

Reporter

PRACTICAL COMPLIANCE, WORKABLE POLICIES, EFFECTIVE MANAGEMENT WITHIN THE LAW

HR Manager's Mantra: Document, Document, Document; But Why Do Documents So Often Fail in Court?

Documentation, so essential in many court proceedings, often fails to prove the desired point. More often than not, says Marcia Keegan, it is because of the most basic reasons. Keegan, who presented her tips at a recent Connecticut Business and Industry Association Conference in Cromwell, Connecticut, is a partner with Wigin & Dana of Hartford, Conn.

Poor documentation can be worse than no documentation at all, says Keegan. Here are her top reasons why documentation fails.

In This Issue

- Document, Document, Document...1**
Why Do They Fail in Court?
- In Brief.....1**
Caught at Fair ... Stress May Not "Substantially Limit" ... Ferry Workers Share OT Settlement
- IRCA Requires I-9 Forms2**
Time for Self-Audit
- Washington Roundup.....3**
Protecting Undocumented Workers ... "Comp" Time ... Tax Break on Insurance ... Ergonomics
- You Be the Judge4**
Did Employer Violate Employee's Rights?
- Web Browser7**
www.law.cornell.com
- From the States8**
Rehabilitated Drug Addict ... Whistleblowing Security Guard ... "Getting Senile" ... Didn't Know

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Unsigned and/or undated

Foremost among the reasons for failure is ignoring the basic formalities. Undated and unsigned documents have little value, yet many of the documents Keegan sees lack these basic elements.

Illegible

Hastily scrawled notes will be difficult to decipher a year or two after they were written.

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1. **HR Trainer.** Let us know if you like this reproducible training handout, and we'll do more. (Email rbpubs@aol.com.)
2. **BLR's Annual Survey of Benefits.** Participants in the survey will receive a summary of the results.

Delayed

Waiting to document is another poor practice. Documentation written at the time of the incident is more believable than documentation created later in preparation for a court hearing.

Inaccurate

Carelessness sinks a good many documents, says Keegan. If there are any inaccuracies in the document, the accuracy of the whole document is called into question.

Not specific

You must think through the eyes of a third party reading your documentation. For example, says Keegan, "talked to Mike about his behavior" is too vague to mean much to a third party. A jury will wonder if the behavior you talked to Mike about

good or bad. Was it related to the current behavior that's causing a problem? There's no way to tell.

Keegan notes that many documents refer to "this incident" but provide no details. Or they may say, "Tim's always late." Again, too vague, says Keegan. Write down the actual dates Tim was late and by how many minutes.

Reaching conclusions without support

For example, "The employee was drunk." This statement alone, unsupported by facts, will not be very useful. Note the behaviors you witnessed, such as, "the employee stumbled, slurred words, was loud and verbally abusive, and smelled of alcohol."

Another example: "Sue's lazy." Write down the facts to support the conclusion. "It takes Sue eight hours" *(continued on page 4)*

In Brief

FMLA

Employee On FMLA Leave Caught At Fair

What would you do if you spotted an employee who was supposed to be sick and on Family Medical Leave (FMLA) at the local fair? That's what happened in this case.

Audeana Connel worked for Hallmark Cards, Inc. While on FMLA leave because of severe

(continued on page 7)

HIRING

IRCA Requires I-9 Forms for Every Employee— Post 9/11 Security Concerns Mean It's Time for a Self-Audit

Since the enactment of the Immigration Reform and Control Act of 1986 (IRCA), all employers must verify each job applicant's identity and eligibility to work in the United States, using the Immigration and Naturalization Service's (INS) Form I-9. This requirement applies to all employers, including those who hire domestic help or farm laborers.

Since the events of September 11, 2001, employer verification of a person's employment status is even more important. Investigations after the bombings showed that illegal employees were working in security positions such as airplane mechanics or baggage handlers in airports, and illegals were also found in other sensitive work positions. It's crucial that employers and their managers and supervisors be well-trained to verify applicant eligibility to work.

