

HUMAN RESOURCE CONNECTION MONTHLY NEWSLETTER

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Steven E. Gall
President
Bio

Gall & Gall Company, Inc. was founded in 1987, with corporate offices in Dayton, Ohio. We presently partner with customers in 19 foreign countries and all 50 states in the United States.

Gall & Gall was founded by **Beverly Gall**, Ohio's first female Police Chief and the third female Police Chief in the nation and **Steven Gall** a former Police Officer with over 27 years in Human Resources.

Together, their background is varied and extensive in information gathering and Human Resources.

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GREETINGS

Welcome to the all New...

Human Resource Connection Monthly Newsletter

Our aim is to reduce your HR headaches by providing the information and tools you need to make life easier! We will provide you with up to date Human Resource Information that will help you in your day to day operations.

If there is information that you are interested in seeing in this newsletter, please let us know by email at sgall@gallgall.com.

If you have a HR question email us and we can do a blind post (you will not be identified) in the newsletter and others can answer by email and we will do a blind post to you answer in the next months Newsletter.

Thank You, Steven E. Gall

QUICK LINKS

(CLICK ON ANY LINK BELOW TO VISIT THE SITE)

Below is a list of websites you may find useful:

SHRM (WWW.SHRM.ORG)

OHIOSHRM (WWW.OHIOSHRM.ORG)

MVHRA (WWW.MVHRA.ORG)

Congress Passes the ADA Amendments Act

Congress has lowered the standard for plaintiffs and employees to claim they are disabled under the Americans with Disabilities Act (“ADA”). Both houses have now approved the ADA Amendments Act. Assuming President Bush signs it, as he is expected to do, the Act is scheduled to go into effect January 1, 2009.

The stated purpose of the Act is to greatly expand the number of individuals covered by the ADA. The result is that employees with back problems, lifting restrictions, conditions corrected by medication (diabetes, epilepsy) and a host of other impairments may now be protected by the ADA. Employers will have a duty to accommodate these “disabilities” and will likely see increased litigation under the ADA.

Over the years, numerous ADA lawsuits have been dismissed because the plaintiff employee was not substantially limited in a major life activity (and, therefore, not disabled) as those terms had been defined by the courts. The Supreme Court in particular has handed down a number of victories for employers, limiting the scope of disability under the ADA.

The ADA Amendments Act reverses a number of these employer victories.

The Changes Made By The ADA Amendments Act

Although an impairment must still substantially limit a major life activity to qualify as a disability, Congress intends that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Some of the significant changes under the new law include:

- The Act expands the definition of “major life activities.” Major life activities had been limited to those activities that are of central importance to daily life. The Act now defines major life activities to specifically include such things as standing, lifting, bending, reading and concentrating, along with performing manual tasks, thinking, working, caring for oneself, seeing, hearing, eating, sleeping, walking, speaking, breathing, learning, and communicating.
- The Act also defines major life activities to include the operation of any major bodily function, including the immune system, normal cell growth, digestive, bowel,

bladder, neurological brain, respiratory, circulatory, endocrine and reproductive functions.

- Under the Act, an individual may now be disabled even if the effects of the individual’s impairment are corrected by mitigating measures such as medication, prosthetics, hearing aids, medical equipment, learned behavioral or adaptive neurological modifications, assistive technology, or accommodations. The Act requires that the analysis of whether an impairment substantially limits a major life activity should be made without regard to such mitigating measures. In other words, an individual will be considered disabled if the individual is substantially limited in a major life activity in his unmedicated state even though the limitations may be corrected by medication.
- An individual may also now be disabled even if the individual’s impairment or condition does not currently substantially limit a major life activity. Under the Act, an impairment that is episodic or in remission will be considered a disability if, when active, it would substantially limit a major life activity.
- The Act also expands the number of individuals who can claim they are regarded as disabled. Under the Act, individuals may be regarded as disabled if they are discriminated against because of an actual or perceived physical or mental impairment regardless of whether the impairment limits or is perceived to limit a major life activity (so long as the impairment is not transitory -- lasting less than 6 months -- or “minor”). Although the amendments make clear that an employer is not required to provide reasonable accommodation for an individual who is only “regarded as” disabled, the revised definition opens the door for employees who have impairments that do not amount to disabilities to claim discrimination.
- Finally, although the Act provides that the need for normal eyeglasses does not make one disabled, the Act prohibits employers from using selection criteria or employment tests based on an employee’s uncorrected vision unless the test is job related for the particular position and consistent with business necessity.

What Should Employers Do?

