# LABOR AND EMPLOYMENT LAW UPDATE

## PERSONAL LIABILITY: THE GROWING MENACE FOR EMPLOYERS AND SENIOR MANAGEMENT

For years, labor and employment laws have presented employers and management with a legal dichotomy. Some laws limit potential liability to employers only, while other laws extend potential responsibility to both employers and employees. Recent trends show that allegations of joint liability are growing. Where permitted, individuals are increasingly being named as defendants in civil suits brought by disgruntled employees.

**WHY CLAIMANTS SUE MANAGERS:** There are many strategic reasons why individuals are being named in civil suits along with employers. A local defendant may prevent an employer from removing a case from state to federal court. Being named individually in a suit can test an employee's loyalty. Suing former employees can be valuable leverage in obtaining cooperation and favorable testimony from those who no longer have any loyalty to an employer.

Naming an individual as a defendant can also complicate, and thereby increase the costs of, the defense of a suit. A conflict of interest between an employer and an individual defendant can necessitate the retention of separate counsel for the individual. Rules of procedure generally allow more discovery where multiple parties are involved. These increased costs are then used by plaintiff's counsel as leverage in settlement discussions.

**DISCRIMINATION LAWS:** Although the Supreme Court has yet to speak on the issue, it is now generally accepted that individuals may not be sued under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act. The Civil Rights Act of 1866 and some state discrimination statutes, however, permit personal liability.

**OTHER EMPLOYMENT LAWS:** Employees generally may not be held personally liable under the Employee Polygraph Protection Act and the Worker Adjustment and Retraining Notification Act. Amongst the federal employment laws which permit personal liability of management employees, however, are the Employee Retirement Income Security Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Immigration Reform and Control Act, the Occupational Safety and Health Act and the Sarbanes-Oxley Act.

**TORT LAWS:** There are a number of work-related torts for which an individual employee can be held personally liable. These torts include wrongful discharge, intentional infliction of emotional distress, defamation, invasion of privacy, negligent hiring/ retention/supervision, assault, battery, false imprisonment and fraud.

**POSSIBLE SOLUTIONS:** A number of options are available to minimize the risks posed by suits alleging joint liability. These options include:

- Limit the number of persons involved in employment decision-making.
- Limit the dissemination of personnel data to those with a need to know the information.
- Include indemnity and cooperation clauses in employment and severance agreements.
- Turn the tactic to the defense's advantage by presenting a human face (a manager) to the jury.

Where appropriate, the costs of joint litigation can also be managed through employment practices liability insurance and arbitration agreements.

## SEXUAL FAVORITISM IN THE WORKPLACE

On July 18, 2005, the California Supreme Court in *Miller v. Dept. of Corrections* confirmed that sexual favoritism in employment can be unlawful sex discrimination under the state Fair Employment and Housing Act. The Court followed the tripartite analysis (set forth below) of the *Equal Employment Opportunity Commission's Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*.

**ISOLATED INSTANCES:** Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men since both are disadvantaged for reasons other than their genders.

**FAVORITISM BASED UPON COERCED SEXUAL CONDUCT:** If a female employee is coerced into submitting to unwelcome sexual advances in return for a job benefit, other qualified employees who were denied the benefit may be able to state a claim of sexual favoritism. Specifically, female employees could claim that granting sexual favors was generally made a condition for the benefit, a condition which was not imposed on men. Men and women alike could also claim that they were injured as a result of the discrimination leveled against the woman who was coerced.

**WIDESPREAD FAVORITISM:** Sexual discrimination may occur if favoritism based upon granting sexual favors is widespread in the workplace. Under such circumstances, managers send the implicit message that women are "sexual playthings", thereby creating an atmosphere that is demeaning to women. Managers also send a message to women employees that sexual conduct or sexual solicitations are prerequisites to fair treatment and advancement. Both men and women who find this atmosphere sufficiently offensive to create an abusive working environment can state a claim for sexual harassment.

**RECOMMENDATIONS FOR EMPLOYERS:** Measures similar to those used to prevent and promptly remedy sexual harassment in the workplace should also be used by employers to prevent and remedy sexual favoritism. Such measures include policies which prohibit sexual favoritism in the workplace and procedures whereby employees can report inappropriate behavior without fear of retaliation. Reports of sexual favoritism should be thoroughly and promptly investigated and, where appropriate, timely remedial taken against persons who have violated the policies.

## DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

**CAMPBELL & LEBOEUF**
**A PROFESSIONAL CORPORATION**

BRUCE A. CAMPBELL
NICOLE T. LEBOEUF
ROBERT G. CHADWICK, JR.*
JASON A. SCHMIDT
SHELLY L. SKEEN
YODETE A. LANE

3939 BELT LINE ROAD, SUITE 510
ADDISON, TEXAS 75001
TELEPHONE: 972.277.8585
FACSIMILE: 972.277.8586
WWW.CAMPBELLLEBOEUF.COM

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