

Fall 2007

Employment Law Update

In this Issue:

Compassion and
Common Sense
Could Have Avoided
ADA Lawsuit

_____ Page 2

24th Annual
Employment Law
Update

_____ Page 2

Minimum Wage
Increase Spurs
Other Actions For
Employers

_____ Page 3

Employees' "Top Gun" Provides Valuable Tips at K&C Seminar

Kevin Martingayle, a successful plaintiff's attorney with Stallings & Bischoff, specializes in suing employers. That's why he may have appeared a little out of place addressing over 150 employer representatives at the 23rd Annual Employment Law Update on July 19th in Hampton. Even so, Mr. Martingayle's interesting luncheon presentation was one of the highlights of the day.

Mr. Martingayle described what he looks for when choosing a case in order to help attendees avoid lawsuits. He pointed out that most former employees who come to him are angry and feel mistreated by their former employers. While Mr. Martingayle said only a small percentage of the complaints he hears end up in lawsuits, he gave examples of cases he has filed against employers where facts and circumstances caused his clients to be particularly sympathetic in front of a jury.

To avoid ending up being sued, Mr. Martingayle advised that employers consider the three "C's" - *Compassion*, *Consistency*, and *Common Sense*. He first suggested that employers show some compassion whenever they discharge an employee. He stated "whenever an employer is a jerk or a bully during the firing process, it only motivates someone to sue and provides sympathy for individuals in court." Mr. Martingayle also pointed out that consistent treatment of employees is an employer's best defense against claims of discrimination. He warned against employers playing favorites and stressed that they should make sure they are consistent in all aspects of the treatment of employees.

In following through on the three "C's" theme, Mr. Martingayle urged employers to use common sense in determining when and how to discharge an employee. He stated that while sometimes common sense might dictate firing a very disruptive employee quickly, employers should watch the timing of discharges and not be too rigid. For example, firing an employee on December 24th or the day someone returns from a protected leave provides an employee with ammunition and sympathy in court.

Practical Pointer

The K&C Employment Team, which only represents employers, feels that providing different perspectives like Kevin Martingayle's helps employers avoid workplace liability. That is why a number of current and former representatives of government agencies that protect employee rights will be on hand at the first showing of the 24th Annual Employment Law Update on November 1, 2007, at the Chesapeake Conference Center. For more information about this program, please contact Nicole Naidyhorski at (757) 624-3232.

Compassion and Common Sense Could Have Avoided ADA Lawsuit

Ahmet Demirelli is a wheelchair-bound employee who worked for a call center in Missouri before he was fired for tardiness. He filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that his employer failed to accommodate his "brittle-bone" disorder when it refused to extend his starting time by 15 minutes. Although Demirelli was often late, his tardiness "stemmed from the lack of adequate handicap parking." After receiving warnings, Demirelli unsuccessfully tried to reduce his tardiness by arriving at work as much as an hour early, but the parking spots were still usually occupied. His employer ultimately fired him for violating its strict policy requiring punctuality.

The EEOC ultimately filed a federal lawsuit on his behalf and Mr. Demirelli won back wages and \$100,000 in compensatory damages. The company appealed, and on July 6, 2007, the U.S. Court of Appeals for the Eighth Circuit affirmed the jury award for Mr. Demirelli.

The Appellate Court found that an extra 15 minutes for this particular employee would have been a reasonable accommodation under the Americans with Disabilities Act ("ADA"). The Court noted that the ADA requires employers to engage in an interactive dialogue with disabled employees regarding appropriate accommodations once the employer is made aware of a legitimate need for an accommodation. In this case, the employer was aware of the employee's disability and the disability's effect on his job performance.

The employer in this case may have been trying to consistently apply its tardiness policy, but it may have been a little too rigid under the circumstances. As the Court stated in its ruling, "prudent management decisions and common courtesy among co-workers may well have avoided this claim in its entirety."

New Law Will Affect Handling of Healthcare Coverage for Former Military Personnel

Many employers currently offer financial incentives for newly hired former military personnel to maintain their coverage with the Department of Defense healthcare system ("TRICARE"). This has the effect of pushing the cost of healthcare from the private sector to the public sector. Effective January 1, 2008, a new law will prohibit any such financial incentives for employers with 20 or more employees.

