

NORTH AND SOUTH CAROLINA SUPREME COURTS BOLSTER EMPLOYMENT-AT-WILL DOCTRINE

South Carolina Case Illustrates Importance of Bringing Employee Handbooks Into Compliance with 2004 Law

The South Carolina Supreme Court ruled on July 18, 2005, that an employer's general statement of non-discrimination in its employee handbook is not sufficient to create a contract between the employer and an employee (*Hessenthaler v. Tri-County Sister Help, Inc. III*). This is the third in a series of opinions over five years addressing South Carolina's employment-at-will doctrine, which generally recognizes that employment may end at any time for any reason as long as that reason is not illegal.

Emma Hessenthaler sued her former employer, Tri-County Sister Help, Inc., for breach of implied contract based on Tri-County's employee handbook. Like many employee handbooks, Tri-County's stated that it is "an equal opportunity employer" that would make employment decisions "without regard to ... any ... protected status." Hessenthaler alleged she was constructively discharged because of her race and in violation of the EEO policy. In 2000, a jury awarded Ms. Hessenthaler \$25,000 for her claim. The South Carolina Court of Appeals reversed the award, finding that the EEO policy did not constitute a contract. On May 12, 2003, the South Carolina Supreme Court reversed the Court of Appeals and found that the combination of a conspicuous disclaimer and the EEO policy created a jury question as to whether a contract existed (*Hessenthaler I*).

Controversy ensued within the legal and business communities. As a result, in March 2004 the South Carolina General Assembly passed S.C. Code Ann. § 41-1-110, which specifies that employee handbooks and certain other documents issued after June 2004 will not be considered contracts of employment as a matter of law if they include "conspicuous" disclaimers. The disclaimers must appear on the first page of the document in underlined, capital letters, and, for handbooks and personnel manuals, employees must sign the disclaimers.

(The online versions of our March 2004 Employment Law Update explaining the background of Section 41-1-110, and our June 2004 Employment Law Update answering frequently asked questions about the law, can be accessed on the Publications page of our website at www.nexsenpruet.com.)

The South Carolina Supreme Court withdrew *Hessenthaler I* and agreed to re-hear the case, and in October of 2004 issued its second opinion (*Hessenthaler II*). Unfortunately, however, *Hessenthaler II* added to the controversy because the court expanded the doctrine of wrongful discharge to include claims of discrimination against employers with fewer than 15 employees; such small employers were not previously covered by Title VII or state discrimination laws.

The Supreme Court then withdrew *Hessenthaler II* and granted another re-hearing. In *Hessenthaler III*, the court reaffirmed the rule that employers may generally avoid creating contractual obligations in a handbook by including a clear and conspicuous disclaimer. The court noted that the inclusion of both promissory language and a disclaimer would normally result a jury question as to whether the handbook creates a contract.

Importantly, however, the Supreme Court emphasized that a court, not a jury, should resolve a handbook issue as a matter of law “if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.” The court determined that Tri-County’s employee handbook contained a conspicuous disclaimer and that its EEO policy did not alter the employment-at-will statute because it did “not create an expectation that employment is guaranteed for any specific duration or that a particular process must be followed before an employee may be fired.”

Neither *Hessenthaler III* nor Section 41-1-110 provides automatic protection for employers from breach of contract claims. However, they do provide employers with opportunities to protect themselves by reissuing their handbooks, manuals, or other written policies to comply with the at-will legislation and to remove any unnecessary mandatory or promissory language. Employers that have not already brought their handbooks into compliance with Section 41-1-110 should do so as soon as possible.

North Carolina Case Refuses to Recognize “Wrongful Constructive Discharge” Claim

In *Whitt v. Harris Teeter, Inc.*, Wendy Whitt claimed that she was forced to resign because her employer did not take effective remedial action against co-workers who allegedly subjected her to sexual harassment. She brought a lawsuit asserting causes of action for, among other things, “wrongful discharge in violation of public policy based on retaliation and wrongful discharge in violation of public policy based upon a hostile work environment.” The trial judge granted the employer a directed verdict on the wrongful discharge claims. On appeal, the North Carolina Court of Appeals reversed the trial judge, recognizing a claim for “wrongful constructive discharge.”

On July 1, 2005, the North Carolina Supreme Court reversed the Court of Appeals, holding that there is no claim for “wrongful constructive discharge” under North Carolina law. The Supreme Court’s rejection of this claim reaffirms that employment-at-will is and shall remain the bedrock of North Carolina employment law.

BENEFITS UPDATE— WHAT EMPLOYERS NEED TO KNOW ABOUT THE NEW MEDICARE PART D PRESCRIPTION DRUG COVERAGE

As of January 2, 2006, individuals eligible for Medicare coverage may elect to participate in a new prescription drug benefit program, Medicare Part D. The electing individual will be required to pay a Part D premium for the new coverage option. If, by the end of an individual’s initial enrollment period for Part D, he or she has not enrolled in Part D and does not have prior “creditable prescription drug coverage” for any period of 63 days or longer, the individual will likely have to pay a higher Part D premium for late enrollment.

Before November 15, 2005, employers that provide prescription drug coverage under any group health plan are required to disclose whether the coverage is “creditable prescription drug coverage.” The disclosure notice must be given to Medicare beneficiaries who are active employees and those who are retired, as well as Medicare beneficiaries who are covered as spouses under active or retiree coverage. The disclosure notice must indicate whether the individual has creditable or non-creditable prescription drug coverage. The

Centers for Medicare and Medicaid Services ("CMS") has developed model notices that may be used for this purpose. The model notices can be accessed at CMS's website, <http://www.cms.hhs.gov/medicarereform>.

After this year, notices must be given no later than November 15 of each year, prior to a Medicare-eligible individual's effective date of coverage when he or she joins an employer's plan, upon a beneficiary's request, and at other times. Our employee benefits attorneys have experience in helping employers understand these notification rules and are available to assist employers in complying with these requirements.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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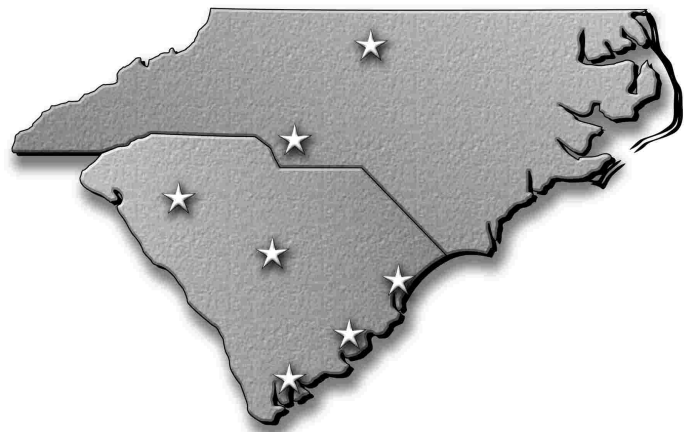
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