

## REASON PREVAILS...

"I'd like to join a club and beat you over the head with it." Before 1947 and Jackie Robinson, Major League Baseball was segregated, forcing talented African-American athletes to play in the Negro League. The Negro League died out in the early 1960s and lacked the funds to pay health or pension benefits to its former members. To remedy indisputable past discrimination against black ballplayers, MLB created a special plan to provide insurance benefits to Negro Leaguers who played before 1948 and who played at least four years in the Negro League or MLB. So, guess what? A white ballplayer brought a class action on behalf of other "nonblack" baseball players, alleging that the plan was discriminatory. The class, 99 percent white, consisted of ballplayers who would have qualified for the benefits but for the fact that they had never played in the Negro League. (They hadn't played with the MLB long enough to qualify for "regular" MLB benefits.) The U.S. Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Northern Mariana Islands) agreed that the lower court had properly sent the plaintiffs to the showers.

**News flash! Viewing kiddie porn on internet at work has consequences!** An employer terminated its operations manager for downloading pornographic images of children. Thankfully, the manager did not have the nerve to sue the employer for any type of wrongful discharge. However, he was criminally prosecuted, and the Ninth Circuit held that the images he had downloaded and images on his hard drive were admissible in his criminal trial. Because the employer had a policy and practice of monitoring employees' internet activity, the court found that the manager had no reasonable expectation of privacy.

**Gone With the Wind.** An Arkansas tree-planting company was sued for wage and hour violations. The company overwrote electronic documents and sent employees to Guatemala so that they could not participate in the lawsuit. Most "creative" of all, they shipped paper records to a Mississippi

beach house at the height of hurricane season. A district court judge in Louisiana sanctioned the company for the discovery violations and left open the possibility that more sanctions could be forthcoming.

**But, boy, does she ever look nice driving up to her new low-level job in that pink Caddy!** The U.S. Court of Appeals for the Eleventh Circuit (Georgia, Florida, Alabama) has upheld dismissal of a race discrimination suit filed by an African-American female postmaster who was demoted for selling Mary Kay cosmetics on the job. The court found that a white male co-worker who distributed Avon products on the job was not similarly situated because he didn't sell, and he wasn't a supervisor. The former postmaster, by contrast, sold to subordinates and post office customers.

**Alas, no constitutional right to be a slob. (\*sob\*)** After a state park in Kentucky required its employees to tuck in their shirts, three seasonal employees refused. When they were fired, they sued and claimed that the terminations violated their First Amendment, equal protection, and due process rights under the U.S. Constitution. Uhhhh, *no*, said the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee), affirming the dismissal by a lower court.

## AND REASON FLAILS...

**Show me the money!** A federal judge in the District of Columbia has found that the U.S. Treasury has violated the federal Rehabilitation Act because the dollar bill – yes, *that* dollar bill – cannot be discerned by the blind or visually impaired. The suit was filed by the American Council of the Blind. Another advocacy group, the National Federation of the Blind, has sharply criticized the lawsuit and the decision. The President of the NFB said, "An employer who believes that every piece of printed material in the workplace must be specially designed so that the blind can read it will have a strong incentive not to hire a blind person." He added, "Essentially, the United States Treasury has been ordered by the courts to come up with a solution for a nonexistent problem."

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INSIGHTS

## ▶ HOW TO FIGHT ABUSE OF INTERMITTENT FMLA LEAVE... AND WIN David Gobeo

Is there an employer of 50 or more employees anywhere who does not think that intermittent leave under the Family and Medical Leave Act is a curse? First, there is the problem of sporadic, unscheduled absences and the difficulty that it causes for supervisors and the employee's co-workers, who have to pick up the slack. Second, there is the problem of trying to prove that the employee is using intermittent leave to suit his or her own personal needs.

Neither of these is generally an issue when an employee takes FMLA leave in a "block" or when the employee takes so-called "reduced-schedule" FMLA leave (essentially, going to a regular, reduced-hour schedule). Both of these types of leave allow the employer to plan. Temporaries can be hired, co-workers' schedules can be adjusted in advance. But intermittent leave does not allow for this because it is, by definition, irregular.

None of this is to say that all employees on intermittent FMLA leave are cheaters. Many employees have perfectly legitimate reasons to take such leave — for example, chemotherapy treatments for cancer might require intermittent periods away from work. So may "flare-ups" related to truly serious conditions, such as cancer, AIDS, or some forms of mental illness. But there does seem to be a significant proportion of employees who take intermittent leave who have (1) "fuzzy" medical conditions, and (2) "fuzzy" reasons for missing work. This article will address this latter group of employees.

