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The Sky's the Limit Despite Federal Caps

*by Helena J. Oroz**

The Sixth Circuit Court of Appeals recently affirmed an award of $800,000 to a former employee who the jury determined was fired because of racial discrimination. The former employee received the $800,000 despite the fact that federal law imposes a cap of $300,000 on punitive damages.

In *Hall v. Consolidated Freightways Corporation of Delaware*, the employee worked as a truck driver. The employee had an excellent work record but claimed he had to endure several incidents of racial discrimination involving racist graffiti, racial slurs and harassing behavior from co-workers. After enduring such incidents for several years, the employee filed complaints with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission. Three (3) months later, the employer terminated the employee. The employee filed a complaint in federal district court alleging race discrimination, racially hostile work environment, wrongful termination based on race and retaliation in violation of Title VII of the 1964 Civil Rights Act and Chapter 4112 of the Ohio Revised Code. The jury found in favor of the employee on all counts and awarded him $800,000 — $50,000 in compensatory damages and $750,000 in punitive damages. The judge, however, noting federal law limits punitive damages under Title VII to $300,000 reduced the damage award to $302,400 — $2,400 in compensatory damages and $300,000 in punitive damages.

The employee appealed to the Sixth Circuit Court of Appeals and argued that the jury properly awarded

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OSHA ALERT

*by Robert C. Hicks**

Employers must begin to use OSHA's new Form 300 on January 1, 2004. The new form is available on OSHA's website located at www.osha.gov. The revisions to Form 300 include changes in the format of the report and the scope of requested information.

**Robert C. Hicks practices in all areas of employment discrimination and occupational safety and health. For questions concerning the new form or complying with OSHA's recordkeeping requirements, please contact Rob at (216) 696-4441 or rch@zrlaw.com.*

Baby Got Back Pay: Employer Cannot Count FMLA Absences Under A No-Fault Attendance Policy

*by Stephen S. Zashin**

The Sixth Circuit Court of Appeals recently held that the Family and Medical Leave Act ("FMLA") protected a discharged employee's absences under the employer's "no-fault" attendance policy. Further, the court affirmed the decision which awarded the employee back pay, interest and liquidated damages and denied the employer's motion for judgment as a matter of law.

In *Taylor v. Invacare Corporation*, the employee worked in the employer's shipping department. On March 24, 1997, the employee suffered a "stress attack" and spent the night in the emergency room. When he returned to work, the employee gave his supervisor a doctor's excuse. Further, the employee used a week of vacation upon his supervisor's request. Nonetheless, the employee received an "occurrence" for March 24th, which counted as an absence under the employer's "no fault" attendance policy.

In June of 1997, the employee took two days off to take his wife to the doctor even though the employer denied his initial request for time off. The employee received another "occurrence." The employer then fired the employee because he had ten (10) absences in a twelve-month (12) period in violation of the company's no-fault attendance policy.

Following his termination, the employee filed a lawsuit in the U.S. District Court for the Northern District of Ohio. In his lawsuit, the employee alleged that the employer violated the FMLA when the company terminated his employment. The jury found in favor of the employee and awarded him $171,464.56 in back pay, interest and liquidated damages. The Sixth Circuit affirmed the trial court's decision.

Under the FMLA, an employee may take up to twelve (12) weeks of unpaid medical leave for certain circumstances (e.g., the "serious health condition" of one's self or spouse). If the leave is foreseeable, the employee must provide the employer notice within thirty (30) days of the leave or as soon as practicable. When the leave is not foreseeable, the employee does not have to explicitly invoke the FMLA. Instead, an employee must notify the employer that he/she requires leave for a medical reason. The employer must then investigate the matter further to determine if the FMLA applies.

In *Taylor*, the employer argued that the employee's leave was not covered by the FMLA because he failed to inform the company of his need for leave under the FMLA. In rejecting the employer's argument, the Sixth Circuit noted that the employee did inform the company that he had sought emergency room treatment. Further, the employee also informed the employer that he required leave to take his wife to the doctor. As a result, the court held that, while an employer is not required to be "clairvoyant," the employee provided sufficient information to alert the employer that the FMLA may have protected his leave.

