

WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

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HOW EMPLOYERS DEAL WITH UNPRECEDENTED MISCONDUCT

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A couple of recent NLRB decisions address the issue of employer discipline where there are no specific rules or precedents addressing the misconduct. In Sam's Club, A Division of Wal-Mart, 342 NLRB No. 57 (2004), an employee was issued a "final warning" for secretly bringing a tape recorder to work to make surreptitious recordings of conversations, including a conversation with the company's director of operations. Just a few days before, a manager had unlawfully interrogated the employee about a wage petition that he was circulating. Under the circumstances, strong discipline issued to an otherwise exemplary employee only days after learning that he had circulated a wage petition, might have been considered normal and lawful had the company produced a rule or policy prohibiting taping or similar conduct, according to the NLRB majority, in finding the discipline to be unlawfully motivated. In dissent, NLRB Chairman Battista criticized the majority, stating that the analysis would result in a violation in any situation where the misconduct in question had not previously occurred. The Chairman stated that there may be instances where no employee has previously engaged in the conduct involved, or in analogous conduct, and the law

does not immunize the conduct from discipline in these situations. He also argued that the fact that the company had no rule or policy about surreptitious taping does not immunize the conduct from discipline. In responding to Chairman Battista's comments, the NLRB majority states that contrary to the dissent's suggestion, it is not holding that an employer may never impose discipline for misconduct that was unprecedented or not specifically addressed by the employer's prior rules or policies. The majority states that their point is that the absence of such evidence is telling under the circumstances of this case, given the employee's exemplary record and the evidence of the company's unlawful motive.

Another recent NLRB ruling dealt with a similar issue. Davey Roofing, Inc., 341 NLRB No. 27 (2004). Here, the NLRB majority found that the company did not violate the law when it discharged two employees for refusing to sign warnings for safety violations at the work site. The employer contended that the refusal of the employees to sign the warnings constituted insubordination and disregard for work site safety. The employer argued that it would have discharged the employees for such insubordination even in the absence of any union activity. The evidence showed that during the day in question the company issued twelve

warnings and that the two employees were the only employees who refused to sign. Prior to the incident in question, no employee had ever refused to sign a safety warning. In the Davey Roofing case, the Board majority found that there were no similarly situated employees against which to compare the company's treatment of the two employees in question.

Dissenting Board Member Walsh, however, found that the reasons for discharging the two employees were not worthy of belief, and that instead the company had seized upon the refusals as a pretext for retaliating against the two employees' union activity. The dissent further relied on certain evidence showing that the company had merely suspended other employees for serious acts of misconduct, while it discharged these two employees for refusing to sign a warning. The dissent further noted that the company's safety policies and procedure manual does not contain a requirement that employees sign safety warnings, or mention any punishment for failure to sign the warnings. The dissent contended that the absence of such provisions belied the company's assertion that signing the safety violation warnings was of such importance that failure to sign the warnings warrants immediate discharge.

Editor's Note - *The theory of a discrimination claim*

is often that the employer failed to follow its prior rules or policies, or past practices, warranting an inference of discrimination. Therefore, the employer's "first line of defense"

is that an employee violated a written rule or policy, and/or past practice in the way certain situations are handled. In these two NLRB cases, there were no written rules or policies,

and no past instances of the conduct in question. Therefore, the NLRB struggled with the issues of whether discrimination had occurred under the circumstances.

SHRM SURVEYS EMPLOYER MEDICAL LEAVE AND FMLA POLICIES

A survey of 416 human resource professionals by the Society for Human Resource Management (SHRM) finds that the primary challenge for employers under the FMLA is discerning what constitutes a serious health condition where FMLA would be legitimately used, and tracking the amount of time used during intermittent leave. Other key findings include:

- 63% make exceptions to FMLA to provide more flexibility for employees.
- 57% offer job-protected leave beyond FMLA requirements, including leave for employees that have been employed for less than twelve months.
- 62% most often assign the work of employees on leave to

other employees, while just 15% most often hire temporary employees.

- Less than half (48%) of leave requests were scheduled in advance.
- 50% of human resource professionals said they had approved leave requests they believed were not legitimate, but had to be granted due to Department Of Labor interpretations of the law.

