

Employer Update

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Next month's topic:

Employment Practices Liability Insurance ("EPLI"), including trends, coverage issues, ability to select counsel, and control over settlement.

Problems to Avoid: **Workplace Violence, Attorney Fees, and Retaliation**

By Brent T. Wilson

It is fair to say that employers strive to avoid or at least limit exposure to the risk of liability for things that happen to their employees in the workplace. This Employer Update focuses on a few different areas where employers face potential exposure to liability. The discussion starts with attorney fees and some differences between state and federal courts when it comes to awarding attorney fees in discrimination and harassment cases. This Employer Update also discusses workplace violence, specifically related to termination of the employment relationship, which is another area where employers potentially face not only tragic consequences, but serious exposure to liability. Finally, this Employer Update also provides a brief discussion regarding a new whistleblowing ruling from the United States Supreme Court as well as changes in minimum wage law.

Attorney Fees in State Versus Federal Court Proceedings

Under the recent Idaho Supreme Court case Stout v. Key Training Corp., 2007 Opinion No. 61 (April 11, 2007), employees who succeed in discrimination suits filed under the Idaho Human Rights Act are not entitled to an award of attorney fees. The plaintiff, Anissa Stout, sued her employer for violating the Idaho Human Rights Act and for several other employment related claims, including violation of public policy, infliction of emotional distress, and breach of contract.

The violation of the Idaho Human Rights Act, for alleged gen-

der discrimination, was the only count that went to trial. The jury found discrimination and awarded the plaintiff \$50,927.16 in damages. The plaintiff then asked for an award of her attorney fees under the Idaho Human Rights Act, as well as a statute applicable to matters involving commercial transactions. Her request was denied.

The Supreme Court held that a plaintiff is not entitled to an award of attorney fees under the Idaho Human Rights Act, despite the fact that she would have been entitled to an award of attorney fees had her claim been brought under federal law. The court reasoned that, unlike federal anti-discrimination statutes, there is no express provision for attorney fees in the



Idaho Human Rights Act. The Supreme Court further reasoned that, had the Idaho legislature intended attorney fees to be awarded under the Idaho Human Rights Act, it surely would have included such language in the Act.

The Supreme Court also held that the plaintiff was not entitled to an award of attorney fees under Idaho Code Section 12-120(3), which awards attorney fees to the prevailing party in commercial transaction disputes. The Supreme Court reasoned that the plaintiff's claim was based purely on a statute, i.e. under the Idaho Human Rights Act, and was not based on any commercial transaction. Because discrimination claims based on the Idaho Human

Rights Act are neither contractual nor tortious in nature, no attorney fees can be awarded under section 12-120(3).

The good news for employers is that attorney fees will not be awarded to plaintiffs who prevail on state-law discrimination or harassment claims. This is in stark contrast to federal anti-discrimination laws, which mandate attorney fees to prevailing plaintiffs. Plaintiffs alleging harassment and discrimination usually file claims under federal law as well as state law. However, in instances where cases are brought strictly under Idaho law (e.g., against an employer with less than 15 employees or to avoid federal court), attorney fees will not be available to the plaintiff.

[Avoiding Workplace Violence When Terminating the Employment Relationship](#)

Workplace violence has long been a concern of employers and has become so commonplace to deserve a slang term – going “postal.” Statistics demonstrate that the number of supervisors killed in the workplace has steadily increased over the past 10 years. On average, three to four supervisors are killed by employees they manage each year. For each that is murdered, many others are assaulted, threatened, or intimidated. Employers have a duty to implement measures to avoid violent situations in the workplace.

Issues of violence in the workplace were recently brought to the forefront with the shootings both at Virginia Tech and NASA. While the Virginia Tech tragedy did not involve a disgruntled employee, this event undoubtedly will affect policies and procedures in the workplace with regard to violence. The incident at NASA more specifically showcases workplace violence issues. There, a disgruntled employee who feared termination of his em-

ployment based on a poor performance review shot a co-worker and took another worker hostage before killing himself.

These tragic and senselessly violent acts take a huge toll on those affected, including the employer. Violence that an employer may have been able to prevent may also place it in the crosshairs of liability-seeking plaintiffs if proper measures were not taken. A situation that especially has the potential to turn violent is when the employment relationship is terminated by the employer. Extra caution should be taken in these situations because the likelihood of violence on the part of the employee may be elevated after termination of employment.

Workplace violence may raise issues of OSHA violations, negligent hiring, negligent retention, and other claims. Creating a safe workplace starts with a culture of civility from the top down. Employees who feel that they were at least treated fairly and with dignity are much less likely to act out with violence when the employment rela-

relationship is terminated by the employer.

