



Study Reports Widespread Wage-And-Hour Law Violations

A new report purports to document widespread violations of wage-and-hour laws in three major U.S. cities, and may lead to increased scrutiny of employers by government regulators.

The 72-page report, titled *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, was released on September 1, 2009. It was published by the Center for Urban Economic Development at the University of Illinois at Chicago, the National Employment Law Project and the UCLA Institute for Research on Labor and Employment. The report contains the results of a survey of more than 4,000 workers in many low-wage industries, and concludes that there are wide-ranging violations of the Fair Labor Standards Act among these workers.

The study comes less than a year after Wal-Mart settled 63 wage-and-hour class action lawsuits with payouts estimated between \$350-640 million, and after an appellate court upheld a \$35 million jury verdict in a collective Fair Labor Standards Act action against Family Dollar Stores, Inc. Release of the report led U.S. Labor Secretary Hilda L. Solis to issue a statement commenting that, "there is no excuse for the disregard of federal labor standards – especially those designed to protect the neediest among us," and reaffirming that "stronger enforcement remains at the top of [her] agenda." In support of this pledge, Secretary Solis stated that she was in the process of hiring 250 new wage and hour investigators in order to monitor wage and hour violations. She noted that during the first six months of 2009, the Department of Labor had succeeded in collecting \$82 million in back wages for nearly 107,000 minimum wage workers.

Who Was Surveyed?

The survey focused on the three largest cities in America – Chicago, Los Angeles and New York City

– which together represent a diverse labor force of more than 11 million workers. To qualify for the survey, workers had to be age 18 or older; employed as a "front-line" worker (i.e. not a manager, professional or technical worker); and work in a low-wage industry as their primary job. Eligible workers' occupations included cooks, dishwashers and food preparers, sewing and garment workers, building services and grounds workers, factory and packaging workers, child care workers, general construction workers, home health care workers, retail salespersons and tellers, maids and housekeepers, cashiers, waiters, cafeteria workers and bartenders, office clerks and couriers, car wash workers, parking lot attendants and drivers, beauty, dry cleaning and general repair workers, security guards and teacher's assistants.

How Was the Survey Conducted?

Researchers used an "innovative sampling strategy" that was developed to overcome the barriers of surveying "hidden" and "hard-to-reach" populations. Known as Respondent-Driven Sampling (RDS), the sampling technique was originally developed by co-author Douglas Heckathorn Ph.D., Professor of Sociology at Cornell University. The RDS technique involves recruiting a small number of workers who fit the study criteria, interviewing them, and sending them into their existing social networks to recruit other workers to complete the survey. Once surveyed, these newly recruited workers then recruit others to complete the survey, and so on.

The interviews, which generally lasted 60-90 minutes, were based on a survey designed to detect violations of laws guaranteeing the minimum

In This Issue:

Study Reports Widespread Wage-And-Hour Law Violations	1-2
Court Declines to Apply 'Bona Fide Executive' Exception to Former In-House Counsel	3-4
Arbitrability of Statutory Discrimination Claims	4-5
Legal Updates	6-11
Executive's Agreement to Defer Salary Violates Massachusetts Wage Act	7

"...employers – particularly those in low wage industries – should ensure that they are in compliance with applicable wage-and-hour laws by conducting an internal audit and reviewing HR policies that deal with overtime pay, meal breaks and other relevant wage-and-hour topics."



By Mark A. Pogue
Providence

By Nancy Van der Veer
Providence

For further information contact:

e: MPogue@eapdlaw.com
t: +1 401 276 6491

e: NVanderVeer@eapdlaw.com
t: +1 401 276 6494

wage and overtime pay, full and timely payment of wages owed, provision of legally required meal and rest breaks, protection against retaliation by employers for complaints about working conditions or attempting to organize, and access to workers' compensation in the case of an on-the-job injury. Questionnaires did not rely on the workers having any knowledge about their rights under employment and labor law; instead, raw data was obtained from workers about their hours, earnings and working conditions, as well as relevant employer actions. The authors then used the reported data to determine whether a law had been violated.

In addition to the raw data discussed above, the questionnaires collected some information regarding workers' awareness of wage-and-hour laws and eligibility. This data has not yet been analyzed. However, according to co-author Annette Bernhardt, Ph.D., Policy Co-Director of the National Employment Law Project, many of the workers surveyed had very little knowledge of the laws, and those who did frequently did not think they were covered due to false information or myths about eligibility.

What Were the Findings?

According to the study authors, widespread violations of low-wage laws exist across many low wage industries in each of the cities studied. The study made the following findings:

- 76 percent of the surveyed workers were not paid the legally required overtime rate by their employers.
- 26 percent of the workers surveyed were being paid less than the minimum wage. Violations were most common for apparel and textile manufacturing, personal and repair services and private household workers. In these industries, more than 40 percent of workers were paid less than minimum wage.
- About 22 percent of the workers surveyed said that they had worked before and/or after their regular shifts in the previous work week. Of these workers, 70 percent did not receive any pay for the work they performed outside of their regular shift. Off-the-clock violation rates were highest for home health care workers (90 percent).
- 57 percent of workers surveyed reported that they did not receive documentation of their earnings and deductions.
- 69 percent of workers who were entitled to a meal break received no break at all, had their break shortened, were interrupted by their employer or worked during the break.
- One in five workers reported that they had made a complaint to their employer or attempted to form a union in the last year. Of those workers, 43 percent experienced some form of retaliation. The reported retaliation included being fired, threatened with a pay cut, or having their immigration status questioned.
- Only 8 percent of the workers surveyed who had suffered serious injuries on the job filed for compensation to pay for medical care and missed days at work stemming from those injuries.

What Should Employers Do?

In light of the findings of the study, and the Department of Labor's prompt response regarding increased enforcement efforts, employers – particularly those in low wage industries – should ensure that they are in compliance with applicable wage-and-hour laws by conducting an internal audit and reviewing HR policies that deal with overtime pay, meal breaks and other relevant wage-and-hour topics.