Under the John Warner National Defense Authorization Act (the "Act"), covered employers may not offer financial or other incentives for an individual not to enroll under a group health plan. The Act further provides that TRICARE-eligible employees shall have the same opportunity to participate in employer-sponsored group health plans and receive primary coverage under such plans as similarly situated employees who are not TRICARE-eligible. Any company which violates this prohibition on financial incentives will be subject to a monetary civil fine up to \$5,000 for each violation.

24th Annual Employment Law Update Solutions that Top the Charts



K&C's Labor & Employment team is getting ready to "rock" on November 1st at the premiere showing of the 24th Annual Employment Law Update – Solutions that Top the Charts! This year's rock n' roll themed program is designed to provide solutions to the everyday challenges faced by today's employer.

Attendees will select from their choice of several educational workshops from our chart topping hit list. Topics include: Dealing with the Problem Absentee Employee; Handling an EEOC Charge; Workplace Harassment; Use of Computers in the Workplace; and more. The day will also feature the premiere of K&C's "Name that Employment Law Tune" game and guest speakers who should both educate and entertain attendees.

For more information, visit our website at www.kaufmanandcanoles.com or contact Nicole Naidyhorski at (757) 624-3232.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

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Minimum Wage Increase Spurs Other Actions for Employers

On July 24, 2007, the minimum wage increased from \$5.15 to \$5.85 an hour. On July 24, 2008, the rate will increase to \$6.55 an hour, and on July 24, 2009, the minimum wage will increase to \$7.25 an hour. With these incremental increases in the minimum wage, employers are well-advised to take other steps to ensure compliance with federal wage-hour laws.

First, employers are now required to post a new minimum wage poster. Employers may also want to use this opportunity to review their wage-hour practices generally to make sure they are not only paying employees at least minimum wage, but that non-exempt employees are receiving appropriate overtime compensation for hours worked over 40 in any workweek. Also, if some employees are being treated as exempt employees, now would be a good time to check their duties and salaries to make sure they are exempt under applicable Department of Labor (“DOL”) regulations.

Finally, employers should make sure they are keeping adequate and accurate payroll and time records. If audited by the DOL, an employer’s records will be checked immediately for compliance with the record-keeping obligations employers have under the law. Failure to maintain proper records is not only a violation of the law, but without records, employees’ claims for backpay may be presumed to be valid.

FYI

If you do not already have a copy of the new minimum wage poster, you can obtain a copy through the DOL website at <http://www.dol.gov/esa/regs/compliance/posters/flsa.htm>. Alternatively, attendees of the November 1st showing of the 24th Annual Employment Law Update will receive copies of this poster along with guidelines on how to audit your wage-hour payment and record-keeping obligations. Current and former representatives of relevant government agencies will also be on hand at the November 1st program to answer any wage-hour compliance questions attendees might have.

Outrageous Cases

Employee Fired for Refusing to Sing “Happy Birthday” Wins Case Against Former Employer

Sabrina Balentine, a Jehovah’s Witness, worked as a server for one of the restaurants owned by Razzoo’s Inc. in Texas. When she was told that she needed to join in singing “Happy Birthday” to celebrating customers, Balentine asked to be excused from participating in birthday celebrations because the activity was inconsistent with her religious beliefs. She claimed that her employer fired her instead of accommodating her request.

Ms. Balentine filed a charge of religious discrimination with the Equal Employment Opportunity Commission (“EEOC”), and the EEOC ultimately filed a lawsuit on her behalf. To resolve this case, a consent decree was entered this past June requiring Razzoo’s to pay Ms. Balentine \$38,750. In addition, Razzoo’s was required to adopt an anti-discrimination policy and train managers and human resources personnel at the restaurant where the firing took place.

Even though Razzoo’s disputed the EEOC’s version of the facts, it agreed to pay the damages to Ms. Balentine and institute training to settle the case. This case may be a candidate for K&C’s new top-ten list of Most Outrageous Employment Cases. This case also begs the question of whether or not embarrassed customers might also have damage claims for being forced to listen to servers sing “Happy Birthday.”

If you hear of any funny, weird, or otherwise outrageous cases, please contact anyone on the K&C Employment Team to let us know about your candidate for our list.

