ZASHIN & RICH CO., L.P.A.

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Know the FACTS: Fair Credit Reporting Act Amended

*by Helena J. Oroz**

Employers should be aware of the recent federal Fair and Accurate Credit Transaction Act ("FACT") signed by President Bush on December 4, 2003. The Federal Trade Commission provided notice of rulemaking that would make March 31, 2004 the effective date for these changes. Under FACT, an employer need not follow the consent and disclosure requirements of the Fair Credit Reporting Act ("FCRA") if the investigation includes suspected misconduct, a violation of law or regulations or a violation of any pre-existing written policies of the employer. In appropriate situations, FACT permits employers to use third-parties to conduct a workplace investigation without the employee's prior consent.

To gain exclusion from disclosure requirements prior to taking adverse employment action, the third-party investigator cannot divulge the contents of the investigative report to anyone other than the employer or the employer's agent. Furthermore, the employer's investigation must concern suspected misconduct relating to employment, a violation of federal, state or local law or the violation of a pre-existing written policy of the employer.

FACT does not absolve an employer of its duty to provide a summary of any investigative report in the event the employer decides to take adverse action against the employee. The statute broadly defines adverse action as any employment decision that adversely affects an employee. Employers using outside consultants to conduct internal investigations must remember to provide this summary to an employee in the event of any

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Ohio Federal Court Says Extending Attendance Performance Program Might Violate FMLA

*by Stephen S. Zashin**

An employer may have violated the Family and Medical Leave Act ("FMLA") by extending an employee's attendance-related probation by the amount of time he spent on statutorily-protected leave.

In *Schmauch v. Honda of Amer. Mfg., Inc.*, the employer placed the employee on an attendance improvement plan ("AIP") specifically designed to curb unexcused absences. The AIP consisted of three two-month segments. During the first two months, the employer permitted two unexcused absences. The second two-month phase only permitted one unexcused absence, while the final phase permitted no unexcused absences. If the employee successfully completed all phases of the AIP, the company took the employee off probation.

The company placed this employee on an AIP after a spate of unexcused absences. The employer originally planned the AIP to last from December 22, 2000 until June 21, 2001. While on the AIP, the employee took FMLA leave and military leave. Consequently, the company extended the employee's AIP by the amount of time he spent on leave, or August 11, 2001. On August 7, the employee had an unexcused absence. As a result, the company fired him for violating the AIP. The employee subsequently sued.

Both parties moved for summary judgment. Rejecting both motions, the court held that a jury could find that the employer violated the FMLA by extending the employee's participation in the AIP plan by the amount of time he spent on FMLA leave. The jury could also find, however, that the extension alone did not cause the employee any harm, since the company ultimately fired him for an absence unprotected by law.

In reaching his decision, the judge relied on two federal regulations. The first regulation prohibits employers from discouraging workers from taking FMLA leave. 29 C.F.R. § 825.220(b). The other regulation prohibits an employer from using FMLA leave as a negative factor in employment actions. 29 C.F.R. § 825.220(c).

According to the Court, the employee presented evidence that the employer violated both regulations: "By using his FMLA leave as the sole basis for extending his AIP, it is arguable that Honda discouraged Schmauch from taking it." The Court further noted that the company did not extend the AIP program for absences due to court appearances, workers' compensation or bereavement. This differential treatment of various forms of leave belied the company's claim that it treated all employees equally.

Furthermore, the Court found that the evidence suggested that the company treated the employee differently and in a more negative fashion solely because he took FMLA leave. As a result, the Court refused to grant summary judgment for the employer because the employee raised a genuine issue of fact as to whether the employer's leave policy dissuaded employees from taking FMLA leave.

Similarly, the Court found that the company's policy might have violated the second regulation, which prohibited use of FMLA as a negative factor in an employer's decision to discharge the employee. In this case, the Court found that the employer used FMLA as a negative factor when terminating employees on AIP for an attendance violation that would otherwise not cause discharge.

Although the employee presented enough evidence to permit his claim to go forward, the Court further held that the evidence did not compel a finding for the employee. At the time of the discharge, the employee was not taking FMLA leave. As a result, the FMLA did not protect the absence for which the employer fired the employee. Accordingly, the Court held that a genuine issue of fact remained as to whether the mere extension of the AIP constituted a violation of the FMLA.

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Six Degrees of Separation Not Enough in an Age Discrimination Case

*by Robert M. Fertel**

The Sixth Circuit recently held that a six-year difference between employees was, without any other indicia of discrimination, irrelevant for purposes of the Age Discrimination in Employment Act ("ADEA").

