UPDATE ON EMPLOYMENT LAW

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by

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LEGISLATIVE AND ADMINISTRATIVE ACTION

Labor poster on hold again. Just after one court cleared the NLRB Labor Rights poster for April 30th mandatory posting, another has issued an injuction – keeping it off the wall again. Organizations opposing the requirement do not believe employers should be forced to post information about workers’ rights to organize or join labor unions. The publicity generated by all the litigation is probably educating workers more about the issue than if employers had just quietly put the notice among all the other required bulletin board posters that few people actually read.

EEOC issues age discrimination guidance. To conform with recent Supreme Court decisions, the EEOC has revised its ADEA guidance on interpreting the “reasonable factor other than age” (RFOA) defense to discrimination complaints. It is now the employee’s burden to overcome the RFOA defense. However, the EEOC will still examine the employer’s RFOA claim to see if:
1. The factors claimed were designed for a reasonable business purpose;
2. The factors were applied fairly;
3. Supervisors were allowed too much “subjectivity” in decision making so as to incorporate personal biases;
4. The employer attempted to assess whether a business practice had an adverse impact on older workers and attempted to reduce that harm in any way.

White House issues order to ease burden on employers. The President’s Office of Management and Budget has issued a memo to all federal agencies to examine administrative rules to assure they are not unduly burdensome for employers. The order
directs agencies to evaluate the cumulative effects of new and existing rules, and coordinate with other agencies to curb redundancy, assure less cost, and to foster, rather than hamper economic growth. The order specifically directs a focus on simplifying rules and costs for small businesses.

**EEOC updates advice on veterans with disabilities.** The EEOC has revised its guidance regarding how the ADA and the Uniformed Services Employment and Re-employment Rights Act (USERRA) combine to protect disabled veterans. The revisions offer advice to disabled vets and to employers about the provisions of both ADA and USERRA.

**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).

**Constitution**

**State employees are not eligible for the self care part of FMLA.** The U.S. Supreme Court has validated lower court decisions finding the 11th Amendment makes state agencies immune from the self care part of the FMLA. So, state agencies can deny FMLA for an employee’s serious medical conditions. The family leave, new child care and military care provisions are still enforceable against state agencies, since they fall under the 14th Amendment’s Equal Protection clause. “State” agencies include state universities and units of state government. Counties, municipalities and other “local” governments are not affected by this decision; the full provisions of the FMLA apply to them. State legislatures may also vote to waive this 11th Amendment immunity and grant self care FMLA rights to state employees. Justices Thomas and Scalia filed concurring opinions with a further argument that no state employees should be entitled to any sort of FMLA, including family or military care leave; the 11th Amendment immunity should totally exclude FMLA for state employees. Justices Ginsburg, Breyer, Sotomayor and Kagen filed a minority decent favoring full FMLA coverage for state employees. *Coleman v. Maryland* (S. Ct., 2012).

**Federal court finds U.S. Defense of Marriage Act unconstitutional.** In *Golinski v. U.S. Office of Personnel Management* (N.D. Cal., 2012), the court issued an injunction against enforcement of DOMA and ordered that health insurance coverage be issued to the legal spouse of a lesbian federal employee. Congress passed DOMA to prohibit the
federal government from recognizing legal but non-heterosexual marriages. The District Court followed the U.S. Supreme Court rulings that sexual orientation and sexual identity are immutable characteristics under the Constitution, and any law impacting these characteristics requires “strict scrutiny” and a “compelling” justification. The government’s stated reason for the law, “to encourage responsible procreation and child rearing,” did not hold up to that strict scrutiny. The court found no rational basis for the argument. Gay people can have children and be parents. DOMA does not prescribe who can become a parent. Heterosexuals can also have “irresponsible” procreation and child rearing. DOMA does not forbid single heterosexuals from being parents and does not declare that only married heterosexuals are allowed to be parents and raise children. So, the government’s rationalization seemed to completely miss the parenting issue and focus only on denying many non-parenting related benefits (health insurance) and rights to a particular group of people. This violated the 14th Amendment Constitutional Equal Protection.

