



# Human Resource and Management Services

November 2008

## HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

### ◆ FROM HR HERO ◆

#### “That’s what Julie Elgar said about *The Office*”

Despite what you might think, Michael’s demand that all employees provide him with candidates to serve as the mother of his children does not violate any major employment law. After all, Michael made the demand of all employees and not, for example, only female employees or employees of a particular race. Continuing to employ an incompetent manager isn’t illegal. Yet.

### ◆ FROM WORKFORCE ◆

#### “Whirlpool suspends workers for smoking”

39 employees of Whirlpool Corp.’s Evansville, Indiana manufacturing plant have been suspended for lying about their smoking habits.

The employees had claimed to be nonsmokers to avoid paying a \$500 annual surcharge Whirlpool has assessed on smokers who are enrolled in the company’s health benefits plan, a company spokesman confirmed.

However, other employees reported seeing the alleged nonsmokers lighting up in designated smoking areas outside the plant, the Benton Harbor, Michigan-based manufacturer reported.

*(Editor’s note - Tsk, Tsk.)*

### ◆ FROM HR SPECIALIST ◆

#### “What counts as an ‘FMLA week’: 40 hours?”

- Q. How should I calculate the number of hours to charge to an employee’s 12-week FMLA entitlement? We have employees who work 40, 55, and 64 hours per week. Do we give them a 12-week cap or do we extend the weekly amount cover that amount of weeks it would take to cover 480 hours (which assumes a ‘standard’ 40-hour week)?
- A. According to the Department of Labor’s regulations, an employee is entitled to equivalent of 12 regular ‘work-weeks’ of FMLA leave. Different employees have different workweeks depending on the number of hours they work.

More specifically, an employer should determine an employee’s workweek by calculating the average number of hours that person actually worked in the 12-weeks period immediately preceding the start of the leave. If

the employee averaged 55 hours per week, then she would be entitled to 660 hours of FMLA leave, which could be used intermittently or as one dozen 55-hour weeks.

### ◆ FROM EEOC ◆

#### “EEOC charged that TSS failed to promote African Americans to managerial positions”

The U.S. Equal Employment Opportunity Commission (EEOC) today announced that Tobacco Superstores, Inc. (TSS) will pay \$425,000 and provide significant remedial relief to settle a race discrimination lawsuit on behalf of qualified black workers who were denied promotion to management.

The EEOC’s lawsuit (Case No. 3:05 CV 00218) in U.S. District Court for the Eastern District of Arkansas, Jonesboro Division, was filed on behalf of Theresa Sharkey and a class of African Americans in Arkansas and Mississippi. In addition to rejecting the class of workers for promotion because of their race, the suit also alleged that Sharkey was forced to resign because of the company’s failure to promote her. Race discrimination violates Title VII of the Civil Rights Act of 1964.

In addition to the monetary relief for the class of aggrieved individuals, the three-year consent decree settling the case also enjoins TSS from denying promotions to African American employees because of their race and from engaging in retaliation. The decree also requires TSS – which operates retail stores in Arkansas, Missouri, and Mississippi – to:

- Provide training to all managers and supervisors on preventing race discrimination and retaliation;
- Create job descriptions for manager and assistant manager positions that outline the qualifications for each position;
- Develop a written promotion policy that will include the procedures by which employees will be notified of promotional opportunities;
- Report assistant manager and manager vacancies, the name and race of all applicants for the position, and the name of the successful candidate;
- Report the names of all African Americans who are either hired or promoted to manager or assistant manager positions; and
- Report any complaints of race discrimination and describe its investigation in response to the complaint.

◆ **FROM PERSONNEL LEGAL ALERT** ◆

**“Employer must offer ADA accommodation even absent employee request”**

The case involved a 19-year-old employee who has cerebral palsy, which noticeably affects his ability to walk, talk, see, and eat. He was hired as a pharmacy assistant. His supervisor quickly became frustrated with his performance and moved him out of her department; he went from dispensing prescriptions to collecting shopping carts and garbage in the parking lot.

He was eventually transferred to the food department, but was not offered the option of returning to the pharmacy. ...He charged the company with numerous ADA and state law violations, including failure to accommodate. The employer asserted it had no duty to accommodate because the employee: 1) never requested an accommodation and 2) didn't think he needed one.

...the court based its ruling on the fact that the ADA speaks to accommodating “known” disabilities, not just disabilities for which accommodating has been requested.

Employee is awarded \$900,000 in compensatory and punitive damages, plus \$644,000 in attorney fees. (*Brady v. Wal-Mart Stores, Inc., 2nd Cir., No 06-5486-cv, 2008*)

◆ **A REAL LIFE SITUATION** ◆

As some of you may be aware, I had a stroke on May 17<sup>th</sup>. The culprit turned out to be a blood clot that had formed on my heart resulting from heart disease which I inherited from my dad's side of the family.

Unlike my father's health care, I am fortunate to live in the age of modern medicine. As a result, I sustained minimal physical limitations, which for the most part have all gone away. The only lingering side effect has been my ability to formulate my thoughts into the right words. Being thought of by some of my clients as a “word master”, this temporary setback has been the most difficult both professionally and personally.

Even though this is a very tough obstacle, my mastery of the English language and my continued high-level abilities in reading and comprehension are the strengths needed to fully regain my gift of articulation. This process will continue to take time in order for the brain to re-circuit itself around the stroke damaged parts.

In the meantime, I am equally fortunate to have my Co-Owner and wife, Sandra, here to fill-in, connect-the-dots, and communicate for me while I continue to recuperate. Her abilities and expertise have strengthened HR&M and proven we are more than ever capable in meeting our clients' needs.

We want to thank you for your patience and more importantly, for your understanding while we go through this difficult experience.

**FEATURED SERVICE**  
**Conducting Lawful Layoffs**

The recent changes in the economy have forced employers to take a hard look at ways to stay profitable. Some employers are looking at such creative ways as having their employees take extra leaves without pay. Unfortunately, when production is slow, reorganizations are in full swing resulting in a lot of positions being downsized.

If your company is looking to downsize, HR&M can provide you with steps and guidelines on developing and implementing a non-discriminatory reduction in force plan, which may include:

- Lawfully identifying positions for elimination which may include such criteria as position, sex, age, and tenure
- Establishing honest and open communication for those affected
- Determining whether or not severance is appropriate
- Developing appropriate documentation and notification letters
- Establishing effective ways to reassure those who are left behind

Layoffs are undoubtedly difficult, painful and unpleasant for everyone involved. HR&M can help ease you through the process toward a more efficient, successful, and profitable organization.

Call HR&M for additional information.

◆ **REMEMBER! WE CAN HELP!!** ◆

Consulting on performance, attendance, FMLA, Wage & Hour, management accountability, and other unique issues is just one of the areas of our expertise.

We also provide:

- **supervisory/management training**, ranging from brown bag luncheon training to ½ or full day sessions
- employee **handbook** development
- responses to **discrimination charges** and **unemployment claims**
- **on-line performance review** forms and processes
- **guidance** and consultation on **coaching, counseling, and disciplining** in employee relations matters
- **succession** and **strategic planning** programs
- **consultation** on issues regarding attendance and performance and guidance on terminations
- development of OFCCP compliant **Affirmative Action Plans**