

Hot off the Press!

Employment Law News You Can Use

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by

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I. "Whistle-blower" and Retaliation Issues

A. U. S. Supreme Court

1. *Gomez-Perez v. Potter* – ADEA prohibits retaliation against federal employees
2. *CBOCS West, Inc. v. Humphries* – § 1981 prohibits retaliation in race bias cases, even though the statute does not contain an explicit anti-retaliation provision.

B. Eighth Circuit Court of Appeals

1. *Skare v. Extendicare Health Care Services, Inc.* – where employee's job requires employee to address compliance issues, employee cannot become a whistle-blower by performing her duties.

C. Minnesota Court of Appeals

1. *Kratzer v. Welch Companies* – whistle-blower claims allowed to proceed where the employee made reports when making such reports were not a part of the employee's job description.

D. Other Courts

1. *Thompson v. North American Stainless* (6th Cir. Ct. App)
 - a. retaliation issue – Employees were not directly involved in protected activity but were closely related to or associated with those who were directly involved. HELD – retaliation against more peripheral employees would undermine the purposes of Title VII, so they were allowed to proceed with retaliation claims.

E. Statutes

1. 144.412 (Freedom to Breathe Act of 2007) contains an anti-retaliation provision
2. Amendments to Minnesota's "whistle blower" statute
 - a. 181.932 - New subsection "e" prohibits retaliation against *public* employees who communicate scientific/technical

findings to the government or law enforcement

- b. 181.935 - New subsection "c" expands the remedies the court can award if 181.932 is violated (court can now order reinstatement, back-pay, compensatory damages, expungement of adverse personnel records, etc.)

F. Lessons to be Learned

- 1. Know what employees' activities are protected**
- 2. Develop thick skin! Consider their complaints/concerns to be "constructive criticism"**
- 3. Before taking adverse action, make sure it is not being done in retaliation for their protected complaints**
- 4. Train/educate staff on the importance of not retaliating**
- 5. Develop policies that clearly state that retaliation is prohibited**
- 6. Make sure to have a LEGITIMATE BUSINESS REASON for your HR decisions.**

II. Importance of Having a Legitimate Business Reason for HR Decisions

- A. *Soto v. Core-Mark International* (8th Cir. Ct. App.) – when analyzing an employer's legitimate business reason for an adverse action under Title VII and the MHRA, the question is not whether the conduct actually happened but whether the employer believed it to have occurred.
- B. *Muafong v. Minnesota Masonic Home* and *Suneson v. Northern Tool* - employers won race/retaliation and age discrimination cases because they were able to articulate a legitimate business reasons for their decisions.
 1. Important note - when LBR is the issue, the question is not whether the LBR is correct (for example, did the employee really commit the offense that lead to the discipline/discharge?), but whether the reason is legitimate.
- C. *The Register Guard* (NLRB) – employers may establish policies that prohibit or restrict the use of employer's e-mail for non-work purposes, including union-related activities.

1. need to have legitimate, non-discriminatory reasons for the restrictions, and they must be narrowly tailored to fit those restrictions.

D. Lessons to be Learned

1. **Communicate concerns to employees when they arise**
2. **Document HR issues/concerns/corrective actions**
3. **When need for adverse action arises, review employee's records and history and make sure the action is based on the LBR.**

III. Federal Highlights

A. EEOC

1. 9% increase in job bias charges in 2007
 - a. Retaliation charges up 18%
 - b. Age - up 15%
 - c. Disability - up 14%
 - d. Religion - up 13%
 - e. National Origin - up 12%
 - f. Race - up 12%
 - g. Sex/gender - up 7%
 - h. Sexual harassment - up 4% (first increase since 2000); 16% of charges were by men.
2. Current focus – systemic initiative (i.e., less focus on one to one discrimination, and more of a global approach).
 - a. Examples of target areas
 - (1) Employment testing that results in disparate impact on protected classes

- (2) Use of arrest / conviction records
 - b. EEO-1 forms now allow investigators to view charges in larger context of the employer's history
 - c. Agency viewing itself as a national "law firm" to take on these issues
3. Religious discrimination is a problem area
- a. Important that employers reasonably accommodate employees' religious accommodation requests
 - (1) garb/grooming/dress code issues
 - (2) work-time prayers
 - (3) scheduling/Sabbath