**Know your rights.** The FMLA is perceived by most employers as a very employee-friendly law. But often employers ignore portions of the law that benefit employers. Be aware of these provisions, and use them to your advantage. For example, an employer is not required to grant intermittent or reduced schedule leave for "new-baby bonding." Such leave is required only when for a serious

health condition. (Other specific "employer-friendly" provisions will be discussed below.)

**Take control early.** When the employee initially requests intermittent leave, request a medical certification. Hold the employee to the deadlines in the regulations unless there are genuinely extenuating circumstances. (In most circumstances, the medical certification must be returned within 15 calendar days.)

Once the medical certification is returned, the employer should read it carefully and make sure that it truly does certify that the employee is entitled to FMLA leave, and that the employee is entitled to such leave on an intermittent basis. If the form is incomplete, or does not make sense, or contains contradictory information, the employer's health care provider has the right to contact the employee's health care provider to get clarification. (Please note that this does not mean that the employer's health care provider can call to try to talk the employee's health care provider out of his diagnosis.)

Once the medical certification is determined to be valid, the employer should have a sit-down with the employee, and the two of them should discuss the best way to handle unscheduled time away from work. The employer may even temporarily reassign the employee to another position that better accommodates the recurring periods of leave. Some offices of the U.S. Department of Labor take the position that this temporary reassignment may be made only when the intermittent leave is for "planned medical treatment." In other words, if the intermittent absences are due to flare-ups of chronic conditions, which may be irregular and unscheduled – and therefore much more disruptive to the workplace – the employer may not temporarily reassign the employee. However, court decisions indicate that the USDOL position may not be accepted, and the

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from the **EDITOR'S DESK****ARE YOU READY FOR YOUR FIRST "INFORMATION AGE" LAWSUIT?**

December 1, 2006, was the effective date of "e-discovery" amendments to the Federal Rules of Civil Procedure. The amendments provide for discovery of electronic information, including e-mails, electronically stored files, such as those in Word or Excel, and instant messages. The new rules require that the parties discuss relevant electronic information early in the litigation process and identify the electronic information they have, how it is stored, and how searches will be managed.

This will be a complex task for everyone except those relatively few companies who have made the decision that their electronic information will never be destroyed. Companies who automatically purge electronic information after a period of time will have to promptly put a litigation "hold" on any electronic information relating to anticipated litigation. It also means saving every relevant file that might have been destroyed from the e-mail server but that an employee is saving on his hard drive. The magnitude of the task will probably mandate that companies put together a team including attorneys, human resources professionals, and IT professionals to ensure that all relevant information is preserved.

Failure to adequately preserve this information can result in a dreaded "Zubulake instruction" – in which the court tells the jury to presume that the destroyed information would have been favorable to the adverse party. ("Zubulake" is the name of the plaintiff in a series of decisions from a federal court in New York in which the court outlined what companies should do to preserve electronic information in litigation and the consequences of their failure to do so.)

Companies who groan at these new requirements may take cold comfort in the fact that several plaintiffs' lawsuits have been dismissed because of the plaintiffs' failure to preserve (or deliberate destruction of) relevant information that was on their home computers.

If you need assistance in developing a policy for electronic document preservation, we at Constangy are ready to assist.

Robin Shea—Editor, Winston-Salem, NC

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**FMLA ABUSE** (continued from page 1)

USDOL does not seem to be aggressively enforcing its position. Temporary reassignment must include equivalent pay and benefits until the employee's FMLA allotment is exhausted. (If the employee is not able to return to his regular job at the end of the FMLA period, then the employer would be required to comply with the Americans with Disabilities Act and workers' compensation laws, if either are applicable.)

The employer should also make sure that the employee understands that working elsewhere while on FMLA leave is prohibited and is ground for discharge, unless the employer gives prior written approval. (More on this below.)

**Follow up.** The FMLA regulations provide for some follow-up, in the form of a "recertification." An employer can request recertification every 30 days unless the minimum duration of incapacity is more than 30 days. In that event, the employer may not request recertification until that minimum duration has passed, unless: 1) the employee requests an extension of leave; 2) the circumstances described in the previous certification have changed significantly; or 3) the employer receives information that casts doubt upon the continuing validity of the certification. Exception 3 usually means there must be a medical reason to question the validity of the certification. Mere suspected misuse of intermittent leave is not enough, but if

there appears to be a suspicious pattern of absences, the USDOL has said that recertification may be justified.

