



THE “HONEST BELIEF” RULE



Catherine E. Shuck

“One of the best ways to develop and prove an honest belief in the reason for an adverse employment action based upon alleged misconduct is to conduct a thorough and careful investigation into the alleged misconduct.”

There are many good reasons to conduct a thorough internal investigation when you receive an allegation of employee misconduct. One of those reasons is highlighted in a pair of recent Sixth Circuit cases dealing with the “honest belief” rule, *Sybrandt v. Home Depot, U.S.A., Inc.*, 560 F.3d 553 (6th Cir. 2009) and *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405 (6th Cir. 2008).

The honest belief rule essentially provides that where an employer has a reasonable and considered basis for an adverse employment action, the plaintiff employee cannot prove that the reason given for the challenged action is pretextual. Thus, where the issue turns on pretext, the employer may be entitled to summary judgment. As the Sixth Circuit explained several years ago, “If there is no material dispute that the employer made a ‘reasonably informed and considered decision’ that demonstrates an ‘honest belief’ in the proffered reason for the adverse employment action, the case should be dismissed since no reasonable juror could find that the employer’s adverse employment action was pretextual.” *Braithwaite v. Timken Co.*, 258 F.3d 488, 494 (6th Cir. 2001). Critically, an honest belief in the reason for an employment action bars the employee from establishing that the reason was pretextual even if the belief is ultimately shown to be incorrect.

Honest Belief Demonstrated

One of the best ways to develop and prove an honest belief in the reason for an adverse employment action based upon alleged misconduct is to conduct a thorough and careful investigation into the alleged misconduct. If the decision results in a charge of discrimination, the employer is in an excellent position to defend, as shown in *Sybrandt v. Home Depot*. In that case, Home Depot fired Ms. Sybrandt, a female assistant manager with 15 years’ service, after she allegedly violated the company’s policy against employees using their own security codes to conduct personal transactions involving Home Depot merchandise. Sybrandt was replaced by a male and sued Home Depot for sex discrimination. The federal district court granted summary judgment to Home Depot and the Sixth Circuit affirmed, based upon Home Depot’s honest belief that Sybrandt had violated company policy.

Before terminating her, Home Depot conducted an exemplary internal investigation. The investigation was handled by a district loss-prevention manager and a human resources supervisor. The investigative team interviewed Sybrandt, after informing her that she was under investigation, as well as a number of other employees, and also reviewed security-camera footage. The results of the investigation were turned over to an Employment Practice Manager, who recommended that Sybrandt be terminated, consistent with his recommendation in eighteen similar cases during the previous three years.

On these facts, the Court of Appeals upheld the district court’s grant of summary judgment to Home Depot, holding that the employer’s reason for firing Sybrandt was not pretextual because it was both “reasonably informed” and reflected a “considered” judgment.

Continued on page 4 ►►

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UPDATE ON IMMIGRATION ISSUES



Jerry Pinn

"As of this writing, no long term resolution pertaining to the funding of E-Verify has been passed, as Congress continues to debate various immigration issues."

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E-Verify

E-Verify, which had been scheduled to expire September 30 of this year, continues to be funded by Congress on a month-to-month basis. There seems to be a growing consensus in Congress to extend E-Verify in its current form for 3 years. As of this writing, no long-term resolution pertaining to the funding of E-Verify has been passed, as Congress continues to debate various immigration issues.

Beginning September 8, 2009, certain federal contractors and subcontractors were required to use E-Verify to confirm the work authorization of all new hires and existing employees who are assigned to work on federal contracts. In general, E-Verify applies to all federal prime contractors regardless of size holding a contract to be performed in the United States with a period of performance longer than 120 days and a value over \$100k. The obligation also extends to subcontractors with service or construction subcontracts valued over \$3,000.00. Supply and service contracts not subject to the E-Verify requirement include those for commercially available off the shelf items, such as food and agricultural products.

Rescission of "No-Match" Regulation

On October 7, 2009, the Department of Homeland Security (DHS) formally rescinded the proposed federal "no-match" regulation. The rescission leaves employers with no direct federal guidance on how to handle their receipt of Social Security "no-match" letters or related letters pertaining to individual employees such as "Request for Employer Information" letters or "Request for Employee Information" letters.

DHS, in its comments to the public comments, does state that: "DHS has not changed its position as to the merits of the 2007 and 2008 rules; DHS has decided to focus on more universal means of encouraging employer compliance than the narrowly focused and reactive process of granting a safe harbor for following specific steps in response to a no-match letter. DHS has determined that focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence. Receipt of a no-match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of "constructive knowledge." A reasonable employer would be prudent, upon receipt of a no-match letter, to check their own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match with SSA."

In response to a public comment that some employers are wrongly implementing the 2007 and 2008 final rules, even though said rules have been enjoined and that employees who receive no-match letters are being discriminated against, DHS states as follows:

Employers should not use no-match letters, without more, as a basis for firing employees without resolution of the mis-match, and DHS has never countenanced such a practice.

DHS also comments on the issue of constructive knowledge in general as follows:

[A] finding of constructive knowledge of unauthorized employment may be based on the totality of the circumstances. Employers remain liable where the totality of the circumstances establishes constructive knowledge that the employer knowingly hired or continued to employ unauthorized workers. An employer's receipt of a no-match letter and the nature of the employer's response to the letter are only two factors that may be considered in determining the totality of the circumstances.

