damages, equitable relief and reasonable attorney's fees in appropriate cases.

Due to the comprehensive nature of the FMLA's remedies, the Court refused to recognize a public policy claim for violating the statute. Although the FMLA does not allow punitive damages, the Court noted that the absence of these particular remedies did not render the other remedies inadequate.

The Court's decision casts doubt on prior decisions recognizing violations of public policy. It is not clear if the Court still recognizes a public policy claim based upon a statutory violation after *Wiles*.

More significantly, the Court's decision signals a case-by-case consideration of public policy claims. This approach will require the Court to decide whether a public policy claim arises under a particular set of facts and applicable constitutional and/or statutory law.

Until the Court definitively resolves such questions, trial courts and appellate courts will make decisions on an ad hoc basis. These piecemeal decisions will create a confusing body of law that provides no clear guidance as to what constitutes a

valid public policy claim in the state of Ohio.

If you have any questions concerning the FMLA or wrongful discharge claims, please contact Michele Jakubs at (216)696-4441 or mlj@zrlaw.com.

**Michele L. Jakubs practices in the areas of labor relations, equal employment opportunity, employment discrimination, the Fair Labor Standards Act, and state wage and hour laws.*

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NOUGH ISN'T ENOUGH: Sixth Circuit Holds that Investigation and Remedial Action Does Not Bar Hostile Workplace Claim**
*by Lois A. Gruhin**

The Sixth Circuit recently held that although an employer promptly investigated claims and took remedial action, those responses might still be unreasonable in light of the employee's pattern of severe and pervasive harassment.

In *Minnich v. Cooper Farms*, the plaintiffs filed hostile workplace claims under federal and Ohio law. According to the plaintiffs, another employee groped them on a number of occasions, made inappropriate comments, and in fact kicked one of the plaintiffs. After an indifferent response from their direct supervisor, the plaintiffs complained to the employer's human resources manager. The HR manager instructed the employee to stay away from the plaintiffs.

As a result of the discipline, the employee "stayed away" from the plaintiffs for a little while. A few months later, the employee began to poke one of the plaintiffs in her ribs. One of the plaintiffs again complained and her supervisor took care of the problem. This pattern consistently repeated itself. The employee would avoid the plaintiffs after discipline, then begin to harass them again.

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Approximately six months later, the employee attempted to follow one of the plaintiffs into a bathroom stall. As a result, the employer suspended him for a day. After his return, the employee gave the plaintiffs dirty looks and called them “bitches” whenever they met in passing. Approximately a week later, one of the plaintiffs alleged that the employee tried to run her over with a skid loader. The HR manager looked into the incident, but said he could not do anything because the employee threatened to hire an attorney.

Several months later, the employer fired the employee for comments he made to another employee. The employee appealed his termination, and the employer’s review committee reinstated him. The employer finally fired this employee six months after the plaintiffs filed suit.

The district court dismissed the plaintiff’s hostile workplace claims. The district court concluded that the employer took prompt and appropriate corrective action to remedy the hostile environment in light of the facts it knew or should have known at the time. Although the employee had a lengthy record of inappropriate behavior, the district court found that the employer took action to eliminate this behavior.

On appeal, the Sixth Circuit reversed. The court emphasized that the appropriateness of the employer’s response depends on the frequency and severity of the alleged harassment. In this case, the court held that the remedial measures might not have been adequate given the employee’s extensive history of sexual misbehavior and the severity of the harassment.

The court noted that the employee received three prior warnings in the three years prior to the plaintiff’s first complaint. Furthermore, the plaintiffs presented evidence that other employees knew of the employee’s behavior. On the other hand, the HR director promptly investigated complaints made directly to him. He also gave

warnings to the employee, suspended him, and terminated him (twice) for sexually offensive and harassing behavior.

On balance, the court concluded that a jury could find that harassment’s severity and persistence outweighed the employer’s remedial measures. As a result, the court reversed the district court’s order granting summary judgment and remanded the case for trial.

This decision puts employers in a very difficult–position. The employer in this case acted on some of the plaintiff’s complaints. Whenever the plaintiffs went directly to their HR manager, he disciplined the employee, and eventually fired him. Other supervisors, however, did not take the plaintiff’s complaints as seriously, and tacitly condoned the employee’s behavior.

The decision in this case highlights the importance of training supervisors and managers to handle harassment complaints. Proper training must emphasize the necessity of immediately dealing with *any and all* complaints—formal or informal—and reporting those complaints to HR. This type of training will eliminate any questions concerning the appropriateness of an employer’s response to harassment complaints.

For more information about hostile environment claims under Ohio or federal law, please contact Lois Gruhin at (614) 861-7612 or lag@zrlaw.com.

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UPREME COURT FORBIDS BACKPAY AWARDS TO
ILLEGAL ALIENS
*by Stephen S. Zashin**

The Ohio Supreme Court recently refused to recognize a common law. In *Hoffman Plastics Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002), the Supreme Court held that the National Labor Relations Board (“NLRB”) cannot grant a backpay award to an undocumented alien working in the United States. The Court reasoned that to allow such an award would violate congressional immigration policy as stated in the Immigration Reform and Control Act of 1986 (“IRCA”).

In Hoffman, the company employed the employee to operate various blending machines. Before the company hired the employee, he presented a number of documents (including a driver’s license and birth certificate) that appeared to verify his authorization to work in the United States.

