

Reporter

PRACTICAL COMPLIANCE,

WORKABLE POLICIES, EFFECTIVE MANAGEMENT WITHIN THE LAW

The Eight D's: Principles for Avoiding Workplace Litigation

Learning the ins and outs of the myriad employment laws and regulations is a daunting task for managers, so Katherine Hesse boiled the details down into eight guiding principles. Her "Eight D's" help managers understand complex rules and avoid most behaviors that encourage lawsuits.

Hesse, of the Boston-based law firm of Murphy, Hesse, Toomey & LeHane, spoke at the recent New England Human Resource Association (NEHRA) convention in Providence, RI.

HR key risk manager

The senior HR person is a key risk manager for the organization, says

Hesse, but many CEOs do not realize this. In large organizations, HR should be sure to work together with the risk management department. In smaller organizations, HR needs to be sure that top management understands the risks of employment litigation and the need for proactive training. Stress not only the dollar impact of litigation, even when cases are won, she suggests, but also the time and the emotional drain from depositions, witnessing, and so on.

Don't forget to mention rising litigation costs and point out the escalation of expensive class action suits.

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In addition to cost factors, there is always risk, says Hesse. Even when you have a good case, there's a risk that you will lose. Because of this combination of loss and risk, management must support training.

Hesse urges HR to insist that top management be involved in training, because they are often part of the problem. For example, they'll say, "Let's replace these older guys with young blood."

The Eight D's

Here are Hesse's Eight D's for avoiding lawsuits in the workplace.

Dignity

The first thing is to remember that you are dealing with human beings,

says Hesse. When they bring a problem to you, if they feel they have been treated fairly and respected, they are likely to accept your decision.

However, if they believe that you have been unfair or have not treated them with respect, they will be annoyed. Hesse says that eventually a friend will say, "You know, you should see a lawyer." And the employee will think, "Yes, it's not right, I should talk to a lawyer." Hesse urges:

- Treat employees with courtesy and respect
• Listen carefully
• Be as responsive as possible
• Keep the employees in the loop.

Practice the Golden Rule, she says. And use the "front page" test on your actions. Would you be comfortable having the details of your action appear on the front page of the paper?

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In Brief

FMLA

Court: Unforeseen Leave Policy Unreasonable

Is it reasonable for an employer to require timely notice for unforeseen Family and Medical Leave Act (FMLA) leave? It depends on where you live. Samuel Cavin worked for Honda as an assembler. Honda's leave policy required notice within the first three days of any unforeseen leave. After a motorcycle accident, he missed work on several

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ENGLISH AND OTHER LANGUAGES

What Employers Should Know About English-Only Rules

About one-fifth of the United States population—nearly 47 million people—speaks a foreign language in the home, according to U.S. Census Bureau data. That's a lot of people. Some of them are probably your own workers.

The fact that we are such a polyglot nation and that we have such a multilingual workforce sometimes leads to confusion and tension. Some employers, faced with what they may consider the inefficient and nonproductive dissonance in their workplaces, simply opt for English-only. Perhaps such a solution makes sense—but is it legal?

May you require all employees to speak English? Are there situations in which the organization must communicate in another language? What is the best course for employers?

English-only

English-only rules in workplaces are not new. In the last years of the 20th century the U.S. had many new waves of immigration, and many of the immigrants have become part of our workforce. Most of the new workers are Spanish-speaking, but in specific areas and states they are Vietnamese, Cambodian, Native American, Chinese (Mandarin or Cantonese), and many, many other nationalities. Many other-language speakers are bilingual, but just as many speak only their native language.

As this new wave of immigration grew, employers faced confusion about work rules. Tensions developed among employees and customers who could not understand the newcomers. Employees complained that the non-English-speaking employees chatted with customers or amongst themselves, in another language. Some thought the conversations were about them, and believed they were insulting. In the face of this discordance, employers devised English-only rules for their companies.

