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**RECENT DEVELOPMENTS AND TRENDS
IN U.S. EMPLOYMENT LAW**

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I. **EMPLOYMENT DISCRIMINATION**

A. **EEOC Charges**

Discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) against private sector employers declined last year by approximately 5% for the third straight year. The EEOC cites aggressive outreach and training efforts by the Agency as a possible factor in the decrease in the number of charges filed. While the number of charges filed in the past three years has decreased, the types of discrimination charges have remained relatively constant, with the most frequent filings based on race, sex and retaliation. The FY 2005 EEOC charge filings were as follows:

- Race – 26,740 charges (35.5% of all filings)
- Sex – 23,097 charges (30.6% of all filings) (includes 12,679 sexual harassment filings with 14% filed by men)
- Retaliation – 22,278 charges (29.5% of all filings)
- Age – 16,585 charges (22% of all filings)
- Disability – 14,893 charges (19.7% of all filings)
- National origin – 8,035 charges (10.7% of all filings) (50% of filings by Hispanics)
- Religion – 2,340 charges (3.1% of all filings) (number of charges trending slightly up in the past 3 years)
- Equal pay – 970 charges (1.3% of all filings)

A national Gallup poll on discrimination in the workplace was conducted this past year in conjunction with the EEOC's 40th anniversary. The poll indicated that 15% of all workers perceived they had been subjected to some sort of discriminatory or unfair treatment. The two

largest subgroups in the survey reporting incidents of discrimination included Asians (31%) and African Americans (26%). Source: See www.eeoc.gov/stats/charges.html

B. Lawsuits by the EEOC

The EEOC filed 383 lawsuits against employers in FY 2005. Of the 383 lawsuits filed:

- 297 contained Title VII discrimination claims
- 49 contained ADA claims
- 43 contained ADEA claims
- 13 contained EPA claims
- 139 sought relief for multiple aggrieved individuals

On April 4, 2006, the EEOC announced that fighting “systemic discrimination” has become a top priority of the Agency. The EEOC acknowledged it has not consistently and proactively identified systemic discrimination. Instead, the Agency has typically focused on individual allegations raised in charges. The significance of this announcement for employers is that the EEOC is focusing more on catching “bigger fish” and recouping larger dollars. The EEOC proudly reports on its website the top five cases resolved in FY 2005 by money recovered:

Top 5 Cases Resolved in FY 2005 by Money Recovered	Amount Recovered
EEOC v. Abercrombie & Fitch	\$50 million
EEOC v. Ford Motor Company	\$10.2 million
EEOC v. Home Depot	\$5.5 million
EEOC v. Dial Corp.	\$3.3 million
EEOC v. Hamilton Sun Strand Corp.	\$1.2 million

Trend:

- Overall number of EEOC claims is declining slightly.
- Expect more “systemic” discrimination claims by EEOC.

C. Race Discrimination

EEOC v. Abercrombie & Fitch Stores, Inc. (N.D. Cal. April 14, 2005)

In one of the largest discrimination cases in recent history, the EEOC alleged that the nationwide retailer engaged in a pattern or practice of race, national origin and sex discrimination in recruitment, hiring, assignment, promotion and discharge of blacks, Hispanics, Asians and women. The lawsuit alleged that Abercrombie & Fitch focused its marketing efforts on a “classic all-American” look and therefore recruited primarily white high school and college students for more visible and lucrative positions. The suit alleged that minorities were channeled into stock and night crew positions rather than sales associate and management positions. Minorities and women were allegedly discharged when corporate representatives believed they were “over represented” at individual stores.

Abercrombie & Fitch settled the case by agreeing to a six-year consent decree which requires the company to show it is taking steps to increase job opportunities for minorities and women. The decree provides for specific benchmarks for the hiring of minorities and women. In addition, the company agreed to establish a settlement fund of \$40 million for a class of applicants and former employees who were allegedly discriminated against and pay attorneys’ fees.

