WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

Website: www.wlswd.com

Knoxville Office
Bank of America Building, Suite 900
550 Main Avenue
P. O. Box 2231
Knoxville, Tennessee 37901-2231
Phone: 865-546-1000/Fax: 865-546-1001

Morristown Office
929 West First North Street
P.O. Box 1066
Morristown, Tennessee 37816-1066
Phone: 423-587-6870/Fax: 423-587-1479

Nashville Office
200 Fourth Avenue South
Suite 900
Nashville, Tennessee 37219
Phone: 615-727-1000/Fax: 615-727-1001

Cookeville Office
1420 Neal Street - Suite 201
P.O. Box 655
Cookeville, Tennessee 38503-0655
Phone: 931-372-9123/Fax: 931-372-9181

Affiliated Office
Wimberly, Lawson, Steckel, Nelson & Schneider, PC
Atlanta, Georgia

Affiliated Office
Wimberly, Lawson, Suarez & Russell, LLC
Tampa, Florida

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THE EAGLE'S VIEW

March 2004 Volume 4, Issue 3

CATCHING EMPLOYEES WHO MISUSE LEAVE

Several court decisions have issued recently involving the controversial subject of employees who misuse medical leave. In one case, an employee called in sick, and that evening was seen shopping by one of her co-workers. The co-worker provided a written statement to the employer, claiming that the plaintiff was at a grocery store with a "cart full of goodies," that her hair and makeup were "done up," and that she "did not look at all like she was sick." After the plaintiff returned to work, she was called in for a meeting with supervisors, and during the meeting admitted being at the store while on sick (FMLA) leave. She was given a choice of resigning or being fired for misusing leave time. She opted to resign and was escorted out of the building. She later sued, claiming that her employer interfered with her rights under the FMLA by not restoring her to her position after she returned from leave and by retaliating against her for use of leave. Agreeing with the plaintiff in part, the court reasoned that a jury could conclude that the plaintiff was able to shop, but unable to work due to her medical condition. The court rejected the plaintiff's FMLA retaliation claim, suggesting that employers may take action against workers they honestly believe are misusing leave time, but allowing the plaintiff to show that the employer's reason was a pretext for discrimination. Jennings v. Mid-American Energy Co, S.D. Iowa, No. 3.02-CV-90069, 9/17/03.

An employer fared better in another case, where the court ruled that an employee's discharge did not violate the FMLA where his employer was justified in its conclusion that he had been untruthful and misused leave. The employee requested leave to care for his father. Investigators for the employer kept the employee under surveillance during the leave. Following surgery, the father stayed at the employee's house. During this time the investigators observed that the employee spent an afternoon playing golf for three hours. Instead of returning to work on the day after his father went home, the employee took the day off to care for his pregnant wife. However, the investigators reported that he worked on his sprinkler system that day. He had also worked on the sprinklers intermittently while his father was staying with him. The employee argued that he did not know he was prohibited from playing golf or installing sprinklers while on leave or that he was supposed to return to work immediately after he had stopped caring for his father. The court rejected the plaintiff's claim, finding that the employer was justified in its conclusion that the employee had

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misused leave and had been untruthful. McDareld v. Eastern Municipal Water District Board, Ca. Ct. App., 148 LC Para 34, 735.

In a separate but somewhat related development, the U.S. Court of Appeals for the Eleventh Circuit has ruled that an employee must be incapacitated for more than three full days to qualify for a "serious health condition" under the FMLA. Russell v. North Broward Hospital, 8 WH Cases 2d 1857, 10/2/03. Accepting the "universally understood" meaning of a "calendar day" - the period from one midnight to the following midnight - the court ruled that "calendar day" refers to a whole day, not to part of the day, and it takes some fraction more than three whole calendar days in a row to constitute the "period of incapacity" required under the regulations. Interpreting the regulation to require full days of incapacity will "insure that 'serious health conditions' are in fact serious, and are the ones that result in an extended period of incapacity, as Congress intended," the court stated. The case dealt with a fact pattern in which the plaintiff claimed she was incapacitated seven days, but during the seven day period she did not contend that at any point in time she suffered from an incapacity lasting three consecutive full days or more. Instead, she argued that partial days of incapacity are enough to satisfy the regulation, and she was incapacitated for parts of more than three consecutive calendar days during the seven day period.