4. Lessons to be Learned

- a. Understand what are the protected classes**
- b. Understand the importance of anti-retaliation policies**
- c. Embrace the concept of reasonable accommodation**

B. Statutes

1. FLSA
- a. Some experts see no end in sight to the wave of litigation over FLSA violations
 - (1) "red hot" area of litigation is over statutory exemptions and independent contractor status, especially for
 - (a) insurance agents
 - (b) assistant managers
 - (c) accountants

b. Lessons to be Learned

- (1) Regularly review your job classifications to make sure your employees are properly classified as exempt**
- (2) Understand what it truly means to be an independent contractor**
- (3) Implement training programs to make sure managers and employees know roles and obligations.**

2. FMLA

a. National Defense Authorization Act

- (1) Expands FMLA leave to require leave for military-related reasons
 - (a) Eligible family members of military members may take up to 26 weeks of leave to care for a wounded member of the Armed Forces;
 - (b) Eligible employees may take up to 12 weeks of leave for and “qualifying exigency” if the spouse, child or parent of the eligible employee is on active duty (or has been notified of impending call to active duty) in the Armed Forces

(2) Lessons to be Learned - if you are subject to the FMLA, learn this new requirement, and have your FMLA policy reviewed to make sure it complies with these new requirements.

b. New DOL regulations in the works but not yet final, but if implemented, would address

- (1) when employees must call in to request leave
- (2) clarification of medical certification process
- (3) allow annual re-certification of serious health

condition

- (4) would leave a relatively narrow definition of "serious health condition" intact

3. Genetic Information Non-Discrimination Act (GINA)

a. Signed into law, but not in effect until sometime in 2009.

b. Provisions

(1) no discrimination based on genetic information (medical information about a non-manifested condition; family medical history)

(2) employers cannot acquire genetic information

(3) confidentiality / privacy protections.

c. *Lessons to be Learned – become familiar with this new law and what it means.*

4. ADA Restoration Act (ADARA)

a. Not yet signed into law

b. Would broaden definition of disability to address the fallout from the *Sutton* case a few years ago (*Sutton* held that whether someone is disabled under ADA must be viewed with reference to accommodations that are provided)

5. Employment Non-Discrimination Act (ENDA)

a. Not yet signed into law

b. Would make sexual orientation a protected class under federal law

C. Other Cases

1. US Supreme Court

a. *Sprint/United Management v. Mendelsohn* – "me too"

evidence may be admissible in discrimination cases.

(1) even if a plaintiff/employee's co-worker is not similarly situated to the employee, discrimination against the co-worker may be admissible to prove discrimination against the plaintiff/employee

(2) Lessons to be Learned – if you do not address discrimination against an employee, another employee may be able to use evidence of that discrimination in his/her own case against you.

b. *Federal Express v. Holowecki* – EEOC intake questionnaire may suffice as “charge” to commence action under ADEA

(1) Requirements

(a) meets the basic requirements of a charge

(b) can be reasonably interpreted as request for the EEOC to do something.

(2) Likely will be applied to related laws such as ADA, Title VII, etc.

c. *AARP v. EEOC* – by denying review of a lower court decision, the Court left intact an EEOC rule that allows employers to sponsor health benefit plans that reduce or eliminate benefits once an employee becomes Medicare-eligible.

d. *Preston v Ferrer* – Federal Arbitration Act trumps state laws that require claims to be submitted to administrative forum.

2. Eighth Circuit Cases

a. *Rask v. Fresenius Medical Care of North America* – under ADA, allowing employee to take sudden, unscheduled absences is not a reasonable accommodation.

b. *Sturgill v. UPS* – employer failed to reasonably accommodate employee' request for reasonable

religious accommodation (scheduling issue in light of Seventh Day Adventist prohibition of work between sundown Friday and sundown Saturday)

c. *Ollis v. Hearthstone Homes* - employee prevailed in a Title VII religious discrimination case but was awarded a very small amount of money; attorneys fees awarded regardless of their ultimate proportion to the employee's damages.

d. Lessons to be Learned

(1) Again, understand and apply the concept of reasonable accommodation.