On the other hand, employers must be careful not to become overzealous. Employers may not require overdocumentation during the I-9 procedure. If the required forms are presented from the list, that's sufficient. Furthermore, managers and supervisors must be trained to avoid discriminatory behavior toward people who "look" foreign. (See "EEOC Reaffirms" in this issue's *Washington Watch*.)

During the summer of 2001, major immigration legislation which would have eased immigration verification and associated penalties was close to fruition. However, the events of September 11 put a stop to immigration reform for the foreseeable future. The legislative focus is now set toward screening and tracking foreign individuals who enter the United States.

What is an I-9?

The I-9 form is formally called "Employment Eligibility Verification Form." It's a form that verifies a new employee's identity and eligibility to work in the United States.

After it is completed, employers do not mail it to the INS, but must

keep it in their files in case the INS or other government agency ever wants to see it (8 U.S.C. 1324a).

All employees, citizens and non-citizens alike, must complete Section 1 of the form at the time of hire. The employer is responsible for ensuring that Section 1 is completed.

The form must be completed on the day of hire. The employer is responsible for ensuring that the form is complete and must physically examine the evidence of identity and eligibility within three business days of the date employment begins. The employer is not meant to be a document specialist, however. If the document looks legitimate and accurate, employers can accept it.

If a new employee does not have the necessary documents, the person must present a receipt for application for the documents within three business days and present the actual documents within ninety days.

If employers hire a person for fewer than three business days, the identity and eligibility check and I-9 form must be completed when employment begins.

Where can employers get the I-9 form?

Form I-9 may be obtained through INS district offices or ordered from the Superintendent of Documents, USGPO, Washington, DC 20402. Forms may be requested by calling (800) 870-3676, or obtained from the Department of Justice's web site on the Internet at <http://www.ins.usdoj.gov/graphics/formsfee/I-9.htm>. Blank forms may be photocopied in any amount, but remember to photocopy the entire document, not just the first page.

What are acceptable documents?

Documentation is required for two purposes: to establish identity and to establish eligibility for work.

IRCA delineates three lists of documents. The documents on the first list, List A, are sufficient to establish both identity and eligibility to work. Documents on List B establish identity only, and those on List C establish

eligibility to work only.

Thus, if the applicant provides a document from List A, that single document is sufficient. If the applicant does not provide a document from List A, two documents—one from List B and one from List C—are required.

List A—One document from this list is sufficient to establish both identity and work eligibility

1. U.S. Passport (either unexpired or expired)
2. Certificate of U.S. Citizenship
3. Certificate of Naturalization
4. Unexpired foreign passport with I-551 stamp or attached INS Form I-94 indicating unexpired employment authorization
5. Alien Registration Receipt Card

(continued on page 3)

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Bruce Plent, J.D.

Art Design, John F. Kallio
Legal Editor, Dorit S. Heimer, J.D.
Levett Rockwood P.C., Westport, CT

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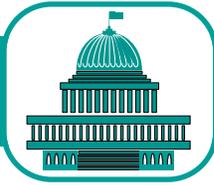
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Washington Roundup

EEOC Reaffirms Protecting Undocumented Workers

The U.S. Equal Opportunity Commission (EEOC) will continue to protect undocumented workers from discrimination. The EEOC reaffirmed that the Supreme Court's recent decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, does *not* affect the government's ability to root out discrimination against undocumented workers. The *Hoffman* verdict disallowed back pay as a remedy for illegal workers.

Federal law makes it illegal to discriminate against any worker in the United States, regardless of immigration status. In response to *Hoffman*, the EEOC recently directed its field offices that claims for all forms of relief, other than reinstatement and back pay for periods after discharge or failure to hire, should be processed in accordance with existing standards without regard to an individual's immigration status.

Bills May Extend "Comp" Time to Private Sector

Compensatory time, a bank of time that employees are allowed to accrue in lieu of overtime pay, is currently only available to public sector employees. However, this may soon change if Congress passes either of two bills currently pending.