Trend: This case supports the trend of “systemic” claims and class action claims.

D. Age Discrimination

Although the EEOC's published statistics do not indicate that the number of age discrimination claims is trending up, age discrimination claims are likely to become more common as the population continues to work longer before retiring. Last month, Duke Energy was sued by former and current employees alleging that the company had committed age discrimination and violated federal pension laws when it made changes to its benefit plans, thereby "disproportionately affecting" older employees. The lawsuit is similar to a recent case against IBM in which the company agreed to pay \$300 million to current and former employees to settle claims similar to those made by the Duke Energy employees. Such claims are likely to continue as more companies change or eliminate pension and benefit plans.

In *Smith v. City of Jackson, Mississippi* (March 30, 2005), the United States Supreme Court confirmed that the Age Discrimination in Employment Act (ADEA) authorizes recovery in disparate-impact cases. However, the Court held that even if the employer's action disproportionately impacted older workers, if the employer's action was based on reasonable factors other than age (RFOA), an otherwise prohibited action under the ADEA is not unlawful. The City of Jackson, Mississippi revised its employee pay plan by granting raises to all police officers in an attempt to bring their starting salaries up to the regional average. In doing so, younger police officers with less years of service received proportionately greater raises than older police officers over 40 who had more years of service. The senior officers' raises, though higher in dollar amount than the raises given to junior officers, represented a smaller percentage of the senior officers' salaries. The disparate-impact was therefore attributable to the City's decision to give raises based on seniority and position. The Court held that the City's decision to grant larger raises to junior employees for the purpose of bringing salaries in line with that of the

surrounding regional average was a decision based on a RFOA and was consistent with the City's legitimate goal of retaining police officers.

In light of the Supreme Court's decision, employers should be even more careful to consider the implications of the ADEA whenever taking adverse employment action against employees who are 40 years of age or older; downsizing, restructuring, or eliminating positions; adopting early retirement benefit plans; and/or making changes to benefit plans.

Trend: Expect to see more age discrimination claims based upon disparate impact due to changes or elimination of benefit plans.

E. Religious Discrimination

According to the EEOC, the number of employees expressing their religious beliefs at work is increasing. This is not surprising given the increasing diversity of the U.S. workforce. The most common type of work-related religious expressions involve requests for accommodation for religious holidays, exceptions for uniform and appearance policies, such as requirements to be clean shaven or prohibitions on wearing head coverings. Legal issues may arise when an employee requests an accommodation for religious practices at work which conflict with the employer's policies and procedures. Title VII prohibits discrimination in the workplace by an employer on the basis of an employee's religious observance, practices and beliefs. "Religion" includes not only established and organized faiths, but also "moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. Unless religion is a bona fide occupational qualification for the job, employers have a duty to reasonably accommodate an employee's religious beliefs and practices so long as it does not create an "undue hardship" (more than minimal cost). Under

current law, an employer has the right to make the choice of which accommodation to provide the employee where there are several options available.

Many recent religious discrimination cases are the result of conflicts between the employer's appearance standards and religious requirements regarding attire or grooming.

Recent examples include:

- *EEOC v. Blockbuster, Inc.* (D. Ariz. June 8, 2005). A video chain manager ordered a Jewish employee to remove his yarmulke since it violated the company's dress code prohibiting head wear. After the employee filed an EEOC charge, Blockbuster allowed him to resume wearing the yarmulke. Subsequently, the company settled and agreed to pay the employee of \$50,000, give him a letter of apology, undertake employee training and modify its employee handbook to allow for exceptions in the dress and grooming standards to accommodate employees' religious beliefs.
- *EEOC v. Russell Enterprises d/b/a McDonalds* (E.D. Va. August 5, 2005). A McDonald's restaurant franchise terminated a Muslim employee who had a beard for religious reasons, refusing to make exceptions to its dress code requiring employees to be clean-shaven. The case successfully resolved in favor of the EEOC.
- *EEOC v. Red Robin Gourmet Burgers* (W.D. Wash. September 7, 2005). A restaurant chain fired an adherent of an ancient Egyptian faith whose wrist tattoos conflicted with the company's policy prohibiting visible body piercings and tattoos. The case successfully resolved in favor of the EEOC.

