

Neel, Hooper & Banes, P.C.

Employment Law With A Different Twist

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SPRING UPDATE

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I. FIRM NEWS



We Are Growing. As you will or have noticed, we are now Neel, Hooper & Banes, P.C. Effective January 1, 2006, Bryant S. Banes merged his practice, which focuses on representing employers seeking or administering government contracts, with the established labor and employment law practice of Neel & Hooper. Bryant gained extensive experience in the practice of government contract law through his years as an Army JAG officer overseeing government contracts and during his years with the Department of Justice from 1998-2002. Bryant's most recent stint on the government side of government contracts came in 2004 when he was activated and served a year in Iraq as Chief, Procurement and Fiscal Law for Theater. Bryant remains a Lieutenant Colonel in the Army Reserve.

Linda Evans, who you all know has been with the firm for over five years, joined Jim Neel, Sam Hooper and Terrence Robinson as being Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Congratulations to Linda. The firm is also pleased to welcome Sean Forbes into the fold. Sean has been

a lawyer for three years and worked with Bryant in assisting employers with government contract issues prior to joining the firm. Sean continues to focus on government contract issues, while being inundated with the practice of labor and employment law. Grae Griffin continues to focus on labor and employment law but is beginning to be exposed to the challenges of dealing with government contracts.

Of all the lawyers in the State of Texas practicing labor and employment law, there are only 209 recognized as "Super Lawyers" by Texas Monthly. Three of those are with Neel, Hooper & Banes, P.C. Jim Neel, Sam Hooper and Terrence Robinson received this honor in the October 2005 issue of Texas Monthly.

II. ADEA And The OWBPA

Dot Your 'I's And Cross Your 'T's. Recall that the Older Worker's Benefit Protection Act (OWBPA) imposes specific requirements for a release of age bias claims to be valid and enforceable. For instance, the waiver must be knowing and voluntary. To be considered knowing and voluntary, the waiver must satisfy certain requirements, including notifying the affected workers about the "class, unit, or group of individuals covered by [the] program, any eligibility factors for such program, and any time limits to such program."

In a recent case, an employer selected 31 employees for a reduction in force. The employer provided to each of the affected employees a letter in which it listed the employees selected for termination and a list of employees not selected for termination. The list, however, was limited to salaried employees who reported to the mill manager, rather than all salaried employees on the

premises. The letter also failed to disseminate any eligibility information or set forth the factors used in making the determination as to who was selected for termination. Nevertheless, the employer presented the selected employee with a severance package that included a release of claims. The Tenth Circuit, however, held that the release of the age claims was invalid because the employer's letter did not comply with OWBPA. Thus, the employees were allowed to bring suit against the employer under the Age Discrimination in Employment Act (ADEA), despite paying the employees money in exchange for waiving the right to sue. The decision highlights just how literal the courts tend to be in construing the specific requirements that employers must follow to make ADEA releases binding. Thus, employers must dot their 'i's and cross their 't's when getting releases.

Fire Me Or Else. Imagine you are an HR Manager being asked to eliminate a position in your department. As you process the pros and cons of each employee, you think I really want to keep the employee with the most experience because he/she brings the most to the table. Now, imagine that employee suing you for NOT laying her off. That's exactly what happened in a recent case in which an HR Manager decided to retain the services of a 70-year-old employee who had 24 years of experience, while terminating the other, younger employee in the department. Once the HR manager informed the senior employee that she was keeping her job, she asked if she could retire and collect severance benefits. The request was denied, and the employee was retained. She then filed an age discrimination suit claiming that the younger employee received better treatment by being FIRED. (Think about what that says about the company.) The court came to the sane conclusion that continued employment in the same role is not an adverse employment action. Thus, the employer was able to convince the court to dismiss the case before the parties got too far into litigation. Amazingly, this was not the first time an individual has brought a suit where their central argument was that keeping their job was an adverse employment action. While this argument has not been successful, at least one opinion has given plaintiffs' attorneys some hope that this argument could be viable in certain situations. Let's hope we never have to find out what these situation may be.

III. TITLE VII

Employees' Out Of Control Teasing About Confidential Info.

As we've stated before, companies should take claims of harassment seriously and have policies in place that deal with such concerns. But it's



not enough to have the policies—they must also be followed. Failure to do so can be costly. Recently a company found that just having an "open door policy" for an employee's complaints was not enough to protect it from a large judgment. To make matters worse, the company appeared to also have an "open mouth" policy where an employee's private medical condition was freely discussed and joked about, often with supervisors joining in the fun. The company's first mistake was allowing office personnel to openly discuss and share with other employees the guy's medical problems.