In at least one favorable judicial development, however, the Eleventh Circuit Court of Appeals in Atlanta has ruled that working partial days may not qualify an employee for FMLA leave. Russell v. North Broward Hospital, 149 LC ¶ 34, 760 (C.A. 11, 2003). The employee was at risk of termination due to excessive unscheduled absences, and worked several partial days

following a slip-and-fall accident at work. She was not entitled to FMLA protection for the time off, according to the court, because she did not have a serious health condition with more than three days of incapacity, according to §825.114 of the federal regulations. The plaintiff argued that partial days of incapacity should count, but the appeals court did not agree. It said she had to be incapacitated for more than three full days, adopting the common midnight-to-midnight definition of "day," in order to have a qualified serious health condition. Holding that full days are required insures that conditions will be serious, according to the court. It also provides a bright-line rule defining the period of incapacity.

COURTS SUPPORT WORKPLACE DRUG TESTING PROGRAMS

Court cases are in support of workplace drug testing, according to a March 25 report issued by the Washington, D.C. based Institute for a Drug-Free Workplace. More than 85% of the court decisions have been pro-drug testing, according to the report. As long as employers follow proper procedures, according to the report, "drug testing of employees and job applicants is not

particularly vulnerable to legal challenge in America today."

The main challenge to private employers' drug testing policies has been under specific state statutes or under general privacy principles. Simply failing to follow proper laboratory testing procedures as set forth by law can cause legal problems. Also, employers that have a reasonable suspicion of an employee's

drug or alcohol use must proceed with caution, especially with employees whose jobs are not safety related, particularly in those states that have broad individual privacy protections in their state constitutions or rulings. Applying fitness-for-duty tests also poses some difficulty, in that the employer must substantiate that the employee is

KNOW YOUR ATTORNEY



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Fred is a Member in the Nashville, Tennessee office of Wimberly Lawson Seale Wright & Daves, PLLC. His law practice includes an emphasis in workers' compensation, employment discrimination and wrongful discharge litigation, ADA and FMLA compliance, and general liability. Mr. Bissinger received his Bachelor of Science, *cum laude*, in Economics from Washington & Lee University and his law degree from the Seton Hall University School of Law. Prior to entering private practice, Mr. Bissinger served in the United States Navy Judge Advocate General Corps from 1993-1997. Mr. Bissinger is a member of the Tennessee Bar Association and the Mid-South Workers' Compensation Association.

incapable of working safely due to the level of intoxication. Overly explicit company policy statements can also prove hazardous if the employer does not update them or fails to notify employees of the new policies.

The six types of drug testing covered in the report are pre-employment,

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random, for-cause, periodic announced, post-accident testing, and rehabilitation testing, which can take place during and/or after successful completion of a rehabilitation program. Among the states, California law on drug testing is probably the most dangerous to employers, because the decisions are based on state judicial decisions that balance the employer's

right to test against the employee's right to privacy which is guaranteed under the state constitution.

As far as government employees are concerned, all 1.8 million federal employees technically are subject to drug testing, but most federal employees are tested only if they are involved in a workplace accident or show signs of possible drug use. The federal Substance Abuse

and Mental Health Services Administration is proposing that federal agencies be permitted to expand drug testing programs to include the testing of the sweat, saliva and hair of agency employees covered by current programs that only test urine. The proposed regulations are based on scientific advances that allow hair, saliva and sweat specimens to be used with

the same level of confidence that had been applied to urine drug testing. The proposed rules would explain when these alternative specimens and testing devices may be used and describe procedures that must be used in collecting samples along with the certification process for approving laboratories to test these alternative specimens.

DEPARTMENT OF LABOR ALSO SURVEYS AND CONSIDERS CHANGES IN THE FAMILY AND MEDICAL LEAVE ACT

This August was the tenth anniversary of the enactment of the Family and Medical Leave Act (FMLA). A survey funded by the U.S. Labor Department finds that more than half of people who take leave under the Act do so to take care of their own serious illness, and about 18% do so to take care of a newborn child. About

13% take time for a seriously ill parent, and about 12% take the time for a seriously ill child. Another 6% take FMLA time to care for a seriously ill spouse, according to the survey.

Both employer and employee advocacy groups say that the law should be modified and expanded,

Partnership for Women and Families, says that the FMLA is now so commonly seen as a plus for attracting and retaining good workers that about a third of businesses not covered by the law now offer the benefit even though they are not required to do so. Employer groups have found problems with the

intermittent leave. Employees who are certified for intermittent leave under FMLA can readily call in at the last minute and get off. This provision also allows employees to take leaves in the smallest increments that a payroll system allows, so that if an employer can calculate payroll time in six-minute increments, an employee can take time off as little as six minutes off at a time. Employers would also like to see the law allow for employers to verify with certifying physicians that an employee's use of leave time is used appropriately. Legislation has been introduced in Congress to address both sides of these issues.



