Labor and Employment Law Reporter

Newsletter for the clients of The Williams Firm, P.C.

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The staff of The Williams Firm wish you and yours a healthy, safe, and prosperous New Year!

This Volume Includes:

Responsibilities Upon Receiving a "No Match Notice" 1

Poor Language Skills May be Protected 2

Minimum Staffing, Layoff, and Recall are not Mandatory Subjects of Bargaining 2

Title VII *Prima Facie* Case Clarified by the Sixth Circuit 3

Around the Water Cooler 4

RESPONSIBILITIES UPON RECEIVING A "NO MATCH NOTICE"

The federal government implemented a new rule, which went into effect September 15, 2007, regarding an employer's duties upon receipt of a "No Match Notice," informing the employer that the social security number on an employee's W-2 does not match information in the Social Security Administration's (SSA) data base. If an employer receives a No Match Notice, it must:

1. Verify that the mismatch was not the result of the company's recordkeeping or clerical error. If it was, provide proof to SSA.

2. If that is not the case, ask the employee to confirm the accuracy of his/her work authorization documents—have the employee bring them in and review them again.

3. If the employee claims the documents are correct, you must ask the employee to personally resolve the mismatch issue with the SSA.

All of the above must be done within 30 days of receiving a mismatch notice.

The employee must then be given 90 days from the date the employer received the No Match Notice to resolve the issue with the SSA. Keep track of the date you notified the employee of his/her obligation and when the 90 days expires—from the date you received the notice, not when you told the employee to resolve it.

If the SSA cannot confirm that the issue is resolved within 90 days (call SSA to inquire on the 90th day), you have 3 days to complete a new I-9 form, using only eligibility documents that contain a photograph of the employee.

If the employee cannot be re-verified using the modified I-9 form, you **MUST** terminate that person's employment. It is important not to overreact (i.e., terminate the employee immediately) or short-cut the process. Give the employee the full 90 days before you call SSA to see if the mismatch has been corrected.

POOR LANGUAGE SKILLS MAY BE PROTECTED

In *Rodriguez v FedEx Freight*, __F3rd__ (6th Circuit, 2007), the Court of Appeals broadened the scope of a traditional national origin discrimination claim to include how an employee speaks. Plaintiff Jose Rodriguez was a FedEx delivery driver who expressed interest in becoming a supervisor. Rodriguez took the leadership apprentice course and applied for several supervisory positions, one of which he was asked to interview for. Rodriquez was found to be qualified for the position, but he wasn't hired because of a concern that his accent and speech pattern would adversely affect his ability to "rise through the ranks." The Sixth Circuit noted that, "accent and national origin are inextricably intertwined and that the equal employment opportunity commission recognizes linguistic discrimination as national origin discrimination."

Rodriquez presented his own testimony, as well as that of two former supervisors, which indicated that he was not promoted because of how he spoke and because he was difficult to understand. Such evidence, in the Court's view, constituted direct evidence of national origin discrimination, entitling Rodriguez to a trial on the merits. Accordingly, the Sixth Circuit reversed the trial court's dismissal and sent that issue back for further proceedings.

This case is important to Michigan employers since the Sixth Circuit has now unequivocally held that evidence of discrimination against an employee because of his accent or poor language skills is equivalent to national origin discrimination. Obviously, increased sensitivity in the treatment of employees with heavy accents would be quite prudent.

MINIMUM STAFFING, LAYOFF, AND RECALL ARE NOT MANDATORY SUBJECTS OF BARGAINING

In *Oak Park Public Safety Officers Association v City of Oak Park*, __Mich App__ (12/11/07), the Michigan Court of Appeals reviewed the propriety of a decision by the Michigan Employment Relations Commission (MERC) regarding the topics of minimum staffing and layoff/recall. The Association is the certified bargaining representative for non-supervisory Public Safety Officers employed by the City of Oak Park. The Collective Bargaining Agreement effective from July 1, 1997 through June 30, 2001, contained provisions pertaining to minimum staffing, layoffs, and recalls. Prior to and during the negotiation of a successor agreement, the City refused to negotiate the minimum staffing provisions, contending they

were only permissive subjects of bargaining. Eventually impasse was reached, and the Union filed for compulsory arbitration pursuant to Public Act 312 of 1969.

At the same time, the City filed an Unfair Labor Practice (ULP) charge against the Union for unlawfully demanding to bargain over the minimum staffing provisions. Following a hearing, MERC's Administrative Law Judge (ALJ) concluded that both the minimum staffing and layoff/recall provisions were only permissive subjects of bargaining. The Union appealed and argued that such issues were inextricably intertwined with public safety, thereby elevating them to the level of mandatory subjects of bargaining. MERC, however, adopted the ALJ's decision and recommended Order, resulting in the instant appeal.

The Court of Appeals upheld MERC's decision. It concluded that MERC applied the correct legal standard and that the Union failed to demonstrate that there were sufficient facts establishing that these topics were inextricably intertwined with safety, so that minimum staffing became a mandatory subject of bargaining. As such, it upheld MERC's decision that the Union's staffing proposal was not a mandatory subject of bargaining within meaning of the Public Employment Relations Act (PERA). The Court also agreed with MERC that the layoff/recall provisions were not mandatory subjects of bargaining, either.

This decision illustrates, perhaps, a recognition by both MERC and the Michigan Courts that there is a new collective bargaining climate in Michigan. While the case was decided on the evidence presented at the hearing before the ALJ, the fact remains that the Union was unsuccessful in its attempt to force the employer to negotiate over something it is not obligated to discuss.

