

Hot Topics for Tennessee cities and towns

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Personnel Issues in the News

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Use of Credit Reports in Hiring

Beginning in September 1997, employers will be required to obtain written permission from employees and applicants before obtaining a copy of a credit report to be used in employment decisions. Changes to the Fair Credit Reporting Act (FCRA) were enacted last year as part of the Omnibus Appropriation Act. Pursuant to the amendments, the Federal Trade Commission (FTC) is developing rules that provide a "Notice to Users of Consumer Reports." The notice includes a section directed toward employers stating that they must obtain written permission before obtaining a credit report. They must also provide an employee or job applicant a copy of the credit report and a summary of his or her rights before taking any adverse employment action, (i.e., denying an applicant a position). A copy of the proposed regulations is available through the FTC's homepage on the Internet at <http://www/ftc.gov> under "What's New," or by calling Clarke Brinckerhoff or William Hayes with the FTC at 202-326-3224.

(Reprinted from *Agency Issues*, Vol 21, No. 6, March 24, 1997.)

INS Issues New Employment Authorization Document

The Immigration Naturalization Service (INS) will issue new identification cards for work-eligible aliens. The Employment Authorization Documents (EADs) form 1-766, were distributed at the end of January. Human resource professionals responsible for verifying employment eligibility should be aware of these new documents. Work-eligible aliens may present the EAD to employers during the employment eligibility verification process. A brochure describing the EAD is on-line at <http://www.usdoj-gov/ins/>. For more information, contact the employer hotline at 202/305-2523.

(Reprinted from *Agency Issues*, Vol 21, No. 3, Feb.10, 1997.)

Discrimination

Title VII's Anti-Retaliation Provisions are Retroactive

The Supreme Court ruled in February that Title VII's anti-retaliation provisions apply to former employees. Title VII prohibits employers from discriminating against employees based on race, sex, color, religion, or national origin. The provision at issue prohibits employers from retaliating against employees who have filed claims under the act. Justice Clarence Thomas wrote the opinion for a unanimous court in *Robinson v. Shell Oil*.

Charles Robinson filed a racial discrimination suit following his termination of employment from Shell Oil. He then applied for a position with Metropolitan Life Insurance Co., but was turned down because of a poor reference from Shell Oil. He then filed a second discrimination suit against Shell, alleging illegal retaliation. Robinson alleged that Shell provided a negative job reference in retaliation for his original racial discrimination law suit. The U.S. Court of Appeals for the Fourth Circuit ruled against Robinson based on the finding that the word "employee" does not include a former employee, as in Robinson's case.

The Supreme Court reversed and held that Title VII does include former employees. Justice Clarence Thomas stated that it is more consistent with the broader context of Title VII to include former employees within its scope. Employers should take note when providing job references. If an employee has brought a Title VII law suit and later asks for a job reference, any negative information given out may provide the groundwork for an illegal retaliation suit.

A copy of the Supreme Court decision is available on the Internet at: <http://supct.law.cornell.edu/supct/>. Once connected to the homepage, search by the title or date of the case.

(Reprinted from *Agency Issues*, Vol 21, No. 5, March 10, 1997.)

OMAG Wins Sex Discrimination Lawsuit

The city of Battlesville, Okla., a member of the Oklahoma Municipal Assurance Group, revealed before a federal jury against allegations of sexual harassment and wrongful termination from a female police dispatcher.

The dispatcher, Gina Thompson, was fired in 1994 for an alleged act of sexual misconduct with a police officer while on duty. In her lawsuit, she denied the allegation and claimed the department was retaliating against her for a sexual harassment claim filed against her sergeant in 1992.

In another matter, Thompson was disciplined for uttering sexually offensive language. Although she claimed to be the victim of several uninvited rumors concerning her sex life with other officers, some evidence convinced the jury that Thompson had started one of the rumors herself. The jury was unanimous in finding for the city in the case. Stephen Reel, an attorney for OMAG, believes one key reason for the verdict was that the gap between the 1992 incident and her termination was too large for establishing a causal relationship supporting Thompson claim of retaliatory discharge (*OMAG News*, Nov. 15, 1996).

(Reprinted from *Prima RiskWatch*, Jan/Feb 1997, Vol XIII, No 1.)

Public Safety

Offer the Light Duty

Three disabled officers win \$800,000 for being denied light duty or civilian positions. One suite was brought by the Justice Department and the other was privately litigated. The Denver Police Department had a policy of separating officers who have been disabled on the job rather than assigning them to light-duty positions or transferring them to other civil service jobs they were qualified to perform.

