company can be required to indemnify the insured only for claims covered by the insurance policy and not others that also might be in the litigation. It stated that the employees, in effect, were raising two claims under ERISA and federal and state wage and hour laws that provide for distinct and separate remedies. The duty to indemnify wouldn't, according to the court, cover the wage and hour claims even if they were "reasonably related" to the covered ERISA claims.

Thus, Travelers would have no obligation to indemnify Perdue for any amounts paid in settlement of any claims asserting wage and hour violations. To determine how the trial court should proceed once the case was sent back to it, the court suggested that a rough apportionment of settlement amounts among covered and noncovered claims would be most appropriate. The factors that should be considered in making that determination include how the parties characterize the claims in the underlying complaint and settlement agreement, the intent of the parties entering into the settlement, and the relative merits of the underlying claims.

The court also acknowledged that that task could have been easily avoided if in the settlement agreement, the parties had specified how liability was allocated between the covered and noncovered claims. According to the court, such a scenario arises with some frequency, and the apportionment of settlement amounts between covered and noncovered claims is typically resolved through negotiation and private agreement. In this case, however, the parties apparently couldn't agree, resulting in additional litigation. *Perdue Farms, Inc. v. Travelers Casualty and Surety Company of America*, No. 04-228 (4th Cir., decided May 16, 2006).

> Come to some agreement with your carrier about how claims should be characterized.

Bottom line

As this case highlights, insurance policies are as varied as the types of claims that employees can file in litigation. Therefore, it's essential that all employers be familiar with the specific types of insurance policies that are in force and exactly what types of employment claims are covered under those policies. Depending on how the claims are described in the complaint, the insurance company may have an obligation to provide a defense to them even if they aren't specifically covered under the insurance policy, but your right to seek indemnification for any ultimate judgment and/or settlement will depend on the nature of the claim involved.

In the event any matter covered by insurance is ultimately settled, it would be prudent to come to some agreement with your carrier about how the claims should be characterized, if at all possible. Your failure to do so, as indicated in this case, can result in more costly litigation, something most employers would like to avoid at all costs! ❖

LITIGATION

Confessions of an employee's lawyer

As many of you know, with each issue of Maryland Employment Law Letter, we try to provide a balanced interpretation of significant legal developments that Maryland employers and others should be aware of. Occasionally, it's helpful to break from that tradition and consider how a highly regarded plaintiff's employment lawyer evaluates potential claims for litigation.

This month, we have the opportunity to get the "inside word" from James E. Rubin, a highly regarded plaintiff's employment lawyer practicing in Montgomery County. I hope you find Jim's insights and perspective on what makes a good case for litigation from an employee's point of view very interesting and helpful.

Here's a typical scenario

Sally Client, a mortgage loan officer, walks into my office complaining of sexual harassment. She claims that a supervisor, Mr. Boss, sent her inappropriate e-mails containing dirty jokes and pornographic pictures. He sent dozens of messages over the course of two years.

Fed up, Ms. Client complained to the CEO, Mr. Executive, about Mr. Boss' conduct. She felt the e-mails were demeaning and in poor taste. Mr. Executive immediately convened a meeting with Mr. Boss and Ms. Client. At the meeting, he admonished Mr. Boss and directed him never to send such e-mails again.

In the ensuing months, although Mr. Boss stopped sending inappropriate e-mails, he pulled Ms. Client off several major accounts and assumed control over one or two of her larger deals. He claimed those projects were too complicated for her and that she's better off managing less complicated sales. She didn't complain. She earned the same amount by working on a higher volume of less-complicated sales as she did when she was working on a lower volume of more-complicated sales.

Shortly before making an appointment to see me, Ms. Client requested two weeks off to take care of her ailing grandmother, who resides in England. The day after she requested that leave, Mr. Executive fired her. He told her that "it was just not working out." Fortunately, she was able to find another loan officer job in a matter of weeks.

