



ROBINSON & COLE LLP

Labor, Employment & Benefits



FTC Issues Document Destruction Rule for Consumer Report Information

The Federal Trade Commission issued a [final rule on the disposal of consumer report information](#) pursuant to the Fair and Accurate Credit Transactions Act, which amended the Fair Credit Reporting Act. Companies must comply with this new rule by June 1, 2005.

The FACT Act is intended to combat consumer fraud and identity theft and protect privacy. According to a study released by the FTC in September 2003, nearly ten million Americans were the victims of identity theft in the previous year alone. The study also found that U.S. businesses lost \$47 billion and consumers lost approximately \$5 billion as a result of identity theft during the same period.

The new rule provides examples of how to comply with the new requirements, including:

- implementing and monitoring compliance with policies and procedures that require shredding or other forms of destruction of documents and electronic media containing consumer information; and
- contracting with a third party to properly dispose of consumer information and monitoring their performance.

The FACT Act disposal rule applies to virtually every business and private employer in the United States. Penalties for violating the rule include actual damages, statutory damages, up to \$1000 punitive damages per violation (with no cap on class action damages), attorneys' fees and civil penalties up to \$2,500. For more information about the FACT Act, visit the FTC website at www.FTC.gov

Connecticut Denied Membership in WARN Class Action

On December 30, 2003, Dolce International/Hartford announced that it was declaring bankruptcy and intended to close the Hastings Hotel and Conference Center in Hartford, Connecticut. That day, Dolce gave written notice to the State's labor department, to Hartford's mayor, and to 117 employees that permanent lay-offs would begin immediately. The employees sought class certification to sue Dolce, arguing that the company failed to provide the 60-day notice required under the Worker Adjustment and Retraining Notification Act. The City of Hartford and the State of Connecticut also sought membership in the class. The company moved to dismiss, arguing that Connecticut did not have standing to sue and that Dolce was not "an employer" under the act.

In [Cashman v. Dolce International/Hartford Inc.](#) (12/17/04), the U.S. District Court for Connecticut certified the class of approximately 117 employees. However, the court denied Connecticut's class membership request, concluding that the State did not qualify as a "person" with standing to sue under the WARN Act. Although the WARN Act does not define the word 'person', its silence on the issue indicates Congress' intent not to include

sovereign entities such as the State, the court ruled. The City of Hartford withdrew its application for class membership.

Jury Finds General Workplace Grips Not Discrimination

Lebert Thomas is Manager of Engineering Services for the Metropolitan District Commission, a quasi-public water treatment and supply facility serving the Greater Hartford, Connecticut, area. Thomas sued the MDC, claiming that he was discriminated against and harassed on the basis of his race and in retaliation for his testimony in a lawsuit brought by a co-worker against the MDC several years prior. Thomas claimed that, following his testimony, his supervisor insisted on participating in certain interviews that Thomas previously conducted individually, he was excluded from certain meetings pertaining to projects generally under his supervision, and a decision regarding the seat placement of a subordinate employee was overruled by his supervisor. Thomas also claimed that he was snubbed by his supervisor following his testimony and, on one occasion, was yelled at during a meeting.

In Thomas v. The Metropolitan District Commission (11/16/04), the U.S. District Court for Connecticut held that Thomas must limit his evidence to that relating to his own experiences, as opposed to those of his co-workers. In addition, the court prohibited Thomas from introducing the results of an internal employment practices audit conducted by an outside law firm on behalf of the MDC. Following a trial, the jury returned a verdict in favor of the MDC on all counts.

Court Upholds Termination after Employee's Doctor Fails to Submit FMLA Forms

Debbie Urban worked for Dollar General as an Assistant Store Manager in Anson, Texas. Urban required bilateral carpal tunnel surgery and notified Dollar General that she intended to take FMLA leave. Dollar General tentatively designated the leave as FMLA-qualifying and notified Urban that she was required to produce medical certification from her physician to approve the leave. Urban requested, and was granted, a fifteen-day extension of time to complete her paperwork. Notwithstanding the extension, Dollar General did not receive Urban's medical certification, which Urban says her doctor failed to send. Dollar General terminated Urban's employment because her thirty days of non-FMLA medical leave provided by company policy had expired and her continued absence was unauthorized. Urban sued alleging that Dollar General terminated her employment in violation of the FMLA. The trial court granted summary judgment to Urban on the basis that Dollar General should have allowed Urban the opportunity to cure any deficiencies in her medical certification. Dollar General appealed.

