

## **EMPLOYMENT & LABOR QUARTERLY NEWSLETTER**

### **Section Board**

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### **BOARD MEETINGS**

The Board meets the first Wednesday of each month. Section members are welcome at all meetings.

### **BENEFITS OF ALL: CAN EMPLOYERS EQUALIZE COVERAGE FOR DOMESTIC PARTNERS?**

Quentin Smith, Esq.  
Gilkey & Stephenson, P.A.

An increasing number of employers are extending benefits, such as health insurance and FMLA leave, to domestic partners. However, under the current state of the law, can an employer equalize coverage for domestic partners?

### **“THE SKY IS FALLING!”**

### **CHICKEN LITTLE AND THE ALBUQUERQUE MINIMUM WAGE ORDINANCE**

By Chris Wolpert of Rodey, Dickason, Sloan, Akin & Robb, P.A.

The Albuquerque Minimum Wage Ordinance was signed into law by Mayor Martin Chavez on April 27, 2006. The ordinance is very broad, and in addition to increasing the City's minimum wage, it imposes a number of restrictions and requirements upon affected employers. The time is now for employers and their advocates to become familiar with these restrictions and requirements of the ordinance, and implement a plan to ensure compliance. The article provides a detailed overview of the ordinance, with particular emphasis on provisions that create potential pitfalls for affected employers.

### **PRE-HIRE ORAL FLUID DRUG SCREENING: A VIABLE ALTERNATIVE**

By S. Charles Archuleta, Shareholder and Justin Breen, summer associate of Keleher & McLeod, P.A.

Is oral fluid (“saliva”) testing for drug use generally accepted and will it withstand judicial scrutiny? Does use of medical review officers (MRO) in oral drug testing increase in importance or become less important?

### **EMPLOYMENT LAW UPDATE**

Cindy Lovato-Farmer, Esq.  
Los Alamos National Laboratory, Office of Laboratory Counsel

Decisions on employment and labor law issues within the last three months.

# **BENEFITS FOR ALL:** ***Can Employers Equalize Coverage for Domestic Partners?***

**By: Quentin Smith, Gilkey & Stephenson, P.A.**

Employers have traditionally offered benefits, such as health insurance, to the spouses and legal dependants of their employees. In 1982, though, the first employer to break ranks and offer domestic partner benefits to its lesbian and gay employees was a New York City weekly publication called the *Village Voice*. Today, the Human Rights Campaign (a nonprofit organization devoted to working for lesbian, gay, bisexual, and transgender equal rights) claims that the number of colleges, governments, and private corporations that offer domestic partner benefits stands at more than 2,500. In an effort to promote equality in the workplace, more and more employers are choosing to offer benefits to domestic partners. However, these efforts to bring more equality to the workplace are not without consequence. Before adopting policies that afford domestic partners the same benefits that are afforded spouses, employers must carefully consider the benefits and risks to such an approach.<sup>1</sup>

## **I. ADVANTAGES TO OFFERING DOMESTIC PARTNER BENEFITS**

The advantages to offering certain benefits to domestic partners can be difficult to quantify, but that does not mean that there are no advantages. First and foremost, depending on the company's industry and market, offering domestic partner benefits may be necessary for enhancing the company's public image. For example, Gap, Inc. is widely regarded as a progressive company. Choosing to provide domestic benefits is consistent with the corporate image that it promotes. On the other hand, Wal-Mart Stores, Inc. promotes a much different corporate image, which is reflected in its benefits packages.

Employers may use domestic partner benefits as a tool to attracting the best qualified employees. National unemployment rates have been running at historic lows since the 1990s. With unemployment at approximately 4 percent for much of the last decade, employers are looking for ways to gain a hiring edge on their competitors. Also, domestic partner benefits could potentially improve a company's retention rate. Not offering such benefits could cause the employer to lose highly qualified employees to another company with more progressive policies. In addition to losing that employee's contributions, the costs of turnover can be surprisingly high. Some studies have put the cost of recruiting a new employee as high as \$75,000 due to costs associated with advertising, interviewing, training, testing, relocation expenses, lost productivity, and recruitment incentives.

