

Summer 2005

# Employment Law Update

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## U.S. Supreme Court Paves Way For More Age Lawsuits

On March 30, 2005, the U.S. Supreme Court ruled that employers may be sued under the Age Discrimination in Employment Act ("ADEA") for neutral actions that have a disparate impact on older workers. This highly publicized decision, *Smith v. Jackson, Miss.*, involved the claims of older police officers and dispatchers against the city of Jackson, Mississippi for adopting a pay plan that allegedly favored younger co-workers. However, the pay plan was part of a legitimate effort by the city to raise compensation levels of lower level employees to bring salaries in line with neighboring police forces.

Even though the Supreme Court rejected the discrimination claims of the employees in this case, it recognized the "disparate impact" theory of recovery in age claims. Thus, it is now clear that an employer may be liable for a practice or policy that disproportionately harms older employees even if the employer never intended such a result. On the other hand, the ruling allows employers to prevail if they can provide a reasonable explanation for the action in question.

The General Counsel for the Equal Employment Opportunity Commission ("EEOC") characterized this decision as "one of the most significant EEO rulings in recent years." The decision was also commended by advocates for older workers like the AARP. Bottom line - this decision recognizes potential liability for employers which had not previously been recognized under the ADEA.

### Practical Pointer

Since roughly one half of the nation's workforce is over 40 years old, it is not surprising that employers are facing more and more ADEA lawsuits. These cases can be difficult because juries tend to sympathize with older employees claiming they were mistreated by their employers. The *Smith v. Jackson* decision sends a message that employers should be cautious when considering any policy or practice that may have a negative effect on older workers. Employers are well-advised to make sure they can document a reasonable explanation unrelated to age for any action that might have a negative impact on older employees.

## New Federal Poster Must Be Displayed

Employers should be aware that a new federal posting requirement recently went into effect. Congress amended the Uniform Services Employment and Re-employment Rights Act ("USERRA") to include a requirement that employers display a USERRA poster along with all other federal and state required postings.

USERRA generally requires re-instatement to employment following a period of military service with no loss in salary or seniority. This law is enforced by the U.S. Department of Labor (D.O.L.), Veterans Employment and Training Services. A copy of the required poster can be downloaded at the D.O.L. website, [www.dol.gov](http://www.dol.gov).

Employer representatives may also obtain a copy of this new poster by attending the final showing of the 21<sup>st</sup> Annual Employment Law Update, sponsored by Kaufman & Canoles, on July 21st at the new Hampton Roads Convention Center. The Employment Law Update is a day-long seminar featuring experienced lawyers as well as current and former representatives of governmental agencies. The speakers provide current and practical advice to employer representatives on all aspects of managing today's complex workplace. For more information regarding this program, contact Nicole Naidyhorski at (757) 624-3232.

## D.O.L. Wage-Hour Audits Prove Costly For Employers

Following the changes last year to the overtime exemption rules under the federal Fair Labor Standards Act ("FLSA"), more local employers have begun to conduct self-audits of their overtime pay practices. These audits are designed, in part, to avoid liability that might result from the Department of Labor (D.O.L.) reviewing compliance efforts after an employee complains. A recent survey indicates that there is a significant risk that the D.O.L. will eventually audit a company whether it has taken steps to bring its pay practices into compliance or not. The survey, conducted by Business and Legal Reports Inc. ("BLR"), found that 1 out of every 5 employers has been audited at least once by the D.O.L. for federal wage-hour violations.

Not only do local employers run a risk of costly audits by the D.O.L., but lawsuits alleging wage-hour violations are becoming more and more common. Lawyers who specialize in suing employers recognize the difficulty employers face in trying to comply with technical wage-hour rules. As a result, employees are more frequently alleging violations and requesting large damages and attorneys' fees in lawsuits against employers.

### FYI

Given the probability of being audited and the cost of wage-hour violations, self-audits to ensure compliance make sense. To aid clients in this regard, the K&C Employment Team provides legal guidance concerning compliance options. When appropriate, our team utilizes a consultant, Gilbert Parker, who is a former District Director of the Wage-Hour Division of the U.S. Department of Labor. This allows employers to receive confidential advice on how to most effectively reduce wage-hour liability before facing a D.O.L. audit or lawsuit.