The Sixth Circuit further held that the employee did <u>not</u> have to provide advance notice or specifically mention the FMLA for his emergency room visit because the leave was unforeseeable. The court ruled, however, that the employee's leave for his wife's doctor visit was reasonably foreseeable. Normally, an employee must provide advance *written* notice for a foreseeable leave. However, an employer who does not inform employees of their rights under the FMLA cannot take adverse action against an employee who does not provide notice. In this case, the employee and one of his co-workers testified that the company did not hang posters in the cafeteria or work area explaining employee rights under the FMLA. As a result, the Sixth Circuit held that the employer could not require the employee to provide notice for his foreseeable leave in order to invoke the protection of the FMLA.

The employer argued that since the employee had other absences and performance issues, his FMLA-protected absences did not cause his dismissal. The Sixth Circuit noted that the employee had accumulated about ten (10) absences in a year. The FMLA protected two (2) of those absences because the employee had either satisfied or did not have to satisfy the notice requirements for the two absences. The FMLA prohibits protected absences from counting under "no fault" attendance policies. Further, the employer did not provide evidence of chronic absenteeism over several years or other serious performance problems. Therefore, the court held that a reasonable jury could have concluded that the employer fired the employee because of his FMLA-protected absences.

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Third Circuit Rules Constructive Discharge Bars Employer Affirmative Defense

*by Lois A. Gruhin**

For the past five (5) years, employers relied upon the United States Supreme Court's decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* to limit liability for harassment. Employers' reliance on these cases stemmed from the Court's holdings which limited an employer's vicarious liability for the discriminatory conduct in violation of Title VII of the Civil Rights Act of 1964. Specifically, the Court held that an employer is strictly liable for a supervisor's harassment only when the supervisor's conduct results in a "tangible employment action." When no tangible employment action results, the court may still find the employer liable for the supervisor's conduct. However, the employer can raise an affirmative defense to liability or damages. First, the employer can show that it exercised reasonable to care to prevent and correct the behavior. Second, the employer can show the employee unreasonably failed (1) to take advantage of preventive or corrective opportunities that the employer provided or (2) to avoid harm. The Court's list of tangible employment actions included "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Noticeably absent from this list, however, was constructive discharge.

In the aftermath of the Court's decision in *Burlington* and *Faragher*, lower courts split over whether a constructive discharge constitutes a tangible employment action. A constructive discharge in violation of Title VII occurs when acts of discrimination make the employee's working conditions so intolerable that the employee reasonably feels compelled to resign. In *Caridad v. Metro-North Commuter*, the Court of Appeals for the Second Circuit (covering New York, Connecticut and Vermont) held that a constructive discharge does not constitute a tangible employment action for three reasons. First, co-workers and supervisors can cause constructive discharges. Second, an employer does not ratify or approve an employee's constructive discharge. Third, the Court's holding in *Ellerth* did not state that constructive discharge constituted a tangible employment action. The Court of Appeals for the Sixth Circuit (covering Ohio, Michigan, Kentucky and Tennessee) adopted *Caridad*'s holding in an unpublished decision. In contrast, the Court of Appeals for the Eighth Circuit (covering North Dakota, South Dakota, Iowa, Minnesota, Nebraska, Missouri and Arkansas) held that a constructive discharge, when proved, would constitute a tangible employment action.

The Third Circuit Court of Appeals (covering Pennsylvania, New Jersey, Delaware and the Virgin Islands) recently added to the confusion when it held that a constructive discharge, when proved, constitutes a tangible employment action. In *Suders v. Easton*, the employee allegedly suffered name-calling, explicit sexual gesturing, obscene and offensive sexual conversation, and the posting of vulgar images so severe that she felt compelled to resign.

