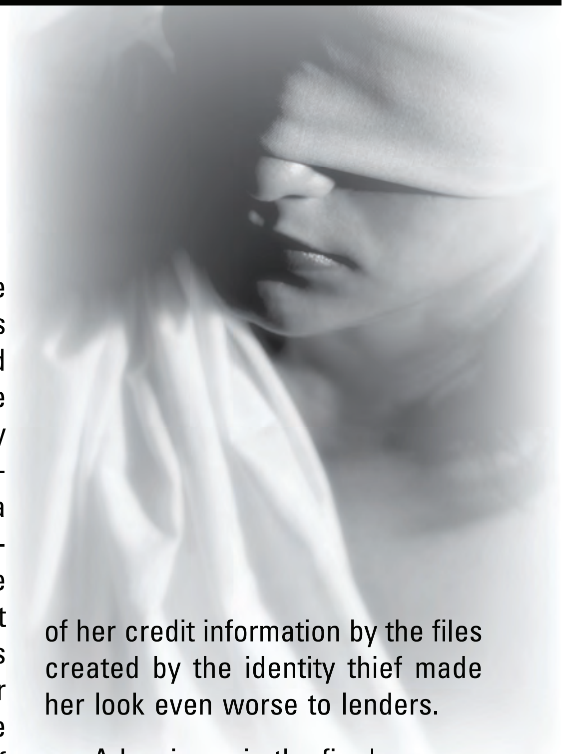
$200,000 FOR IDENTITY THEFT VICTIM



Nicole discovered that someone with a name very similar to hers had stolen her identity and opened fraudulent accounts in her name and under her Social Security number. This was only the beginning of a long and arduous saga in which she took all of the recommended steps to rectify the problem, but nonetheless was beset by financial and emotional stresses over several years before the matter was finally resolved. Ultimately, she secured some relief in the form of a substantial jury verdict against a credit reporting firm. The firm bore no responsibility for the identity theft itself, but it had repeatedly compounded the impact of the theft by mishandling information about Nicole. Nicole sued the firm under the federal Fair Credit Reporting Act (FCRA).

Although it did not do so intentionally, the credit reporting firm had caused Nicole's ordeal to be more protracted, and to have more consequences for her finances and general well being, by mistakenly putting her address and Social Security number on credit files set up by the identity thief. What is worse, the firm did this a few times over several years, even after having been informed of the problem. Because of the erroneously adverse credit files, Nicole was sometimes denied credit, such as for a home mortgage. On other occasions, she was offered credit only on very disadvantageous terms because she was perceived as such a high risk. Nicole did have some previous credit problems of her own making, but the "infection" of her credit information by the files created by the identity thief made her look even worse to lenders.

A key issue in the firm's unsuccessful appeal from the jury verdict was whether Nicole had shown enough to recover a large sum not just for out of pocket losses, but also for emotional distress. The federal appellate court left the verdict undisturbed. The jury had not indicated what portion of its total award was attributable to emotional injuries, but, in any case, the court was satisfied that the award was not excessive in light of the evidence offered at trial.

Nicole had been made to spend literally hundreds of hours, often while having to miss work, trying to undo the tangled mess created by the firm. The record showed that as she dealt with the credit reporting service and tried to cope with the rippling effects of its errors, Nicole often was uncharacteristically upset with friends, family members, and coworkers. She was beset by frequent headaches, sleeplessness, and even such symptoms as bad skin and hair loss. In short, Nicole became a wreck emotionally and even physically. For its role in causing it all, the credit reporting firm had to pay. ■

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Legal Matters

Winter 2009

MOUNTAIN STATES SUPER LAWYERS RECOGNIZES THREE HUTCHISON & STEFFEN ATTORNEYS

Hutchison & Steffen partner, Mark A. Hutchison, was recently named to the 2009 Mountain States Super Lawyers list. In addition, two Firm associates — John H. Gutke and Kevin M. Sutehall — were named 2009 Mountain States Rising Stars, which is part of the prestigious annual Super Lawyers list.