Study author Bernhardt also suggests that larger employers pay attention to the wage-and-hour policies of all staffing agencies, temporary employment agencies, outsourcing firms and subcontractors with whom they contract, because employers may be liable for any violations committed by these entities under the joint employer doctrine. Bernhardt also suggests that employers pay close attention to the signals they send to their local and regional managers regarding the importance of keeping costs down during difficult economic times, and recommends that any such messages be given with a reminder that cutting costs by cutting overtime or asking workers to perform off-the-clock work is prohibited.

A Resource for Legal & Human Resources Professionals



The **Labor & Employment Practice Group** understands that our clients and friends cannot always fit continuing education into their busy schedules.

We are pleased to offer a library of complimentary recordings of all past webinars on <http://www.eapdlaw.com/events/>.

Topics that we've covered in the past year include:

- Managing Terminations and Reductions in Force
- New Federal Red Flag, Massachusetts and Other State Data Security Rules
- Preparing and Implementing Effective Employee Evaluations
- Overview of the ADA Amendments Act of 2008: Reasonable Accommodation Issues For In-House Counsel and Human Resources Professionals
- FMLA and New Jersey Paid Family Leave Update: New Responsibilities for Employers
- Preparing for the Employee Free Choice Act.

Court Declines to Apply ‘Bona Fide Executive’ Exception to Former In-House Counsel

Certain companies have mandatory retirement policies that apply to senior executives who meet the requirements of the “bona fide executive” exemption under the Age Discrimination in Employment Act (“ADEA”). A recent federal court decision makes clear, however, that employers seeking to utilize that exemption must satisfy a high standard of proof. The court declined to apply that exemption to a former in-house counsel and instead concluded that the company violated ADEA by forcing the retirement of its in-house attorney. *Raymond v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 3:06-cv-1362 (D. Conn. Aug. 27, 2009).

Although ADEA does not prohibit voluntary retirement programs, policies that force individuals to retire must come within the recognized “bona fide executive” exemption in order to avoid creating liability. 29 U.S.C. § 631(c)(1). An employer may require an employee to relinquish his/her position if the employee: (1) is sixty-five or older; (2) was a “bona fide executive” or in a “high policymaking” position for the two years prior to retiring, and; (3) is entitled to collect an immediate, nonforfeitable retirement benefit of at least \$44,000 annually. This exception is narrowly construed and, pursuant to federal regulations, the employer bears the burden of establishing each element with clear and unmistakable evidence. 29 C.F.R. § 1625.12(b).

Factual Background

In *Boehringer*, the company required its executives to retire once they reached the age of sixty-five. In 1994, Dr. Robert Raymond joined Boehringer as its Chief Patent Counsel when he was fifty-five years old. As Chief Patent Counsel, Raymond managed the patent law group and reported directly to Boehringer’s General Counsel. On October 1, 2002, the same month that Raymond turned sixty-three, Boehringer promoted him to Vice President of Intellectual Property. Raymond’s responsibilities did not increase as a result of the promotion. In August 2003, Boehringer hired Michael Morris as a patent attorney. Immediately, Morris assumed most of Raymond’s managerial responsibilities and Raymond’s direct reports began reporting to Morris. In 2004, Raymond had a limited managerial role and concentrated primarily on patent litigation for Boehringer. Also in 2004, Boehringer’s general counsel referred to Morris as the “de facto head of the department.”

In September 2004, Boehringer informed Raymond that he was expected to retire when he turned sixty-five pursuant to its mandatory

retirement policy. Raymond was not previously aware of Boehringer’s policy and objected to the legality of the policy and its application to him. Despite Raymond’s objections, he retired on October 31, 2004, two days after he turned sixty five. Raymond subsequently commenced a lawsuit in the United States District Court for the District of Connecticut, asserting that Boehringer’s mandatory retirement policy violated ADEA.

The Court’s Decision

The district court concluded that Boehringer failed to establish by “clear and unmistakable proof” that Raymond was a bona fide executive or high policymaker for the two years prior to his retirement because Morris assumed all of Raymond’s managerial responsibilities well before Raymond’s departure. Moreover, in order to qualify as a high policymaker, an employee must have significant corporate influence or access to top decision makers when advocating corporate policy. Although Raymond did obtain patents for Boehringer, and this was integral to the company’s core mission, the court did not find this argument persuasive, stating that it is “the type of function that the employee performs, and not the importance of that function” that determines whether an employee is a high policymaker. Even before Morris took over the bulk of Raymond’s duties, Raymond’s only contact with corporate executives was to provide legal advice and not to develop corporate policy.

The court similarly rejected Boehringer’s argument that Raymond was a bona fide executive. A bona fide executive is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. During the last year of his employment at Boehringer, Raymond played a minimal role in hiring and firing decisions, even in his own department, and supervised only one direct report.



By Martin W. Aron
Madison NJ

By Emily Moloney Smith
Boston

For further information contact:

e: MAron@eapdlaw.com
t: +1 973 520 2315

e: ESmith@eapdlaw.com
t: +1 617 239 0851

“... policies that force individuals to retire must come within the recognized “bona fide executive” exemption in order to avoid creating liability..”



“employers must also ensure that the retirement benefit includes only benefits from a pension, profit-sharing, savings or deferred compensation plan...”

As Raymond was not eligible for either exception, the court concluded that Boehringer violated ADEA. However, the Court did not award Raymond damages because it concluded that he failed to mitigate his damages by actively looking for a new position following his termination.

Lessons for Employers

While mandatory retirement policies are useful for employers seeking to refresh upper management, companies must be cognizant that courts strictly construe the mandatory retirement exception to ADEA. An employer should scrutinize its policy to ensure that it satisfies each element of the exception. Specifically, employers should evaluate each employee on an individual basis to determine

whether that employee’s duties qualify him or her as a high policymaker or a bona fide executive; simply providing an employee with an executive job title is insufficient. In addition, if an employee holds two positions in the two-year period before retirement, *each* position must qualify as a bona fide executive or high policymaking position in order to satisfy the exception.