Early court decisions said OK

Several of the early cases to address English-only rules in the workplace found them to be legal, at least as applied to bilingual employees. The courts reasoned that bilingual

employees could easily comply with English-only rules, and thus there would be no adverse impact on them. They accepted business justifications given by employers for their English-only rules, which included:

- combating alienation employees feel when they cannot understand conversations in the foreign language
- helping management understand and evaluate employee performance
- training non-English speaking employees in English;
- promoting safety.

For example, in 1980, in *Garcia v. Gloor*, Gloor, a hardware store owner, fired Garcia when he spoke in a language other than English to a co-worker. Garcia was bilingual and could have communicated in English.

Garcia sued Gloor on the grounds that his firing amounted to national origin discrimination based on the rule against non-English while on the job. The store owner defended his reasons: customers complained that they could not understand non-English; written materials were only available in English; speaking English at work would improve the bilingual employee's English; and English-speaking supervisors would be better able to supervise the employee.

The 5th Circuit U.S. Appeals Court ruled for the store owner. The English-only rule was confined to the workplace and to actual work time. It didn't apply to conversations during employee free time. The rule only required that workers who could speak English do so while on duty, said the court, which was not discriminatory.

In the 1993 case of *Garcia vs. Spun Steak Co.*, the company had adopted a rule that only English would be spoken in connection with work after receiving complaints that some Spanish-speaking employees were using their bilingual capacities to harass other workers. The curtailed employees contended that the rule adversely affected them by preventing them from expressing their cultural heritage on the job, and denied them a privilege of employment enjoyed by English speakers.

The 9th Circuit U.S. Court of Appeals disagreed, ruling in the employer's favor. The rule would promote safety, enhance product quality and help put a stop to national origin harassment and intimidation, the court said.

On the other hand, there were opposite results. In 2000, *EEOC v. Watlow Batavia Inc.* was settled to the employees' advantage. Watlow agreed to pay \$192,500 to eight Hispanic workers who were terminated for speaking Spanish to co-workers and friends. And in 2001 the EEOC settled a suit for \$2.44 million with the University of the Incarnate Word, on behalf of 18 Hispanic housekeepers who were subjected to an unlawful English-only regulation.

Between 1995 and 2000 the number of English-only suits filed with the EEOC or other Fair Employment Practices agencies increased by nearly 500 percent. Such complaints still don't amount to a large number over-

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Bruce Plent, J.D.

Art Design, John F. Kallio
Legal Editor, Dorit S. Heimer, J.D.
Levett Rockwood P.C., Westport, CT
Editorial and business offices are at
21 E. Main Street, Mystic, CT 06355.

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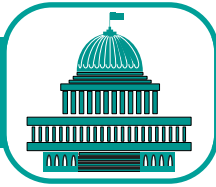
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Washington Roundup

Senate Passes Genetic Discrimination Bill

The Senate recently passed S1053, a bill to prohibit discrimination on the basis of genetic information with respect to employment and health insurance. Sponsored by Senator Olympia Snowe (R-ME) and 22 other Senators, the bill would bar employers from discriminating on the basis of genetic information in matters of hiring, firing, promotions, and job placement, and prohibit insurers from determining coverage issues and rates based on genetic information. The bill was passed unanimously in the Senate and has been forwarded to the House of Representatives where it is scheduled for debate.

GAO Says WARN Too Confusing

The U.S. General Accounting Office (GAO) recently reported that the Worker Adjustment and Retraining Notification Act (WARN) doesn't seem to be working and should be updated to provide employers with clearer guidelines. WARN requires employers with 100 or more employees to give 60 days notice of a layoff or plant closure if it affects at least 50 employees or one-third of the entire staff. The theory

behind WARN is to allow employees to seek other employment by working through their state and local centers for dislocated workers.

The GAO conducted a study of mass layoffs during 2001 and found that only 36% of employers were in compliance, although some employers that didn't need to provide notice did. According to the report—which interviewed employers and attorneys who represented employers in WARN lawsuits—many employers are confused about when notice is required. However, it seems unlikely that the Department of Labor will make any changes to WARN in the coming year.