In February 2006, the United States Supreme Court in the case of *Gonzalez v. O Centro Espirita Beneficente Uniao Dio Vegetl* upheld the right of a Brazilian-based church with about 130 members in the United States named UDV (Uniao Dio Vegetl) to receive communion through hoasca, a tea containing hallucinogenic compounds. Justice Roberts, in his first decision for the Supreme Court, found that the federal government failed to show a compelling interest in substantially burdening the exercise of a person's religion in the least restrictive means.

Congress is currently considering the *Workplace Religious Freedom Act* which would amend Title VII to make it easier for employees to obtain accommodations for their religious practices at work. The proposed Act would apply to employers with 50 or more employees. The proposed Act would:

- Require an employer to engage in an “affirmative and bona fide effort” to find an accommodation thereby putting a greater burden on the employer and granting greater input to the employee.
- Redefine “undue hardship” as involving “significant difficulty or expense” for the employer.
- Require accommodation of an employee who can perform the “essential functions” of the job with regard to clothing, grooming and observance of the Sabbath or holy days unless the accommodation would require “significant difficulty or expense.”

The proposed legislation would not allow employees to wear whatever they want in the workplace or take time off whenever they want based on their religious preferences. The legislation should continue to recognize there are instances where dress codes and scheduling are essential functions of the position.

Trend: The trend is to give greater latitude to employees and place a greater burden on employers to accommodate employees' sincerely held religious beliefs. As diversity increases, expect more claims for religious and/or national origin discrimination.

F. Disability Discrimination

In *Heiko v. Colombo Savings Bank* (4th Cir. January 10, 2006), the Fourth Circuit Court of Appeals expanded the definition of "major life activity" under the Americans With Disabilities Act (ADA). Under the decision, kidney disease can be a disability under the ADA. The plaintiff in the case worked for a small commercial bank. He was diagnosed with end-stage renal disease which destroys a kidney's ability to filter toxins from the blood through urination. The plaintiff began dialysis treatments while waiting for a kidney transplant. During this time, the plaintiff applied for a promotion and was not selected. After complaining, he claims his job responsibilities were reduced, and he resigned. The plaintiff sued the Bank under the ADA claiming the employer's failure to promote him constituted discrimination on the basis of his kidney disease. The trial court found that the plaintiff's kidney disease did not constitute a disability under the ADA since the employee was not substantially limited in any "major life activities." The Fourth Circuit disagreed finding that major life activities are those important to daily life which can be performed by the average individual. The Court concluded that the plaintiff's inability to eliminate waste constituted an impairment which substantially limited him with regard to a major life activity.

Trend: The definition of what constitutes a "major life activity" under the ADA is continuing to be refined.

G. **Sex Discrimination**

1. Denial of Equal Opportunities Due to Sex

The EEOC announced on March 31, 2006 that it has filed a national class action sex discrimination lawsuit against Lawry's Restaurants, Inc., a national chain doing business under various franchises. The lawsuit was filed on behalf of male applicants who are alleged to have been systematically rejected for higher paying jobs as food servers. The EEOC stated: "Lawry's practice of hiring only women as servers, with their traditional period costumes, pre-dates the landmark Civil Rights Act of 1964. Nonetheless, the practice of denying men the opportunity to work in the higher-paying server jobs is blatant sex discrimination. An employer as large and sophisticated as Lawry's should certainly know better and act better."

Trend: With more women in the workplace, will we see more claims by males for sex discrimination?