**Employees’ Social Media Use**

*Employee’s private social media threatening comments cascade into the work environment*. An off-duty flight attendant used his personal blog to post angry insults and threats of physical harm toward people in the airlines scheduling department. The airlines handbook warned that personal social media use, tied to the workplace, would not be considered private. An arbitrator ruled that discipline and discharge were warranted in this situation; “privacy cannot be a defense for threatening fellow employees”. The off-duty postings became part of the work environment when sent to other employees and the public. *Airtran Airways, Inc. v. Council 57, Assoc. of Flight Attendants* (2012).

**Discrimination**

**Sex**

*Female deputy who allowed escape has sex discrimination case*. A female sheriff’s deputy and a male jail guard were loading inmates for transport. She left the van door open, key in the ignition and motor running; then went inside while the male guard escorted the inmates out to put them in the vehicle. He had decided to bring out more inmates at a time than regulations allowed. He continued the loading process, despite knowing the deputy had gone inside, and that he was working alone with more than the allowed number of inmates. One inmate jumped into the van and drove off, making a successful escape. The female deputy was fired. No action at all was taken against the male guard, in spite of the fact that he contributed to the escape. In the deputy’s sex discrimination case, the court found the disparity between her discharge and the total lack of action against the male guard to be substantial evidence of discrimination. *Wainwright*
$168 million verdict – Catholic hospital guilty of sexual harassment and ongoing retaliation. In Chopourian v. Catholic Healthcare West (E.D. Cal, 2012), a jury found that a female physician’s assistant in the cardiac operation unit was subjected to ongoing harassment by the surgeons and other male staff. The jury found that she had to endure ongoing vulgarity, obscenities, male surgeons’ overt discussions of their sex lives, sexual come-ons and touching of private body parts. She submitted complaints about “abuse of women” including herself. One week later she was fired for “not being a team player.” Then the hospital proceeded to prevent her from obtaining further employment. When she finally got a job with an OBGYN practice, which used the hospital, the hospital refused to grant her privileges to enter, resulting in her losing that job. The jury found sexual harassment and an ongoing practice of overt retaliation. It awarded $168 million in compensatory and punitive damages.

Restaurant allows deputy sheriff to harass waitresses – pays $200,000. A restaurant will pay $200,000 to several waitresses to settle a claim that it allowed a local deputy sheriff to sexually harass its female wait staff over a prolonged period. EEOC v. 441 S.B. LLC, d/b/a Hurricane Grill & Wings (S.D. Fla., 2012). It may be difficult for a business to take a stand when caught between an abusive police officer with potential power to harm the business, and the obligation to protect its employees. Ultimately, not protecting the employees is more damaging -- in money, publicity and its reputation for integrity.

Race

White school administrator shows discrimination and constructive discharge. A Court of Appeals upheld a jury verdict against a school district and four individually-named school board members. After elections resulted in a majority African American school board, that board quickly demoted and reassigned the district’s only two White administrators. The plaintiff had been a finance administrator. She was reassigned to the job of food services worker. The board followed none of the standard procedures and failed to consult with the superintendent or legal counsel before ordering the demotion. In its appeal, the board did not contest the jury’s verdict of race discrimination. Instead, it challenged the finding of constructive discharge and awarding of back pay; it had not fired the administrator, only demoted her. The court found that the demotion from administrator to food service worker was such a great disparity that it appeared intended to cause humiliation and to make the employee quit, and a reasonable person would be justified in doing so. Sanders v. Lee County School Dist. (8th Cir., 2012).