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but disagree on what that should entail. A spokeswoman for the National

medical leave portion of the Act, including problems related to the use of

NLRB LIMITS TEMP WORKERS IN UNION BARGAINING UNITS

In another example of the "Bush" NLRB changing a policy adopted by the "Clinton" NLRB, the NLRB has ruled that temporary workers who are jointly employed by a supplier employer and regular workers solely employed by the user employer cannot form a single union bargaining unit, absent the consent of both employers. Oakwood Care Center, 343 NLRB No. 76 (11/19/04). This

case overruled the decision adopted by the Clinton NLRB in M.B. Sturgis, 331 NLRB 1298 (2000), in which the NLRB found it was permissible for the jointly employed workers to be in the same unit with union-represented workers solely employed by the user employer. The more recent ruling was a 3-2 decision, with the three Republicans voting to overturn the Sturgis decision which was decided

under a 3-member Democratic majority on the NLRB. The two Democrat members dissenting in the current Oakwood Care Center case argued that the temporary workers are now a "legal underclass," making it difficult for unions to reach out to these workers and organize them.

Editor's Note - While this case has direct application to a union petition seeking to represent both regular employees

and temporary agency employees, it also has application to an existing bargaining unit represented by the union. Sometimes unionized employers supplement their regular workforce with temporary agency employees, and the union could have used the prior precedent in M. B. Sturgis as grounds for including the temporary workers in the main bargaining unit. The current Oakwood Care Center ruling will make it more difficult for unions to add temporary agency workers to

existing bargaining units. Although the current ruling will help employers avoid unions among their temporary agency workers, employers must still keep in mind that such agency employees are often

considered jointly employed by the user employer, and thus the user employer may still be subject to discrimination charges and the like, brought by temporary agency employees.

Thus, employers should not assume that they are immune from legal liability resulting from the use of temporary agency employees. Sometimes arrangements can be made with the

temporary agency to provide for indemnity to the user employer in such situations, however. These type issues are sometimes covered in the user contract between the employer and the temporary agency.

AVERAGE PLAINTIFFS' VERDICT INCREASES

Between 2002 and 2003, the median plaintiffs' verdict increased from \$230,000 to \$250,000 for federal cases in which there was a verdict for the plaintiff in employment practice litigation, according to Jury Verdict

Research. The award mean was even higher in 2003, at \$595,718. The largest plaintiffs' verdict was \$4 million. In federal district court cases where plaintiffs received compensation, 25% contained allegations of sexual



harassment and 18% contained allegations of a hostile work environment. In general, of plaintiff verdicts, the median award is considered the more accurate gauge of the norm for a sampling of jury award data.

HEAD NOD EXPRESSIONS AS ADMISSION OF GUILT

Over the years several cases have arisen as to whether an employer's silence, or expression, can be deemed an admission of guilt. In a recent case, the plaintiff claimed that he was being terminated because he was "too old" and testified that the employer's president nodded his head in response. The plaintiff contended that this head nodding constituted an admission of guilt even though the

company president did not say anything. The court concluded that under the proper circumstances, a nod of the head can qualify as an affirmative admission, and used against an employer to prove a case of discrimination. McDevitt v. Bill Good Builders, 91 FEP Cases 595 (2003). The court even cited an earlier ruling that in some circumstances, a smile in response to an accusation has been found to be

"tantamount to an admission" under certain circumstances.

Editor's Note - Managers and supervisors need to be aware that if a claim of discrimination or illegal acts are made against their employer, they should not indicate agreement but should deny or doubt the allegation. There have even been some reports that some employees have hidden tape recorders in an effort to illicit some type of admission from management.

A claimant might argue that a manager's silence in the face of such an accusation might constitute some type of admission. For similar reasons, if an employer receives in the mail a letter from a claimant setting forth allegations, it is probably a good idea to respond to such a letter and at least in some manner deny the accusations. It is not necessary to go into detail, as a general denial should be sufficient to negate any implied admission by failure to respond.

GRAFFITI MUST BE QUICKLY ADDRESSED

Racial, sexual, or degrading graffiti are showing up in an increasing number of cases. Because of the public nature of graffiti, courts are increasingly mandating that it be removed quickly, in order to avoid the creation of a "hostile environment." A recent example of an appropriate employer response is suggested in the case of Scarberry v. Exxon Mobil Oil Corp., 91 FEP Cases 1320 (C.A. 10, 2003).

