UPDATE ON EMPLOYMENT LAW

February 2012

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LEGISLATIVE AND ADMINISTRATION ACTION

NLRB again postpones poster requirements. The Employee Rights poster which was to originally be required in all workplaces in 2011 has been delayed for the second time. The posting requirement was challenged in court by several business groups, including the U.S. Chamber of Commerce. The NLRB has set a new date of April 30, 2012 for the posting to go into effect.

LITIGATION

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing conclusions. So a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

Labor Relations

Confidentiality policy was too broad. A company confidentiality policy provided discharge for "divulging any company knowledge to any client." The NLRB ruled that the policy was an unfair labor practice because it could be reasonably read to chill employees from engaging in their legally protected rights to openly reveal and discuss a wide variety of concerns about wages, hours or conditions of employment. In re Trinity Protection Services, Inc. (NLRB 2011). Such an overbroad policy would be likely to also violate rights under Title VII and a variety of whistleblower or ethics laws.
**Teacher fired for late night bar brawl with a student.** A high school teacher attended a party at a local tavern. At about 2:00 a.m. she got into an argument with a 16-year-old high school student who was also there drinking. This escalated into a fight. The student required stitches afterward. The school district fired the teacher, and she appealed. She claimed that other teachers had engaged in personal, off-duty altercations and other indiscretions and had not been fired (shoplifting, drunk driving and possession of marijuana). The arbitrator, however, found these situations were not applicable comparisons, as they did not involve students or a work-related context. A teacher should not drink with underage students and should not get into fights with students. The bar brawl was a direct reflection on a teacher’s ability to control the teacher-student relationship or to show the required concern for the welfare of students at all times. *In re Monroe County Board of Education and Alabama Education Association* (2011).

**Fair Labor Standards Act**

**Restaurant banquet sales managers can be exempt administrative employees.** The sales managers of several large restaurant/banquet facilities were ruled to be salaried administrative employees, exempt from overtime pay. They were responsible for sales and organizing large banquets, weddings and other special events which were non-routine. There was a good amount of discretion in dealing with customers to finalize prices, do special orders and create unique events to meet the wishes of the customer. The court ruled that this "creative freedom" satisfied the discretion and independent judgment required for the administrative exemption. *Hines v. State Room, Inc.* (lst Cir., 2011).

**Discrimination**

**Religion**

**Non-Amish worker can pursue discharge case.** In *McIntire v. Keystone RV Co.* (E.D. Penn., 2011), the court found sufficient evidence to validate an ex-employee's religious discrimination case. The plaintiff alleged that he took a job at an Amish-owned company, then a new manager began a practice of replacing non-Amish workers with Amish. The plaintiff was then replaced. The company tried to argue that being "non-Amish" is not a protected category under Title VII; one must be discriminated against because of one's religion--not one's non-religion. The court rejected this argument. Title VII protects a person because of their religion and also protects against discrimination because one does not hold the same beliefs as the employer. Religion should play no role either way in private sector employment decisions.
Age

Stray remarks don't make a case, but employer's failure to follow its own procedures does. A 72-year old county construction inspector, and all other inspectors over age 60, were laid off in a reduction in force. Younger inspectors were retained. The 72-year old sued for age discrimination. The court rejected evidence that a year earlier a County Commissioner had made statements such as older employees just aren't productive like "when they were 22." The Commissioner was not involved in any lay-off decisions, so the statement was ruled to be just non-evidentiary "stray remarks." However, the reasons given for the discharge did not hold water. The younger person who was retained had a "special certification." However, the facts showed that certification had nothing to do with construction inspection; it was irrelevant to the job. The County seemed to disregard its own policies regarding seniority and elements for consideration in layoffs. Welborn v. Shelby County Government (W.D. Tenn., 2011).

