



WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

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THE EAGLE'S VIEW

August 2004 Volume 4, Issue 8

NON-UNION EMPLOYEES NO LONGER HAVE RIGHT TO REPRESENTATION AT EMPLOYER INTERVIEWS

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In 1975, the U.S. Supreme Court held in NLRB v. J. Weingarten, Inc., 420 U.S. 251, that employees in unionized workplaces are entitled to representation during investigatory interviews by their employer. In 1982, for the first time, the Board ruled in Materials Research Corp., 262 NLRB 1010, that the Weingarten right encompassed the right of an employee to request the presence of a co-worker in a non-unionized setting. The Board stressed that the right to representation derives from the Section 7 right of employees to engage in concerted activity for mutual aid or protection, i.e., two employees acting together, and thus the Board concluded that the Weingarten right does not depend on whether the employees were represented by a union. At this point, the Board flip-flopped on the issue four times, with the latest ruling on June 9, 2004 in IBM Corp., 341 NLRB No. 148, that non-union employees do not have the right to have a co-worker present in an investigatory interview that might lead to discipline.

The employer had argued that the considerations supporting application of the Weingarten right in a unionized setting do not exist in a non-union setting. It pointed out that co-workers, unlike union representatives, cannot

represent the interests of the entire workforce; cannot redress the perceived imbalance of power between an employer and its employees; and cannot facilitate the interview process in the same way as a union representative. The employer further argued that extending the represen-

cepts these arguments and its comments on the issues are quite interesting. The Board notes that employers face ever-increasing requirements to conduct workplace investigations pursuant to law, particularly laws addressing workplace discrimination and harassment. The Board cites that it is especially cognizant in the rise of the number of instances of workplace violence, as well as the increase in the number of incidents of corporate abuse and fiduciary lapses. Further, because of the events of September 11 and their aftermath, employers must now take into account the presence of both real and threatened terrorism, as well as investigations involving the use of toxic chemicals, to provide a drug-free and



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tation right to a non-union setting may compromise the confidentiality of sensitive employment information obtained during an interview, as well as interfere with an employer's ability to conduct an effective fact-finding investigation. In addition to confidentiality issues, the presence of a co-worker during an investigatory interview could reduce the chance that the worker being interviewed will tell the truth.

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damage to his reputation and/or personal relationship and the employer's investigation could be compromised by inability to get the truth about workplace incidents. The Board concludes:

"Our examination and analysis of all

these factors lead us to conclude, that on balance, the right of an employee to a co-worker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough and confi-

dential workplace investigations."

Editor's Note: *This case demonstrates the kind of changes that can occur during change in national administrations. Currently, the Labor Board consists of three members of the President's party, and two Democrats. It should further be noted, that while the*

NLRB in the IBM case ruled that employees do not have the right to have representation in a non-union situation, the Board also stated that they cannot be disciplined for requesting such representation. The Labor Board emphasizes its holding is that the non-union employer has no obligation to accede to the request.

EMPLOYER'S RIGHT TO INVESTIGATE ALSO EXPANDED IN RECENT CREDIT ACT CHANGES

Another example of the increased importance of employer investigations is a recent change from Congress, in which the Fair Credit Reporting Act, 15 U.S.C. Sec. 1681 *et seq.*, was amended, to allow employers to hire and utilize third party investigators, such as attorneys, without meeting the technical requirements of notice and consent to the use of consumer reporting agencies. Section 611 of the new FCRA provision, known as the Fair and Accurate Credit Transactions Act ("FACTA"), removes the so-called Vail letter stipulation. The Vail letter stipulation, which first appeared in a 1999 FTC Opinion letter, stated that employers that use third-party investigators must notify targeted employees before conducting the investigation, to obtain the employee's prior consent, and to fully disclose investigative reports before taking any adverse action against the employee. Not surprisingly, the provision had a chilling effect on employer investigations. As a result, both the employer community and the civil rights community supported the revision, arguing that the Vail letter deterred employers from using experienced and objective outside organizations to

investigate workplace misconduct. As a direct result, in December 2003, FACTA was signed into law. This legislation excludes employee investigations from the FCRA requirements as long as they meet certain criteria, including:

- The communication must be made by the third party to an employer in connection with an investigation of suspected misconduct relating to (a) employment, or (b) compliance with Federal, State or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.