It has been argued that increased employee productivity can be another windfall from offering domestic partner benefits. Workplace advocates argue that a domestic partner benefits program will help alleviate personal stress experienced by gay, lesbian, or

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<sup>1</sup> This Article is not intended to offer an opinion on whether any particular employer should or should not offer domestic partner benefits. Rather, the Article is intended to provide an objective analysis of the pros and cons for any employer who is considering affording certain benefits to its employees' domestic partners.

unmarried employees that keeps them from fully focusing on their work. One workplace advocate has employed a formula to measure the dollar amount of increased productivity created by offering fair domestic partner benefits. The formula assumes the proportion of gay and lesbian employees in any workplace to be approximately 5 percent and further assumes a 10 percent increase in productivity in those employees associated with offering domestic partner benefits. (Using these figures, a company with a workforce of 1,000 employees would have approximately 50 gay and lesbian employees. If the average salary is \$40,000, the average loss in productivity per gay and lesbian employee would be \$4,000. Thus, the total annual loss to the company in productivity would be \$200,000.)

Finally, from a legal standpoint, offering domestic partner benefits may be helpful to defending or even staving off employment-related lawsuits. While it is unlikely an employee could win a discrimination suit under the current state of the law, benefit inequities could invite claims by gay and lesbian employees that would have to be defended at company expense. Equal benefits policies could even assist the employer in defending against other non-benefits-related claims. For example, whenever a charge of discrimination (for example, race, age, or gender discrimination) is filed with the Equal Employment Opportunity Commission (EEOC), during the investigation the EEOC will request the charged employer's policies. The resulting perception of fairness that could result from offering domestic partner benefits can only help an employer facing such a charge of discrimination.

## **II. LEGAL IMPLICATIONS OF OFFERING DOMESTIC PARTNER BENEFITS**

All these potential advantages, though, do not come without costs. Employers who want to diversify their workforces and distinguish themselves from competitors by offering the same benefits to all employees are discovering that it can be difficult, expensive, and even impossible to equalize coverage under current legal standards. The following is a list of the various benefits that employers may try to extend to domestic partners, along with an analysis of the feasibility and risks of doing so:

### **A. Medical Insurance**

Whenever a company offers medical insurance to an employee, it is common for that employee's spouse to be covered under the policy. Companies certainly may offer the same opportunities to domestic partners; however, it will cost the company more to insure a domestic partner than it will to insure a spouse. The Internal Revenue Service (IRS) has ruled domestic partners cannot be considered spouses for tax purposes. Employers are obligated to report and withhold taxes on the fair market value of the domestic partner coverage. Conversely, health insurance coverage for legal spouses is not considered taxable income. The fair market value of the domestic partner coverage is usually the amount the employer contributes to the health plan to cover the domestic partner, over and above the amount contributed for single and/or dependent coverage. Domestic partner benefits may be considered non-taxable only if the domestic partner meets the IRS definition of a "dependent." Internal Revenue Code (IRC) Section 152 defines a dependant as someone who resides in the employee's household and who receives at least half of their support from the employee.

## **B. Cafeteria Plans**

Many employers allow their employees to make pre-tax contributions to “flexible spending accounts.” The money contributed to these accounts—known officially as IRC Section 125 cafeteria plans—can go to medical expenses not covered by health insurance, such as prescription eyeglasses, medicines, and psychological counseling. Employees covered by cafeteria plans are also allowed to use pre-tax dollars to pay their health insurance premiums. However, unless a domestic partner qualifies as a dependant under the IRS definition, premiums for domestic partner coverage cannot be offered on a pre-tax basis. And unless a domestic partner qualifies as a dependent, his or her out-of-pocket medical expenses cannot be paid out of a flexible spending account. Some employers choose to offset this taxation difference by “grossing up,” which means paying the difference. Choosing this option, though, can be rather expensive for an employer.

## **C. Pension Benefits**

When an employee or former employee dies, his or her surviving spouse generally automatically receives any benefit provided for under the employee’s pension plan, including both traditional pensions and retirement plans like 401(k)s and IRAs. If an employer wants to offer the same type of pension benefit to gay or lesbian domestic partners, the federal Defense of Marriage Act of 1996 (DOMA) stands in the way. Because DOMA states that “marriage” can only be between a man and a woman, it would prohibit employers from defining a spouse as somebody who is not of the opposite sex. Therefore, even if an employer would like to extend surviving spouse pension benefits to gay or lesbian domestic partners, a same-sex person cannot inherit as a spouse. If the employee is not married, it may be possible to name a domestic partner as an heir by filling out the proper forms. But if the employee does not act affirmatively to obtain such pension benefits, the domestic partner cannot inherit. Furthermore, even if a domestic partner is named as a heir, that partner will be unable to roll over pension benefits into his or her own IRA or retirement plan on a tax-deferred basis like a spouse could elect to do.

