

Summer 2008

# Employment Law Update

In this Issue:

Manager Who Resigned Loses Lawsuit	Page 2
24th Employment Law Update	Page 3
Employee Entitled to Overtime Pay	Page 3

## Discrimination Charges on the Rise

The Equal Employment Opportunity Commission (EEOC) is the principal federal agency responsible for investigating employee charges of discrimination. The final statistics for charges handled by the EEOC during its fiscal year 2007 revealed sharp increases in the number of discrimination charges filed against Virginia employers. In FY 2006, the number of EEOC charges in Virginia rose over 32%. This was a substantially greater increase than the 9.3% national increase in charges handled by this federal agency. The EEOC also reported that it recovered \$345 million in monetary relief for charging parties in FY 2007, up 26% from the previous year.

The EEOC released a statement attributing the increase in charges to a combination of factors, including changing economic conditions, increased diversity in the U.S. workforce, and a greater awareness of Federal anti-discrimination laws. The greater awareness of anti-discrimination laws is in part due to "outreach programs" the EEOC is offering to help educate the public.

While the economy and employment rates may improve, increased diversity combined with the EEOC's ongoing outreach efforts will probably result in further increases in EEOC charges in the foreseeable future.

### Practical Pointer

The former Area Director of the Norfolk office of the EEOC, John DiDio, was on hand at the March 20, 2008 showing of the 24th Annual Employment Law Update to advise employers on how to handle EEOC charges. During his workshop he commented on the recent rise in claims filed. Mr. DiDio noted that while more race discrimination charges were filed than any other type of discrimination, retaliation charges are the fastest rising type of charge filed. Practical advice on avoiding discrimination liability was presented during a number of employer-oriented workshops throughout the day at the 24th Annual Update. For those who missed it, this program will be presented again on July 17, 2008, at the Hampton Roads Convention Center.

## K&C Unveils Supervisory Training Webinar

In addition to its long-standing day-long Employment Law Update seminar, the K&C Employment Team provides shorter supervisory training clinics to help employers avoid employment liability. K&C is pleased to announce that on Wednesday, June 11th, it will present its first Supervisory Training Webinar. The inaugural topic will be Workplace Harassment. This Webinar will provide focused training for supervisors without the hassle of scheduling time away from the office. Anyone interested in the Webinar or attending the next Employment Law Update should contact Ashley Dufrene at 757-624-3232.

## Manager Who Resigned Loses Discrimination Lawsuit

Whenever an employee resigns voluntarily, he/she will have a very difficult time proving that he/she was forced to resign because of discrimination. That is what a General Electric Co. plant manager discovered when he sued his employer for age discrimination despite having resigned during severance discussions with his employer.

In *Torrech-Hernandez v. General Elec. Co.*, General Electric maintained that Mr. Torrech had resigned voluntarily during severance negotiations, which were initiated at his request. The manager even sent his employees a resignation announcement without being prompted to do so by General Electric. In what the First Circuit Court of Appeals characterized as a "classic bait and switch," the plant manager ultimately rebuked General Electric's good faith attempt to meet his severance request and demanded an amount grossly out of proportion with their previous discussions. Only at that point did Mr. Torrech threaten that he would demand his job back if he did not get what he wanted, even though he had already resigned and a replacement had already been selected. The Court ruled that there had simply been no discharge and that Mr. Torrech had not been forced to resign because of his age.

### Practical Pointer

This case points out that when an employer accepts an employee's voluntary resignation, he/she certainly faces an uphill battle with any claim that discrimination forced the separation. A truly voluntary resignation will also prevent liability for other claims such as unemployment compensation claims. Even when an employee is about to be discharged, an employer may be wise to offer that individual the opportunity to resign. As a practical matter, someone who accepts the offer to resign is less likely to sue an employer.

Even if there is a lawsuit, the employee who claims he/she was forced to resign, or constructively discharged may have a difficult time proving discrimination. If a case of constructive discharge goes forward, the employer is cast in a sympathetic light for having offered the employee the opportunity to resign to help the employee get another job. So, unless an employee engages in severe misconduct for which an employer wants to send a message to others by terminating the employee, the offer of resignation is an option that should almost always be considered.

## Employee Struck by Lightning Not Entitled to Workers' Comp

Recently, the Virginia Court of Appeals held that an employer was not liable for a lightning strike for which the employee claimed she was at greater risk due to the nature of her employer's facility. In *Rivanna Water & Sewer Authority v. LaFleur*, the Court determined that the employee did not adequately prove that her job increased the risk of injury associated with such a natural act.