$17.7 million to older drivers. A jury found that a soda bottling company engaged in a deliberate plan to rid itself of older truck and forklift drivers by artificially lowering performance evaluations and assigning harder work designed to cause injury or motivate them to resign. Evidence included a "manager claiming he was required to discriminate against older drivers," comments by a senior manager referring to facilities with older worker as "retirement communities" in need of "new blood," and the non-responsive nature of Human Resources to complaints made by the older workers. Seven plaintiffs received the award, including $1 million each for pain and suffering and up to $2 million each in punitive damages. Ward v. Cadbury Schweppes Bottling Group (C.D. Cal., 2011). The awards were under California's anti-discrimination laws and are not subject to the liability caps of the federal ADEA.

Gender, Transgender and Sexual Orientation

Company caught in sexual orientation conflict loses $1 million verdict. Three women filed a discrimination charge against a shipping company alleging that the company only hired gay men for station manager jobs. Then when the gay male manager of one location left, the assistant, also a gay male, was logically made acting manager. He stated his interest in being appointed as the regular station manager. However, the company refused to even accept his application for the opening. He was told he would not be considered because the company was "in a boiling pot of water" due to the three women's complaints. A senior manager told others that the company "needed to clean house" of homosexuals. Under the Maine Human Rights Act, a jury awarded over $1 million in damages plus attorney fees for discriminatory denial of the promotional opportunity. Russel v. Express Jet Airlines, Inc. (Maine S.Ct., 2011). The warning in this case is about overreaction. Do not react to one discrimination case by then discriminating in another direction. Adopt validated, sound practices in general.
**Georgia legislature could not fire transgender state employee.** The 14th Amendment Equal Protection Clause covers discrimination on the basis of sexual orientation and transgender by government employers (unlike Title VII which does not cover these issues). When the editor of a Georgia General Assembly publication began a transition from male to female, the Legislative Council Manager initiated a discharge. The manager stated that the sex change would be "inappropriate" and "disruptive" and some co-workers would have a "moral issue and feel uncomfortable." In the resulting case, the court found clear discrimination based on transgender and gender stereotyping. *Glenn v. Brumby* (11th Cir., 2011).

**Race**

*Stick to one story.* An African American welder gave two different versions for leaving his employment, in two different cases -- personal injury and Title VII discrimination. In the Title VII case, the employee claimed he was constructively discharged, he had to quit due to racial harassment by co-workers and supervisors knew it, and that was the only reason he left. Prior to resigning, the welder had been injured in an off-work car accident. He sued the other driver. In that case, he claimed he had been forced to quit work due to the injury. "I'm in pain all the time." He claimed the only reason he had to quit work was due to the injury and "my supervisors knew this is why I had to quit." It appeared he was telling whatever story was most convenient to get the most damages in either case -- double-dipping. Evidence of the testimony in the personal injury case came to light in the Title VII case. The court dismissed the discrimination case based upon dishonesty. *Brown v. Oil States Skagit Smatco* (5th Cir., 2011).

**Disability**

*Injured vet gets job, but not millions.* An injured Iraq war veteran won a jury verdict of $4.4 million due to discrimination. The defendant was, of all entities, the Department of the Army. The plaintiff lost his right hand, part of a lung and an eye while defusing a roadside bomb. On return from duty, he had a civilian job at the Detroit Arsenal. His supervisor and some co-workers were derogatory of his disability, calling him "cripple," "lefty" and other names. When he objected, the supervisor said, "If you don't like the way you are treated, go find another job." He left, sued for constructive discharge and won. The award included $4.4 million in "front pay." An appeals court modified the verdict. It held that reinstatement to a job -- a higher paying job under different supervisors -- was the proper remedy, and not front pay. At age 38, it was unfeasible that he needed an entire life's worth of pay, as if he would never be able to find another source of income, which is what front pay is suppose to compensate. *McKelvey v. Army* (6th Cir., 2011).
**Cell phone calls to girlfriend defeat case.** A night shift shuttle driver had depression and anxiety disorders. He requested a transfer to day shift to accommodate his disabilities and also his child custody issues. The company stated that it had no day openings at the time. In the same time frame, there was a $527 monthly bill for the employee's company cell phone -- $450 more than anyone else's bill. The calls were personal, to the employee's girlfriend. He was suspended for excessive personal use. Then he generated a $442 bill. The company reviewed the usage over several months and found that out of 3,700 calls, 3,000 were to the girlfriend. He was fired. He sued, alleging he was fired in retaliation for having requested a reasonable accommodation for his disability. The court found ample non-discriminatory reasons for the discharge -- flagrant excessive and continued personal cell phone use. *Furtado v. Standard Packing Corp.* (D. Mass., 2011).