Mark A. Hutchison

Hutchison is a senior member of the Firm and holds an AV-rating from Martindale-Hubbell®. He practices primarily in the areas of business and commercial litigation, tort litigation, medical malpractice, employment law, trust and probate litigation, and appellate litigation.


John H. Gutke

Gutke practices primarily in business and commercial litigation, healthcare professionals advocacy, corporate and transactional law, and real estate. Sutehall has focused his growing practice on business and commercial litigation.


Kevin M. Sutehall

Super Lawyers is a listing of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Super Lawyers is published as a special supplement in leading newspapers and city and regional magazines across the country. Super Lawyers magazine, featuring articles about attorneys named to the Super Lawyers list, is distributed to all attorneys in the state or region, the lead corporate counsel of Russell 3000 companies and the ABA-approved law school libraries. ■

CAREGIVER BIAS IN EMPLOYMENT

Today, it is commonplace for workers to handle both work and caregiving responsibilities for spouses and children, parents and other older family members, or relatives with disabilities. Women still are disproportionately more likely to exercise primary caregiving responsibilities but, in increasing numbers, men also have assumed the dual roles of caretaker and breadwinner.

Our society may be evolving toward more individuals simultaneously sharing the duties of an employee and a caregiver, but old stereotypes in the workplace sometimes die hard. The result is a steady rise in claims of employment discrimination based on what is sometimes called "family responsibility discrimination." You would search in vain for a federal law that expressly prohibits discrimination at work against caregivers, but complaining employees have been able to pursue claims under other employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA).

The cases brought under Title VII tend to allege sex discrimination or gender stereotyping. A classic example is the pregnant woman who is let go or passed over for a promotion because the employer's decision maker assumes that with the baby will come a diminished commitment to the employer and a failure by the employee to meet all of the obligations of her job. Such was the case in a recent litigation in which a mother of triplets was denied a promotion because, in the employer's words to her, "You have a lot on your plate right now." When a federal appellate court reinstated the lawsuit after its dismissal by the trial court, the employer likely came to the belated conclusion that it should concern itself only with the employer's portion of the employee's "plate."

The ADA can come into play as a vehicle for caregiver discrimination claims because the phrase "discriminate against a qualified individual on the basis of disability" in the statute includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."

The FMLA may be the existing federal statute that by its terms most directly addresses caregiver rights in employment, but it affords employees more restricted protection than do Title VII and the ADA. The FMLA provides that covered employers (private sector employers with at least 50 employees in a 75 mile radius) must provide up to 12 weeks of unpaid medical leave during a 12 month period to eligible employees (those who have worked for the employer for at least 12 months or 1,250 hours) for childbirth and newborn care, adoption or foster care placement, care for immediate family members with a serious health condition, or to handle the employee's own serious health condition.

In its recently published guide to the best practices for employers on this subject, the Equal Employment Opportunity Commission (EEOC) touts the benefits and advantages of employers adopting flexible workplace policies that help employees achieve a satisfactory work life balance. According to the EEOC, employers taking that approach may not only experience decreased complaints of unlawful discrimination but, according to many studies, may also benefit their workers, their customer base, and even their financial picture. Flexible workplace policies also aid recruitment and retention efforts, helping employers to keep a talented, knowledgeable workforce and save the money and time that would otherwise have been spent recruiting, interviewing, selecting, and training new employees. ■

BONUS PLAN MAY TRIGGER OVERTIME

The federal Fair Labor Standards Act (FLSA) provides that employers may not require their employees to work more than 40 hours per workweek unless those employees receive overtime compensation at a rate of not less than one and one half times their regular pay. The FLSA contains certain exemptions from the overtime compensation requirement, one of which is for employees working in a "bona fide executive, administrative, or professional capacity." In other words, if an employee works in such a capacity, the employer is exempt from the general requirement of paying overtime pay. Under the FLSA regulations, an employee's position must satisfy three tests to qualify for this exemption: (1) a duties test, (2) a salary level test, and (3) a salary basis test.

The issue before a federal appeals court recently was whether the compensation plans used for management level employees of a health club chain satisfied the salary basis test.

