



Iowa Department of Administrative Services
Human Resources Program Delivery Services ■ Labor Relations Bureau
LABOR RELATIONS INFORMATION AND NEWS
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“Most people who want to get ahead do it backward. They think, 'I'll get a bigger job, then I'll learn how to be a leader.' But showing leadership skill is how you get the bigger job in the first place. Leadership isn't a position, it's a process.”

- John Maxwell, Author & Motivational Speaker

Sample GRIP Cases:

The following cases were recently heard and resolved at GRIP:

1) *The grievant, a Correctional Officer assigned to an institution's visiting room, was in the visiting room when a visitor came up to him and advised him he had a money clip with folding money in it. According to the institution's policy, the money clip and folding money were considered contraband and should have been left in a locker outside the visiting room. The investigation reflected that the grievant looked at the money clip while the visitor held it, and decided to allow the visitor to keep it rather than possibly cause a disruption by making the visitor leave. The visitor later reported that he had been allowed to visit an inmate while carrying contraband. He also reported that the money clip had a knife and a scissors on it. The evidence reflected that Management did not interview the visitor or ask to examine the money clip.*

The GRIP Panel resolved the grievance by upholding the discipline because the grievant admittedly did not do a thorough examination of the money clip and allowed contraband into the visiting room. However, the Panel agreed that the following sentence would be removed from the grievant's disciplinary letter: "The investigation also revealed that the money clip contained a knife."

2) *The grievant, a correctional employee, was arrested for an OWI and was given a 1-day suspension for the OWI and failure to report the arrest to Management. The parties agreed that the past practice for correctional employees arrested for OWI has been a written reprimand, whether they reported the arrest in a timely manner or not. Management presented no evidence to show this correctional institution had any other past practice.*

The GRIP Panel resolved the grievance by reducing the 1-day suspension to a written reprimand and returning 1 day of back pay and any lost accruals to the employee.

Arbitration Summary:

The State recently received a favorable decision in a dispute over whether or not a grievance was timely appealed to arbitration within 120 days in accordance with Article IV (Grievance Procedure), Section 3 (Time Limits) of the AFSCME Collective Bargaining Agreement (CBA).

The grievance involved an employee who was terminated from employment on April 24, 2007. The Union filed a grievance over the termination and the grievance was denied at Step 2 on July 6, 2007. The grievance was originally scheduled to be heard at GRIP on August 9, 2007, but was ultimately heard and deadlocked at GRIP on September 13, 2007. The GRIP decision document was eventually signed off on October 24, 2007. In October, the Union requested an opportunity to interview Management's witnesses in the case, and the interview was eventually scheduled for November 15, 2007. The Union finally notified DAS on January 17, 2008, that the Union was pursuing the grievance to arbitration.

The Union argued before the arbitrator that the arbitration appeal to DAS should be considered timely for several reasons: 1) the GRIP postponement; 2) the GRIP decision signed off on October 24; 3) the delay in scheduling the witness interviews; 4) DAS' awareness that the Union was considering arbitrating the grievance; and 5) the Union's earlier offer to schedule the grievance for arbitration.

The arbitrator ultimately determined that there was not an understanding between the parties that the Union intended all along to pursue the grievance to arbitration, the reasons set forth by the Union for delaying its appeal to arbitration were not sufficient to prevent the Union from scheduling the grievance for arbitration within the 120 days set forth in the CBA, and, therefore, the grievance was not arbitrable.