**Hotel kitchen worker loses ADA case; would have won ADAAA case.** The pre-Amendment ADA cases are gradually coming to an end, while cases under the ADA Amendments Act are coming to the fore. This case is an illustration of why the ADA was amended. In *Ramos-Echeverra v. Pichis, Inc.* (1st Cir., 2011), a hotel kitchen worker's epilepsy caused up to 16 seizures a week. However, this rarely interfered with work and never caused a serious performance or a safety issue. Management, however, denied him full time hours. He sued under the ADA. The court dismissed, ruling that even with 16 seizures a week, he was not "disabled," because he could still do work and most life activities. The ADAAA was passed specifically because the courts were making restrictive rulings about the definition of disability. It changed the definition of disability. The employee's history of epilepsy and number of seizures would clearly be a disability now, and the case would proceed.

**Court rules for deceased employee: morbid obesity is a disability.** The EEOC pursued a disability case on behalf of a person fired from a residential care facility because her morbid obesity allegedly interfered with her work. During the course of the case, the plaintiff passed away -- due to complications of obesity. The court allowed the EEOC to continue the case on behalf of the employee's estate, and under the EEOC's authority to address discrimination regardless of the presence of an individual plaintiff. Then the court ruled that morbid obesity, itself, can be a disability. Prior decisions have emphasized that there should be some other medical conditions which contribute to the obesity. Thus, those other conditions are the disabilities, and obesity is an effect. Now, this court found no other physiological impairments need be present; the obesity alone is a disability. *EEOC v. Resources for Human Development, Inc.* (E.D. La., 2011).

**Family And Medical Leave Act**

**Prenatal appointments qualify for FMLA and company should have known better than threaten discharge.** Pregnancy itself is defined as a serious medical condition under the
FMLA. In *Dean v. Wackenhut Corp.* (N.D. Ill., 2011). An employee requested FMLA for prenatal care appointments. She made the request 20 days in advance. The company denied leave, on the basis that the appointment was "merely an initial examination and not medically necessary." Then the company told her that she would be fired for no call-no show if she did go to the appointment. The employee pleaded for the ability to go to the appointments. In response, she was told that she "should not use pregnancy as a crutch . . . pregnancy is not an illness." She sued for interference with FMLA rights. The court granted summary judgment in her favor. The violation was so clear cut that damages could be awarded without need of a trial. The decision called the employer’s actions "misguided and unfounded" and held that by denying leave and "by attempting to scare her into not taking the time off by threatening disciplinary action -- indeed, discharge," Wackenhut deprived her of her rights under the FMLA as a matter of law.

*University denies intermittent leave for adoption.* FMLA covers leave for birth, adoption or placement of a foster child. A university employee requested intermittent leave to care for a newly adopted child. The university denied the leave. She sued for interference with FMLA rights. The court granted summary judgment, dismissing the case. FMLA leave for serious medical conditions of employees or family members can be taken in short, intermittent periods. The new child leave provision is different. It allows the employer the discretion to grant intermittent leave or deny it and force the leave to be taken all at one time. The employee had not made any claim about a serious health condition, so the University could validly deny intermittent leave. *DeLuca v. Trustees of the University of Pennsylvania* (E.D. Penn., 2011).