

PREDICTING KATRINA'S IMPACT ON MINNESOTA EMPLOYERS



With the long process of rebuilding the coastal cities yet to begin, many of Katrina's evacuees may not return to their homes for quite some time, if ever. Those who have gone to live with family members in other states, or who accepted evacuation elsewhere may look to settle where they are, and that could be right here in Minnesota. What

issues will Minnesota employers face when they consider hiring Katrina's victims who wish to rebuild their lives here?

Employment Verification

The Department of Homeland Security (DHS) has recognized that many evacuees are unlikely to be able to produce sufficient verification of their ability to work in the United States. DHS therefore has announced that they will not sanction employers who, within a 45 day period, hire the victims of Katrina who are unable to provide appropriate documentation. Nevertheless, employers must still try to complete the I-9 verification form as much as possible, and a note should be placed on the form that the remaining information is not available because of the hurricane. DHS has not yet stated whether this moratorium on sanctions will be extended after the initial 45-day period, which expires in late October.

Employee Benefits

Many of these new employees probably participated in medical insurance plans, 401(k)'s and other benefit programs. They may have difficulty proving their coverage under prior medical plans, or the lack of a pre-existing condition. They may need some help in getting the information necessary to roll over their 401(k)'s. You will want to consult your experts in dealing with these unusual but pressing issues.

Aid for New Employees

Many employers in Minnesota and around the country will find that once they hire evacuees, their existing work forces will want to help their new co-workers, and will ask that the employers do the same.

When faced with requests to set up or sponsor some sort of effort on behalf of the new employees, employers must be sure that they understand and accept the full effect of such generosity.

Donated vacation and sick leave days, employee loans and paycheck advances all may have tax consequences for both the donor and the donee. Be sure to advise everyone involved that they need to find out how they will be affected, and don't forget to explore and plan for the obligations such programs impose on the employer.

Work on employer-sponsored fund raisers or other relief activities during working time could raise issues relating to whether the hours count under wage & hour regulations, or whether workers compensation laws might apply if an employee is injured during these events.

Katrina victims may have difficulties adjusting to their new lives and new surroundings. Make sure that you publicize your employee assistance plan effectively, if you have one, or identify local resources available to stressed out employees. Consider organizing transportation assistance plans, mentoring relationships and other similar programs to help your new employees feel at home as quickly as possible. Such efforts may reduce the risk of violence, drug use or other dangerous

SEXUAL CONDUCT WITH ONE EMPLOYEE MAY RESULT IN CLAIMS FOR CO-WORKERS

A recent California Supreme Court decision has the whole country sitting up and taking notice. In *Miller, et al. v. Department of Corrections*, (Cal. Supreme Court July 18, 2005), the California court ruled that under certain circumstances, sexual favoritism for certain employees, when sufficiently widespread or severe, may create a viable hostile work environment claim for the remaining workers.

The Details

While working at the Central California Women's Correctional Facility, Edna Miller learned that Chief Deputy Warden Lewis Kuykendall was having concurrent, consensual sexual affairs with three subordinate female employees. Miller complained about this "inappropriate situation" to Kuykendall's supervisor, who informed her that she had already addressed the matter.

A year later, Miller was transferred to the Valley State Prison for Women (VSPW), where Kuykendall now served as the warden. From this vantage point, Miller observed that one by one, each of the three women involved with Kuykendall at the previous facility was transferred to VSPW as well.

The warden's continuing affairs with these women, and the favorable treatment they received at work, was readily apparent to the VSPW staff. All three obtained promotions that appeared to have been based on sexual favors rather than on merit, especially in two cases where Miller's higher rank, superior education and greater experience were overlooked. Moreover, two of the women bragged about their power to extort benefits from the warden - one even boasted that if Kuykendall denied her a promotion, she would "take him down" because she "knew every scar on his body." Kuykendall and at least one of the women were often seen fondling each other at company events, and staff members witnessed squabbling among the women over Kuykendall's affections.

The Complaints

Miller complained about Kuykendall's favoritism, and was joined by her assistant, Francis Mackey. After the complaints, both Miller and Mackey suffered excessive criticism of their work, reduced authority, increased workloads and threats of reprisal. One of the women

having an affair with Kuykendall physically assaulted Miller and held her captive in her office for two hours.

Kuykendall claimed that he was powerless to control the women because of his affairs with them, professing that he was "finished" with one of them because of her "untrustworthiness." He then told Miller that he should have "chosen" her, which Miller understood to mean that he should have pursued her for a sexual relationship.