DOL: Strongest Economic Growth in 19 Years


U.S. Secretary of Labor Elaine L. Chao recently answered the question on most employers' minds—is the economy improving? Her answer was yes. Secretary Chao reported a third-quarter Gross Domestic Product (GDP) growth of 7.2 percent, the largest economic growth since 1984. She also reported that the economy saw unemployment claims drop to an eight-month low and pointed to a recent employment report that showed 57,000 new jobs were created in

September 2003. We'll let you make your own conclusions, but we hope it's a sign of better economic times to come.

Illegal Aliens and the Wal-Mart Controversy

The Department of Homeland Security (DHS) recently found hundreds of illegal aliens working on cleaning crews at Wal-Mart. There is still some question as to whether Wal-Mart knew the workers were illegal and whether the giant retailer will be heavily fined if it did. According to the DHS, while the Wal-Mart incident recently topped the headlines, this is a common issue.

What can you do to stay legal?

Employers must have all new employees fill out I-9 forms for employment eligibility verification. There has been some confusion regarding an update of the I-9, but employers should continue to use the I-9 form dated 11/91. If using an outside service for temporary or maintenance workers, chances are that the service will be responsible for obtaining the I-9 form, but do not assume it—have them put it in writing so that there is no question that the responsibility is not yours. For frequently-asked questions on the I-9 form, go to the U.S. Citizenship and Immigration Service's website at <http://uscis.gov/graphics/howdoi/faqeev.htm>. 

ENGLISH AND OTHER LANGUAGES

English-Only

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all (there were 443 in 2000), but the number is still on the rise as more and more non-English speakers or bilingual speakers enter the United States workforce.

Have things changed?

The EEOC always has taken the position that linguistic or accent discrimination was a form of national origin discrimination. But in December 2002, the EEOC released a new guidance for national origin discrimination as a violation of the Civil Rights Act of 1964 (Title VII); it included a prominent section on language discrimination in the workplace. (*Editor's note:* This is available at www.eeoc.gov.) The EEOC counts "linguistic characteristics" as one component of national origin discrimination and sets up many examples

of circumstances where employer or supervisor insistence on English-only violates Title VII. The guidance says that the section covers accent discrimination, fluency requirements, and language use in the workplace. According to the EEOC guidance, rules are lawful:

- In emergencies or other situations in which workers must speak a common language to promote safety
- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- For communications with customers, co-workers or supervisors who speak only English.

Many cases have arisen on the basis of the EEOC rules. The courts these days are deciding in both directions, but blanket policies—that is, saying that all employees, both bilingual and non-English speakers, must

speak English in the workplace at all times, whether on duty or on break—are disfavored.

State laws about English-only

In the past several years, a few state legislatures have added statutes about the English-only rules. In *Illinois*, for example, a new law makes it a violation of the state civil rights statute to prohibit an employee from using a language other than English when the employee is speaking about matters not related to the job. In *Alaska*, a law (approved in 1998 by the voters) requiring government workers to speak only English when conducting public business was struck down as unconstitutional by a Superior Court judge. In *Nebraska*, the Protections for Non-English-Speaking Employees Law applies to employers that employ 100 or more workers and recruit or hire

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LAWSUIT AVOIDANCE

The Eight D's

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Disclosure

Hesse notes that one arbitrator believes that “just cause means no surprises.” That’s a good theory to follow.

- Make rules of conduct and performance expectations clear
- Make penalties for infractions equally clear
- Put expectations and penalties in your handbook
- Reflect expectations and penalties in your documentation
- Use warnings, especially final warnings, to make expectations and penalties clear on an individual basis
- Use advance reminders when enforcement has been inconsistent in the past, or when you intend to start enforcing an existing but previously not-enforced rule. Give notice and allow time before beginning to enforce the rule. Similarly, when a new supervisor or manager has new policies, disclose them

- Beware of “anti-disclosure” statements, such as “Oh, don’t worry”
- Think ahead when difficult situations are coming up. For example, if a special early retirement program has been decided upon, but not yet announced, how will you handle inquiries about retirement programs?

