

PACAH 60th Annual Convention
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Labor and Employment Law Legal Update

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Case Law Update



Retaliation Claim Filings with the EEOC

- For first time, in 2010 retaliation claims most commonly filed claims with EEOC
- Retaliation charges represent 36.3% of 36,258 charges filed in 2010
- In 2010, race claims represented 35.9%
- Likely related to relaxed standard for retaliation claims announced by United States Supreme Court



Recent Retaliation Cases

- *Burlington Northern v. White*, 548 U.S. 53 (2006):
 - Supreme Court announced any action by employer which could be seen as deterring employee from raising or asserting discrimination claim may support retaliation claim



Recent Retaliation Cases (cont'd)

- *Thompson v. North Amer. Stainless, LP* (2011):
 - Former engineer brought suit when fired three weeks after company received notice of fiancé's discrimination charge
 - Termination of one's fiancé could dissuade worker from raising discrimination claim



Sexual Orientation Discrimination:


Prowel v. Wise Business Forms, Inc. (3rd Circuit)

- Machine operator from 1997 until termination in December 2004 (told being laid off for lack of work)
- Sued, claiming harassed and retaliated against because of his gender – did not fit male sexual stereotype (effeminate)
- Claimed some co-workers reacted negatively to his demeanor/appearance (called “Princess,” “Rosebud” and “fag”)




Sexual Orientation Discrimination:
Prowel v. Wise Business Forms, Inc. (3rd Circuit)
(cont'd)

- “Outed” in 1997 and harassment started (items left on his machine; messages on bathroom walls)
- Title VII does not protect against sexual orientation discrimination in workplace BUT does prohibit discrimination because of sex; hard to distinguish whether victim because of sexual orientation or because failed to conform to sexual stereotypes
- Court sent back to jury to decide




ADA / Drug Treatment
Penalty for Applicant Rejection

- Hussey offered production laborer position to applicant conditioned on passing physical examination
- During examination, physician learned applicant receiving methadone (part of chemical dependency treatment program)
- Company rescinded job offer, concluding applicant safety risk due to methadone treatments



ADA / Drug Treatment
Penalty for Applicant Rejection (cont'd)

- EEOC contended applicant qualified for position and not experiencing adverse side effects
- Treatment program reportedly provided company’s doctor information verifying successful and compliant participation in program
- Company agreed to settle after three-day nonjury trial in federal court (\$85,000 and agreed to hire applicant as mason utility laborer)



Righi v. SMC Corp. of America,
7th Cir., No. 09-1775 (Feb. 14, 2011)

■ Facts:

- While attending mandatory training seminar, Righi learned mother rushed to hospital
- Righi left seminar and drove home to assess situation
- Employer called Righi's company-issued cell phone several times that day



Righi v. SMC Corp. of America,
7th Cir., No. 09-1775 (Feb. 14, 2011) (cont'd)

■ Facts (cont'd):

- Next day Righi emailed employer ("needed next couple days off" to arrange for mom's care)
- Employer called Righi 13 more times to clarify request for time off
- After nine days of silence, Righi called employer



Righi v. SMC Corp. of America,
7th Cir., No. 09-1775 (Feb. 14, 2011) (cont'd)

■ Facts (cont'd):

- Righi told to come to office next day for meeting; terminated for violating company's leave policy
- Righi sued, alleging violations of FMLA



Righi v. SMC Corp. of America,
7th Cir., No. 09-1775 (Feb. 14, 2011) (cont'd)

■ Holding:

- Trial and appellate court ruled in favor of employer
- Righi failed to notify company of approximate return-to-work date
- Burden on employee to notify employer of anticipated duration of leave “as soon as practicable”
- Righi’s failure to respond to employer’s calls doomed FMLA claim



Righi v. SMC Corp. of America,
7th Cir., No. 09-1775 (Feb. 14, 2011) (cont'd)

■ Lessons Learned:

- Reminder that obligations under FMLA are two-way street
- Employees must provide 30 days’ notice when foreseeable, or as soon as practicable
- Employers should enforce call-in procedures/seek information on need for leave
- If policies and procedures not followed, FMLA coverage for absence may be delayed or denied