In this case a male employee had just returned from a medical leave of absence for penile implant surgery and immediately became the butt (well not exactly) of many unwanted jokes. The company's second mistake was not investigating his complaints and attempting to stop the harassment. In court the company tried to claim that the employee was not entitled to punitive damages because the company's open door policy was evidence of a good faith effort to comply with the law. The court rejected the idea that just having the policy was enough. It said that the open door policy was just a sham designed to give the appearance of a compliance effort and that the employer acted with reckless disregard of the employee's rights. A word to the wise: respect employees' privacy rights when it comes to medical issues. It's not only good workplace manners, it's also the law! Second word to the wise: have a policy that requires harassment complaints to be taken seriously and then follow that policy.

Count First. Title VII defines an employer covered by Title VII to include only those having "fifteen or more employees." The Fifth Circuit, along with several other circuits, has held that the fifteen or more requirement is jurisdictional, thus a court's jurisdiction over a Title VII case depended upon the employer having employed fifteen or more

employees. In a recent case, the employer went all the way through trial and lost, without raising the issue of jurisdiction. A new lawyer was brought on who then moved for judgment in the district court, contending that the court did not have subject matter jurisdiction over the case and, since subject matter jurisdiction can be raised at any time, the court could not enter judgment in favor of the plaintiff. The district court agreed with the employer and dismissed the case. The Fifth Circuit affirmed the district court. The U.S. Supreme Court then entered the fray and held that while it is correct that subject matter jurisdiction may be raised at any time, the fifteen or more requirement set out in Title VII is not jurisdictional. Rather that requirement is an element of the plaintiff's case. Since the employer had not challenged the allegation that the case arose under the Act, the Supreme Court held that the original jury verdict in favor of the plaintiff be reinstated. While the fifteen or more requirement is not technically an affirmative defense, an employer must deny any allegation that it is an employer as defined under the Act and raise the issue prior to trial or it will forfeit the requirement that the plaintiff prove that it employed fifteen or more employees as required for coverage as an employer under the Act.

Just Saying It Ain't Fair Ain't Enough! Employers will be happy to know that although there is a fairly low requirement for employees seeking protection against retaliation, Title VII does have its standards. Recently both the district court and an appeals court held that a general and vague claim of "it ain't fair" does not automatically translate into a charge of illegal discrimination that triggers the protection of the anti-retaliation provisions of Title VII. An employee working at a jail was reprimanded for various incidents of insubordination and inappropriate behavior over the course of several months. He filed an EEOC charge making general allegations of discrimination that the EEOC dismissed for his failure to state a claim. His bad behavior continued, he was discharged and he filed a second EEOC charge, claiming his termination was in retaliation for filing the earlier charge. Before it was all over, the employee filed a third EEOC charge, but this too was dismissed because the EEOC could not find evidence of a violation. Not being the type to go away quietly, the employee then filed a lawsuit, alleging his termination was unlawful retaliation. Both courts that heard the case said the employee's charges did not comply with the Title VII language that clearly requires allegations of discrimination on the basis of race, color, sex,

religion or national origin. The employee's charges were too vague and he was sent packing—no doubt crying "it ain't fair" all the way home.

Boy, That's A Slap In The Face!

The U.S. Supreme Court held that the Eleventh Circuit had erred in holding that referring to an employee as "boy" could not be deemed discriminatory unless the term was modified by a racial classification, such as "black" or "white." The Supreme Court held that the use of the term "boy" alone may be evidence of racial animus depending upon various other factors such as context, inflection, tone of voice, local custom, and historical usage. The Supreme Court also disapproved of the Eleventh Circuit's articulated standard for determining whether a plaintiff's assertion of being more qualified than the successful white selected for a position. The Eleventh Circuit had applied the standard that, in order to establish pretext "the disparity in qualifications [must be] so apparent as virtually to jump off the page and slap you in the face." While the Supreme Court rejected that standard, it did not set out what would be the correct standard to use in situations when the qualifications of two candidates are being compared. This decision of the Supreme Court emphasizes the need to train supervisors and managers of the risk of referring to employees in potentially offensive terms (such as "boy," "girl," "yahoo," "gorilla," etc.). How the apparently neutral negative term is spoken by the supervisor (which is a fact question) could lead to costly litigation. Further, when selecting one candidate over another, be certain that the qualifications and experience of the unsuccessful candidate are not obviously more impressive than those of the successful candidate (or the reason for the selection of the lesser qualified applicant can be explained by non-discriminatory reasons).



IV. GOVERNMENT CONTRACTS

Protecting Your Company From Whistleblower Suits Under the False Claims Act. Late last year, a Houston-based construction company agreed to pay the United States \$3 million to settle allegations that it violated the False Claims Act by failing to abide by minority-business contracting mandates on a federal highway project.