Finally, although not at issue in this case, employers must also ensure that the retirement benefit includes only benefits from a pension, profit-sharing, savings or deferred compensation plan; benefits from health insurance or life insurance plans, social security, contributions by prior employers, and employee contributions are excluded.



By Windy Rosebush Catino
Boston

By Jennifer Geiser Chiampou
West Palm Beach

Arbitrability of Statutory Discrimination Claims

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the “FAA”) in 1925 as a solution to the “costliness and delays of litigation,” but arbitration has other benefits as well, including keeping potentially embarrassing discrimination claims private. Whether statutory discrimination claims are arbitrable has been the subject of debate and conflicting legal analysis, leaving employers with no reliable option other than defending claims publicly and at great expense. However, a few recent cases shed some light on the subject for employers who wish to take advantage of the benefits of arbitration to resolve statutory discrimination claims.

For further information contact:

e: WCatino@eapdlaw.com
t: +1 617 951 2277

e: JChiampou@eapdlaw.com
t: +1 561 820 0299

Is a Statutory Discrimination Claim Arbitrable?

In principle, courts have been open to the concept that employment discrimination claims may be arbitrated for some time. For example, in *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 24-26 (1991), the Supreme Court held that the FAA allows for the arbitration of federal employment discrimination claims, unless otherwise barred by law. The applicability of arbitration clauses to discrimination claims is, therefore, complicated by various federal and state anti-discrimination statutes, which often guarantee claimants access to administrative avenues to redress their claims. Such administrative remedies are attractive to employees because they are often designed to permit a claimant to file a complaint without retaining counsel or expending any fees.

Moreover, even when an employment agreement contains an arbitration clause, if an employer and an

employee disagree over whether a discrimination claim is arbitrable, courts are called upon to interpret whether the parties have a contractual agreement to submit the particular claim to arbitration. While judicial rulings on the arbitrability of discrimination claims have been inconsistent, a few recent cases provide some practical guidance for employers on this subject.

Recent Cases Provide Guidance to Employers

In 2009, the Supreme Judicial Court decided the case of *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, in which the plaintiff, a former chief of anesthesiology, sued her employer for gender-based discrimination and retaliation under Massachusetts law, and asserted other factually related common-law claims. In the trial court, the employer moved to compel arbitration on the ground that the employment agreement with the plaintiff mandated



arbitration of all of her claims. The Supreme Judicial Court of Massachusetts disagreed, holding that the plaintiff's statutory discrimination claims did not fall within the scope of the arbitration clause contained in her employment agreement. The agreement contained a broad arbitration clause similar to that found in many employment agreements, which required that "[a]ny claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration." The court found that such language did not evidence an intent to arbitrate the plaintiff's statutory discrimination claims. In reaching that conclusion, the court held that Massachusetts' public policy against workplace discrimination is so strong that any employment contract in which an employee limits or waives any of the rights or remedies conferred by Massachusetts' anti-discrimination laws will only be enforceable if the arbitration agreement "is stated in clear and unmistakable terms," and is "unambiguous."

In reaching its decision, the *Warfield* Court relied, in part, upon another recent ruling of the United States Supreme Court - *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) - which upheld the validity of agreements to arbitrate statutory discrimination claims in the collective bargaining context. In *Pyett*, the Supreme Court held that as long as the agreement to arbitrate is "explicitly stated" in the collective bargaining agreement, it would be enforceable. In reaching that conclusion, the Court stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."

Similarly, in *Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.*, 773 A. 2d 665 (N.J. 2001), the Supreme Court of New Jersey held that "[t]o be enforceable, a waiver-of-rights provision should provide at least that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination."

Take Away for Employers

Whether a statutory discrimination claim will be arbitrable will depend upon the applicable law in the jurisdiction and the language of a particular employment agreement. Such agreements must be crafted carefully, and particular attention must be paid to the language of the arbitration clause if it is to be enforced. In general, public policy arguments will favor a plaintiff's right to assert

administrative and judicial claims against the employer absent a clear and unmistakable waiver of such rights. In the absence of laws prohibiting the arbitration of discrimination claims, the more explicit and unambiguous the arbitration agreement is, the more likely it is that a court will require the employee to arbitrate all covered claims, including statutory discrimination claims.

As the *Warfield* Court advised employers in Massachusetts, "parties seeking to provide for arbitration of statutory discrimination claims must, at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause." Standard and commonly used language making "any and all disputes arising out of or in connection with an employment agreement" arbitrable is likely to be insufficient to force the arbitration of a statutory discrimination claim. Given the strong public policy behind anti-discrimination statutes, and the fact that discrimination claims are often based upon allegations of intentional, tortious behavior, courts interpreting such language may very well exclude discrimination claims from the scope of such an arbitration clause because such claims do not necessarily "arise out of or concern" the written agreement.

Rather, to position a discrimination claim for arbitration, an employment agreement should state as clearly as possible that the employee is specifically agreeing to arbitrate his or her common law and statutory discrimination claims, thereby waiving the right to seek applicable administrative or judicial remedies. Employers should also consider including express references to all applicable statutory provisions in the arbitration clause, so that the waiver of rights under those statutes is unambiguous. In addition, the agreement should clearly reflect the employee's understanding of the type of claims subject to arbitration. For example,

employers should consider including terms, in the employee's primary language, which reflect that:

- the employee knows that options other than arbitration, such as federal and state administrative procedures and judicial remedies, are available to resolve his or her discrimination claims;
- despite knowledge of such remedies, the employee agrees to arbitrate his or her discrimination claims;
- the employee understands that by signing the agreement he or she is waiving, and will forever be precluded from asserting, the right to utilize available statutory administrative procedures and to seek judicial remedies; and
- regardless of the nature of the employee's discrimination claim, the employee understands that such claim can only be resolved by arbitration, which is binding that upon all parties.

