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WHAT WILL THEY THINK OF NEXT?

By Daniel Cohen

The Family Leave Insurance Act (HR 1723), introduced by Pete Stark, the Democrat from California and chair of the health committee of the



House Way and Means Committee has recently been referred to the House Committees on Education and La-

bor; Oversight and Government Reform; and Ways and Means.

This legislation would create a federal insurance fund to provide employees with twelve weeks of paid family and medical leave. The fund would be established and administered by the Secretary of Labor. Employers with two or more workers for 20 or more weeks in the current or preceding calendar year would be affected. Under the benefits proposal, most employees would contribute 0.2 percent

of their annual earnings, and employers would match employee payments. For employers with fewer than 20 workers, 0.1 percent of earnings would go into the fund. Benefit amounts would be tiered progressively according to income level so that a low wage worker (earning less than \$30,000) will receive full or near full salary replacement, middle income workers (\$30,000- \$60,000) receive 55% wage replacement, and higher earners (over \$60,000) receive 40-45%, with the benefit capped at approximately \$800 per week. Benefit amounts would also be indexed for inflation under the Social Security wage index.

The legislation also prohibits employers from interference, discrimination, or retaliation concerning an employee's exercise of rights under

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Recent Victories for Our Clients

Wayne County Circuit Court dismissed workers' compensation retaliation and age discrimination claims against PC&T's client, a Dearborn steel mill. Despite extensive safety training highlighting four "Cardinal" safety rules, handouts, posters, and face to face conversations about the importance of the rules and a warning from an hourly employee that entering a pit would violate a Cardinal Rule, he entered it anyway. When questioned, he stated that he was completely unfamiliar with the Cardinal Rules and was discharged. Despite evidence that Plaintiff's boss had once errantly entered the same pit (before the Cardinal Rules had been announced), that the General Manager informed HR that he had "opposed" the employee's prior comp claims, and that all prior violators had been merely suspended, the Court sustained the discharge, ruling that a supervisor handling molten steel who could not remember the four most important safety rules is "not qualified" for the job. The disregard of the warning and claim of ignorance despite training distinguished the case from prior violations. Finally, the Court followed a line of cases holding that merely seeking or conveying information about a plaintiff's protected status is not "direct evidence" of a discriminatory or retaliatory motive.

PCT obtained dismissal in Oakland County Circuit Court of a two count complaint. PCT's client, an auto dealer, terminated a salesperson because he was dead last in sales amongst the experienced salespersons. The plaintiff claimed that his termination was due to his age and the result of pressure from a third party to terminate his employment, relying on the close proximity in time between a high level meeting with the third party as well as evidence that he was treated differently than

others. The Court rejected the plaintiff's arguments because there was no evidence that the topic of discharge came up during the meeting with the third party and because PCT pointed out that the employees to whom Plaintiff compared himself had been treated better than all other employees, young and old, alike.

PCT successfully enforced a non-compete agreement against a California resident on behalf of a consulting firm and obtained a \$221,087.50 damage award in arbitration despite California's statutory prohibition of non-compete agreements. The agreement contained a non-compete and non-solicitation provision, a clause that Michigan law controlled, and required the parties to arbitrate any and all disputes. When the individual went to work for a competitor, nearly 75% of the client's customers terminated their relationship and followed the consultant to the competitor. PCT secured testimony from one of the few customers that did not follow the consultant and an e-mail that the consultant had sent the customer offering his assistance and disparaging PCT's client. When the former consultant refused to permit a forensic examination of his computer hard drive, PCT obtained a ruling which (1) prohibited the former consultant from arguing that he did not send the same letter to all of the customers and (2) prohibited the former consultant from arguing that the other customers left PCT's client for legitimate reasons unrelated to the letter of persuasion. Most importantly, PCT identified an obscure line of California law that permits arbitrators to enforce a choice of law provision, and provides for entry of judgments upon arbitration awards enforcing non-competes in California despite California's statutory ban on non-compete agreements. The message for PC&T clients: non-compete agreements with Michigan choice of law and arbitration clauses can avoid California's ban on non-compete agreements. ❖

