

# THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER  
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES  
PREPARED BY ATTORNEYS BETTY BECHTEL AND MICHAEL SANTO

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## END OF AN ERA AT UNEMPLOYMENT

After 23 years as the Unemployment Hearing Officer on Colorado's Western Slope, Benny Mestas has retired. We are going to miss this hard-working, fair-minded, decision maker, whose incisive questioning and unlimited patience for attorneys-with-exhibits ("I'll consider that document for what it's worth," he often said, without a hint as to what it was "worth") made unemployment hearings as pleasant of an experience for both sides as any human being possibly could. In his honor, the Employer's Advisory is dedicating this section to an update on recent unemployment decisions by Colorado Courts:

SUBSTANTIAL CHANGE IN WORKING CONDITIONS. When Jesus Madrid was hired by Chris the Crazy Trader, Madrid was promised that he would be working full-time, similar to all the other Crazy Trader employees. But two weeks after starting the job, Crazy Trader reduced Madrid's hours to that of a part-time employee. In response, Madrid quit and filed for unemployment benefits. Madrid claimed that the unemployment statute provided full-benefits to claimants who

quit due to a "substantial change" in working conditions compared to other workers performing the "same or similar work." Crazy Trader argued that to award benefits under that section, the Hearing Officer had an affirmative duty to obtain evidence concerning the working conditions of employees doing similar work for other local employers. The Court of Appeals disagreed: "in determining eligibility, the Division is an adjudicatory, not investigatory body...." Since neither party had presented any evidence concerning individuals doing similar work for other local employers, the Court awarded Madrid his unemployment benefits. 81 P.3d 1148.

**Practical Tip.** In preparing for an unemployment hearing, employers should remember Tom Cruise's mantra from Jerry McGuire. No, not "Show me the money." Remember? "Help me, help you." That is, during unemployment hearings, employers must be prepared to present all the evidence necessary for the Hearing Officer to deny benefits. Employers should not expect the Division to do its leg work.

"I QUIT. NO, I DON'T. YES, YOU DO."  
Cherry Cunliffe worked for the Small Business Administration (SBA). After a short time on the

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job, Cunliffe's supervisor transferred her. Cunliffe believed her new cubicle contained grossly inadequate work space. Impetuously, Cunliffe gave the SBA her two-week notice. But 3 hours later she asked her supervisor if she could rescind her resignation. Her request was denied, and Cunliffe found herself among the unemployed.

Cunliffe filed for unemployment benefits. In that claim, she asserted that the SBA's "unreasonable refusal" to rescind her voluntary resignation transformed her quit into an involuntary termination. The Colorado Court of Appeals disagreed. It held that an employer may not be required to accept an attempted withdrawal of a resignation. The Court explained that "a claimant may be denied benefits on the basis of a voluntary resignation because an employer is entitled to rely on [the resignation] without risk of being charged for compensation benefits if the employee attempts to withdraw the resignation before the effective date." 51 P.3d 1088.

**Practical Tip.** Don't delay in accepting the resignation of employees you've been hoping would leave.

LAST CHANCE AGREEMENT NOT SO "LAST CHANCE." Regional Transportation District (RTD) suspended its employee, Renita Bell, for job performance problems. As a condition of returning to work, RTD required Bell to sign a last chance agreement admitting that "she had engaged in substandard employment," that she "waived her administrative appeal rights," and "released her employer from all claims she may have against them" through the date of the agreement. When Bell refused to sign the agreement, RTD terminated her for insubordination and contested her receipt of unemployment benefits for this reason. While the Hearing Officer agreed that

Bell's refusal amounted to insubordination, the Court of Appeals disagreed. It determined that while "the employer could reasonably request claimant to consider settling their differences, . . . because claimant was not obliged to settle [those claims], her refusal to sign the settlement agreement could not be insubordination." In essence, the Court determined that "acts done in defense of an employee's contract rights are not insubordination." So, Bell was awarded unemployment benefits. 93 P.3d 584.