2. Pregnancy Discrimination

A recent NBC news report quoted the EEOC as stating that discrimination claims have increased 31% between 1992 and 2005. This author has not independently verified these statistics, but the claim is not surprising given the current number of working mothers in the work force. In one recent case, *EEOC v. Johnson International*, E.D. Wis. (December 27, 2004), a financial services company signed a written employment contract to hire a woman as executive vice president. After the woman disclosed her pregnancy, the company conducted additional reference checks and revoked the job offer. Under a consent decree with the EEOC, the company agreed to pay \$450,000.

Trend: The number of pregnancy discrimination claims appears to be on the rise.

II. COVENANTS NOT TO COMPETE

Historically, covenants not to compete between an employer and employee have not been viewed favorably by the courts. However, if the covenant is (i) in writing, (ii) reasonable as to terms, time and territory, (iii) made a part of the employment contract, (iv) based on valuable consideration and (v) not against public policy, the covenant is generally enforceable. In addition, if the employer seeks an injunction against the employee, the employer must show the covenant is reasonably necessary to protect the employer's "legitimate business interest." *Triangle Leasing Company v. McMahon, et al.*, 327 N.C. 224 (1990).

The December 2004 decision of the North Carolina Court of Appeals in *Visionair, Inc. v. Douglas S. James*, 606 S.E.2d 359, suggests that the North Carolina courts will take an even harder look at non-competes and will invalidate them entirely if they are broader in scope than is reasonably necessary to protect the business of the employer. The case involved an employee who left his employment with Visionair to become a software engineer at another software company. His non-compete prohibited him for a period of two years following employment from (a) selling or developing any software products which directly or indirectly competed with the employer's software products and (b) *owning, managing, being employed by or otherwise participating in any business similar to the employer's within the Southeast*. When the employer sought to enforce the non-compete covenant, the court refused to do so finding that the covenant was over broad. The court focused on the fact that the covenant would not merely preclude James from engaging in work similar to that which he did for his employer, but would also prevent him from doing wholly unrelated work at any firm similar to the employer's.

Trend: Covenants not to compete in North Carolina will be more difficult to enforce. Employers should ensure that non-compete covenants are reasonable and narrowly drawn to

protect the employer's legitimate business interest. Employers may want to review existing non-compete agreements to see if they can pass muster under the *Visionair* case.

III. **ARBITRATION OF EMPLOYMENT DISPUTES**

In recent years, arbitration (and other forms of alternative dispute resolution such as mediation) have become a more popular method of settling disputes of all kinds. In March 2001, the United States Supreme Court in *Circuit City v. Adams* paved the way for most private, non-union employers to require employees to submit employment claims, including discrimination claims, to private, final and binding arbitration in substitution of the employee's right to recourse through the courts. The reasons for the trend toward arbitration in lieu of litigation are many. They include the risks of "run-away jury" verdicts, punitive damages, clogged civil court dockets, and costly and time-consuming discovery. Certainly, one could argue that the "pros" of arbitration include:

- Arbitration is fast. Many lawsuits can go on for years. Quick resolution has both monetary and other tangible and intangible value to the employer.
- Arbitration is cheaper. Arbitration procedures may be streamlined, and discovery may be limited in the discretion of the arbitrator.
- Arbitration is private. The arbitration proceedings are generally confidential and private.
- Arbitration is final. Most arbitration awards are not subject to appeal.
- Arbitration is more "fair." Since many arbitrators are specialists in the particular types of cases handled, the risk of outrageous verdicts and punitive damages is less.

On the other hand, the arbitration of employment disputes may be ill-advised for a number of reasons. Some potential “cons” to arbitration include:

- Arbitration is not always faster. In court, the judge has the ability to dismiss a case before trial by way of summary judgment or other motions.
- Arbitration is expensive. The trend has been to modify arbitration rules to provide for discovery which, in many cases, is similar to what takes place in the court system. As a result, the cost of arbitration, including significant expense often associated with arbitrator’s fees, can make the cost of arbitration comparable to litigation.
- Arbitration is final. Because arbitration is final, there is generally no ability to appeal the decision so an employer may be stuck with a bad decision.
- Out-of-state witnesses cannot be subpoenaed. If a case requires witnesses from outside the state, an arbitrator may be unable to subpoena a witness to testify.
- Arbitration is not binding on the EEOC. The arbitrator’s decision does not bind the EEOC or preclude the EEOC from bringing suit in its own name.

