



WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

THE EAGLE'S VIEW

July 2004 Volume 4, Issue 7

RELIGIOUS ACCOMMODATION TO DIVERSITY POLICIES

About our Firm

Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Nelson & Schneider, P.C., Atlanta, Georgia; Wimberly Lawson Daniels & Brandon, Greenville, South Carolina; and Wimberly, Lawson, Suarez & Russell, Tampa, Florida.

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A number of interesting cases have arisen in which some religious employees have raised objections to certain employer diversity policies and diversity training. Although these cases have almost uniformly been decided in favor of the employer - defendants, one such recent case ruled for a Christian employee who believed in the literal language of the Bible, and was discharged for refusing to sign a certificate recognizing his employer's diversity policy, which required him "to recognize, respect and value differences among employees." Buonanno v. AT&T Broadband, 93 FEP Cases 1204 (D.Colo. 4/2/04).

The plaintiff employee testified that he attempted to live his life in accordance with the literal language of the Bible and he valued and respected all other AT&T employees as individuals. He testified that he never would discriminate or harass another employee due to differences in belief, but that his religious beliefs prohibited him from approving, endorsing, or esteeming behavior or values that are repudiated by Scripture.

The employer's new Employee Handbook included its "Diversity Policy." The plaintiff employee questioned the meaning of one

sentence in the Diversity Policy, which read: "Each person at AT&T Broadband is charged with the responsibility to fully recognize, respect and value the differences among all of us." He believed that some behavior and beliefs were deemed sinful by Scripture, and thus he could not "value" - that is, hold in esteem or ascribe worth to such behavior or beliefs, without compromising his own religious beliefs. Accordingly, he could

plaintiff attempted to clarify the meaning of the Diversity Policy by asking how it would apply to the beliefs of "neo-Nazi skinheads," the Human Resources Director refused to engage in what she characterized as a "philosophical debate." The employer maintained that permitting an employee to certify anything other than full agreement with all language in the handbook would destroy the competitive advantage its diversity philosophy creates. Doing so would demonstrate to other employees that its policies were not uniformly applied and enforced.

At trial, five corporate officials testified about the challenged language in the Diversity Policy, but none of them shared a common



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not sign the certificate of understanding of the handbook, agreeing to "abide by" such language. After a meeting with his pastor, the plaintiff and his pastor scheduled a meeting with the employer's Human Resources Director. The employer's Human Resources Director explained the importance of the Diversity Policy and stated that the plaintiff was required to sign the certificate in order to keep his job. When the

understanding of what it actually required. The court found that no employer representative explored or explained the intended meaning of the challenged language to the plaintiff, nor sought to devise ways to accommodate the plaintiff's religious beliefs or reassure him that the challenged language did not require him to surrender his religious beliefs.

The plaintiff argued two

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theories of religious discrimination, that he was discriminated against because of his religion, and second that his employer failed to accommodate his religious beliefs. The court found no evidence that he was terminated based on his failure to follow the religious beliefs of his superiors. However, the court went on to find that the employer made no efforts to accommodate the religious beliefs of the plaintiff before terminating him. In such circumstances, the employer may only prevail if it shows that no accommodation could have been made without undue hardship.

The employer contended that it could not have carved out an exception to the "Diversity Policy" without diminishing the value of the policy as a whole. The court accepted the employer's contention that allowing employees to strike piecemeal portions of the handbook or certification could pose an undue hardship on its business, making uniform application of company policies more difficult. Nevertheless, the court stated that had the employer gathered more information about the plaintiff's concerns before terminating his employment, it may have discovered that the perceived conflict between his beliefs and the employer's policy was not an actual

conflict at all, and that if a true conflict existed, it was possible to relieve that conflict with a reasonable accommodation. That is, had the employer sought more details about the plaintiff's concerns, it would have found that the plaintiff's only objection was to the literal interpretation of the challenged language that required him to "value" particular behavior and beliefs of co-workers. Had the employer investigated the matter, it would have observed that, like the Jewish employee who must recognize - but not adopt - the differing beliefs of his Muslim co-worker, the challenged language did not require the plaintiff to more than recognize that there are differences but to treat everyone with respect regardless of their beliefs. Thus, the employer could have explained the language had a figurative rather than a literal meaning, and even if this would not have resolved the situation, the employer could have even provided a minor revision to the challenged language requiring all employees to "fully recognize, respect and value that there are differences among all of us" which would have accomplished the employer's goals without any apparent hardships. Instead, the employer failed to engage in the required dialogue with the plaintiff after notice of his

concern and failed to clarify the challenged language to reasonably accommodate the plaintiff's religious beliefs.

