



Recent Developments In Employment Law

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**FEDERAL COURT DECISION UNDERSCORES
IMPORTANCE OF EEO TRAINING
FOR MANAGERS AND SUPERVISORS**

The Seventh Circuit has affirmed assessment of a form of punitive damages against an employer in an age discrimination case where the employer had not provided any training regarding basic EEO principles to managers whose duties included hiring new employees.

In *Mathis v. Phillips Chevrolet, Inc.* (October 15, 2001), the court affirmed the jury’s award of \$50,000 in liquidated damages based on the testimony of the car dealer’s manager that he was not aware that it was illegal to discriminate on the basis of age. The court found that “leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an ‘extraordinary mistake’ for a company to make,” which a jury could find constitutes “reckless indifference,” supporting a liquidated damages award.

This case suggests that prudent employers should provide basic EEO training to all managers and supervisors, just as they do regarding sexual harassment. We can provide such training or support you in your own training program by providing an outline to distribute, reviewing materials you prepare, *etc.* For more information about our employment law training services, please contact John Cashen in our Oakland County office, Karen Piper in our Detroit office, or Kathleen Lieder in our Northern Michigan office.

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UNDERSTANDING OF USERRA IS CRITICAL FOR EMPLOYERS IN TIME OF NATIONAL CRISIS

As the country's uniformed services mobilize, understanding the Uniformed Services Employment and Reemployment Rights Act ("USERRA") becomes increasingly important for human resources professionals. USERRA applies to all employers regardless of size. It protects applicants and employees from disadvantages when they must be absent from their civilian employment in order to serve in the uniformed services.

First, USERRA requires that employers not discriminate against an individual because of his or her past, present or future military service. This applies to initial employment, promotion, reemployment, the continuation of employment and all employment benefits.

Second, USERRA requires employers to grant uniformed service members ("USMs") leave for duty, (whether voluntary or involuntary), training, fitness examinations and funeral duty. Employers must grant the USM up to five years of cumulative leave, but the five years does not include leave time caused by war or a national emergency. In September, President Bush declared a national emergency, so until the national emergency declaration is lifted, service time spent since September 2001 will not count toward the five years of leave. A USM is entitled to, but cannot be required to, use paid leave time for absence due to military duty. Unless circumstances make it unreasonable, the USM should give advance notice of the need for leave.

Third, USERRA gives USMs the right to reemployment after military leave ends. Under most circumstances, an employer must return the USM to the position he or she would have occupied if the military leave had not occurred, provided that the USM is qualified or

can qualify within a reasonable time for that position. If the USM cannot qualify, after your reasonable efforts (such as the provision of training to refresh or upgrade skills), the USM is entitled to return to the position that the USM held when the military leave began. To be eligible for reemployment, USMs must report for work within certain time limits which vary depending on the length of the USM's leave.

Fourth, USERRA provides for continued health plan coverage during military leave for USMs and dependents covered immediately before the leave. This coverage lasts until the earlier of 18 months or the day after the USM fails to return to work or apply for reemployment following leave. If the USM is absent on military leave for less than 31 days, he or she pays only the employee share of the cost of coverage. If the USM is absent 31 or more days, he or she can be required to pay up to 102% of the full premium.

Fifth, USERRA protects the USM's pension benefits. Upon the USM's reemployment, you must treat the period of military leave as service with the employer for nonforfeitability and accrual purposes. You must make contributions to the plan that the USM would have received based upon his or her normal pay. The USM also must be allowed to make up employee contributions that he or she could have made if continuously employed during the leave.

Finally, upon reinstatement, USMs are entitled to the seniority and other rights and benefits that the USM would have attained if continuously employed during the military leave. Also, USMs are entitled to "just-cause" employment for six to twelve months, depending on the length of leave, following reinstatement. Employers can require USMs to pay the employee cost of any benefits to the same extent required of any other employee on other types of leaves of absence.

USMs may either bring a civil suit or file a complaint with the Secretary of Labor for alleged violations of USERRA. Possible damages are lost wages and benefits, liquidated damages and attorney fees.