This case centered on Exxon Mobil's responses to incidents of sexually degrading graffiti referring to the plaintiff and another female employee. Someone had spray-painted

several demeaning statements about both women on the walls of the plant during the night, and on a large spool used as a table in a break area. The plaintiff claimed that because the human resources manager did not come to work on his day off to personally view the table, and because the investigation of the graffiti incident spanned three



months before the suspected perpetrator was fired, the jury could conclude that the employer's investigation was not prompt or adequate.

The court disagreed, and found the employer had promptly and adequately responded. The court found that after his day off, the human resource manager took the following actions: (1) personally viewed the graffiti; (2) took pictures of the graffiti so that he could investigate the handwriting; (3) authorized the graffiti's

immediate removal; (4) began interviewing employees and security guards to determine who might be responsible; (5) began interviewing employees who had been targeted as suspects; (6) during the following weeks, the manager collected numerous writing samples from the suspects' employee records and compared them with the graffiti; (7) reviewed the plant's security system surveillance tapes; (8) reviewed trucking logs of outside contractors who were on the premises during the relevant period;

Racial, sexual, or degrading graffiti are showing up in an increasing number of cases.

(9) attempted to identify a forensic handwriting expert; (10)

contacted headquarters seeking additional assistance; and (11) alerted security to be more aware of the potential problems

at the plant.

Editor's Note - *Employers must be particularly wary of graffiti and racial or sexual symbols. A number of*

recent cases, for example, have also addressed the issue of nooses hanging in plants or maintenance shops even for a brief period of time. Such fact

patterns often generate litigation and even though employers often win these cases, the lesson to be learned is to take action very thoroughly and quickly.

LAYOFFS AND STATISTICS - DAMNED IF YOU DO AND DAMNED IF YOU DON'T

Employers have long been concerned about reductions in force which adversely or disproportionately affect protected groups such as minorities and females. Employers are sensitive that such layoffs resulting in adverse impact to protected groups often result in discrimination claims, often brought by more than one individual or possibly even a class action. For these reasons, employers sometimes run projected layoff figures and then look at the statistics and then determine if adjustments are necessary to avoid discrimination claims. In these circumstances, it can be said that an employer is running risks whatever it does.

First, technically it is discrimination to create a demographic profile of a "balanced" RIF and then to select employees on the basis of their demographic characteristics. The reason for the discrimination, is that an employer would be making some of the decisions on the basis of race, sex, etc., and layoff decisions may not be made on that basis.

Further, there are so many variations in grouping employees and in protected classifications, it would be hard as a practical matter to produce a RIF selection that produces no statistical imbalance of any type. For example, layoff statistics are normally evaluated out of the groupings of employees or "pools" of which selections are made,

and such pools could be a classification, department, office, division, plant, or even a broader basis. Further, there are various sub-groups of protected classifications, which in addition to the more common groupings of race, sex, age, national origin, etc., might include each group such as persons 50 and over, African American women, or even white men. Further, a plaintiff might bring his or her complaint in a manner to best challenge a RIF or selection process based on the particular sub-group or job classification showing the greatest adverse impact.

The point of all this is not to suggest that employers should not view their statistics before carrying out RIF's but instead that such analyses must be carefully done. First, it is suggested that preliminary analyses be done on advice of counsel, and that an attorney work product privilege be attached to the analysis. This allows the employer to disclose the results in litigation if favorable, or to keep them out as confidential, based upon the attorney client privilege. Next, any adverse impact shown on a protected group by the preliminary analysis, should only serve as a device to prompt closer scrutiny of the RIF process, rather than an actual criteria for actual RIF selections. That is, suppose the preliminary analysis shows that a much higher percentage of

African Americans are being selected in the RIF than in proportion of the pool out of which they were selected. This would send a message to the employer that it should closely review the criteria on which the selection decisions are made, to determine whether the criteria are job-related and consistent with business necessity. If many traits are determined subjectively, the employer would then evaluate whether there are safeguards built into the selection process, such as whether more than one person makes the decision, whether a consensus is required, whether the decision-makers are diverse in terms of their demographic makeup, and the extent to which the initial decisions are reviewed at higher organizational levels. If mistakes are found in these procedures, changes would be made not because too many minorities were selected for layoff, but because the criteria had not been applied properly. The reason for being careful in the evaluation of adverse impact, and potential changes resulting therefrom, is that if changes are made in selection solely because of adverse impact, in theory certain majority group members who were thus selected for the RIF after the initial round of selections, arguably could make out a case of reverse discrimination if they could prove their inclusion was motivated by a desire to

achieve a racial quota in the selections. That is, if an adjustment is made the purpose of the adjustment should not be to remedy the initial outcome but to correct an erroneous choice.