Editor's Note - With the advent of various forms of diversity policies and training and the publicity now being given to same-sex marriages, these type religious issues are likely to continue to arise. There is no question that generally, the employer can make signing the certificate of receipt of an employee handbook, or even a disciplinary notice, as a condition of employment, and discipline employees refusing to acknowledge and abide by the document or policy. Further, the courts are quite willing to give employers much leeway in implementing diversity policies and training. In this case, however, the employer's interest in the worthiness and uniformity of its policies, overshadowed its obligation to engage in a dialogue and at least consider whether a reasonable accommodation was possible. A letter to the employee addressing his concerns would probably have been sufficient. Further, in matters of great importance to employees, much hostility can be created by failure to accommodate.

KNOW YOUR ATTORNEY



KELLY A. CAMPBELL

Kelly is a Member of the Morristown, Tennessee office of Wimberly Lawson Seale Wright & Daves, PLLC., which she joined in 1994. Her law practice includes an emphasis in workers' compensation, employment discrimination and wrongful discharge litigation (defense), as well as ADA and FMLA compliance for employers. She received her Bachelor of Science degree in General Business from the University of Tennessee at Knoxville in 1984 and her Doctor of Jurisprudence degree from the University of Tennessee College of Law in 1988. Ms. Campbell is a member of the Hamblen County Bar Association and the American Bar Association. She is active in community activities for H.A.W.K. (Hamblen Adults Working for Kids) (Board of Directors), Pregnancy Support Center of the Nolachucky Baptist Association (Board Secretary 2002-2004), and Morristown Area Chamber of Commerce (Vice-Chair, Morristown Leadership Committee, 2002-2004). She is also an Adjunct Instructor in the Paralegal/Legal Assistant Program at Walters State Community College in Morristown, Tennessee.

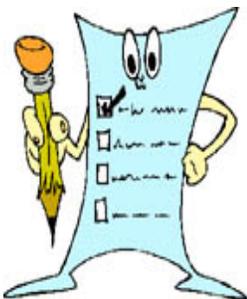
IMPORTANT DATES TO REMEMBER:

SMOKY MOUNTAIN FALL CONFERENCE

October 28 and 29, 2004
Knoxville, TN

MUSIC CITY FALL CONFERENCE

November 18 and 19, 2004
Nashville, TN



CASES INCREASING OVER DIFFERENCES IN HARASSMENT DISCIPLINE

While over the years an employee terminated for sexual harassment was considered to have no legal claim, such persons are increasingly attacking their treatment. A recent case involved a Black female plaintiff, who was terminating for grabbing or attempting to grab her male co-worker's genitalia. She claimed that she had been discriminated against, because a white female co-worker was found to have exposed her breasts to others upon request, and this white female was only reprimanded and not terminated. *Wheeler v. Aventis Pharmaceuticals*, 93 FEP Cases 741 (C.A. 8, 2004).

The plaintiff contended

that the conduct was not unwelcome and should not be classified as anything but "horseplay," and argued that other employees often engaged in such "horseplay" at work and received little, or no, resulting discipline. She also argued that the circumstances might lead a jury to conclude that the touching never occurred, but the court rejected this argument on the basis that the inquiry was not whether the decision was correct or wise, but only "whether the reported incident was the real reason for the termination and not a pretext for racial discrimination." Further, the employer could rationally make a

distinction between the different conduct, as the plaintiff received the same discipline as the only other worker accused of touching co-workers' genitalia, and thus the actions of the employees in question involved different levels of misconduct even though they both might be called sexual "horseplay." That is, the court explained, sexually offensive conduct that involves physical contact is not the same as offensive comments, gestures, or lewd displays.

Editor's Note - There are a couple of points to be made about this decision. First, in discipline for serious infractions such as sexual harassment,

employers are given some discretion in determining the appropriate level of discipline. Second, even though there is a dispute of "he said - she said" the employer is allowed to make a good faith credibility determination regarding what it believes actually happened.