When she sees me for an initial consultation, Ms. Client is still outraged about the dirty e-mails. She believed she was working in a professional office. She was willing to put in long hours to serve her clients and earn

commissions and feels she didn't deserve that kind of treatment.

I tell Ms. Client that she shouldn't have been made to suffer such indignities at work. Unfortunately, though, I tell her that what she's claiming may not meet the legal definition of sexual harassment as the U.S. Supreme Court has defined it. Also, I tell her that her employer may have a good defense to her claim because when Mr. Executive found out about the harassment, he stopped it. But I ask her to allow me to ask some additional questions that may lead to other claims against her former employer:

Q: How many hours did you work every week?

A: There was no week in which she worked fewer than 50 hours. She knows that because she dropped her child off at daycare every morning by 7:30 a.m. before going to work and picked him up after 5:30 p.m. The daycare center is less than a five-minute drive from her former office.

Q: How were you paid?

A: One hundred percent on commissions. In fact, there were several weeks, usually at the beginning of a month, when she received no money at all because most of her loans closed in the last few business days of each month.

Q: Do you know why Mr. Boss removed you from the complicated commission projects?

A: No. In fact, she had handled similar deals in the past. She admits, however, that Mr. Boss frequently moved salespeople from job to job without much reason.

Q: Had you completed all or substantially all of the work necessary to earn the commissions in your pipeline when you were fired?

A: It takes about six months to close a loan. Her main responsibility is to bring clients in the door, but she did have some responsibility to stay on top of the loans until they closed. Hence, for loans that were approaching a closing date, she had completed all of the work. For loans that were scheduled to close in several months, she admitted that there was a lot of loan officer work to be performed to ensure the company earned its fee.

Q: Did your grandmother have a serious medical condition? If so, did you tell your employer about it?

A: Yes. Her grandmother is suffering from cancer. Mr. Boss knew about her condition because she told him about it. She requested leave so she could take care of her ailing grandmother during a round of chemotherapy.

Q: What was your relationship with your grandmother?

A: Her grandmother raised her because her mother died at an early age. Again, Mr. Boss knew about this because she was very open about having a difficult childhood.

Q: Did you sign a noncompetition agreement?

A: Yes. Her noncompetition agreement prohibits her from working in the mortgage industry in Maryland for one year.

With that, I tell Ms. Client that she has several viable claims against her former employer that are worth pursuing. Each one represents a true confession of a plaintiff's employment lawyer.

Employees' lawyers look for overtime claims

No matter the reason a potential client has for making an appointment with me, I ask her whether she ever worked overtime. Although the FLSA and the Maryland Wage and Hour Law have been around for decades, employers still misclassify employees as exempt or simply fail to pay them overtime. In my view, overtime claims are easier to prove than most other claims and more appealing to a jury than a typical discrimination claim. Of course, a good overtime claim carries with it the threat of liquidated damages and attorneys' fees. Under the FLSA, a successful claimant can receive liquidated damages, or a doubling of the back wages that may be due.

Ms. Client may very well have a good claim for overtime under the FLSA. It doesn't appear that she's exempt for any reason. Indeed, in a recent Maryland case, a group of 31 mortgage loan officers filed overtime claims against their employer. In a lengthy opinion, the court denied the employer's request to dismiss the case without a trial because the loan officers were exempt under the motor carrier exemption. *Rogers v. Savings First Mortgage, LLC.*

Watch out for the minimum wage

Some employees who work only on commission may have weeks when they earn no commission at all. In the *Savings First Mortgage* decision, the court granted the mortgage loan officers' request that the case be dismissed without a trial in their favor and awarded them $97,430 in unpaid minimum wages, plus liquidated damages. In our scenario, Ms. Client worked several weeks without compensation. She likely has an easy-to-prove minimum wage claim.

