

Supervisor Liability

While the courts have long dealt with the issue of employer liability for discrimination, there is now a growing number of cases in which the courts have looked at whether individual supervisors can be held personally liable for discriminatory and harassing acts. This trend obviously has implications for both employers and supervisors.

The Iowa Supreme Court addressed the issue in 1999 in *Vivian vs. Madison*. The court held that under Iowa Code, section 216.6(1) of the Iowa Civil Rights Act, a supervisor could be held personally liable for unfair employment practices. This ruling came despite the fact that it has been held that supervisors may not be held individually liable under Title VII of the U.S. Civil Rights Act, upon which the Iowa act is modeled. The Iowa court found difference in wording in the two statutes to allow different conclusions to be reached.

Iowa Code Section 216.6(1) provides in part that:

“It shall be unfair or discriminatory practice for any:

- a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any

applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation.”

Title VII, on the other hand, states only that:

“It shall be unlawful employment practice for an employer:

1. To fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of an individual’s race, color, religion, sex, or national origin;”

The Iowa Court distinguished the language under Title VII and Chapter 216 referring to employer and person. The Court in *Vivian* concluded that the legislature’s use of the words “person” and “employer” in section 216.6(1), and throughout the chapter, indicates a clear intent to hold a “person” subject to liability separately and apart from the liability imposed on an “employer.”

In a more recent decision, the Washington Supreme Court held in 2001 that under Washington’s law against discrimination, supervisors who discriminate against or

harass an employee can be held individually liable for their actions. *Brown v. Scott Paper Worldwide Co.*

Unlike the Iowa statute that referred to “person,” the Washington statutes prohibited “employers from discriminating against any person in terms of employment based on age, sex, marital status, race, creed, color, national origin, or disability”. However, the law defined “employer” as including “any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons....”

The Court held that the “Washington legislature intended to include individual managers and supervisors, consistent with the broad public policy of eliminating all discrimination in employment.”

Aid, abet discrimination

In *Vivian*, the Iowa court referred to other language in the Iowa Civil Rights Act that differs from Title VII but did not directly address the issues it raises. Section 216.11 of the Iowa Code states:

“It shall be unfair or discriminatory practice for:

1. Any person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared

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EXTENDED MASS LAYOFFS REVIEW OF 2001

Employers reported a record number of extended mass layoff actions - 8,191, up from 5,620 in 2000. Worker separation events reached a record 1,695,335 and were up more than 500,000 over the year. The annual average national unemployment rate increased from 4.0 percent in 2000 to 4.8 percent in 2001.

In the private sector, manufacturing accounted for 41 percent of all mass layoff events and 37 percent of all separations that occurred during 2001, noticeably higher than in 2000 (34 percent and 33 percent, respectively).

Twenty-seven percent of all layoff events and 29 percent of the separations in 2001 were due to the completion of seasonal work. These layoffs occurred in establishments primarily engaged in food production (agriculture and food and kindred products).

Layoff activity due to internal company restructuring reached record highs in 2001. Employers cited this in 1,897 events (23 percent of the total), resulting in the separation of 488,233 workers (29 percent of the total).

Impact of September 11 Attacks

After the attacks of September 11, the Bureau of Labor Statistics added a new code for "reason for the layoff," "non-natural disaster," for

use in the reporting of extended mass layoffs (those lasting more than 30 days). This allows for the identification of workers separated from companies as a direct or indirect effect of situations such as the September 11 attacks. Layoffs indirectly attributed to the September 11 disasters include those in establishments outside of the immediate areas in and around the World Trade Center in New York City (for example, airlines and hotels and motels).

Preliminary reports for the weeks ended September 15 through December 29 show that there were 408 events involving 114,711 hotel and motel workers directly or indirectly attributed to the attacks.

The Mass Layoff Statistics (MLS) program is a federal-state program that uses a standardized, automated approach to identifying, describing, and tracking the effects of major job cutbacks, using data from each state's unemployment insurance database. Each month, states report on establishments that have at least 50 initial claims filed against them during a consecutive 5-week period. These establishments then are contacted by the state agency to determine whether these separations lasted 31 days or longer, and, if so, other information concerning the layoff is collected. States report on layoffs lasting more than 1 month on a quarterly basis.