- The communication must not be made for the purpose of investigating a consumer's credit worthiness, credit standing or credit capacity.

- The communication must not be provided to any person except the employer or agent of the employer, any Federal or State officer, agency, or department; any officer, agency or department of a unit of general local government; any self-regulatory organization with regulatory authority over the activities of the employer or employee; or, anyone otherwise required by law.

Another improvement in the new law forbids states from passing laws that conflict with the FCRA. This is helpful inasmuch as it would be difficult for employers to comply with various state laws regarding employee credit and background checks.

However, while FACTA does exempt the majority of employer investigations, if any action is taken as a result of the investigation, Section 611 requires the employer to provide the subject of the investigation with a "summary containing the nature and substance" of the report. While the rule makes it clear that it is not necessary for an employer to reveal its sources in such a report, the FCRA allows for unlimited damages for employers who violate the disclosure provision. This may be problematic, as the Act is vague as to what information must be included; however, it is also important to remember that the requirements will only apply to investigations that would have originally fallen under the ambit of the FCRA. Nevertheless, the vague language utilized in much of the Act promises that there will be future litigation to clarify the law.

Editor's Note: *In employment law today, other than the development of rules and*

KNOW YOUR ATTORNEY



JEROME D. PINN

Jerry is a Member of Wimberly Lawson Seale Wright & Daves. He practices out of the Knoxville, Tennessee office in the areas of employment law litigation, wage-hour and employment practices compliance. He received his Bachelor of Arts in Government and History from Cornell University in 1987, and was admitted to the Phi Beta Kappa honorary society. Jerry served as editor-in-chief of the Cornell Review and he was the recipient of the Dunaway Award for being the best graduate in the Government/Political Science Department. He received his Doctor of Jurisprudence from the University of Michigan Law School in 1990. He joined the firm after practicing law for five years in Washington, D.C., at a major mid-Atlantic law firm. His emphasis was on commercial and employment law litigation.

policies and training. I can think of no issue of greater importance than the development of appropriate procedures to conduct internal employer investiga-

tions. While many of us think of these investigations only in terms of sexual harassment complaints, similar requirements actually apply to any type of harassment, and indeed, any

type of complaints of discrimination or work-place violence. Review the facts and evaluate the situation and make appropriate recommendations.

Another example of the increased importance of employer investigations is a recent change from Congress, in which the Fair Credit Reporting Act, 15 U.S.C. Sec. 1681 *et seq.*, was amended, to allow employers to hire and utilize third party investigators, such as attorneys, without meeting the technical requirements of notice and consent to the use of consumer reporting agencies.



SUPREME COURT RULES ON WHAT A CONSTRUCTIVE DISCHARGE IS

The most recent U.S. Supreme Court ruling involving discrimination, *Pennsylvania State Police v. Nancy Drew Suders*, 93 FEP Cases 1473 (2004), is probably best known for the proposition that constructive discharge may not constitute a tangible employment action, so that the affirmative defense is still available to employers that have installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and the plaintiff unreasonably failed to avail herself of that preventive or remedial apparatus. The affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. The Court granted certiorari to resolve the disagreement among the Circuits on the question of whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes the assertion of the affirmative defense. The

rationale of the Court is based upon its earlier rulings in *Ellerth* and *Faragher*, that there must be some type of "official" act to underlie the constructive discharge, since such actions are most likely to be brought home to the employer, as otherwise the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the workforce. The Court also gives examples as to how the "official act" or "tangible employment action" should play out when constructive discharge is alleged.

Editor's Note: The Court's ruling makes a lot of sense, but it does implicate a couple of equally important legal issues that are suggested in the ruling. The first is what is the true nature of a "constructive discharge" case, and the second is what type of "official act" or "tangible employment action" is necessary in order to generate a judicable legal claim of discrimination.