## **D. Family and Medical Leave**

The Family and Medical Leave Act (FMLA) requires certain employers to grant an employee up to 12 weeks of unpaid leave in a rolling 12-month period to recuperate from illness or care for an ailing spouse, child, parent, newborn, or newly adopted child. Employees are not protected by the FMLA when caring for domestic partners. However, a number of employers have chosen to adopt unpaid leave policies to close this gap in FMLA coverage. A company certainly can voluntarily allow an employee to take up to 12 weeks to care for a seriously ill domestic partner. That leave cannot be counted by the employer as FMLA leave, though. The problem occurs when that same employee gets sick during the same 12-month period. The employer is then placed in a bind because the employee is now entitled to an additional 12 weeks of unpaid FMLA leave. There is no way an employer can protect itself against such “stacking” of unpaid leave.

## **E. Other Legal Considerations**

There are other legal considerations that an employer should consider before adopting a policy granting or denying domestic partner benefits. First, the employer should consider all ordinances in the cities or counties in which it does business. For example, several California cities, including Berkeley, Los Angeles, Oakland, and San Francisco, have adopted an Equal Benefits Ordinance that requires all companies with city contracts to extend domestic partner benefits to their employees who reside in the city or who work on contracts for the city. Second, as mentioned earlier, choosing not to extend domestic partner benefits may expose employers to potential lawsuits. State laws that ban sexual orientation and marital status discrimination have been used to argue that employers are required to offer domestic partner benefits. These claims have largely been unsuccessful; however, in 1998, the Oregon Appeals Court did rule that municipalities were in violation of the state constitution by not offering domestic partner benefits. See *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). Although that ruling applies only to government employees, it could be a harbinger of things to come in other jurisdictions.

# **“The Sky is Falling!” Chicken Little and the Albuquerque Minimum Wage Ordinance**

By Chris Wolpert of Rodey, Dickason, Sloan, Akin & Robb, P.A.

You may recall the old fable of Chicken Little who, convinced that the sky was falling, whipped his colleagues into the mass hysteria that ultimately led to their demise. The analogous reaction of many employers to the recently-enacted Albuquerque Minimum Wage Ordinance threatens to perpetuate the same type of hysteria and eventual demise at the hands of the restrictions and requirements imposed by the new ordinance. The ordinance has taken effect, and first of three resulting minimum wage increases is less than six months away. The time is now for affected employers and their advocates to become familiar with the provisions and requirements of the ordinance, and implement a plan to ensure compliance.

Frustrated with the lack of action on the part of the Federal and State legislatures, and emboldened by the enactment and successful defense of Santa Fe’s living wage, the Albuquerque City Council recently passed the Albuquerque Minimum Wage Ordinance. Starting in January of 2007, the ordinance raises the minimum wage for workers in the City of Albuquerque, which is home to twenty-five percent of New Mexico’s residents. According to the New Mexico Department of Labor, the ordinance will directly impact the wages of nearly forty thousand workers. In addition to raising the minimum wage, the ordinance imposes numerous restrictions and requirements upon affected employers, and provides damages for violations thereof.

Following in the footsteps of many other states, counties, and cities throughout the country, an increase in the minimum wage has been at the forefront of the Albuquerque City Council’s agenda for the past two years. Early in 2005, Southeast Heights City Councilor, Martin Heinrich, introduced a bill to raise Albuquerque’s minimum wage from the federal minimum of \$5.15 per hour, which had been in effect since 1997. The bill died amidst rumors of impending action by the state legislature, which ultimately suffered the same fate. Then, in the Fall of 2005, voters defeated an Albuquerque ballot initiative, by a narrow margin of less than two percent. In April of this year, Councilor Heinrich introduced an amended version of his 2005 minimum wage bill, which the Council passed by a 6-3 vote. Mayor Martin Chavez signed the ordinance into law on April 27, 2006.