EEOC Issues Fiscal 2001 Enforcement Data

The U.S. Equal Employment Opportunity Commission (EEOC) released its annual comprehensive enforcement and litigation statistics for Fiscal Year 2001 (October 1, 2000, through September 30, 2001). According to the data, total discrimination charges filed against private employers increased one percent from the previous year to 80,840 - the highest level since the mid-1990s.

The types of discrimination with the highest rate of increase in FY 2001, compared to the prior year, were allegations of discrimination based on age (one and one-half percent increase) and disability (one-half percent increase). All other types of charge filings either declined slightly (less than one-half percent) or remained level compared to FY 2000.

"The incidence rate of age and disability discrimination appears to be on the rise with the graying of America," said EEOC Chair Cari M. Dominguez. "Employers must be vigilant in preventing such characteristics from being fac-

tored into their employment decisions."

In addition to the rise in workplace bias filings, the FY 2001 data also show:

- The private sector pending inventory of charges (backlog) decreased by five percent from the previous year to 32,481 - the lowest level in nearly two decades.
- The average charge processing time for private sector charge filings stood at 182 days - a 34-day decline from FY 2000 and the lowest level since the early 1980s.
- The average time to resolve a charge through voluntary mediation was 84 days - a drop of 12 days from the prior year.
- The merit factor rate (charges with meritorious allegations and/or outcomes favorable to the charging party) increased to 22 percent - the highest level since the early 1980s. Of the 80,840 total charges filed with EEOC, the most frequent types of discrimination alleged were based on:

- Race - 28,912 or 35.8 percent of all charge filings.
 - Sex/Gender - 25,140 or 31.1 percent of all filings.
 - Retaliation (all statutes) - 22,257 or 27.5 percent of all filings.
 - Age - 17,405 or 21.5 percent of all filings.
 - Disability - 16,470 or 20.4 percent of all filings.
- [The total adds up to more than 100% because multiple types of discrimination are often alleged.]
- Other types of charge filings included allegations based on:
- National Origin - 8,025 or 9.9 percent of all filings.
 - Religion - 2,127 or 2.6 percent of all filings.
 - Equal Pay - 1,251 or 1.5 percent of all filings.

Federal Record Keeping Requirements

Nearly every employment law has record keeping requirements. The following is a list of most of the Federal laws and regulations that employers are required to maintain:

- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Asbestos Exposure Standard
- Bloodborne Pathogens Standard
- Davis Bacon Act *
- Department of Transportation Drug/Alcohol Testing Rules
- Employee Polygraph Protection Act
- Employee Retirement Income Security (ERISA)
- Equal Pay Act
- Executive Order 11246 *
- Fair Labor Standards
- Family and Medical Leave Act
- Federal Insurance Contributions Act
- Federal Unemployment Tax Act
- Federal Income Tax Withholding Rules
- Immigration Reform and Control Act (ICRA)
- National Labor Relations Act
- Occupational Safety and Health Act
- Rehabilitation Act of 1973 *
- Title VII, Civil Rights Act of 1964
- Toxic Substances Control Act
- Vietnam Era Veterans*

In upcoming issues, HR-News will review the various record keeping requirements.

*Applies to certain Federal contractors.



Personnel File/ Record Keeping Requirements

In developing personnel files employers must consider:

1. What items should be contained in the personnel file
2. Who should have access to the files
3. What items should be considered confidential and how should these items be handled.

This is the first in a series of articles regarding personnel files and record keeping requirements that will appear over the next few months. Hopefully, this information will be helpful. As always, HR-OneSource is available to assist employers if you have any questions.