In these cases, the city had civilian positions that the litigants were capable of performing. The officer represented by the Justice Department was awarded \$300,000 plus back pay. The other two were awarded \$250,000 each. *U.S. v. City & Co. of Denver*, 943 F. Supp. 1304, 1996 U.S. District Lexis 15258 (D.Colo.); *Davoll et al v. Webb*, 943 F. Supp. 1289, 1996 U.S. District Lexis 15257 (D. Colo.); DOJ News Release CR 96-558.

(Reprinted from *Fire and Police Personnel Reporter*, No. 97-2, Feb. 1997.)

EMS Employees Exempt From Overtime Requirements

A federal circuit court ruled in favor of the City of Gladstone, Mo., in a FLSA case with important implications for public employers. The U.S. Court of Appeals for the Eighth Circuit ruled that the city's emergency medical services (EMS) employees are partially exempt from the FLSA overtime requirements. In this case, three EMS employees sued for overtime pay. However, the city contended that they were covered by the partial overtime exemption in Section 207(k) of the FLSA. *Kevin D. Christian, et al v. The City of Gladstone, Missouri*, Docket Nos., 96-1646/1777.

In reversing, the Eighth Circuit found that the EMS personnel spent the required amount of time on exempt activities and therefore were covered by the partial overtime exemption. The Eighth Circuit also found that the EMS employees met the four-part test contained in the Department of Labor regulations. The four parts are: (1) employment by an organized fire department or fire protection district; (2) training to the extent required by state statute or local ordinance; (3) the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) performance of activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental non-firefighting functions, as housekeeping, equipment maintenance, lecturing, attending community fire drills, and inspecting homes and schools for fire hazards. The regulations include rescue and ambulance service personnel, if such personnel form an integral part of the public agency's fire protection activities.

(Reprinted from *Agency Issues*, Vol 21, No. 6, March 24, 1997.)

New Law to be Clarified by Department of Justice

The Public Safety Officers Benefits (PSOB) law continues to cause confusion for human resources professionals struggling to determine exactly what level of benefits must be provided to injured officers. The PSOB was enacted as part of the Omnibus Consolidated Appropriations Act for fiscal year 1997. It states that health benefits must be provided to a "public safety officer who retires or is separated from service due to injury suffered as the direct and proximate result of a personal injury sustained in the line of duty while responding to an emergency or hot pursuit (as such terms are defined by state law) with the same or better level of health insurance benefits that are paid by the entity at the time of retirement or separation."

Help is at hand for jurisdictions trying to decide exactly what benefits are required. First, the term "public safety officer" actually includes more than just police officers — it also includes law enforcement officers, firefighters, rescue squad, and ambulance crew. According to staff with the Department of Justice, Office of Justice Programs (the agency responsible for enforcing the new law), the provision applies only to Local Law Enforcement Block Grants and only to 1997 money that has not even been made available yet. Further, jurisdictions must only offer the same or better benefits to injured officers as they would under regular retirement plans. For instance, if a jurisdiction normally pays for 50 percent of a retiree's health benefits, it must pay 50 percent of the health benefits for an injured officer.

(Reprinted from *Agency Issues*, Vol 21, No. 7, April 7, 1997.)

Short Disciplinary Periods Means Fire Chiefs are Hourly

In many communities, determining who is and is not exempt from FLSA requirements can translate into tens of thousands of dollars. In Portland, Ore., a city policy that provides for disciplinary suspension of less than one week has led a federal appeals court to rule that battalion chiefs in the fire department are not exempt from FLSA's overtime pay requirements. Since the city can issue suspensions of less than one week, the chiefs are considered hourly employees under FLSA and therefore, entitled to overtime pay. The three-judge court, in making its ruling, noted that even though such a suspension had never been ordered (since the city was authorized to do it) the chiefs qualified under FLSA for overtime pay.

(Reprinted from *What's Working in State & Local Government*, Dec. 31, 1996.)

National Guard Duty Leave Abuse Leads to Firing

An arbitrator has upheld the actions of Youngstown, Ohio police officials in a case in which an officer was paid for time used to attend National Guard training even though the officer never made it to the training. In this case, the officer was absent from work for a total of five days in a three-month period to attend National Guard training. Accordingly, the police department paid him full salary and benefits for these days. It was discovered, however, that he never attended any of these sessions. When confronted about his absence, the officer claimed he was sick on three of the days, had to attend a family emergency on another, and offered to use compensatory time for the fifth day.