In this case, Rose LaFleur was employed as a water operator when a thunderstorm struck. As Ms. LaFleur took water samples from a faucet, she saw a bright flash, heard a loud noise, and saw a red or orange streak flash outside a window. She testified that her right hand was on or near the faucet when this incident took place. Since Ms. LaFleur felt that something happened to her, she went to Martha Jefferson Hospital with her supervisor. The doctor who saw her could find no identifiable injury, but suspected she could have experienced a flash injury caused by lightening. She and her supervisor filled out an accident report at the hospital, and she returned to work. Over the next weeks, Ms. LaFleur experienced headaches and tingling in her right hand and arm. Accordingly, she ultimately filed for benefits with the Virginia Workers' Compensation Commission.

During the ensuing litigation, expert witnesses for Ms. LaFleur convinced the Workers' Compensation Commission that the location and structure of the plant where Ms. LaFleur worked made it especially likely to be struck by lightning, and that workers within the plant were at risk of shock by the conduction of electricity through metal pipes. However, on appeal the Virginia Court of Appeals disagreed and found that Ms. LaFleur did not produce enough evidence for such a conclusion. It noted that only one system of pipes in the building was made of metal and that Ms. LaFleur was not near those pipes at the time of the lightning strike. The pipes near her were made of

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non-conductive plastic. Further, the Court pointed out that Ms. LaFleur was not certain whether her hand was close enough to the faucet for electrical current to arc from the metal to her hand and she could not remember whether the water was on. Accordingly, the Commission's award of temporary total disability benefits, medical benefits, and attorneys fees was reversed.

## 24<sup>th</sup> Annual Employment Law Update

### Solutions that Top the Charts



K&C's Labor & Employment team is getting ready to "rock" on July 17<sup>th</sup> at the Peninsula showing of the 24<sup>th</sup> 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 their choices of several educational workshops from our chart topping hit list, including: Handling an EEOC Charge; Workplace Harassment; The K&C Discipline & Discharge Clinic; and more. The day will also feature the premiere of K&C's "Name that Employment Law Tune" game, where attendees will be eligible to participate as contestants and win a grand prize package that includes an IPOD Nano.

For more information, visit our website at [www.kaufmanandcanoles.com](http://www.kaufmanandcanoles.com) or contact Ashley Dufrene 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](http://www.hrci.org).

## Employee Entitled to Overtime Pay

A Federal Circuit Court recently held that an employer cannot avoid the obligation to pay overtime simply by adopting a written policy prohibiting unauthorized overtime. In *Chao v. Gotham Registry, Inc.*, the Second U.S. Circuit Court of Appeals determined that a group of nurses were entitled to overtime pay for unauthorized overtime even though the employer's policy requiring pre-authorization was clearly stated on its timesheets. The Court pointed out that the law requires employers to pay employees for any work that is "suffered or permitted" whether or not it is authorized.

To avoid liability for unauthorized overtime, employers should carefully monitor their employees' work to make sure they are not working unauthorized overtime. Employers should make sure they keep daily records of hours worked and re-assign shifts that would likely result in overtime. If such monitoring is difficult and/or employees continue to disregard the overtime policy, an employer may simply refuse to assign shifts to employees who violate the policy in addition to taking appropriate disciplinary steps against employees who work unauthorized overtime. When taking appropriate action to deter unauthorized overtime, employers should remember that if they are ever audited by the Department of Labor, it does not matter to the DOL that the employees requested to work longer hours and insisted that they not be paid for overtime.

## Proposed New FMLA Regulations

The Family Medical Leave Act (FMLA) provides eligible workers with job protection for unpaid absences attributable to the birth or adoption of a child or to a serious health condition of a worker or family member. On February 12, the Department of Labor (DOL) proposed new regulations for the FMLA, the first changes to the FMLA since it was enacted in 1995.

The proposed changes are a result of more than 15,000 comments from individuals and businesses interested in changing or simplifying the FMLA. The regulations are substantial and incorporate a number of "employer-friendly" changes. Included are changes to the definition of a "serious health condition," the notice requirements, a new form for work recertification, and other key provisions. The comment period on these proposed regulations closed on April 11, 2008 and it is expected that the DOL will issue final regulations in the near future. Employers should review leave policies now and be prepared to act quickly once the regulations become final.

## Labor & Employment

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### Inside This Issue

- Discrimination Charges on the Rise
- Employee Entitled to Unauthorized Overtime Pay
- Supervisory Training Webinar
- Manager Who Resigned Loses Lawsuit

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