Employers will need to re evaluate the manner in which they determine whether an employee qualifies for an accommodation or other protections under the ADA. Em-

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employees who may not have been disabled under the prior law may now have protections afforded by the ADA.

Under the ADA, employers have a duty to reasonably accommodate their employee's disabilities. Reasonable accommodation can include modifying work schedules and modifying job duties. The ADA does not require employers to remove essential functions of a job in order to accommodate an employee with a disability. Under the amendments, disability discrimination claims will now likely hinge on whether a particular duty is an essential function and whether the employer has offered a reasonable accommodation, instead of whether an individual is disabled. Before these issues are raised, employers should update their job descriptions to ensure that the essential functions of each of their positions are accurately described.

Taft's Labor & Employment attorneys are available to assist employers with proactive solutions to this change in disability discrimination law. They will be discussing this new law at upcoming seminars, including their Annual Labor & Employment Law Update in Cincinnati on December 4, 2008

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EEOC Releases Updated Guidance on Religious Discrimination

On July 22, 2008, the Equal Employment Opportunity Commission (EEOC) adopted a new compliance manual section on religious discrimination in response to the fact that religious discrimination claims have increased by 100% between 1992 to 2007. The comprehensive 94-page document, which took the EEOC six years to draft, replaces Section 628 of the agency's compliance manual, titled Religious Accommodation, along with several appendices. According to a spokesperson for the agency, the newly released document does not change existing EEOC policies or regulations pertaining to religious discrimination but is intended to update and consolidate the EEOC's statement of position regarding religious discrimination and accommodation issues, which had previously been scattered among a handful of different agency policies.

The new section, titled Religious Discrimination, is considerably more expansive than the section it replaces. Aside from addressing the various issues that arise with respect to religious accommodation requests, the new section also discusses employment decisions (hiring, discipline, compensation and other conditions of employment), harassment, and even related forms of discrimination (national origin, race, and retaliation). Along with the new section, the EEOC has released an eight-page fact sheet, titled Questions and Answers: Religious Dis-

crimination in the Workplace, and a four-page booklet, titled Best Practices for Eradicating Religious Discrimination in the Workplace.

The fact sheet tracks the contents of the new section, in effect reducing the 94 pages to a readable eight pages, while the text of the best practices booklet is drawn verbatim from the new section. Employers and their supervisors should review these documents and keep them on hand in order to understand the EEOC's position with respect to certain accommodation issues. Both of these documents are available on the EEOC's website at http://www.eeoc.gov/policy/docs/qanda_religion.html (fact sheet) and http://www.eeoc.gov/policy/docs/best_practices_religion.html (best practices booklet).

For those who handle religious accommodation requests and other matters concerning religious discrimination (attorneys, human resource managers, etc.), the EEOC's new section offers the EEOC's interpretation regarding current religious discrimination and accommodation law. It includes an exhaustive compilation of current case law, as well as numerous fact patterns, which the EEOC created to illustrate the principles it emphasizes in the guidance. Many of these examples are based on fact patterns from actual cases that plaintiffs have filed in federal court. The new section also points out those instances in which the EEOC's position on religious discrimination or accommodation differs from court precedent or

where the EEOC has taken a position on an issue but the courts have not yet done so.

Although in terms of actual numbers religious discrimination cases only represent a fraction of the number of EEOC claims filed each year — in FY 2007, there were 2,880 religious discrimination claims filed (3.5%) compared to 30,510 (37%) race and 24,826 (30%) sex claims — the trend of increasing religious discrimination claims is likely to continue in the short term due to a confluence of factors. While an EEOC spokesperson attributed the increase in religious discrimination claims to the rise in religious diversity in the workplace, other factors that have contributed to the increased number include the backlash experienced by employees perceived to be Muslim or non-Christian following the events of September 11 and, more recently, the increasingly heated debate surrounding immigration policies and whether illegal immigrants are taking jobs from U.S. citizens and/or depressing wages in those industries historically believed to rely on illegal aliens to fill their jobs. In 2007, foreign-born workers (defined as having been born in another country to parents who were not U.S. citizens) made up 15.7% of the civilian labor force, up nearly 5% from 1996. It should come as no surprise that the number of national origin claims also has been on the rise. In FY 2007, there were 9,396 (11.4%) national origin claims filed with the EEOC. Often plaintiffs file religious and national origin discrimination claims simultaneously.

