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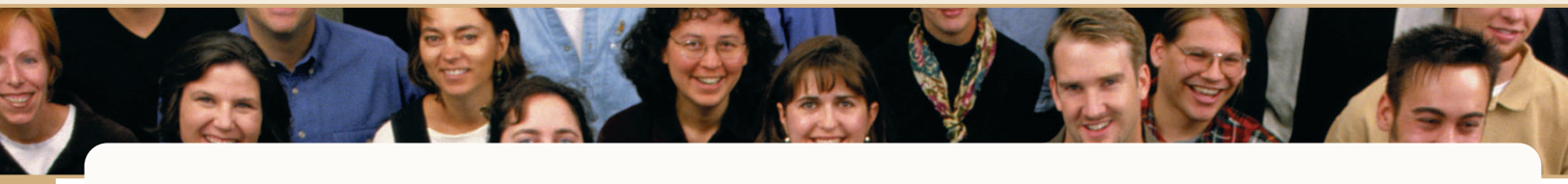
LABOR AND EMPLOYMENT NOTES

MAY 2004



RETALIATION BY EMPLOYERS

In an April 2, 2004 press release, the Equal Employment Opportunity Commission announced that a federal court in Philadelphia ruled in the EEOC's favor and against Allstate Insurance Company in a retaliation suit. According to the EEOC, the court held that Allstate unlawfully retaliated against over 6,000 of its employees in violation of the non-retaliation requirements of several federal laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990.

In the lawsuit, the EEOC alleged that Allstate required its U.S. independent-contractor agents to sign a release or waiver related to *all* workplace discrimination charges in order to keep their jobs. The EEOC alleged that Allstate's actions deprived the agents of the right to participate in federally protected activities.

In ruling in the EEOC's favor, the Court stated: "It is illegal to either retaliate, or threaten to retaliate, against an employee to prevent him from exercising rights under the EEOC, Title VII, ADEA, ADA, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all been threatened with such an outcome if they exercised their right to refuse to sign the proposed release."

The EEOC's regional attorney described the decision as "monumental" and that '[i]t guarantees that employees cannot be coerced by the threatened termination of their employment into giving up their rights under the nation's employment discrimination laws. This decision is crucial to the continued effectiveness of those laws. It sends a strong message to other employers not to try a similar scheme."

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VALUABLE EVIDENCE FOR AFFIRMATIVE DEFENSE TO EMPLOYER LIABILITY FOR HARASSMENT

In 1998, in two landmark cases, the United States Supreme Court set out an affirmative defense available to employers under certain circumstances in cases where an employee has proven unlawful harassment by his/her supervisor. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998). To prove the defense, the employer must show: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the employee unreasonably failed to take advantage of the preventive and corrective opportunities provided by the company or to avoid harm otherwise. The evidence an employer can use to establish that it exercised reasonable care to prevent harassment includes evidence that it instituted and disseminated policies regarding discrimination and harassment to all of its employees, and that the employees were periodically trained on the policies. One way an employer can prove that an employee has reviewed and understands the policies is by showing an acknowledgment signed by the employee stating that he/she has read and understands the company's policies on discrimination and harassment. This evidence can be gathered and maintained by having a procedure whereby a new employee is given a copy of the discrimination and harassment policy and the policy is reviewed with the employee at orientation. Then the employee signs an acknowledgment that he/she has read and understands the policy, and the acknowledgment is placed in the employee's personnel file. Employees also should receive periodic training on the policies. An effective way to establish that employees have received this training is to keep a record of employees' attendance at the training and to place the record in each employee's personnel file.

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