HR 1982, The Working Families Flexibility Act, introduced by Rep. Judy Biggert (R-IL) in 2001 and recently in the news again, proposes to amend the Fair Labor Standards Act of 1938 to provide workplace flexibility options for (1) time and a half compensatory time off, and (2) biweekly work programs (allowing up to ten hours more than 40 hours of work in one week and correspondingly less in the other).

The bill would require that employee participation be voluntary, and that collective bargaining agreements be honored. In addition, the bill sets forth procedures for employer discontinuance of, or employee withdrawal from, certain programs, and prohibits coercion.

A similar bill, S624, was introduced in 2001 by Senator Judd Gregg (R-NH). Both bills are in subcommittee.

Small Business May Get Tax Break on Insurance

Small businesses may get a large tax break if Senate Bill S2679 is passed. The bill, sponsored by Senator Max Baucus (D-MT), entitled the Health Insurance Access Act of 2002, amends the Internal Revenue Code to create—for qualified small businesses (of up to 50 employees) providing health insurance coverage to all

qualified employees—an employee health insurance expenses credit of up to 50 percent of qualified employee health insurance expenses.

The Act includes leased employees and employees reasonably expected to receive at least \$5,000 of compensation annually. In order to qualify for the tax credit, employers who did not previously offer health insurance coverage to their employees must provide a premium subsidy level of at least 50 percent for the first five years of the program. The bill has been referred to the Finance Committee.

Ergonomics May Be Back

Remember ergonomics? Well, it may be back if Senate bill S2184 is passed. The bill, sponsored by Senator Jon Breaux (D-LA), provides for the re-issuance of a rule relating to ergonomics. This bill, unlike the bill introduced in the Clinton administration, would not apply to injuries that are not work-related, and would prohibit the expansion of state workers' compensation laws. Labor Secretary Elaine Chao has said that the Department of Labor is working on a new ergonomics plan and has advised President Bush to veto Breaux's legislation. The bill has been sent to Senate subcommittee. **bp**

HIRING

I-9 Forms

(continued from page 2)

- with photograph (INS Form I-151 or I-551)
- 6. Unexpired Temporary Resident Card (INS Form I-688)
- 7. Unexpired Employment Authorization Card (INS Form I-688A)
- 8. Unexpired Reentry Permit (INS Form I-327)
- 9. Unexpired Refugee Travel Document (INS Form I-571)
- 10. Unexpired Employment Authorization Document with photograph (INS Form I-688B)

The INS has developed a new employment authorization form, Form

I-766. The form is designed to make it easier for employers to determine if a document is genuine. For example, it includes holograms (pictures or words that appear when the card is turned or tilted) of the Statue of Liberty, the letters "U.S.A." and the words "U.S. Immigration and Naturalization Service." The I-766 will eventually replace the I-688A and I-688B forms and may be used by employers as a List A document. However, employers may still use I-688A and I-688B.

List B—Documents that establish identity

1. Driver's license or ID card issued by U.S. state or possession with photograph or identifying physical information
2. ID card from federal, state, or

- local government agencies or entities, with photograph or identifying physical information
3. School ID card with photograph
4. Voter registration card
5. U.S. Military card or draft record
6. Military dependent ID card
7. U.S. Coast Guard Merchant Mariner card
8. Native American tribal document
9. Canadian driver's license

For those under 18 without the above documents:

1. School record or report card
2. Clinic, doctor, or medical record

(continued on page 5)

DOCUMENTATION

Document

(continued from page 1)

to do the work that others do in two hours.”

Making indirect statements

Sometimes, in an effort to be nice to employees, especially well-liked employees, the supervisor or manager tries an indirect statement. For example, “Mike's work could be improved.” The jury wonders, “Was Mike's work ‘OK’ work that could be improved to ‘excellent,’ or was it unacceptable work that would appropriately lead to discipline?” Your document should make that clear.