TITLE VII *PRIMA FACIE* CASE CLARIFIED BY THE SIXTH CIRCUIT

On December 19, 2007, the United States Court of Appeals for the Sixth Circuit clarified that which must be shown to make a *prima facie* case of Title VII "gender discrimination" in *Vincent v Brewer Company* __F3d__(12/19/07). There, as with most discrimination claims, discrimination may be proved either by presenting direct or circumstantial evidence of discrimination. If there is no direct evidence of discrimination (such as an employer saying, "I am firing you because of your gender"), a plaintiff must follow the oft-cited *McDonald Douglas* burden shifting analysis. Under this analysis, the plaintiff must first set forth a *prima facie* case, that which the employer has an opportunity to rebut. The elements of a *prima facie* case are:

1. That the plaintiff is a member of a protected group;
2. That he/she was subjected to an adverse employment decision;
3. That he/she was qualified for the position; and
4. That he/she was replaced by a person outside the protected class, or similarly situated non-protected employees were treated favorably.

The employer's argument in Vincent, which was accepted by the trial court, was that to make a *prima facie* case, the fourth element requires a plaintiff to demonstrate that she was "replaced with a similarly qualified person." It imported this additional element into the case from a 1996 decision, entitled *Suggs v Service Master Education Food Management* 72 F3d 1228 (6th Circuit, 1996).

In emphatic terms, the Sixth Circuit made it clear that a Title VII gender discrimination plaintiff need not demonstrate that a person to whom she compares herself was "similarly qualified." Doing so would inappropriately increase the showing that a plaintiff must make in order to establish a *prima facie* case. A *prima facie* case is simply offering enough evidence to go to trial, rather than have it decided on motion. The Sixth Circuit emphasized that for the fourth element of a *prima facie* case, the plaintiff need only show that she was "replaced by a person outside the protected class." Consequently, the Sixth Circuit reversed the trial court's decision and reinstated the case.

AROUND THE WATER COOLER

The Williams Firm, P.C. is pleased to introduce a new segment in our quarterly newsletter. Frequently, employers have questions that, although they may not require their own detailed article, are still important. We find that these types of questions are shared by many employers, so we offer this segment to address these questions. If you have any specific questions that you would like to have answered and which you feel are worthy of inclusion in this segment of our newsletters, please let us know.

Question: May Non-Union Employees be Forced to Participate in a Direct Deposit Payroll Plan?

Answer: No. The Michigan Wages and Fringe Benefits Act expressly states that employers may not deposit employees' wages in a bank, credit union, or a savings and loan association without the full, free, and written consent of the employee. That consent must be obtained without intimidation, coercion, or fear of discharge or reprisal for refusing to permit the deposit. If direct deposit is offered to employees, it must be truly voluntary, subject to written permission by each employee. If employees refuse to provide their consent, they must still be issued a pay check on the regularly scheduled pay date.

Question: May an Employee Record Conversations With Supervisors and Co-Workers While on Duty?

Answer: Maybe. Michigan law allows anyone to secretly record conversations, so long as the person doing the recording is part of the conversation. To this extent, secret recordings are allowed. However, if a tape recorder is left running, but the one doing the recording is not present when a conversation is recorded, the person that set up the tape recorder could be in violation of Michigan's Eavesdropping and/or Wiretapping statutes.

If a person tape recording another is doing so in such a fashion as to interfere with the employee's job duties or the legitimate business concerns of the employer, the employer may be able to discipline the employee for so doing. However, it is important to ensure that the employee is on notice that such activities are prohibited. If the employee continues recording, the employee may be disciplined for failing to follow directives and/or for engaging in conduct detrimental to the employer's business enterprise.

As a practical consideration, to eliminate this problem entirely, an employer may adopt a policy or work rule prohibiting surreptitious tape recordings all together. Failure to comply with the policy *would* be grounds for discipline.

AROUND THE WATER COOLER (CONT'D)

Question: Why do the I-9 Forms Look Different?

Answer: The United States Citizenship and Immigration Services Department revised its I-9 Employment Eligibility Verification Form on November 8, 2007. This form is now available for use, but will not become mandatory until reprinted in the Federal Register. The most significant change is the removal of five "List A" documents from the form. The List A documents are those used to verify employment eligibility. Those removed are: Certificate of U.S. Citizenship; Certificate of Naturalization; Alien Registration Receipt Card; Unexpired Reentry Permit; and Unexpired Refugee Travel Document. These forms were deleted because they lacked features to deter counterfeiting, tampering, and fraud. One item was added to List A, that being the Employment Authorization Document. That document was previously accepted as a means of proving identity and employment eligibility, and has now been added to the list. The new form may be found at www.uscis.gov/files/form/I-9.pdf.

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for the clients of:

THE WILLIAMS FIRM, P.C.

ATTORNEYS AND COUNSELORS AT LAW

KENDALL B. WILLIAMS
JOAN N. PIERSON
TIMOTHY R. WINSHIP
SEAN M. SIEBIGTEROTH

8263 S. Saginaw Street
Grand Blanc, Michigan 48439
Telephone: 810-695-7777 * Toll Free: 888-695-7887
Facsimile: 810-695-9549

www.TheWilliamsFirm.com
Email: Info@TheWilliamsFirm.com

Of Counsel:
ABNER J. TANSIL
CHRISTINE A. WAUN