

**RULES OF ENGAGEMENT
LATEST EMPLOYMENT LAW DEVELOPMENTS
(SEPTEMBER, 2004)**

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I. INTRODUCTION

This compilation includes summaries of recent employment cases on select issues from the Seventh and Eighth Circuits, along with additional cases of interest from Minnesota and Wisconsin courts. We have attempted to be comprehensive, yet not overwhelming, in our coverage by capturing the latest developments that announce new principles, provide a new interpretation of existing law, or apply the existing law in new or less common settings.

II. DISCRIMINATION/HARASSMENT CLAIMS

A. Disability

Hostile work environment claims are actionable under the ADA . . . but not in this case. *Shaver v. Independent State Company*, 350 F.3d 716 (8th Cir. 2003). The Eighth Circuit Court of Appeals held for the first time that hostile work environment claims are actionable under the ADA.² In order to succeed in a claim, the employee must prove that he or she is a "qualified disabled person" subject to ADA protection and that the hostile environment standards developed under Title VII in other contexts are met. In the *Shaver* case, some supervisors and coworkers made offensive remarks to the employee after finding out he had nocturnal epilepsy and had part of his brain replaced with a metal plate. The remarks went on for a two-year period of time. Comments included referring to him as "platehead", "stupid", "not playing with a full

¹ Sheila Engelmeier and Autumn Huiras would like to thank Amy Taber for her substantial and thoughtful contributions to these written materials, as well as her assistance in our preparation for our oral presentation on this subjects.

² The Eighth Circuit has many times previously "assumed without deciding" that disability harassment claims are actionable; and the EEOC has previously opined that disability harassment claims are actionable. Given that courts occasionally disagree with the EEOC, this decision merits some attention.

deck", and prone to "piss in his pants when the microwave was on." The Court held that the harassment was not sufficiently severe or pervasive to be actionable, noting that "nicknames" were common in the plant. The Court noted that most (but not all) offenders stopped when the employee asked, the conduct was not physically threatening, and the employee (although offended) sought no psychological treatment.

Telling an employee he was being terminated because of his "disability" did not violate the ADA. *Tockes v. Air-Land Transportation Services*, 343 F.3d 895 (7th Cir. 2003) *cert. denied*, 124 S.Ct. 1414 (2004). An employee, a truck driver, with a hand injury was fired for using only one hand in fastening a load to a truck bed, which was a violation of company safety rules. The employee sued the employer for disability discrimination under the ADA. The court held that the fact that the employee was allegedly told he was being terminated because of his "disability" was not sufficient to establish that the employer regarded him as disabled under the ADA.³ The court stated that words such as "crippled," "disabled," and "handicapped," do not necessarily establish a belief that an individual is entitled to ADA protection.

Even if an employee is "regarded as" disabled, if he is unable to perform the essential functions of the job, he is not protected under the ADA. *Dyke v. O'Neal Steel, Inc.*, 327 F.3d 628 (7th Cir. 2003) (a case originating out of Indiana). As a condition to employment, an applicant was required to pass vision and physical abilities tests as well as a criminal background check. The physical and vision tests set minimum standards which helped ensure the safety of employees in the warehouse, where large, heavy, and potentially sharp pieces of metal protrude at many different angles and heavy equipment is operating. Here, a temporary worker, after working as a temporary in the warehouse for several weeks, applied for a fulltime

³ The test for whether an employer regards an employee as disabled under the ADA is whether the employer regards that person as substantially impaired in a major life activity (such as seeing, hearing or working).

position. Subsequently, his temporary position was terminated and he was told he would not be considered for a fulltime position due to only having one eye. The employee filed suit against the employer, alleged the employer violated the ADA both by terminating him from his temporary position and by failing to hire him for a permanent position. The court held that the employer regarded the temporary employee with one eye as disabled, but that the employee was not entitled to ADA protection because he presented no evidence showing he could perform the essential functions of the job, i.e. pass the physical abilities test for essential safety requirements.⁴

A change in job duties may be a reasonable accommodation in a given circumstance. *Hutchinson Technology Inc. v. LIRC and Roytek*, 682 N.W.2d 343 (Wis. 2004). An employee, due to a back condition, was restricted to working eight-hour shifts. She had been working twelve-hour shifts. The employer allowed her to work eight-hour shifts for ten months and then terminated her. The Wisconsin Supreme Court affirmed the lower court's holdings that the employer did discriminate against her when it failed to establish that the proposed accommodation (a reduced schedule) would have imposed a hardship on it. The employer provided no evidence of actual hardship and only relied upon speculation that a hardship would occur. The Court noted that it was "mindful that a business must have the right to set its own employment rules" but that such rules do not "exist in a vacuum" and must "bend to the requirement of Wisconsin Fair Employment Act."

Employee's intolerance to mold and various chemical substances did not constitute a disability where the employee did not provide evidence of a long-term or permanent impairment. *Cramer v. Allina Health Systems*, No. A03-437, 2003 WL 22952381 (Minn. Ct.

⁴ The result in this case could turn out differently under the Minnesota Human Rights Act.

App. Dec. 16, 2003) (unpublished opinion). A water main broke and flooded a portion of the workspace, causing water damage and mold infestation. The employee took a three-month medical leave due to her sensitivity to mold and chemicals. After her leave, she was released to return to work, with the restriction that she avoid contact with mold, perfume, cleaning alcohol, and dust. The employer terminated her current employment but offered her another position in an area that would accommodate her restrictions. The employee filed suit alleging that the employer failed to accommodate her disability and instead terminated her. The court held that the employee did not meet the definition of "disabled" and therefore did not have a claim.

Employee who is not qualified for the position at the time of his discharge is not protected by the ADA. *Dobesh v. CBS Broadcasting, Inc.*, No. A03-978, 2004 WL 771725 (Minn. Ct. App. Apr. 13, 2004) (unpublished opinion). Per FAA regulations, a helicopter pilot who had suffered a heart attack had to wait at least nine months before the FAA would recertify him to fly. Because of this, the employer had to outsource the piloting duties to a third party. The Court of Appeals affirmed the summary judgment for the employer finding that the employee was not qualified for the position (i.e. was not certified by the FAA) at the time of his termination.