The ordinance raises the minimum wage in Albuquerque to \$6.75 per hour, effective January 1, 2007. It provides for additional increases to \$7.15 per hour and \$7.50 per hour on January 1, 2008 and January 1, 2009, respectively. The ordinance does not contain an inflation adjustment provision, which means that the wage will not increase without further action from lawmakers, after it reaches \$7.50 per hour in 2009. In the event that the State of New Mexico or the Federal government ultimately increase their

respective minimum wages to an amount exceeding that which is provided for under the ordinance, this higher rate would supersede the City's minimum.

The scope of the ordinance is quite broad. It applies to anyone who (1) is required to have a business license or business registration from the City of Albuquerque, and (2) directly or indirectly employs or exercises control over the wages, hours or working conditions of an employee who performs at least two hours per week of work for the employer, within the municipal limits of the City. The ordinance applies to part-time, seasonal, and temporary employees, as well as employees who receive tips or work for commissions.

Despite its breadth, the ordinance expressly exempts from its purview several categories of individuals, including employees of the Federal government; certain individuals and volunteers working for educational, charitable, religious or non-profit organizations; salespeople who are compensated only by piecework, flat rate or commission; and registered apprentices. The ordinance also expressly excludes both seasonal employees and disabled individuals who hold valid exemption certificates from the Department of Labor, as provided for by the New Mexico Minimum Wage Act.

The ordinance provides employers with a credit towards the minimum wage under specific circumstances. For example, tips and commissions received and retained by an employee may be counted as wages and credited towards the satisfaction of the minimum. However, the ordinance's detailed definition of a "tip" restricts the applicability of that credit to very specific circumstances. This definition is fraught with potential pitfalls for affected employers. Familiarity with the nuances of when an employee's tips may be credited towards the minimum, and meticulous attention to detail on the part of employers utilizing that credit are necessary to ensure compliance with this particularly intricate provision of the ordinance. In addition, the ordinance reduces the minimum wage by one dollar per hour for employers who provide healthcare and/or childcare benefits to employees for which the employer pays at least \$2500 per year.

Employers must provide their employees with notice of the minimum wage and their rights under the ordinance. Such notices must be posted, in both English and Spanish, in a conspicuous place at any workplace or job site where any employee works. The notice is created by, and can be obtained from, Albuquerque's City Attorney.

In addition to the notice requirement, the ordinance mandates that all employers must keep detailed records of both the daily hours worked by and wages paid to all employees. These records must be retained by the employer for a period of three years. In addition, when an employer uses an employee's tips to meet the minimum wage, the employer must obtain a signed tip declaration from each such employee for each pay period in which the tip credit is invoked. These declarations must also be maintained by the employer for a period of three years.

The aforementioned rights and requirements of the ordinance may be enforced either through civil litigation by an aggrieved employee, or by the Albuquerque City Attorney. The ordinance allows an employee who has been paid less than the applicable minimum wage to file a civil suit to recover the balance of the wages owed, including interest. The same provision provides for additional damages equal to twice the wages owed, as well as the recovery of litigation costs and attorneys' fees for a prevailing plaintiff. In addition, the ordinance expressly prohibits an employer from retaliating against an employee who seeks to enforce his or her rights under the ordinance, and provides damages for such retaliation, as well as reinstatement in the event of a retaliatory discharge. In such situations, damages are calculated from the date of discharge to the date of reinstatement, waiver of reinstatement, or the issuance of a final judgment.

In sum, don't be a Chicken Little. The Albuquerque Minimum Wage Ordinance is in place and affected employers must ensure compliance to avoid liability. The scope of the ordinance is broad, and its exceptions are both narrow and limited in number. Regardless of whether the sky is indeed falling, affected employers must be aware of and understand the nuances of the ordinance's requirements for calculating wages, posting notices, keeping records and preventing retaliation. Employers who fail to abide by, or neglect to ensure strict compliance with, the ordinance face civil liability for damages that may substantially exceed the wages owed to the employee. In order to avoid such liability, affected employers and their advocates should take action now to become familiar with the ordinance's requirements and ensure compliance therewith.

# **Pre-Hire Oral Fluid Drug Screening: A Viable Alternative**

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References: Kadehjian, Leo. *Legal Issues in Oral Drug Testing*; Forensic Science International, 2005 v150, i2-3 p.151 (June 2005).