All employers should have at least a basic Violence Preparedness and Prevention Plan. Topics may include designation of a place for people to go and steps to take if violence erupts. The Plan should also identify who calls the authorities (and which authorities) in the event of workplace violence. The Plan should include an anti-violence policy and a mechanism for other employees to report threats of violence. Another part of the Plan should include necessary pre-employment screening to identify individuals with violent tendencies or pasts. In carrying out such screening, be sure to keep in mind other potential liability pitfalls such as the Fair Credit Reporting Act and the Americans with Disabilities Act, which are laws that may come into play if an adverse decision is made in relation to pre-employment screening.

Your Plan should include a process for evaluating the violence or threat of violence when a complaint is made or violence is observed. If an employee whose employment is being terminated has had outbursts in the past, such incidents must be evaluated and the appropriate security should be put in place when the employment relationship is terminated and for an appropriate amount of time afterward.

All employers should have a Violence Preparedness and Prevention Plan.

Your Plan should also include a violence prevention team made up of various managers or supervisors. The team may be put in place to review complaints, update policies and procedures, and be identified as key actors if a violent situation arises.

With regard to employment termination situations, always collect from the employee all keys, electronic passwords, or any other item that may provide the employee access to your premises. Change locks, codes, and access passwords as necessary. Alert security and risk management personnel of employment terminations and, if necessary, hire outside security for a time period. If conducting exit interviews, be aware of any clues

that indicate the employee is suffering from stress beyond the fact that his or her employment has been terminated. The termination of employment may just be the match to an already explosive situation.

In implementing and carrying out your Violence Preparedness and Prevention Plan, be aware of the employee's privacy. Do not unnecessarily embarrass an employee feeling the stress and difficulties of employment termination. With a little forethought and planning, violence stemming from the end of the employment relationship may be prevented.

Copycat Whistleblowing Falls Out of Favor with Federal Courts

The United States Supreme Court recently struck down an individual plaintiff's claim for damages under the federal False Claim Act. This is good news for employers, but the case only applies to a narrow set of circumstances. In Stone v. Rockwell International Corp., the U.S. Supreme Court de-

nied the plaintiff's claim against his former employer for reporting alleged violations of environmental regulations. The employee prepared a report regarding a process the employer attempted to engage in that the employee felt would lead to environmental contamination. The employee was laid off,



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but later learned through media reports that the employer was engaging in the unsafe process. However, the incident that led to the environmental violations was part of a process that was entirely unrelated to the reason the former employee felt the process was unsafe.

The former employee sued under the False Claims Act alleging that he was the "original source" of information to the employer that its process was unsafe and violated environmental laws. The U.S. Supreme Court set aside a judgment awarded to the former employee on the basis that the former employee learned of the employer's environmental problems strictly through media reports. The

report that the former employee prepared was not the "original source" of reporting the violation because the former employee's report did not focus on the process and incident that led to the environmental violation.

For employers who are federal contractors, this case is not a panacea. Employees may still pursue False Claim Act claims if the employee is an "original source." Likewise, this case does not eliminate other potential whistleblowing activities by employees nor does it eliminate potential retaliation liability. Employers should take from this case that it is far better off to deal with whistleblowing issues pursuant to internal procedures than in the courts.

Minimum Wage

A few *Employer Update* readers have posed questions about the current status of the minimum wage and whether the minimum wage will change anytime soon. The Idaho Legislature determined during the recent legislative session that Idaho will change its minimum wage only as the federal minimum wage changes. In other words, Idaho's minimum wage is linked to the federal minimum wage.

After significant political wrangling, it appears Congress is prepared to pass legislation increasing the federal minimum wage. On April 20, 2007, the House and Senate came to an agreement regarding increases to minimum wage as well as tax breaks to small businesses to assist with increased labor costs related to the minimum wage increase. All indications from the White House are that President Bush will sign the bill increasing the federal minimum wage. In short,

changes to the federal minimum wage will likely occur, but nothing officially has happened yet.

Under the new law, the minimum wage will be increased in three phases. The first increase to \$5.85 will take place 60 days after the bill is signed into law. The second increase to \$6.55 will occur one year later. Finally, the last increase to \$7.25 will occur one year after that. When the new minimum wage legislation is signed into law by President Bush, the Department of Labor will issue new compliance posters which all business must display. It is unclear at this time whether the compliance poster will reflect the three-phase increase or whether a separate poster will be issued for each increase. The Idaho Department of Commerce and Labor also issues a poster regarding minimum wage which is displayed along with the U.S. Department of Labor poster.