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- Benefits and Detriments of Arbitration of Statutory Claims vs. Traditional Litigation
- Consent and Authorization to Release Employment Information
- Employment Application
- Fair Credit Reporting Act Forms
- Garnishee Disclosure Form
- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

SUPREME COURT MAKES IT TOUGHER TO PROVE AGE DISCRIMINATION NO MIXED-MOTIVE THEORY AVAILABLE

By Paul Kramer

Title VII of the Civil Rights Act (Title VII) makes it unlawful for an employer to use a person's race, color, religion, sex, or national origin as "**a motivating factor**" in an adverse employment decision. 42 U.S.C. §2000e-2m and §2000e-5(g)(2)(B). The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer to take adverse action against an employee "**because of** such individual's age." 29 U.S.C. §623(a). Despite the different terminology, courts have commonly treated the burden of proof for discrimination claims under Title VII and the ADEA the same. This recently changed, however, with the Supreme Court decision in *Gross v FBL Financial Services, Inc.*

Plaintiff, Jack Gross, was employed as a Claims Administration Director by FBL. He was reassigned in 2003 when he was 54 years old. Gross considered the reassignment a demotion, and sued FBL for age discrimination under the ADEA.

At trial, Gross introduced evidence that his reassignment was at least partly based on his age. At the close of trial, over objection, the court instructed the jury that it must return a verdict for Gross if he proved that his "**age was a motivating factor**" in the decision to demote him. The jury was also instructed that Gross's age would qualify as a "motivating factor," if it played a part or role in his demotion. The jury returned a verdict in the amount of \$46,000 in lost compensation for Gross.

FBL challenged the jury instruction on appeal all the way to the United States Supreme Court. Concluding that the jury had not been properly instructed, the Supreme Court found it could not ignore Congress' conscious decision to use different terminology in the ADEA that discrimination must be "**because of**" an individual's age rather than merely "a motivating factor" as Congress had required for Title VII claims. Since the words "because of" were defined in the dictionary as "by reason of: on account of," the Supreme Court ruled that to discriminate under the plain language of the

ADEA, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. Simply proving that age was one motivating factor in the decision does not suffice.

Gross v FBL Financial Services, Inc. was a clear victory for employers since it established a higher burden of proof for age discrimination claims. Nevertheless, it may be a short lived victory. Legal commentators are predicting that Congress will soon amend the ADEA to overcome

the effect of the *Gross* decision, just as Congress passed the ADA Restoration Act to overcome Supreme Court decisions favorable to employers. Consequently, employers should remain vigilant in avoiding practices that can be claimed to be age discrimination, even if the defense of such claims is easier today.



FLIA Cont.

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the act, and would give employees a corresponding private right of action. The Secretary of Labor would have investigative authority and would be authorized to bring an administrative or civil action. The bill also provides criminal penalties for knowingly submitting or helping another to submit a false certification in order to fraudulently collect benefits.

Is it just me or does this sound like a tax on business, including small businesses that



are not even covered by the FMLA (50 or more employees) or the ADA (15 or more employees) because they are deemed too small? I thought we were in a recession and the game plan was to stimulate the economy. This legislation comes at the wrong time and exacts too high a price on business. Indeed, for an employer with 50 employees using Michigan's per capita income of \$35,000, the annual contribution would cost the employer \$35,000 or the equivalent of one annual salary.



SAFETY ISSUES TAKE CENTER STAGE IN JUNE

By William Pilchak

Safety issues dominated the month of June, 2009, at PC&T. One client experienced a fatality on its premises. A vendor-electrician died while working on equipment. As most know, a fatality mandates an OSHA investigation, where the DOL strives mightily to find a violation that caused the death. Beyond the tragedy of the death and the resources devoted to the investigation, any employer experiencing a fatality can expect claims: whether workers' comp claims by an employee or litigation claims filed by a vendor's employee.