Eventually, both Miller and Mackey resigned and, among other claims, sued the Corrections Department for sexual harassment. The trial court dismissed the case, a decision that was affirmed by the California Court of Appeals, who concluded:

"A supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, nonfavored employees."

Although the Court of Appeals recognized that widespread sexual favoritism could support a claim for sexual harassment if the accompanying conduct were sufficiently pervasive or severe, it stressed that the plaintiffs were unable to make an appropriate showing in that respect given the absence of any evidence that they were sexually propositioned or that the sexual affairs were nonconsensual.

New Ground is Broken

The California Supreme Court reversed this decision, concluding:

[A]lthough an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment...

"When such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment"



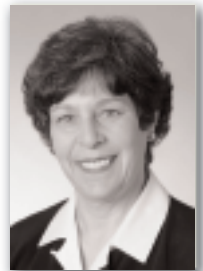
The Court relied upon a 1990 Equal Employment Opportunity Commission policy statement condemning managers who view female employees as “sexual playthings” and who “engage in widespread sexual favoritism [which] may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment.” The judges felt that such a message, even in the absence of coercive sexual conduct, can support an actionable sexual harassment claim. Consequently, they ruled that the evidence in the case justified a full trial on whether the warden’s behavior could be considered “sexual favoritism widespread enough to constitute a hostile work environment.”

An Omen?

This case was decided under California law but it could signal a trend that will spread to other states. If Minnesota adopts the reasoning of the California courts, we can expect a dramatic increase in litigation from employees who feel disadvantaged by affairs

between supervisors and co-workers. Therefore, this may be a good time to consider how far you wish to go in discouraging or even prohibiting such relationships, and to revise your sexual harassment policy to reflect your intentions in this area.

Nevertheless, the Court of Appeals recognized that in the future, widespread sexual favoritism could support a claim for sexual harassment if the accompanying conduct were sufficiently pervasive or severe. In this case, however, they stressed that the plaintiffs were unable to make an appropriate showing in that respect given the absence of any evidence that they were sexually propositioned or that the sexual affairs were nonconsensual.



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Penelope J. Phillips & Karen G. Schanfield

These Felhaber attorneys were nominated to the Top 100 Female Super Lawyers™ list, featured in *Minnesota Law & Politics*. Ballots were mailed to every Minnesota attorney licensed to practice law for at least five years. Ms. Phillips and Ms. Schanfield were nominated by their peers as among the best lawyers they have personally observed in action as opposing counsel or co-counsel, or through other first-hand observation.



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NEW LAW GIVES MINNESOTA EMPLOYEES TIME OFF TO GET RESTRAINING ORDERS

A new amendment to state criminal laws now requires Minnesota employers to give "reasonable" time off to employees who need it to obtain domestic restraining orders, harassment restraining orders, or attend criminal court proceedings in which the employee, his or her spouse, or next of kin was a victim of a "heinous crime" such as murder, rape, and similar crimes of physical violence. The employee is expected to give 48 hours' notice of the need for the leave except in exigent circumstances, and the employer may request written verification of the need to be in court. Employers are required to keep all information related to the leave confidential.

There does not appear to be a limit on the size or type of employer to whom these three amendments apply. The amendments became effective on August 1, 2005 and also prohibit virtually all types of adverse action, as well as threats of such action, against employees who take this leave. An employer who violates these provisions is guilty of a misdemeanor and may be punished for contempt of court, as well as face a civil action in which a variety of remedies are available to the employee, including attorneys' fees.

The biggest danger to employers lies in the confidentiality issue. Hopefully, your employees will not need this type of leave very often but when they do, the facts of the matter will probably generate some gossip around the office or plant.

Your managers and supervisors must resist all temptation to discuss the leave and/or the reasons for it with anyone else, regardless of how caring or sympathetic they wish to appear. It would be a good idea to provide them with some training on this issue to alert them to the criminal and civil penalties they and you could face if confidentiality is not observed.

One question leaping out at us is whether this new law applies to situations where the employee

Our long-time partner and very good friend Ed Bohrer is retiring from private practice. Ed has practiced management labor law for 45 years and has been recognized as one of the premier labor contract negotiators in the upper Midwest. He will be remembered for his outstanding work on behalf of the printing, dairy, and health care industries, as well as a wide variety of other business and industrial groups.



Ed has been a terrific teacher, mentor and friend to the younger lawyers in the firm. He also has been a great role model for his professionalism in the office and his active involvement in community and religious affairs.