COURT OF APPEALS DEFINES “HIGHER MANAGEMENT” IN SEXUAL HARASSMENT CASE

In *McCarthy v. State Farm Ins. Co.* (1988), the Michigan Court of Appeals ruled that one way to show that an employer knew of sexual harassment of an employee is to prove that the employee complained to “higher management.” Now, in *Sheridan v. Forest Hills Public Schools* (September 25, 2001), the court of appeals has defined “higher management” for the first time.

In *Sheridan*, the employee was a school custodian who claimed that in 1990 a co-worker raped her while at work. The employee also claimed that in later incidents the co-worker repeatedly harassed and abused her through sexual demands, nonconsensual touching and propositions.

In 1991, after being transferred to another location, the employee told the head custodian that she had a “bad” incident with a particular co-worker, but she did not provide him with any specifics and did not say that she had been sexually assaulted or raped. It was not until August 1993 when the employee reported the specifics, and this time she told the school district’s Assistant Superintendent of Personnel. The employer immediately investigated the matter and fired the co-worker.

The employee sued the school district in 1996 claiming a hostile work environment and sexual harassment, alleging (among other theories) that the district knew of the harassing conduct before she reported it in 1993 because of her earlier complaint to the to the head custodian in the school where she worked.

The court ruled, however, that in order for an employer to be considered to have known of harassment, a complaint must be made to “someone in the employer’s chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing and administering discipline over the offensive employee.” Since the head custodian merely supervised the custodians’ work and had no power to hire, fire or discipline, the court found that the school district did not receive knowledge of the complaint because of the employee’s conversations with him.

The court’s opinion left open the possibility that an employer’s written sexual harassment policy might unwittingly broaden the category of personnel whose knowledge would be imputed to the employer. This could occur if the policy identified lower level employees as persons to whom complaints should be made.

Because the *Sheridan* court has limited “higher management” to employees with significant responsibility, harassment policies should generally not expand the category of employees to whom complaints can be made beyond those managers with significant responsibilities. It is also advisable to identify managers (to whom complaints should be made) as those who have been trained in harassment issues, and to assure that at least one manager is a woman, so complaints might more freely be made.

IRS EXTENDS GUST DEADLINE

The Internal Revenue Service has announced that the deadline for GUST amendments for pension plans with calendar plan years has been extended from December 31, 2001 to February 28, 2002. Plans with plan years ending in January are also given the same extension, but plans with plan years ending February 28 and later must still amend by the

last day of their plan years ending in 2002. The extension also applies to adoptions of prototype and mass submitter plans and certifications of intent to adopt prototype and mass submitter plans.

DEPARTMENT OF LABOR RELEASES MAJOR CHANGES TO OSHA RECORDKEEPING RULE

The U.S. Department of Labor has revised its recordkeeping requirements effective January 1, 2002. The changes can be viewed online at www.osha-slc.gov/recordkeeping/index.html, or contact Anthony Allegrina of our Detroit office at (313) 393-7564 to receive a hard copy.

EMPLOYMENT LAW UPDATE 2001 A SUCCESS THANKS TO YOU

Thanks to all of our faithful readers who helped make Bodman, Longley & Dahling LLP's Employment Law Update 2001 a success. Nearly 300 Firm clients and friends attended our seminars, which were held October 3 in Dearborn, October 4 in East Lansing and October 5 in St. Ignace. We especially appreciate those in attendance who took the time to provide us with detailed evaluations. We review each evaluation and consider your comments carefully when planning the following year's seminar.

Please keep in mind that some of Michigan's most respected and experienced employment law attorneys, members of our Labor & Employment Law Practice Group, are available throughout the year to provide custom, in-house seminars to your managers and supervisors on a variety of employment law topics. For more information on our seminar offerings, please contact John Cashen in our Oakland County office, Karen Piper in our Detroit office, or Kathleen Lieder in our Northern Michigan office by phone or by e-mail.

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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