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Recent Victories for Our Clients

PCT obtained dismissal of an EEOC Charge alleging sexual harassment by arguing that the Charge relied, in part, upon conduct that occurred more than 300 days before the Charge was filed in violation of the applicable limitations period and that the claimant had failed to file a complaint pursuant to the published harassment policy in the Employee Handbook. PCT argued that the claimant’s failure to make an internal complaint was particularly unreasonable as the claimant would have had an acute understanding of the harassment policy because she was involved in drafting the Employee Handbook. PCT also pointed out that apart from the procedural defects in the claimant’s Charge, the alleged conduct, if it did occur, was not sufficiently severe and pervasive to interfere with the employment relationship.

**“NO-MATCH” LETTER...NO PROBLEM:
five steps to ensure YOU are following the NEW rule**

By John Schwartz

On August 10th the Department of Homeland Security (DHS) released its new rule requiring employers to take action when they receive a Social Security No-Match Letter for a new employee. The new rule takes effect on September 14, 2007.

No-Match letters are issued by the Social Security Administration (SSA) and are used to notify employers that an employee’s name or social security number that was submitted on a W-2 or I-9 does not match the agency records.

The new rule requires an employer to take the following steps when in receipt of a No-Match letter:



1. Check personnel records within 30 days of receipt of the letter to determine if the cause of the problem was a typographical, transcription, or clerical error. If so, the employer should correct the records, inform DHS of the error, verify the corrected information matches agency records, and keep records of all steps taken to resolve the matter. All records should be kept with the employee’s I-9 form.
2. If the employer determines that there was no clerical error, the employer must ask the employee to confirm that the employer’s records are correct. If

the employee is able to correct the records, the employer should make the correction, inform DHS, and verify the information with the agency, keeping records of each step taken to be saved with the employee’s I-9.

3. If the employee cannot resolve the discrepancy, the employer must ask the employee to correct the situation by contacting the DHS or SSA. Resolution will not result until the employer can verify with the SSA that the employee’s name matches the social security number or the DHS verifies the records indicating immigration status or employment authorization. This verification must be completed within 90 days of receiving the No-Match letter.
4. If there is no verification within 90 days, the employer must attempt to complete a new I-9 form for the employee by the 93rd day. The employer may not accept any document containing the social security number or DHS-issued document that was previously used and could not be verified. If the employee resolved the matter with the SSA or DHS individually, the employee will possess new, verifiable identification information. The employer may not accept any identity document without a photograph.
5. If the employee cannot provide new

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

documents, the employer **MUST** terminate the employee. Failure to terminate may lead to a finding that the employer had constructive knowledge of the employee's lack of authorization, leading to fines of up to \$10,000 *per worker* and incident.

Employers should adopt a new "No-Match Letter Policy" consistent with the above instructions and the new rule. Employers should NOT

terminate any employee when a No-Match letter is received. Both the employee and employer are provided an opportunity to resolve the mismatch. However, if no clerical errors are found, and the employee is unable to resolve the discrepancy within 90 days and is unable to provide adequate documents, the employer **MUST** terminate the employee or face serious monetary penalties.

**FEDERAL JURY RETURNS A
 VERDICT OF NO CAUSE FOR
 ACTION**

By Robert Tice

Last month, the battle was over drugs and sex when a Utah-based biogenetic "pharmaceutical" company drew the line in a federal court action. The plaintiff, a former account executive, challenged the legitimacy of her discharge and sought over \$1.5 million in wage loss damages. In a trial that lasted the entire month of July, a federal jury found in favor of the defense and determined that the plaintiff had no cause of action for gender and age discrimination. Rejecting the theory that unlawful discrimination had motivated her discharge, the federal jury of four women and four men concluded that a "Big Pharmaceutical" sales philosophy had not cost the plaintiff her employment. The case was defended by Bob Tice of PCT.

Plaintiff, a 44-year-old woman, had worked as a pharmaceutical account executive for approximately 12 years. At trial,

she argued that soon after a new vice president of sales joined the company; he implemented a change in sales philosophy and sales culture. In spite of good objective sales numbers, which exceeded her revenue goals, the plaintiff was terminated for "subjective" concerns raised by her regional supervisor having to do with her sales technique to private physicians. Plaintiff argued that these subjective reasons were unlawful and discriminatory because "sales are everything" in the pharmaceutical industry. Additionally, evidence was presented that four other over 40 female account executives had also "coincidentally" been terminated within a five month window. A vocational rehabilitation expert testified that the pharmaceutical industry prefers *cheerleader* types as account executives (i.e. sex sells). Also, a statistical expert claimed 40 year old women were terminated at a rate "inconsistent with chance."