Softening the blow

Similarly, managers often try to find a pleasant way to deliver difficult performance information. In so doing, they often compromise their efforts. For example, the performance review

says, “You've missed some important deadlines. I know we're understaffed and we've been really busy, but we all need to pull together to meet these deadlines.” This softly-stated criticism makes the jury wonder, “Was it the employee's fault that the deadlines were missed, or were things so hectic that it was unreasonable to expect anyone to meet deadlines?”

Not the whole truth

Sometimes documentation only mentions one reason for termination, when in fact there were several. If they all were taken into account in the decision to terminate, they must all be on the documentation at termination. You get into trouble, says Keegan, when you try to add on new reasons at the trial.

Stating ‘harmless’ untruths

A step beyond softening the blow is making false statements “for the

sake of the employee.” Even though you think you're doing something nice, you are falsifying a document.

For example, you fire someone for cause, but you say the reason for termination is “restructuring” or “lack of work.” You have made a false statement, although you have done it with the best of intentions. If the employee later sues, claiming the real reason was discrimination, not lack of work, you will have to explain, and your credibility will be compromised.

Inconsistent

You discipline an employee for being late three times, and he or she says, “But John was late six times and he didn't get disciplined.” Your inconsistency makes you look unfair or discriminatory.

Creating personal documentation

Managers often jot down notes to themselves—unsigned, undated, perhaps illegible, and never shown to the employee. Such documentation is weak at best. The employee can accuse you of just making this up now, and that he or she never knew there was a problem.

Overdocumentation

Some documentation is so overboard that it covers “the employee was two minutes late” to “the employee slugged the supervisor.” Focus only on the important incidents, says Keegan.

The ‘last straw’ tendency

Conversely, avoid the tendency to focus just on the straw that broke the camel's back—that is, the final incident. Don't ignore the long history of incidents that lead up to the last one.

Missing documents

Keegan reports that it is not unusual for managers and supervisors to say they documented everything, but then when the time comes to produce the documents, they are nowhere to be found. As
(continued on page 5)



You Be the Judge

Did the Employer Violate the Employee's Rights by Investigating and Firing Him?

Vast Protection Insurance Company laid off 600 employees, including Jamie Watson. The following day one of Vast Protection's senior vice-presidents, George Goff, received three telephone messages, in a disguised voice, threatening his life and predicting that his wife and children would be kidnapped and killed also. A fourth call came in later, and Goff recorded it.

Nearly a year later, Vast Protection rehired Jamie Watson. Later that year Goff again received several anonymous calls, promising to kill him on the lay-off anniversary date. This time, various long-term employees recognized Watson's voice. A voice analysis firm also stated that Watson's voiceprint matched that of a recorded specimen of Watson's normal speaking voice. The police were called in and, after investigation, decided to pursue the case. The next morning, at work, Vast Protection fired Watson and then the police arrested and charged him with threatening and harassing, both criminal felonies.

Although several employees and the voice analysis firm testified in the case, the jury acquitted Watson. He sued Vast Protection for abridgment of his constitutional rights, including that the company had no “probable cause” for its actions. Watson sued under 42 U.S.C. Sec. 1983, a statute that essentially provides that a person can sue if they are deprived of constitutional rights by an “actor” of the state. Normally, this statute would not apply to a private company. But Watson argued that Vast Protection was so closely aligned with the police—a state actor—that the company was, in effect, acting as the state. He also sued for false arrest, false imprisonment, malicious prosecution, and wrongful discharge. The case was heard in federal district court.

Who won? You be the judge: turn to page six.

You Be the Judge scenarios are based on real cases. Names and places are fictitious. Any resemblance to real persons, companies, or places is inadvertent and unintended.

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DOCUMENTATION

Document

(continued from page 4)

HR managers review a situation, they should ask to see the documents.

Must the employee sign

Should the employee sign all documentation? Yes, says Keegan, ideally the employee signs all documentation. The signature acknowledges receipt of the document, not agreement with what it says. If employees refuse to sign, she says, don't worry; the refusal just proves they really are uncooperative and contrary.

In general, she says, do not put anything in writing that you have not discussed or are not willing to discuss with the employee. Nothing in the file should be a surprise to the employee.