After his hire, a union began an organizational campaign at the company. The employee participated actively in that campaign. The company then laid off the plaintiff and a number of other employees engaged in the organization campaign.

As a result of the layoffs, the NLRB found that the company laid off the employees to rid itself of known union supporters, in violation of the National Labor Relations Act (“NLRA”). To remedy that violation, the NLRB ordered the company to cease and desist, post a detailed notice to employees, and offer reinstatement and backpay to the terminated employees.

At a compliance hearing, the employee testified that he was never legally authorized to work in the U.S. He borrowed a friend’s birth certificate to obtain a driver’s license and a Social Security card. As a result, the administrative law judge

(“ALJ”) held that the NLRB could not award backpay. The NLRB reversed the ALJ’s order. The NLRB held that “the most effective way to further the immigration policies embodied in [the IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees.” As a result, the NLRB awarded the employee 3 ½ years of backpay with interest. On appeal, the D.C. Court of Appeals denied the company’s petition for review and enforced the NLRB’s order. The Supreme Court granted certiorari and reversed.

The Supreme Court held that allowing the NLRB to award backpay to illegal aliens “unduly trenches” upon the federal immigration policies expressed in the IRCA. In reaching its decision, the majority explored the interaction between the NLRB’s application of federal labor law and the underlying policies of federal immigration law. The Court cited a line of cases that limit the NLRB’s authority to compel reinstatement of an employee and award backpay. Simply stated, while the NLRB retains broad discretion to fashion remedies for violations of the NLRA, that discretion is not unlimited.

In reaching its decision, the Court analyzed the IRCA—a statute designed to deny employment to aliens not lawfully present in the United States or not lawfully authorized to work in the United States. The IRCA compels employers to verify the identity and eligibility of all new hires before they begin to work. If an employer unknowingly hires an illegal alien, the employer must discharge the employee upon discovery of his/her illegal status.

The statute punishes employers with civil fines and the prospect of criminal prosecution. The IRCA also criminalizes attempts to subvert the identification system by using fraudulent documents. Aliens who fraudulently obtain or use documents to secure employment face civil fines and criminal prosecution.

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Against this backdrop, the Court held that awarding the employee—an admittedly illegal alien—backpay and reinstatement would undermine the immigration policies of the IRCA. The Court noted that Congress criminalized the employee’s fraudulent means of gaining employment. The Court found it inconceivable that Congress intended to permit backpay awards where, but for the unfair labor practice, the employee would have remained illegally in the United States and continued to work illegally. To award backpay not only trivialized immigration laws, according to the majority, it condoned and encouraged future violations.

Despite the Supreme Court’s decision in Hoffman, employees must continuously strive to improve documentation practices concerning new employees identity and eligibility to work in the United States. The ominous specter of large backpay awards no longer lurks in the shadows. The implications of hiring and employing illegal aliens still looms large, however, for employers who carelessly document the identity and work status of prospective employees.

For more information on determining whether EPLI is right for your company or in selecting an appropriate EPLI policy, please contact Stephen S. Zashin at (216) 696-4441 or ssz@zrlaw.com.

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S TUCK IN THE MIDDLE: Sixth Circuit Allows Suit for Reverse Age Discrimination *by Robert W. Hicks**

The Sixth Circuit recently held that employees over the age of 40 can sue their employer for treating older workers more favorably. In *Cline v. General Dynamics*, the Court allowed a group of employees between the ages of 40 and 49 to sue their employer for eliminating health benefits for employees under the age of 50 in a collective bargaining agreement.

A prior collective bargaining agreement required the employer to provide full health benefits to retired workers with 30 years of seniority. The subsequent collective bargaining agreement eliminated full health benefits—with one exception. Under the new agreement, only employees over 50 could receive full retiree health benefits. As a result, a class of employees between the ages of 40-49 sued.

The district court dismissed the plaintiff’s complaint. While the district court admitted that the collective bargain agreement facially discriminated on the basis of age, it concluded that the ADEA did not recognize a claim for “reverse discrimination.” According to the district court, the ADEA protected older workers—not workers discriminated against because they are too young.

The Sixth Circuit reversed. The court held that the plain language of the ADEA prohibited discrimination against any worker 40 years or older

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because of age. The ADEA makes it unlawful for an employer to refuse to hire or discharge any individual because of the individual's age. Congress defined individual as any individual over the age of 40.

This language, according to the court, needed no interpretation. As a result, the court rejected other opinions that refused to recognize a "reverse discrimination" claim under the ADEA. The court rejected this reasoning for a number of reasons.

A majority of courts to address this issue decided not to allow a cause of action for reverse discrimination under the ADEA. These courts interpret the ADEA to prohibit discrimination against those in the protected class older than the favored employees. The employees in *Cline* could not successfully bring suit in these circuits.

Unlike other circuits that have addressed this question, the Sixth Circuit did not find any inconsistency within the ADEA's definitions. Even if the language did conflict, however, the court said it would reach the same result. According to the court, Congress expressed its intention to protect older workers, then defined older workers as any individual over 40.

The court reasoned that had Congress wanted to protect only relatively older workers, it could have done so in the statute. Congress, however, did not. As a result, the court felt bound by the plain language of the ADEA.

In the aftermath of *Cline*, employers must precisely draft *all* workplace policies to avoid unwittingly violating the ADEA. Policies concerning retirement benefits and seniority systems are particularly susceptible to age discrimination claims. The vigilant employer, however, must review all company policies for language that implicates age in light of the *Cline* decision.

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