PCT's challenge was to convince the jury that -- to this company -- sales numbers were

not everything. Notwithstanding plaintiff's characterization, the new sales philosophy implemented by the company's vice president was a legitimate and nondiscriminatory marketing strategy that emphasized sales to a larger market of private physicians. Convincing private physicians to use genetic testing for treatment of patients with an inherited cancer risk was a sophisticated sales skill that the plaintiff could not master. The plaintiff's initial selling success was achieved based on her marketing to a smaller and "already convinced" customer base comprised of genetic counselors and hospitals with biogenetic research departments. Her supervisor's concerns were based on observed physician interaction and appropriate periodic performance documentation.

A crucial component of PCT's defense strategy was to shield the jury from hearing testimony about the other "40 plus" females. PCT was challenged, but was successful in excluding this significant "me too" evidence of discrimination, and much of the testimony of two former disgruntled (over 40) female account executives was excluded from the trial.

Having drawn the line, the defendant employer devoted sufficient resources and personnel to demonstrate its employment practices were appropriate and lawful. The risks associated with a jury trial were carefully analyzed and accepted. The case was submitted to the jury and it ruled in favor of the employer.

Not every case is appropriately handed to a jury to second-guess. But occasionally it's nice to see juries capable of understanding the facts and making informed and appropriate decisions.



MICHIGAN FEDERAL COURT RULES NO LIMITATION ON HOW FAR BACK SERVICE TIME COUNTS IN DETERMINING EMPLOYEES' FMLA ELIGIBILITY

By Rhonda Armstrong

The Department of Labor Regulation on the "12-month service time" requirement under the Family and Medical Leave Act has troubled employers and the courts alike since its inception in 1993. This regulation states that an employee must have twelve months of service time with an employer to qualify for family and medical leave and that the twelve months "need not be consecutive." 29 CFR §825.110.

There are at least two different ways to interpret this language. It could mean that employees qualify for FMLA so long as they have worked for the employer at least 12 months, even if they have been off for long periods of time (e.g., other FMLA leave, short-term or long-term disability, etc.). Or, it could mean that any periods of service with the same employer count, even if there has been a break in service. This latter interpretation is quite problematic for employers since employers are not required to maintain personnel records indefinitely. In fact, the FMLA only requires employers to maintain personnel related records for three years. Consequently, an employee could have a break in service for years, become re-employed, and it could occur that there are no records or knowledge of the prior employment.

The Courts have adopted the second, more problematic interpretation. First, in *Rucker v. Lee Holding, Co.*, 471 F3d 6 (CA 1, 2006), the First Circuit held that prior periods of service with the same employer could be considered in calculating whether the employee met the 12-month service requirement, even if separated by five years. Although the First Circuit recognized the problem this created, it declined to rule that a

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five year break in service was too long to apply the pre-break employment toward the 12-month service requirement. Interestingly, the DOL had submitted a brief informing the court that it considered five years as the “outer limits of what is permissible.”

Just last month, the Eastern District of Michigan was presented with similar facts, in *O’Connor v. Busch’s, Inc.*, — FSupp2d —, 2007 WL 1816601 (ED MI 2007). There, an employee had worked for the employer for several years in the mid-1980s, had a lengthy break in service, and was rehired in 2005 at which time

she worked seven months prior to requesting FMLA-leave. While the court was “troubled by the potential consequences of permitting [the employee] to combine periods of employment separated by nearly twenty years” it too declined to develop any rule, stating this was a “determination. . .best left to Congress and the DOL.”

This “12 month service time” rule is just one of the many technicalities of the FMLA that is ambiguous and problematic for employers. The DOL is considering changes to its FMLA Regulations, which will hopefully offer added guidance and spell

some relief for employers. Earlier this year, the DOL sought public comment on a number of FMLA rules including 29 CFR §825.110. PCT submitted detailed proposals for change., including a proposal to address the above problem. The DOL recently posted the public comments, including quite a few of PCT’s comments. These are available on our website or at: <http://www.eeoc.gov/policy.docs/caregiving.html>.