Because laws governing discrimination claims vary by jurisdiction, employers must first determine whether such claims are arbitrable. If so, judicial interpretation of arbitration clauses in a particular state may provide helpful guidance which can shape the language of the arbitration clause. In the absence of a clear directive, however, an employer should work with counsel to draft a clear, unambiguous arbitration clause, which is understandable to the contracting employee. While there are no guarantees that a particular discrimination claim will be subject to arbitration even if there is an express agreement between the parties, entering into an agreement which unequivocally requires arbitration of discrimination claims will make it more likely that a court will enforce the provision and that the employer will receive the benefit of its bargain.



Announcement/ Recognitions

EAPD earned the top rating for the second year in a row - 100 percent - by the Human Rights Campaign in the annual Corporate Equality Index (CEI).

We are proud to be in the company of 305 other major US businesses which get top marks for their treatment of lesbian, gay, bisexual, and transgender (LGBT) employees and consumers.



By Sheryl D. Hanley
Providence

For further information contact:

e: SHanley@eapdlaw.com
t: +1 401 276 6628

Legal Updates

The Supreme Judicial Court of Massachusetts Upholds \$2 Million Verdict Against Wal-Mart for Gender-based Discrimination

In *Haddad v. Wal-Mart Stores, Inc.*, SJC-10261, 2009 WL 3153155 (Mass. Oct. 5, 2009), the Supreme Judicial Court of Massachusetts (“SJC”) upheld a gender discrimination jury verdict of \$972,774 in compensatory damages and \$1 million in punitive damages against Wal-Mart Stores, Inc. (“Wal-Mart”). The plaintiff, Cynthia Haddad, worked as a pharmacist at Wal-Mart for approximately ten years, and consistently received excellent evaluations. In March 2003, she accepted a temporary transfer to a pharmacy manager position. From the time of her transfer until her termination, however, she was paid at an hourly rate considerably lower than any male pharmacy manager in the region. Although she was told she would receive the additional hourly pay, she never did. She also did not receive a pharmacy manager bonus. Ultimately, after numerous complaints, she received a check for the pharmacy manager bonus two months after the rest of the managers, but she never received her additional hourly pay. Less than a week after receiving the bonus, the plaintiff was terminated for a prescription that was fraudulently written by a pharmacy technician while the plaintiff was on duty. After her termination, the plaintiff brought suit against Wal-Mart alleging unequal compensation and termination of employment based on gender in violation of Massachusetts law. Following a jury trial, Wal-Mart was found liable for \$972,774 in compensatory damages and \$1 million in punitive damages. The motion judge, however, vacated the award of punitive damages.

In reversing the lower court’s decision regarding the award of punitive damages, the SJC concluded that there was sufficient evidence for the jury to conclude that Wal-Mart’s proffered motive for the plaintiff’s termination was a pretext and that the defendant acted with a discriminatory animus. In determining whether sufficient evidence existed to uphold the award of punitive damages, the court first took issue with the reason given for the plaintiff’s termination. Wal-Mart told the plaintiff that she was terminated because she left the pharmacy area unsecured and the pharmacy technician unattended, allowing the technician to fraudulently write a prescription. The court, however, noted that a male pharmacist who was on duty when a fraudulent prescription was filled was neither questioned nor disciplined. In addition, the same male pharmacist testified that he commonly left the pharmacy area unsecured to talk to customers, go to the restroom

or get a snack. Moreover, Wal-Mart gave inconsistent reasons for the plaintiff’s termination and the plaintiff’s “exit interview” forms were dated the day prior to her actual termination.

In reviewing the amount awarded by the jury for front pay, the court stated that “[w]hile the award of \$733,307 represents a significant dollar figure for front pay, the evidence supported such an award.” Although Wal-Mart argued that the nineteen-year award of front pay was excessive, the court noted that the award was at the lower end of the plaintiff’s expert’s estimate. Regarding the jury’s punitive damages award, the court began by noting that the standard for awarding punitive damages is “if a defendant knows that it acted unlawfully by interfering with the legally protected

“... the court held that the award of \$1 million in punitive damages was not excessive in light of the amount of compensatory damages.”

rights of the plaintiff, such ‘reckless indifference’ to the rights of others constitutes conduct warranting ‘condemnation and deterrence’ ...and could be sufficient to support an award of punitive damages.” Although recognizing that there was no evidence that Wal-Mart knowingly or intentionally violated the plaintiff’s rights, there was evidence that it had policies prohibiting harassment from which a jury could infer gender discrimination was not legally permitted. In addition, there was sufficient evidence of “reprehensible or recklessly indifferent conduct” because Wal-Mart refused to pay the plaintiff’s hourly pay differential, and fired her for a single infraction while male pharmacists were not investigated for similar or more serious infractions. Finally, the court held that the award of \$1 million in punitive damages was not excessive in light of the amount of compensatory damages.



Employer May Terminate Husband After Discharging Wife

In *Pleau v. Centrix, Inc.*, No. 08-4895-Cv, 2009 WL 2603396 (2d Cir. Aug. 26, 2009), the United States Court of Appeals, Second Circuit, recently held that an employer has the right to terminate one of its employees when the employer believes that the employee can no longer perform his/her duties effectively after the termination of his/her spouse. In *Pleau*, the plaintiff, John Pleau, brought a claim against his employer, Centrix, Inc. ("Centrix"), for marital status discrimination under the Connecticut Fair Employment Practices Act ("CFEPA"), and age discrimination under both the Age Discrimination in Employment Act of 1967 ("ADEA") and CFEPA. With respect to his marital status claim, the plaintiff alleged that the defendant's reason for terminating him was tied to its unfair presumption that a married individual would not be able to separate the termination of his spouse, who worked for the same employer, from his responsibilities to his employer. After recognizing that no Connecticut case specifically addressed the viability of a marital status stereotyping claim, the court held that the employer's decision "does not imply an unlawful stereotype about married individuals as compared with those who are single, divorced, or widowed." As such, the court concluded the plaintiff's marital status discrimination claim was without merit.