**Practical Tip.** The employer's error was focusing on Bell's refusal to sign the waiver as the reason for her termination, while ignoring her performance problems. As the Appeals Court explained, "when an employee's job performance gives rise to a 'last chance' agreement, and the employee refuses to sign the agreement, the employee may well be disqualified from receiving unemployment benefits. The disqualification may be premised, not on the refusal to sign the agreement, but on the actions and omissions that gave rise to the employer's original dissatisfaction with employee's performance."

RECEIPT OF UNEMPLOYMENT BENEFITS REQUIRES EFFORT. Susan McClaflin was a long-time King Sooper employee who took a leave for health-related reasons and when her leave ended, was not offered work by King Sooper. In essence, she was discharged. Normally, a discharged employee is entitled to unemployment benefits unless the employer can prove the discharge was the employee's own fault.

In this case, the discharge was not McClaflin's fault, but she was denied unemployment benefits because the hearing officer determined that McClaflin was not actively seeking employment, as required by the unemployment statute. The regulations provide

that a claimant must make reasonable and diligent efforts to actively seek suitable work unless otherwise relieved of this requirement by virtue of (1) participation in approved job training, (2) job attachment, or (3) limited job opportunities. And since McClafin failed to prove the existence of any of these exceptions, the Court of Appeals denied her claim for unemployment benefits. As the Court explained, “while claimant is certainly free, based on her circumstances [recent carpal tunnel surgery], to refuse to seek work from other potential employers, [the Court] is not persuaded that the unemployment fund should bear the expense of that refusal. The unemployment statute was not designed to finance apparently hopeless quests for the claimant’s old job or [a job] paying equal wages, and although claimant may continue to refuse lower paying jobs, she must do so at her own expense rather than that of the unemployment fund.” 126 P.3d 288.

**Practical Tip.** Employers often overlook the job-search requirement for receiving unemployment benefits. If you have reason to believe that the ex-employee is not looking for work, or turning down reasonable offers, include this as a reason for contesting an award of unemployment benefits. At the hearing, ask the claimant to specifically identify companies the claimant has contacted and dates of such contact, offers of employment, and response to the offers.

## **HI-HO SILVER! EMPLOYMENT AT-WILL TO THE RESCUE**

While the Employer’s Advisory certainly believes in advising employees about the reason for a termination decision, the importance of companies maintaining their employment at-will rights (i.e., the right to terminate an employee with or without notice or cause) cannot be

minimized. If you disagree, consider the following case.

Coos-Curry Electric Company advised applicants in Coos-Curry’s employment application that all employees could “resign or be terminated with or without cause or notice at any time.” Yet, after it terminated Robert Ewalt for poor performance, Ewalt sued Coos-Curry for breach of contract. Ewalt claimed that the application’s employment-at-will language was superseded by a policy in the Employee Handbook. That policy provided that “work rules were to be uniformly enforced by supervisors.” The policy also promised that “employees were entitled to adequate notice and warning of the consequences of their behavior and [that] a fair and objective investigation of the facts must be made before discipline is administered.”

After it completed discovery, Coos-Curry moved for summary judgment claiming that the employment application expressly provided for employment at-will, while the handbook policy informed employees that it was only a “guideline and not absolute rules” which Coos-Curry had the discretion to interpret and apply as it saw fit. Thus, Coos-Curry claimed, the specificity of the application language trumped the more general language of the handbook policy. Fortunately, for Coos-Curry, the Court agreed with that argument. In denying Ewalt’s breach of contract claim, the Court determined that the handbook policy did not create a separately enforceable contractual employment term.

**Practical Tip.** While this case is certainly good news for employers, after all, the employer won, the case emphasizes the importance of clearly advising applicants and employees of the employer’s at-will rights. And the case shows the problems that can arise if an employer creates

policies that appear to conflict with these rights. Coos-Curry spent 3 years litigating whether the application or the handbook policy controlled the employment relationship. It is unlikely that Ewalt's attorneys would have invested that much time in the case if Coos-Curry's handbook policies had reinforced the at-will employment relationship. Finally, because this case is from Oregon, and applied Oregon contract law, Colorado employers should be wary before relying on this decision too heavily. Preferably, get rid of handbook policies that promise fair treatment, warnings before discharge and progressive discipline. 2005 WL 2659525.