In *Grosjean v. First Energy Corp.*, the employer removed the 54-year-old plaintiff's supervisory duties. The company temporarily reassigned these duties to a 48-year-old then permanently reassigned the position to a 51-year-old. According to the plaintiff's supervisor, the plaintiff performed exceptionally with regard to his technical skills, but did not effectively perform the supervisory function of his position. After a number of meetings failed to cure the problem, the company demoted the plaintiff. Consequently, the plaintiff filed suit, alleging that his demotion violated the ADEA and Ohio's discrimination act.

The district court granted the employer's motion for summary judgment, holding that the plaintiff failed to rebut the employer's contention that the demotion occurred as a result of poor performance. On appeal, the Sixth Circuit affirmed the district court's decision, but on an alternate basis.

The Court held that the plaintiff could not establish that a significantly younger employee replaced him. ADEA cases, the Court noted, follow the familiar McDonnell-Douglas burden-shifting framework. To present a claim, the employee needed to demonstrate that (1) he was 40 years old or older; (2) was subject to an adverse employment decision; (3) was qualified for his position and (4) he was replaced by a significantly younger person. This case turned on the final element of the prima facie case—whether the employer replaced the plaintiff with a significantly younger person.

As a preliminary matter, the Court needed to decide exactly when the employer replaced the plaintiff. Initially, the employer reassigned the plaintiff's supervisory duties to a co-supervisor, age 48, performing the same job. This other employee maintained his current job duties and functions, merely absorbing the plaintiff's duties. Under Sixth Circuit law, redistributing an employee's duties does not amount to replacing that employee. Consequently, the Court held that the employee was not replaced until the company hired someone to fill the vacant position permanently.

The company ultimately hired a 51-year-old to fill permanently the plaintiff's supervisory position. Since both employees fell within the class of employees protected by the ADEA, the case reduced to whether the new supervisor was significantly younger than the plaintiff.

To reach its decision, the Court explored precedent from sister courts to define a significant age difference. According to the Court, the overwhelming majority of courts have held that differences of 10 years or less bear no legal significance. Indeed, the Seventh Circuit adopted a 10-year difference bright-line rule demarcating cognizable age discrimination claims.

Uncomfortable with the 10-year rule, the Sixth Circuit adopted a 6-year bright-line rule for age discrimination cases. Thus, in the absence of direct evidence that the employer considered age significant, an age difference of six years or less between an employee and a

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Z&R Update

Zashin to Speak in Toledo

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

Z&R to Address the Ohio Society of Certified Public Accountants

On March 15, 2004, Stephen S. Zashin will speak to the OSCPAs in Columbus regarding Employment Practices Liability Insurance ("EPLI") and Loss Prevention Guidelines.

Firm Covers "Employment Law from A to Z"

Stephen S. Zashin will speak in Independence, Ohio on April 13, 2004 at "Employment Law from A to Z in Ohio," a seminar sponsored by Lorman Education Services.

Zashin to Instruct Regarding Interplay Between Employment Laws

Stephen S. Zashin will speak at the Council on Education in Management's Ohio Personnel Law Update on April 30, 2004 regarding the interplay between the FMLA, ADA and workers' compensation laws.

Unsigned and Sued: Employer Liable for Discharging Employee who Who Refused to Sign Non-Compete Agreement

*by Michele L. Jakubs**

A New Jersey court recently held that an employee could state a claim for wrongful discharge in violation of public policy when her employer terminated her for refusing to sign a non-compete agreement. In *Maw v. Advanced Clinical Communications, Inc.*, the employer hired the employee as a graphic designer. The employee's duties included creating design concepts for graphic materials, preparing the design and layout of technical charts, graphs, and reports, and working with vendors on design issues.

In 2001, the employer required all employees above a certain level to sign an employment agreement. The agreement included a non-compete covenant which prohibited employees from becoming employed with any of the employer's customers or competitors for two (2) years without the employer's prior consent. The employee proposed changes to the document, but the company refused. The employer terminated the employee after she refused to sign the agreement. The employee sued and alleged, among other things, that the employer terminated her in violation of New Jersey public policy.

The court first noted that courts look unfavorably upon noncompetition agreements as potential restraints on trade. However, a non-compete agreement is reasonable if it: (1) protects the legitimate interests of the employer; (2) imposes no undue hardship on the employee; and (3) does not injure the public. To subject an employee to a noncompete agreement, the employer must demonstrate that it has legitimate interests that require protection–such as highly confidential or proprietary business information, trade secrets, or customer relations information.