The new compliance guidance also highlights the difficulties employers face (i) trying to balance the interests of employees who wish to proselytize in the workplace against those employees and customers who may feel harassed by such conduct, (ii) managing employees who believe that certain aspects of their job run afoul of their religious beliefs and want to be relieved of such duties (e.g., pharmacists who do not want to dispense the “morning after” pill or contraceptives), or (iii) managing employees whose religions require that they dress a certain way or wear facial hair (e.g., a beard) contrary to the employer’s grooming or dress code policies.

The EEOC provides the following list of its “employer best practices”:

- If confronted with customer bias (i.e., an adverse re-

action to being served by someone in religious garb), the employer should consider taking the opportunity to educate the customer regarding any misperceptions he or she may have;

- Allow religious expression among employees to the same extent as other types of personal expression, provided that such expression is neither harassing nor disruptive;
- Employers should promptly intervene when they become aware of conduct that is objectively abusive or insulting, even in the absence of a formal complaint;
- Supervisors and managers should be trained to recognize when employees are seeking a religious accommodation and consider developing internal procedures for processing such requests;
- Respond promptly to an employee’s reasonable accommodation request; in the event an accommodation cannot be promptly administered, consider providing a temporary accommodation and keep the employee apprised of implementing a permanent accommodation;
- Employers should not automatically reject an accommodation request because it will interfere with an existing seniority system or collective bargaining agreement (CBA), since they can seek a voluntary modification to the CBA;
- Employers should work with employees seeking an adjustment in their work schedules to accommodate religious practices and adopt policies that enable employees to voluntarily swap shifts by providing a central file, bulletin board or other means to help an employee find a volunteer to substitute or swap shifts;
- Employers should make efforts to accommodate an employee’s need to wear religious garb and should train managers and employees not to engage in stereotyping based on religious dress and grooming practices;
- Employers should be sensitive to the risk of unintentionally pressuring or coercing an employee to attend

“The new section, titled Religious Discrimination, is considerably more expansive than the section it replaces.”

social gatherings after an employee requests that he or she not be required to attend for religious reasons; and

- Employers should have an anti-harassment policy that covers religious harassment and any anti-harassment workplace training should include a discussion of religious expression and the need for employees to be sensitive to the beliefs and non-beliefs of others.

While many of these suggestions seem practical and reasonable in most situations, each request for religious accommodation arises under unique circumstances, and employers should keep in mind that there is no patented response that works in every situation.

In recent years, members of Congress have repeatedly sought to amend Title VII in order to expand religious protections in the workplace, particularly as it relates to an employer's obligation to reasonably accommodate an employee's religious beliefs or practices. The bill that Congress is currently considering, called the Workplace Religious Freedom Act of 2008 (H.R. 1431), would make it much more difficult for an employer to show that it would suffer an "undue hardship" if required to accommodate an employee's religious beliefs or practices. Members of Congress have introduced various versions of this bill since 1996. Currently, in order to avoid making a religious accommodation, an employer need only show that the requested accommodation would create more than a de minimis cost to the employer. Courts have historically applied this de minimis rule in a manner that has been favorable to employers since the U.S. Supreme Court first defined undue hardship in the religious accommodation context in its ruling entitled *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). We will keep you apprised of the Workplace Religious Freedom Act's status in our future Management Alerts.

For more information on this subject, please contact the Seyfarth Shaw attorney with whom you work, or any Labor and Employment attorney on our website (www.seyfarth.com/LaborEmployment).

Men filing more claims for sexual harassment

Despite a drop in sexual harassment claims filed during the past 10 years, the number of men filing claims has increased nearly 5 percent since 1997.

Men accounted for 16 percent, or 2,001, of the sexual harassment claims filed in 2007, up from 11.6 percent, or 1,843, of the claims filed in 1997, according to the U.S. Equal Employment Opportunity Commission.

The total benefits paid each year from sexual harassment claims has remained nearly unchanged, with \$49.9 million being paid in 2007 compared with \$49.5 million paid in 1997.

Most cases — 5,273, or 45.5 percent — were dismissed in 2007 after the EEOC determined no reasonable cause

to believe discrimination occurred.

State has 1.5 percent of nation's law teachers

The 138 law professors at Louisiana's four law schools represented nearly 1.5 percent of the nation's 9,532 legal educators population for 2007-08, according to the Association of American Law Schools.

Tulane University Law School leads the pack with 67 faculty, representing 0.7 percent of the national total. Louisiana State University Paul M. Hebert Law Center had 38, or 0.4 percent; Loyola University School of Law had 21, or 0.2 percent; and Southern University Law Center had 12, or 0.1 percent.

Harvard Law School in Cambridge, Mass., had the most law professors with 1,179, representing 12.4 percent of the national figure.

