HOT TOPICS IN EMPLOYMENT LAW 2014 – 2015

Presented by

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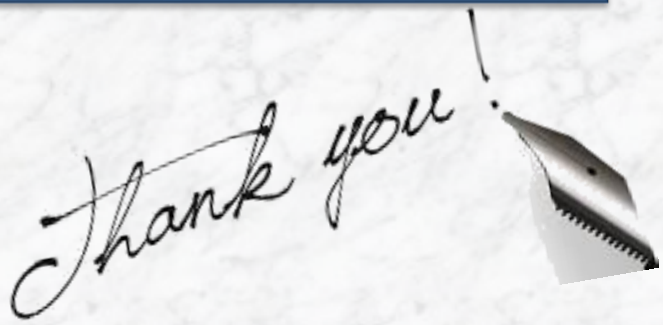

PURPOSE OF 

- Learn about interesting employment law cases from 2014-15
- Discuss lessons learned from cases on FMLA, accommodation of disabilities, harassment and discrimination and first amendment rights of public sector employees
- Sneak preview of what will likely be in the new FLSA regulations
- Trend spotting

LEAVES – FMLA

I'm Golden – I took FMLA-Not

Dalpiaz v. Carbon County, Utah (10th Cir. 2014)

- Long time benefits coordinator who was very familiar with FMLA, terminated for, among other things, untruthfulness about the extent of her injuries and her ability to work and essentially failure to participate in the FMLA process in good faith
- Held
  - Her interference claim failed because the employer established that it would have terminated her regardless of her use of FML.
  - "What is important is not the absolute truth regarding Plaintiff's state of health, but rather whether the county terminated her because it sincerely, even if mistakenly, believed that she had abused her sick leave and demonstrated significant evidence of untruthfulness."

LESSONS LEARNED

- Be aware of your state laws
- Employees who misrepresent their FMLA qualifying status or fail to engage in the process in good faith may do so at their peril
- And what about the IME?

Leaves – FMLA

- **You can't call me; I'm on FML!**

  (Adapted from FMLA Insights Blog)

  - Question: Can you ask an employee on FML to perform "work"?
    - Answer: "…reasonable contact limited to inquiries about the location of files or passing along institutional or status knowledge will not interfere with an employee's [FMLA] rights; however, asking or requiring an employee to perform work while on leave can constitute interference…."

LEAVES – FMLA

- Question: So how much is *too* much?
  - Answers:
    - *Reilly v. Revlon* (S.D.N.Y. 2009) and *Kesler v. Barris et al* (E.D. Mich. 2007): answering a few occasional calls about one's work is a "professional courtesy" that does not interfere with FMLA.
    - *Sabourin v. Univ. of Utah* (10th Cir. 2012): asking that plaintiff return certain work-related materials, even when the supervisor was obviously annoyed about his leave request, insufficient to constitute interference.

Leaves – FMLA

- Question: So how much is *too* much?
  - Answers:
    - *Sherman v. AI/FOCS, Inc.* (D. Mass. 2000): while on maternity leave, plaintiff regularly called by supervisor and ordered to come into work for 3 to 4 hours on one day to resolve accounting difficulties, and was "chewed out" by supervisor for training procedures in the accounting department is evidence of FMLA interference.
    - *Smith-Schrenk v. Genon Energy* (S.D. Tex. 2015): while on unpaid FML, supervisor called and emailed Smith, requiring her to perform work assignment and was openly hostile to Smith regarding her leave. This was evidence of FMLA interference and the case could proceed to trial.

LEAVES – FMLA

- **Hey, hey Mr. Postman – Delivering your FMLA notices**
  - Sending notices via US mail to employee's address of record was considered sufficient … until recent cases.

Lupyan v. Corinthian Colleges Inc. (3rd Cir. 2014)

- Sending notice via US mail creates a weak presumption of employee receipt – and presumption can be defeated whenever employee denies receipt! Employers should use some method of delivery that "includes verifiable receipt."