Ed may be leaving law practice, but he will be anything but retired. In fact, he already has embarked upon his new career as an Interim Parish Life Administrator for the Catholic Archdiocese of St. Paul and Minneapolis.

We'll miss Ed and we wish him the very best in this new direction.

wants time off to get a restraining order against a co-worker or supervisor. Technically, this would seem to fall within the language of the statute, which then might encourage more employees to pursue such matters. On the other hand, maybe we can point to the "reasonable time" provision and say that no amount of time off is reasonable if it is being asked for the purpose of taking a form of legal action against the employer.

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BREWING FIGHT OVER FMLA WAIVER RIGHTS?

Two directly conflicting decisions from different appeals courts have set the stage for a possible U.S. Supreme Court showdown over the validity of releases of claims under the Family and Medical Leave Act (FMLA).

Tastes Great

In *Faris v. Williams WPC-1, Inc.*, a 2003 case from the Fifth Circuit Court of Appeals, (which covers Texas, Louisiana and Mississippi), the employee was terminated for poor performance and was given one month's severance pay in return for a release of all claims. The employee signed the agreement, cashed the payment and later sued the employer claiming that she was fired in retaliation for exercising her right to take an intermittent leave under FMLA.

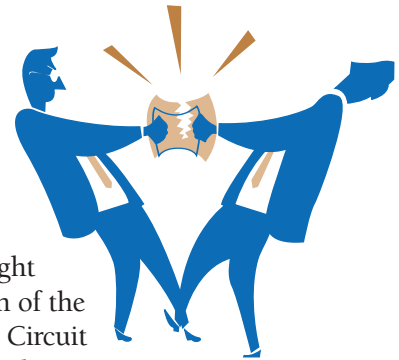
The trial judge allowed the suit to proceed, based on an FMLA regulation providing that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." The Fifth Circuit reversed that ruling and dismissed the case, finding that the regulation was intended to apply only to current employees, not someone who had been terminated by the company. In addition, they ruled that the regulation only banned a waiver of an employee's substantive right to take a leave authorized by FMLA. In other words, an employee could not be asked to waive their right to take an FMLA leave in the future (in return for an offer of employment or a wage increase for example) but they certainly could bargain away a lawsuit over a claimed violation of the law in return for payment of a sum of money.

Less Filling

Interestingly, in July, 2005, the Fourth Circuit Court of Appeals (covering the mid-Atlantic states) decided just the opposite in a very similar case entitled *Taylor v. Progress Energy, Inc.* There, a laid off employee was required to sign a release of all claims (which both parties understood to include FMLA claims) in order to receive severance. The employee signed the release, took the money and then sued the company a full two years later for various FMLA-related claims.

The trial court followed the reasoning of the *Faris* decision and dismissed the case on the grounds that the waiver was valid since she was not waiving present or future rights to take a leave, merely her right to sue over a past violation of the law. However, the Fourth Circuit disagreed, concluding that the FMLA regulation above prohibits both waivers of future leaves and releases of past violations, unless they are approved by the Department of Labor or a court of law. In large part, the Fourth Circuit judges were persuaded by the fact that the Department of Labor, which issued the FMLA regulations, has specifically stated their intent that FMLA's enforcement scheme be the same as that of the Fair Labor Standards Act (FLSA). Since the FLSA enforcement provisions also contain a ban on waivers of claims, and since that provision has been ruled to prohibit waivers of all sorts, the Appeals Court felt that an identical interpretation was required for FMLA waivers.

Looking to the other Circuit Courts will not help untangle this mess. The Sixth and Ninth Circuits have upheld private releases of FMLA claims but have not explained their reasoning. The remaining Circuit Courts, including the Eighth Circuit (covering Minnesota, Iowa, the Dakotas, Nebraska, Missouri and Arkansas) and the Seventh Circuit (Wisconsin, Illinois and Indiana) have yet to chime in on the matter. As a result, employers in the Midwest should proceed somewhat cautiously. Since our federal courts have not yet ruled on the validity of settlements of FMLA claims, you should continue to include those matters in your separation and severance agreements. However, until such a ruling is issued, either in our jurisdictions or by the U.S. Supreme Court in an attempt to resolve this difference in the lower courts, there will still be a little nagging doubt as to whether such settlements will hold up.



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behavior by new employees whose coping skills may already have been pushed to the limit.

A little planning and a dose of generosity can help a lot of people get a fresh start, and that will benefit Minnesota employers, too.



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Labor & Employment Report

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