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Congress has first report with new bankruptcy laws

Consumers seeking bankruptcy protection reported holding total assets of more than \$108 billion and total liabilities of more than \$139 billion between Oct. 17, 2006, and December 2007, according to the first report containing new bankruptcy statistics mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Of the 798,370 cases filed in 2007, property, such as land and homes, accounted for 77 percent of the reported assets, and personal property made up the remaining 23 percent. Of debts owed, 64 percent were categorized as secured claims such as homes and cars, 2 percent as unsecured priority claims and 34 percent as unsecured non-priority claims.

In Chapter 13 cases, debtors filing consumer cases reported total assets of \$55.5 billion and total liabilities of \$54.7 billion. About 13 percent of the cases terminated in 2007 were filed under Chapter 13.

Meanwhile, 86 percent of cases terminated were filed under Chapter 7, where debtors reported total assets of more than \$51 billion and total liabilities of \$83.1 billion.

The average time from filing to disposition was 124 days in Chapter 7 cases and 155 days in chapter 13 cases.

Employee with 'Expunged' Criminal Past Sues for Discrimination

A New Jersey man did not reveal an old and expunged criminal charge when he applied for a job with a Sheriff's Office. When he sued for employment discrimination, his employer claimed that his lawsuit was barred because he failed to disclose his old crime when he applied. The case made its way before the New Jersey Supreme Court.

What happened. In 1974, when he was 21 years old, "John" was arrested for breaking and entering, and pleaded guilty. In 1990, the court expunged the arrest and conviction from his record. John's attorney explained that this meant the conviction had effectively never happened and that he would not be required to disclose it if anyone asked.

In 1994, John applied to become a Morris County Sheriff's Officer. He indicated on the application that he had never been arrested or convicted of a criminal offense. He was hired and began working as an officer.

In 1996, during a blood drive sponsored by the Sheriff's Office, John and his co-workers discovered that he had hepatitis C. He claimed that his co-workers began to harass him, refusing to shake his hand or eat with him, sanitizing everything he touched, and calling him "hepatitis boy." John filed a report with his

supervisors but claimed that they did nothing to alleviate the situation. On November 14, 2000, John signed out early and never returned to work. He submitted a formal letter of resignation on February 25, 2002.

John sued the Sheriff's Office under the New Jersey Law Against Discrimination (NJ Rev. Stat. Secs.10:5-1 to -49). He complained that the Sheriff's Office had discriminated against him for his medical condition and that it had allowed a hostile work environment to exist. The Sheriff's Office countered that John's 1974 arrest and conviction barred him from employment in the Sheriff's Office, and that he could not sue because he had never disclosed that arrest and conviction.

The trial court concluded that John was obligated to reveal his prior conviction when he applied for his job, and that because he was thus ineligible for the job, he could not bring an employment lawsuit against the Sheriff's Office. John appealed. The court of appeals reversed the trial court's decision and sent the case back for trial. The Sheriff's Office appealed to the state Supreme Court.

"He claimed that his co-workers began to harass him, refusing to shake his hand or eat with him, sanitizing everything he touched, and calling him 'hepatitis boy.'"

What the court said. The Sheriff's Office argued that John was barred from bringing an employment-related lawsuit against it because he had not disclosed his 1974 arrest and conviction when he applied to work. It claimed that the 1990 order expunging John's record did not apply in this

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case because the New Jersey expungement law makes an exception for people applying for law enforcement jobs, who are required to disclose prior arrests and convictions (NJ Rev. Stat. Sec. 2C:52-1 *et seq.*).

The New Jersey Supreme Court disagreed. The New Jersey expungement statute did not ban John from working in law enforcement, so even if he had revealed his prior crimes he would not have been disqualified from holding a job with the Sheriff's Office. The Sheriff's Office did not have a policy of refusing to hire anyone with a prior history of an expunged offense. Nothing in the record suggested that he would not have been hired had he revealed his conviction.

The Supreme Court suggested that the Sheriff's Office was trying to use evidence of John's misconduct in the workplace to eliminate his right to relief under anti-discrimination laws. John's case was similar to that of

someone who commits résumé fraud: John should have disclosed his prior convictions (even though he was following his attorney's advice), but his failure to do so was irrelevant to the discrimination case. The Court wrote, "Even if the Sheriff's Office would not have hired plaintiff in the first place ? plaintiff was entitled, during the period of time when he was employed, to be protected from discrimination and to serve in a workplace free from the hostility that he endured." It sent the case to trial. *Cicchetti v. Morris County Sheriff's Office*, Supreme Court of New Jersey, No. A-102 September Term 2006 (5/28/08).