Gardner v. Detroit Entertainment LLC dba MotorCity Casino (E.D. Mich. 2014)

- Sending FML notice by email does not establish notice was provided absent proof that email was opened and actually received.

Leaves – FMLA

Our Recommendations

- Personal delivery, if possible – with signed acknowledgment of receipt. The gold standard!
- Email – if the employee has confirmed in writing that she will be checking email at that address during FML and agrees to accept FML notices and related correspondence that way. Consider having cover email request that employee confirm receipt. Then, if you don't receive confirmation within a few days, follow up.
- If sending via US Mail, also send it by a method that provides confirmation of delivery, such as certified mail, or Federal Express. If you don't receive the confirmation, follow up.

LEAVES – FMLA

- **FMLA's RTW Protections**

  White v. City of Los Angeles (Cal. Ct. of Appeal 2014)

  - Peace Officer took FML after a period of time on the job exhibiting erratic behavior and poor judgment following death of a family member.
  - Returned to work without restrictions; restored to payroll and "assigned to work from home"; told she had to be evaluated by a physician of the County's choosing
  - She obtained a TRO arguing that she was entitled to RTW based on her physician's statement that she is fit for duty.

Leaves – FMLA

- Held
  - The court found that she had been returned to work in accordance with the FMLA. Then it relied on DOL to find that the FFD was appropriate. "An employer may not require that an employee submit to a medical exam by the employer's health care provider as a condition of returning to work. A medical examination at the employer's expense by an employer's health care provider may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the ADA. Thus, if an employer is concerned about the health care provider's fitness-for-duty certification, the employer may, consistent with the ADA, require a medical exam at the employer's expense after the employee has returned to work from FMLA leave as stated in paragraph (h) in the final rule. The employer cannot, however, delay the employee's return to work while arranging for and having the employee undergo a medical examination."

Lessons Learned

- It did not matter here that there was no evidence of problematic behavior either during her leave or thereafter
- But, this case turned a lot on the facts; as a peace officer she carried a gun and there was plenty of evidence of pre-FML problems

LEAVES – PREGNANCY

Young v. United Parcel Services, Inc.
(U.S. Sp. Ct. 2015)

- *The Supreme Court and Pregnancy?*
  - Facts: Peggy Young was a part-time UPS driver who became pregnant. One of the essential functions of a driver is to be able to lift 70 lbs. unassisted. Young's doctor restricted her to lifting 20 lbs. during the first 20 weeks of her pregnancy and 10 lbs. thereafter. Young asked for light duty. According to the CBA, light duty was available for three groups of drivers only:
    - Drivers with work-related injuries or illnesses;
    - Drivers who lost their DOT certification; and
    - Drivers who were disabled within the meaning of the ADA.

Leaves – Pregnancy

Young v. United Parcel Services, Inc.

- Because Young did not qualify under any of the three categories, she was denied light duty. UPS provided her with a long leave (beyond that required by the law); she returned to work and sued.
- She lost at both trial court and the Fourth Circuit Court of Appeals. She petitioned the Supreme Court who charted what some commentators call a "middle ground".

Leaves – Pregnancy

- Holding: To establish a prima facie case under the PDA, the plaintiff must establish:
  - That she belongs to a protected class;
  - That she sought accommodation;
  - That she was not accommodated; and
  - That her employer accommodated others "similar in their ability or inability to work."

Note

- This case arose before the ADA was amended. Now clear that short-term disabilities may be covered.

Leaves – Pregnancy

- **The EEOC's position in light of *Young***
  - The EEOC is going to revise its Guidance on the PDA focusing on the how to establish a pregnancy discrimination and/or accommodation claim under the standard the Court used in *Young*.
  - The EEOC's position is that an employer does need to look treatment of comparable employees before denying an accommodation to pregnant employees.

Lessons Learned

- Examine accommodation provided to other disabled employees before declining to accommodate a pregnant woman.
- Know your state law.