In addition, the court dismissed the plaintiff's age discrimination claim. The basis of the plaintiff's age discrimination claim was that he, his wife, and a number of other employees over the age of forty were either terminated or left Centrix during the period in question. The court began its analysis by affirming the district court's holding that the plaintiff had met the "minimal" burden of proof for a *prima facie* case of age discrimination, but that the defendant offered a legitimate, non-discriminatory reason for the termination. More specifically, the defendant terminated the plaintiff because of its concern that he would no longer perform effectively after the termination of his wife. The court then held that there was insufficient evidence to support the conclusion that the plaintiff's termination was motivated by age discrimination. In doing so, the court rejected the plaintiff's use of statistical evidence because, aside from the termination of the plaintiff, his wife, and a third employee, there was no evidence regarding the circumstances under which the remaining employees over the age of forty left defendant's employ. Thus, the statistical evidence advanced by the plaintiff had little probative value.

Executive's Agreement to Defer Salary Violates Massachusetts Wage Act

A recent Massachusetts federal court decision voided a common practice used by companies, including many start-up companies, to defer the salary of executives and other top level managers until the company achieves certain financial milestones. In *Stanton v. Lighthouse Financial Services, Inc.*, the U.S. District Court for the District of Massachusetts ruled that a salary deferral provision in an executive's employment contract violated the Massachusetts Weekly Wage Act.

In *Stanton*, John Stanton, the co-founder of a start-up company, Lighthouse Financial Services, Inc., entered into a one-year employment agreement to serve as the company's president. The employment agreement contained a provision allowing Stanton's salary to be deferred to the election of the board for the first year of employment, but required any deferred salary be paid to Stanton before any distribution of profits. Stanton left the company after 14 months, without having been paid the majority of his salary.

Stanton sued the company for, among other things, violating the Wage Act. The company argued that Stanton was not an employee subject to the Wage Act because as a co-founder of Lighthouse, he was an employer. The court disagreed, reasoning that a person can be both an employee and an employer for purposes of the Wage Act, and as president, Stanton was an employee of the company. Further, the court held that Stanton's unpaid salary constituted "wages" under the Wage Act because the salary payments were not contingency-based compensation, such as commission or bonuses. Noting that the Wage Act specifically states no person shall "by special contract with any employee or by any other means exempt himself" from the provisions of

the Wage Act, the court determined that the salary deferral provision in Stanton's employment agreement was void as a matter of law.

The *Stanton* decision makes clear that certain salary deferral arrangements, even those initiated by the employee, may result in liability under the Wage Act, possibly imposing treble damages and an award of attorney's fees on the company and individual liability on the company's officers and directors for failing to pay the wages. However, *Stanton* may not preclude a company from paying executives nominal base salaries (as long as such salaries meet or exceed the minimum wage rate, or at least \$455 per week if exempt) and providing larger amounts of compensation in the form of bonuses or other payments contingent on the company's financial performance. It is important that any compensation deferral agreement be carefully drafted to ensure compliance with the applicable payment of wages statute, the deferred compensation provisions of Section 409A of the Internal Revenue Code and other laws.

For further information contact:

Lori A. Basilico
 Providence
 e: LBasilico@eapdlaw.com
 t: +1 401 276 6475



Employers Not Required To Engage In Interactive Process Under The ADA Where No Accommodation Exists

In *McBride v. BIC Consumer Products Manufacturing Co.*, No. 07-5689-cv, 2009 WL 3163218 (2d Cir. Oct. 5, 2009), the United States Court of Appeals, Second Circuit, recently held that “an employer’s failure to engage in a sufficient interactive process does not form the basis of a claim under the [American Disabilities Act of 1990 (“ADA”)] and evidence thereof does not allow a plaintiff to avoid summary judgment unless she also establishes that, at least

“...the district court granted summary judgment in favor of the defendant because there was no accommodation that the defendant could have pursued to allow the plaintiff to continue her employment.”

with the aide of some accommodation, she was qualified for the position at issue.” In *McBride*, the plaintiff alleged that BIC Consumer Products Manufacturing Co. (“BIC”) violated the ADA by terminating her employment rather than reasonably accommodating her disability. The plaintiff, a utility operator in the cartridge assembly area of BIC’s ink department, became ill and suffered from a respiratory ailment, as well as panic and anxiety attacks. After she was placed on medical leave, she began treatment under the care of a variety of medical and psychiatric practitioners. After nearly a year on medical leave, she was cleared to return to work with certain restrictions. The restrictions included, among others things, the “complete avoidance of chemical, solvent or ink fumes, as well as any other hydrocarbon fumes.” Upon her return to work, the plaintiff’s supervisor offered her a respirator to allow her to properly breathe while at the same time avoiding any of the fumes that were present at her prior position. The plaintiff, however, rejected the offer. Neither party discussed any additional accommodations and, approximately a month later, the plaintiff was terminated on the grounds that she refused to accept the defendant’s proposed accommodation and failed to propose any alternative accommodation that would have allowed her to return to work.

Subsequently, the plaintiff filed an action against BIC alleging that it violated the ADA by failing to accommodate her. Through the course of discovery, the defendant revealed a variety of positions that were vacant at the time the plaintiff was terminated. However, nearly all of the positions required extensive experience in the field, proficiency in the use of particular software, or a college degree. In addition, each of the available secretarial positions required at least three years of experience. The only other available position, quality assurance technician, would have required the plaintiff to be exposed to chemical fumes, a situation that violated her medical restrictions. In light of these facts, the district court granted summary judgment in favor of the defendant because there was no accommodation that the defendant could have pursued to allow the plaintiff to continue her employment.

