page 2
Employer sued for death due to dangerous machinery
Deaf employee may be entitled to an interpreter
page 3
Company can't fire executive *and* his wife
Male worker can sue for sexual harassment
Can employer require arbitration if it went to court first?
page 4
Businesses are under fire over background checks

Legal Matters®
Employment Law
winter 2011

More workers are suing their employers for 'retaliation'

It's illegal for an employer to retaliate against a worker who complains of discrimination. This is true even if the employer genuinely believes that the worker's claim is untrue.

What's more, workers who are retaliated against – through changes in their job, or having to endure a hostile environment – can sue in court for damages.

And these days, more and more workers are doing just that. In fact, "retaliation" is now the single most common type of complaint filed with the federal Equal Employment Opportunity Commission, making up 36 percent of all claims last year.

That means there are more claims for retaliation than for any of the specific underlying types of discrimination, such as race, sex, age or disability.

In the past, many workers would sue for discrimination and "add on" a claim for retaliation, more or less as an afterthought. But these days, a growing number of workers are filing lawsuits that focus almost entirely on what the employer did *after* the initial complaint about job bias was made.

©istockphoto.com/Ljupco

One reason is that it can be easier for workers to persuade a jury that they were retaliated against after they complained than that they were discriminated against before they complained.

For instance, few employers come right out and say that they are passing employees over for

continued on page 2

BELIVEAU LAW GROUP, LLC
Massachusetts offices: Waltham, MA; Danvers, MA; and Quincy, MA
New Hampshire offices: Manchester, NH and Salem, NH
Florida offices: Fort Lauderdale, FL and Naples, FL
Main Telephone Number: (781) 890-8600 • Email: firm@beliveaulaw.com • Website: www.beliveaulaw.com

More workers are suing their employers for 'retaliation' *continued from page 1*

a promotion because they are "too old," so it can be difficult to prove that the employer was motivated by age rather than by some legitimate job concern. And sexual harassment complaints can sometimes become a "he-said-she-said" battle in which it's hard for a jury to decide who's telling the truth.

Jurors might be very willing to believe that an employer who was accused of discrimination became angry and tried to 'get back' at the accuser.

On the other hand, jurors might be very willing to believe that an employer who was accused of discrimination became angry and tried to "get back" at the accuser.

Take the case of Moises Mendez, who worked as a baker at the Westin Hotel in Times Square for seven years. He complained to the hotel management that he suffered humiliating treatment at the hands of his co-workers, who made fun of his appearance, called him names such as "Speedy Gonzales," and even punched him in the face.

According to Mendez, three weeks after he reported the incidents, the hotel installed a video camera in the kitchen space where he worked.

He sued, claiming that the installation of the camera amounted to retaliation for his complaints.

At trial, the hotel argued that it installed the camera in order to investigate the harassment. But Mendez noted that the camera was pointed only at him, not at other areas of the kitchen, and argued that it was there not to protect him but to intimidate him.

Mendez also introduced evidence that his complaints had been altered by the company. He claimed that one of his complaints included a statement by a co-worker that he saw another worker approach Mendez with his fist drawn, but someone removed this statement and then attached Mendez's signature page to the altered document.

The jury found *against* Mendez on the underlying discrimination claim. But it nevertheless found that the hotel had retaliated against him – and it awarded him $1 million for his pain and suffering, and an additional $2 million in punitive damages against the hotel.

The case shows that employers need to be extremely careful about how they treat employees who complain about discrimination. They need to consult an attorney right away about steps to take to make sure that supervisors do not retaliate against an employee or do anything that could be perceived as retaliation.

On the other side, employees who complain about mistreatment in a workplace should carefully document how they are treated afterward, in order to protect their rights.

Employer sued for death due to dangerous machinery

An employer can be sued for the death of a laundry worker if it knew that employees routinely violated safety rules in order to improve productivity, a federal court in Oklahoma has ruled.