However, the employer's discretion must be rational. In this case, the employer's defense was buttressed by the fact that a white male employee had been terminated for grabbing the breast of two of his female co-workers, suggesting the employer was consistent in strong discipline for offenses involving physical contact.

VICTIMS OF DOMESTIC VIOLENCE NOT PROTECTED FROM DISCHARGE

In a recent case in North Carolina, an employee was terminated after he was hospitalized for serious injuries he sustained when his wife shot him. The plaintiff alleged his supervisor informed him "he was being terminated due to the plaintiff being a victim of domestic violence." As a victim of domestic violence, the plaintiff sued alleging that he was a "member of a class of persons sought to be protected by the laws of the State of North Carolina," and therefore his termination violated public policy "in that termination of any employment based on the employee's status as a victim of domestic violence tends to be injurious to the public and against the public good." The employer filed a motion to dismiss the claim, the motion was granted and the ruling was upheld by the North Carolina Court of Appeals. *Imes v. City of Asheville*, 21 IER Cases 359 (N.C. Ct. App. 4/20/04).

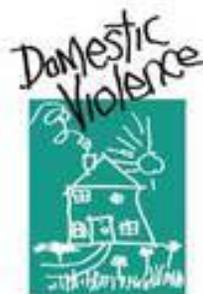
The court noted that

although at-will employment may be terminated "for no reason, or for an arbitrary or a rational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." The court discussed the fact that various state laws offered protection for victims of domestic violence, but did not establish victims of domestic violence as a protected class of persons or extend employment security status to such persons. Thus, although the court recognized that domestic violence is a serious social problem along with victims of poverty, child abuse, substance abuse and the like, the court refused to interpret such laws as creating specialized and protected classes of persons entitled to employment and other status protection.

Editor's Note - A few states do have or are considering laws to protect the employment status of victims of domestic

violence. However, federal law does not protect such persons, nor do the laws of most states, unless they fall under some other category of protection, such as the ADA or FMLA. A recurring issue coming up in some situations, is when an employee is in some manner "stalked" by a violent spouse or boyfriend/girlfriend and the employer chooses to terminate the innocent

employee to protect the employer's facility from the potential of violence from the other potentially violent party. These situations involve particularly difficult decisions for the employer. One approach, other than the suspension of the innocent employee, involves getting a local court "stalking order" against the culprit enjoining that person from coming anywhere near the employer's facility. Such actions are increasingly "user friendly" under local court procedures. Also, the employer would be wise to brief its security guards and the like as to such circumstances so that they can be aware of the potential for violence.



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IMPROVING ECONOMY TO TEST EMPLOYEE LOYALTY

In another sign that the U.S. economy is improving, American businesses are now hiring more employees, testing the loyalties of a national workforce that is uncertain about whether to seek new job opportunities or stay with their current employers. There is actually one silver lining in tough economic times; employee retention is typically not a problem. In addition, workers concerned about the economy and job security are unlikely to question pay adjustments that would otherwise be less than satisfactory, and also are more likely to put in extra effort.

Although many feel compensation is an important factor in employee retention, it usually isn't the deciding factor. The top three benefits issues, according to the Society for Human Resource Management, are health care;

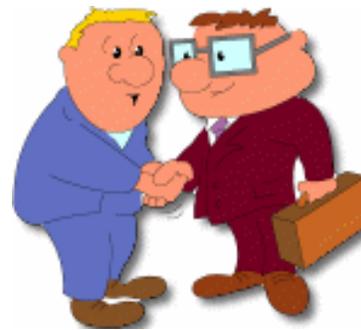
leave time; and retirement, particularly for older workers. Recruiting from within appears to be an effective recruiting advantage, and flexible policies including flex-time and effective communication improves retention.

Future demographic changes suggest that the search to find and retain employees will be an even greater problem in the future.

Employer Retaining Employees

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While many people assume that the population will dramatically increase, forecasts by the United Nations and



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other show that the world population, currently at a little over 6 billion, is unlikely to double - ever. Some demographers predict that the world population will peak at 9 billion within the lifetime of today's generation and then start shrinking. The primary reason, confirmed in a recent U.S. Census Bureau report, is a fall in fertility rates all over the world. The social trend appears to be that as more and more of the population moves to urban areas in which children offer little or no economic reward to their parents, and as women gain economic opportunity and reproductive control, people are producing fewer and fewer children. At the same time, the overall population will age, creating fewer productive workers and more dependent elders.