The Third Circuit found the *Caridad* line of cases unpersuasive. Moreover, the Third Circuit held that holding an employer strictly liable for a con-

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Z&R Update

Hicks speaks on Litigation Prevention

Robert C. Hicks will speak to the Cleveland Metal Forming Association on November 11, 2003. He will present techniques for preventing employment litigation and discuss emerging trends in employment law.

Z&R to Provide HR Certifications

Stephen S. Zashin and Lois A. Gruhin will provide training for the Council on Education in Management's HR Certification Program on November 17 and 18 in Columbus, Ohio.

Gruhin Moderates Council

Lois A. Gruhin will moderate the Council on Education in Management's Personnel Law Update 2003 on December 10 and 11 in Columbus, Ohio.

Oroz and Zashin to speak in Cleveland

Helena J. Oroz and Stephen S. Zashin will present information about HIPAA, ADA and FMLA on February 3, 2004 for Lorman Education Services in Cleveland, Ohio.

Zashin to Speak in Toledo

Stephen Zashin will speak on the interplay between the FMLA, ADA and workers' compensation laws and how they apply to the "Leave of Absence Puzzle" for the Council on Education in Management in Toledo, Ohio on March 3, 2004.

Competent or Not: Resignation Stands

*by Michele L. Jakubs**

A recent decision from the Stark County Court of Appeals ensures that employers will not have to double as mental health specialists. Specifically, the court held that employers do not have to consider a resigning employee's mental capacity. The court further held that an employer does not have an obligation to rehire an employee who regrets the decision to resign and attempts to rescind that decision.

In *Escott v. The Timken Co.*, the plaintiff/employee became angry when, during a meeting, his supervisor expressed displeasure with his performance. After meeting with his supervisor, the employee called his wife and he told her that he wanted to quit. The employee's wife suggested that he take some time to "cool off." Ignoring that advice, the employee told his supervisor that he had "had it" with the company, and he wanted to resign. The supervisor suggested that the employee speak with human resources.

Following a meeting with a human resources representative, the employee returned to his office and began putting his belongings in a box. Further, he deleted files from his office computer. During this time, the supervisor visited the employee to express his regret that "it has to end this way." Notwithstanding the supervisor's remorse, the employee gave his computer, company badge, company credit card and access cards to his supervisor. Soon after, the employee completed an exit interview.

A few hours after leaving the company, the employee apparently reconsidered his actions. Further, the employee attempted to meet with a doctor in the company's medical department. However, upon his arrival, medical personnel told the employee that, due to his resignation, he could not see the doctor.

Following his resignation, the employee filed a complaint in the Stark County Court of Common Pleas against the company. In that complaint, the employee alleged breach of contract and fraud. In support of his claims, the employee alleged that he resigned as a result of mental incapacity and that his resignation was invalid. However, the employee did not dispute the *at-will* nature of his employment which enables both the employer and employee to terminate the employment relationship at any given time — for any lawful reason or no reason at all.

Despite his acquiescence to the concept of at-will employment, the employee asked the court to bar employers from accepting the resignation of employees suffering from diminished mental capacity. In essence, the employee asked to the court to ignore his right to terminate the employment relationship. The court rejected the employee's request holding that it would essentially require an employer to determine the employee's mental capacity before accepting a resignation. The court concluded that such a requirement came dangerously close to violating the Ohio Constitution's ban on involuntary servitude.

Pursuant to *Escott*, employers are not required to consider the mental capacity or stability of an employee when accepting a resignation terminating an at-will employment relationship. However, this decision does not permit employers to consider an employee's mental capacity and/or stability when making employment based decisions. As a result, employers must proceed with caution when dealing with employees with mental health issues, whether real or perceived, and never refer to or consider the mental state of an employee when making employment decisions. Nevertheless, this case clearly demonstrates that employers do not have to reconsider an employee's resignation.

**Michele L. Jakubs practices in the areas of equal employment opportunity, employment discrimination and wage and hour compliance. For more information on the employment at-will relationship or employee performance issues, please contact Michele at (216) 696-4441 or mlj@zrlaw.com.*

The Sky's the Limit

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damages in excess of the federal cap because his claims were brought under both Title VII and the Ohio Revised Code. While Title VII has a defined cap on damages, employment claims under the Ohio Revised Code have no such damage cap. The Sixth Circuit agreed.