### **PARAMOUR FAVORITISM UNFAIR BUT NOT UNLAWFUL**

When the boss has a romantic relationship with a subordinate, co-workers may perceive unfairness in the workplace due to favoritism toward the paramour. And often, their perceptions are correct. But is the favoritism unlawful? Amazingly, the answer is "no." Take, for example, the separate plights of Mr. Wilson and Ms. Sherk.

Mr. Wilson worked for Delta State University. When a co-worker, Ms. Roberts, was promoted over him without the University advertising the position, he complained to the University president that Ms. Roberts was unqualified and only got the job because she was having an affair with a University administrator. The president took no action. But Ms. Roberts did! Soon after Mr. Wilson's complaint to the president, she reorganized her department, eliminating Mr. Wilson's job. Mr. Wilson sued the University claiming sex discrimination and retaliation under Title VII. The court dismissed his sex discrimination claim because Title VII

does not protect employees against paramour favoritism. And it dismissed his retaliation claim because he did not demonstrate that he had "at least a 'reasonable belief' that the opposed practice was unlawful." 143 Fed.Appx. 611.

In another case, Ms. Sherk suffered a similar fate. She was a good sales manager for Adesa Atlanta and doing well in the company, until she got cross-wise with one of her subordinates who was the paramour of Ms. Sherk's boss. The company had a policy against supervisors having romantic relationships with subordinates. Her boss, Mr. Rush, was reprimanded after Ms. Sherk reported his relationship with Ms. Cody. The relationship went underground, but continued. Later, Ms. Sherk made the fatal mistake of complaining about Ms. Cody's substandard performance. Mr. Rush quit speaking to Ms. Sherk and shortly thereafter fired her for insubordination.

Ms. Sherk filed a Title VII complaint, alleging that the favoritism Mr. Rush showed Ms. Cody created a hostile work environment for her and other employees with whom he was not having sex; and that he fired her in retaliation for complaining about the hostile work environment. Her complaint was dismissed because, according to the court, the law is clear that "[f]avoritism, unfair treatment and unwise business decisions do not violate Title VII unless based on a prohibited classification." Title VII seeks to eliminate discrimination in employment based sex and "when a supervisor gives favorable treatment to his paramour, every other employee with whom he is not having sex experiences the resultant discrimination or harassment, regardless of their gender." Thus, favoritism of a paramour, while unfair, "is gender neutral and 'more akin to nepotism' than sexism." Because the law is so clear on this issue, Mr. Sherk could not have an

“objectively reasonable belief that her employer had engaged in unlawful conduct.” Title VII does not prohibit retaliation for reporting obviously legal conduct. 2006 WL 1460259.

**Lesson:** Favoritism by the boss toward a paramour employee may not be unlawful, but it is unfair and creates havoc in the workplace, not to mention lawsuits. No employer wants a lawsuit, even a lawsuit it can win.

## **SUPREME COURT LOWERS BAR FOR RETALIATION CLAIMS**

Once upon a time, employers could transfer an employee who complained of unlawful discrimination to another position in the Company, at the same pay and benefits, without fear of being successfully sued for retaliation. But that may have now changed as the U.S. Supreme Court recently broadened the circumstances when claims of retaliation can be made to include transfers where the employee suffers no monetary damages, but a “reasonable employee would have found the challenged action materially adverse.” *Burlington Northern and Santa Fe Ry. Co. v. White*.

Title VII contains an anti-retaliation provision that forbids employers from retaliating against an employee or job applicant because the individual opposed discrimination based on sex, race, national origin, or religion. “Opposed discrimination” includes making a charge of discrimination, testifying, assisting or participating in a Title VII investigation, proceeding, or hearing.

