UPDATE ON EMPLOYMENT LAW

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LEGISLATIVE AND ADMINISTRATION ACTION

Wisconsin revises discrimination law -- back to 2008. The Wisconsin Legislature has passed a revision of the Wisconsin Fair Employment Act, eliminating recent changes and restoring the law to its 2008 status. The revision eliminates punitive and compensatory damages, as well as the double trial process which dramatically escalated the costs and the timeframes of WFEA cases. The changes may be beneficial to plaintiffs with smaller cases, restoring the WFEA to a more user-friendly, less formal process with quicker remedy for smaller cases. The revised law still awards significant damages of back pay, front pay, job restoration and attorney fees. Federal court is still there for larger cases, in which the extra compensatory damages, etc. are desired.

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).

Theme of the Month: You May Be Right, But You Can't Do It That Way

There are situations in which an employee is legally and morally right, but the way the person handles the issue overcomes that valid foundation. Uncivil or violent reactions turn their right into a wrong and can result in discharge. Our legal system and internal
complaint processes are designed to provide a civil way to address wrongs done to employees and to allow these complaints to be made in an appropriate manner. Some may complain about the level of litigation in our country, but much of our civil law and grievance systems grew out of the effort to ban people from settling disputes by dueling with pistols and to mandate a "civil" process and expect them to "civilly" abide by that process.

You may be right, but you can't say it like that. A technician complained that a less senior employee had received a special assignment he should have had, in violation of the collective bargaining agreement. In the grievance meeting, the employee called the supervisor a liar and repeatedly interrupted with a series of gross profanities. The technician received a disciplinary suspension for this behavior and grieved it to arbitration. The arbitrator determined that the company had violated the seniority provision; however, the technician's offensive conduct was not warranted and was inexcusable. The disciplinary suspension was held to be justified. Ohio Power Company and Utility Workers Union of American (2011).

Racial names do not justify slapping customer. A White customer suspected of shoplifting was escorted to a security area for questioning. The customer's White friend then barged into the area, cursing at the store employees, one of whom was African American. She used the N-word toward the African American store employee, who reacted by slapping the verbally abusive customer in the face. The police were called and both customers were arrested. The store then fired the employee for having slapped the customer, in violation of its no violence policy and no physical contact with customers policy. The fired employee filed a Title VII race discrimination case, alleging that KMart was promoting a racially hostile environment and "ratifying hate speech" by firing the victim of harassment. The court ruled against the employee. The customer's behavior was clearly harassing and improper. However, the store took prompt action to have the police remove the offender. The company had policies on how to deal with customers for these situations and how to raise complaints without escalating a situation. Slapping a customer was against policy and not warranted by a verbal situation. The employee's escalation to the physical level was unwarranted and justified discharge. Lee v. Kmart Corp. (D. Minn., 2012).

Constitutional Speech

Proselvizing judge loses case. A Michigan State Court administrator filed a complaint about the Chief District Judge's use of the courtroom to proselytize. She alleged that he used his judicial position and authority to promote his particular religious beliefs, in violation of the Constitution. The judge then fired the administrator. She sued. The federal court jury awarded $734,000 in economic, compensatory and punitive damages. The Appellate Court confirmed the verdict, plus attorney fees. It found the
administrator's complaint was clearly Constitutionally protected; it addressed a matter of serious public concern. The Chief District Judge's actions were clearly retaliatory against a citizen's right to freely speak out against a government official's alleged violations of the Constitution. *Pucci v. Somers* (E.D. Mich., 2012).

**Restrictive Covenants**

**Family ties create liability.** An owner sold his business and all trade secrets, including a highly confidential special manufacturing process, to another company. He then stayed on as a key employee for several years. He signed noncompetition and confidentiality agreements. He then left employment. Within a few months, his son started a business (with dad guaranteeing the loans) in direct competition with the former company, using the highly confidential secret manufacturing process. In the resulting litigation, the ex-employee claimed that he had not violated any agreement; he was not the person who started the new company and was not employed by that company. The court saw this as an invalid cover. The father-son connection was too close to constitute anything but a breach of the agreements and a violation of trade secret laws. The court granted an injunction and awarded damages against the son, father and new company. *Centrifugal Aquasition Corp. v. Moon* (E.D. Wis., 2012).

**Discrimination**

**Disability**

**Essential function can depend on number of other employees to bear the burden.** A nurse suffered a stroke. She rehabilitated enough to return to work, but not full time. She could work limited hours with no on-call duties. This meant the other nurses had to put in extra duty hours and pull more frequent on-call nights, weekends and holidays. The nurse could not provide a return to full time estimate and was ultimately terminated for inability to meet the essential scheduling requirements. She filed an ADA case and lost. There was no duty to convert a full time job to part time. The court ruled that "A job function may be considered essential by virtue of the limited number of employees available to perform the work." The ADA does not require accommodation by shifting essential functions and extra burden onto others. *Azzam v. Baptist Healthcare Affiliates, Inc.* (W.D. KY, 2012).