For a copy of the arbitration award, please contact:
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Employment Law Updates

ADA:

- On April 3, 2008, the 8th Circuit Court of Appeals upheld a district court ruling finding that an employee who had missed 40 of the 77 workdays preceding her termination failed to show that any reasonable accommodation would have allowed her to perform the **essential function of attendance** at work. *Jeannette Brannon v. Luco Mop Company*, No. 07-1434. For a copy of the decision, go to:
<http://www.ca8.uscourts.gov/opndir/08/04/071434P.pdf>
- The 7th Circuit Court of Appeals partially reversed a lower court when it held that a nurse manager who claimed she was fired by an Illinois hospital due to the escalating medical treatment costs of her husband's cancer may pursue her claim under the American's with Disabilities Act (ADA) for **association discrimination**. *Dewitt v. Proctor Hospital*, No. 07-1957 (February 27, 2008). For an article discussing the decision, go to:
<http://emlawcenter.bna.com/pic2/em.nsf/id/BNAP-7CHQ5F?OpenDocument>
For a copy of the decision, go to:
<http://www.ca7.uscourts.gov/tmp/CW0YWKYT.pdf>
- The Supreme Court will not issue a ruling in *Huber v. Wal-Mart Stores, Inc.*, as the parties resolved the dispute and it was removed from the Court's docket in January 2008. The case was to decide the correct standard to apply in ADA cases when an employee seeks a **reassignment to a new position as a reasonable accommodation** – should that employee merely be afforded the opportunity to compete with other applicants in the normal hiring pool, or should the employer be forced to grant preferential treatment and automatically reassign that employee above more qualified candidates? Currently, the Courts of Appeals for the 8th and 7th Circuits apply the more employer-friendly interpretation, while the Courts of Appeals for the 10th Circuit and the District of Columbia apply the affirmative action, employee-friendly standard, leading to problematic applications for national employers with a workforce spanning across the country. For an article on the issue, go to:
<http://www.laborlawyers.com/showarticle.aspx?Ref=list&Type=1119&Cat=3386&Show=10356>
- On March 19, 2008, the U.S. Department of Labor made available to employers a **free database of job candidates** with disabilities seeking work in a variety of fields. Federal employers can tap into this ongoing recruitment resource online, and private sector, other government and nonprofit employers can request unlimited searches by calling a toll-free telephone number. For the press release go to:
<http://www.dol.gov/opa/media/press/odep/odep20080389.htm>
- The House Education and Labor Committee, House Judiciary Committee and the Senate Health, Education, Labor and Pension Committee have held hearings on the **ADA Restoration Act** (H.R. 3195/S. 1881) introduced in July 2007, and more are expected soon. The bill appears to shift the burden of proving whether an individual is qualified to perform a job from employee plaintiffs to employers. For an article on the issue, go to:
<http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1308>
For H.R. 3195, go to:
<http://www.govtrack.us/congress/billtext.xpd?bill=h110-3195>
For S. 1881, go to:
<http://www.govtrack.us/congress/bill.xpd?bill=s110-1881>

ADEA:

- On February 27, 2008, the Supreme Court held in *Federal Express Corp. v. Holowecki* that a former employee who filed an **intake questionnaire** supported by a detailed affidavit had filed a charge that entitled her to file a suit under the Age Discrimination in Employment Act (ADEA). The Supreme Court decided that a document filed with the EEOC that requests action to protect the employee's rights or to settle a dispute with the employer constitutes a discrimination charge under the ADEA. For a copy of the decision, go to:
<http://www.law.cornell.edu/supct/html/06-1322.ZO.html>
For an article discussing the decision, go to:
<http://www.littler.com/presspublications/index.cfm?event=pubItem&pubItemID=18291&childViewID=249&type=all§ion=Press%20%20Publications&subject=ASAPs&title=A%20Charge,%20by%20Any%20Other%20Name,%20Is%20Still%20a%20Charge:%20High%20Court%20Adopts%20Broad%20Definition%20in%20Age%20Cases>

EEO/Title VII:

- Iowans who face discrimination now have **four extra months to file complaints** with the state's Civil Rights Commission under a bill (S.F. 2292) signed into law recently by Governor Chet Culver. For S.F. 2292, go to:
<http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&hbill=SF2292&ga=82>
- The 8th Circuit Court of Appeals recently held that an employer that acted on the only complaints it received about harassment was not guilty of creating a **hostile work environment** and constructive discharge. *Anda v. Wickes Furniture Company, Inc.*, No. 07-1427 (February 19, 2008). For a copy of the decision, go to:
<http://www.ca8.uscourts.gov/opndir/08/02/071427P.pdf>