## **Questions Presented:**

1. Is oral fluid ("saliva") testing for drug use generally accepted and will it withstand judicial scrutiny?
2. Does use of medical review officers (MRO) in oral drug testing increase in importance or become less important?

## **Introduction:**

Many employer-clients have an existing drug policy using urinalysis to test for the presence of drug use in non-Department of Transportation pre-hires. One alternative method involves testing an oral sample taken from the donor with a swab. The advantage in using an oral swab test is (1) convenience; (2) cost and (3) minimized intrusion on a potential-hires privacy. A follow-up issue whether is not using a Medical Review Officer ("MRO"), again as a cost saving, would expose an employer to increased potential liability, under this new method of testing.

## **Summary Conclusion:**

Using swab specimen testing may increase exposure to liability because, although on the rise, this method has not been judicially scrutinized. Although there is a wealth of science behind the technique, we have found no legal authority definitively accepting the validity or admission of the use of saliva as a specimen for drug testing in humans. Nor is there any authority rejecting such use. Ultimately, saliva swab testing appears a reasonable alternative in pre-hire testing, but all employers should be aware that such testing is open to challenge, as is any newer, alternative testing procedure.

Because there is no judicial authority accepting this method, the use of an MRO is not any less important. Using saliva specimens may be a good way to filter out negative results. For positive test results, non-saliva confirmation tests and an MRO shall likely be recommended.

## **Discussion:**

1. **Is use of saliva as a specimen for testing drug use generally accepted and reliable, and will it withstand judicial scrutiny?**

*A. State approaches to the use of saliva as a specimen.*

Some states have statutes governing the testing of employees for drug use. Although New Mexico does not have a statute governing employer drug screening policies, an examination of states that do provides insight into whether use of saliva is an acceptable specimen to determine whether an employee has illegal drugs in his or her system.

Arizona's employer drug testing statute defines as a "sample" for use in drug testing, "urine, breath, saliva, hair or other substances." A.R.S. § 23-493(7) (2006). The statute requires that testing of the sample comply with "scientifically accepted analytical methods", but does not indicate what "scientifically accepted" means. A.R.S. § 23-493.03(4). The statute provides that the sample must be tested by a laboratory approved or certified by the U.S. Department of Health and Human Services, or college of American pathologists. A.R.S. § 23-493(7). Further, the statute requires confirmation of positives by use of a different chemical process than that used in the initial drug screen. A.R.S. § 23-493.03(5). There is no requirement that an MRO be made available.

Louisiana's drug screening statute also defines as a "sample" to be used in drug screening "urine, blood, saliva or hair." La. Rev. Stat. § 49:1001 (2005). The Louisiana statute is favorable to the employer. For positive pre-employment testing, the statute says that the employer can offer the applicant the opportunity to pay for a confirmation of the test and for a review by an MRO. § 49:1007.

These statutes both authorize the use of saliva as a specimen for drug testing. Although they cannot be used as controlling authority in New Mexico, one may conclude that the legislatures recognized the use of saliva as an alternative method for testing. There are, however, provisions built into the statutes that prohibit complete reliance on that method. Arizona, regardless of which method is used, requires that the confirmation test use a different chemical technique. Louisiana permits employers to offer the opportunity for MRO review, but that provision only applies to applicants, not employees.

*B. Daubert and saliva specimens.*

New Mexico has accepted the Daubert analysis as to the admissibility of scientific evidence. State v. Alberico, 116 NM 156, 168, 861 P.2d 192, 203-204 (1993). Some of the factors that the Daubert rule examines are the general acceptance of the technique, whether the technique has been tested, whether it has been subject to peer review and publication, and what the known or potential error rate is. Although the use of saliva as a specimen for drug testing is on the rise, and appears to be accepted in the scientific community, we have not found judicial authority subjecting the use of the specimen to a Daubert analysis.

*C. Other considerations.*

One consideration in analyzing the effective use of saliva testing is that it has not been accepted by the Department of Transportation as a means to test for drug use. There are established procedures for alcohol testing in oral fluids under the DOT regulations.