In its suit, the government alleged that the contractor violated the False Claims Act while acting as a prime contractor on federally-funded highway construction projects being performed in Texas. The company was accused of failing to abide by the U.S. Department of Transportation's (DOT) "disadvantaged business enterprise" (DBE) contracting requirements. The DBE program helps companies owned by minorities and women participate in state and local contracts. The Justice Department claimed that the contractor did not inform the DOT that it actually exercised control over two companies that were said to be DBE businesses so it didn't qualify under the DBE program and was fined big time for trying.

In March 2006, a jury sitting in Virginia federal court found that an American security contractor in Iraq must pay more than \$10 million in penalties and damages for defrauding the U.S. government. The verdict marks the first time that a contractor has been found liable under the False Claims Act for defrauding the government in connection with Iraqi reconstruction work. The defendant contractor was sued in 2004 by a subcontractor, its managing director and a former employee of the security contractor. The plaintiffs claimed the company knowingly submitted false payment claims under both contracts to the Coalition Provisional Authority that temporarily governed Iraq, and the jury agreed. Although the federal government declined to participate in the suit, it will share in the award with the plaintiffs.

The civil False Claims Act's "qui tam" provisions permit private parties to file fraud suits in their own names and to share in any Government monetary recovery for false claims, which can be three times the government's loss. This means that anyone who becomes aware of fraud (other than through public disclosures), including even a participant in the fraud, has a substantial financial incentive for exposing it.

If any of you want to know more about the benefits and the pit falls of government contracts: How to get them, how to keep them, and how to comply, we have prepared a memo that would be of help to you. Just call Tiffany at (713) 629-1800 or email her at tlaird@neelhooper.com.

Federal Minimum Wage Guidelines Applicable To City Construction Projects. As of February 1, 2006, the City of Houston will follow the new federal wage guidelines for workers on municipal government construction jobs. However, between 1985 and February's adoption of federal wage guidelines, the city established minimum wages on its construction projects based on data collected by private consultants. The difference in methodology for establishing minimum wages resulted in a great disparity between wages and benefits on county projects versus city projects. For example, some minimum wage rates for city projects had not been raised since 1985. This is the rationale given by the city for its decision. But what is the real impact of this decision on companies engaged in municipal construction projects?

The city's recent pronouncement makes the Davis Bacon Act and its sister statutes applicable to city construction projects for the first time. The Davis Bacon Act is the federal government's vehicle for providing minimum wage and fringe benefits for workers on federal construction contracts. Under this Act, the Secretary of Labor determines what the prevailing minimum wages and fringe benefits are for a given locality. Contractors subject to this Act must pay these prevailing local wages and benefits. Contractors must post schedules of these prevailing wages in a visible location at the work site. Contractors must pay workers no less often than once per week. Contractors must keep records detailing their compliance with the Act for three years after completion of a project. Furthermore, its provisions apply equally to both prime and subcontractors. Now the Act's provisions apply to contractors on the City of Houston's construction projects.

Remember, from this point forward, there are some new procedural and administrative hurdles associated with City of Houston construction contracts. Fortunately, with the right advice, they are in no way insurmountable hurdles.

V. ARBITRATION

There Is A Point To This Story. A former union steward purchased a set of ornamental (but sharp) set of knives on his way to work one night. At break time he discussed



the knives with a fellow employee and then went to his car to retrieve the knives to show the fellow employee. A third employee saw the grievant with the knives and loudly proclaimed that he was afraid of knives, that knives were not allowed in the plant and the grievant should take the knives back to his car. The third employee testified that the grievant walked toward him and said: "I'm going to slice your balls off," while moving the knife back and forth in a slicing manner. Once the conduct was reported to management, the company suspended the grievant and conducted an investigation of the incident. The company interviewed four witnesses to the incident and obtained written statements from each one. The company did not interview the grievant but did ask the now former union steward to ask the grievant if he had threatened the third employee. The steward reported back in writing that the grievant admitted to having threatened the third employee. Pretty open and shut case isn't it? Not quite. At trial, the grievant denied having threatened the third employee and denied having admitted to having done so to the then union steward. The union also presented evidence that the grievant and the former union steward were political adversaries in the union and that the grievant was campaigning against the former steward at the time the incident occurred. The arbitrator concluded, at the urging of the union, that the company erred in not interviewing the grievant during its investigation of the incident. The company responded that it would have made no difference if it had interviewed the grievant because the statements from the other employees clearly established that the grievant had threatened the third employee. Not good enough, concluded Arbitrator Paull who ordered the grievant reinstated with full back pay. Lesson learned: Always give the accused employee an opportunity to tell his/her side of the incident which may lead to discipline (we recommend doing so in order to pin down the accused employee on a story as quickly as possible – perhaps before the union coaches him/her).