EEO/Title VII: (continued)

- The 8th Circuit Court of Appeals recently upheld a district court's dismissal of an employee's Title VII claim holding that the employee failed to timely contact the EEO office and rejected the employee's claim that she missed the deadline because she was **physically and mentally incapacitated**. *Vicky E. Jessie v. John E. Potter, Postmaster General*, No. 07-1050 (February 20, 2008). For a copy of the decision, go to:
<http://www.ca8.uscourts.gov/opndir/08/02/071050P.pdf>
- The 4th Circuit Court of Appeals recently found it appropriate to consider the impact on the employer and co-workers in determining whether an accommodation of an **employee's religion** is reasonable. *EEOC v. Firestone Fibers & Textiles Co.*, No. 06-2203 (February 11, 2008). For a discussion of the decision, go to:
<http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1309>
For a copy of the decision, go to:
<http://pacer.ca4.uscourts.gov/opinion.pdf/062203.P.pdf>
- The 11th Circuit Court of Appeals recently found in favor of the employer when an employee claimed that her employer did not reasonably accommodate her **deep religious convictions** which prevented her from working Friday or Saturday shifts. The employer prevailed by showing that it had a neutral rotating shift system and that it provided the employee the opportunity to swap shifts with her coworkers. *Morrisette-Brown v. Mobile Infirmary Medical Center*, No. 06-14082 (November 7, 2007). For a copy of the decision, go to:
<http://www.altlaw.org/v1/cases/194547>
For a discussion of the case, go to:
<http://www.laborlawyers.com/showarticle.aspx?Ref=list&Type=1119&Cat=3386&Show=10357>
- For an article discussing **religious discrimination and dress code policies**, go to:
<http://www.hmw.com/workcite/20080214.htm>
- On February 29, 2008, the EEOC issued two question-and-answer guides providing technical assistance for employers and veterans on workplace issues affecting **veterans with service-connected disabilities**. For a copy of the guides, go to:
<http://www.eeoc.gov/facts/veterans-disabilities-employers.html>
- On March 11, 2008, the EEOC announced the settlement of a **race and national origin harassment** lawsuit for \$1.9 million and significant remedial relief against Allied Aviation Services, Inc. on behalf of African American and Hispanic workers who were the targets of racial slurs, graffiti, cartoons, and hangman's nooses at a facility in the Dallas/Ft. Worth airport. For the press release, go to:
<http://www.eeoc.gov/press/3-11-08.html>
- Under the **E-RACE** (Eradicating Racism & Colorism from Employment) Initiative, the EEOC is seeking to retool its enforcement efforts to address contemporary forms of overt, subtle, and implicit bias. For an inexhaustive list of significant EEOC private or federal sector cases from 2003 to the present, go to:
<http://www.eeoc.gov/initiatives/e-race/caselist.html>
- The EEOC received a total of 82,792 private sector discrimination **charge filings in Fiscal Year 2007**, the highest volume of incoming charges since 2002 and the largest annual increase (9%) since the early 1990s. The EEOC also reported recovering \$345 million in monetary relief for job bias victims for that time period. For data, go to:
www.eeoc.gov/stats/charges.html
- On March 3, 2008, a federal judge in Mobile, Alabama, ruled in favor of The Home Depot on allegations of hostile work environment, retaliation, assault and battery, outrage, and invasion of privacy in a sexual harassment lawsuit filed by two former store managers. However, the judge let stand a claim that the company **failed to properly train and supervise** the employee accused of harassment. For an article on the decision, go to:
<http://www.al.com/news/mobileregister/index.ssf?/base/news/1205313405147140.xml&coll=3>
- A new bill entitled the **Civil Rights Act of 2008** (S. 2554/H.R. 5129) aims to reverse or modify seven workplace-related decisions handed down by the Supreme Court over the past two decades. The bill's provisions restrict mandatory arbitration clauses, eliminate damage caps in gender and religious discrimination cases, reward successful plaintiffs with expert witness fees, and allow state employees to seek damages from their employers for age discrimination and Fair Labor Standards Act (FLSA) violations. For a more detailed summary of the provisions, go to:
<http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1285>
For S. 2554, go to:
<http://www.govtrack.us/congress/bill.xpd?bill=s110-2554>
For H.R. 5129, go to:
<http://www.govtrack.us/congress/bill.xpd?bill=h110-5129>