**Pursue suspected fraud.** Many employers have good reason to suspect that some employees are taking "FMLA leave" and going to other jobs, nursing hangovers, watching TV for the day, going to the amusement park or the race track, *ad infinitum*. Very few employers, however, actually do what is necessary to nail down such fraudulent use of FMLA leave.

Regarding other jobs, there are some instances in which the employee may not be medically able to perform his own job but may be able to perform a job that entails lighter work, different work, or less stress. In such event, the employee should be allowed to work. In most cases, however, the employee is using "FMLA leave" to start a new

business or "try out" a new job that is every bit as demanding as was the employer's job. Sometimes such an employee can be caught by a simple telephone call to the reception desk of the suspected new workplace. If the employee's new job is in a retail establishment, the supervisor can "go shopping." If the employee's new job is landscaping or yard work, a drive through the work area on a pretty day may be all that is necessary. Otherwise, it may be necessary to conduct surveillance using a qualified private investigator.

Know your rights, take control early, follow up, and pursue suspected fraud – employers who do these things will stop FMLA abuse while guaranteeing that deserving individuals get it. ◀

*Daivd Gobeo (Tampa, FL) practices in the area of employment litigation prevention and defense.*

*"Very few employers do what is necessary to nail down fraudulent use of FMLA leave."*

**SMART EMPLOYER, FOOLISH EMPLOYEE**

An employee with a panic disorder has been certified and approved for intermittent FMLA leave, which may occur once a week and last three days at a time for a period of one year. The employee requests a day off to attend a parent-teacher conference, but due to staffing needs that request is denied.

On the day of the conference, the employee goes to the doctor to take a blood test. After the test, she calls in to say that she became sick during her test and cannot return to work.

Do these circumstances merit recertification of her panic disorder?

No. The facts do not indicate anything that would lead the employer to believe that the original certification was invalid.

Does that mean that the employer has to suck it up and treat this suspicious absence as FMLA-protected?

No! A federal court has upheld an employer's actions in investigating and terminating an employee under similar circumstances. The employee's supervisor became suspicious and questioned the employee about her attendance at the parent-teacher conference. The employee denied attending the conference. However, she later admitted that she had lied

but said she had done so only because she was afraid her supervisor would think that she had misused her intermittent FMLA leave.

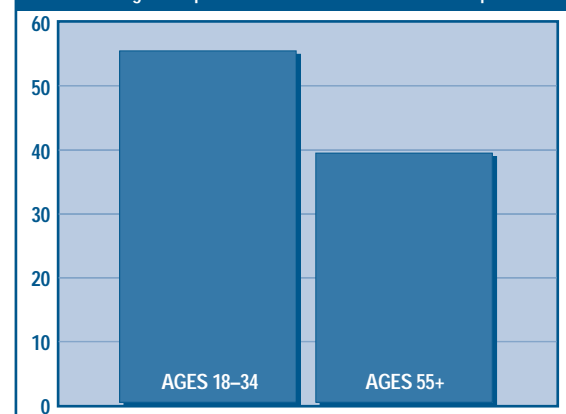
Here is the way the company finally got the admission: The company required the employee to provide documentation that she had gone to the blood-testing facility on the day in question. The employee instead returned a note from her doctor. The employer pressed the employee for proper documentation, and she presented a note from a different testing facility, stating she had been confused. The employer contacted that facility, which said that they did not remember the employee.

The company terminated her for being untruthful in an investigation, misrepresenting her health status, and providing false records.

In the employee's FMLA lawsuit, the court held that the FMLA did not prohibit an employer from investigating allegations of dishonesty or terminating an employee for dishonesty. Even though the FMLA regulations prohibit an employer from contacting a health-care provider, the court found that the contact was permissible in this case because the regulations apply only to the initial medical certification. The court also noted that it is proper to terminate an employee based on the employer's good-faith, reasonable belief that the employee had abused her leave. —**DAVID GOBEO**

**QUARTERLY PULSE****Older May Really Be Wiser, After All**

"But I thought that personal e-mails I sent at work were private!"



Source: Employee survey conducted by WeComply of Mt. Kisco, NY.