White police officer has no case. A White State Police Master Sergeant received a 30 day suspension and demotion for sending offensive sexual and racial cartoons to 16 friends using the department’s email. Some of the friends then sent them on to numerous
others. The now ex-sergeant sued for racial discrimination under Title VII and 42 U.S. Code 1983, claiming that he would have received less discipline if he was African American. The court dismissed the case. The plaintiff could produce no evidence of any non-White officer who engaged in any comparable violation of computer policies. His claims were pure speculation, and a case cannot be based on conjecture and speculation. *Hanners v. Trent* (7th Cir., 2012).

**African American officer fired for lying about concealing runaway, not due to race.** An African American police officer put a 15-year-old runaway girl in a motel without informing anyone of her whereabouts. When she was discovered, the officer then denied his involvement. He was fired for his actions and for lying. He also pled guilty to charges of endangering the welfare of a child and obstructing an investigation. He then sued under Title VII, 42 U.S. Code Section 1981, 1983, and the New York Human Rights Law, claiming that he was treated more severely than similarly-situated White officers. The court found no evidence of discrimination. The plaintiff produced no evidence of any White officer who had ever engaged in such a serious infraction, lied during the investigation and was convicted for these acts. The department also followed proper procedures in its investigation and discipline. The Court of Appeals upheld the lower Court's summary judgment against the officer. *Brown v. Syracuse* (2nd Cir., 2012).

**Religion**

*Employer offered several reasonable accommodations.* A mall kiosk cell phone salesman converted to Seventh Day Adventism. He requested all Saturdays off so he could observe the Sabbath. Saturdays, however, were the single biggest sales day at the mall, and all sales employees were required to work most Saturdays. The company offered him the opportunity to trade shifts with others and even a special flexibility from the standard attendance/discipline policy. The company offered him one, and then another, alternate position which did not have required Saturday work; but also paid $5,000 to $10,000 less per year. The employee declined all of these offers. The employee eventually took a lower paying job at another company when he exceeded the flexibility allowance on Saturday work and was on the verge of being fired. He sued under Title VII. The court found that the employer had a legitimate essential functions requirement for Saturday work for the mall sales job. It found that the employer had made three reasonable accommodation offers, and therefore, met its obligations under the law. *Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc.* (1st Cir., 2012).

**Disability**

*Absence policy violates ADA rule on medical inquiry.* An absence policy required both a doctor’s excuse and identification of the medical condition. Failure to name the condition resulted in unexcused absence and discipline. The court found this to be an
improper medical inquiry. The policy was not limited to incidents where the information was specifically job related and “consistent with business necessity” (i.e., safety, fitness for duty, work restrictions). Instead, it was a blanket inquiry into all medical conditions of all employees, whether or not there was any impact on performance or the job duties, outside of mere absence. *EEOC v. Dillard’s, Inc.* (S.D. Cal., 2012).

**Supervisor could not effectively work from home.** A manager was repeatedly absent due to a back condition. She was allowed to do work from home for a limited time, but the employer denied her request to have a long term work from home arrangement. She sued under the Rehabilitation Act and the state disability law for failure to accommodate. The court ruled for the employer, finding that personal interaction and observation of staff was an essential function of this supervisory position. In fact, after the limited work from home period, the manager’s own emails expressed frustration about the inefficiency of staff during that time -- “Very little happened until I was physically back in the office.” *Hanion v. Missouri Dept of Health & Human Services* (W.D. Mo., 2012).

**National Labor Relations Act -- Drug Testing**

**Failure to Produce is not a “refusal.”** A bus driver was fired for refusal to cooperate in a drug test. He did not produce sufficient liquid for a test to be performed. The discharge was reversed in arbitration. There was no evidence the driver was uncooperative or did not try to comply. The arbitrator found it “ridiculous” that the test nurse demanded he produce a sample only 15 minutes after his first sample was too small. Then the nurse threw the second sample away as inadequate also. Finally, the tester and employer failed to consider whether the driver’s diabetes had an effect on his inability to produce. Categorizing “inadequacy” as an “intentional refusal” was unreasonable under the circumstances. *Greater Dayton Transit Authority and Amalgamated Transit Authority* (2012).