When Ms. White complained to her employer about sexual harassment by her foreman, the company disciplined him and transferred her from her forklift position, which required special skills, to a standard laborer position. Her pay and benefits remained the same,

but the new job was “dirtier” than the forklift position. So, she filed a charge of discrimination with the EEOC, and was then suspended without pay for 37 days. Later, the employer rescinded the suspension and paid her for the full 37 days. Nevertheless, the U.S. Supreme Court ruled that the transfer and suspension might convince a reasonable employee that it wasn’t wise to complain about sex harassment.

The Court added, just for clarification, that unlawful retaliation does not have to be workplace related or employment-related retaliatory acts to create liability. It gave two examples: a situation where the FBI retaliated against an employee by refusing, contrary to policy, to investigate death threats a federal prisoner made against the employee and his wife; and another situation where the employer filed false criminal charges in retaliation against a former employee who complained about discrimination. 2006 WL 1698953.

**Significance:** Retaliation claims based on an employer’s treatment of an employee who has complained of Title VII violations, are going to become even more popular than they are now. Employers must carefully scrutinize how they respond to a complaint. Any action that might keep a reasonable person from making a complaint in the future could be deemed unlawful retaliation—unless, of course, we are talking about retaliation against a victim of paramour favoritism!

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## **JULY SEMINAR IN DURANGO**

The Employer’s Advisory editors, Michael Santo and Betty Bechtel, will be presenting a full-day Employment Law Update seminar in Durango on July 26, 2006, sponsored by the Durango Area Human Resources Managers (DAHRM). See our website at [www.bechtelsanto.com](http://www.bechtelsanto.com) for details.

## Q & A

- Q. *One of our Department Heads is abusing his position as an exempt salaried employee. He shows up late, leaves early, and takes off big blocks of time during the day without telling anyone what he's doing. Can we dock his pay for working less than 40 hours a week, or give him an unpaid suspension?*
- A. Generally, you can not dock the pay of an exempt employee for working less than 8 hours in a day or 40 hours in a workweek without losing the exemption to overtime. Similarly, an unpaid suspension for absences, can destroy the employee's exempt status and expose the company to overtime liability. But when an employer provides paid leave benefits and the exempt employee has used up all of the paid leave, if the employee is absent for a full day, the day can be deducted from the salary. A partial-day absence can be deducted from accrued leave bank, but not from the salary. If the employee violates a "work-place conduct rule" by engaging in horseplay, profanity, an assault, theft or other such misconduct, a full-day suspension can be unpaid and not affect the employee's exempt status. But suspensions for attendance problems and performance problems are not considered "work-place conduct" and the exempt employee can not be punished by an unpaid disciplinary suspension. WH Opinion Letter 2006-6.
- Q. *If a worker is injured on the job, but is not properly documented to work in the United States, can that worker claim worker's compensation benefits?*
- A. Yes. The Workers' Compensation Act in Colorado applies equally to employees who have legal status and who are illegal aliens.
- Q. *If an employee is absent because of a work-related injury, can that employee also be on FMLA leave?*
- A. Most definitely! The Family Medical Leave Act allows employees who work for employers with 50 or more employees in a 75 mile area, who have worked for 12 months, and have 1,250 work hours in the past 12 months, up to 12 weeks of unpaid leave in a 12-month period for a serious health condition. A serious health condition can be due to a work-related injury that is also covered by workers' compensation benefits. Anytime an employee misses more than 3 consecutive days of work because of a job injury, you should determine whether the employee has a condition covered by the FMLA. Get a doctor's certification regarding this issue. If it is a serious health condition, notify the employee that he or she is on FMLA leave anytime he or she is absent related to the injury. Also, light-duty for the job-related condition can be considered FMLA leave.
- Q. *We have an employee who just turned 80. Can we make him retire?*
- A. Not if you have 20 or more employees. The ADEA protects employees 40 and older from age discrimination. Make your decision based on performance, not age. Colorado employers with less than 20 employees can fire based on age after the employee reaches 70.