B. Gender Discrimination

Ridding Company of "Good Old Boys" not sex discrimination. *Steinhauer v. DeGolier*, 359 F.3d 481 (7th Cir. 2004). A newly hired female manager in a male-dominated department did not discriminate against a male employee on the basis of gender when she fired him. Her comment that she wanted to "get rid of the good old boys club" was not direct or indirect evidence of discrimination. Upholding the grant of summary judgment to the employer, the court stated that the manager's comments established that she wanted to get rid of employees in the department who were reluctant to change and who engaged in a power struggle against the

new manager. Also noted by the court was the fact that the male employee was replaced by another male and that the employee could not show that the manager acted out of an anti-male animosity.

"Barefoot and Pregnant" comment allows case to go to jury. *Volovsek v. Wisc. Dept. of Agric.*, 344 F.3d 680 (7th Cir. 2003). A female employee filed a sex discrimination suit based on comments made by company decisionmakers following a meeting where she was told that she was not being promoted (11 of her male co-workers were promoted). The lower court dismissed but the Seventh Circuit reversed, stating that, if the comment ("keeping them barefoot and pregnant") had been the only evidence of discrimination, it would not have been enough to survive summary judgment. However, based on the timing of the comment following on the heels of the meeting denying her the promotion, the court found it could show that the person making the comment did not want women in the workplace. As such, it was more than a "stray comment" and went to the heart of the employee's claim that the failure to promote her was based on her sex.

C. Sexual Harassment

Male employee's allegations are enough to deny summary judgment for hostile work environment. *Hollen v. USCO Distribution Services, Inc.*, No. Civ. 02-1119 JRT/FLN, 2004 WL 234408 (D. Minn. Feb. 3, 2004) (unpublished opinion). The employee claimed a sexually hostile work environment under the MHRA, citing behavior by women coworkers such as: viewing of pornographic internet sites and discussing them; printing pornographic pictures and jokes from the internet and passing them around work; open discussions about sexual activities; sexual activity in the company parking lot between female and male employees; sex toys in the workplace; and comments made directly to or about the employee, including calling his mother a sheep, referring to him as a "bitch" and as "sheep fucking Baaab," and while sitting in his car, he

was asked if he was receiving oral sex. The court concluded the alleged conduct was sufficiently severe or pervasive to create a hostile work environment.

Compensatory award of \$750,000 against the employer and individual manager affirmed by Court of Appeals where the employer failed to appropriately respond to employee complaints. *Devane v. Sears Home Improvement Products, Inc., et al.*, No. C5-03-305, 2003 WL 22999363 (Minn. Ct. App. Dec. 23, 2003) (unpublished opinion). The Court of Appeals affirmed the district court finding that the employee was subjected to "repeated, unwelcome, sexually-offensive conduct," which was corroborated by several former coworkers. The employee made repeated complaints which the employer failed to investigate or act in a responsive manner. The court also upheld the joint and several liability of the employer and individual manager for compensatory damages in the amount of \$750,000.⁵

Faragher/Ellerth affirmative defense is not available in cases involving harassment by a coworker rather than a supervisor. *Lissick v. Merrill Corp.*, No. 02-3676 ADM/AJB, 2003 WL 22213114 (D. Minn. Sept. 23, 2003) (unpublished opinion). In this case, a coworker continued to harass a female employee even after the employer took some remedial steps to stop the harassment. The harassment alleged included referring to the employee as "Robin Yellow Breast" while staring at her chest when the employee, whose name was Robyne, was wearing a yellow shirt; pressing his groin against her buttocks; staring at her and walking past her in an intimidating manner, and parking near her vehicle and sitting in his car watching her as she left work. After making several additional complaints to the company, the employee eventually filed a charge of discrimination. The employer asserted the affirmative defense available under *Faragher/Ellerth*. The court held that when harassment is by a coworker, the affirmative defense

⁵ One of the most interesting things about the Devane case is that the employee was awarded no wage loss; all of her damages were for emotional distress.

under *Faragher/Ellerth* is not available to an employer. In a coworker sex harassment case, the employer is liable for the harassment if it knew or should have known about the sexual harassment and failed to take prompt remedial action. The court distinguished the standards between supervisor harassment and that of coworker harassment, when negligence by the company will result in liability.

Employer may be liable for harassment by an employee of another company contracted to assist in a company restructure. *Anderson v. Crossroads Capital Partners*, No. Civ. 01-2000 ADM/SRN, 2004 WL 256512 (D. Minn. Feb. 10, 2004). The harasser, a contracted employee, allegedly touched the employee sexually on several occasions and engaged in other inappropriate behavior. Among other claims, the employee asserted an assault and battery claim against the employer. The court denied the employer's motion for summary judgment on these claims, holding that because the employer controlled the harasser's work, there was a factual issue whether the employer was liable for the harasser's actions under the borrowed servant doctrine.

D. Race and National Origin Discrimination

Employee must be able to establish that similarly situated employees were treated differently to prove prima facie case. *Watson v. Ceridian Corp.*, No. A03-853, 2003 WL 23024525 (Minn. Ct. App. Dec. 30, 2003), *review denied* (March 16, 2004) (unpublished opinion). An employee alleged race discrimination after being terminated for poor performance. The Court of Appeals affirmed the lower court's grant of summary judgment for the employer based on the fact that the employee was unable to show that any similarly-situated employees were treated differently, noting that "similarly situated" employees in this case were employees with a similar pattern of poor performance. The court disagreed with the lower court's holding that the employee was not qualified for her position based on her poor performance and therefore

failed to establish a prima facie case of discrimination. The court stated that the prima facie analysis is generally related to the employee's vocational skill and ability to perform the job, not deficient on-the-job performance.⁶

Supervisors are not individually liable under the MHRA for aiding and abetting in their own bad conduct. *Iyorbo v. Quest International Food Flavors & Food Ingredients Co.*, No. Civ. 03-5276, 2003 WL 22999547 (D. Minn. Dec. 19, 2003). In this case, the employee filed a discrimination charge and alleged that her supervisor was the actor in nearly every incident of discrimination set forth in the complaint. The court dismissed the claim against the supervisor, stating a supervisor cannot be held liable for "aiding and abetting himself."⁷

Black female's participation in "horseplay" was more offensive than other white employees, supporting the level of discipline imposed. *Wheeler v. Aventis Pharmaceuticals*, 360 F.3d 853 (8th Cir. 2004). The court affirmed summary judgment for the employer on a race discrimination claim. The employee alleged that many employees engaged in inappropriate behavior, "horseplay," at work but that she was singled out for discipline because she was black. The court distinguished between the different types of "horseplay" in evaluating the employer's reason for discipline, finding that a white female exposing her breasts upon request by male employees was not as serious as the employee's unsolicited and offensive grabbing of male employees' crotches.

