Ford & Harrison Mourns the Passing of David M. Safon

Ford & Harrison is deeply saddened by the loss of our partner David M. Safon who passed away suddenly on Saturday, June 10, 2006. David was an outstanding lawyer and individual who was deeply devoted to his wife Lisa and their three children. David joined Ford & Harrison in 2004 with the opening of the firm's New York office and immediately endeared himself to the firm and to clients around the country. His warm personality and dedication to his work left a strong impression on his colleagues and clients.

In addition to serving his clients, David was active in the New York community. He was a former president of his synagogue, Congregation Ohav Sholom. He was also active in the American Bar Association serving as chair for several committees.

In remembrance of David Safon, a college scholarship fund for David's three children - Jenny, Keith and Noah - has been established. Anyone interesting in donating to the Section 529 fund should make checks payable to the Safon Children College Fund and send them to Congregation Ohav Shalom, 145 South Merrick Avenue, Merrick, NY 11566.

David will be deeply missed by all who knew him. •

Ford & Harrison Announces F&H Solutions Group

Ford & Harrison is pleased to announce our new human resources consulting subsidiary, which will complement the services of our law practice. F&H Solutions Group provides comprehensive human resources and labor relations solutions to address business and organizational needs.

F&H Solutions Group consolidates all of Ford & Harrison's consultants under one independent business entity. Jerry Glass, former executive vice president and chief human resources officer for US Airways and, most recently, president of J. Glass & Associates, will lead the consultancy practice.

The new firm will provide its clients with assistance in human resources, labor relations, strategic and transition planning, management and non-management recruiting, organizational change and performance management, employee benefits and compensation, wage and hour consulting, corporate and learning development, and employee and crisis communications. In addition, the consulting firm will specialize in assisting companies with corporate restructurings.

F&H Solutions Group serves its national clientele from offices in Atlanta, Jacksonville, Memphis, New York, Tampa and Washington, DC. The firm's web site is www.fhsolutionsgroup.com. •

Employee Handbook *continued from pg. 3*

Conclusion

A well-drafted handbook can be a tremendous asset to employers. Care must be taken however to ensure that handbooks are drafted to comply with all applicable laws, including state and federal employment laws and state and federal labor laws.

Additionally, handbook provisions must be precise and unambiguous. The Board has repeatedly held that ambiguously worded provisions that could be interpreted to prohibit protected activity are unlawful, even if that was not the employer's intent. Also, handbook provisions that are not enforced may still subject employers to an adverse Board ruling because of the chilling effect the provisions could have on employees' protected activities.

Ford & Harrison attorneys can assist you in preparing or revising handbook provisions that comply with the applicable federal and state laws. If you have any questions regarding the issues raised in this article, please contact the author, Donald R. Lee, dlee@fordharrison.com, 404-888-3861, an attorney in our Atlanta office, or the Ford & Harrison attorney with whom you usually work. •

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MANAGEMENT UPDATE

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The Management Update is a service to our clients providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For information, please contact Lynne Donaghy (404-888-3858 or ldonaghy@fordharrison.com) or write to the Atlanta office.

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Certification as a Labor and Employment Specialist is not currently available in Tennessee or Mississippi.

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MANAGEMENT UPDATE

IN THIS ISSUE

U.S. Supreme Court Adopts Expansive Interpretation of Title VII Retaliation

On June 22, 2006, the U.S. Supreme Court issued a decision that will likely make it easier for individuals claiming retaliation under Title VII to take these claims to trial. *See Burlington Northern and Santa Fe Ry. Co. v. White*. In this case, the Court held that a person complaining of retaliation under Title VII is not required to prove that the allegedly retaliatory conduct was related to his or her employment or workplace. Additionally, the Court held that a retaliation claim can proceed if the complaining person shows that a reasonable employee would have found the challenged action materially adverse, which means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination. The standard adopted by the Court in *Burlington Northern* is more lenient than that imposed by many federal appeals courts.

Title VII's retaliation provision forbids employers from discriminating against individuals who have opposed practices forbidden by Title VII or who participate in a Title VII investigation or other proceeding. Federal appeals courts have disagreed on whether the allegedly retaliatory conduct must be related to the complaining person's employment or workplace and regarding the degree of harm the person claiming retaliation must show to be able to proceed with the claim. Some courts have required a showing that the allegedly retaliatory conduct had an adverse effect on the employee's "terms, conditions or benefits" of employment or that the conduct was an "ultimate employment decision," such as hiring, firing, compensation, etc. More lenient courts, however, have permitted retaliation claims to proceed if the challenged action would have been material to a reasonable employee or if the complaining person showed adverse treatment based on a retaliatory motive, which was reasonably likely to deter the charging party or others from engaging in protected activity. The Court's decision in *Burlington Northern* resolved this split among the appeals courts.