Finally, use all available communication opportunities. Frame all your communications so that they will likely be understood by all. Avoid legalese and technical terms. Remember: communication is a two-way street.

Due diligence

Due diligence means doing your homework, says Hesse. When situations arise, investigate thoroughly. Don’t rely on hearsay, stereotypes, or assumptions. You need the actual facts. Managers are busy, and the tendency is to shortcut investigations and to rely on hearsay. This is dangerous, warns Hesse.

Due diligence is important in all aspects from the communications effort to the investigation to the ensuring of consistent treatment.

The final part of due diligence is seeking appropriate advice (e.g., from HR or an attorney) before taking action.

Due process

The first part of due process is taken care of by disclosure: informing employees of the rules and performance expectations and the consequences of failure to meet expectations or conform to the rules. Where appropriate, these should be in writing or otherwise clearly published.

Keep an open mind until all have had their say. Make sure to avoid statements or actions that might indicate that you have pre-judged the employee. Also:

- Give the employee an opportunity to be heard, and give notice of that opportunity
- Give the notice and opportunity prior to the imposition of discipline, except in very rare circumstances
- When a decision is reached, communicate it to the employee in a timely fashion.

Documentation

The reasons for good documentation are many, not the least of which is that judges, juries, arbitrators, and administrative agencies expect it.

Beware of bad documentation. If you are not careful about your writing, you may create a “smoking gun.”

- Don’t promise more documentation than you can deliver
- Document soon after events
- Document facts, not conclusions.

(*Editor’s note:* Readers may access the September 2002 *Legal Reporter* article “Why Do Documents So Often Fail?” on the rbpubs.com website.)

Delay

Remember, says Hesse, that to the employee, the issue you are dealing with is number one. They are agonizing over it, and they are losing sleep

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You Be the Judge

‘Exempt’ Site Coordinator Suddenly Says, ‘Pay Me Overtime.’ Was She Really Exempt?

Arlene Frank enjoyed her position as an event coordinator for the Big City Show Management, Inc. She was the on-site contact during conventions, registering exhibitors, dealing with their myriad problems, and taking care of billing at the end of the event. The hours were often long, but since she was categorized as exempt under the administrative exemption of the Fair Labor Standards Act (FLSA), she received no overtime.

One day, chatting with the head of the decorators union, she discovered that in other exhibition management companies, the people in her position got overtime. After doing a little checking and talking to an attorney, she sued Big City, alleging that her position was wrongly classified as exempt and that she was due overtime pay for her past service.

Big City was not happy. If Frank were right, not only would they have to pay her, but they would also have to pay several other employees in her job category. And not only for past work, but in the future as well. Hundreds of thousands of dollars were at risk.

Frank’s attorney argued that Frank’s job consisted largely of routine clerical work, and that her problem-solving decisions were based on standard guidelines. When the guidelines didn’t help, she called headquarters.

What do you think the courts found? Was Frank’s job exempt, or did Big City owe substantial overtime to the entire group? Turn to page six to find out.

You Be the Judge scenarios are based on real cases. Names and places are fictitious. Any resemblance to real persons, companies, or places is inadvertent and unintended.

LAWSUIT AVOIDANCE

The Eight D's

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over it. So do some handholding. Say, "I'm working on it."

- Act, investigate, and respond as promptly as possible under the circumstances
- Always adhere to any time limits set forth in the employee handbook, contract, or other relevant source
- Keep employees informed of the need for additional time
- Be proactive—try to anticipate potential issues and plan your strategy ahead of time so that you can respond quickly
- Document agreements to extend timelines.

Discrimination

Avoid illegal discrimination or the appearance of it. Remember that ille-

gal discrimination can occur without an intent to discriminate if there is an adverse disparate impact on members of a protected class. Furthermore, acting against an unprotected class may result in reverse discrimination.

Being consistent—a big part of avoiding discrimination—is perhaps the single most important guiding principle in handling workplace issues.