DISABILITY – ACCOMMODATION

- **You Should Have Known I Was Disabled and Accommodated Me**

  Waltz v. Ameriprise Financial (8th Cir. 2015)

  - Long term employee began behaving in erratic, disruptive manner and eventually took FML
  - Prior to FML, she had been counseled and warned on numerous occasions; boss even asked the Starbucks Question: what can I do to help you? She never indicated she needed help and/or accommodation.
  - She was released to return to work with note which says she was "stabilizing on her medication"
  - Things went smoothly for a while until her erratic, disruptive behavior resumed; she was eventually fired
  - Although she never revealed her disability—bipolar disease, she alleged that her employer failed to accommodate her.

Disability – Accommodation

- Held:
  - Having good interpersonal relationships were an essential job function
  - Her behavior showed that she was not qualified for the job without an accommodation.
  - Where a "disability, resulting limitations, and necessary accommodations, are not open, obvious, and apparent to the employer," a plaintiff who fails to disclose her disability and request an accommodation from her employer cannot show that she is qualified with accommodation.

Lessons Learned

- Build a good record
- Importance of acknowledgement that she signed upon return from FML that told her how to apply for an accommodation

Disability – Accommodation

- **Temporary Disabilities Covered Under ADA**

  Summers v. Altrum Institute (4th Cir. 2014)

  - Summers suffered severe injuries in a fall where he broke his left leg, tore his meniscus in the same leg, broke his right ankle and ruptured tendons in the same leg; he was confined bed rest initially and told that would not be able to walk normally for at least 7 months.
  - While he was on leave, he made several inquiries about returning to work including providing a plan which include a period of working at home and gradually reintegrating himself into the workplace.
  - His employer never responded to his requests. Instead, 6 weeks later, he was terminated.

Disability – Accommodation

- Held:
  - Even short-term conditions qualify as disabilities under the amendments to the ADA.

Lessons Learned

- Always engage in the Interactive Process
- The law is intended to expand coverage and the requirement that the condition substantially limit a major life activity is "not meant to be an demanding standard."

Disability – Accommodation

- **Purloined Potato Chip May Require Reasonable Accommodation**

  EEOC v. Walgreen Co (N.D. Cal. 2014)

  - Hernandez was a long term employee with type II diabetes and her disability was accommodated by Walgreens.
  - While stocking the aisles, she experienced a hypoglycemic attack and had no personal food available.
  - She grabbed a $1.37 bag of potato chips in her cart and ate some of them to stabilize her condition. She went to the cashier to pay but no one was there so she left the half eaten bag under the counter. When the supervisor returned and asked whose they were, Hernandez said they were hers. She later explained during the investigation that her "blood sugar low, not have time."
  - She was fired for violating the company's well-established, uniformly enforced no "grazing" policy.

Disability – Accommodation

- Held:
  - Because this was at the summary judgment stage, there is an open question of whether her alleged misconduct was caused by her disability and whether the employer should have accommodated her by making an exception to its policy on these facts; sent to trial court.

Lessons Learned

- This is an interesting case because it suggests that a reasonable accommodation to a policy may have to be made after the fact.
- Best understood in light of the 9th Circuit's line of cases that misconduct caused by a disability (other than violence, threats, destruction of property) is not a legitimate basis for termination.

Other Discrimination/Harassment Cases

- **Age Discrimination: The perfect storm – new supervisor; stray remarks and a policy not followed**

  Cheal v. El Camino Hospital (Cal. Ct. of Appeal 2014)

  - Cheal, age 61, a long term employee with good reviews, was terminated by her new supervisor for poor performance.
  - She was a diet tech and part of a group of employees whose job it was to prepare meals for patients that met their doctors' restrictions. Under a new supervisor, she was written up for her shortcomings and given a final warning and then fired.
  - The hospital prevailed in the SJ motion and the court held that she was fired for "making several mistakes on menus between January and May 2008."
  - The hospital's own policies reflected that a certain number of errors were within the norm (less than one error per day for menu writing: less than two errors per day for meal tray checking; less than one error per day for nourishment checking skills; etc.).
  - And there was credible evidence that the new supervisor said that she favored younger and pregnant employees and that she was worried about this being notice.