## GETTING TO KNOW US



**DAVID GOBEO** (*Tampa, FL, employment litigation prevention and defense*) received his bachelor's degree in political science *cum laude*, with minors in economics and philosophy, from Stetson University. David then received his law degree with honors in appellate advocacy from the University of Florida. Before attending law school, David worked as a computer technician for Kemper National Services. David enjoys playing his guitar, reading, exercising, cooking, following politics and spending time with his wife, Dawn.



**BRIAN MAGARGLE** (*Columbia, SC, employee benefits, and employment litigation prevention and defense*) received his bachelor's degree in political science *cum laude* from the University of South Carolina and his law degree from Washington and Lee University School of Law. In 2003, Brian was intimately involved in the drafting and passage of the South Carolina statute that prevents employee handbooks from being considered contracts of employment. Brian's articles have been published in the *South Carolina Business Journal*, *Federal Discovery News*, and *Focal Points*, a publication of the Greater Columbia Chamber of Commerce. He is also an alumnus of Leadership Columbia. When he is not practicing law, Brian and his wife, Paula Sommerkamp, enjoy USC football, Duke basketball, and politics.

**SHARONDA MILLS** (*Tampa, FL, wage and hour, and employment litigation prevention and defense*) received her bachelor's degree, *magna cum laude*, in business administration from Florida A&M University. She earned both her law degree, with honors, and her master's in business administration from Florida State University. Her articles have been published in *HR Magazine*



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**DAVID STEFFEN** (*Tampa, FL, labor relations, workers' compensation, employment training and policy analysis, and employment litigation*) received both his bachelor's degree in psychology, with a minor in history, and his law degree from Marquette University. While in law school, David was a recipient of the Martin Greenberg Award for excellence in the study of sports law.



When he is not practicing law, David enjoys scuba diving, kayaking, and playing golf. He and his wife, Sara, have two young daughters.

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## ▶ EXACTLY WHAT IS "RETALIATION"? Sharonda Mills

**EDITOR'S NOTE:** *On June 23, 2006, Constangy issued a Client Bulletin alerting clients to the Supreme Court decision in Burlington Northern & Santa Fe Railway Co. v. White. Because of space limitations, an in-depth discussion of this important decision was not possible, but we promised to provide a more thorough discussion in Labor & Employment Insights. Here is the promised analysis.*

All employers know (or certainly should know) that it is unlawful to retaliate against an employee for engaging in activity protected by civil rights laws. However, questions continue to arise as to the scope of "retaliation." Several years ago, the Supreme Court resolved one issue, finding that unlawful retaliation could occur beyond the boundaries of the employment relationship: for example, when an employer refuses to hire an applicant, or provides a negative reference for an ex-employee who has engaged in protected activity. Another question is how severe the employer's conduct must be. Clearly, an "ultimate decision," such as termination or denial of a promotion, would be severe enough, but what about lesser sanctions that are still painful to the employee?

This past summer, the Supreme Court provided guidance on this latter issue in the case of *Burlington Northern & Santa Fe Railway Co. v. White*. The Court said that any conduct that would cause a "reasonable employee" to feel dissuaded from engaging in protected activity will be considered sufficiently "adverse" to give rise to a retaliation claim. Although *Burlington Northern* dealt with a retaliation claim under Title VII of the Civil Rights Act of 1964, the reasoning in the decision will probably be applicable to many other types of retaliation claims.

### A retaliation primer

A valid retaliation claim consists of three elements: (1) legally protected activity, (2) adverse employment action, and (3) a "causal nexus" (that's lawyerese for "connection") between the protected activity and the adverse action.

There are two types of protected activity under Title VII: "participation," which includes such

things as filing an EEOC charge or lawsuit, and testifying on behalf of a charging party or plaintiff in a discrimination case; and "opposition," which includes more informal actions, such as making comments or complaints in the workplace about alleged discrimination.

It is not unusual for the parties in a retaliation case to dispute whether the employee actually engaged in protected activity (or whether the employer knew about it), or whether the adverse action was connected with the protected activity. But in a relative handful of cases, the employer may argue that the action taken was not substantial enough to constitute an adverse action. The *Burlington Northern* decision addressed this last issue.

### What happened

Sheila White complained to her employer about sexual harassment. She was subsequently accused of insubordination. While the insubordination investigation was pending, White was transferred to a less desirable job (although with the same title and same rate of pay as her previous job) and suspended without pay for 37 days. The investigation was eventually resolved in White's favor, and she was paid for the missed days. However, she sued, alleging that the railroad's delayed wage payment and the transfer constituted retaliation in violation of Title VII.

