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Attorneys Representing Management in Labor and Employment Law

WORKPLACE CHRONICLE

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Recent Victories for Our Clients

PC&T successfully defended a motion for preliminary injunction, seeking to divest a partner and his workforce from a venture the partner had developed.

After PC&T's defense, the client will continue to operate the business with its employees and share in the profits of the venture.



But is it Discriminatory?

By now, most business owners and human resource professionals understand the basic rules of discrimination. We are familiar with terms like disparate treatment, prima facie case, legitimate, non-discriminatory business reasons and pretext. Most are even familiar with the difference between "direct evidence" and "circumstantial evidence" cases. But, did you know that:

1. A plaintiff alleging disparate treatment may not point to others treated more favorably to make her case unless those others are nearly identical in all relevant aspects of their employment situations. *Lytle v Malady*, 458 Mich 153 (1998);
2. A decision cannot be discriminatory unless it is materially adverse in that it is more than a mere inconvenience or alteration of job responsibilities. *Wilcoxon v Minnesota Mining & Mfg Co.*, 235 Mich App 347 (1999);
3. Employment decisions can be incorrect, mistaken and downright idiotic without being discriminatory as courts will not second-guess whether the decision was "wise, shrewd, prudent or compe-

tent." *Town v Michigan Bell Telephone Co.*, 455 Mich 688, (1997)

4. A single remark from a supervisor in the context of a discussion regarding a plaintiff's termination, even if the statement is subject to multiple interpretations, is sufficient to constitute direct evidence and enough to get the plaintiff's case in front of a jury. *DeBrow v Century 21 Great Lakes, Inc.*, 463 Mich 534 (2001);
5. But where the remark in question is not made by a person involved in the termination of a plaintiff's employment, it is irrelevant and cannot be attributed to the employer. *Krohn v Sedgwick James of Michigan, Inc.*, 244 Mich App 289 (2001).

These cases teach that differences in qualifications, experience, departments, supervision and the like are differences that can be taken into account in the decision-making process and that the decision-making process, itself, is not held to an error-free standard. Honest mistakes do occur and some decisions are simply wrong. Such human error is

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- 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)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

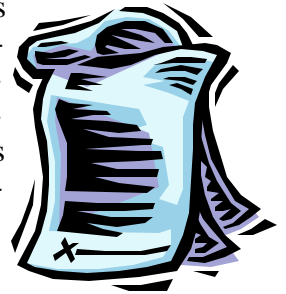
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not in and of itself discriminatory. However, the rules are different when speaking. A single comment made by a decision-maker and others involved in the decision-making process can be discriminatory. And, it will land you in court in front of a jury.

Understanding these more subtle points will often mean the difference between winning and losing discrimination suits. We cannot expect to be perfect in our decision-making and mistakes will inevitably occur. However, two simple rules will keep you out of trouble in nearly every instance: (1) All things equal, treat your employees the same; (2) Eliminate bad language from your management ranks. ■

90 Day Statute of Limitations?

Last month, the Michigan Court of Appeals (published decision) ruled that an employment application, which limited to six-months the time period within which an employment lawsuit could be commenced, was enforceable. *Clark v DaimlerChrysler Corporation*, (September 13, 2005).



The case involved an age discrimination suit filed 2 years after the plaintiff was “encouraged” to retire; but well within the Civil Right Act’s (CRA) standard three-year time limit. Clark argued the six-month limitation was unreasonable and unenforceable.

The Appeals Court applied *Roy v Continental Ins Co* (2005), where the Michigan Supreme Court recently ruled,

an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of reasonableness is an invalid basis upon which to refuse to enforce contractual provisions. Only recognize traditional contract defenses may be used to avoid the enforcement of the contract provision.



The *reasonableness rule* was overruled. And, since the CRA does not explicitly prohibit contractual modifications of limitations periods in employment, it did not violate public policy. Likewise, the period of limitations was not procedurally or substantively unconscionable.

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The court did not rule, how short the limitation period could be. Perhaps, a 90 day limitation -- like a whistleblower claim -- may be enforceable. *Clark*, provides an important opportunity for employers who seek to *minimize* and *promptly* deal with discharge litigation. By eliminating relatively stale claims, there is the prospect of controlling fading memories and avoiding tardy lawsuits. PC&T can help your company implement a policy that maximizes this new development. ■

Identity Theft and Social Security Numbers

The problem of identity theft has gained momentum in recent years due to the accessibility of identifying personal information, mainly through computer use. Because employers inevitably have access to personal employee information, safeguarding this sensitive material is vital.

Two developments in Michigan are worthy of note. First, Michigan has joined other states in limiting the use of social security numbers, MCL 445.83. Effective March 1, 2005, Michigan requires that social security numbers not be displayed publicly and not appear on the outside of packages mailed to individuals. Other requirements prohibit the use of social security numbers on identification badges or cards, membership cards, permits and licenses. Social security numbers may not be the primary account numbers for individuals after January 1, 2006. And, subject to certain exceptions, Social security numbers may not be contained in documents mailed to an individual. Social security numbers may be used when permitted by federal or state law or where the number is used in the ordinary course of business to verify an individual's identity for employment purposes.

Second, the Michigan Court of Appeals recently affirmed a judgment for victims of identity theft.

Bell v Local 1023 (Mich App, 2005) The plaintiffs filed suit against their union. They claim the union was liable for not safeguarding their personal information and that this negligence facilitated identity theft perpetrated by a third party. Following trial, they were awarded \$250,000.

The union, in the case, argued that there was no duty to protect against acts of a third-party absent a "special relationship." That is, it was not responsible for acts of criminals, because such acts are not foreseeable.

The Appeals Court disagreed and ruled for the plaintiffs. It held that the harm of someone misusing plaintiffs' personal information was foreseeable. The evidence consisted of confidential union lists, which were taken home by a worker. The

court noted, "The severity of the risk of harm of allowing personal identification information to be taken to an unsecured environment is high." And, "it is the potential severity of the risk, not the actual risk encountered, that must be considered in deciding to impose liability."

The court found the necessary *special relationship* because, (1) the union was obliged to act in the best interest of its members to protect their personal information; (2) the union controlled access to the personal information; (3) the sensitive information was stored in an uncontrolled environment (the treasurer's home); (4) the severity of potential loss was substantial and included monetary losses and damaged credit worthiness; and (5) the burden on the union to safeguard was not substantial.

The implications of these two developments open the door to potential employer liability for work related identity theft. Most factors described demonstrating a *special relationship* are present whenever an employer fails to provide adequate safeguards for protecting employee information. And, although most employers do not have a duty to act in the best interests of their employees absent a

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statutory mandate, the act likely furnishes that statutory basis. Michigan employers, by January 1, 2006 must create a *privacy policy* that assures:

- Confidentiality of Social Security numbers;
- Prohibits the unlawful disclosure of the numbers;
- Limits access to the information;
- Describes how to properly dispose of documents containing the numbers; and
- Establishes penalties for violation of the privacy policy.

In addition to adopting this policy, making sure that the policy is followed will substantially reduce the risk of a costly verdict in favor of an employee who's social security number is stolen and used to commit identity theft. ▾



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