



West Sound Human Resource Management Association

West Sound Happenings

February 2007

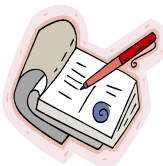
*Save The
Date*

Monthly Luncheons

Mark these dates on
your Calendar!

March 14, 2007
Jennifer Lambert
Legislative Director,
SHRM

April 11, 2007
Business Writing
That Counts!
Dr. Julie Miller



Please continue to check
our website at
www.wshrma.org
for updated information



WSHRMA MONTHLY LUNCHEON EMPLOYMENT LAW UPDATE PRESENTED BY: BRANDON CHUN, WASHINGTON EMPLOYERS, INC.

**FEBRUARY 14, 2007— SILVERDALE BEACH HOTEL
11:45 A.M. TO 1:30 P.M.**

Keeping abreast of legal developments in the employment sector can be daunting and time-consuming for any human resources administrator. But not today! This session offers condensed overviews of pertinent federal and Washington State case law and legislation affecting employers and the workplace.

Brandon R. Chun is an attorney with Washington Employers, Inc., an employer association with over 1000 members, including for-profit, non-profit, private, public and quasi-public entities. The Association provides advice and support to management in personnel and employment-related matters, in addition to handling the labor negotiations, grievances and arbitrations for union-based employers. Mr. Chun counsels and represents businesses in all aspects of employee relations and regulatory compliance. He has been practicing labor and employment law since graduating in 1992 from the University of California, Hastings College of the Law, where he was a member of the Hastings Law Journal. Mr. Chun is licensed to practice in Washington State and Hawaii.

RSVP by February 9, 2007

Date: February 14, 2007

Time: 11:45 a.m. to 1:30 p.m.

Place: Silverdale Beach Hotel

Price: \$20.00 Member*

\$30.00 Non-Members*

RSVP: wshrma@artanderson.com

360-479-5600 x2265

**Silverdale Beach Hotel
3073 NW Bucklin Hill Road
Silverdale, WA 98383
360-698-1000**

*Add \$10 with no reservation. Cancellations must be received at least 2 days prior to receive refund.

HR

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SUPREME COURT TO EXAMINE HR'S ROLE IN TERMINATION

Become A Member

Are you interested in a SHRM Membership or transferring your membership to our chapter? Please contact Pati Olson, VP of Membership with any questions: pati_robinson@yahoo.com

AFFILIATE OF



Job Bank

Please check out our website at www.wshrma.org for current job openings. If you would like to advertise an open HR position in the WSHRMA job bank, please contact Mandy Clute at 360-478-2608 or e-mail to mclute@kpshealthplans.com

By Allen Smith

A rubberstamped recommendation to discharge will get a second look by the U.S. Supreme Court in a case involving HR's role in termination decisions. The Supreme Court announced on Jan. 5 that it will review several HR-related cases, including whether BCI Coca-Cola Bottling Co. of Los Angeles is liable under Title VII for an HR professional's decision to fire a black merchandiser, based solely on an allegedly biased supervisor's recommendation.

The U.S. Equal Employment Opportunity Commission (EEOC) sued BCI on behalf of Stephen Peters, a black man employed as a merchandiser who claimed that his supervisor, a Hispanic district manager, subjected black employees to greater scrutiny and more serious discipline than others. A number of co-workers said they shared this view.

After the supervisor learned on Sept. 28, 2001, that another merchandiser who covered extra shifts was injured, the supervisor asked Peters to work on a Sunday, but Peters refused. The supervisor, who did not have authority to fire, met with an HR manager who had not met or heard of Peters, telling her that Peters planned to call in sick rather than work on Sunday. The HR manager recommended that the supervisor tell Peters to report to work and inform him that failure to do so would be grounds for discharge, which the supervisor did. After Peters did not work on Sunday, he was fired.

'Cat's paw' theory

Peters filed a charge with the EEOC, which argued that BCI should be liable for the discharge under the "cat's paw" theory.

The theory's name is derived from a fable about a monkey that persuades a cat to pull chestnuts for it out of a fire, burning the cat's paws in the process, Maria Greco Danaher, an attorney with the firm of Dickie, McCamey & Chilcote in Pittsburgh, told *HR News*. She said this case was the proverbial "cat's paw" fact pattern, because the supervisor allegedly used the HR manager as "an unwitting dupe" by giving a legitimate reason for discharge when the real motive purportedly was unlawful racial bias.

The district court dismissed the case, but the 10th Circuit reversed (*EEOC v. BCI Coca-Cola Bottling Co.*, No. 04-2220 (10th Cir. 2006)). Danaher predicted that the Supreme Court would uphold the 10th Circuit, which adopted the cat's paw theory.

BCI's defense that the HR manager didn't know Peters was black "blew up in its face," according to Danaher, because that information was in the personnel file, which the HR manager apparently didn't check. Danaher said the HR manager should have conducted a full and fair investigation, at least talking to the employee to get his or her side and being "the most neutral of all decision-makers."