In overturning the district court's decision, the Sixth Circuit noted that, under federal law, the employee is entitled to punitive damages if the employer acted with "malice" or "reckless indifference." The Sixth Circuit defined "reckless indifference" as "want of care which would raise the presumption of a *conscious indifference* to consequences." The Sixth Circuit further noted that, under state law, the jury can award punitive damages if the employer acted with "actual malice." The definition of "actual malice" under Ohio law includes "a *conscious disregard* for the rights and safety of other persons that has a great probability of causing substantial harm." In comparing the two standards, the Sixth Circuit saw no difference between "conscious indifference" and a "conscious disregard" for purposes of awarding punitive damages. As a result, the district court's instruction to the jury supported an award of punitive damages under both federal and state law. Therefore, the Sixth Circuit concluded that the employee was entitled to the balance of the award in excess of the federal $300,000 cap. Accordingly, the Sixth Circuit reinstated the employee's award of $800,000 in punitive damages.

The Sixth Circuit's decision in *Hall* essentially nullifies the federal cap on punitive damages. An employee simply can file a complaint under both federal and state law to avoid the $300,000 limit under federal law. As a result, employers can no longer rely on the federal cap and may be subject to excessive verdicts if they fail to prevent discrimination in the workplace.

**Helena J. Oroz practices in all areas of employment discrimination and employee benefits litigation. For more information about damage caps, jury verdicts or the differences between state and federal discrimination laws, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

Baby Got Back Pay

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Despite the employer's challenge, the Sixth Circuit also upheld the trial court's award of liquidated damages. An employer can avoid liquidated damages under the FMLA by proving (1) its violations were in good faith; and, (2) its actions were reasonable. The Sixth Circuit held that although the employer did not act in bad faith, the company's actions were unreasonable. Specifically, the company counted one of the employee's absences against him despite the company's knowledge that the employee missed the day because of an emergency room visit.

In order to avoid violating the FMLA and facing significant liability, employers must carefully evaluate the information an employee provides concerning an absence to determine whether the absence is covered by the FMLA. Such an evaluation is especially critical when disciplining employees for absenteeism.

**Stephen S. Zashin is an OSBA Certified Specialist in Labor and Employment Law and has extensive experience in FMLA compliance and litigation. For more information about the FMLA, please contact Stephen at (216) 696-4441 or ssz@zrlaw.com.*

Zashin & Rich Co., L.P.A.
www.zrlaw.com

Cleveland:
55 Public Square, Suite 1490
Cleveland, Ohio 44113-1901
Phone: (216) 696-4441
Fax: (216) 696-1618

Columbus:
2242 S. Hamilton Road, Suite 101
Columbus, Ohio 43232
Phone: (614) 861-7612
Fax: (614) 861-7616

Zashin & Rich Co., L.P.A.
55 Public Square, Suite 1490
Cleveland, Ohio 44113-1901

Affirmative Defense

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structive discharge resulting from its supervisors' conduct more faithfully adheres to the policy objectives of *Ellerth, Faragher* and Title VII cases.

The Third Cicuit ruled that if an employee could prove a constructive discharge, the employer would become strictly liable for its supervisor's conduct. If the employee could not prove constructive discharge, the employer could invoke the *Ellerth/Faragher* affirmative defense.

Because of the split in the Circuit Courts, the issue of whether a constructive discharge constitutes a tangible employment action will likely reach the United States Supreme Court. In the meantime, however, employers should avoid constructive discharge situation by taking measures to ensure that no employee's working conditions become so intolerable that an employee feels reasonably compelled to resign. To that end, employers should provide employees with numerous avenues to complain about alleged harassment and promptly investigate and remediate such complaints.

**Lois A. Gruhin, a member of the firm's Columbus office, is a former General Counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment discrimination matters. For more information on investigating harassment in the workplace, please contact Lois at (614)861-7612 or lag@zrlaw.com.*