⁶ This is one of the areas on which the state and federal courts disagree. State courts generally hold that an employee may demonstrate s/he is "qualified" for the job by showing that s/he bears the minimum qualifications for the job; whereas, in federal court (in both the 8th and 7th Circuits [including Minnesota and Wisconsin, respectively]), the courts tend to hold that an employee must show that s/he is "qualified" by demonstrating s/he actually effectively performed the job at issue.

⁷ Although the federal district court states it is reinforcing its previous holdings that "a supervisor cannot be directly liable for violations of the MHRA," there are a number of state court cases in Minnesota holding individuals liable for discrimination and/or harassment under the MHRA, including *Devane*, cited herein. Taken together, these cases would support the conclusion that the federal courts are often tougher on employees in employment cases than the state courts.

E. Age.

U.S. Supreme Court rejects claims of "reverse" age discrimination under the Age Discrimination in Employment Act ("ADEA"). *Cline v. General Dynamics Land Systems, Inc.*, 124 S.Ct. 1236 (2004). Present and former employees between ages of 40 and 49 sued the employer under the ADEA, alleging that the elimination of retiree health insurance benefits for workers under 50 discriminated against younger workers. The employees were successful at the circuit court level. In a 6-3 decision, the United States Supreme Court ruled that the ADEA does not prohibit employers from favoring older workers over comparatively younger workers, who are still within the protected class of 40 years and older.

NOTE: Despite this holding under federal law, Minnesota employers must be wary that such "reverse" discrimination claims might still be viable under the Minnesota Human Rights Act. The MHRA protects all workers **over 18 years old** against age discrimination. Wisconsin law mirrors the federal law and protects employees 40 years and older.

Exclusion of EEOC questionnaire at trial, which would have provided evidence of prior inconsistent statements by the employee, prejudiced employer. *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004). The Eighth Circuit Court of Appeals reversed a jury's finding of age discrimination and harassment and a damage award in excess of \$1 million based on the exclusion of evidence that should have been admitted and went to the heart of the issues decided by the jury. The court found that the EEOC statement that the employee filled out, was relevant and held that the inconsistencies between Weyers' trial testimony and her EEOC statement would have reflected directly on her credibility at trial. The court remanded for a new trial. As an additional note, the Eighth Circuit Court of Appeals set forth, for the first time in detail, its analysis as to the appropriate definition to be used in determining who qualifies as a "supervisor" in the *Ellerth/Faragher* framework for analyzing harassment claims.

Employer who changes its reasons for termination is more likely to be held liable for discrimination. *Applebaum v. Milwaukee Metro Sewage District*, 340 F.3d 573 (7th Cir. 2003). The Seventh Circuit upheld the jury's finding for age discrimination and affirmed an award of \$115,000 in compensatory damages and \$87,000 in punitive damages. The employer discharged a 60-year old human resource employee, stating different reasons at different proceedings for her discharge (breach of confidentiality and poor performance). The Seventh Circuit Court of Appeals stated that because the employer had shifted its stated non-discriminatory reasons for termination, the jury was free to infer that the real reason was age discrimination.

F. Constructive Discharge

Employer may assert *Ellerth/Faragher* affirmative defense when an employee claims constructive discharge due to an intolerable work environment. In *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), the United States Supreme Court ruled that the *Ellerth/Faragher* affirmative defense is available to employers in some cases of supervisory harassment involving constructive discharge. “Constructive discharge” refers to a situation where working conditions are so intolerable that no reasonable person could be expected to endure it (and, therefore, the employee is justified in resigning). In *Suders*, the Court noted that constructive discharge may be affected through co-worker conduct, unofficial supervisory conduct, or official company acts. This is unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. Assessing whether there is constructive discharge involves both an analysis of the employee's decision to leave and the precipitating conduct. The Supreme Court held in this case that where the constructive discharge at issue resulted from no direct or indirect official act, then the affirmative defense set forth in *Ellerth/Faragher* is available to employers; whereas, where the constructive discharge at

issue resulted from an official act, then the affirmative defense set forth in *Ellerth/Faragher* is not available and there is strict liability for the supervisor's behavior.

Practice Tip: TRAIN—TRAIN—TRAIN your managers to ensure that they understand their responsibilities as an agent for the company. Train your employees so that they understand their responsibilities as an employee and are aware of reporting procedures. React! Do not wait to see if things get better or blow over. Take immediate and appropriate action to investigate and stop the harassment or discrimination. And, when terminating an employee, clearly articulate the reasons and stick to them.

III. FAMILY AND MEDICAL LEAVE ACT ("FMLA")

Where an employee has established that s/he is FMLA eligible, a question of whether or not the leave was requested or denied will allow the claim to move forward to trial. *Carlsen v. Green thumb, Inc.*, No. Civ. 01-0276, 2004 WL 234406 (D. Minn. Feb 04, 2004). The employee in this case alleged that her employer violated her rights under the FMLA by interfering with her ability to take FMLA leave when the employer terminated her instead of granting her request for leave. The employer argued that the employee did not make a request for FMLA leave and therefore it did not interfere or retaliate against the employee. Because the employee was eligible for leave and there was conflicting testimony as to whether the leave was requested and/or denied, the action was allowed to proceed forward so that the finder of fact could determine whether or not the request was made.

Employee's failure to notify company of the reason for requested FMLA leave will cause an employee's claim of retaliation to fail. *Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950 (7th Cir. 2004). In this case, the employee left a voicemail at work stating his wife was about to go into labor and that he needed to stay home to take care of her. (She delivered

approximately 10 days later.) The employer immediately sent FMLA forms to him. He returned the forms indicating his wife had a "serious health condition" but provided no details of her condition. The employer denied the FMLA leave and fired the employee for attendance violations (he was absent two weeks). After he was fired, the employee provided a note from his wife's doctor that stated she had experienced "complications" with her pregnancy. The court held that the employee failed to give proper notice as required by the FMLA and further stated that employees may not simply demand leave—they must give their employer enough information to establish the probable basis or qualifying event for the leave.

An extreme change in an employee's behavior may be enough to put an employer on notice of a serious health condition. *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003). In this case, the employer took some proactive steps to address the employee's drop in performance and sleeping on the job. After the employee failed to show up for a meeting to discuss the performance issues, the employee was terminated. Subsequently, the employer found out that the employee had suffered from depression and had received treatment for his illness. Two months after termination, the employee asked to be rehired, which the employer refused to do. The court held that the employer "should have known" that the employee required FMLA leave based on the employee's prior exemplary work performance and his sudden change in behavior. As such, the court stated that the employer had constructive notice of the employee's need for leave and violated the FMLA by refusing to reinstate him at the time he requested rehire.