The second June safety issue is reflected in the "client victories" column. PCT obtained dismissal of a case where a supervisor was discharged following a safety violation. The supervisor, who sought to excuse his safety violation by claiming he was unable to learn the most important safety rules despite extensive training, was not qualified to work in a facility handling molten steel.

The violation, entering a below-ground pit without following confined space procedures, could easily have had fatal consequences. Though the most dramatic danger was the prospect of molten steel flowing into the pit while occupied, less dramatic dangers were presented. A below-grade pit can fill with an invisible, heavier-than-air, oxygen-deprived atmosphere, so that multiple fatalities can occur as the first entrant collapses, as do rescuers who are unable to perceive the danger.

The litigation case revealed one of the implications of workplace injuries: The emotional trauma to co-workers and the prospect of their disability claims. In witness interviews, one burley steelworker recounted an experience from twenty-five years earlier where a young colleague died after entering a confined space, as rationale why he would never knowingly commit a confined space violation. Despite the passage of decades, tears welled in his eyes as he described the event. He had been profoundly affected. Your workers' compensation carrier can confirm that employees can raise troublesome claims that they cannot work in an industrial environment after witnessing a workplace fatality. Indeed, long-time friend of PC&T, renowned Dr. Kenneth Wolf of the Incident Management Group, does post-event counseling for companies, in part, to avoid such claims.

Against these recent safety-related experiences, it was especially interesting to meet

with Marc Shaye over lunch. Shaye is not only an attorney who defends employers in OSHA claims arising from fatal workplace accidents, but he consults with the 3D Experimental Training Company ("3D ETC"). On the "legal" side, Shaye reports that the



"buzz" in the OSHA community is the imminent increase in enforcement activity. That is consistent with what PC&T has perceived since the decline in the economy and election of Barack Obama. Fines and penalties can replace tax revenue declines resulting from job loss, fewer sales and non-

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Safety Cont.

existent profits. And, the Obama administration, being more worker-friendly, can be expected to fund increased agency oversight and investigations.

PC&T has already seen a spike in activity by MIOSHA, the Office of Federal Contract Compliance Programs (affirmative action obligations), and the Department of Labor Wage Hour Division. One client received a notice of a \$1000 penalty from MIOSHA for failing to mail back the “OSHA Occupational Injury and Illnesses Data Collection Form.” No one could recall such a violation in our twenty-five years in the labor practice. Luckily (and perhaps not surprisingly), the company had stopped doing business in Michigan, so that no form was required to be mailed.

Shaye’s information about 3D ETC is equally interesting. 3D ETC is founded on the principle that just as people learn more by hearing than reading and by seeing than

hearing, they learn best by actually participating in a real experience. Accordingly, 3D



ETC has constructed a safety training program that immerses participants into a safety-related story-line, through the use of “virtual reality” equipment, including 3-D and stereographic headgear, as depicted in the photo (above). Participants experience how safety shortcuts can have disastrous consequences, as the video follows workers required to notify the widow and as the family home is foreclosed upon.

Shaye’s description hit home, given recent experiences. The 3-D experience seeks to replicate the burley steelworker’s internalization of his fatality experience, so participants would never put themselves in the situation they “experienced.” The unique presentation is designed so that no one could “forget” (or even claim to forget) the message that a departure from safety procedures can have serious consequences.

The client that introduced Shaye to PC&T, a heat-treating company, experienced a 71% reduction in lost-time injuries compared to the two previous years, and a 64% drop measured against the prior five year average. Injury severity, measured by days lost per recordable injury dropped 64% and 57% against the same time periods. The client experienced an amazing 840% return on investment in the first year after the training. PC&T clients who would like to know more about the safety training can contact 3D ETC at www.3-DETC.com.