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Is Your Business Ready for a Flu Pandemic?

In light of the extensive news coverage given to the possibility of an Avian flu pandemic, many employers are concerned about their operations as well as potential legal obligations should such a pandemic occur. Ford & Harrison attorneys and F&H Solutions Group consultants have prepared a Legal Alert (available on our web site, www.fordharrison.com) that provides guidance for developing a plan to help ensure the safety of the workplace should a pandemic occur. The Alert also provides a general discussion of possible legal issues that may arise from an influenza pandemic.

Because a pandemic will impact different types of businesses differently, and because different types and sizes of businesses will have different needs, not every point in this Alert will be relevant to every business. Ford & Harrison attorneys and F&H Solutions Group consultants are ready to help you address your specific business needs and implement emergency preparedness and disaster response plans that are tailored to your needs, size and business operations. •

U.S. Supreme Court - *Continued from pg. 1*

The Court held that Title VII's prohibition on discrimination is expressly limited to actions that affect employment or alter the conditions of the workplace; however, the antiretaliation provision is not so limited. The Court noted that the prohibition on discrimination seeks to prevent injury to individuals based on who they are, i.e., their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.

According to the Court, Congress could achieve the objectives of the antidiscrimination provision by prohibiting only employment-related discrimination; however, it could not achieve the objectives of the antiretaliation provision by limiting its prohibitions to employment-related harm. The Court noted, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace."

In addressing the extent of harm the person complaining of retaliation must show, the Court held that an individual must show that a reasonable employee would have found the challenged action materially adverse, which means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination. While this standard is more lenient than those courts that require an adverse effect on the employee's terms or conditions of employment or an "ultimate employment decision," the Court emphasized that the challenged action must be materially adverse, not trivial. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."

In this case, the Court held that the facts supported the jury's verdict on the employee's retaliation claim. Here, the employee claimed she was subjected to illegal retaliation when she was reassigned to more arduous duties after complaining of sexual harassment and when, after complaining of this reassignment, she was later disciplined for insubordination and suspended without pay for 37 days.

The Court rejected the employer's argument that the employee's suspension could not be retaliation because she was reinstated with backpay. The Court noted that even though she eventually received backpay, the employee and her family had to live for 37 days without income, not knowing whether or when she could return to work. "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former."

While the Court's decision will likely enable more retaliation claims to get to trial instead of being resolved by the judge (without a jury) at an earlier stage, ultimately the decision reiterates the importance of taking proactive steps to ensure that employees who complain of discrimination are not subjected to retaliation. An employer considering taking disciplinary action against an employee shortly after that employee has complained of discrimination should evaluate the proposed discipline carefully to ensure that it is consistent with the employer's policies, past practices and disciplinary actions directed toward employees in comparable situations.

If you have any questions regarding the Supreme Court's decision, or labor or employment related issues in general, please contact the Ford & Harrison attorney with whom you usually work. •

Employee Handbook Provisions Could Leave Employers Vulnerable to Union Attacks

There are many reasons for employers to implement and distribute well-drafted employee handbooks, including protecting themselves (as much as possible) from liability for unlawful harassment and demonstrating compliance with the FMLA and other employment laws. While complying with employment laws is rightfully at the forefront of employers' concerns when issuing handbooks, employers should be equally concerned with ensuring that their employee handbooks comply with federal labor law. This is especially true now, because unions have increasingly attacked the legality of certain handbook provisions of both unionized and union-free employers.

Handbook Vulnerability

Challenging the legality of handbook provisions is now part and parcel of many unions' corporate campaigns against union-free employers. In a corporate campaign, unions exert pressure on the employer in multiple ways in an effort to wear the employer down and get it to agree to "card check recognition." Unlike elections, card check recognition almost inevitably results in the union being recognized as the employees' bargaining representative.

As part of a corporate campaign, unions often file a multitude of unfair labor practice (ULP) charges (often targeting employee handbook provisions) with the National Labor Relations Board, which can be expensive and time consuming to defend.

Unionized employers are not out of the woods either. Unless the employer's collective bargaining agreement (CBA) states that it has the right to make work rules, the employer likely will have a duty to bargain with the union before implementing a new handbook or making changes to an existing one. If the employer has the right to implement an employee handbook, the clauses in the handbook must still comply with federal labor law. Otherwise, the employer is exposed to potential liability.