Point to remember: Once an individual becomes an employee, he or she is entitled to all protections of employment. The fact that this employee made a mistake when applying for his job was irrelevant to his discrimination lawsuit.

Background checks: how far can bosses go?

A word of warning to employers about doing criminal background checks on their workers. It's an issue that's made headlines again recently. On 9NEWS 7 a.m. we asked Denver labor law attorney Kim Ryan how far bosses can go in looking into the histories of prospective employees.

Sex Offenders At Work

9NEWS recently reported that a man with two convictions for sexual assault on a child remained a team assistant for a youth football team for years after organizers learned of his criminal record.

A league organizer said she was not in a position to dismiss the assistant, asking "Doesn't he have rights?" Ryan says this raises a compelling question for employers, who must balance the duty to provide a safe workplace with the rights of those who work for them.

She says a felony conviction for sexual assault on a child can provide a valid reason to terminate a worker or volunteer, even if there is no report of violence yet. This is especially true when the job would put the convicted felon in close proximity with children.

Employer Negligence

In Colorado an employer may be held liable for negligent hiring for injuries caused by a worker if the employer should not have hired the person in light of his dangerous propensities. Ryan says the employer also can be sued for injuries caused by its negligent retention or supervision of a worker after the employer learns information that makes it foreseeable that an injury might occur.

One key question is whether there is an unreasonable risk of injury. Another is whether the employer "knew or should have known" that the worker posed a risk of violence.

Cases on the Rise

Ryan says these cases have touched Colorado and are on the rise nationally. In April, The Catholic Archdiocese of Denver settled a lawsuit for \$300,000 after a priest was accused of sexual assault of a teenager.

Last month, the Archdiocese announced a \$5.5 million



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settlement of 18 cases of sexual abuse by three priests against young children. In Los Angeles, the Mass Transit Authority settled a negligent hiring case for \$1.85 million. The lawsuit alleged that a public bus driver with a prior felony conviction sexually assaulted a 15-year old boy on the bus route, causing him serious injuries and post traumatic stress disorder.

Employer Considerations

Employers should evaluate these matters carefully. Some experts suggest that before firing a worker with a criminal record, managers should try to determine if the employee conviction involved conduct that would jeopardize the safety of others if it was repeated in the workplace.

For example, Ryan says it could be argued that an applicant with a child assault conviction might be hired as a welder for a construction company without raising the same

“Last month, the Archdiocese announced a \$5.5 million settlement of 18 cases of sexual abuse by three priests against young children.”

safety concerns as the applicant vying for a child care or coaching job. Employers hiring workers should consider using a detailed job description, employment application, background check, reference checks, and an interview.

Depending on the job, additional investigations may be appropriate including a criminal check, drug screening or credit report. Because the law limits the kinds of background checks that can be used, employers should

be sure to understand the rules before investigating their applicants and workers.

“But when they do learn of violent felony convictions against children, employers should not allow child assault felons to work in positions of trust with children,” says Ryan. “If something were to happen to a child because of a negligent hiring decision, a lawsuit would be the least of their problems.”

For more employment law information visit Kim Ryan’s blog at or e-mail her at kim@ryanfirm.com

What germs lurk inside your keyboard?

By Sean O’Driscoll
For The Associated Press

The average office has hundreds of times more bacteria than a toilet seat. The “enter” button on your office fax machine is probably a rank stew of vile bacteria. And here’s a controversial bit — women spread more germs in the workplace than men.

Those are some of the findings of America’s leading expert on work and home hygiene, Charles Gerba, a professor of microbiology at the University of Arizona. Before women take offense, the higher germ concentration is proof that women have a healthier diet than men. Women, Gerba found, tend to store apples, bananas and other biodegradable, healthful food at their desk while men go for less nutritious and therefore less germ-ridden junk food, such as gum or potato chips.

Over the past two years, Gerba and his team have seen an improvement in overall office hygiene as desk wipes and hand cleaners become more popular.

However, in these summer months, with air conditioning units and ventilation shafts serving as a good breed-

ing ground for bacteria, there are a number of points experts want you to be aware of before you high five a colleague at the office meeting:

FIRST, WASH

Washing you hands for 20 seconds under soap and running water is far better than a quick squirt of hand sanitizer at your desk, says Dean Cliver, a professor of food safety at the University of California.

While many hand sanitizers boast of anti-microbial properties, a scrub with ordinary soap is far better, Cliver said; Water penetrates much deeper, helping to remove food debris and other particles that hand sanitizer doesn’t reach.