Practice Tip: When in doubt, give notice of FMLA leave rights. If the employee does not timely respond and/or does not provide adequate information, the employer may decline the leave.

An employee must be able to perform on the job without modifications or assistance upon return from FMLA leave. *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002). Leave time under the FMLA is an opportunity for the employee to treat or attend to the condition rendering her/him unable to perform her/his job. Upon expiration of the leave, if the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.⁸ This case also addressed the issue of what is appropriate notice from the employee to the employer that FMLA entitlement may be an issue. The court held that the fact that an employee cites "depression again" for a need to be absent from work may be sufficient notice to the employer of the employee's need for FMLA leave.

Whether a person's indefinite need for intermittent leave disqualifies the employee from protection under the FMLA, when attendance is a job requirement, is a question "worth noting." *Johnson v. Moundsvista, Inc.*, 83 Empl. Prac. Dec. P 41,267 (D. Minn. August, 2002) (not reported). Most relevant in this case was the fact that the court mentioned, but did not address, the question of whether a person's expected and indefinite need for intermittent leave disqualifies the employee from protection under the FMLA when attendance is a job requirement. The court cited to *Spangler* noting that neither the *Spangler* court nor the *Collins* court determined when the need for unpredictable leave "so undermined an employee's ability to perform her job that the FMLA no longer provided protection." This continues to be a subject open for argument.

⁸ Of course, this does not address the employers' obligations under either the ADA and/or MHRA to assess whether it has a duty to reasonably accommodate beyond the leave time available under the FMLA. Such assessments need to be made on a case-by-case basis.

An employee who merely states that she was "sick," was not sufficient to put employer on notice of potential FMLA leave need. *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001). This case stated that courts "have been reluctant to read the FMLA as allowing unscheduled and unpredictable, but cumulatively substantial absences when the ADA protects only persons who over the long run are capable of working fulltime." Here, the employee was asserting a right to take unscheduled leave at a moment's notice for the rest of her life, which the court implied to mean that she was not qualified for her position where reliable attendance was a bona fide requirement. However, this was not the question the court needed to resolve. It held that where the employee merely stated that she was "sick," was not sufficient to put employer on notice of potential FMLA leave need.

An employee who is unable to perform the essential functions of the job, apart from the inability to work a full-time schedule, is not entitled to intermittent leave. *Hatchett v. Philander Smith College*, 251 F.3d 670 (8th Cir. 2001). The primary question presented was whether an employee, who was unable to perform the essential functions of her job at the end of a twelve-week leave, was entitled to intermittent or reduced schedule leave. The court held that she was not, citing legislative history of the FMLA. The purpose of the FMLA is to allow an employee to be away from the job, not to force the employer to participate in the employee's rehabilitation. The FMLA does not require an employer to allow an employee to remain in a position that he/she cannot perform.

NOTE: PROPOSED REVISED FMLA REGULATIONS. The DOL is scheduled to publish proposed regulations updating the FMLA. Among other revisions, it is believed the new regulations will address those struck down by the Supreme Court in *Ragsdale v. Wolverine World wide, Inc.*, 122 S.Ct. 1155 (2002). *Ragsdale* held that the FMLA regulation requiring employers to give more than twelve weeks of FMLA leave time to an employee if the employer had failed to timely provide notice and designate the employee's leave as FMLA leave was invalid because it went beyond Congress's intent when it drafted the FMLA. The Court

criticized the regulation because it penalized employers for failure to give notice even when the lapse did not cause the employee to suffer any loss.

IV. WHISTLEBLOWER/RETALIATION

A. Whistleblower

A violation of an employer's internal policy does not fall within the protections extended under the whistleblower statute. *Salgy-Knapp v. Cirrus Design Corp.*, No. A03-654, 2004 WL 193140 (Minn. Ct. App. Feb. 3, 2004) (unpublished opinion). To come within the safe harbor provision of whistleblower protection, an employee must show a "greater proximity" between the practice reported and the violation of a statute or regulation. In this case, the employee's report alleged failure by the employer to utilize production drawings in designing aircraft, which was an internal policy, not a statutory or regulatory requirement.

Minnesota whistleblower statute only protects current employees, not former employee. *Guercio v. Production Automation Corp.*, 664 N.W.2d 379 (Minn. Ct. App. 2003). A former employee claimed that the reason his former employer did not rehire him was because he filed an anonymous complaint, *after* his separation with the company, with the Minnesota Department of Health alleging that the employer permitted smoking in the workplace. Based on the definition of "employee" in Minn. Stat. § 181.931, the court held that the statute did not protect the former employee. *See* Minn. Stat. § 181.932.

If there is no adverse employment action, an employee will not be able to assert an action under the whistleblower statute. *Nelson v. Ellerbe Becket Const. Serv., Inc.*, 283 F.Supp.2d 1068 (D. Minn. 2003). Summary judgment was granted to the employer in this case even though the employee's complaints about the failure to pay him overtime and his objection to being asked to record inaccurate financial data were ruled good-faith reports of suspected violations of state or federal law. The reason the employee's complaints were dismissed, the

court held that no reasonable jury could find that the employee had suffered an adverse employment action where the he had accepted a \$5,000 bonus ten days before quitting his job.

B. Retaliation

Adverse employment action must be "material" to give rise to a retaliation claim under MHRA. *Mercure v. West Publishing Corp.*, No. A03-853, 2003 WL 23024519 (Minn. Ct. App. Dec. 30, 2003), *review denied* (March 16, 2004) (unpublished opinion). In this case, the employee claimed that the company's failure to promote her was an act of retaliation. The court did not agree, applying the Title VII principle to the retaliation claim brought under the MHRA. The court, citing *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686 (8th Cir. 1997), held that part of what an employee must prove to show retaliation under Title VII requires a material alteration in the terms or conditions of employment. "[N]ot everything that makes an employee unhappy is an actionable adverse action."