Consistency includes:

- Consistency between the handbook, policies, and contracts, and how they have been previously interpreted and applied to other employees
- Consistency among departments, divisions, and locations
- Internal consistency in how you treat the individual employee.


Don't think you can hide inconsistencies, warns Hesse. You may be sure that they will come up in discovery.

Deceit

Don't lie. It's better to say nothing than to give a false reason, even if your reason for lying is a good one.

A typical example: You've converted to a computerized operation and one of your long-time workers can't pick up the new computer skills which are now essential to performing the job. You don't want to hurt the employee's feelings, so you say the job was eliminated. When the ex-employee hears you've hired a replacement, the ex-employee is likely to sue. Now you are caught in a lie. Your credibility is shot, and, as a matter of law, the jury may infer that you acted for discriminatory reasons.

Use the D's as a checklist

Hesse recommends that managers use the Eight D's as a simple checklist whenever they are about to take some serious action against one of their employees. sdb 

ENGLISH AND OTHER LANGUAGES

English-Only

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non-English-speaking workers residing more than 500 miles from the place of employment, and where more than 10 percent of the employers' workforces are non-English-speaking and speak the same non-English language. The law says that employers must provide bilingual employee interpreters to assist non-English speaking workers in carrying out their job responsibilities and to provide them with information on community services.

In *California* employers may not adopt or enforce a policy that limits or prohibits the use of any language in any workplace, unless both of the following conditions exist:

- the language restriction is justified by a business necessity
- the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed and of the consequences for violating the language restriction.

"Business necessity" is defined as "... an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, that the language restriction effectively fulfills the business

purpose it is supposed to serve, and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact."

But in *Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington*, a 9th circuit court decision requires one of the following two circumstances for an employee to challenge a "speak-English-only" policy in the workplace under federal law:

- the rule is applied to employees who speak no English or who have difficulty speaking English; or
- the policy creates, or is part of, a work environment that is hostile toward national origin minority employees.

If, initially, an employee is able to show that either of those conditions applies, the employer must show some "business necessity," a sufficiently compelling and clearly job-related need, for the policy. Even if the employer does demonstrate business necessity, the policy is still illegal if there are less discriminatory alternatives to the policy that achieve the same goals just as effectively.

Many states have statutes making English the official language of the state—but generally speaking, these

statutes have little effect on the workplace.

A problem for employers

Are English-only rules OK? The answer is unclear, as this is still an unsettled area of the law. That means it is a real problem for employers. Not every court abides by the EEOC guidelines, which are, after all, only guidelines. Several courts have decided that if there are true office tensions between co-workers who are bilingual and those who speak only English—and it leads to anger between colleagues—English-only is a legitimate rule.

A *Massachusetts* district federal court recently said that although the EEOC "may offer guidance," the court was not bound by its regulations. The court said that the Salvation Army's English-only policy for employees was lawful (*Cosme v. Salvation Army*, D. Mass., No. 01-12045, 2003). But sometimes it works out the other way. For example, in 2003, the EEOC settled an English-only lawsuit with Colorado Central State Casino, Inc. for \$1.5 million on behalf of Hispanic employees who were forbidden to speak other than English under any circumstances during the work day. The employees alleged they were harassed if they spoke anything other than English, even on breaks.

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What should employers do?

As the law on language discrimination continues to evolve, what should employers do? Employers may, and often do, have a very good reason for insisting that workers speak only English while performing duties. But until there are clear-cut answers, employers must be careful as well; it is not a good idea to adopt a rule that completely prohibits a language other than English in the workplace at any time or under any circumstances. For example, when a worker was fired for saying “buenos dias” to a co-worker, the firing was not a good idea. It is risky to implement a rule that says that employees may not chat in their native languages during their breaks or lunch hours. It's not that every court will rule against the employer, but some may do so. And what employer wants to be facing a discrimination lawsuit in any case?

Also, employers must have a written policy that outlines the rules and

the penalties for violating them; the policy must be communicated widely to employees.