PROTECT YOUR FACE

Office workers touch their hands to their faces an average of 18 times an hour, according to Elizabeth Scott, a professor at the Simmons Center for Hygiene and Health in Boston.

When we touch our faces, we bring all the collected gunk of our keyboard, desktop or BlackBerry right to their

respiratory and digestive system every three and a half minutes — bacteria and viruses couldn't ask for a better transportation system.

Scott recommends washing hands regularly and, yes, using hand sanitizer, especially after shaking hands with a colleague suspected of having a cold or another illness. "As soon as I see someone come into my office that I think is sick, I immediately grab the sanitizer. You can shake hands at business meetings and still protect yourself," she said.

Gerba, in contrast, politely declines a handshake if someone has a cold. "You could infect the whole office. Any reasonable person will understand that," he said.

BEWARE THY NEIGHBOR'S CUBICLE

Is your cubicle a pristine display cabinet while your neighbor's is a mounting pile of paper, uneaten food and sports socks? Those bacteria will multiply and crawl over that cubicle wall.

Gerba's research found that two adjacent offices at one company had the biggest yeast contamination of dozens of offices sampled. The contamination simply spread from one to the other.

"It might be of interest to take note of your neighbor's hygiene practices, so sharing of bacteria and yeast doesn't occur," he wrote in his report.

CLEAN OUT THAT KEYBOARD

Shake an average office keyboard and you are likely to find what Gerba calls "the bagel shower" — bits of bread particles and other food bits lodged between the keys.

Most office cleaning companies do not touch computers or keyboards because they don't want to risk causing any damage. Hygiene is left to the employee, and many don't bother.

Gerba recommends an alcohol-based sanitizer for cleaning the keyboard. Simply blowing compressed air over it is not going to remove bacteria clinging to the surface, he warned.

Perhaps the best combination is that used by Brendan



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Cahalan, a risk manager with Standard Motor Products in Long Island City in New York. He uses an alcohol-based cleaner on his computer as well as compressed air to clean out any debris between the keys.

DISPOSE OF UNWANTED FOOD

Don't let food accumulate in your desk drawer, where it will provide a breeding ground for bacteria. According to Gerba, women bring healthier food to their desktop, such as bananas and fruit, which provide a boon for nutrient-hungry bacteria.

Gerba recommends the rapid disposal of any unwanted food; hassled employees often forget about food lodged at the back of desk drawers.

"The office refrigerator is a total mess as well," he said. "People do not keep to the disposal rules, and the refrigerator is taking in food from many, many different households."

Scott comes to women's defense on the food issue — women often have cleaner desks than men, so they will not allow the bacteria to build, she said.

WORK LIKE A LAWYER

Gerba's study of offices in New York, San Francisco and Tucson, Ariz., found that teachers' offices had by far the highest levels of germs per square inch, nearly three times as much as bankers, the next most contaminated professionals. Lawyers had the least infection.

While lawyers have the advantage of having little contact with children, they are also good at sticking to a regimen, Gerba said.

One example is Colleen Kerwick, an aviation litigation attorney with the firm in Manhattan. She wraps up food remains and dumps them immediately. She was encouraged to do so after seeing a mouse's head peer out of a waste basket at a previous employer's office.

"I do not use hand sanitizers or antibiotics as I believe they weaken your immune system. However, I'm much more careful about office hygiene since my mouse sighting," she said.

THINK TWICE BEFORE USING THE FAX MACHINE

Gerba's research in dozens of offices has found that the "enter" and "send" buttons on fax machines carry some of the highest concentrations of harmful microbes. In contrast, lesser used keys have significantly less contamination. Other commonly used surfaces with high contamination levels include the "copy" button on the office copier, and the handles of rest room doors.

And before you ask to work from home, consider that Gerba's research has found much higher levels of contamination in home offices. Home workers are less likely to separate their private lives, he said.

"Children can be a major source of contamination and home workers are much more likely to do things they would never dare attempt in a corporate office, such as put their feet on the desk," Gerba said.

California Supreme Court Invalidates Non-Compete Agreement

In a unanimous decision, the state's highest court recently ruled that a noncompetition agreement entered into between an employer and one of its former employees is unenforceable under California law. In so doing, the California Supreme Court upheld a longstanding state law restricting employers from using such agreements to restrain employees' practice of their professions. *Edwards v. Arthur Andersen LLP*, No. S147190, California Supreme Court (August 7, 2008).