V. CONTRACT CLAIMS

A. Noncompete/Nonsolicitation Issues

Wisconsin: Non-compete banning employee from any job with a competitor is unreasonable. *Overhead Material Handling, Inc., v. Potratz*, 2003 WL 22852227 (Wis. Ct. App. Dec. 3, 2003) (unpublished opinion). Employer sought to enforce non-compete against former employee that restricted the employee from working "directly or indirectly" with any competitor within a 10-county area of Wisconsin. The court evaluated whether the overbroad covenant was reasonably necessary for the protection of Overhead's business and held that it was not. The court stated that under Wisconsin law, non-compete provisions are automatically "suspect," and require close scrutiny. The court held that the provisions preventing employees from seeking "any type of employment with a competitor" were "overbroad and unreasonable."

Minnesota: Successor employer unable to enforce noncompete and nonsolicitation agreements due to lack of assignment provision. *Inter-Tel, Inc. v. CA Communications, Inc.*, No. Civ. 02-1864 PAM/RLE, 2003 WL 23119384 (D. Minn. Dec. 29, 2003) (unpublished opinion). A noncompete clause contained in a severance agreement, entered into prior to the sale of the employer's business to a third party, was held unenforceable by successor employer because it did not provide for assignment. The court noted that the buyer should have known that the seller was in the process of reducing its workforce and should have insisted on the assignment of any severance agreements prior to their execution.

Practice Tip: Make sure your noncompete agreements are reasonable with respect to time, geography and application. Don't get greedy and unintentionally limit your ability to stop competition. In addition, make sure that your noncompete agreements have both assignability and survivability provisions.

B. Contract Claims

Careful drafting of the "just cause" definition in an employment contract is essential to an employer. *Kernz v. J.L. French Corp.*, 667 N.W.2d 751 (Wis. Ct. App. 2003). An employee was accused of committing two violations of plant safety rules and was terminated by the employer. The employee claimed that he was not terminated for "just cause" as required by his employment contract and sued for damages. The court held that the employer had breached the employment contract by terminating the employee and awarded \$263,993.02 in damages. On appeal, the Court of Appeals affirmed the holding, stating that the term "just cause" was ambiguous as set forth in the employment contract. Based on contract interpretation rules, the court held that the employer's claimed definition was not sufficient and that the employee was entitled to damages.

Continued employment for new employer constituted acceptance of new employment terms. *Guercio v. Production Automation Corp.*, 664 N.W.2d 379 (Minn. Ct. App. 2003). An employee's continued employment with a successor employer, with the knowledge that the new employer planned to change the commission structure, constituted acceptance of a unilateral contract offer by the new employer to change the terms of employment. Although the new employer did not have the right to unilaterally change the terms of the employee's employment, the employee's at-will status allowed him to quit rather than work for the successor employer.

C. Arbitration and Jury Waivers

After years of requiring arbitration, some employers are deciding to return to the court system, but with certain stipulations. Based on the rising cost of arbitration, and mixed results in arbitration, some employers are opting to forego arbitration clauses in employment agreements, allowing disputes to go to court, but on the condition that they be heard only by a judge, not a jury. These new "jury waiver" clauses appearing in employment contracts are raising legal questions in some states, as discussed below.

California deems jury waivers unconstitutional. *Grafton Partners LP v. Superior Court*, 9 Cal.Rptr.3d 511, Feb. 6, 2004. (review granted). This court held that jury waivers, unlike agreements to arbitrate, violate the state Constitution. This court distinguished these two types of clauses by stating that "[t]here is a federal and state public policy in favor of enforcing an agreement to arbitrate disputes, while there is a historical policy in favor of jury trials, thus against jury waiver clauses." This court's decision was overturned by California's higher appellate court.

Georgia deems jury waivers unconstitutional. *Bank South, N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994). The court ruled that a waiver of the constitutionally protected right to a jury trial was controlled by state law and a pre-litigation contractual waiver was unenforceable.

Enforceability under Minnesota law? The Minnesota Constitution provides, free from violation, the right to a jury trial. Further, Rule 38.01 of the Minnesota Rules of Civil Procedure states that parties are entitled to a jury trial in specified actions unless the right is waived. An individual may waive his or her right as follows:

- a. In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial by:
 - i. failing to appear at the trial;
 - ii. written consent, by the party or the party's attorney, filed with the court administrator; or
 - iii. oral consent in open court, entered in the minutes.

Minn. R. Civ. P. 38.02. *See also* Minn. Stat. § 487.23, subd. 3. Like the statutes at issue in California and Georgia, this Rule contemplates the existence of a pending legal action and specifies the actions that must be taken in order to waive a jury trial. Nevertheless, when this rule was codified at Minn. Stat. § 546.26, since repealed, the Minnesota Supreme Court held that "[t]he statutory methods of waiver of right to jury trial are not exclusive, but when some other manner of waiving a jury than those specified by statute is relied upon, the intention to waive must be clear and unequivocal." *Roske v. Ilykanyics*, 45 N.W.2d 769 (Minn. 1951) (no authority of support cited). Under this case law interpretation, since unchallenged, a predispute jury waiver agreement may be upheld in Minnesota.

Practice Tip: With any contract, clear and unambiguous drafting is key to enforcement. Employers should work with counsel before presenting a contract to an employee to ensure

enforceability of the terms. Employers should also evaluate whether or not they really want to arbitrate or attempt to secure a jury waiver under current developing law.⁹

VI. EMPLOYMENT TORTS

A. Defamation

Former manager's negative comments about employee, to employee's new prospective employer, held to be defamatory. *Gibson v. Overnite Transportation Co.*, 671 N.W.2d 388 (Wis. Ct. App. 2003). The court upheld an award of \$33,000 in compensatory and \$250,000 in punitive damages for a defamation claim brought by a former employee. The negative statements made about the former employee included he was "way below average," "needed to improve his work ethic and attitude," and that the company would "'never' rehire" him. Based on the comments made by the former supervisor, the prospective employer opted not to hire the employee. The court held that the comments were grievous and constituted express malice toward the employee. *See* W.S.A. § 895.487 (good faith reference).

Comments made in context of employment were within employer's qualified privilege. *Mercure v. West Publishing Corp.*, No. A03-853, 2003 WL 23024519 (Minn. Ct. App. Dec. 30, 2003), *review denied* (March 16, 2004) (unpublished opinion). An employee alleged defamation based on comments, made in a performance review, that his skills needed substantial improvement; comments made by supervisor to employee's new supervisor that he had some "issues" that human resources was working on; and supervisor's statement that employee had barged into his office and did not respect his supervisor's time. The court affirmed summary judgment for the employer holding that the statements were protected under a qualified privilege because they were made upon proper occasion, from a proper motive, and based upon reasonable cause.

⁹ Several research studies show that judges more often find in favor of employees than juries. However, judges' awards are typically smaller than jury awards.