Even if some sort of statistical impact ultimately results, employers can still defend such situations on the basis that the decisions were based upon legitimate, non-discriminatory reasons, or were job-related and consistent with business necessity. Further, sometimes adverse impact is not statistically significant and/or various groupings of statistics or explanations can be made that do not lead to statistically significant adverse impact. Advice of counsel is definitely necessary in such matters, as old rules of thumb such as the 80% rule can be very misleading. Under the old 80% rule, if the majority is selected for layoff at a rate of at least 80% in their appropriate pool as protected groups there is no adverse impact. Such simplistic rules of thumb may be misleading, however, particularly in larger samples, and advice of counsel is necessary to evaluate statistical results.

In RIFs, many employers also consider other protective measures, such as offering voluntary termination plans and/or severance packages in exchange for a release of claims.

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EFFECTS OF FOUR MORE YEARS

The Republican party's resounding victory on November 2 should support pro-business employment policies over the next four years. Republicans added to their majority in both the Senate and the House, adding four Senate seats to 55, and at least 3 House seats, giving them 232 seats to the Democrats' 202. However, 60 votes are still needed to block a filibuster in the Senate, and thus the Democrats will still retain a form of veto in that chamber.

In addition to the President's base of conservative Christians, the President expanded his vote among Jews (24% from 19%), Hispanics (43% from 35%) and Catholics (51% from 47%). Among African-Americans, the President was able to use his conservative position on social issues to

increase his vote share to 11% from 8% four years ago, and an even larger 15% in the decisive state of Ohio. People who identified themselves as Republicans and Democrats each made up 37% of the electorate. Self-identified conservatives made up 34% of the electorate, up from 29% in 2000, compared to the 21% proportion of self-identified liberals.

Contrary to the popular perception, the largest turnout in history, some 120 million, did not hurt and may have actually aided the President, particularly in rural America. The President was undoubtedly aided also by the gay marriage ban proposals on the ballot in 11 states, all of which overwhelmingly passed. Exit polls indicated that voters listed terrorism and morals as two of their top 3 concerns, over certain issues such as jobs and education that in past

have aided the Democrats.

President Bush's victory will significantly affect federal regulatory policies, including those in employment. The Bush Administration is likely to continue to push to loosen labor rules and regulations, and to avoid or at least delay many employment issues championed by Democrats. The latter group includes raising the federal \$5.15 minimum wage to \$7.00 per hour, expanding coverage of the Family and Medical Leave Act to include small business, and overturning the new overtime regulations. The second Bush Administration will also bring about major

changes in retirement and health insurance. The President's emphasis on individual responsibility may lead him to start to shift away from a health care system that most Americans get their insurance through work, to one in which individuals are more responsible for financing their health care through a system of tax credits and health-savings accounts. Recent initiatives indicate that sharing more costs with employees is succeeding, as workers who have to spend more out of pocket are more careful in their use of healthcare services. The President has also championed new types of investment vehicles to build up retirement savings, including an extension of the concept to the Social Security system. The President has proposed that individuals be allowed to direct some of the taxes that they pay on their behalf into personal retirement accounts, while the rest of the Social Security taxes would continue to go towards covering traditional benefits.



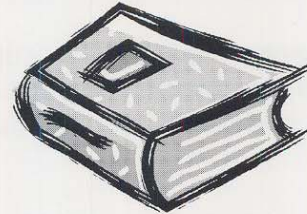


***Congratulations and Thanks
for a Job Well Done!***

The Firm is proud to announce that as of January 1, 2005 Phil Lawson, the founding member of the Tennessee Operations of Wimberly Lawson Seale Wright & Daves, is beginning his well-earned retirement from the active practice of law. He will continue developing his arbitration, mediation, and leadership training efforts.

Under Phil's leadership the Tennessee operations of Wimberly Lawson Seale Wright & Daves grew from his solo practice in Morristown, Tennessee to a practice located in Morristown, Knoxville, Cookeville and Nashville, employing nearly thirty attorneys. Phil and his lovely wife, Neville, gave unselfishly to the Firm and warmly touched our lives. He made a difference.

All of us congratulate Phil upon his retirement and thank him for a job well done. His spirit and inspiration will continue to guide the Firm for many years. Thanks Phil!



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