Retaliation claims are often stronger than the underlying claims

Employers and individual supervisors often make the mistake of taking retaliatory action against an employee

who makes an informal complaint of discrimination or sexual harassment. An odd law of inverse proportion seems to apply: The less meritorious the underlying claim, the more likely a supervisor will take retaliatory action. Adding to the potential viability of retaliation claims is the possibility that the U.S. Supreme Court may allow for an expanded definition of what constitutes an adverse employment action under Title VII of the Civil Rights Act of 1964 in its upcoming decision in *Burlington Northern v. White*, Docket No. 05-529 (U.S.).

Ms. Client's sexual harassment claim may not be her strongest. But the timing of her employer's decision to reduce her responsibilities is suspect. Whether she suffered an adverse employment action will likely be better defined after the Supreme Court issues its decision in the *Burlington Northern* case.

Medex case lurks at every firing

Although it has been more than three years since the Maryland Court of Appeals issued its decision in the case of *Medex v. McCabe*, word doesn't seem to have spread to many Maryland employers. The lesson of the *Medex* decision is that by virtue of the Maryland Wage Payment and Collection Law, employers may not arbitrarily require employees to forfeit earned wages. The issues that most often arise when an individual's employment ends are whether the employee performed the work necessary to earn any bonuses, commissions, severance, or accrued leave or other benefits and whether the employer paid those earned wages.

> Employers still misclassify employees as exempt or simply fail to pay them overtime.

Ms. Client, like the employee in the *Medex* case, performed all the work to earn certain commissions that closed after her firing. Her employer failed to pay them. She will assert a claim under the Maryland Wage Payment and Collection Law and cite the *Medex* decision.

Beware the FMLA

Employers often miss the application of the Family and Medical Leave Act (FMLA) when taking job actions against their employees. An employer's alarm should go off when it's firing an individual who requested extended leave, is on extended leave, or is returning from extended leave. The employer should ask, "Is the requested leave protected by the FMLA?" Although U.S. Department of Labor regulations place the initial burden on the employee to request FMLA-qualifying leave, the specific regulation states: "The employee need not expressly assert rights under the FMLA or even mention the FMLA." The burden then shifts to the employer "to obtain the necessary details of the leave to be taken."

Most employers understand that the FMLA applies when an employee is caring for a sick parent. Far fewer employers know that the definition of "parent" includes an individual who "stood *in loco parentis* [in place of the parent] to an employee when the employee was a son or daughter." In a recent Maryland federal district court case, the court held that there was a genuine issue over whether a grandmother stood *in loco parentis* to an employee. More recently, a jury in the same case issued a verdict in the employee's favor and awarded her $76,914 in back pay. As of this writing, the parties' posttrial motions are pending. *Dillon v. Maryland-National Capital Park & Planning Comm.*, 382 F. Supp. 2d 777, 786 (D. Md., 2005).

In Ms. Client's situation, she told her employer (or her employer knew) that she was requesting leave to go to England to care for her sick grandmother, who was undergoing chemotherapy. Assuming her employer is a qualified employer and she's a qualified employee, her request for leave may be protected by the FMLA. The timing of her firing raises the possibility that Mr. Executive took the action because she requested FMLA-protected leave.

Noncompetition agreements are the wild card

Some Maryland employers and employees still incorrectly believe that all noncompetition agreements are unenforceable. Many potential clients reveal to me that they didn't check their noncompetition agreements before agreeing to work for a competitor. As often as employees violate such agreements, employers fail to take action to enforce them.

In the situation presented by Ms. Client, her noncompetition agreement is the wild card. Because she's working for a competitor and is likely violating that agreement, she'll have to make difficult decisions about whether to disclose that fact to her former employer, challenge the agreement's enforceability, solicit her former clients, or choose another profession for the agreement's one-year term.

Bottom line

Although the above may be confessions, they aren't secrets. Management lawyers advise their clients about these issues all the time. Now, you can tell your clients that if they don't follow your advice to them about their obligations under the FLSA, the *Medex* decision, and the FMLA, they're likely to get a letter, if not a lawsuit, from their former employee (and her attorney).

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