Defamation claim in the context of a drug test dismissed. *Anderson v. Independent School District*, 357 F.3d 806 (8th Cir. 2003). An employee (bus driver) was randomly selected to take a drug test and provided an insufficient sample for a test. Under applicable federal regulations, this was considered to be a refusal to submit to a required test. The employee alleged that he was defamed by his employer when it stated (1) that he refused to provide an adequate sample; (2) had refused to submit to the test; (3) had tested positive on the test; (4) was a drug user; and (5) had failed the test. The court held that the first alleged statement was never published to a third party (a requirement for a defamation claim) but merely sent from the employer to the employee. The court also held that the second statement was true, as understood within the context of the federal regulations (truth is always a defense to a defamation claim). The court found no evidence to prove the third and fourth statements were ever made, and the person who overheard the fifth statement could not identify who said it.

B. Privacy

Faxing of employee names and social security numbers to managers within the company did not constitute a "publication." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550 (Minn. 2003). This case addressed an invasion of privacy claim based on the publication of private facts, a tort action established in *Lake v. Wal-Mart*, 582 N.W.2d 231 (1998). The claim was based on the unauthorized faxing of 204 employee names and social security numbers to sixteen managers in six states.

The Court of Appeals held that this disclosure of information was a violation of the employees' privacy rights. The Court of Appeals relied on *Lake*, holding that the definition of publicity could turn on whether the dissemination of private information unreasonably exposed the employee to a significant risk of loss. In reversing the Court of Appeals, the Supreme Court adopted the Restatement definition of "publicity," which provides that a matter is made public by

communicating it to the public at large, or to so many people that the matter is substantially certain to become public knowledge. The Supreme Court also noted that the tort of publication of private facts should provide a remedy for the truthful but damaging dissemination of private facts, thus filling a narrow gap left by the tort of defamation.¹⁰

C. Tortious Interference with Contract

Corporate officer had qualified privilege to interfere with the employee's contract with employer. *Guercio v. Production Automation Corp.*, 664 N.W.2d 379 (Minn. Ct. App. 2003). The employee alleged interference with his employment contract when the new employer changed the commission structure. He also alleged that the employer acted with malice by attempting to obtain a customer database maintained by the employee on his home computer. Absent actual malice or action outside the scope of employment, the court held that a corporate officer has a qualified privilege to interfere with contracts between a corporate entity and its employees. The court held that there was no showing of how the commission change, which affected all sales personnel, was directed at the employee or how the corporate officer acted with malice by attempting to obtain the database.

VII. UNEMPLOYMENT AND WORKERS' COMPENSATION

A. Unemployment

Failure by employee to participate in a performance improvement plan constitutes employment misconduct. *Vargas v. Northwest Area Found.*, 673 N.W.2d 200 (Minn. Ct. App. 2004). **NOTE:** This case was decided under the pre-2003 version of Minn. Stat. § 268.095, which required that the conduct be intentional and disregard standards of behavior or the

¹⁰ This case could mean that it will be very difficult for employees to make invasion of privacy claims based on dissemination of private information.

employee's duties and obligations.¹¹ The court held that the employee's intentional refusal to attempt any part of the improvement plan demonstrated that he "consciously disregarded" his duties and obligations. *But see, Hagel v. TCR Corp.*, No. A03-1247, 2004 WL 837866 (Minn. Ct. App. April 20, 2004) (unpublished opinion) (employee did not engage in misconduct when he refused to sign an amendment to a previously signed that he felt was inaccurate).

Reduction in hours constituted adverse change in employment. *Schleueter v. Reiner Contracting, Inc.*, No. A03-707, 2004 WL 422558 (Minn. Ct. App. Mar. 9, 2004) (unpublished opinion). The Court of Appeals held that the employer's alteration of the employee's vacation and sick time benefits and reducing her hours from forty to twenty-four per week constituted an adverse change to her employment, providing good reason for the employee to quit and entitling her to unemployment compensation benefits.

Failure to return to work without having been expressly terminated constituted a voluntary quit. *Moore v. Second Harvest St. Paul Food Bank*, No. A03-488, 2004 WL 193100 (Minn. Ct. App. Jan. 26, 2004) (unpublished opinion). An employee who gathered her personal belongings, turned in her timesheet, and informed her supervisor that she was leaving because she was sick, coupled with her failure to return to work without being told that she was fired, constituted a voluntary quit, disqualifying the employee from unemployment compensation benefits.

Second violation of company's email policy by employee constituted "misconduct." *Daniels v. Onan Corp.*, No. A03-885, 2004 WL 376975 (Minn. Ct. App. Mar. 2, 2004) (unpublished opinion). An employee's continued, inappropriate email correspondence to coworkers, in violation of a policy in the employee handbook, after receipt of a verbal warning

¹¹ The 2003 revisions to the definition of misconduct under Minnesota's unemployment laws favored employers. It makes it slightly easier to prove misconduct. See text below herein.

for similar behavior, constituted employee misconduct disqualifying him from unemployment compensation benefits.

B. Workers' Compensation

An employer's liability for an injury, due to a birthday spanking at work, is covered under the exclusivity of the Workers' Compensation Act. *Meinstma v. Loram Maintenance of Way, Inc.*, 672 N.W.2d 224 (Minn. 2004). An employee was injured in a "birthday spanking" given by coworkers pursuant to a workplace tradition. The Court of Appeals found that the injury occurred within the time and space boundaries of employment, and thus "in the course of employment," implicating workers' compensation benefits. The Court of Appeals also found that the employer and coworkers did not intentionally harm the employee, disposing the potential liability under the intentional tort exception of the Workers' Compensation Act. On appeal, the Supreme Court affirmed the lower court's holding as to the employer, affirming that Meinstma's only remedy against Loram was under the Workers' Compensation Act. However, the Court held that the co-employee exception did not preclude Meinstma's action for potential damages against the individual co-employees. The court reversed and remanded this portion of the case stating that there was a genuine issue of material fact as to whether the coworkers intended to inflict injury when they engaged in the birthday spanking. If the employees intentionally harmed the employee, damages for the injury inflicted by the employees would fall outside the Workers Compensation Act.¹²

The Minnesota Supreme Court has the authority to review a Workers' Compensation Court of Appeals ruling that reversed and remanded an arbitrator's denial of benefits. *Kline v. Berg Drywall, Inc, and American Compensation Insurance Co./RTW, Inc.*,

¹² Unfortunately for employers, they may still be liable for the behavior of these individual employees, outside the workers compensation system.