However, Manesh Rath, SPHR, a member of the Society for Human Resource Management Employee Health, Safety & Security Special Expertise Panel, told *HR News* that he did not think that it was fair to attribute to an employer the discriminatory animus of a supervisor if HR has rubberstamped a supervisor's recommendation to terminate without knowledge of the discriminatory motive. How can a court conclude that there was discriminatory intent if the employer had no knowledge of discriminatory content or conduct, asked Rath, who is a lawyer with Keller and Heckman LLP.

Continued on page 3

SUPREME COURT CONTINUED

Rath noted that the case raises questions about when employees act as employer's agents. Supervisors with authority to terminate or promote might be viewed as agents of the employer. And a supervisor without authority to fire still might be an agent if the supervisor's recommendations to terminate were rubberstamped. But if HR does not give this authority away to supervisors and makes an independent determination of whether to accept termination recommendations, the employer will have greater legal protection.

If objective reasons are put forward by a supervisor to fire someone, a best practice for HR would be to take "a quick look at the personnel file" to see if there is documentation of, for example, a performance problem or trouble with excessive absenteeism, Rath agreed. If the reason is subjective—such as behavior that leads or may lead to difficulties with clients—the HR professional might have little choice but to credit the supervisor's account. But HR at least should question whether anyone else was present whom it might contact, or whether there were e-mails or written correspondence, according to Rath.

"HR managers ought to view themselves as the guardians of the employer's interest to be fair and comply with laws," Rath said. "A supervisor is a guardian of a team" and should be considering whether the elimination of one person from the team may make it stronger, he added. Rath remarked that the case "is extremely important for employers to take note of and will have a substantial impact on the role HR managers play."

Domestic service exemption

In addition, the Supreme Court agreed on Jan. 5. to review an appeals court ruling (*Long Island Care at Home Ltd. v. Coke*, 462 F.3d 48 (2d Cir. 2006)) that agency home health employees are not covered by the domestic service exemption. The U.S. Department of Labor (DOL), by contrast, said in an opinion letter that they are exempt.

The DOL interpreted the exemption to apply to those workers who come to the household by way of an agency, not just babysitters or child care workers employed by the household directly, Rath noted in an interview. Like the BCI termination case, this exemption case raises employer agency issues, he commented. Rather than turning on substantive Fair Labor Standards Act (FLSA) issues, the case is likely to focus on the level of deference courts should give to DOL interpretations, Rath explained.

Rath predicted that the decision will have "a huge potential impact" on the at-home nursing industry, as well as staffing and temporary agencies. "It's important for HR managers to stay up to date" regardless of the industry of their current employers because "they do not know what company they may be with next," he said.

\$1.5 million award vacated

In a separate case that will impact the railroad industry, the Supreme Court decided on Jan. 10 that when an injured railroad employee sues under the Federal Employers' Liability Act (FELA) for negligence, the same standard should be used for determining a railroad's negligence as for an employee's contributory negligence.

When the Missouri Court of Appeals considered the FELA claim of Timothy Sorrell, a Norfolk Southern Railway Co., trackman who injured his neck and back, it instructed the jury that the railroad would be negligent if its negligence contributed in whole or in part to the injury. The jury received instructions on the standard for an employee's contributory negligence that were more favorable for Sorrell—contributory negligence was present only if his negligence *directly* resulted in injury. The word "directly" was removed from the railroad's negligence causation standard, explained Steven Loewengart, an attorney with Squire, Sanders & Dempsey LLP, in an interview.

The jury came back with a \$1.5 million award for Sorrell, which the Supreme Court vacated, remanding the case for further proceedings (*Norfolk Southern Railway Co. v. Sorrell*, No. 05-746 (U.S. 2007)).

Allen Smith, J.D., is SHRM's manager of workplace law content.

FEBRUARY 2007 LEGISLATIVE UPDATE

Changes to Federal Rules of Civil Procedure: Key role for HR in setting up email recovery systems needed to comply with new rules to protect the company in the event of a lawsuit

Amendments to recent Federal rules effective December 1, 2006, may make it more likely that your company's electronic documents be turned over to a plaintiff's attorney in the event of a lawsuit. New rules require employers to confer with attorneys in employment litigation suits within 90 days after the appearance of a defendant or 120 days after the complaint has been served on the defendant. A thorough description by category and location of all electronically stored documents in the "possession, custody or control" of the employer must be disclosed. (Rule 26(a)(1)(B)) It is believed that the rule should result in fewer discovery requests from plaintiff's attorneys and the frequent excuse from employers that they can't afford to provide all of the requested electronic information. Some feel the result will be more uniformity in the courts regarding the treatment of electronic information.

While the landmark decision against UBS Warburg LLC who was sanctioned for not preserving e-mail back up tapes had some employers rallying against the new rules, Rule 37(f) does provide a safe harbor to shield employers if information is lost as a result of "routine, good-faith operation of an electronic information system." Back-up copies of e-mails to CD-ROM's stored off-site may ultimately become impractical if it is not possible to recover the information quickly. HR appears to have two choices: 1) use a product that provides fast access to email, enabling employers to run key word searches to comply with the "meet and confer" requirement or 2) employers can create e-discovery response teams. HR, IT, and legal should be key members of these teams. It will also be critical to train employees on the dangers of misusing or attempting to delete email. Even seemingly innocent emails with jokes and pictures could be used as future evidence against an employer as a now permanent record that cannot be deleted.