EEO/Title VII: (continued)

- The 11th Circuit Court of Appeals recently found that, since they failed to seek **class certification**, nine African American employees could not prosecute their pattern and practice claim against their employer for its racially biased supervisor hiring practice. *Davis v. Coca-Cola Bottling Company*, No. 05-12988 (February 6, 2008). For a copy of the decision, go to:
<http://www.ca11.uscourts.gov/opinions/ops/200512988.pdf>
For an article discussing the decision, go to:
<http://hr.cch.com/news/employment/030708a.asp>
- On February 26, 2008, the Supreme Court issued its long-awaited decision in *Sprint/United Management Co. v. Ellen Mendelsohn*, No. 06-1221, regarding "**me, too**" testimony, or testimony offered by a plaintiff's co-workers who are not parties to the suit, claiming discrimination by different supervisors who had no role in the challenged employment decision. The Supreme Court held that trial court judges have discretion to admit or exclude such testimony, depending on the particular facts of the case. For articles discussing the decision, go to:
<http://www.phelpsdunbar.com/articles-section/searcharticle/article/supreme-court-refuses-to-bar-co-workers-me-too-testimony-in-discrimination-cases-1062.html>
<http://www.littler.com/presspublications/index.cfm?event=pubItem&pubItemID=18406&childViewID=249&type=all§ion=Press%20&%20Publications&subject=ASAPs&title=Supreme%20Court%20Holds>
- The 10th Circuit Court of Appeals recently ruled that a husband, wife, and daughter could not assert a prima facie case of sex discrimination under Title VII based on **familial status** after they were discharged in part because the father's hiring and direct supervision of the wife and daughter "were ill-advised under the company's discretionary anti-nepotism policy." *Adamson v. Multi Community Diversified Services Inc.*, No. 05-3478 (February 1, 2008). The court rejected the assertion that familial status was a protected class. For a copy of the decision, go to:
<http://www.ca10.uscourts.gov/opinions/05/05-3478.pdf>
For an article discussing the decision, go to:
<http://hr.cch.com/news/employment/031908a.asp>
- On March 19, 2008, the EEOC announced a litigation settlement with Washington Group International, Inc. for \$1.5 million dollars, as well as significant injunctive relief, on behalf of African American workers who were **racially harassed** and then retaliated against for complaining about it. For a copy of the press release, go to:
<http://www.eeoc.gov/press/3-19-08.html>
- The 8th Circuit Court of Appeals dismissed a lawsuit brought by an employee who claimed that her employer subjected her to a **hostile work environment**. The court found that, while the employer exercised reasonable care to prevent and correct the alleged harassment, the employee failed to take advantage of the corrective opportunities offered by the employer. *Brenneman v. Famous Dave's of America, Inc.*, No. 06-1851 (November 16, 2007). For a copy of the decision, go to:
<http://www.ca8.uscourts.gov/tmp/061851.html>
For an article discussing the decision, go to:
<http://www.ogletreedeakins.com/publications/index.cfm?Fuseaction=PubDetail&publicationid=276>
- On March 25, 2008, a federal judge approved a \$24 million **race discrimination** settlement in a lawsuit filed by the EEOC on behalf of about 10,000 current and former African American employees of Walgreens Co. The lawsuit alleged that African Americans were unfairly denied promotions or assigned to lower performing stores. For a copy of the EEOC's press release, go to:
<http://www.eeoc.gov/press/3-25-08.html>