**Jurisdiction**

**TSA immune from most employment suits.** A diabetic Transportation Security Administration employee had a foot infection, took leave, and returned with a fitness for all duties doctor's certification. His TSA supervisor refused to let him return because he "was too much of a liability." He then, with EEOC support, sued under the
Rehabilitation Act. The court dismissed the case. It ruled that the legislation creating TSA exempted the agency from liability under the Rehabilitation Act, FLSA, ADEA and several other employment laws. The court made a broad interpretation of the general clause in the Act giving TSA the power to set and enforce its employment standards "notwithstanding any other provision of law." National security overrides all other interests. *Field v. Napolitano* (1st Cir., 2011).

**National Origin/Race**

**Hostile supervisor loses discharge case.** A Cuban-born manager filed national origin and race discrimination cases under Title VII and 42 U.S. Code §1981 after he was discharged. The evidence showed that the manager's employees filed complaints about his supervisory behaviors. The evidence was that he yelled and swore at employees, used a "brutal and belittling manner," demeaned them as they were dealing with customers, and generally "created a fearful environment." When Human Resources met with him about these concerns, the manager refused to acknowledge any of the issues and expressed that he would not change his management style. He was fired as a result. The court found valid reason for the discharge and no evidence of any similarly situated non-Hispanic manager. The only other managers who were cautioned about rough supervisory behaviors had immediately recognized issues, expressed a sincere interest in change and corrected the behaviors, instead of digging in their heels and refusing to acknowledge the concerns. The manager's case was dismissed. *Martinez v. W.W. Granger, Inc.* (8th Cir., 2012).

**Race/Gender**

**The other person "interviewed better" defense fails when the supervisors did not keep the interview notes.** An African American man filed a Title VII case after a less qualified White woman was selected for promotion to a hygiene safety manager position. The court found evidence of discrimination. The plaintiff had a Bachelor's degree in industrial hygiene and a Master's in public health. The woman had no degree beyond high school. He had 15 years of direct work experience in the industrial hygiene field, including developing complex safety programs. She had less experience. The employer's defense was that the White woman "interviewed better." However, there were no scores for the interviews. The interviewing manager kept no notes on some interviews or had notes in which pages were missing for others. The court found that the person selected had "observably and vastly inferior qualifications" than did the plaintiff. The employer's defense was highly subjective and the absence of documentation could lead to a reasonable conclusion that the employer's explanation was pretext for discrimination. *Hamilton v. Geithrer* (D.C. Cir., 2012).
Gender

**Downsizing Walmart.** Last year, the Supreme Court voided the nationwide sex discrimination class action against Walmart as being far too large and disjointed. Now the case seems to be reviving in smaller segments, one state at a time. In late 2011, a class action was filed for all female Walmart employees in California. Now, *Odle v. Walmart Stores, Inc.* (N.D. Tex) has been filed alleging discrimination on behalf of female employees in Texas.

**Fair Labor Standards Act**

*Electronic discovery: When just one person files, records for all must be preserved.* A few former accountants filed a complaint alleging that they were misclassified as salaried-exempt and should have been hourly and paid overtime. The company was asked to then preserve the computer hard drives of all accountants, nationwide. It objected, claiming this was too broad, only a few individuals had filed, and it was unreasonable to freeze all hard drives or to anticipate which of the much larger number of past or present accountants might later file a claim. It argued that only the records of those who actually had filed should be preserved. The court denied the company's motion. It ruled the employer's argument to be "nonsense" and without any merit. In FLSA cases, it is the norm for other employees to join in cases. It is also the norm for the Department of Labor to find a violation on just one person's complaint and then order a remedy of overtime pay for all other employees in the same job classification, and this is entirely "foreseeable." In the electronic age, computer log on and log off are the effective time clocks and the computer hard drive also shows the types of work done. Both of these are crucial evidence in FLSA cases. Allowing destruction of hard drives would obliterate evidence which would be used in clearly foreseeable additional cases or claims. *Pippins v. KPMG, LLC* (E.D. NY, 2012). This case underscores the obligation under federal and state discovery rules to freeze the electronic system and preserve all potential evidence upon notice of litigation or of "potential" or "foreseeable" litigation and "foreseeable" plaintiffs. A records retention policy and procedure is crucial for all organizations.

**Family And Medical Leave Act**

*Double damages for failure to give proper notice of change in FMLA policy.* A company had an FMLA policy, providing 12 weeks per calendar year. So each January 1st there was a fresh 12 weeks available. It then changed to a "rolling" method, giving 12 weeks leave in a 12-month period measured back from the current usage. It did not send notice to employees about this change. In April, a 36-year employee requested and was granted FMLA. He had taken FMLA the prior calendar year as well. The company terminated the employment a month prior to his expected return because it now counted
the prior year's FMLA (pre-January 1st) as part of the use in the past rolling 12 months. The effect was not only loss of a job, but it also cut him off from retirement benefits he would have had in just two more years. In the FMLA suit, the court found bad faith on the part of the employer. It could not hold employees to a new policy which had not been communicated to them. (The FMLA generally requires a 60-day written notice of policy changes before they become effective.) The company's actions were like springing a trap door without warning. The bad faith interference with FMLA rights warranted double damages, an adjustment of the discharge date by two years to create eligibility for retirement benefits, and attorney fees, for a total of over $400,000. Thom v. American Standard, Inc. (6th Cir., 2012).