I have often bragged that I have never lost a "constructive discharge" case as a heavy burden is placed on a plaintiff to win such a case. Indeed, one line of cases requires specific intent to force the employee to quit in order to make a constructive discharge actionable as an

actual discharge. As Justice Thomas points out in his dissent, the Court has now adopted a definition of constructive discharge that is broader, holding that to establish "constructive discharge" a plaintiff must "show that the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response." The Court cites various appeals court rulings for the proposition that "a plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." Thus, there is some question as to whether the Court has "lowered the bar" as to the definition of constructive discharge in a wide variety of employment situations, unrelated to sexual harassment.

Perhaps an even more important question is presented by the Court's definition of "official act," which the Court seems to treat as somewhat synonymous with "adverse employment action." Over the years, the rulings have evolved into a requirement that certain actions must occur for a claim to be serious enough to warrant judicial treatment. Beginning in retaliation cases, and then moving over into run of the mill discrimina-

tion cases, the courts have often referred to such an injury warranting a claim as a "tangible employment action." See, e.g., *Stavropoulos v. Firestone*, F.3d (CA 11, 2004) (employment action must be "objectively serious and tangible enough to alter the employee's compensation, terms, conditions or privileges of employment"). The Supreme Court's ruling in *Ellerth* defines a tangible employment action as constituting "...a significant change in employment status such as hiring, firing, failing to promote, reassignment with significant different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 760. I submit to you that it is quite interesting to compare this definition, with the definition of an "official act" used by the Court in *Suders*. In the latter case, the Court suggested that an official act was one likely reflected in company records, such as a demotion or a reduction in compensation, or transfer to significantly more adverse responsibilities. In other words, I believe that the Court in *Suders* may have again "lowered the bar" as to the type of employer conduct that is actionable under the discrimination laws.

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with Mildred Ramsey
and**

**Basic Workplace Laws
by Wimberly Lawson**

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In June, a federal district court in California certified as a class action a sex discrimination lawsuit against Wal-Mart stores in a class representing more than 1.6 million current and former employees. This case thus becomes the largest private civil rights case ever and is being brought against the largest private employer in the world. Wal-Mart currently operates over 3,400 stores in the U.S. and currently employs well over a million people.

The case was initially brought in June 2001 by two current and four former employees in California, but the class certification will now include females who worked at Wal-Mart stores nationwide since December 1998. The women claim that females are paid 5-15% less than men in comparable positions and receive fewer promotions to management than men. One of the original plaintiffs states

she quit her job as store manager in 2000 after monthly sales meetings were held at a Hooters Restaurant and she was taken to a strip club during a business trip. The judge rejected Wal-Mart's arguments that the sheer size of the class would make it unmanageable. Defense counsel argued that it would take 13 years in daily court sessions to go through all the testimony of managers of all of the 3,473 U.S. stores discussing some 170 separate job classifications. Already the case has generated more than 200 depositions and a million pages of documents.

Wal-Mart has increasingly been the subject of labor troubles, primarily union initiatives and lawsuits claiming

it works employees "off the clock." Wal-Mart currently faces more than 30 lawsuits alleging it failed to pay workers overtime properly, and other investigations are in process regarding immigration practices. Although Wal-Mart is attempting to appeal the certification of the class, such certification often gives leverage to plaintiffs to negotiate favorable settlements. Even a modest settlement to each affected worker in the current case would total several billions of dollars. Because of the significance of the case and its implications, next month we will devote some attention to analyzing it in more depth. We will look at what Wal-Mart has already done, and what other employers may do, to avoid becoming a target for such class actions.



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Significant Developments Over the Year in EEO Law
Changes at OSHA and What They Mean to You

Strategies in Implementing Changes in Wage & Hour Requirements
Strategy in Reducing, Settling & Winning Workers' Comp Claims
Pro & Cons of Specific Written Work Rules, Policies, and Discipline Thereunder
Special Issues with Temporary, Part-Time, Seasonal and Contract Employees

Changes in OFCCP (AAP) Enforcement
Point & Counterpoint - Pros & Cons of Alternative Dispute Resolution Agreements
Cutting Edge Issues in Harassment Investigations and Litigation
Update on Social Security No-Match Letters and Immigration Compliance

Tips on HIPAA Compliance
Handling Employees Who Misuse Absenteeism and Leave Policies
Go-To Checklist in Handling FMLA Issues
Status of Unions - Where Have the Organizers Gone?

How to Avoid Becoming a Target for a Discrimination Class Action
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