The worker was employed at a Cintas plant in Tulsa that used automated machinery to clean uniforms. He died when he fell into a dryer while attempting to clear a conveyor jam.

Cintas argued that it couldn't be sued and that the worker's family was limited to collecting workers' compensation.

But the court said that that the company could be sued if it intentionally acted in a way that it knew was likely to cause the death. In this case, there was evidence that company managers knew that workers routinely tried to fix equipment while it was still operating, and that this practice had led to accidents at other plants.

Deaf employee may be entitled to an interpreter

An employer may be obligated to provide a deaf worker with a sign language interpreter at staff meetings, disciplinary hearings and training sessions, according to a California federal appeals court.

The worker was employed by UPS as an accounting clerk. He sued under the Americans with Disabilities Act, claiming that an interpreter was a "reasonable accommodation" for his disability.

UPS argued that it had fulfilled its legal obligations by providing the worker with meeting agendas, notes and summaries.

But the court said that it was up to a jury to decide whether the written information gave the employee the same benefits that other employees received from attending and participating in weekly staff meetings.

We welcome your referrals. We value all our clients. And while we're a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you've already referred someone to our firm, thank you!

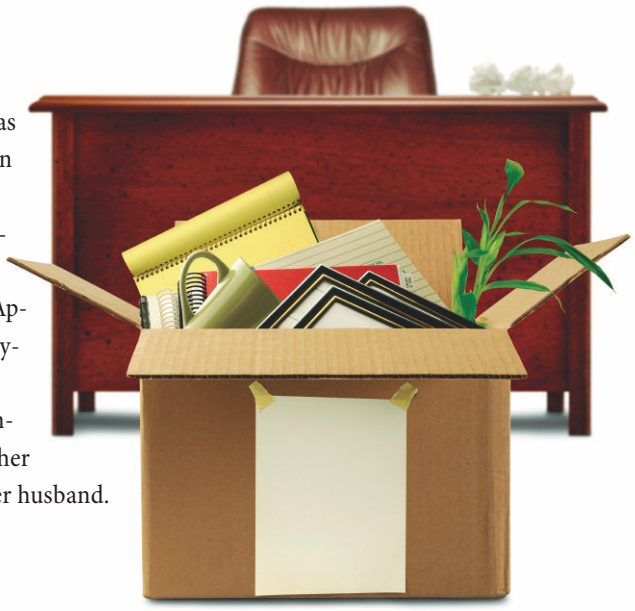
Company can't fire executive *and* his wife

A receptionist at a Minnesota cabinetmaking company was married to the president of the company. When business plummeted, the owner terminated the president, and terminated his wife as well.

The wife sued under a state law that prohibits "marital status discrimination." She argued that she was fired because of her marital status – that is, the only reason she was let go was because she was married to the president.

She claimed that the CEO of the parent company told her that "it would probably be awkward" for her to stay since her husband was leaving, and that her position was eliminated because she would probably have to relocate with her husband.

The Minnesota Court of Appeals allowed the lawsuit, saying the woman had made a good argument that the company discriminated against her because of the identity of her husband.



©istockphoto.com/David Kneafsey

Male worker can sue for sexual harassment

A male airport employee can sue for sexual harassment where he received repeated romantic overtures from a female co-worker and the employer didn't put a stop to it, says a federal appeals court in San Francisco.

The company argued that this wasn't "harassment" because most men in the employee's position would have been flattered and delighted by the co-worker's romantic interest.

But the court said that even if "most men" would have been flattered, the question was whether *this particular employee* – a recent widower – welcomed the constant flirting.

The law against sexual harassment "is not a beauty contest," the court said, and even if the co-worker "looks like Marilyn Monroe, [the employee] might not want to have sex with her, for all sorts of possible reasons."

Can employer use arbitration if it went to court first?

Many employment agreements these days say that in the event of a dispute, both sides will go to arbitration.