In order to have an enforceable agreement to arbitrate, the agreement must be written and signed and specifically reference the obligation to arbitrate the employment claims in issue. The agreement must provide for the same substantive relief (damages and attorneys’ fees) available under the civil rights laws. In addition, the employer may not unfairly shift the cost of the arbitration, including the arbitrator’s expenses, to the employee. Most employment arbitration agreements provide that the employer pays most or all of the arbitrator’s expenses.

Trend: The arbitration of employment disputes is becoming more commonplace. Employers should carefully consider the pros and cons of arbitrating employment disputes to determine which is the best option for them.

IV. IMMIGRATION LAW

A. Immigration Law Reform

In recent months, legislation has been introduced in Congress that would significantly reform U.S. immigration laws. It is estimated that approximately 400,000 illegal aliens enter the United States from Mexico each year. There are currently an estimated 8,000,000 to 12,000,000 undocumented immigrants in the United States. There is nearly universal consensus that the current immigration system is broken and needs reform.

There are several bills currently pending in Congress. Each of these bills, while different, address four primary areas:

- Temporary Work Visas. Most of the proposed legislation will provide temporary work visas which would be valid for two to three years with possible extensions. Undocumented individuals already in the United States, as well as those seeking entry into the country, would be eligible for the work visa.
- Green Cards. Some proposals would provide for the issuance of green cards which would permit individuals to live and work in the United States indefinitely. Most of the proposals require a clean criminal background, proficiency in English, a history of paying taxes, and a job offer to be eligible.
- Work Site Enforcement. This proposal would implement a mandatory electronic employment verification system requiring employers to verify the immigration

status of all employees. This system would presumably involve a link between the basis for Homeland Security and the Social Security Administration. The proposals would increase the penalties for employers engaging in unauthorized employment of illegal aliens.

- Border Enforcement. The proposals would strengthen border enforcement with additional funding, the hiring of additional border patrol agents, and improved information sharing among law enforcement agencies.

B. Harsher Penalties for Immigration Violations

On December 12, 2005, the U.S. Supreme Court decided to review the 11th Circuit Court of Appeals decision in *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005). The Supreme Court agreed to hear the case to resolve a split on corporate liability under the Racketeer Influence and Corrupt Organization Act (RICO) for the employment of undocumented illegal aliens. If liable under RICO, employers may be subject to increased civil penalties and even criminal prosecution. The Supreme Court's agreement to hear the case is a reminder of employers' significant obligations in recruiting, interviewing, and hiring immigrant workers.

Trend: New immigration reform legislation is coming. Expect harsher penalties for immigration violations.

V. WAGE AND HOUR ISSUES

A. Final Regulations Regarding Exemptions for White Collar Employees

The minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) were updated effective August 23, 2004 with the issuance of final regulations implementing the exemption for minimum wage and overtime pay for executive, administrative,

professional, outside sales and computer employees, also known as “white collar” exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis in an amount not less than statutory minimums. The amendments were necessary in part because minimum salary levels had not been updated since 1975, and the job duty requirements had not been amended since 1949. The regulations also clarify that the overtime exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy, or to non-management employees in maintenance, construction and similar occupations, or to police officers, firefighters, paramedics, and similar employees. The proposed regulations also clarify and simplify the tests for determining exemptions for each white collar “category.”