VI. OSHA

Ignorance Of The Law Is No Excuse. Recall that in order for an OSHA violation to stand, the Secretary of Labor must prove that the employer knew of the violative condition or could have known of the condition through reasonable diligence. Part of 'reasonable diligence,' according to OSHA, is anticipating hazards and taking reasonable measures (e.g., instituting safety rules) to ensure hazardous conditions do not exist. Amazingly,

failing to institute and enforce appropriate safety rules could mean that an employer is saddled with constructive knowledge should an OSHA citation occur. This is exactly what happened in a recent administrative hearing in which an employer failed to implement and enforce adequate safety rules. The employer was engaged in the business of hanging highway signs from overpasses. One day, an OSHA inspector witnessed two employees working in a cherry picker without being tied off to the bucket or the overpass. The inspector approached the supervisor and asked why they weren't using fall protection. The supervisor responded that the cherry picker was the fall protection and that **he did not know** that any additional measures were necessary. The investigator explained the error and cited the employer for failing to take adequate fall-protection measures. At the hearing, the employer argued, much like the supervisor at the scene, that it was not guilty of the conduct because it thought the cherry picker provided the adequate fall protection. Unfortunately for the employer, the administrative law judge upheld the citation, holding that the employer had constructive knowledge of the proper means of fall protection because it should have known about the proper measures to prevent falls and should have had rules communicating as much. In other words, the judge came to the illogical conclusion that the employer knew of the violative conduct because the employer DID NOT disseminate and enforce rules regarding the violative conduct. While this aspect of OSHA law is incredibly illogical, it demonstrates that employers must be diligent about investigating potential workplace hazards and communicating the proper ways to avoid these hazards to employees. Further, employers must remain vigilant about enforcing workplace safety rules, or risk citations and fines. A lack of diligence or knowledge about workplace safety will not be a defense when OSHA comes calling.



VII. NEW LEGISLATION

Sexual Orientation As A Protected Category – 17 States and Counting. The state of Washington recently passed legislation prohibiting discrimination based on sexual orientation in employment, accommodation, commerce, real estate and other business transactions. Sixteen other states as well as the District of Columbia currently have such laws. The Washington Law Against Discrimination already prohibited discrimination based on race, creed, color, national origin, families with children, sex, marital status, age, the presence of any sensory, mental or physical disability, or the use of a trained guide dog or service animal by a disabled person before adding sexual orientation. There are exceptions to the new statute, including among other things, employers with less than eight employees and nonprofit religious or sectarian organizations. Supporters of the bill included several large companies like Microsoft Corp., the Boeing Co., Nike Inc., Hewlett-Packard as well as the Washington Human Rights Commission and some church groups. Opponents included other church groups and individuals, including an anti-tax group. Although Texas does not have such a state-wide law, three cities--Austin, Dallas and Ft. Worth--do. If you do business outside the state of Texas, we can give you the additional information you need to keep up with this changing area of the law.

A Toast To The Texas Supreme Court! We generally like employee manuals and, in fact, have helped many clients develop or revise their manuals. However, a couple of years ago there was a court case out of Corpus Christi which made us a little concerned about termination language in a manual. That court had held that language in a manual that stated employees *maybe* dismissed for cause meant employees could be dismissed *only* for cause.

We just didn't think that was right and now the Texas Supreme Court agrees with us. Cheers! It recently reversed the decision by the Corpus court and held that just because a manual says an employee may be dismissed for cause does not mean that is the *only* reason an employee can be terminated nor does the manual alter the at-will employment relationship as the Corpus court suggested. The Texas Supreme Court went on the say that an employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified

circumstances for the at-will relationship to be altered. Salute!

Union Organizational Activity Since Our Last Newsletter. Seven petitions for certification have been filed by unions since September 30, 2005. Five elections have been held, three of which have been won by management.

The Quarterly Update is a newsletter providing recent items of interest to our clients in the various areas of employment law. While the Update is to alert you to potential new problem areas or changes in the law, it is not to be considered legal advice or a legal opinion. Such can only be given after careful consideration of the facts unique to any situation. The contents of this newsletter are copyrighted and may not be used without express written consent of Neel, Hooper & Banes, P.C.

Neel, Hooper & Banes, P.C. **
1700 West Loop South, Suite 1400
Houston, Texas 77027
713/629-1800
713/629-1812 (Facsimile)
www.neelhooper.com (Website)

James M. Neel*	jneel@neelhooper.com
Samuel E. Hooper*	shooper@neelhooper.com
Bryant S. Banes	bbanes@neelhooper.com
Terrence B. Robinson*	trobinson@neelhooper.com
Linda H. Evans*	levans@neelhooper.com
M. Grae Griffin	ggriffin@neelhooper.com
Sean D. Forbes	sforbes@neelhooper.com

* Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization

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