Personnel files should contain the following:

1. Basic Employee Data, including name, address and telephone number, Social Security number, employee identification number, and emergency contact; information about current position, such as job description, supervisor, department, work telephone number, and date hired;
2. Employment History, including date of initial hire, dates and job titles of positions held since hire, and jobs held prior to joining the company; information regarding the employee selection process including such documents as resume, employment application, any test results, interview notes, and other records used as a basis for hire, promotion, demotion, selection for training, job transfer, and other employment actions; including job offer or acceptance letter, copy of a signed authorization letter to release information used to obtain references;
3. Pay Data, including full-time or part-time status, exempt or nonexempt status, current salary or wage rate, tax and other withholdings;
4. Fringe Benefits, such as life insurance coverage, health benefit plan elections, dependent coverage elections, 401(k) or other fringe



benefit program participation, and pension eligibility and amounts;

5. Attendance and Leave History, such as accrued and used amounts of sick, vacation, and personal leave, dates of leave used for Family and Medical Leave Act purposes, dates of unpaid leaves of absence or sabbaticals, and dates of leave for military service;
6. Performance Documentation, performance evaluations, letters of commendation or complaint, recognition awards, disciplinary warnings and suspensions;
7. Employee Development, records of any training or educational programs completed, degrees received, licenses or certificates held, and special skills or proficiencies, including familiarity with specific types of computer applications or other equipment;
8. Confidential Records: All medical records, such as physical examination results, need for family or medical leave, requests for accommodations of disabilities, workers' compensation records, unemployment insurance records, and occupational exposure or medical screening records, must be kept in confidential files, separate and apart from general personnel records.

In addition to the above, certain information (such as credit reports) the employer has should be kept in a separate "confidential" file to protect the privacy of the employee. The area of confidential records and privacy will be discussed in future issues.

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SHORT FACTS

UNEMPLOYMENT – The national unemployment rate decreased to 5.6% in January. The jobless rate was 4.1% a year ago. Iowa's unemployment rate for December was 3.5%. The Iowa rate one year ago was 2.5%

CPI – The Department of Labor reported that for the 12-month period ending in January, the CPI-U increased 1.1%.

EMPLOYEES INSURANCE CONTRIBUTION – According to a recent BNA survey, two out three employers increased what employees' pay toward their health care over the last 12 months. The survey finds that all but 5 percent of the employers faced higher health care costs, with half of the employers contending with steep increases.

WEEKLY EARNINGS – According to the Bureau of Labor Statistics, the median weekly earnings of full-time U.S. workers in the fourth quarter of 2001 rose 3.4%.

SENDING LETTER TO EMPLOYEE VIA CERTIFIED MAIL MEETS COBRA REQUIREMENTS

Sprint Corp. met the notification requirements of the Consolidated Omnibus Budget Reconciliation Act (COBRA) when it sent a letter to a former employee via certified mail detailing the employee's COBRA rights, even though the company knew the employee did not actually receive the letter. Sprint Corp. discharged the plaintiff on Feb. 4, 1998 and sent him a letter on Feb. 11, 1998, by certified mail informing him that, under COBRA, he had the right to elect continuing health care coverage. After two failed attempts to deliver the letter to plaintiff, the letter was returned to Sprint. The appeals court found that the certified letter was a "good faith" effort to notify the plaintiff of his COBRA rights, even if he never received the letter.

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unfair or discriminatory by this chapter."

This language raises the question of whether a supervisor who acquiesces in discriminatory conduct by the employer is considered to have aided and abetted it such that he/she would be liable even if they did nothing themselves. Several New Jersey cases have dissected similar language in their discrimination laws and determined that mere knowledge of unlawful conduct is not sufficient; the supervisor must knowingly give substantial assistance or encouragement to it. Because the Iowa law uses the term "intentionally," a similar level of involvement by the supervisor would be required to find liability for civil rights violations

These rulings allow employees to recover damages from individual supervisors who are found to discriminate and could dramatically increase the number of discrimination lawsuits in which plaintiffs' counsel will include supervisors and managers as individual defendants.

With the addition of individual defendants, the cost and complexity of defending these claims will increase, along with the added complication of conflicts of interests among individual defendants. Additional costs will be incurred in efforts to extract individual defendants. In many cases, separate defense counsel for the individual defendants will be required to guard against attorney conflicts, and individual defendants may seek to advance their own cases at the expense of the company's defense.

Individual managers may even consider settling separately with the plaintiff for a nominal amount, and in exchange agree to cooperate with the plaintiff's attacks on the company with its "deeper pockets."

These decisions provide added incentive for employers to implement effective anti-discrimination policies and training programs to educate their supervisors about workplace discrimination and harassment issues.