He was terminated and his local union filed a grievance. During the grievance hearing, it was revealed that the 18-month veteran had no sick leave available to him at the time of his absences since he had already used the 180 hours accrued during his tenure. As such, he would not have been paid for those days. In ruling in favor of the police department, the arbitrator noted that the officer had failed to notify the department of his absences from National Guard training until confronted about it. The arbitrator also noted that the officer "violated the trust placed on him by his supervisors and the public."

(Reprinted from *What's Working in State and Local Government*, May 31, 1997.)

Flirting While On-Duty Can Cost a Job

An arbitrator in Ohio has upheld the termination of a state trooper who was accused of stopping a motorist while on-duty so that he could flirt with her. In this case, the female motorist, at the urging of her police officer boyfriend, filed a complaint with the state police department alleging that a trooper had pulled her car over for no apparent reason. While talking with the stopped driver, the trooper allegedly told the motorist that she was "cute" and asked her to drive off of the interstate so they could continue their conversation. The motorist declined and filed the written complaint. During the hearing contesting the trooper's termination, the trooper denied both stopping the motorist and the alleged conversation. The arbitrator noted, however, that the motorist was able to pick the officer out of a picture array, and the department duty logs indicated that the trooper was in the area where the alleged confrontation occurred. As for the punishment of termination, the arbitrator relied on several factors in upholding the decision — the trooper had been disciplined several times in the past, including a three-day suspension.

(Reprinted from *What Working in State and Local Government*, March 31, 1997.)

EEOC

ADA/Psychiatric Disability Guidelines

The Equal Employment Opportunity Commission (EEOC) recently issued enforcement guidance on psychiatric disabilities and the Americans With Disabilities Act (ADA). EEOC issued the new guidelines to help employers understand how the ADA applies to people with mental illness such as major depression, anxiety disorders, schizophrenia, and personality disorders. To establish a psychiatric disability, an individual must first prove a substantial limitation in a major life activity other than working, such as sleeping, concentrating, or caring for oneself. Working should be analyzed only if no other major life activity is substantially limited by an impairment. The courts generally focus on the abilities of the particular individual, not simply on the type of medical condition. In essence, EEOC is ensuring that employers do for employees with psychiatric disabilities — make reasonable accommodations that will enable those employees to do their jobs, unless making an accommodation causes undue hardship to the employer by proving to be too difficult or too expensive. Types of accommodations that may be suitable for persons with psychiatric disabilities could include time off using accrued paid leave or additional unpaid leave, a modified work schedule, adding room dividers or soundproofing for those who can't concentrate, allowing more frequent breaks, providing detailed daily guidance, or providing a temporary job coach to help a job candidate with a psychiatric disability through training.

Copies of the 38-page guidance may be obtained by calling EEOC's Publication Distribution Center at (800) 669-3362 or write EEOC's Office of Communications and Legislative Affairs, 1801 L St. N.W., Washington, DC 20507.

(Reprinted from *PRIMA RiskWatch*, Vol XIII, No. 6, July 1997.)

Non-Waivable Employee Rights

In April 1997, the EEOC issued a document on non-waivable employee rights. The document advises employers that they may not interfere with the protected rights of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under Title VII, the ADA, the ADEA, or the Equal Pay Act.

The EEOC states that interference with these protected rights is contrary to the public policy and that anti-retaliation provisions of the civil rights statutes prohibit such conduct. The guidance document cites with approval a case in the U.S. Court of Appeals for the First Circuit, *EEOC v. Astra USA* (1996), in which the court prohibited the employer from enforcing a settlement agreement that prohibited employees from assisting the commission in investigating any sexual harassment charges against the employee.

(Reprinted from *Agency Issues*, Vol 21, No. 10, June 9, 1997.)

DOL Regulatory Agenda

- **FLSA Exemption:** DOL is reviewing the salary-level test requirements used to determine which employees qualify as exempt from the minimum wage and overtime rules. State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s, and do not readily adapt to contemporary government functions. The agency also says court rulings have caused confusion as to what constitutes compliance in both the public and private sectors. A proposed rule is scheduled for September 1997.
- **FLSA Recordkeeping:** DOL plans to issue a proposed rule to provide guidance on the information employers must keep in records deemed essential for determining compliance with the Fair Labor Standards Act's requirements for paying minimum wages and overtime compensation to covered and nonexempt employees. The proposed rule is scheduled for June 1997.
- **Drug/Alcohol Tests:** The FTA is considering amending its drug and alcohol rules to let employers use the results of a drug or alcohol test administered by state and local law enforcement personnel after an accident. The change would make FTA's rule parallel with FHWA's.
- **Occupational Exposure to Tuberculosis:** OSHA is developing a proposed rule that would require certain employers to take steps to eliminate or minimize employee exposure to TB. Cost will be incurred by employers for engineering controls, respiratory protection, medical surveillance, training, exposure control, recordkeeping, and work practice controls.