Furthermore, use the "Journal Test," she suggests. Don't put any-

thing in writing that you wouldn't wish to see on the front page of the *Wall Street Journal*. For example, on documentation that would otherwise have been valuable, Keegan has seen the following statements:

She hasn't been the same since she got pregnant.

Don't hire—too old.

Never showed for interview; can't trust those people.

Are written warnings required?

Nothing in the law requires written warnings, notes Keegan. However, in her experiences watching mock juries deliberate, Keegan has heard the jurors talking about written warnings. The jurors generally agree that written warnings are required, and they hold it against a company if warnings haven't been issued.

When should you start documenting?

In a situation which has developed over time, managers and supervisors may not have documented the initial events except on informal notes. However, when the situation escalates or starts to head downhill, recapture the informal notes in a formal document that details times and dates and content of the prior informal discussions.

Keegan's keys

Keegan offers the following keys to better documentation:

- Make your documentation simple, factual, and non-accusatory
- Date and sign all documents
- Establish an internal system to check for consistency
- If possible, get the employee's side on record. sdb 

HIRING

I-9 Forms

(continued from page 3)

3. Day-care or nursery school records

List C—Documents that establish employment eligibility

1. U.S. social security card (unless it says it is not valid for employment)
2. Certification of Birth Abroad (Department of State Form FS-545 or DS-1350)
3. Original or certified copy of birth certificate bearing an official seal
4. Native American tribal document
5. U.S. Citizen ID Card (INS Form I-197)
6. ID Card for Resident Citizen of the United States (INS Form I-179)
7. Unexpired employment authorization document issued by the INS (other than those under List A)

Employees hired before November 6, 1986

These employees are "grandfathered," meaning they do not have to complete the I-9 form nor are employers required to verify their status. Temporary employment interruptions will not cause them to lose their pro-

tected status but if they quit, are fired, or leave the United States they will lose their "grandfathered" status.

Are original documents required or are photocopies acceptable?

Employees must present original documents. Employers may not accept copies, except that a certified copy of a birth certificate is considered original.

Employers may (but are not required to) photocopy the documents and keep them with the I-9—and it's definitely the safest thing to do although it may take up some room. However, employers may not retain the photocopies for just some employees. They must do it for all or none.

The employer must sign the I-9 form.

Can the employer require only certain documents?

No. Any documents from the appropriate list will do, and the employer may not require any particular document or ask for more documents than are required.

How long must the employer keep an I-9—and where?

The employer must keep the I-9 form for three years after the hiring

day, or one year after termination, whichever is the longer time. The law does not say that these documents must be kept separately from the person's personnel file. However, because the I-9s contain age and citizenship documentation, it is advisable to keep them separate from other personnel files, and in a locked drawer or locked area.

Furthermore, if the I-9s are kept separately, and an inspector comes to look at them, you won't have to give the inspector access to the organization's complete personnel records. An inspector with access to all records could be alerted to problems unrelated to the I-9s.

More than one location

If the employer does business in several places or states, the I-9 record-keeping should be done at the various operational locations. The records should also be retained in the operation's location, not in a central or corporate location.

Mergers and acquisitions

An acquiring company inherits all I-9s (and responsibility for any errors, omissions, issues, etc.) of the company being acquired. Employers need to be aware of immigration issues and
(continued on page 6)

HIRING

I-9 Forms*(continued from page 5)*

ensure that their attorneys attend to them.

Updating the I-9

Identity documents need not be updated, as they have served their purpose. However, eligibility documents that expire must be updated. Employers typically maintain a tickler file to track these expiration dates. Employee name changes should be recorded on the old form by lining out the old name, printing the new name and reason for change, and dating and initialing the changes. If the employee's name has changed and the form needs updating otherwise, the change must be recorded in Block A of Section 3.

When updating or reverifying the I-9, employers must complete Section 3 and sign the form again. If an

employee is rehired within three years of the original completion of the form and the employee is still eligible on the same basis, the employer should complete Block B of Section 3. If the employee is rehired within three years, reauthorization is not required. However, if the employee is rehired within three years and the work eligibility authorization is expired or about to expire, the employee must provide new documents and the employer must examine the documents, record the document title, document number, and expiration date, and must sign.