Under its bonus plan, in particular, the employer could deduct bonus plan "overpayments" if an employee did not meet certain performance levels. The legal outcome for the employees was affected by the time frame in which the compensation plan was in effect. For the period after August 23, 2004, when a new Department of Labor regulation on the salary basis test went into effect, employees were entitled to compensation for pay periods in which actual deductions from pay were made. The regulation provided that "[a]n actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis."

Other employees also were entitled to overtime compensation for some pay periods before the regulation's effective date, even when the employer made no actual deductions, but the employer had in place a policy that made such deductions significantly likely to occur. Under a then controlling United States Supreme Court ruling, an employee was not paid on a salary basis, and thus was eligible for overtime compensation, if (1) there was an actual practice of salary deductions, or if (2) an employee was compensated under a policy that clearly communicated a significant likelihood of deductions.

In the case before the court, the policy fit within the "significant likelihood of deductions" category. The employer's compensation plan targeted specific members of management; its policy set out a particularized formula whereby their pay would be in jeopardy; the employer took affirmative steps to demonstrate that the pay deduction plan would be enforced (including the creation of a "performance pay committee" that made the case by case decisions); and it took actual deductions from employees' salaries not long after the employees stopped meeting their performance goals.

Employers desirous of avoiding a similar outcome, in which overtime pay ultimately is owed to employees generally considered by the employer to have been "salaried employees," should be cautious about making any alterations to the predetermined pay for such employees. An employee will be considered to be paid on a "salary basis" within the meaning of the regulations only if the employee regularly receives a predetermined amount constituting all or part of the employee's compensation, and such amount is not subject to reduction because of variations in the quality or quantity of the work performed. ■

LIFE INSURANCE POLICY RESCINDED

A business executive was answering questions for an application for a $3 million life insurance policy that named as the beneficiary a company he had started with others. He answered in the negative when asked the common question as to whether he "[e]ngaged in auto, motorcycle or boat racing, parachuting, skin or scuba diving, skydiving, or hang gliding or other hazardous avocation or hobby." In fact, on about 20 occasions, the executive had gone heli skiing, which involves skiing down remote mountain trails after being dropped off by a helicopter.

Only three months after the policy was issued, the executive was killed in an avalanche while heli skiing. The tragedy for his survivors and former business partners was compounded in the courtroom when a federal appeals court upheld the life insurer's rescission of the life insurance policy on the grounds of a misrepresentation on the application.

A reasonable person in the position of the life insurance policy applicant would have known that his heli skiing avocation constituted a hazardous activity, as that term was used in the application. The applicant clearly was aware of the heightened avalanche risks associated with heli skiing, as compared to resort skiing. He had routinely signed waivers to that effect whenever he engaged a company that made arrangements for such excursions. It was hardly necessary for the insurer to point out, in making this argument, that heli skiing commonly involves rescue and survival training and the use of specialized lights and breathing devices meant to increase one's chances of surviving an avalanche.

About three weeks after the executive had completed the insurance application by telephone, an underwriter making calls for the insurer called him with some follow-up questions, including the same inquiry about "any hazardous activities." This time, the executive mentioned in the conversation that he enjoyed skiing and golf, among other things, but still there was no mention of heli skiing. Nor did the executive show any concerns or confusion over what the term "hazardous activities" meant. The beneficiary under the rescinded policy unsuccessfully sought to use this exchange to argue that the life insurer was chargeable with knowledge of the insured's concealment of his heli skiing avocation, and thus was precluded from seeking rescission.

The court ruled that the insured's "skiing" statement, when combined with the negative responses to the general question of whether he engaged in hazardous activities, would not have put a prudent underwriter on notice of the need to investigate further. Otherwise, any report by an applicant of a generally low hazard recreational activity, such as wrestling, juggling, or fishing, would unreasonably require the insurer to investigate the myriad possible "extreme" variants of such activities.

Instead, to make an insurer legally chargeable with knowledge of an undisclosed fact, generally it must be shown that it had knowledge of evidence indicating that the applicant was not truthful in answering a particular application question. In this case, there was no such "red flag" that might have allowed the policy beneficiary to avoid the consequences of the executive's untruthfulness. ■