(Reprinted from *Prima RiskWatch*, Jan/Feb 1997, Vol XIII, No 1.)

News from the Courts

The U.S. Supreme Court in a five to four vote overturned a lower court's \$818,000 award to a woman injured by a police officer. The ruling makes local governments less vulnerable to suits alleging civil rights violations. The court said that a victim must show that a city or county consciously disregarded the risk of hiring a person and that the injuries were a "plainly obvious consequence" of the hiring decision. The case involved an Oklahoma deputy sheriff who had a record of various misdemeanors before he was hired. However, state law did not prohibit him from being hired. While on duty, he pulled a woman from a truck and threw her to the ground, which resulted in her having four operations for total knee replacements. Although a victim could still sue the individual officer, the ruling makes it harder for a person to bring suit under Section 1983 against a state or municipality for infringing on rights protected by the Constitution or federal statute. The ruling covers only hiring decisions, not claims that a government failed to properly train or discipline officers or other workers. In the majority opinion, Justice Sandra Day O'Connor noted, "Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause." O'Connor said that the victim failed to show that the county, through its "deliberate indifference" was the "moving force" behind her injuries (*The Washington Post*, April 29, 1997, *Commissioners of Bryan County v. Brown*).

Arbitrator Reinstates Worker Who Lied About Identity

Even though a worker lied about his identity when he originally applied for a job, a federal court has upheld an arbitration award that reinstated the worker and awarded him back pay. As was all too common at the time, the worker in this case had entered the U.S. illegally and lacked proper identification. To get a job, he gave a false name and social security number. While employed for more than nine years, he gained legal residency under a federal amnesty program and became a naturalized citizen five years later. When company officials discovered that he had lied when applying for the job, they fired him. An arbitrator, citing the nine years of unblemished service, ordered the man reinstated and awarded back pay. In upholding the award, the federal court noted that the man "proved himself an honest employee," and that the termination was too severe of a punishment.

(Reprinted from *What's Working in State & Local Government*, December 31, 1996.)

Available Personnel Resources

EEOC Launches Internet Web Site

The EEOC recently launched a homepage on the Internet to provide the public with greater access to an array of agency information materials and resources. The new homepage can be found on the World Wide Web at <http://www/eeoc.gov/>.

The page includes biographies of the commissioners and general counsel, EEOC's annual report, addresses and phone numbers of field offices, the text of the laws enforced by the agency, press releases, fact sheets, and periodicals. Other documents to be included in the future will be the agency's policy guidance and litigation logs.

(Reprinted from *Agency Issues*, Vol 21, No. 7, April 7, 1997.)

BNA Releases SSI and Medicare Fact Sheet

Human resources professionals have a convenient and cost-effective way to answer employees' benefits concerns with the 1997 Edition of *Your New Social Security and Medicare Fact Sheet*, published by the Bureau of National Affairs (BNA). The fact sheet gives current information, and answers the most commonly asked questions about Social Security and Medicare for employees, retirees, and their dependents.

The fact sheet briefly summarizes the benefits under the Social Security and Medicare programs, which include hospital and medical insurance, as well as retirement, disability, and survivors' benefits. In addition, the fact sheet can help employees find out the 1997 tax rates and 1997 ceiling on the Social Security tax; how much they will receive in retirement, requirements for survivor and disability benefits, when they can begin receiving benefits, Medicare premiums, co-payments and deductibles, details on medical services covered under Medicare, and more.

For price or ordering information, contact BNA Books, P.O. Box 7814, Edison, N.J. 08818-7814. Telephone orders: 800-960-1220; fax orders: 908-417-0482. A free catalog of BNA law books is available by calling 800-960-1220, or visit BNA's homepage at: <http://www/bna.com/bnabooks>.

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MTAS Mission Statement

The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee's Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, communications, and wastewater management. MTAS houses a comprehensive library and publishes numerous documents annually.

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