Discrimination

IRCA prohibits employers from discriminating in hiring, firing, recruiting, or referring on the basis of national origin or citizenship status. For example, if an employer only requires documents from those who look foreign and not from all employees, this would be considered discriminatory. Or if employer preferences disproport-

tionately disqualify individuals of a particular national origin, this may be considered discriminatory. Or if an employer insists upon certain work eligibility and identity documents from among those on the list, it could be construed as discriminatory. If an employer engages in unfair discriminatory practices, the employer will be ordered to stop the prohibited practice and take one or more of the following steps:

- Hire or reinstate the individual
- Lift any restrictions
- Post notices to employees about their rights and employer obligations
- Educate personnel involved in hiring about the discrimination requirements of the law
- Remove false performance documents from employee's file
- Pay fines ranging from \$275 to \$11,000, depending upon the number of offenses.

Note: The Equal Employment Opportunity Commission has issued a policy guidance that emphasizes that undocumented workers are entitled to most of the same legal remedies in a lawsuit as are other workers. (See "EEOC" in *Washington Roundup* for more details.)

Penalties for other violations

Employers who have knowingly hired unauthorized aliens or continue to employ them knowing they are unauthorized will be fined from \$275 for a first offense, up to \$11,000 for several offenses. They may also face criminal penalties of up to \$3,000 per employee and up to six months imprisonment. Employers may be fined up to \$5,000 for any fraudulent document used or accepted.

Good faith defense

If an employer can show that he or she has complied with the I-9 requirements, that constitutes a "good faith" defense to a charge of knowingly hiring an unauthorized alien.

Compliance suggestion: Make an audit of your I-9 files. Do you have an I-9 on file for every employee? If grant of authorization to work forms have expired, take action to update. And, set a date for the next audit. rc 

**The Decision****Company Is Not a State Actor, So No Constitutional Rights Were Violated**

The lower court dismissed Watson's entire case. They said that Vast Protection had probable cause to believe that Watson had committed a crime and thus had legal justification to report its information to the police. On this basis, the court rejected his civil rights and other charges. Watson appealed to the federal appeals court.

The appeals court affirmed the lower court findings. Vast Protection had conducted a thorough investigation into the threatening calls, the court said. When the employer went to the police, it had reasonable evidence to believe that Watson had threatened to commit crimes. Merely making a good-faith request for a police investigation did not mean the employer was a "state actor," so there was no liability for the employer, even if the police had acted unconstitutionally (which they did not).

Furthermore, the police and the district attorney acted independently of Vast Protection in arresting and prosecuting Watson, and had probable cause to do so. So Watson lost no "constitutional rights" in being arrested. The fact that the jury acquitted Watson does not mean there was not probable cause to arrest him, since the standards are very different.

Comment: *The original criminal case was decided basically on which was more credible—Watson's denial, or the employees who said it was his voice—and apparently the jury believed Watson. But that was no help to Watson on the constitutional rights issue. This court and many other federal courts have agreed—a private employer's investigating an employee's possible misconduct does not automatically make the employer a state actor.* rc 

In Brief

FMLA

(continued from page 1)

tension headaches and cervical spasms, she was spotted at a nearby fair when she was supposedly too sick to work.

When confronted, Connel lied about being at the fair. The company later called her doctor who told them that "if she were well enough to attend [a] fair, then she was well enough to go to work." She was terminated shortly afterward and sued, alleging wrongful termination while on FMLA leave.

Ruling for Hallmark, the court reasoned that Connel was terminated for dishonesty, and not because she was on FMLA leave (*Connel v. Hallmark Cards, Inc.*, D. KS, No. 01-2060-CM, 6/19/02).