2004 WL 1748931, -- N.W.2d -- (Minn. 2004). There were multiple issues in this case involving constitutional rights, the intent of the Workers' Compensation Act, and a collective bargaining agreement. Key holdings that the Court announced were: (1) An alternative dispute resolution ("ADR") system established by the collective bargaining agreement could not limit judicial review; (2) the employee's claim was not preempted by section 301 of the Labor Management Relations Act; and (3) the exclusion of the employee's counsel at the early stages of the ADR process diminished his entitlement to benefits and entitled him to a new arbitration.

Wisconsin Supreme Court issues decision revisiting the "odd lot" rule in Workers Compensation cases. *Beecher v. LIRC, Outokumu Copper Kenosha and Fremont Indemnity*, 682 N.W.2d 29 (Wis. 2004). The Court of Appeals reversed the commission's and lower court's holding that a worker is required to prove that he or she has conducted a job search and has been unable to find a job with the physical limitations the doctor has ordered before the burden shifts to the employer. In affirming the Court of Appeals' decision, the Wisconsin Supreme Court rejected the commission's argument that it properly found that Beecher had not made a prima facie case for permanent total disability and that the odd-lot doctrine analysis under *Balczewski v. DILHR*, 76 Wis. 2d 487 (1977) should be re-evaluated and expanded in light of the enactment of Wis. Stat. § 102.17(7) and the promulgation of Wis. Admin. Code DWD § 80.34(1).¹³

VIII. OTHER ISSUES

A. Fair and Accurate Credit Transactions Act ("FACTA")

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act ("FACTA"), which reauthorizes and amends the Fair Credit Reporting Act ("FCRA"). A 1999 FTC opinion letter ("Vail letter") concluded that a report by a third-party (such as a law firm) hired by the employer to conduct a harassment investigation would be

¹³ For Wisconsin workers' compensation cases, please consult with Leslie Altman, or one of the other lawyers regularly practicing in that area.

considered a "consumer report," triggering the FCRA notice and disclosure requirements. This required the employer to notify and obtain the consent of the alleged harasser before beginning the investigation.

The new law removes the FCRA notice and disclosure requirements on third-party investigations of employees for this type of investigation. However, FACTA does require that, if an employer decides to take an adverse action against the employee based on the findings of the investigation, the employer must provide the employee with a summary containing the nature and substance of the report. The employer is not required to disclose the sources of information, such as witnesses or specific statement of those interviewed.

The new language of FACTA reads as follows:

SEC. 611. CERTAIN EMPLOYEE INVESTIGATION COMMUNICATIONS EXCLUDED FROM DEFINITION OF CONSUMER REPORT.

(a) In General.--Section 603 of the Fair Credit Reporting Act (15 U.S.C. 1681a), as amended by this Act is amended by adding at the end the following:

(x) Exclusion of Certain Communications for Employee Investigations.--`

(1) Communications described in this subsection.--A communication is described in this subsection if—

(A) but for subsection (d)(2)(D), the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of--

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

(D) the communication is not provided to any person except--

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 608.

(2) Subsequent disclosure.--After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse

action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed.

(3) Self-regulatory organization defined.--For purposes of this subsection, the term `self-regulatory organization' includes any self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), any entity established under title I of the Sarbanes-Oxley Act of 2002, any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission."

(b) Technical and Conforming Amendment.--Section 603(d)(2)(D) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(D)) is amended by inserting ``or (x)" after ``subsection (o)".

B. Reversal of "Weingarten rights"

In *IBM Corporation*, 341 NLRB No. 148 (6/9/04), the National Labor Relations Board ("NLRB") reversed its previous position and held that non-union employees are not entitled to representation at disciplinary interviews. Previously, an employee (regardless of union status) was entitled to have a coworker or witness present at a meeting that the employee reasonably believed would result in discipline. The Board's decision was largely based on policy issues underlying an employer's need to conduct confidential investigatory interviews in "sensitive situations." The Board ruled that non-union employees do have the right to request a co-worker at an interview and cannot be disciplined for making the request. However, employers have no obligation to comply with the employee's request if the employee is in a non-unionized setting.

C. Damages

Front pay qualifies as "actual damages" and is subject to the multiplier set forth in the MHRA. *Ray v. Miller Meister*, 684 N.W.2d 404 (Minn. 2004). After a jury trial on a Title VII claim, and a bench trial on the MHRA claim, the District Court ordered a total of over \$1 million in damages. The MHRA damage award including \$123,004 in front pay, which the court doubled to \$246,008, pursuant to the multiplier in the MHRA. The Employer appealed. The Supreme Court upheld the doubling of the front pay stating that because "[t]he scope of discrimination liability, and its consequences, is more onerous under our state laws than under

Title VII," it was not bound to follow seemingly analogous federal court decisions. Based on this, the Court concluded that the scope of damages under the MHRA is not similar to those provided under Title VII and declined to adopt Title VII damages principles for the MHRA.

Court affirms \$1,000,000 punitive damage award. *Rowe v. Hussman*, 2004 WL 1900299, -- F.3d -- (8th Cir. Aug 26, 2004). A jury awarded the employee \$500,000 in emotional distress damages and \$1,000,000 in punitive damages after finding that employee had endured a sexually hostile work environment that her employer knew of and failed to rectify promptly. Employer appealed the damage awards as excessive and the court affirmed the award. As to the compensatory damages, it stated that although the award was substantial, it did not view it as "monstrous or shocking", given the testimony regarding a coworker's repeated abusive conduct. The court also affirmed the \$1,000,000 punitive award citing the supervisor's knowledge of the harasser's abusive conduct, his repeated failure to take effective action to stop the conduct, and his defense of and excuses for the harasser's conduct, the supervisor's inactions and actions were all imputed to the Company and met the "outrageous or reckless indifference" standard under state law. (Despite the ability to cap damages under federal law at \$300,000, an employer may be liable for much more under state law.)

Practice Tip: Prompt remedial action by supervisors – that is, action that demonstrates intolerance for the offending behavior and actually works to stop it -- is the only real insurance to avoiding sizeable claims.

IX. LEGISLATION

A. Bills Passed

1. Minnesota Reference Law

Effective August 1, 2004, a new Minnesota law allows employers some additional protection for disclosing certain types of information about current or former employees to a prospective employer or employment agency. (to be cited at Minn. Stat. 181.967). The new statute does not require a private employer to disclose anything. What it does do is make it more difficult for a current or former employee to bring a lawsuit for disclosure of certain types of information under certain circumstances.