Employers would be wise to analyze whether it is really necessary to require English-only. If yes, they should create the policy with as little burden to all as possible. Is there a truly legitimate business need—and will the policy meet it? It's best to keep an English-only policy as narrowly drawn as possible.

When must the organization speak another tongue?

Are there requirements for the employer to communicate in languages other than English?

Federal laws

There is no general statute that requires federal labor posters to be posted in any language but English. The sole federal law that requires such multi-language posting is the Family and Medical Leave Act (FMLA) which says that where a significant proportion of an employer's workforce is not proficient in English, the employer must provide notice in the

language the employee speaks. Several posters (including, for example, the Job Safety and Health Protection [OSHA] poster and the Equal Employment Opportunity Act poster) appear in English and Spanish although the law itself does not mandate it.

State laws


Some states (including Arizona, California, Florida, Georgia, New York, and Texas) call for posters that communicate in Spanish as well as English. These and other states and commercial vendors generally offer a complete labor law poster that contains all required federal and state posters on one sheet and in both languages. Other states offer posters in other languages although they are not required (for example, the Wisconsin Equal Rights Act poster is offered in Spanish and Hmong as well as in English).

Can an employer require employees to be English-speaking?

Yes, but only if English proficiency is an important part of the job. For example, it would not be illegal for a secretary to be required to speak, read, and write English well, if the job called for reading, writing, and proofing letters and documents in English. Or a salesperson in a retail store dealing with mostly English speakers could be obligated to speak English reasonably well. But if English proficiency is required and is not a salient part of the job (for example, on an assembly line), the employee or applicant could claim the employer violated Title VII, and/or state discrimination law.

Must the employer communicate in another language?

Should employers make it a point to communicate posters, policies, and training in other languages, even if not required by law?

It makes sense that you want your employees to understand their legal rights and obligations, the rules and policies that you intend to enforce, the expectations that you have, and the consequences of not abiding by rules or not meeting expectations. Otherwise, in the event of a lawsuit, non-English speakers will likely claim that they “didn't understand,” and this will certainly muddy the waters of any lawsuit. 



The Decision


Court Says Exercise of Discretion and Other Factors Mean Administrative Exemption Is OK

Ruling for the exhibition management company, the court of appeals that heard this case explained that the administrative exemption is appropriate if an employee's “primary duty” meets two tests:

- 1) the duties consist of the performance of office or non-manual work directly related to management policies or general business operations
- 2) the job requires the exercise of discretion and independent judgment.

The court reasoned that Frank did indeed use independent judgment to perform her job.

Comment: *The administrative exemption is probably the most confusing of the four exemptions to apply (the others are executive, professional, and outside sales)—mainly because of its rather generic title and its potential to apply to many positions. The key is that these employees work under general supervision only; they have the authority to make some decisions without getting prior approval.*

A quick FLSA update: *The proposed regulatory changes to the FLSA have been stalled in Congress. It will be interesting to see whether the proposal gains momentum as 2004 is an election year. We are watching this closely and will keep you posted.*  bp/sdb

In Brief

FMLA

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occasions. He contacted Honda to inform them that he would need to take FMLA leave, but, according to Honda, not within the three-day window on two of the occasions. Cavin was terminated and sued Honda for violating his FMLA rights. Specifically, he alleged that their unforeseen leave policy was unreasonable.

Ruling for Cavin and going against other circuit court rulings, the 6th Circuit Court of Appeals concluded that employers can't deny FMLA relief for failure to comply with their internal notice requirements. The question of whether the notice was adequate remains undecided (*Cavin v. Honda of America Manufacturing, Inc.*, 6th Cir., No. 02-3357, 10/10/03).

Comment: Employers should note that other circuit courts have ruled that short notice policies for unforeseeable leave do not violate the FMLA. Ultimately, the Supreme Court may end up deciding the issue. Until then, make sure that any notice policy for unforeseen leave is fair and reasonable.