Comment: *It is often risky to terminate an employee who is out on FMLA leave; however, there are instances—such as in this case—where employers can feel confident that the termination is justified and will not be misconstrued as retaliation for taking leave.*

ADA

Stress May Not Meet 'Substantially Limits' Test

Stress may not meet the "substantially limit" requirement of the Americans with Disabilities Act (ADA). Stress can be disabling, but sometimes it can be just stress, as in this case. Francis Carroll began working at Xerox in 1970 and eventually assumed a sales position. In 1994, Xerox increased their sales objectives by 94% and Carroll had a difficult time meeting those objectives. He went to his physician complaining of

chest pains, but no cause was found. Shortly afterward, he complained to his manager about his workload and asked for early retirement, but was denied. A few months later, he went to the emergency room again complaining of chest pains. The doctor concluded that Carroll was suffering from stress, and as a result, Carroll took a disability leave. While he was out, another sales representative successfully met the sales quotas in Carroll's territory.

Carroll eventually sought to return to work and was transferred to Houston, TX to work at a less stressful, but lower paying job. He retired a few years after and then filed suit against Xerox alleging that Xerox had failed to accommodate his disability. Ruling for Xerox, the court explained that he was not "significantly restricted" in his ability to perform the job and more importantly, he failed to show that his impairment was "profound enough and of sufficient duration" to significantly restrict him from working (*Carroll v. Xerox Corp.*, 1st Circuit, No. 01-2013, 6/28/02).

Comment: *Showing that a condition "substantially limits" the ability to work is the first step in proving a disability claim. In this case, Carroll was able to work and had no symptoms once he was transferred.*

FLSA

Ferry Workers Share In OT Settlement

It seems that every day there is another lawsuit or settlement based on employers misclassifying workers.

Starbucks, Pepsi, and Wal-Mart have all been in the news recently for

violations of the Fair Labor Standards Act (FLSA). Here's the latest. One hundred and fourteen employees working as deckhands and bartenders on ferries to Block Island, RI, were classified as exempt employees and were not paid overtime. The employers involved—CT-based Interstate Navigation Co. and Nelseco Navigation Co.—claimed that the employees fell under a "seaman's exemption" of the Act. However, the employees in this case were material handlers and snack bar attendants and clearly did not fall under the exemption.

In a settlement with the Department of Labor (DOL), the companies agreed to pay \$160,000 in back pay and damages for improper recordkeeping of hours worked. The settlement also prohibits the companies from future violations of the FLSA (*Chao v. Interstate Navigation Co.*, D-CT, No. 3:01 CV 594, settlement approved 6/24/02).

Comment: *There has been a dramatic increase in the number of FLSA claims being brought by employees and by the DOL. If you haven't recently done so, do an audit to be sure that all your employees are categorized correctly. While this case discussed an uncommon exemption, most employers will find legitimate exemptions for administrative, executive, professional and outside sales employees. Each category has its own requirements. Employers can visit the DOL's website for these requirements at www.dol.gov. Nevertheless, there are grey areas between clearly exempt and clearly non-exempt. If you are unsure, avoid litigation by having a qualified attorney review the classifications.* bp 



This month's site:

WWW.LAW.CORNELL.COM

This website, maintained under the auspices of the Legal Information Institute of the Cornell Law School, provides a wide variety of materials related to employment law.

Although it is not specifically geared toward employment law, it offers much of interest to HR managers.

In the "About ... employment law" section, there are sub-groups for collective bargaining, labor law, pensions, discrimination, and so on.

Digging deeper, you find U.S. code, CFR, state materials, international material, and other references, which include key internet sources, all hot-linked.

Next time you have an employment law question, give it a try. 



FROM THE STATES

ARIZONA

Policy Barring Rehabilitated Drug Addict Violates ADA

Joel Hernandez worked for Hughes Missile Systems Company (Hughes) for twenty five years, first as a janitor, then as a service technician. In July 1991, he tested positive for cocaine. Hughes was also aware that Hernandez struggled with an alcohol problem. Rather than terminating Hernandez, Hughes gave him the option to resign, which he accepted.

