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Weekly Employment Brief

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Employer Properly Disciplined "Whistleblower" For Poor Performance

In one of the first cases addressing the federal Sarbanes-Oxley Act's provisions protecting employee "whistleblowers," a federal Department of Labor administrative law judge dismissed an employee's complaint in *Halloum v. Intel Corporation*. Complainant Halloum alleged that Intel "set him up to fail" and forced him to resign after he complained to the federal Securities and Exchange Commission ("SEC") and Intel's CEO about allegedly fraudulent accounting practices. However, Intel demonstrated that the timeline of events did not support Halloum's retaliation claim. Specifically, *before* Halloum voiced a complaint, management placed him on a written corrective action plan ("CAP"). Upon receiving the CAP, Halloum went on a medical disability leave of absence. During his leave, Halloum complained to the SEC and Intel's CEO. (Intel investigated and concluded the Company's accounting practices were lawful.) As a condition of his return from leave, Halloum insisted that Intel remove the CAP. Halloum also divulged that he had surreptitiously tape-recorded conversations with Intel managers. Intel refused to remove the CAP but offered to modify the plan. Halloum asserted the modified plan was a "setup for failure," and resigned. He then filed suit. Dismissing the complaint, the judge ruled that Intel established legitimate business reasons for its actions. Further, the judge opined that even if the modified plan set "unobtainable" goals as Halloum alleged, Intel could have terminated Halloum outright for poor performance and violation of Intel's policy prohibiting surreptitious tape-recording of conversations. Accordingly, the modified CAP did not support Halloum's whistleblower-retaliation claim. This case exhibits the importance of carefully documenting the date (as well as the substance) of employment actions to rebut "whistleblower" complaints raised after the imposition of disciplinary action.

After Eight Years Of Paid Disability Leave, Employee Sues For Disability Discrimination (And Wins, In Part)

In *Sutton v. Potter*, Sutton worked for the U.S. Postal Service in a dusty mail-handling warehouse. In 1991, she developed a hypersensitivity to dust. Thereafter, in 1992, she commenced a paid disability leave of absence. For many years, "neither Sutton nor USPS demonstrated any practical interest in getting Sutton back to work." In 1998, the Postal Service offered to install a "clean air machine" as an accommodation. Sutton rejected the offer because the machine the Postal Service purchased for Sutton was rated to handle up to 15,000 cubic feet but was to be installed in an open work area that totaled almost 170,000 cubic feet. Years later, in July 2000, the Postal Service ceased paying Sutton disability benefits. However, it allowed her to continue on unpaid disability leave. In November 2001, the Postal Service terminated Sutton's employment. Sutton sued for disability discrimination under the Rehabilitation Act of 1973. The federal district court judge in Illinois concluded that between July 2000 until May 2001 (when Sutton admitted she became totally disabled), Sutton was a "qualified individual" able to perform the essential functions of the job with reasonable accommodation. Accordingly, in July 2000, the Postal Service was obligated (and failed) to engage in an "interactive process" designed to identify accommodations that might enable Sutton to continue working. The court awarded Sutton her lost disability benefits from July 2000 through May 2001. The judge also expressed outrage at the Postal Service's waste of taxpayer dollars in this case, opining that: "First, it appears that the Postal Service slept through nearly eight years of Sutton collecting disability at government expense; second, once awakened from its slumber, the Postal Service's sole action was so woefully inadequate as to suggest a total lack of effort on its part to comply with . . . the Act. " This case illustrates the importance of closely

monitoring employee disability leaves of absence and engaging in a thorough interactive process to identify reasonable accommodations that may enable the employee to return to work. Only then may the employer take appropriate action to include dismissing an employee who remains unable to perform the essential functions, even with a reasonable accommodation.

Petty Refusal To Provide Work Chairs Turns Into Federal Age Discrimination Lawsuit

The state of Iowa receives the WEB Update's 2004 First Quarter "What Were They Thinking" Award for cases with bizarre facts. In the most recent example, *Ryan v. O'Halloran International, Inc.*, the federal district court judge ruled that plaintiffs, three older workers (collectively "Ryan"), stated sufficient facts to prevent dismissal of their age discrimination claim. Ryan alleged that O'Halloran removed the work station chair that he used for years. The employer required him to work standing all day while, at the same time, allowing younger workers to sit while performing their job duties. Ryan furnished a doctor's note supporting his request for a work chair. The employer provided a high stool with minimum padding and no leg, back or arm supports. Ryan complained that the stool caused him pain and exacerbated his physical infirmities. The employer refused to return Ryan's former work chair. Unsatisfied, Ryan retrieved his original work station chair from storage. The employer again removed Ryan's chair, this time giving it to a younger worker. The company provided Ryan with a new stool with more seat padding, but still lacking leg, back or arm supports. Ryan filed suit. The court explained that to state a claim of age discrimination, a plaintiff must establish that he suffered an "adverse employment action," *i.e.*, a "tangible change in duties or working conditions that constitute a material disadvantage." However, "minor or trivial acts that make an employee unhappy do not constitute materially adverse employment actions" (for example, a demotion with no change in pay or benefits). The court ruled that Ryan satisfied this legal requirement by alleging the employer caused him "unnecessary physical pain and suffering" by taking away his chair and making him stand all day. The decision addressed only the sufficiency of Ryan's complaint, and did not discuss the employer's defense to this seemingly petty sequence of events. Assuming the employer had legitimate business reasons for taking away Ryan's chair, the company perhaps could have avoided suit by treating all similarly-situated workers the same, rather than giving Ryan's chair to a younger worker.

Office Of Federal Contract Compliance Programs Issues Proposed Definition of "Internet Applicant"

Following the federal Equal Employment Opportunity Commission's issuance of its definition of "Applicant" (see March 18, 2004 WEB Update), on March 29, the Office of Federal Contract Compliance Programs ("OFCCP") issued its proposed regulation defining "internet applicant" as any individual who: (1) submits an "expression of interest" in employment through the internet or other electronics means, (2) the employer considers the individual for employment in a particular open position, (3) the individual's expression of interest indicates the individual possesses the "advertised, basic qualifications" for the position, and (4) the individual does not subsequently indicate that he is no longer interested in employment. The OFCCP enforces federal affirmative action laws covering federal contractors and subcontractors (collectively "contractors"). Covered contractors must identify and review applicant information for affirmative action and record keeping purposes. The proposed regulation is favorable to contractors by clarifying two issues that have vexed the employer community. First, the individual is not an "internet applicant" if the employer does not consider him or her for employment in a "particular open position." Second, the individual is not an applicant (so as to trigger affirmative action obligations) if s/he does not possess the "advertised, basic qualifications" for the position. In the past, the OFCCP has on occasion required contractors to treat an individual as an applicant even in the absence of any particular open position or where the individual did not

have basic, minimum qualifications to perform the job. The public comment period extends through May 28, 2004. We are hopeful that the regulation will become final soon thereafter.