On appeal, the Second Circuit began by stating that “[o]ur only inquiry . . . concerns whether [the plaintiff] made a sufficient showing that, with a reasonable accommodation, she could perform the essential functions of the relevant job and that [the defendant] failed to make the appropriate accommodations.” In concluding that the plaintiff failed to make such a showing, the court reasoned that the plaintiff “provided no evidence that there existed any potential accommodation that would have allowed her to continue to work, regardless of the form such an accommodation would have taken.” The court first recognized that the plaintiff failed to identify any accommodation that would have allowed her to perform the essential functions of her pre-disability position. In addition, the court noted that she also failed to identify a suitable position to which she could have been transferred. More specifically, the plaintiff “presented no evidence that, at or about the time of her termination, there existed a vacant position at BIC for which she was qualified and reassignment to which would not have involved her promotion.” Similarly, the court rejected the plaintiff’s argument that the defendant’s failure to engage in a sufficient interactive process should excuse her failure to identify an accommodation that would have allowed her to continue her employment. Although recognizing that the ADA imposes liability for a discriminatory refusal to undertake a feasible accommodation, the court concluded that liability is not imposed where, even if possible accommodations were explored, no accommodation existed. Thus, the court held that the defendant was not liable for failing to engage in a sufficient interactive process because the plaintiff presented no evidence that an accommodation was possible.



The Ninth Circuit Distinguishes Physical Tests From Medical Exams Under ADA

In *Indergard v. Georgia-Pacific Corp.*, No. 08-35268, 2009 WL 3068162 (9th Cir. June 4, 2009), the plaintiff, a worker in Georgia-Pacific Corporation's ("GP") mill facility, appealed the district court's decision in favor of GP in her action for damages under the Americans with Disabilities Act ("ADA"). In *Indergard*, the plaintiff took medical leave to undergo surgery for work-related and non-work-related injuries to her knees. After her orthopedic surgeon authorized her to return to work, GP required her to undergo a physical capacity evaluation ("PCE"). In order to conduct the PCE, a physical therapist visited the GP facility and conducted a job analysis of the plaintiff's prior position, Consumer Napkin Operator, and the position which she was entitled to under the collective bargaining agreement, Napkin Adjuster. Among the lifting requirements for the positions were a sixty-five pound lift and carry for the Consumer Napkin Operator position and a seventy-five pound lift for the Napkin Adjuster position. In light of these requirements, the physical therapist determined that the plaintiff's injuries prevented him from conducting the PCE. Even after the plaintiff's orthopedic surgeon removed the permanent restrictions and allowed her to undergo the PCE, she was unable to perform the lifting requirements and was informed that she could not return to either position. Because no other positions were available, she was terminated. After her termination, the plaintiff brought suit against the defendant and alleged, *inter alia*, that GP relied on the PCE to "remove and/or deny" her return to employment. In response, GP argued that the PCE was not a medical examination and, therefore, it did not violate the ADA. Further, it argued that even if the PCE was a medical exam, it was job-related and a business necessity which is expressly allowed by the ADA. The magistrate judge agreed with GP that the PCE was not a medical examination, a decision adopted by the district court.

In reviewing the district court's decision, the Court of Appeals began its analysis by recognizing that an employer may not require a current employee to undergo a medical examination unless it is shown to be job-related and consistent with business necessity. More specifically, employers are permitted to make inquiries or require medical examinations "when there is a need to determine whether the employee is still able to perform the essential function of his or her job." Using the *EEOC Enforcement Guidance* as a guidepost, the Ninth Circuit concluded that the PCE was a medical examination because the occupational therapist who conducted the PCE measured the plaintiff's heart rate and recorded an observation about

her breathing after a treadmill test. In the court's opinion, "[m]easuring [the plaintiff's] heart rate and recording observations about her breathing and aerobic fitness ... was not only unnecessary to determine whether she could perform the task,

"...the Court of Appeals began its analysis by recognizing that an employer may not require a current employee to undergo a medical examination unless it is shown to be job-related and consistent with business necessity."

but is also the kind of examination that the *EEOC Enforcement Guidance* identifies as inappropriate to include in a non-medical physical agility or fitness test." The court emphasized that the plaintiff's heart rate was taken before *and* after the treadmill test, and including the results in the report to GP was unnecessary for the purpose of determining whether the plaintiff was physically capable of performing her job duties. Further, after applying the seven factor test used by the *EEOC Enforcement Guidance*, the court concluded that the factors established that the PCE was a medical examination. The court then stated that "[t]he purpose of the PCE may very well have been to determine whether [the plaintiff] was capable of returning to work", but "[t]he substance of the PCE ... clearly sought 'information about [the plaintiff's] physical or mental impairments or health.'" As such, the Court of Appeals vacated the district court's decision and remanded the matter to determine whether the PCE was job related and consistent with business necessity.



“... preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination.”

Complaints Regarding Supervisor’s Affair Are Not Protected Activity Under Title VII

In *Anderson v. Oklahoma State University Board of Regents*, No. 08-6249, 2009 WL 2488158 (10th Cir. Aug. 17, 2009), the United States Court of Appeals, Tenth Circuit, held that preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination. In *Anderson*, the plaintiff complained to his employer that he believed his supervisor was having an affair with a female employee. He claimed that after he reported the affair he was not included in managerial meetings and felt excluded from involvement in department matters. Subsequently, the plaintiff was terminated as part of a reduction-in-force (“RIF”). After his termination, the plaintiff alleged that he was terminated from his employment in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”).

The district court ruled that the plaintiff’s action of complaining about his supervisor’s affair and the alleged favoritism the supervisor showed to that employee was not protected opposition to discrimination under Title VII. In affirming the district court’s decision, the Court of Appeals stated that “preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination.” The court reasoned that “Title VII’s reference to ‘sex’ means a class delineated by gender, rather than sexual affiliations.” Therefore, the court concluded that the plaintiff’s complaints about his supervisor’s affair and favoritism did not constitute opposition to an employment practice made unlawful by Title VII.