In this case, the court held that much of the information that the employee worked with was already public information. Although the employee conceded that she had access to some confidential information, her access did not exceed that of other employees who the employer did not require to sign such the agreement (e.g., administrative and clerical personnel). Under these circumstances, the court found that the non-compete agreement did not meet the threshold necessary to warrant judicial protection of a quantifiable proprietary interest.

In the court's view, the employer did not reasonably limit its non-compete agreement. The agreement did not specify the type of information that the employer feared would damage its proprietary interests if in the hands of a competitor. The agreement also did not restrict its geographical scope. Further, the court found that the duration of the non-compete exceeded necessary limitations. As a result, the court concluded that the employer violated New Jersey public policy when it discharged the employee for refusing to sign a non-compete.

The effect of this court's decision remains unclear. Other courts throughout the country may follow this court's lead in expanding further the public policy tort. This case also reinforces the notion that employers must take an employee's position with the company into consideration when implementing a non-compete agreement. Companies should consider an employee's exposure to and command of the material they wish to protect and then only impose a non-compete agreement on those employees whose know-how, trade secrets, pricing policies, operational methods of doing business, etc. pose a real proprietary threat if revealed to a competitor. As this case demonstrates, employers that attempt to present mandatory non-compete agreements to all employees regardless of their job duties may stretch the limits of enforceability and leave the company vulnerable to costly allegations of public policy violations

**Michele L. Jakubs practices in the areas of employment torts, employment discrimination and wage and hour compliance. For more information about this case or non-compete agreements, please contact Michele at (216) 696-4441 or mlj@zrlaw.com.*

Know the FACTS

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adverse action—even a written or verbal warning. The summary does not have to reveal the individuals interviewed or any sources of information.

FACT also contains a separate limitation concerning employer requests for medical information. Employers seeking medical information about a "consumer" applicant or employee must obtain a specific written consent describing in "clear and conspicuous" language the intended use of the information. Furthermore, the medical information sought must relate to the employee's job. The legislation provides additional levels of privacy by specifically reminding employers that they cannot disclose medical information except as necessary to fulfill the purpose of the initial disclosure or as otherwise permitted by law.

Additionally, employers must remain cognizant of the privacy requirements imposed by the Health Insurance Portability and Accountability Act ("HIPAA") before acquiring copies of any medical reports. Specifically, HIPAA's rules require covered health care providers to obtain specific authorization when an employer requests copies of employee medical information.

FACT will require employers to reevaluate their investigation policies in light of the new rules. Employers conducting background checks should scour the forms supplied by consumer reporting agencies to determine whether the forms comply with the FCRA's requirements, especially if the employer seeks medical information. Additionally, the employer must determine whether the medical information sought requires a separate HIPAA authorization. Finally, employers must remember to provide employees with a summary of the results of any third-party investigation before taking an adverse employment action.

**Helena J. Oroz practices in all areas of employment discrimination and employee benefits litigation, including HIPAA. For more information about FACT, privacy requirements or HIPAA, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

Ohio Federal Court

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This case illustrates the manner in which the FMLA affects various aspects of the employment relationship. In this case, the alleged violation was not the refusal to grant FMLA, but rather potential interference for taking FMLA leave. As this case makes clear, employers must craft policies that do not interfere with an employee's ability to take FMLA leave.

**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 this case or 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

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ELQ Contributing Editor:
- Robert W. Hartman

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Age Discrimination

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replacement is legally insignificant. "This rule," according to the Court, "will assist district courts in making a firm determination, yet does not encroach on our precedent holding that eight years can be a significant age difference."

This case illuminates a number of issues concerning age discrimination claims and discrimination claims in general. Most significantly, the rule announced by the Court applies only in cases where the employee lacks direct evidence that age played a role in an employment decision. Thus, age differences of less than six years are legally significant where the employee presents direct evidence that the employer considered age when making an employment decision. In this respect, employers might find themselves bound by the inappropriate remarks of other management level employees.

Additionally, this case demonstrates the case-by-case nature in which courts consider discrimination claims. Changes in any of the facts of this case could have resulted in a different decision. In this respect, employers cannot rely on the Sixth Circuit's rule as a safety blanket to insulate all decisions concerning protected workers. Rather, courts will explore the individual circumstances when making discrimination determinations.

**Robert M. Fertel, who successfully argued an employment law case before the United States Supreme Court, practices in all areas of employment discrimination litigation. For more information about this case or the ADEA, please contact Bob at (216) 696-4441 or rmf@zrlaw.com.*