But this raises a question: Sometimes, if an employee files a lawsuit, the employer will respond in court, perhaps thinking it can get the court to dismiss the suit quickly. Only later will it insist on going to arbitration instead. So…is this valid, or does an employer that spends a long time fighting a lawsuit give up the right to stop in mid-stream and start over in a different forum?

That's not entirely clear, but two federal appeals courts recently addressed the issue.

In one case, a Ricoh employee claimed he was fired because he reported fraud at the company. Ricoh responded to the lawsuit, but five months later it demanded that the case go to arbitration.

A court in Denver said this was okay, because Ricoh had engaged in only "minimal litigation activity" during the five months and it didn't intentionally give up its right to arbitration.

In another case, though, a Philadelphia court said a company that waited 15 months to demand arbitration waited too long.

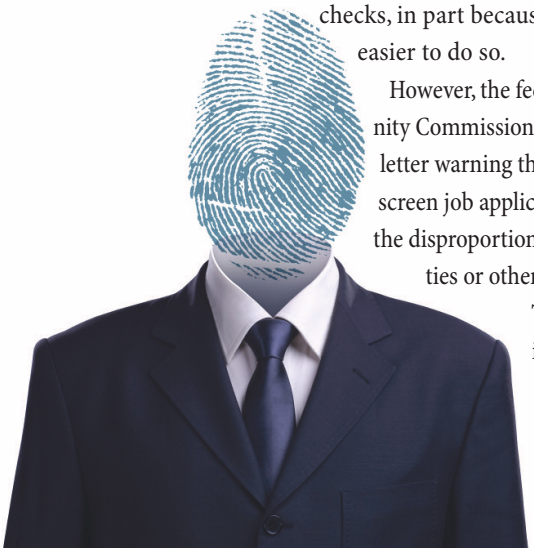
In that case, an employee sued a jewelry company for discriminating against him because of his sexual orientation and national origin. The court said that even though his employment contract said that arbitration was his only remedy, it would be unfair to enforce the contract at that point because the company's delay would have cost the employee 15 months of wasted litigation expenses.

Does an employer that spends a long time fighting a lawsuit give up the right to stop in mid-stream and start over in a different forum?

Businesses are under fire over background checks

Companies that conduct background checks on job applicants are increasingly facing scrutiny, and need to be careful that they are following the law.

A growing number of companies have been routinely conducting credit checks and criminal background checks, in part because new technology has made it easier to do so.



©istockphoto.com/Pavlen

However, the federal Equal Employment Opportunity Commission recently released a legal advisory letter warning that the use of credit checks to screen job applicants could be illegal if it leads to the disproportionate exclusion of women, minorities or other protected groups.

The Commission is stepping up its investigations of credit checks, criminal background checks, and other hiring policies that may have a negative impact on certain groups.

Many states are also cracking down on background checks. For example, a new law in Illinois prohibits employers from asking about an employee's or job applicant's credit history, and from using credit history as a basis for an employment decision.

The law exempts some employers, including banks, insurance companies and police departments. It also exempts high-level managers and employees with unsupervised access to large amounts of cash or to customers' financial information.

Oregon recently adopted a law limiting credit checks by employers in an effort to ease unemployment, and Hawaii, Louisiana and Washington have passed similar measures.

In Massachusetts, many employers must overhaul their job applications to comply with a new law that prohibits most businesses from inquiring about an applicant's criminal history on an initial job application. However, an employer may still make decisions based on criminal history information obtained from other sources. The law exempts certain employers, such as schools and day care providers.

BELIVEAU LAW GROUP, LLC

Massachusetts offices: Waltham, MA; Danvers, MA; and Quincy, MA
New Hampshire offices: Manchester, NH and Salem, NH
Florida offices: Fort Lauderdale, FL and Naples, FL
Main Telephone Number: (781) 890-8600
Email: firm@beliveaulaw.com • Website: www.beliveaulaw.com