Higher Standard Of Proof Required To Establish ADEA Claim When Employee Is Terminated During RIF

In *Geiger v. Tower Automotive*, 579 F.3d 614 (6th Cir. 2009), the United States Court of Appeals, Sixth Circuit, reviewed the standard to evaluate Age Discrimination in Employment Act (“ADEA”) claims in light of the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009). In *Geiger*, the plaintiff alleged that he was the victim of age discrimination after he was terminated as part of a reduction-in-force (“RIF”). The plaintiff, a Maintenance, Repair, and Operations Buyer (“MRO”), was terminated when his employer reduced the number of MRO positions from 21 to 6. Prior to the RIF, an MRO was assigned to a single facility. After the consolidation, each MRO was responsible for a geographic region.

In analyzing the plaintiff’s ADEA claim, the court looked to the recently decided *Gross* decision. The court concluded that “*Gross* overrules [Sixth Circuit] ADEA precedent to the extent that cases applied Title VII’s burden-shifting framework if the plaintiff produce[s] direct evidence of age discrimination.” Instead, in cases where direct evidence is involved, “the correct standard for ADEA claims [is] whether the plaintiff has proven ‘by a preponderance of the evidence ... that age was a ‘but-for’ cause of the alleged employer decision.’” After concluding that the plaintiff failed to present any direct evidence of age discrimination, the court then analyzed the plaintiff’s claim under the circumstantial evidence standard.

The court recognized that “the *McDonnell Douglas* framework can still be used to analyze

ADEA claims based on circumstantial evidence.” In accord with the *McDonnell Douglas* framework, the court noted that the plaintiff had to establish, *inter alia*, that he was replaced by someone outside of the protected class. The court then concluded that the plaintiff had not actually been replaced. More specifically, the employee that was selected to perform the plaintiff’s duties had to perform her own duties in addition to the plaintiff’s duties. Moreover, the remainder of the plaintiff’s duties were absorbed by hourly employees. Thus, the RIF consolidated the plaintiff’s duties with employees who were already employed at Centrix.

Lastly, because the plaintiff’s termination occurred in the context of a RIF, the court stated that the plaintiff had to meet a “heightened standard” of proof to establish his *prima facie* case. Instead of the “minimal” standard usually applied, the plaintiff was required to provide “additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.” The court then held that the plaintiff had not met this burden because the record supported the defendant’s claim that it selected the better candidate for the position. Specifically, the employee selected had a better skill set for the position, interviewed more impressively, and performed well in her implementation of the company’s policies and procedures. Therefore, the preference of the candidate selected was not actionable because it was not motivated by discriminatory animus.



Defendant Established *Faragher/Ellerth* Defense With More Than Reasonable Action

In *Roby v. CWI, Inc.*, 579 F.3d 779 (7th Cir. 2009), the Court of Appeals, Seventh Circuit, concluded that the defendant was protected from liability from the plaintiff's hostile work environment claim by the *Faragher/Ellerth* affirmative defenses. In *Roby*, the plaintiff, a cashier at the defendant's store, alleged that she was sexually harassed by her supervisor after he began making sexually suggestive remarks to her. At the time the defendant learned of the plaintiff's allegations, it promptly began investigating the matter. During the investigation, the interviewees were instructed that the investigation was confidential. In addition, while the investigation was conducted, the defendant attempted to rework the store schedule to ensure that at least one of the other managers would be in the store during all working hours to make the plaintiff feel more comfortable. However, given the small number of employees at the store, the defendant could not prevent the plaintiff and the harasser from sometimes having overlapping schedules.

At the conclusion of the investigation, the defendant found that the harasser's conduct did not rise to the level of unlawful harassment, but did find that his conduct was inappropriate and he received a three-page written warning and was required to undergo anti-harassment policy training. After her harasser was not terminated, the plaintiff requested that she never be scheduled to work at the same time as him. As stated above, her request could not be accommodated because of the store's small size. After going on leave, the plaintiff never returned to work and never informed the defendant that she did not want to work there anymore. Subsequently, she filed a claim against the defendant alleging that she was sexually harassed.

On appeal from the district court's grant of summary judgment in favor of the defendant, the court began its analysis by determining whether a tangible employment action occurred. This inquiry was necessary because the defendant would be entitled to assert the *Faragher/Ellerth* affirmative defense if no tangible employment action occurred. More specifically, the defendant would be free of liability if it could demonstrate that it exercised reasonable care to prevent and correct any harassing behavior, and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities to avoid harm. In rejecting the plaintiff's claim

that a tangible employment action occurred because she was terminated, the court noted that the plaintiff was merely put on leave and was supposed to make arrangements to return to work. Moreover, the defendant kept the plaintiff on the weekly schedule for several months. In the court's opinion, "[t]his [was] a far cry from termination." Alternatively, the plaintiff alleged that she was constructively discharged. The court, however, disagreed and held that there was insufficient evidence of constructive discharge. The court reasoned that the plaintiff had not presented any evidence indicating that her working conditions were so intolerable that she had to quit. The court pointed out that the plaintiff presented no evidence of threats to her or her employment "that would lead a reasonable person to believe that she needed to quit her job to protect herself." As such, the defendant was entitled to raise the *Faragher/Ellerth* affirmative defense.

The court began its analysis of the defendant's affirmative defense by first concluding that the defendant presented evidence dem-

onstrating it exercised reasonable care to prevent the harasser's conduct. Specifically, the defendant performed an investigation, instructed interviewees that the information was confidential, fired an employee who breached the confidentiality, and disciplined the harasser by issuing him a written reprimand and ordering him to attend education and retraining classes. In addition, the defendant attempted to rework the schedule so that another supervisor would be present and minimize the plaintiff's shifts with the harasser, even allowing the plaintiff to skip a shift and take time off. The court concluded that "[a]ll of these steps were more than reasonable attempts to correct the problem." Finally, in holding that the defendant demonstrated that the plaintiff failed to take advantage of the corrective opportunities, the court reasoned that the plaintiff was aware of the harassment policy and failed to immediately report the harassing conduct for at least five months. Based on these facts, the court held that no rational jury could conclude that the plaintiff's actions were reasonable.