B. Walking to Change Clothes is Compensable Time

In two related cases, the United States Supreme Court recently addressed two separate questions relating to compensation for a “principal activity” under the Fair Labor Standards Act (FLSA). In the consolidated cases of *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*, the court held on November 8, 2005 that where donning and doffing protective gear is integral and indispensable to the worker’s principal activities, the FLSA mandates that time spent by the workers walking to and from the locker room is compensable. However, the court held that time spent waiting to dress for work was not compensable. The opinion is consistent with earlier decisions by the court that time spent putting on and taking off specialized protective gear is compensable under the FLSA.

Trend: The Department of Labor is continuing its efforts to update and modernize Wage and Hour laws.

VI. VETERANS' RIGHTS

On December 19, 2005, the Department of Labor published the final regulations for the Uniformed Services Employment and Re-employment Rights Act (USERRA). The regulations clarify the laws of returning service members and employers. The purpose of USERRA is to protect returning service members from discrimination due to military service. Additional information is available at www.dol.gov/vets/regs/fedreg/final/2005023960.htm.

Trend: The rights of returning veterans is becoming an issue for more and more employers. The new regulations do not greatly change but should clarify employers' obligations under USERRA.

VII. DOCUMENT RETENTION / SPOILIATION

Documentation, or the lack thereof, often plays a critical part in the outcome of employment cases. Employers who have good documentation supporting their employment decisions are generally successful. It is prudent for employers to have document retention policies in place. However, employers who are aware of actual or anticipated litigation, subpoenas, investigations, or audits must suspend their normal document destruction procedures and advise all persons with relevant documents to preserve them. Otherwise, an employer may be liable for "spoliation" (improper destruction or alteration) of evidence. The spoliation of evidence rule allows the drawing of an adverse inference against a party whose intentional conduct causes not just the destruction of evidence, but also against one who fails to preserve or produce evidence, including the testimony of witnesses. *Horton v. Synthes*, 2005 U.S. App. LEXIS 9628 (2005). A leading spoliation case, *Zubulake v. UBS Weirburg*, involved a claim of

sex discrimination. The court found that the employer, UBS, became aware of the claim when the plaintiff filed an EEOC charge. Thereafter, UBS employees deleted relevant e-mails. As a result, the court allowed there to be an adverse inference against UBS which ultimately led to a jury verdict of \$29,000,000 against UBS.

In addition to civil liability, fines, penalties, and attorney's fees for spoliation, criminal liability is a possibility under § 802 of Sarbanes-Oxley, 18 U.S.C. § 1519, and other statutes. There have been a number of criminal indictments in recent years against individuals who have allegedly obstructed justice by instructing employees to delete or destroy relevant documents.

Employers should anticipate events which trigger the obligation to preserve documents and which warrant suspension of normal document destruction procedures. The obligation to preserve documents may accrue well before an actual lawsuit is commenced, even as early as an employee's internal complaint or upon receipt of a demand letter from an attorney. Employers should monitor such "litigation holds" to ensure they are being complied with.

Trend: Recent cases suggest that employers who do not manage document retention (and ensure "litigation holds" are in place) are at greater risk of civil or criminal penalties.

VIII. FAMILY MEDICAL AND LEAVE ACT (FMLA)

The administration of the Family and Medical Leave Act (FMLA) is a challenge for even the most sophisticated human resources professional or employment attorney. Most employers understand the basics of the FMLA, which permit eligible employees to take up to 12 weeks of unpaid leave in a 12-month leave period for certain family and medical reasons, including the employee's own serious health condition or the serious health condition of a spouse, child or parent. The FMLA regulations published by the Department of Labor are of assistance to

employers in understanding their obligations under the FMLA. However, the regulations are in some instances inconsistent with the FMLA as construed by the courts. In addition, the interrelationship of the FMLA with the ADA, worker's compensation requirements, and employers' other leave policies, can cause confusion and make FMLA compliance particularly difficult for smaller employers with limited HR staffs.

In 2002, the U.S. Supreme Court in *Ragsdale v. Wolverine Worldwide*, 535 U.S. 81 invalidated a portion of the FMLA regulation which states: "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. 825.700(a). Since this decision, the Department of Labor has been promising new FMLA regulations. In May 2005, the Department of Labor again announced that changes to the FMLA regulations would be published soon. To date, no new regulations have been issued.