A jury found in White's favor, but a panel of the Court of Appeals for the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) reversed the verdict, concluding that neither the transfer nor the delayed pay amounted to actionable adverse employment actions. The case was reheard before the full Sixth Circuit, which agreed with the District Court. The railroad appealed to the U.S. Supreme Court.

The Supreme Court ruled in White's favor, affirming the full Sixth Circuit. First, the Court noted that retaliation claims could be based on conduct that did not directly affect the workplace. Second, the Court said that conduct is sufficiently "adverse" ("substantial" might be a better word) if a reasonable employee would find the action to be

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## QUARTERLY QUIZ

Momandpop Corporation has just completed investigating a theft in one of its retail establishments. All the evidence points to Abe, age 70, who was the only clerk with access to the cash register at the time in question. Abe was also caught on videotape with the cash drawer open while no customers were present. He stared at the open drawer for approximately 30 seconds, looked up at the video camera, seemed startled, and then hastily closed the drawer. Although it is not completely clear, the videotape seems to indicate that Abe slipped something into his pocket while completing the next sale.

Based on this evidence, Momandpop fires Abe. Abe sues for age discrimination, insisting that he was innocent of the theft. During discovery in the lawsuit, another employee admits that she was the real thief, not Abe. Upon further internal investigation, Momandpop determines that the theft could have occurred the way the other employee described – in other words, Abe's good name is cleared.

Does Abe now win his lawsuit?

(answer on page 6)

## RETALIATION (continued from page 5)

adverse; or, put another way, “[the conduct] might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” This invalidates the standards that had previously been applied in many courts, which had required retaliation claims to be based on an “ultimate” employment decision (for example, termination or denial of a promotion).

The Court cautioned, however, that the “reasonable” adjective is significant. An employee’s unreasonable or irrational belief – no matter how sincerely held – will not give rise to a retaliation claim. Nor will trivial unpleasant actions on the part of the employer. For example, the Court said, “petty slights, minor annoyances, or simple lack of good manners” are normally not enough to give rise to a retaliation claim.

### Impact of *Burlington Northern*

*Burlington Northern* will make it more difficult for employers to get summary judgment in retaliation cases. Moreover, we foresee a new body of court decisions dealing with “the reasonable person” in the retaliation context.

What should employers do in a post-*Burlington Northern* world? We suggest the following:

- **Educate supervisors and managers.** Supervisors and managers should be well versed in the concept of retaliation and know that it is strictly prohibited. They should understand that virtually every employment-related law on the books prohibits retaliation.
- **Keep a close watch on any “vindictive” managers.** Some personalities are more naturally “vindictive” than others. Not all vindictive behavior is unlawful, but supervisors and managers who are generally reputed to be vindictive are more likely to engage in behavior that could “dissuade” a reasonable person from engaging in protected activity. Moreover, vindictive managers are more likely to be reasonably perceived by their employees as retaliatory, whether the managers actually are or not. “Vindictive” perceptions and personality

issues should also be addressed in the managers’ performance evaluations.

- **A stitch in time saves nine.** If you don’t already do it, you should ensure that any supervisor or manager who is getting ready to discipline, transfer, demote, or terminate an employee identify whether the employee has engaged in legally protected activity. If so, the decision should be reviewed by Human Resources or Legal before any action is taken. Post-employment conduct can also be retaliatory, so individuals who provide reference information should also consult with Human Resources or Legal before they deviate from the employer’s normal practice.
- **Make sure employees know their rights.** This is cringe-inducing, but sound, advice. All employees should feel assured that they can raise certain issues in the workplace without the fear of retaliatory action. If the employees believe that the company will protect them, they will be less likely to be “dissuaded” from engaging in protected activity.
- **Where you find retaliation, crack down on the retaliators, and (where possible) make sure employees know you did.** Certainly a manager accused of retaliation is entitled to a full and fair investigation. If the evidence is only ambiguous or weak, it may not be appropriate to take action. But in the (hopefully rare) instances in which a manager is found to have retaliated, employers should not be afraid to be tough. (CAUTION: Be sure that any statements you make are 100 percent factual and given to those only with a need to know so that you will not open yourself to a defamation claim from the manager.)
- **But don’t overreact.** Finally, don’t think that *Burlington Northern* means you can never take appropriate action against an employee who has engaged in protected activity. Generally, if an employer treats the “protected” employee the same as it would treat any other employee with the same performance deficiencies, behavior issues, and the like, it will prevail in a retaliation claim. ◀