WORKERS' COMPENSATION

Employee Shot on Break Not Entitled to WC Benefits

Should an employee be eligible for workers' compensation benefits for any accident that occurs on the jobsite? This court said no. Richard Dukes worked for Rural Metro Corporation in South Carolina. While on a smoking break, a co-worker retrieved her new gun from her car to show Dukes. When Dukes handed the gun back to her, it accidentally discharged and struck Dukes in the thigh. Dukes sought workers' compensation benefits, but was denied. He took his claim to court.

The South Carolina Court of Appeals affirmed lower court decisions and denied Duke's claim. The Court explained that the "personal comfort" doctrine, developed by courts dealing with workers' compensation cases, states that an employee is entitled to workers' compensation benefits even if an injury arises when the employee is engaged in personal

acts while on the job. However, the doctrine has limits. The Court reasoned that an employee's personal gun was not part of this company's operations, and therefore, the employee should not be compensated for the injury (*Dukes v. Rural Metro Corp.*, S.C. Ct. of App., No. 25730, 10/13/03).

Comment: Many employers don't realize that workers' compensation laws are predominantly state-driven. While this South Carolina court refused to pay Duke, other state courts might have found in his favor. Specifically prohibiting weapons and other dangerous items in the workplace in your employee handbook might seem overly cautious, but establishing that an employee knew of a prohibition can only help an employer in court.

AGE DISCRIMINATION

Consistent Policies Overcome Age Claim

Most employers have employees who are resistant to change. This employer dealt with it brilliantly. Edwin Bailey, a 68-year old male, had worked for the Associated Press (AP) as a photographer since 1986. During the late 1990's, many of AP's photographers began using digital photography. Bailey resisted the new technology at first, but eventually agreed to try it. AP provided him with digital equipment, including a laptop computer, which had been used initially by other employees who had mastered the technology and had then received updated equipment.

Bailey's job performance declined shortly afterwards and he received nine performance warnings. He filed an age discrimination suit alleging that AP failed to provide him with adequate training and refused to let him take his laptop home to practice while on medical leave.

Ruling for AP, the Southern District Court of New York found that AP provided the same training to each of its eight photographers in the office, six of whom were over 40 years of age (and one who was 84 years old). The Court also found that

other photographers were not allowed to remove their laptops from the office for long periods of time (*Bailey v. Associated Press*, S.D.N.Y., No. 01 Civ. 4562 LTS RLE, 9/29/03).


Comment: Consistency in administering company policy should be a cardinal rule for all employers. While rules are often "stretched" for some employees due to extenuating circumstances, maintaining general consistency often plays a significant role in the employer's favor when litigation arises.

SEXUAL HARASSMENT

Asking for a Hug Not Sexual Harassment

Is asking someone for a hug in the workplace too much? This employee thought so. Roberta Mann, a customer service representative for Sovereign Bank in Rhode Island, complained to Sovereign's human resource department that she was being sexually harassed by her supervisor. In particular, she said that the supervisor—also a female—continually complimented her on her attire and repeatedly asked her for "a hug." The supervisor was reprimanded, but resumed the behavior six months later. Mann did not return to work and filed a sexual harassment suit against the bank.

Ruling for the bank, the District Court of Rhode Island stated that female-on-female sexual harassment claims "... are about as common as a baseball post-season that includes the Cubs and the Red Sox." (We don't make this stuff up, folks—and for those non-baseball fans, the analogy means it is very uncommon!) The Court found that the conduct, however inappropriate and distasteful, did not rise to the level of harassment (*Mann v. Lima, Sovereign Bankcorp, and Sovereign Bank*, D.R.I., No. 02-088S, 10/13/03).

Comment: Although the bank "won" in this case (it likely paid out substantial attorney's fees and who knows what lost time and so on), it could have lost. Be careful to give due attention to any complaints of harassment or discrimination. bp 



FROM THE STATES

NEW YORK

Employer Denies FMLA Request For 'Baby-sitting'

Well, that's how this company categorized it. Wrongly. Ola Jennings worked in the HR department of Parade Magazine's Manhattan office. Her six-year-old son was diagnosed with attention deficit hyperactivity disorder (ADHD) and required extra care. Jennings did not have anyone to provide that care. Living in Pennsylvania, her commute into the city was two hours each way. She requested a schedule change which would allow her to work from 10 a.m. to 5 p.m. without taking lunch instead of her normal hours of 9 a.m. to 5 p.m.