USE OF EEO-1 FORMS IN DISCRIMINATION LITIGATION

More and more plaintiffs' lawyers are requesting EEO-1 reports in discovery and possibly, using the reports in litigation. At a recent ABA Labor and Employment Section meeting of plaintiffs lawyers, a plaintiffs lawyer speaker said that during discovery you should always request the reports, which companies with 100 or more employees must file with the EEOC to show the demographic composition of the work force. About one-third of eligible employers have not filed, he explained, and a jury may make a presumption as to why the employer did not file. Statistics from the reports can be used, even in individual cases, as part of the argument to show that the employer discriminates, according to the speaker. Alfred W. Blumrosen, who, with the backing of the Ford Foundation, completed a study on the EEO-1 reports, showing that the data in the reports is not conclusive evidence, but is admissible and can be persuasive. Blumrosen noted that the reports can help the two-thirds of employers that his statistics show were not discriminating. One speaker not only urged plaintiffs' attorneys to use the reports, but also urged employers to distribute the reports to management, so that they could form an accurate impression of their own work forces.

PROGRESS ON EEOC'S MEDIATION PROGRAM

The new EEOC emphasis on the voluntary mediation program has generally been well received. According to one survey, some 96% of participating employers said they would use the program again. However, there remains a relatively low employer participation rate in the voluntary program. The EEOC statistics show that in the past two years, only about 31% of employers who were offered mediation agreed to engage in the process. In contrast, more than 80% of charging parties agreed to participate in the program. The main factor in many employers declining participation in the voluntary mediation program is based on the employers' perception that the merits of the case did not warrant mediation. The second major factor was that employers did not believe that the EEOC was likely to issue a "reasonable cause" finding. The third most common reason given was the perception that the mediation program required

Since 1999, the EEOC has mediated more than 50,000 cases, about 70% of which were successfully resolved in an average time of 85 days...

KNOW YOUR ATTORNEY

MARK C. TRAVIS

Mark is the Regional Managing Member of the Cookeville and Nashville, Tennessee offices of Wimberly Lawson Seale Wright & Daves, PLLC. His law practice includes an emphasis in workers' compensation, employment discrimination and wrongful discharge litigation, as well as ADA and FMLA compliance. Mr. Travis received his Bachelor of Science degree from the University of Tennessee College of Business and his law degree from the University of Louisville. He has received certification in labor relations and collective bargaining from the Cornell University School of Labor and Industrial Relations, and is currently an Adjunct Professor of Industrial Relations at Tennessee Technological University. Mr. Travis is a member of the Litigation and Labor and Employment Law Sections of the Tennessee Bar Association. In the American Bar Association, he is a member of the Sections for Litigation, Labor and Employment Law, as well as the Tort and Insurance Practice Section where he serves as a member of the Workers' Compensation Committee. Mr. Travis is also a member of the Mid-South Workers' Compensation Association, the Tennessee Defense Lawyers' Association and the Defense Research Institute. He is the author of the Tennessee Workers' Compensation Handbook, and serves on the Editorial Advisory Board for the Tennessee Workers' Comp Reporter, both published by M. Lee Smith Publishers.

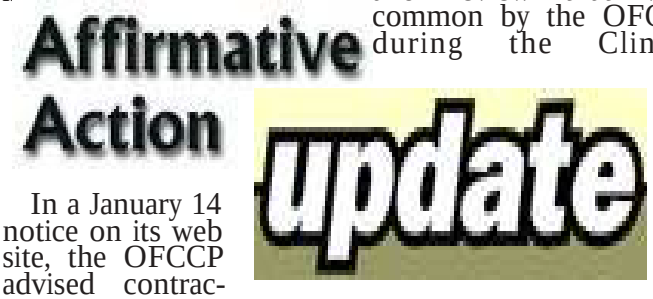
monetary settlement. In another survey, conducted among members of the American Bar Association's Labor and Employment Section who had participated in the EEOC mediation program, participants cited that "the most important reason for declining mediation is doubt about the quality of mediators." The other reasons cited in this survey mirrored those from the other study - they believed that the charge was without merit, that a monetary settlement was required, and that pressure would be applied to settle meritless charges. In respect to choosing a mediator, ABA survey participants preferred outside mediators - rather than EEOC employees - and put "lawyers with mediation training and experience with the law of employment discrimination" at the top of the list.

Since 1999, the EEOC has mediated more than 50,000 cases, about 70% of which were successfully resolved in an average time of 85 days - about half the time it takes to resolve a charge through the investigative process.