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## Employers Can Use Personal Web Pages as Screening, Defense Tool

### ▶ THAT’S ENOUGH ABOUT ME. WHAT DO YOU THINK OF ME?

David Steffen

The exploding popularity of personal web pages and internet blogging has created new opportunities that can help an employer make good business decisions. From disgruntled employees to potential job candidates, everyone is broadcasting personal information on *Myspace*, *Facebook* and similar websites.

For most people, personal web pages are nothing more than a fun and an easy way to keep in touch with friends and family. However, a significant minority reveal a little *too much* about the posters. . . including their sexual proclivities, their prejudices, their work ethic, and even their illegal activity.

Because people (especially young people) generally view personal web pages as a way to socialize, they fail to recognize the potential ramifications that their postings may have on their professional lives.

According to the *Tampa Tribune*, an estimated 21,500 of the 43,000 students at the University of South Florida have registered on *Facebook*, a social networking website that is designed for students. Of those students, 149 belong to the group “My Blood Alcohol Level Is Higher Than My GPA.” Another 451 joined the group “I Would So Have Sex In The Library,” and there are 204 members of the “Trophy Wives In Training” group. The paper also reported that universities across the country have uncovered pictures and admissions of criminal activity based upon student misconduct complaints.

Therefore, it may be a good idea to run an internet search on job candidates who have made it past the initial screening process. Personal web pages can reveal personality traits or other potentially problematic behavior that may not be discovered during a job interview.

Companies have also been able to use personal web pages to their advantage in litigation defense. For example, in a case that our firm recently handled, a terminated employee alleged

that she was sexually harassed. Within hours of her termination, the company conducted an internet search on the individual and found her personal web page.

She posted about taking two co-workers to a strip club over their lunch break and socializing with the very people she later claimed were harassing her. Then the company reviewed the personal web pages of her co-workers and found even more: a photo of the former employee voluntarily participating in the allegedly harassing behavior – and with a big smile on her face. The company continued to monitor the former employee’s web postings.

Through the information obtained from the internet, the company was not stuck in a “he-said/she-said” situation. Several months later, when her attorney threatened to file a discrimination charge, we were able to respond by providing her attorney with excerpts of the former employee’s web page. That was that: the attorney declined to pursue the matter.

Not every personal web page will be this helpful, but even little pieces of information can be invaluable. Employers should search the internet on candidates for at least executive, management or management-training, and professional positions. Although it may not be practical to do such a search for every candidate, the employer can perform searches on candidates who survive the initial screening process. And a search regarding employees who threaten litigation is definitely wise also, as our client’s experience shows.

Finally, parents should teach their children that there is much to be said for leaving a few things to the imagination.

**David Steffen (Tampa, FL) practices in the areas of employment litigation prevention and defense, and labor relations, and he provides employment law training and workers’ compensation consulting services.**

## MY SPACE DOES IT AGAIN!

The city of Wichita Falls, Texas, recently suspended indefinitely a police officer whose web page on *MySpace* contained pictures of dismembered women and other violent material.

The officer used the name “Leatherface” for his web page, and he listed his occupation as “superhero/serial killer.” His page contained a photograph of a woman with the word “loath” [sic] carved into her body. The web page has since been removed.

A defense attorney representing a man who had been arrested by the officer found the web page and reported it to the district attorney. According to the defense attorney, the officer had used excessive force against his client.

In suspending the officer, the City said that the web page would undermine public confidence in the police department.

The officer, ironically surnamed Love, said that he had intended for the web page to be “humorous.”

—DAVID STEFFEN

## ANSWER

(from Quarterly Quiz, page 5)

No. Although Momandpop may have been wrong about Abe, the company had a reasonable basis for believing that he had committed the theft, and employee theft is a legitimate ground for discharge. In other words, it is clear that Abe was discharged because of the company’s belief (albeit mistaken) that he was a thief—not because of his age.

Employers should nonetheless be careful that they have enough evidence of employee misconduct to support a “reasonable good-faith” finding before they take action against the suspected employee. They should also be very careful about what they communicate to third parties and co-workers about the termination so that they avoid liability for defamation.