Factual Background

Raymond Edwards II, a certified public accountant, was hired as a Tax Manager by Arthur Andersen LLP in January 1997. As a condition of his employment, Edwards was required to sign a noncompetition agreement. The agreement stated, in part, "If you leave the Firm, for eighteen months after release or resignation, you agree

not to perform professional services of the type you provided for any client on which you worked during the eighteen months prior to release or resignation. This does not prohibit you from accepting employment with a client." The agreement further stated: "For twelve months after you leave the Firm, you agree not to solicit (to perform professional services of the type you provided) any client of the office(s) to which you were assigned during the eighteen months preceding release or resignation."

Arthur Andersen eventually went out of business and sold its practice to various entities. The firm's Los Angeles tax practice, including Edwards' group, was sold to HSBC. As a condition of the sale, Arthur Andersen required that all managers execute a "Termination of Non-Compete Agreement" in order to obtain employment with HSBC. The agreement required employees to: (1) voluntarily resign from Arthur Andersen; (2) release Arthur Andersen from "any and all" claims, including "claims

that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from" Arthur Andersen; (3) continue to indefinitely preserve confidential information and trade secrets except as otherwise required by a court or governmental agency; (4) refrain from disparaging Arthur Andersen or its related entities or partners; (5) cooperate with Arthur Andersen in connection with any investigation of, or litigation against, the Firm.

In exchange, Arthur Andersen would agree to accept Edwards' resignation, agree to Edwards' "employment by or affiliation with" HSBC, and release Edwards from the 1997 noncompetition agreement. Edwards signed and returned HSBC's written employment offer, but refused to sign the Termination of Non-Compete Agreement. As a result, Arthur Andersen terminated his employment, and HSBC withdrew its employment offer.

In April 2003, Edwards filed a lawsuit alleging intentional interference with prospective economic advantage and anticompetitive business practices in violation of the Cartwright Act. The trial judge dismissed the intentional interference claim, after finding that both the 1997 noncompetition agreement and the 2002 Termination of Non-Compete Agreement were valid. The trial judge also held that Edwards lacked standing to sue under the Cartwright Act. Edwards appealed this decision to the California Court of Appeal.

The California Court of Appeal disagreed, holding that the 1997 noncompetition agreement was invalid and against public policy. Likewise, the court concluded, requiring Edwards to execute the Termination of Non-Compete Agreement as consideration for release from the 1997 noncompetition agreement was also in violation of public policy and an independently wrongful act for purposes of Edwards' intentional interference with prospective economic advantage claim. The case was ultimately heard by the California Supreme Court.

Legal Analysis

Section 16600 of California's Business and Professions Code sets forth the general rule in California – covenants not to compete are void. There are several exceptions to this general rule, however. For example, Sections 16601 and 16602 "permit broad covenants not to compete in two narrow situations, i.e., where a person sells the goodwill of a business and where a partner agrees not to compete in anticipation of dissolution of a partnership."

Arthur Andersen asked the court to adopt another theory

for concluding that a noncompetition agreement is valid – the "narrow restraint" exception, which the trial judge relied on to uphold the 1997 agreement. This exception provides that a noncompetition agreement does not violate Section 16600 as long as the restriction imposed is limited and leaves a substantial portion of the market available to the employee.

Finding that California courts have not embraced the narrow restraint exception, the California Supreme Court declined to adopt this exception to Section 16600. According to the court, "California courts 'have been clear in their expression that Section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.'"

The "plain meaning" of Section 16600, the court noted, indicates that an emcourt rejected Arthur Andersen's effort to relax the statutory rule such that only contracts that totally prohibit an employee from engaging in his or her profession would be illegal. The court reasoned that by restricting Edwards from working for Arthur Andersen's Los Angeles clients, the 1997 noncompetition agreement restricted his ability to practice ployer may not "restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to that rule." The his profession and was therefore invalid.

However, the court rejected Edwards' argument that the Termination of Non-Compete Agreement violates Labor Code section 2804. According to the court, while the agreement released Arthur Andersen from "any and all claims," it did not expressly reference indemnity rights. Since the agreement did not implicate Edwards' nonwaivable right to indemnity, the court held that it was not unlawful.

Practical Impact

According to Marcus McDaniel, a shareholder in Ogletree Deakins' Los Angeles office: "This decision confirms that noncompetition agreements are invalid under California law except in the limited situations expressly permitted by statute. Requiring employees to sign unenforceable non-competes can lead to troubling consequences. Separately, the court's ruling reduces the concern that general releases will be unenforceable unless they expressly carve out nonwaivable statutory claims."