Two years later, he applied to be rehired and attached two letters of reference to his application, one from a pastor and another from a counselor stating that he had a strong commitment to his recovery. His application was rejected and he sued, alleging discrimination under the Americans with Disabilities Act (ADA). Hughes argued that Hernandez was not rehired because of its unwritten policy not to rehire employees who were terminated or resigned due to violating the company's code of conduct.

In allowing Hernandez to continue with his claim, the court explained that his application was rejected because of his prior drug addiction and that any policy barring re-employment of a drug addict despite successful rehabilitation violates the ADA (*Hernandez v. Hughes Missile Systems*, 9th Cir., No. 01-15512, 6/11/02).

Comment: *Drug addiction in recovery and alcoholism are covered disabilities under the ADA. Employers who do not hire an applicant when aware of the disability should thoroughly document the reasons for their employment decision.*

MARYLAND

Whistleblowing Security Guard Has No Case

Those who report criminal activity in the workplace may not have whistleblower protection. Edward Wholey was employed by Sears, Roebuck and Co. (Sears) as a senior security officer for 24 years, from 1972 until 1996. He was a police officer prior to his employment at Sears.

In 1995, Wholey observed the store manager taking merchandise from the store floor into his office, which was against company policy. The merchandise would then disappear from that office. Wholey reported this to his supervisor who advised Wholey to continue with his observation. At Wholey's suggestion, a security camera was installed inside the manager's office. However, only two hours later, the supervisor told Wholey to remove the camera as the store manager was entitled to more respect. Two months later, Wholey was terminated because Sears did not like his "cop mentality." He brought suit alleging wrongful termination for whistleblowing.

A divided court ruled that Wholey could not prevail because he did not report the activity to law enforcement authorities, and therefore his action did not qualify as whistleblowing (*Wholey v. Sears Roebuck, MD.*, No. 01-105, 6/19/02).

Comment: *The dissenting judges argued that public policy is not best served by limiting whistleblowing to that brought to law enforcement. The onus is now on Maryland's legislature to expand the scope of the law.*

PENNSYLVANIA

"Getting Senile" May Constitute Age Discrimination

Insensitive comments about age can often cause trouble for employers. Thomas Keown was a vice president for Richfood Holdings Company and in his 50's. A female vice president of the company began sending him pamphlets at work that offered advice to older men on how to have better sexual relations. Forged notes supposedly from his much younger wife were attached to the pamphlets. Keown complained to upper management, but nothing was done. Shortly afterward, a company official told him that he was "getting senile" and that the company was looking to get rid of older workers.

Keown complained again and met with his superiors. Much to his surprise, he was told that his performance

was bad, that he would not be getting a company car that was promised him, and that he had no future with the company. He resigned and filed suit for sexual harassment and age discrimination.

The court ruled that the pamphlets Keown received, while in extremely bad taste, did not reach the level of severe, pervasive, and regular sexual harassment to be actionable. However, there was enough evidence of age discrimination and retaliation to continue the suit (*Keown v. Richfood Holdings*, E.D. PA., No. 01-2156, 6/19/02).

Comment: *Here's another case where a retaliation complaint crept in. Train managers about the expensive consequences of just-for-fun "teasing."*

KANSAS

Comp Claimant's Bosses Say They Didn't Know of Injury

Is it possible for a manager to not know when an employee is hurt on the job? Juanita Foster worked for Allied Signal, Inc. and injured her arm and back while on the job. She did not report to work for the three days following the injury without calling in, and she was terminated for violating the company's attendance policy. She sued, claiming that the company retaliated against her by terminating her in violation of the state's workers' compensation law. The state's law prohibits retaliation for an employee's filing of a workers' compensation claim.

Allied Signal claimed that they did not know that Foster had sought workers' compensation, but testimony showed that a claim had been sent certified mail and signed by someone at the company and that at least one of the managers was aware of her injury. The court ruled for Foster (*Foster v. Allied Signal, Inc.*, 10th Cir., No. 00-3243, 6/18/02).

Comment: *One wonders if the employer could have saved the cost and time of defending litigation if they had tried to contact Foster or investigate the matter more thoroughly.* bp 