FLSA:

- The 8th Circuit Court of Appeals recently upheld a decision finding an employee's claim was proper because the employer failed to provide specific evidence contradicting the employee's claim that the employer's agent had scheduled the employee's doctor appointment and that the employee was **entitled to paid leave** under the Fair Labor Standards Act (FLSA). *Cynthia Howser v. ABB, Inc.*, 06-3403 (March 27, 2008). For a copy of the decision, go to:
<http://www.ca8.uscourts.gov/opndir/08/03/063403P.pdf>
- On March 17, 2008, the Department of Labor issued an opinion letter on the **substitution provisions** of the FLSA in response to a request for opinion regarding a public agency employer that allows employees of the same classification to substitute shifts for one another. For a copy of the opinion letter, go to:
http://www.dol.gov/esa/whd/opinion/FLSA/2008/2008_03_17_02_FLSA.pdf

FLSA: (continued)

- The 4th Circuit Court of Appeals recently held that the remedies contained in the FLSA are **exclusive and preempt remedies** that would otherwise be available under state law. *Anderson v. Sara Lee Corporation*, No. 05-1091 (November 19, 2007). For a copy of the case, go to:

<http://pacer.ca4.uscourts.gov/opinion.pdf/051091.P.pdf>

For an article discussing the case, go to:

<http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1282>

- The 2nd Circuit Court of Appeals has ruled that the FLSA requires employers to pay one-and-a-half times the regular rate of pay as compensation to employees who perform overtime work even though the **work was not authorized and was in violation of company policy**. *Chao v. Gotham Registry, Inc.*, No. 06-2432-cv (January 24, 2008). For an article on the issue, go to:

<http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1287>

For a copy of the decision, go to:

<http://www.dol.gov/sol/media/briefs/gotham-08-21-2006.htm>

- McLane Co. Inc., headquartered in Temple, Texas, has agreed to pay \$1,559,316 in overtime back wages to 570 current and former retail merchandising specialists nationwide after an investigation by the U.S. Department of Labor's Wage and Hour Division found that the company had **misclassified employees** and did not pay overtime wages required by the FLSA. For the press release, go to:

<http://www.dol.gov/opa/media/press/eta/eta20080134.htm>

FMLA:

On February 11, 2008, the Department of Labor (DOL) published a **Notice of Proposed Rulemaking (NPRM)** proposing revisions to certain regulations implementing the Family and Medical Leave Act (FMLA). The NPRM addresses many of the comments received by the DOL in response to its Request for Information published in December 2006, as well as legal challenges to many provisions in the current regulations. The DOL also included a Request for Comments on issues to be addressed in final regulations regarding **military family leave**. For the NPRM, go to:

<http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>

For a discussion of the proposals, go to:

<http://www.fordharrison.com/shownews.aspx?Show=3472>

<http://www.laborlawyers.com/showarticle.aspx?Ref=list&Type=1119&Cat=3386&Show=10355>

The DOL has also published a notice on its website that may be used by employers to provide notice of the **family military leave amendments**. For a copy of the notice, go to:

<http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>

HIPAA:

On February 14, 2008, the DOL issued a field assistance bulletin that included a **Wellness Program Checklist**. If an employer's wellness program is connected to an Employee Retirement Income Security Act (ERISA) covered group health plan, it must comply with the Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination provisions. The Checklist is a series of questions designed to help determine whether a plan offers a program of health promotion or disease prevention that is required to comply with the DOL's wellness program regulations and, if so, whether the program is in compliance with the regulations. For the field assistance bulletin, go to:

<http://www.dol.gov/ebsa/regs/fab2008-2.html>

For an article discussing the Checklist, go to:

<http://www.fordharrison.com/shownews.aspx?Show=3507>

Miscellaneous:

- The 8th Circuit Court of Appeals recently ruled that an AFSCME collective bargaining agreement obligated the city of Benton, Arkansas, to pay **retiree health benefits**, and such a provision is not prohibited by Arkansas statutes, the Arkansas Constitution, or public policy considerations. *AFSCME Local 2957 v. City of Benton, Arkansas*, No. 07-1589 (January 25, 2008). For a copy of the decision, go to:

<http://www.ca8.uscourts.gov/opndir/08/01/071589P.pdf>

- The 8th Circuit Court of Appeals recently reversed a district court's dismissal of a claim by an offender committed to the Missouri Sexual Offender Treatment Center against an employee of the treatment center for hitting the offender with a walkie-talkie, and remanded the case for further proceedings on **assault and battery**. *William G. Carter v. Julia Hassell*, 07-1145 (March 12, 2008). For a copy of the decision, go to:

<http://www.ca8.uscourts.gov/opndir/08/03/071145U.pdf>

Miscellaneous: (continued)

- A proposed bill could ban discrimination based on **height and weight** in Massachusetts. For an article on the issue, go to:
<http://www1.whdh.com/news/articles/local/BO75942/>
- A recent study by the University of Florida suggests that **rude bosses** defeat their purpose by browbeating employees into poor job performance. For an article discussing the study, go to:
http://www.techjournalssouth.com/news/article.html?item_id=4753
- A recent review of 110 studies conducted over 21 years that compared the consequences of employees' experiences of sexual harassment and workplace aggression showed that **workplace bullying** appears to inflict more harm on employees than sexual harassment. For an article discussing the findings, go to:
<http://www.sciencedaily.com/releases/2008/03/080308090927.htm>
- The California Legislature has proposed the Healthy Families, Healthy Workplace Act of 2008, which, if passed, would mandate that all employers, regardless of size, provide some form of **paid sick leave benefits** to all employees who work in California for seven or more days in a calendar year. For an article on the issue, go to:
<http://www.fordharrison.com/shownews.aspx?Show=3542>
- According to the American Institute on **Domestic Violence**, lost productivity and earnings due to intimate partner violence accounts for almost \$1.8 billion a year. Victims lose nearly 8 million days of paid work each year, the equivalent of more than 32,000 full-time jobs. For an article on the issue, go to:
<http://www.nwaonline.net/articles/2008/02/23/news/022408szbusinessabuse.txt>
- The Department of Homeland Security and the Department of Justice recently announced plans to continue their strategy of aggressively targeting employers for violations of **immigration laws**, and to toughen sanctions against employers who hire illegal immigrants. For an article on the issue, go to:
<http://www.phelpsdubar.com/articles-section/searcharticle/article/federal-agencies-to-step-up-enforcement-of-immigration-laws-against-employers-1061.html>
- The California Supreme Court recently ruled that, while employers may be held liable for discrimination under the California Fair Employment and Housing Act, **individuals may not be held financially responsible** for retaliation claims in the discrimination context. *Jones v. The Lodge at Torrey Pines Partnership*, No. S151022 (March 3, 2008). For an article discussing the decision, go to:
<http://www.ogletreedeakins.com/publications/index.cfm?Fuseaction=PubDetail&publicationid=297>
- A comprehensive review of 31 years of data from 830 mid-sized to large U.S. workplaces found that most **diversity training** efforts are ineffective and even counterproductive in increasing the number of women and minorities in managerial positions. A related study found that faulty delivery methods diminish the overall benefit of corporate diversity and inclusion initiatives, despite the proliferation of such programs. For articles discussing these studies, go to:
<http://www.washingtonpost.com/wp-dyn/content/article/2008/01/19/AR2008011901899.html>
<http://www.hreonline.com/HRE/story.jsp?storyId=83036993>
- New Jersey recently became the third state in the nation to give employees the right to take **paid leave to care for a newborn or a sick relative**. For an article on the legislation, go to:
<http://www.nytimes.com/2008/03/04/nyregion/04leave.html>

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and click on the link for Labor Relations Information and News.

For questions, or to provide suggestions for items/topics to be included in upcoming issues of this newsletter, please contact:

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