**2. Does use of medical review officers (MRO) in oral drug testing increase in importance or become less important?**

Because use of saliva in drug screening is not as well defined as urine testing, and because even using urinalysis, a reliable and accepted method, requires review by an MRO under the DOT regulations, use of the MRO should be strongly considered. It is important to review this on a “cost versus risk” analysis. The safer route is to use an MRO. Since the screening discussed is limited to post-offer, pre-employment screening, the risk factor is lower than when testing current employees.

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# Employment Law Update

*Recent Decisions on employment law issues*

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## U.S. Supreme Court Cases

### TITLE VII - RETALIATION

Burlington Northern & Santa Fe Railway Co. v. White, -- S.Ct. --, 2006 WL 1698953 (2006).

- The Court granted certiorari to resolve a split in the interpretation of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, which prohibits employers from “discriminating against” employees who “opposed any practice” forbidden by Title VII or who “made a charge, testified, assisted, or participated in” a Title VII investigation or proceeding.
- The Court interpreted “discriminated against” by looking at differences in language and purpose between the substantive provision in § 703(a) and the anti-retaliation provision in § 704(a) to hold that the scope of the anti-retaliation provision extends to actions not related to employment and that do not take place at the workplace.
- The plaintiff must show that a reasonable employee, considering all of the circumstances, would have found the action “materially adverse,” meaning that it may deter an employee from making a discrimination charge.
- Materiality depends on the circumstances of the case. In this case, reassignment of duties within the job description was determined to be materially adverse because assigning less desirable duties would discourage an employee from charging discrimination. In addition, a 37-day investigatory suspension without pay was deemed materially adverse even though the employer had reinstated the employee and awarded backpay on the basis that living without income with an uncertain future for over a month is a serious hardship for many employees and could deter charges of discrimination by an employee.

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<sup>1</sup> The summaries and views expressed herein are those of the author, and not of the Los Alamos National Laboratory. The Los Alamos National Laboratory strongly supports academic freedom and a researcher’s right to publish; therefore, the Laboratory as an institution does not endorse the viewpoint of a publication or guarantee its technical correctness.

## First Amendment retaliation claim under 42 U.S.C. Section 1983

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006).

- The Supreme Court reversed the Ninth Circuit and held “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitutional does not insulate their communications from employer discipline.”
- The Court reasoned that “restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”
- The majority (Kennedy, Roberts, Scalia, Thomas, and Alito) declined to extend the test established in *Pickering* for speech made by public employees as citizens on public concerns (weighing individual and public interest in the speech versus government interest in operating efficiently without distraction or embarrassment) to speech made by public employees performing their job duties. Instead, the majority held that when a government employee speaks as part of the job he/she is performing, the individual is not speaking as a citizen for First Amendment purposes. The employee is speaking for the government, not him/herself. Supervisors can evaluate the performance of their employees, including the speech made as part of the job. The individual retains the right to speak outside of his/her job duties.

## Tenth Circuit Court of Appeals Cases

### ADEA

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006).

Summary Judgment for Employer reversed.

- Employees were terminated as part of a reduction in force. They signed identical Releases of Claims to get a severance package and gave up the right to assert an ADEA claim against the employer. Plaintiffs contested the waiver for failing to conform to the requirements of the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA).
- The release was found to be invalid because the employer inaccurately identified the “decisional unit” as required by the OWBPA, so the waiver was deemed ineffective as a matter of law.
- The Court rejected the contention that the defendant’s error in identifying the “decisional unit” was de minimis stating that the requirements of the OWBPA are “strict and unqualified.”

## TITLE VII - Race Discrimination

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, -- F.3d --, 2006 WL 1545501 (10th Cir. 2006).

Summary judgment for employer reversed.

- The “cat’s paw” and “rubber-stamp” theories were accepted by the 10th Circuit. “Cat’s paw” is described as a “situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.” The “rubber stamp” doctrine is used when “a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.”
- These theories arise in subordinate bias claims and impute racist motive to the employer who does not undertake an independent investigation into the reasons for an employment action but relies solely on the input of another employee, who has racial animus. The proper inquiry is whether the “biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action.”
- The court found that summary judgment was inappropriate because there was a dispute of material fact – whether the individual who provided the information to the decisionmaker (who had no knowledge of the employee’s race) had a history of racist comments and racial treatment of employees sufficient to show racial bias.