Visit www.uscourts.gov/rules/newrules6.html for more information.

Upon gaining majorities in the House and Senate during the November 2006 elections, Democrats announced their immediate legislative priorities. Senate leadership has identified its top 10 legislative priorities, which will be introduced in bills numbered S. 1 – S. 10. The Senate priorities mirror those identified by the House but also include military enhancements and immigration reform. Much of the identified legislation will have an impact on the HR profession.

Minimum Wage—First among the proposals affecting the workplace is an increase in the minimum wage. This year's proposals would raise the minimum wage from \$5.15 to \$7.25 an hour in three steps.

Budget—Both houses have agreed to reinstate pay-as-you-go (PAYGO) budget rules. This provision impacts other legislation by requiring a budget off-set for any legislative proposal that would increase the deficit. In order for Congress to pass any bill that increases spending or reduces taxes, that bill must include a proposal for how to pay for the increased spending or make up for decreased revenue. In addition, the 110th Congress has vowed to require full transparency and an approval process for any special interest earmarks.

Other priority proposals include legislation authorizing HHS to support research involving embryonic stem cells, implementation of the 9/11 Commission's recommendations, legislation promoting renewable energy and energy efficiency, and legislation aimed at rebuilding the military.

SHRM has been tracking these proposals as they developed in the previous Congress and will be monitoring how the proposals change and take shape in the 110th Congress, paying particular attention to how legislation and other public policy proposals may impact HR professionals. As details on these and other proposals emerge, SHRM will keep our members informed through the Insider, HR Congressional Monitor, and other information posted on www.shrm.org.

As part of SHRM's outreach efforts, the Society has scheduled three regional sessions to inform SHRM members of the DOL's initiatives on FMLA and also gather input from HR professionals. One session was held on January 10, 2007, in Seattle, Washington. SHRM will also provide a sample letter through HRVoice for SHRM members to submit comments directly to DOL. Finally, SHRM, as the leading organizer of the [National Coalition to Protect Family Leave](#), will continue to work with companies and other associations to ensure that the views of the employer community are fully represented.

Upcoming event to consider:

Employment Law & Legislative Conference

March 12-14, 2007

Capital Hilton | Washington, D.C.

Educational sessions focusing on the most compelling employment law, compliance and legislative issues facing today's workplace. Take advantage of this rare opportunity to visit the congressional office of your senators and/or representatives.

DIVERSITY UPDATE

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***To Diverse or Not Diverse?
Diversity Policies Give
A Business Advantage to Organizations
(The Bulletin by WE)***

Three-Fourths of U.S. companies have policies that address diversity in the workplace and actively use diversity to gain a business edge, according to a survey released recently by the Society for Human Management.

In addition to having policies addressing diversity, 79% of companies offered training on diversity issues, such as anti-discrimination and diversity awareness.

Of the employees surveyed, the majority (58%) indicated that they prefer to work for an organization that is committed to diversity.

The survey also addressed concerns regarding the 2007 reporting revisions to the Employers Information Report (EEO-1) form used by the Equal Employment Opportunity Commission to collect data from private employers with 100 or more employees, and from federal contractors with 50 or more employees and \$50,000 or more in government contracts.

For the first time in 40 years, the EEO-1 form will be revised to include new job, race, and ethnicity categories and will strongly encourage employers to use employee self reporting rather than visual identification. Nearly half (48%) of HR managers said that their organization had done nothing to prepare for the upcoming EEO-1 changes.

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EEO-1 Report Revision Notice

Beginning in 2007, employers, including Federal contractors, will collect and report data about the racial, ethnic, and gender composition of their workforces on a revised Standard Form 100, Employer Information Report EEO-1. The revised EEO-1 report must be filed for the first time in calendar year 2007 by September 30, 2007.

The existing EEO-1 report calls for workforce data to be broken down by nine job categories, using five race and ethnic categories. The revised EEO-1 report contains changes to the race and ethnic categories. A new category titled "two or more races" has been added, and the category "Asian or Pacific Islander" has been divided into two separate categories - "Asian" and "Native Hawaiian or other Pacific Islanders." In addition, the approved revisions include an increase in the number of job categories as a result of dividing the Officials and Managers category into two subgroups - Executives/Senior Level and First/Mid Level Officials. These and other changes are discussed in the Federal Register notice published on November 28, 2005 (70 FR 71294); available on EEOC's website at <http://www.eeoc.gov/eeo1/index.html>

The revisions to the EEO-1 job categories may also necessitate changes in the regulations implementing Executive Order 11246. The current regulations require contractors to collect, maintain, and report information about the gender, race, and ethnicity of their employees - Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives - using the same categories on the current EEO-1 report form.

To avoid imposing inconsistent burdens on Federal contractors, OFCCP is in the process of reviewing the regulations for possible changes. Before any changes can be made, the proposed changes must be published and the public given the opportunity to comment. OFCCP will provide contractors a reasonable transition period before any of the changes become effective.

www.dol.gov

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