(2) Realize that even low-damage claims can be expensive!

3. U.S. District Court for the District of Minnesota

a. *Peterson v. Seagate* – releases were voided by the court because they did not comply with the OWBPA

(1) Lesson to be Learned – if you want a release from an employee (e.g., as a part of a severance package or when trying to dispose of a disputed claim), know that such agreements must comply with various state and federal laws; otherwise, they're no good.

IV. State Highlights

A. Minnesota Supreme Court

1. *Lee v. Fresenius Medical Care, Inc.* – affirms that employers may establish policies regarding how accrued but unused vacation/PTO time can be handled upon separation from employment.

a. Lessons to be Learned

(1) Make sure employees acknowledge vacation and PTO policies (without jeopardizing at-will status)

(2) Policies must be clear

(3) To limit exposure if it's to be paid upon separation

(a) provide benefit on accrual basis/not lump sum

(b) limit carry-over

B. Court of Appeals

1. Non-compete cases

a. *Sealock v. Peterson* – covenant enforced against employee who advertised in restricted area

b. *Tenant Construction v Mason* – \$500 and continued employment was sufficient consideration to support a covenant

c. *Witzke v. Mesabi Rehabilitation Services* – combination of years of continued employment, including training, financial support and customer responsibility was adequate consideration to support a covenant.

d. Lessons to be Learned – CNC's have, perhaps, become more useful.

2. MHRA

a. *Leitner v. Gartner Studios* – in disability cases under MHRA, a physical impairment alone is not a disability - there needs to be evidence that the impairment materially limits a major life activity.

b. Lessons to be Learned – if employee claims a disability (and, for example, needs an accommodation), the condition needs to be analyzed closely to determine if it even qualifies as a disability under the MHRA.

C. Gov. Pawlenty's Executive Order 08-01 (E-Verify)

1. Employers who have contracts with State of MN for over \$50,000.00 must use E-Verify system to make sure new hires are

eligible to work in the U.S.

- a. Registration & agreement with Department of Homeland Security is required.

2. Lesson to be Learned

- a. **Are you a qualifying state contractor?**
- b. **If so, you need to comply.**

D. Statutes

1. 181.9631 (amends Minnesota's Personnel Records Statute)

- a. As of 1/1/08, employers must provide **written notice** to new hires of their rights under the statute to review their personnel records, etc.

b. Lesson to be Learned

- (1) Develop a standard letter or form that will suffice as the proper notice, and start using it now.**
- (2) Consider addressing this in your employee handbook.**

2. 325E.59 – SSN Shield Law

- a. Goes into effect 7/1/08
- b. Imposes numerous prohibitions about what private employers cannot do with an individual's SSN

3. 144.412 - Freedom to Breathe Act of 2007

- a. Prohibits smoking in many places, including places of employment
 - (1) Posting requirements
 - (2) Must ask smokers to refrain when/where prohibited
 - (3) Prohibits placement of ashtrays

(4) **Anti-retaliation provisions**

4. 325E.60 - Restroom Access Act
 - a. Requires retail establishments that have restroom facilities for employees to allow customers to use them if they are reasonably safe and if
 - (1) customer has eligible medical condition (Chron's, IBS, e.g.)
 - (2) 3 or more employees are working at the time
 - (3) restroom not normally made available to the public
 - (4) not obvious safety or security risk
 - (5) no immediately accessible public restroom available
5. 181.723 - Independent Contractors
 - a. Defines independent contractors in context of residential and commercial construction services
 - b. Requires such workers to get certification from the state
 - c. Repeals 176.042 effective 1/1/09.
6. 323A.29, subd. 4 – raises punitive damages cap in MHRA cases from \$8,500.00 to \$25,000.00.
 - a. ***Lesson to be Learned – the stakes keep getting higher.***
7. 123B.03 - requires school districts to request background checks on more applicants, specifically, coaches (broadly defined to include coaches in athletics, arts, etc., whether paid or volunteer)

This outline is for informational purposes only and is not to be considered legal advice. For answers to your specific legal concerns, please consult with your attorney.