Unsure of whether ADHD was covered under FMLA and after consulting the legal department, Parade denied the request because they felt it was really for "baby-sitting." Parade terminated her when she refused to continue working her normal schedule and Jennings sued Parade for violating her FMLA rights.

Ruling for Jennings and allowing the case to go to trial, the Southern District Court of New York explained that consulting their legal department about the problem created doubt that Parade thought the request was just for "baby-sitting" (*Jennings v. Parade Publications*, S.D.N.Y., No. 01 Civ 8590, 9/30/03).

Comment: Additional facts will undoubtedly surface at trial, but Jennings' request—under the circumstances—seemed reasonable. Employers faced with situations like this should

be as reasonable as possible. Agreeing to a temporary schedule change appeases the employee, but still keeps the employer in charge.

CALIFORNIA

CA Chamber Seeks to Repeal Recent Healthcare Bill

Here's an update to an article we ran in November. Californians Against Government Run Health Care—a coalition led by California Chamber of Commerce trying to stop SB 2 from being enacted—has launched a campaign to repeal the bill, one of the last bills to be signed by former governor Gray Davis, by putting it to referendum for the March 2004 ballot.

SB 2 requires employers with 20 or more employees to provide health insurance for their employees. Employers with 200 or more employees would also have to provide coverage for their employees' dependents. The cost, according to the Chamber, is \$5.7 billion for employers and \$1.5 billion for workers. We'll keep you posted.

FLORIDA

Quick Response to Harassment Saves the Day

Sexual harassment doesn't always occur "in the office." Lucianne Walton worked as a salesperson for Ortho-McNeil Pharmaceuticals, a subsidiary of Johnson & Johnson Services, Inc., in Florida. The company did not have office space for its sales team, so they worked from their homes. Walton contacted Ortho's HR department and reported three incidents of sexual harassment by her boss. Specifically,


she complained that he groped and fondled her while the two were working in his apartment. She alleged that forced intercourse took place about a week later while the two of them had wine together in his apartment, and again the following week when Walton returned to his apartment to get a massage.

Ortho's HR investigator interviewed her within a week and the male employee was suspended 10 days later and eventually fired. Walton was terminated shortly afterward for not returning from an unrelated disability leave and sued Ortho for sexual harassment. Ruling for Ortho, the Eleventh Circuit Court of Appeals explained that Ortho had acted reasonably under the circumstances and stated that the victim of the harassment "... has an obligation to use reasonable care to avoid harm ..." which in this case would have meant reporting the offenses earlier, and staying out of her harasser's apartment. (*Walton v. Johnson & Johnson Services, Inc.*, 11th Cir., No. 02-12520, 10/20/03).

Comment: Sexual harassment can happen anywhere, and a timely response to a complaint is critical. It is important to have procedures in place that deal with sexual harassment by those who telecommute, that is, work from remote offices or from home, or any place where there is no HR person on site.

MASSACHUSETTS

Gay Marriage Legal In Massachusetts

The Massachusetts' Supreme Court ruled on 11/18/03 that gay marriage is legal, but would not go as far as issuing marriage licenses to gay couples. Instead, the Court ordered the Massachusetts' Legislature to come up with a solution within 180 days. Massachusetts is the only state in the nation to recognize marriage between same-sex couples. A handful of other states have enacted "domestic partner" laws, which extend limited rights (insurance coverage, etc.) to gay couples, but all have been silent on whether gay marriage is legal. We'll be watching this carefully and will let you know the outcome. bp 



This month's site:

www.ada.gov

This comprehensive site is a good place to start when dealing with Americans with Disabilities Act (ADA) issues. It contains most of the government's information and technical assistance materials concerning compliance and enforcement, as well as links to other government agencies with ADA responsibilities.