Doucett v. D.R. Horton, Inc.
(D.N.M. February 2010)

- Employer underwent reduction in force (RIF)
- Doucett laid off, along with 23 other employees
- At time, Doucett was pregnant and few weeks away from starting approved FMLA leave
- Claimed terminated in retaliation for upcoming FMLA leave



Doucett v. D.R. Horton, Inc.
(D.N.M. February 2010) (cont'd)

- Court held employer had legitimate, non-discriminatory reason for termination -- struggling financially
- Performance appraisals were weakest, making her logical choice to be laid off
- Evaluations supported employer's argument that Doucett terminated as part of RIF, not because of request for leave



Cutcher v. Kmart Corp.
(6th Circuit, February 2010)

- Cutcher terminated as part of RIF while on FMLA leave
- Reevaluated employees as part of reduction in force process, and Cutcher's score not high enough to make cut
- In RIF evaluation, notation made that she was on leave



Cutcher v. Kmart Corp.
(6th Circuit, February 2010) (cont'd)

- Previous evaluation (20 days before) "exceeds expectations"
- 6th Circuit found material question of fact as to reason for Kmart's termination of Cutcher
- Court relied heavily on fact that RIF evaluation had leave notation and last evaluation rated Cutcher as "exceeds expectations"



EEOC v. Rent-A-Center
(June 27, 2011)

- EEOC sued for failure to accommodate religious beliefs
- Manager = Seventh Day Adventist which precludes work on Sabbath (before sundown Saturday)
- Initially accommodated but then required him to work Saturdays
- Terminated when he refused



Regulatory Updates



GINA Regulations

- Medical examinations after making job offer or during employment permitted by ADA
- May not include collection of family medical history
- Employer must tell health care providers not to collect genetic information and if it finds out family medical histories are being collected, employer must take measures within its control including not using services of health care provider, to prevent from happening in future



GINA Regulations (cont'd)

- When employer makes request for health-related information should warn employee and/or health care provider from whom it requested information not to provide genetic information
- Final rule suggests language employer should use (Tab "A")
- If warning provided, resulting acquisition will be considered inadvertent; warning creates "safe harbor" for employers



Wage and Hour Activity

- In 2009-2010, hired 250 new investigators
- 2011 Budget in Brief: Individuals wrongly classified as independent contractors denied access to critical benefits
- Joint Labor-Treasury initiative to strengthen and coordinate Federal and State efforts to identify/deter misclassification of employees
- DOL memos of understanding signed with various states



Union Updates



J. Pinci Flooring, Inc

- Set a new standard in requiring employers to post electronic notices for communicating with employees about union representation
- Previously, electronic posting had been considered an extraordinary remedy to resolve unfair labor practices



NLRB Requires Notice of NLRA Rights (cont'd)

- Board issued a final rule that requires employers subject to the National Labor Relations Act to post notices informing employees of their rights under the NLRA



NLRB Requires Notice of NLRA Rights (cont'd)

- Beginning January 31, 2012, private sector employers will be required to post an employee rights notice along side other typical workplace notices.
- No requirement that the notice be sent by email to employees



NLRB Advises Attorneys General in Four States That Secret Ballot Amendments Are Preempted by Federal Law

- Board advised Arizona, South Carolina, South Dakota and Utah that their recently approved state constitutional amendments governing the method by which employees choose union representation conflict with federal labor laws



Specialty Healthcare and Rehabilitation Center of Mobile

- Board overturns Park ManorCare Center case which has permitted employees of nursing homes and other non-acute health care facilities to organize with reasonable ease and enabled unions and management to bargain collectively



Specialty Healthcare and Rehabilitation Center of Mobile (cont'd)

- Park Manor established a separate community of interest standard for health care facilities
- Considered by experience to be a sound basis for unit determination and balancing operational issues of employer