A list of our offices & contact numbers are below. We hope you find this publication useful and interesting and would welcome your feedback. For further information on topics covered in this newsletter or to discuss your labor & employment issue, please contact one of the editors or any of the attorneys listed on page 12:

Offices

Boston, MA	t: +1 617 239 0100
Fort Lauderdale, FL	t: +1 954 727 2600
Hartford, CT	t: +1 860 525 5065
Madison, NJ	t: +1 973 520 2300
Newport Beach, CA	t: +1 949 423 2100
New York, NY	t: +1 212 308 4411
Providence, RI	t: +1 401 274 9200
Stamford, CT	t: +1 203 975 7505
Washington, DC	t: +1 202 478 7370
West Palm Beach, FL	t: +1 561 833 7700
Wilmington, DE	t: +1 302 777 7770
London, UK	t: +44 (0)20 7583 4055
Hong Kong (associated office)	t: +852 2116 9361/9362

Editors

Timothy P. Van Dyck
Boston
 e: TVanDyck@eapdlaw.com
 t: +1 617 951 2254

Mark A. Pogue
Providence
 e: MPogue@eapdlaw.com
 t: +1 401 276 6491

Further information on our lawyers and offices can be found on our website at www.eapdlaw.com.



For further information on topics covered in this newsletter or to discuss your labor & employment issue, please contact one of the editors or any of the following attorneys:

Martin W. Aron, <i>Co-Chair</i>	t: +1 973 921 5215	Sheryl D. Hanley	t: +1 401 276 6628	John H. Reid, III	t: +1 860 541 7721
Timothy P. Van Dyck, <i>Co-Chair</i>	t: +1 617 951 2254	Elaine Johnson James	t: +1 561 820 0276	Dennis M. Reznick	t: +1 973 921 5214
Neil Adams	t: +44 (0)20 7556 4572	Alice A. Kokodis	t: +1 617 239 0253	Adam P. Samansky	t: +1 617 517 5550
Kori Anderson-Deasy	t: +1 617 239 0206	Denise Kraft	t: +1 302 425 7106	Mark E. Schreiber	t: +1 617 239 0585
Lori A. Basilio	t: +1 401 276 6475	Rachel Lafferty	t: +44 (0)20 7583 4055	Emily Moloney Smith	t: +1 617 259 0851
Matthew D. Batastini	t: +1 973 520 2399	Daryl J. Lapp	t: +1 617 239 0174	Holly M. Stephens	t: +1 617 239 0698
Robert J. Brener	t: +1 973 921 5219	Barbara A. Lee	t: +1 973 921 5208	Charles W. Stotter	t: +1 973 921 5226
Simeon D. Brier	t: +1 954 667 6140	Gary J. Lieberman	t: +1 617 235 5305	John G. Stretton	t: +1 203 353 6844
Paulette Brown	t: +1 973 921 5265	Steven H. Lucks	t: +1 212 912 2886	Jason D. Stuart	t: +1 212 912 2937
Stephanie A. Bruce	t: +1 617 239 0635	Stephen J. MacGillivray	t: +1 401 276 6499	Siobhan Michele Sweeney	t: +1 617 517 5596
Scott H. Casher	t: +1 203 353 6827	Eric B. Mack	t: +1 401 455 7621	Jeff Swope	t: +1 617 239 0181
Windy Rosebush Catino	t: +1 617 951 2277	David R. Marshall	t: +1 212 912 2788	Nancy H. Van der Veer	t: +1 401 276 6494
Kenneth J. Cesta	t: +1 973 520 2336	Rory J. McEvoy	t: +1 212 912 2787	Karen West	t: +1 203 353 6871
Jennifer Geiser Chiampou	t: +1 561 820 0299	Mary L. Moore	t: +1 973 921 5259	Thomas H. Wintner	t: +1 617 239 0881
David N. Cohen	t: +1 973 921 5262	Patricia M. Mullen	t: +1 617 239 0619	Gina D. Wodarski	t: +1 617 951 2233
Gail E. Cornwall	t: +1 617 239 0899	William E. Murray	t: +1 860 541 7207	Gary A. Woodfield	t: +1 561 820 0217
Richard M. DeAgazio	t: +1 973 921 5229	Ivan R. Novich	t: +1 973 921 5227	Robert G. Young	t: +1 617 239 0180
Erica C. Farrell	t: +1 401 455 7650	Mark A. Pogue	t: +1 401 276 6491	Marc L. Zaken	t: +1 203 353 6819
Mark W. Freel	t: +1 401 276 6681	Todd M. Reed	t: +1 401 528 5858		

EDWARDS ANGELL PALMER & DODGE

eapdlaw.com

The Labor & Employment Bulletin is published by Edwards Angell Palmer & Dodge for the benefit of clients, friends and fellow professionals on matters of interest. The information contained herein is not to be construed as legal advice or opinion. We provide such advice or opinion only after being engaged to do so with respect to particular facts and circumstances. The firm is not authorized under the U.K. Financial Services and Markets Act 2000 to offer UK investment services to clients. In certain circumstances, as members of the Law Society of England and Wales, we are able to provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Please note that your contact details, which may have been used to provide this bulletin to you, will be used for communications with you only. If you would prefer to discontinue receiving information from the firm, or wish that we not contact you for any purpose other than to receive future issues of this bulletin, please email JElint@eapdlaw.com or call +1 617 239 0349.

© 2009 Edwards Angell Palmer & Dodge LLP a Delaware limited liability partnership including professional corporations and Edwards Angell Palmer & Dodge UK LLP a limited liability partnership registered in England (registered number OC333092) and regulated by the Solicitors Regulation Authority.

Disclosure required under US Circular 230: Edwards Angell Palmer & Dodge LLP informs you that any tax advice contained in this communication, including any attachments, was not intended or written to be used, and cannot be used, for the purpose of avoiding federal tax related penalties, or promoting, marketing or recommending to another party any transaction or matter addressed herein.

ATTORNEY ADVERTISING: This publication may be considered "advertising material" under the rules of professional conduct governing attorneys in some states. The hiring of an attorney is an important decision that should not be based solely on advertisements. Prior results do not guarantee similar outcomes.