UPDATE ON AFFIRMATIVE ACTION AND PAY SURVEYS

The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) has advised federal contractors that are required to maintain affirmative actions plans that they must begin using newly available census data beginning in 2005. At that time, the agency also will start using the new data to analyze contractors' affir-mative action plans. In late December, the Census Bureau released Census 2000 Special Equal Employment Opportunity Data. Under OFCCP regulations, federal contractors that file affirmative action plans are required to use "the most current and discrete statistical information available to derive availability figures."

The new data contains information on the number of people employed in nearly 500 occupations, with information on sex, race, ethnic background, education, age, industry and earnings. Contractors frequently use census data to determine availability and the OFCCP relies on census data to assess whether a contractor's availability determination is reasonable.



In a January 14 notice on its web site, the OFCCP advised contractors that they may begin using the new data immediately, and that contractors that have already prepared their 2004 affirmative action plans based on earlier data, will be given time to update their plans. Use of the most recent census data will become mandatory in 2005.

In related developments, the OFCCP noted that it has moved away from on-site compliance checks and review that were common by the OFCCP during the Clinton administration, and made a shift towards off-site evaluations to allow the agency greater efficiency. At the end of last year, the OFCCP began sending out another round of its mandatory pay survey to 10,000 randomly selected contractors. The survey requires respondents to submit detailed information on the compensation, personnel activity and tenure of full-time employees, according to race and gender. Since its development by the Clinton administration in 1999, however, the employer community has criticized its usefulness and complained about its burdens. The survey has yet to be used by the OFCCP as a tool in the contractor selection process and the agency has engaged an outside consulting firm to analyze its usefulness.

UPDATE ON SOCIAL SECURITY NO-MATCH LETTERS

The Social Security Administration (SSA) has been modifying its review of W-2 Forms and the crediting of Social Security earnings, whereby they determine if the Social Security Number on a W-2 Form matches SSA records. Previously, the SSA would send no-match letters to employers when information submitted for at least 10% of their employees did not match SSA records. In 2001, the system resulted in 110,000 letters, with 1 in 60 employers receiving no-match letters. In 2002, the SSA sent a letter to every employer who had at least one employee whose information did not match the SSA's records, resulting in the equivalent of 1 in 8 employers receiving these letters. The volume of no-match letters sent out in 2002, combined with language in the letter indicating that the Internal Revenue Service (IRS) could fine the employer for each incorrectly reported Social Security Number, resulted in uncertainty among both employers and employees. Despite language indicating otherwise, the letters were confused with notification of immigration violations. Reports indicate that U.S. employers lost thousands of workers due to the effects of the no-match letter.

For 2003, the SSA made significant changes to the number of no-match letters that were issued. Letters will only be sent to those employers with more than 10 employees with mismatched information or for whom mis-matched employees represented one-half of 1% of the W-2 Forms filed with SSA. The SSA restructured its method for calculating which employers should receive no-match letters because very few employers submitted corrected information to the SSA, and much of the information received still did not match the agency's database information.

The 2003 no-match letter also contains several content revisions. Most importantly, it does not include any reference to IRS fines. The letter also explains on the first page that it is not a statement about the employees' immigration status. The letter provides a list of the SSN's of all employees with no-match information and requests that the employer provide the correct information within 60 days. The letter also advises employers not to take any adverse action against an employee just because the SSN appears on a no-match list, and that

Wimberly Lawson
Seale Wright & Daves, PLLC
Attorneys & Counselors at Law
P.O. Box 2231
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taking adverse action could violate state and federal law and subject the employer to legal consequences.

In addition to the reduction in the volume of the letters and the content changes to the employer letter, the SSA will also now send a no-match letter to each "no-match employee" about two to three weeks prior to sending the no-match letter to the employer. If the SSA does not have a valid address listed for a particular employee, the agency will send the letter directly to the employer.

Although the SSA does not have any power to enforce its requests for corrected information, the SSA is required by law to provide the IRS with information on no-match W-2 Forms. The IRS is authorized by regulation to fine employers $50 for each incorrectly reported Social Security Number and reportedly is planning to begin enforcing the regulation after it develops a program for imposing the penalties. However, the regulations provide waivers from penalties if the employer acts in a responsible manner and if the events of non-compliance are beyond the employer's control. For example, the IRS will not fine an employer for incorrect information on the W-2 Forms if they are based on a duly executed W-4 Form and the employer has shown due diligence in trying to obtain the correct information. Due diligence may be shown if the employer solicits the correct information from the employee by requesting that he or she fill out a new W-4 Form.

According to both SSA and IRS representatives, neither agency is currently sharing detailed information with the INS. The INS currently takes the position that a Social Security no-match letter is not by itself notice that the employee is presently not work-authorized.

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