Common Handbook Mistakes

The following are examples of common handbook provisions that, if not worded properly, may increase an employer's vulnerability to successful ULP charges:

1. *Off-Duty Employee Access*: Employers generally can exclude off-duty employees from the inside of their properties and other work areas. However, employers usually cannot prohibit off-duty employees from accessing non-working areas outside of the property, such as parking lots. Thus, any employee access policy should be limited explicitly to property interiors and other work areas.

2. *Divulgence of "Confidential Information"*: Employers generally are free to protect the confidentiality of their trade secrets and other proprietary information. However, a handbook provision that prohibits (or can be interpreted to prohibit) employees from discussing their wage rates or other terms of employment may be unlawful.

3. *Speaking with the Press*: Employees may be prohibited from discussing truly confidential information with the press. As discussed above, confidential information typically includes trade secrets and other proprietary information. However, employees have a right to speak with the press about their wages and other conditions of employment. Thus, a blanket rule prohibiting speaking with the press is likely unlawful.

4. *Making False Statements*: Employers may prohibit employees from making intentionally false statements concerning the employer or its employees. However, employers may not implement a work rule prohibiting statements that are merely false; i.e., inaccurate statements that the employee reasonably did not know were false when s/he made them.

5. *Solicitation and Distribution*: Employers may implement a policy prohibiting the distribution of literature and other materials in working areas and during the working time of the employee doing the solicitation and the employee being solicited. However, an otherwise valid no-solicitation/no-distribution policy may be held unlawful if it is selectively enforced. Similarly, a facially valid policy issued in response to union organizing activity may also be found to be unlawful.

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Employer Waived Verification Requirement by Not Raising it During EEOC Investigation

The Third U.S. Circuit Court of Appeals has held that an employer who responded to an unverified EEOC charge and participated in the EEOC investigatory process waived the right to raise the lack of verification of the charge as a defense to a lawsuit under the Americans with Disabilities Act (ADA). *See Buck v. Hampton Township* (June 30, 2006). Accordingly, the court reversed the lower court's decision dismissing the lawsuit.

Individuals filing discrimination complaints under the ADA must comply with Title VII's procedural requirements. Under Title VII and the EEOC's regulations, complainants must file a charge with the EEOC before filing a lawsuit and the charge must be in writing and verified.

Generally, an EEOC complainant will file a charge of discrimination with a supporting affidavit. Here, however, Buck filed a detailed, eight-page charge of discrimination signed by her attorney, which the court later held did not constitute a verified charge. After Buck filed her charge, the EEOC sent the employer a "Notice of Charge of Discrimination" with a copy of the unverified charge attached. The employer filed an answer and statement of position, responding to the allegations of the charge and denying any discrimination. The EEOC then issued a Right to Sue Letter and Buck sued the employer in federal court.

> *"...the verification requirement exists only to protect the employer from responding to an unverified charge . . ."*

The trial court dismissed Buck's complaint, based on her failure to file a verified charge with the EEOC. The Third Circuit reversed this decision.

The Third Circuit held that the verification requirement should be subject to waiver when required by equitable considerations and refused to view the requirement as a rigid jurisdictional prerequisite. Quoting from a 2002 U.S. Supreme Court decision affirming the EEOC's relation-back regulation, the Third Circuit noted that the verification requirement exists to protect employers from the disruption and expense of responding to a claim unless the complainant is "serious enough and sure enough to support it by oath subject to liability for perjury." Since the verification requirement exists only to protect the employer from **responding** to an unverified charge, the employer waives this protection by responding to the charge, according to the Third Circuit.

Here, the court noted that rather than responding to the unverified charge, the employer could have refused to respond because the charge was unverified. Then Buck could have either amended the EEOC complaint to include a verified charge, demonstrating that she was serious about her claims, or refused to do so, from which a court could conclude that her charge was frivolous and would be justified in dismissing any later suit. Instead the employer responded to her claims and did not raise the failure to verify the charge until after the Right to Sue Letter had been issued and Buck's right to amend her charge had been cut off. The court held that it would be inequitable to rigidly apply the verification requirement to bar Buck from proceeding with her lawsuit, where the employer could have raised the lack of verification at the charge stage.

Other federal courts are split on the issue of whether the failure to verify an EEOC charge is fatal to a subsequently filed lawsuit. The Fourth and Eleventh Circuits have held that it is fatal (*Balazs v. Liebenthal* (4th Cir. 1994); *Fry v. Muscogee County School Dist.* (unpublished decision) (11th Cir. 2005)), while the Ninth Circuit has held that it is not fatal (*McWilliams v. Latah Sanitation, Inc.* (9th Cir. 2005)).

If you have any questions regarding this case or about responding to an EEOC discrimination charge, please contact the Ford & Harrison attorney with whom you usually work. •