## Employment Case Gives New Meaning To "Un-Cola"

Every year, the K&C Employment Team selects a list of the ten most outrageous employment cases. One of the candidates for this year's most outrageous case involved a Florida woman who received a 20-year prison sentence for putting rat poison in her boss' soda. The employee, Femesha Foster, worked as a technician at Wal-Mart. She explained that she placed poison in her supervisor's soda when she found out that he had discovered that she had been writing checks from his bank account. Ms. Foster said she was not trying to kill him, but only wanted to send him home sick so she could have time to cover her tracks.

Ms. Foster's defense was not successful in her criminal trial, but her case made the 6<sup>th</sup> Annual K&C Top Ten Outrageous Employment Cases. Perhaps her supervisor's potential workers' comp claim will make a future Top Ten List. This year's candidates were announced at the March 24<sup>th</sup> showing of the 21<sup>st</sup> Annual Update where attendees cast their votes for the final rankings. The final rankings will be announced at the July 21st showing of this popular program.

## Northern Virginia Employer Wins \$1.6M In Non-Compete Case Against Former Employee

In March, James, Ltd., a high-end clothier in the Tysons Galleria in McLean, Virginia won over \$1.6 million in a lawsuit against a former top salesman and his new employer, competitor Saks Fifth Avenue. The salesman, Doug Thompson, had agreed to a non-compete restriction preventing him from working within one mile of his former employer for a period of three years. Even though the Saks lawyer apparently dismissed the agreement as unenforceable, Arlington Circuit Court Judge Joanne F. Alper upheld it and found that Thompson otherwise violated the duty of loyalty he owed to his former employer. Judge Alper also found that Thompson and his new employer had illegally conspired to injure, and otherwise illegally interfered with, the business of James, Ltd.

### Practical Pointer

This case points out that properly drafted covenants not to compete are enforceable as a means to protect a company's business. Even without an employment agreement, unfair competition claims like breach of a duty of loyalty or conspiracy may lead to viable claims against a former employee and/or his or her new employer. If an employee is in a position where he or she can hurt a company by leaving and taking business or confidential information, employers are well-advised to make sure they have an enforceable covenant not to compete. Employers should also be careful to take affirmative steps to protect the business' good will and confidential information.

## Outgoing EEOC Area Director Announces Retirement At K&C Seminar

While speaking at the March 24, 2005 showing of the 21<sup>st</sup> Annual Employment Law Update, the Area Director of the Richmond Office of the Equal Employment Opportunity Commission, Gloria Underwood, announced that she would be retiring effective April 1, 2005. This was the first public announcement of her retirement decision. Although her replacement has not yet been named, Ms. Underwood introduced attendees to Patricia Glisson who is now acting as the Officer in Charge of the Richmond EEOC Office until a new Area Director is in place.

Gloria Underwood also provided insightful comments regarding her office's operations and guidance to the employer representatives present on how to effectively handle potential discrimination issues. She encouraged those present to consider utilizing the EEOC Mediation Program in the event they are faced with a discrimination charge. Ms. Underwood noted that this program has been very successful in effectively and efficiently resolving charges that otherwise would have taken substantial resources on the part of all concerned to fully investigate.

### Final Showing! 21st Annual Update: *Dealing With Risk in the Workplace*

On July 21<sup>st</sup>, the K&C Employment Law Team will host the **FINAL** showing of the 21<sup>st</sup> Annual Employment Law Update at the new Hampton Roads Convention Center. This highly-rated program is presented by experienced attorneys as well as current and former representatives of governmental agencies and features new information and materials designed to help employers deal with risk in the workplace. We are expecting a full house, so reserve your seat today! For more information or to register, please contact Nicole Naidyhorski at (757) 624-3232 or [njnaidyhorski@kaufcan.com](mailto:njnaidyhorski@kaufcan.com).

*The votes are in and the 6th Annual Top Ten Outrageous Employment Law Cases will be announced at the final showing! Don't miss it!*

### 2005 Supervisory Training Clinic Series

Our On The Job: Supervisory Training Clinic provides focused training for supervisors. Whether an employer is interested in a new training program for all its supervisors or reinforcement training in one or two areas for a few supervisors, the K&C Training Clinic should be of help. Topics this year include *Workplace Harassment* and *Effective Interviewing & Hiring Strategies*, with a showing in Richmond on June 9th and in Norfolk on September 15th. For more information or to register, please visit our website at [www.kaufmanandcanoles.com](http://www.kaufmanandcanoles.com).