ICE I-9 Audits

On July 1st, 2009, Immigration and Customs Enforcement (ICE) issued 652 Notice of Inspection (NOIs) letters to companies nationwide - which is more than ICE issued throughout all of last fiscal year when it only sent out 503 similar notices. The

**“UPDATE ON IMMIGRATION ISSUES”
continued from page 2**

notices alerted businesses that ICE wanted to inspect their employment records to determine whether or not they were complying with employment eligibility verification laws and regulations. Those chosen for the audits were not randomly selected, but were based on ICE suspicions of supposed compliance issues. I-9 forms for current and former employees were requested, along with payroll

lists, Social Security letters and responses, and related items. Some of these employers began getting written responses from the ICE audits a couple of months later, in many cases outlining what steps the employer should take in correcting or re-accomplishing their I-9 forms and in some cases requiring the employers to take investigatory steps to review the legal status of certain named employees. This type of process is expected to be a prime ICE enforcement method for the future, and ICE has suggested that criminal penalties and civil fines are going to be a large part of its strategy going forward. Although ICE does not directly state it will no longer conduct workplace raids, it does state that workplace raids will not be a point of emphasis in the future.

ICE Publication of its Worksite Enforcement Strategy

On April 30, 2009, ICE Director of Investigations Marey Forman issued a memorandum to ICE agents pertaining to ICE’s worksite enforcement strategy. This memorandum was just obtained during October under a Freedom of Information Act request.

Among other things, the memo states that “Arresting and removing illegal workers must be part of the strategy to deter unlawful employment, but alone is insufficient as a comprehensive worksite enforcement strategy. Of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were of employers. Enforcement efforts focused on employers better target the root causes of illegal immigration. An effective enforcement strategy must do all of the following: (1) penalize employers who knowingly hire illegal workers; (2) deter employers who are tempted to hire illegal workers; and (3) encourage all employers to take advantage of well-crafted compliance tools. To accomplish these goals, ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal workforce.”

The memo goes on to state that “ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.”

Moving on to specific elements of its program, ICE states regarding criminal prosecution that:

- ICE is committed to targeting employers, owners, corporate managers, supervisors, and others in the management structure of a company for criminal prosecution through the use of carefully planned criminal investigations.
- ICE offices should utilize the full range of reasonably available investigative methods and techniques, included but not limited to: use of confidential sources and cooperating witnesses, introduction of undercover agents, consensual and non-consensual intercepts, and Form I-9 audits.

Continued on page 4 ►►

KNOW YOUR ATTORNEY

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ANNE T. McKNIGHT is an Associate in the Nashville, Tennessee offices of Wimberly Lawson Seale Wright & Daves, PLLC, which she joined in October 2009.

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**“UPDATE ON IMMIGRATION ISSUES”
continued from page 3**

- ICE offices should consider the wide variety of criminal offenses that may be present in a worksite case. ICE offices should look for evidence of the mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering, and other such criminal conduct.

- Absent exigent circumstances, ICE offices should obtain indictments, criminal arrests or search warrants, or a commitment from a U.S. Attorneys office to prosecute the target employer before arresting employees for civil immigration violations at a worksite.

Concerning administrative and civil tools, ICE states that its I-9 audits is its most important administrative tool, and states as follows:

- The Form I-9 audit process will be utilized in both criminal and administrative investigations to identify illegal workers, including criminal aliens employed at a business.

- ICE offices may issue documents to employers, including Discrepancy and Suspect Document letters, for the purpose of fostering prompt corrections in hiring and documentation practices and also laying the groundwork to establish probable cause to support subsequent criminal charges if corrections are not made.

**“THE ‘HONEST BELIEF’ RULE”
continued from page 1**

Honest Belief Not Demonstrated

In contrast, the lack of a careful investigation to support a reasonable belief resulted in the reversal of summary judgment on appeal in *Martin v. Toledo Cardiology Consultants*. There, the defendant medical practice reduced the salary of Ms. Martin, a 56-year-old lab technician with 37 years of service, on the basis of alleged disciplinary infractions, including allegedly making a racial slur. Martin filed an age discrimination charge approximately six weeks later. A week after the employer received the charge, the employer informed Martin that the practice was being restructured and that she was being demoted to a lower-level position. In response, Martin drafted a letter to the practice manager requesting reconsideration of her job duties. Upon receiving the letter, the practice manager called Martin into his office and terminated her.

The employer asserted that it had fired Martin due to personality conflicts, an unwillingness to cooperate with restructuring of the practice, and for allegedly making a racial slur regarding a patient approximately three months prior to the termination. The trial court granted summary judgment to the employer, holding that there was no evidence that the employer’s proffered reasons for terminating the employee were a pretext for age discrimination, but the Sixth Circuit reversed. The appellate court was unconvinced by the employer’s story for a number of reasons, but as to the alleged racial slur, the court explained that the employer could not definitively show that it had made a reasoned and informed decision because of the inadequacy of its investigation into the slur. The court noted that the employer failed to interview all of the witnesses to the alleged slur, instead taking the word of a single employee who was known to be favored by management.

Although the employer’s case in *Martin* had other problems, the failure to conduct a thorough investigation into the alleged racial slur—which could have formed a legitimate basis for the termination—meant that the employer could not rely on its investigation to sustain the grant of summary judgment.

Editor’s note: Although internal investigations take some time to put together and execute properly, the time you invest can pay substantial dividends if litigation ensues. Internal investigations can also be a double-edged sword, however. The facts that are uncovered in internal investigations, as well as interview notes, may be discoverable in litigation unless the investigation was protected by attorney work product or attorney-client privilege.