Indiana - Indiana Court Rejects Negligence Suit Brought By Murder Victims' Estate

A state appellate court recently ruled in favor of an employer whose employee left a job site in the middle of a shift, drove several miles away in his personal vehicle, broke into a home, and murdered two residents. According to the Indiana Court of Appeals, because the harm caused by the employee was not reasonably foreseeable, the employer was not responsible for negligently hiring and retaining him. *Clark v. Aris, Inc.*, No. 48A04-0801-CV-19, Indiana Court of Appeals (July 24, 2008).

Factual Background

In 2004, Frederick M. Baer applied for a job with Aris, Inc., an Indiana corporation that supplies traffic controllers to contractors. On his application, Baer admitted to having a burglary conviction and authorized Aris to perform a criminal background check, which Aris did not do. Approximately one month after hiring him, Aris assigned Baer to work on a Madison county job site where construction was being performed by N.G. Gilbert Corp. Baer left the job site without Aris' permission, drove his personal vehicle to the residence of Cory and Jenna Clark, entered the home, and murdered them. Baer was later found guilty of the Clarks' murders. John Clark, individually and as the personal representative of the Estate of Cory Clark, filed a lawsuit against Aris for negligent hiring and retention. The trial judge ruled in Aris' favor and Clark appealed this decision to the Indiana Court of Appeals.

Legal Analysis

The state appellate court first considered whether Aris owed the Clarks a duty of care on the basis of the employment relationship between Aris and Baer. The court reasoned that to determine whether to impose a duty of care it must consider whether the harm to the Clarks was reasonably foreseeable. Specifically, the court considered whether the Clarks were reasonably foreseeable victims who were injured by a reasonably foreseeable harm.

In making this determination, the Indiana Court of Appeals took note of several facts: (1) Baer's job did not put him in personal contact with citizens; (2) Baer's job did not give him access to people's homes; (3) to commit the murders Baer left his job mid-shift and drove his personal vehicle several miles to break into the Clark home. Given these facts, the court stated it "simply cannot conclude that Cory and Jenna Clark, who lived miles from the construction site in a residence that Baer was not authorized to enter for any purpose whatsoever, were reasonably foreseeable victims, or that the tragic harm that befell them was reasonably foreseeable." Concluding that the Clarks were not reasonably foreseeable victims, the court held that Aris did not owe a duty of care to the Clarks and affirmed the trial judge's ruling in the company's favor.

Practical Impact

According to Kim Ebert, a shareholder in Ogletree Deakins' Indianapolis office: "The result in this case was predictable given the facts. The lesson for Indiana employers is that the court recognizes that there may be circumstances under which an employer can be held liable for criminal acts of employees that harm third parties. Special care should be exercised in evaluating applicants and current employees in positions which will involve contact with the public, especially jobs in which employees visit the homes or premises of customers, handle valuables or drive as a part of work duties. Failure to conduct proper background checks could result in liability to the employer when harm or a loss is suffered at the hands of an employee with a record of past misdeeds."

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Prior to entering the private sector, Steven worked in law enforcement and personnel administration for over twenty-seven years. He has dealt with employers and assisted them in resolving a wide variety of personnel problems and issues. Steven provides instruction and consulting to many Associations and Companies annually. His programs focus on all areas of HR Management.

Steven has conducted training sessions for Miami Valley Human Resource Association, Kentucky State Chapter of the Society of Human Resource Association, The National Apartment Association, The Florida State Apartment Association, The United States Department on Senior Care & Aging, The Cooperative State Research, Education, and Extension Service (CSREES) an agency within the U.S. Department of Agriculture as well as many other Associations and Companies Nationally. One of his areas of expertise is Employment Law, The Fair Credit Reporting Act, and Due Diligence in Employment Background Screening, Workplace Violence and other areas of Human Resources. Steven also speaks on Technology in today's workplace, "The Good, The Bad & The Ugly."

Professional Associations and Community Leadership Activities:

- SHRM Society of Human Resource Management – Professional Membership
- SHRM Ohio State Council – State District Director – West Central Ohio
- SHRM Chapter Miami Valley Human Resource Association, – Past President, Technology Director
- Miami Valley Military Affairs Association – Past President, Technology Director, Membership Chair
- Dayton Area Chamber of Commerce
- Huber Heights Chamber of Commerce
- Main Street Piqua - Technology Director
- Piqua Area Chamber of Commerce
- Tipp City Area Chamber of Commerce - Technology Director
- Trotwood Chamber of Commerce - Technology Director
- Troy Area Chamber of Commerce – Chair of The HR Council
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