In Urban v. Dolgencorp. of Texas, Inc. (12/8/04), the U.S. Court of Appeals for the Fifth Circuit ruled in favor of Dollar General. Although the FMLA requires an employer to advise an employee of any deficiencies in the certification form, the court held that the curing provision did not apply where an employee fails to submit a medical certification altogether. The court found that it was Urban's responsibility to insure that her certification was submitted by the appropriate deadline. It would seem illogical, the court concluded, to require an employer to continually notify an employee who failed to submit medical certification within a specified deadline, because otherwise "the concept of a 'deadline' ...

would have no meaningful significance or no actual consequences.” The court noted that although the Fifth Circuit had not addressed the issue before, at least one other court of appeals had ruled against an employee who was terminated for failing to submit medical certification, despite receiving several notices that she must do so.

Ineligible Employee Cannot Bring FMLA Retaliation Claim

Sandra Humenny worked as a regional sales manager for GENEX Corp. When Humenny was unable to attend a meeting because of an emergency involving her sick mother, she was asked to consider taking a leave of absence to care for her mother or to devote herself more fully to her job. The following month, Humenny was downgraded to the position of regional account executive. The day she began her new job, Humenny went out on sick leave for her own unspecified illness. Humenny stayed on sick leave for approximately 3 months, until she was told that her sick leave would terminate. Humenny requested an additional 30 days leave, which GENEX denied based on poor business revenues. Humenny did not return to work and was terminated. She sued for retaliation under the FMLA, among other claims. The trial court granted GENEX summary judgment on the grounds that it employed fewer than 50 employees and, thus, was not subject to the FMLA. Humenny appealed, claiming she could sue for retaliation even if she was not eligible for substantive rights under the FMLA.

In [Humenny v. GENEX Corp.](#) (12/8/04), the U.S. Court of Appeals for the Sixth Circuit agreed with the trial court and rejected Humenny’s claim that she was terminated for attempting to assert rights to which she believed she was entitled under the FMLA. The court held that “a close reading of the statute reveals that the retaliation provisions prohibit employers from retaliating based on the exercise of a ‘right’ under the statute.” The court concluded that because Humenny never qualified for FMLA leave, due to GENEX's size, she never “exercised or attempted to exercise” any rights provided to her by the FMLA.

“Confederate-Southern American” Not Protected by Title VII

Curtis Storey worked as a security guard for Burns International Security Services in Pennsylvania. After Storey displayed a confederate flag sticker on his lunchbox and two confederate flag bumper stickers on his pickup truck, his supervisors directed him to remove the stickers. Storey refused, despite the supervisors’ explanation that Burns had a zero tolerance policy with respect to the display of such symbols. Burns ordered Storey to report to its headquarters where some managers attempted to persuade Storey to remove or cover the stickers on the grounds that some employees might be offended by them. Storey refused again to remove the stickers and replied that, as a Christian, he was offended by his co-workers’ use of profanity, but he accepted it as part of the job. When Storey reported back to work, he was told that he had been terminated. Storey sued, alleging that Burns fired him because of his national origin, Confederate-Southern American, and religion, Christian. The trial court dismissed the complaint and Storey appealed.

In [Storey v. Burns Int’l Sec. Servs.](#) (12/9/04), the U.S. Court of Appeals for the Third Circuit agreed with the trial court’s decision to dismiss the claim. The court concluded that Storey failed to claim to have suffered an adverse employment action within the meaning of Title VII, because he conceded that he was fired because he refused to cover or remove his

confederate flag symbols when his employer directed him to. The court found that if Storey had complied with Burns' demand, "he would have continued working for Burns as a Confederate-Southern American and Christian. Therefore, even if we assume, *arguendo*, that he is a member of a protected class and if we further accept the claim that the confederate flag may be viewed as a religious symbol, Storey still has not established a cause of action." Storey did not claim that Burns was aware of the purported religious symbolism that he attached to the confederate flag. Storey alleged in his complaint that he displayed the stickers because he is proud of his heritage and passionate about sharing it with others.

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