The Department of Labor did recently issue an opinion letter (DOL Opinion Letter FMLA 2005-2-A) which provides employers additional guidance on medical certifications. Under the FMLA, an employer may request medical certification from the employee's healthcare provider if the employee requests FMLA leave for his or her own serious health condition. If the employer questions the validity of the certification, the FMLA regulations permit a second and even third medical opinion at the employer's expense. Current regulations permit an employer to request recertifications for chronic or permanent conditions no more often than every 30 days except in the event of changed circumstances or if the employer receives information that casts doubt upon the employee's stated reason for the absence. An employer does not have an option of obtaining second or third opinions of recertifications. The new DOL Opinion Letter confirms that after expiration of the original 12-month leave period, an employer may require that the

employee obtain a new medical certification of the serious health condition. In effect, the employer can require the employee to re-qualify for FMLA leave following each 12-month leave period and may, in each case, require a second and third medical opinion, as appropriate.

Trend: Hopefully the Department of Labor will soon issue new FMLA regulations.

IX. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

It is well established that the State of North Carolina applies the employee-at-will doctrine. Employees at will (without written contracts guaranteeing employment term) may be terminated at any time and for any reason, for no reason, or for an arbitrary or irrational reason. However, the courts have adopted a public policy exception to the employee-at-will doctrine. The public policy exception has continued to evolve. The courts have defined “public policy” as a principle of law which holds that no citizen can lawfully do that which has a tendency to injury the public or is against the public good. There is no laundry list of what constitutes termination in violation of public policy, but the courts have said that it would include firing an employee in contravention of express policy declarations contained in North Carolina statutes. The following are examples of situations involving terminations in violation of public policy exception to the at-will doctrine:

- Termination for refusing to falsify driver logs required by federal trucking regulations.
- Termination for refusing to work for less than minimum wage.
- Termination for refusing to testify untruthfully or incompletely on behalf of the employer in a court proceeding.
- Refusing to submit to sexual harassment.

On July 6, 2004, the North Carolina Court of Appeals in *Whitt v. Harris-Teeter*, 165 N.C. App. 132 (July 6, 2004) held that North Carolina recognized a claim for wrongful discharge in violation of public policy even though the discharge was constructive. “Constructive discharge” can occur when an employer deliberately causes or allows the employee’s working conditions to become so intolerable that the employee is forced to resign. Prior to the *Whitt v. Harris-Teeter* case, North Carolina had not yet recognized a tort for constructive discharge under the public policy exception. However, there has been a growing willingness among courts to recognize a constructive discharge exception to the at-will doctrine.

The Harris-Teeter employee informed her employer that another employee was harassing her by making sexually-oriented comments, touching her without permission, and following her when she left work. The employer investigated and determined it was baseless. The company promoted the employee and reassigned him to another store but did not order him to stay away from the employee who complained. After the employee filed an EEOC charge, the employer reduced the number of hours she was allowed to work, and other employees stopped talking to her. The employee quit her job several months later and sued, claiming wrongful discharge.

The Court of Appeals on these facts found that the employee was constructively discharged and further held that North Carolina recognize the claim of wrongful discharge in violation of public policy where termination is constructive.

On July 1, 2005, the North Carolina Supreme Court reversed the decision of the Court of Appeals by adopting Judge McCullough’s dissenting opinion.

Trend: The trend in other jurisdictions is to expand the public policy exception to the employment-at-will doctrine. Due to the recent North Carolina Supreme Court reversal of *Whitt*

v. Harris-Teeter, it appears that North Carolina courts are not currently inclined to further dilute the at-will doctrine.

The foregoing document has been prepared for general information only. It is not meant to provide legal advice with respect to any specific matter and should not be acted upon without the specific advice of qualified legal counsel.