*Specialty Healthcare and Rehabilitation
Center of Mobile (cont'd)*

- Board adopts a single-unit determination using a same-unit community of interest standard of traditional workplaces
- Proliferation of units and fragmentation of workplaces



*Specialty Healthcare and Rehabilitation
Center of Mobile (cont'd)*

- Health care is no longer found to be different from other industries
- Need for stable labor relations and the avoidance of workplace disruption is obsolete



*Specialty Healthcare and Rehabilitation
Center of Mobile (cont'd)*

- Employer may challenge bargaining unit if can prove excluded employees have “an overwhelming community of interest”



Protection of New Collective Bargaining Relationships

- *Lamone Gasket Co.* overturns *Dana Corp.* (2007) in which Board allowed immediate challenge to union status by 30% showing of employees or rival union
- Return to old standard of challenges being barred for a reasonable period following voluntary recognition



Protection of New Collective Bargaining Relationships (cont'd)

- *UGL-UNICCO Service Company* looks at period following change of ownership of company with a unionized workforce
- Overturns *MV Transportation* which had created an immediate window for 30% employees, company or rival union challenge to union status
- New standard protects the bargaining relationship between incumbent unions and new employees for a reasonable period of time



“Reasonable Period”

- Now defined to be voluntary recognition
 - 6 months – 1 year
- Successor relationship
 - 6 months if new employees adhere to existing contract
 - Up to 1 year if new terms and conditions of work are imposed



NLRB v. American Medical Response of Connecticut

- Board issued a complaint alleging that the company committed an unfair labor practice by firing an EMT who had posted some unflattering words about her supervisor on Facebook



NLRB v. American Medical Response of Connecticut (cont'd)

- The company's position was that the EMT was terminated because of complaints that she was rude to patients
- Postings were implemented by the use of her home computer
- Comments elicited supportive responses from co-workers and led to further negative comments from the employee herself



NLRB v. American Medical Response of Connecticut (cont'd)

- The company's reasons for wanting to settle
 - Cases can drag on for years
 - If one can escape years of litigation and attorney's fees by posting a notice and amending a social media policy, the employer has achieved a winning settlement



NLRB v. American Medical Response of Connecticut (cont'd)

- Facebook criticisms will be more likely to be classified as “concerted protected activity” when they involve comments by several co-workers
- If no such comments by co-workers, disparaging remark may be grounds for discipline



Hispanics United of Buffalo, Inc. v. Ortiz

- In first ruling of its kind, NLRB finds Buffalo non-profit unlawfully discharged 5 employees after they post comments on Facebook
- Employee overheard another employee complain about co-worker’s job performance
- Employee posts criticism of that co-worker and other co-workers’ comment



Hispanics United of Buffalo, Inc. v. Ortiz (cont'd)

- Employees fired for harassment of the original employee under no tolerance policy
- Administrative law judge orders reinstatement of employees with back pay for Section 7 concerted activity violation



Register-Guard

- Employers right to restrict employee use of email for union-related solicitations



Register-Guard (cont'd)

- Case involves the lawfulness of a company policy prohibiting employee use of its email system for “non-job related solicitations” and the question of whether the company could lawfully discipline an employee under the policy for sending email messages telling employees about a union rally and soliciting support for union activities.



Register-Guard (cont'd)

- Majority found the company’s communications policy prohibiting “non-job-related solicitations” was lawful
- Board explained that email use is governed by its decisions dealing with an employer’s equipment



Register-Guard (cont'd)

- Board “has consistently held that there is no statutory right ... to use an employer’s equipment or media; as long as the restrictions are non discriminatory”

McCann v. Iroquois Memorial Hospital

- Employer can be held liable under the Federal Wiretap Act for taping an employee’s conversation
- Two co-workers at the hospital had a closed-door conversation in which they were highly critical of the CEO and the hospital’s board

McCann v. Iroquois Memorial Hospital
(cont'd)

- Based upon the conversation, the hospital revoked Lindberg’s privileges and banned McCann from entering the hospital for anything other than health care being provided to herself and loved ones
- court dismissed the suit against the CEO and board, it allowed the suit to go forward against the hospital

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