LEGAL REPORT

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# It's the Real Thing: $192.5 Million

BY JOSHUA M. JAVITS

Coca Cola's record breaking $192.5 million race discrimination class action settlement should sound alarm bells in many corporate boardrooms.

One of the remedies in the Coca-Cola settlement was the establishment of an "ombuds." The Swedish parliament came up with this early watchdog in 1809, then called an "ombudsman." The role of the ombuds was to listen to complaints from the public about governmental actions, inaction or misconduct. The ombuds had authority to investigate and, if appropriate, intervene on behalf of the petitioner.

A corporate ombuds is appointed by a company to receive and investigate complaints as an alternative to the company's formal complaint processes, and to make recommendations that are equitable to the parties. Importantly, an ombuds must preserve confidentiality, unless the complaining employee indicates otherwise.

With increasing frequency, employers worldwide are using ombuds. Why? Because ombuds encourage and facilitate informal, early resolution of conflicts. Further, informing the ombuds, as opposed to informing the employer itself, of alleged wrongful behavior may not constitute *legal notice* to the employer, which would trigger an obligation to conduct a formal investigation. An employer who is notified of an allegation of discrimination or sexual harassment and who fails to conduct an investigation exposes itself to much greater liability, including punitive damages, if a violation is eventually found. Furthermore, such employer fails to take advantage of a valid, affirmative defense even where discrimination is found: that the employer investigated and took prompt remedial action.

It remains to be seen, however, what the extent of the protection is: specifically, (1) whether an "ombuds privilege" exists so that communications with an ombuds can be safeguarded from discovery in litigation; and, (2) whether such communications may be used to establish notice to the employer of discrimination or sexual harassment, which would trigger the company's duty to conduct an investigation.

Courts that have addressed these issues have ruled inconsistently. For example, on the question of whether an "ombuds privilege" is recognized, the Federal District Court for the Eastern District of Missouri granted a corporate ombuds' motion for protection from discovery, holding that an "ombuds privilege" exists under Federal Rule of Evidence 501. *(Kientzy v. McDonnell Douglas Cmp.).* The court stated: "The function of the ... ombudsman's office is [to] receive communications and to remedy workplace problems, in a strictly confidential atmosphere. Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures." The court further opined that "the harm caused by a disruption of the confidential relationship between the ombudsman's office and others in plaintiff's case would be greater than the benefit to plaintiff by disclosure."

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*Joshua M. Javits is a Partner at Ford & Harrison LLP in Washington, D.C. He is an Adjunct Professor at Georgetown Univeristy Law Center, and former Chairman of the National Mediation Board.*

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

DOL Issues Significant New Guidance on Plan Expenses
page 3

Mediation and Arbitration of Employment Law Claims
page 7

The Eight Circuit, however, rejected the holding in *Kientzy*, finding that "the creation of a wholly new evidentiary privilege" was not warranted. *(Carman v. McDonnell Douglas Corp.).* Specifically, the court reasoned that an "ombuds privilege" need not exist because the advantages to be gained from such a privilege would not cease to exist without the privilege. The court explained that the "corporate ombudsmen still have much to offer employees in the way of confidentiality, for they are still able to promise to keep employee communications confidential from management."

Despite this reluctance to recognize an "ombuds privilege," courts have been more inclined to hold that the filing of a confidential complaint does not constitute notice on the part of a company. For example, the Second Circuit affirmed summary judgment in favor a of the defendant employer, even though the plaintiff had established a prima facie case of race and sexual harassment, the employer knew of the harassment and did not act immediately upon that information. *(Torres v. Pisano).* The court reasoned that, because the plaintiff asked that her complaint to her supervisor be treated confidentially, her employer was not liable because it failed to investigate through its regular complaint processes. In fact, the court concluded, an employer is liable only where the recipient of a complaint does not fulfill its obligation to take prompt and effective remedial action. The court's holding supports the proposition that a company may not be held liable for honoring an employee's request for confidentiality.

For maximum legal protection, employers that create ombuds programs should probably ask employees who wish to use the ombuds' services to sign a complaint form which includes language recognizing that communication with the ombuds and even the fact of filing a complaint is confidential and non-discoverable.

There are good reasons to develop and use a confidential ombuds program. Employees and employers can resolve their disputes informally, quickly, cheaply, and effectively, without depending on elaborate mediation or arbitration procedures. Ombuds prevent damage to corporate reputations, which these days appear as frequently as computer viruses: see Bridgestone/Firestone, Ford, Mitsubishi and Texaco.

In each case, stocks plunge, customers flee, media pounces, government investigates, lawyers swoop in and crisis management gurus take charge. The feeding frenzy can stun a vibrant company into years of defensive and dispirited withdrawal.

If there is no corporate vaccine to inoculate against such crises, then the answer may be to build in a buffer between the Company and the crisis in advance. Call it preventative crisis management. An internal corporate watchdog with broad access and authority, such as an ombuds, could be put in position to sniff out systemic problems and identify conditions which may lead to full-blown scandals.

A corporate ombuds is: available to investigate complaints about defective product or service quality, workplace discrimination and other disputes; accessible to all levels of the corporate community from the line employee to the CEO; authorized only to address problems rather than having specific, conferred decision-making powers; confidential in all dealings, unless given permission to do otherwise by the complainant; and independent. One way to guarantee independence is to give ombuds a single non-renewable term office (e.g. 5 years) and to assure that he/she cannot be terminated during that term.

Complainants and whistle blowers often have nowhere to go in a corporate institution to vent their concerns confidentially and to feel confident that their issues will be considered fairly, objectively and at the appropriate corporate level. Workers' concerns made to line supervisors at Bridgestone/Firestone were allegedly unresponded to and plaintiff lawsuits were compartmentalized in the General Counsel's office. These corporate units may have reacted defensively, not remedially and not from the perspective of the corporation as a whole. Coca-Cola, like many large corporations, is a "deep pocket" target for plaintiffs' attorneys. Like most corporations, it chose to litigate rather than to institute insulating, pro-active approaches.

An Ombuds is ultimately responsible for protecting the integrity of the whole corporation as an institution. In effect, however, it protects the public, the employees and the stockholders by identifying problems at the earliest possible time. It is really a corporate "early warning" system. The Ombuds brings problems to the attention of the appropriate decision-makers and addresses them before they explode onto the local or national front pages.

Twenty years ago, the medical community gave short shift to preventative health care, perceiving it as not serious medicine. Not any more. Today, preventative legal measures, such as Ombuds, are similarly denigrated by the legal establishment, but offer a way to avoid the public relations disasters and legal juggernauts faced by companies like Coca Cola and Bridgestone/Firestone.

An ounce of prevention is worth a pound of cure. LR

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Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314
(703) 548-3440 • FAX (703) 836-0367
[TDD (703) 548-6999]
Internet: http://www.shrm.org
Email: shrm@shrm.org