The language of the statute reads:

No action may be maintained against an employer by an employee or former employee for the disclosure of information listed in subdivisions 3 to 5 about the employee to a prospective employer or employment agency as provided under this section, unless the employee or former employee demonstrates by *clear and convincing evidence* that the information was false and defamatory; and the employer knew or should have known the information was false and acted with malicious intent to injure the current/former employee.

The statute allows an employer to provide the following information in response to a request:

1. Dates of employment;
2. Compensation and wage history;
3. Job description and duties;
4. Training and education provided by the employer; and
5. Acts of violence, theft, harassment, or illegal conduct documented in the personnel file that resulted in disciplinary action or resignation and the employee's written response, if any, in the personnel file.

A disclosure of the type of **information listed in #5 must be in writing with a copy sent contemporaneously by regular mail to the employee's last known address** in order for

the statute to protect the employer. No reference is made to the form of disclosure for #1-4 or that the employer is under an obligation to notify the employee of these types of disclosure.

The statute does not apply to information outside of the topics listed in #1-5, such as general performance or behavior issues. It also does not apply to any disclosures of the listed acts in #5 if the act is not documented in the employee's personnel file and that did not lead to disciplinary action or resignation.

If the employee has provided written authorization, it allows the employer to disclose, in writing:

- a. Written employee evaluations conducted before the employee's separation and any response by the employee in the employee's personnel file;
- b. Written disciplinary warnings and actions in the five years preceding the written authorization, along with any employee response contained in the employee's personnel file; and
- c. Written reasons for separation from employment.

To come within the protection of the statute when disclosing this type of information under written authorization, an employer must contemporaneously mail the current or former employee a copy of the information disclosed and tell the employee to whom it was disclosed.

The statute specifically states that it does not provide protection against an action involving an alleged violation of the Minnesota Human Rights Act or "other statute". The statute also states that it does not "diminish or impair the rights of a person under a collective bargaining agreement." The statute contains other details, as well as a provision relating specifically to public employers and to disclosures by administrators of school districts and charter schools.

Practice Tip: An employer is not required to disclose any information. In certain cases, non-disclosure could put the employer at risk.

2. Minnesota amendment: Right to Review Personnel File; Frequency

Included in the new reference law legislation was an amendment to Minn. Stat. § 181.961. The "old" version of the law required an employer to allow a former employee to review his or her personnel file one time within a year of separation from the Company. Once the year had passed, the employer was no longer obligated to allow the employee to review his or her file.

The "new" version allows a former employee to request and review his or her personnel file "once each year after separation for as long as the personnel record is maintained." What does "maintained" mean? Because "maintained" is not defined in the statute, it could mean anything from having the personnel file on premises to being "maintained" and accessible off-site.

The amendment did not change the need for a request to be in writing. It also did not change the right of current employees to review their personnel file once every six months and to receive a free copy of the file upon written request.

Practice Tip: If the personnel file exists and is accessible, oblige the employee's written request. In addition, make sure you are providing the documents that belong in the personnel file – not more or less. Either could hurt you depending on what you send. Finally, if your company does not have a records retention policy in place, or has one but does not consistently destroy documents per the policy, now is the ideal time to get your policy and practice in order.

3. Minnesota Unemployment Compensation

Effective August 1, 2203, the definition of "misconduct" was amended in the Minnesota unemployment compensation statute. The definition of "misconduct" is now defined as any "intentional, negligent or indifferent conduct, on the job or off the job (1) that evinces a serious violation of the standards of behavior the employer has a right to reasonably expect of the

employee, or (2) that demonstrates a substantial lack of concern for the employment." Minn. Stat. § 268.095.

4. Wisconsin Amendment to the Definition of "Employee"

The definition of "employee" was amended in Chapter 109, adding groups to those previously excluded from coverage. *See* W.S.A. § 109.01 (1r).

5. Wisconsin amendments to the workers' compensation act

The legislature made two amendments to better clarify several requirements under the Act. W.S.A. § 102.18(1)(e) clarifies the 21-day payment standard under the Act and W.S.A. § 102.32(6) clarifies the payment of permanent partial disability benefits.

B. Bills Under Consideration in Minnesota

1. Proposed amendments to the MHRA

- a. Amend Minn. Stat. 363A.03, subd. 43 to state that the elements of proof, burdens of proof, and affirmative defenses that apply to sexual harassment claims under Title VII shall apply to claims under the MHRA. House File 2443/Senate File 2816
- b. Repeal Minn. Stat. 363A.26, subd. 2, which allows a charging party to request a hearing if there has not been a finding with respect to probable cause within 180 days of the filing of the charge. House File 2676/Senate File 2666
- c. Extend the definition of "sex" to include sexual harassment. House File 2677/Senate File 2819
- d. Extend the definition of "reprisal" to include actions against persons associated with persons who are of a different sex, age, familial status, marital status, status with regard to public assistance, or membership or activity in a local human rights commission. House File 2677/Senate File 2819
- e. Amend the definition of familial status in the MHRA to include any person who is pregnant or in the process of adopting a minor child. House File 3065/Senate File 1384
- f. Remove sexual orientation as a protected class under the MHRA. House File 341/Senate File 545

2. Elder Care Leave
 - g. Would provide employees up to 16 hours of unpaid leave per year to assist an elderly or disabled parent or grandparent in attending a health care appointment. House File 117/Senate File 160
3. Workers Compensation Amendments
 - h. Amend the definition of "physical injury" for claims to include mental injury, whether or not it is accompanied by physical injury. Senate File 649 (no House companion)

X. ADOPTED REGULATIONS

A. Occupational Safety and Health Act (Minnesota)

The state adopted certain federal occupations safety and health standards by reference. See Minn. Rules 5205.0010 (2003).

B. COBRA (Federal)

Effective for plan years beginning on or after November 26, 2004, new regulations are in place. The final regulations include two model notices and are organized in the same four parts as were in the proposed regulations, relating to four aspects of COBRA administration:

1. the initial notice (the DOL calls this the "general notice")
2. the qualifying event notice that must be provided by employers to plan administrators for certain qualifying events;
3. notices that qualified beneficiaries must provide to plan administrators; and
4. notices that plan administrators must provide to qualified beneficiaries.

C. Fair Labor Standards Act (Federal)

For an in-depth overview of these new regulations, please refer to the materials under the section entitled, "Color of Money: Everyday Issues in Wage and Hour Law."