Other Discrimination/Harassment Cases

- Held
  - There was enough disputed evidence on the issue of whether Cheal was in fact an unsatisfactory worker so that this issue could go to trial. Additionally, at least for purposes of summary judgement the statement about favoring younger employees could come in as declaration against interest.

Lessons Learned

- Know your policies
- Watch out for new supervisor syndrome
- Train your supervisors to avoid stray remarks

Other Discrimination/Harassment Cases

- **Same Sex Harassment: Element of Sexual Desire Not Necessary**

  Taylor v. Nabors Drilling (Cal. Ct. of Appeal 2014)

  - Taylor, a heterosexual male and part-time actor, was hired to work on an oil rig.
  - His two supervisors taunted him daily calling him a fag, queer, gay porn star; he was never referred to by is name but rather as "come here, f'g fagot," etc. One of his supervisors would come up behind him and arouse himself and ask Taylor to sit on his lap or grab him from behind; both supervisors knew he was a straight male and had a girlfriend.
  - The company denied that the supervisors engaged in unlawful actions because there was no element of sexual desire.

Other Discrimination/Harassment Cases

- Held
  - ". . . here sex was used as a weapon to create a hostile work environment for respondent. Mason and Mendez "employed attacks on [Taylor's] identity as a heterosexual male as a tool of harassment." The Court relied on an earlier case which held that ". . . there is no requirement that the motive behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' [Citations.] Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment."

Lessons Learned

- Train! Train!
- Create a climate where employees know how to report and are encouraged to report

Other Discrimination/Harassment Cases

- **Disability Discrimination: Just Because I Threatened My Co-workers Doesn't Mean You Can Fire Me**

  Curley v. City of N. Las Vegas (9th Cir. 2014)

  - Curly had a terrible work record and a hearing problem for which he was being accommodated; he also had filed an EEOC charge alleging failure to accommodate and retaliation for having filed a previous charge on age and race discrimination.
  - Following an altercation with a fellow employee, he was placed on administrative leave. At the conclusion of the investigation, Curly was fired for non performance of duties (making excessive phone calls); intimidating co-workers with threats of violence; running his own business on work time; and disparaging management and the City.
  - Meanwhile the City sent him out for a FFD and he was declared fit for duty and not a danger to himself or others.
  - Curly sued alleging that he had been terminated because of his hearing disability and in retaliation for asking for an accommodation and for his EEOC filings. He argued that the fact that he had been declared fit for duty and not a danger to others established that the proffered reasons were pretext for discrimination.

Other Discrimination/Harassment Cases

- Held
  - Relying on case law from the Seventh Circuit, the Court held that Curly was being fired for past threats, not danger of future violence.

Lessons Learned

- What about the FFD?
- What could the City do differently such that this kind of egregious conduct would have come to light sooner?

Other Discrimination/Harassment Cases

- **Third Party Harassment: Too Little Too Late**

  Freeman v. Dal-Tile Corp (4th Cir. 2014)

  - Freeman, an African American customer service rep, for three years was subjected to unwanted sexual and racial comments by a customer, Koester, who interacted with her on an almost daily basis.
  - On weekly and sometimes even daily basis, Koester told of his sexual escapades, showed photos of naked women, referred to black women as "black b*****s", made racially derogatory remarks, including the use of the "n" word, made lewd remarks, including discussing having sex with one of Freeman's co-workers daughters.
  - Freeman complained on several occasions to her boss. Her boss characterized Koester as a "pig", and told Freeman to ignore him. Her boss never reported Freeman's complaints. She also complained to Koester's boss who said that she should do what he did, "hit him because he is an asshole." Freeman on numerous occasions told Koester to stop.
  - Because of his behavior, Freeman was distracted at work; cried in front of her co-workers and eventually had to take a leave for anxiety and depression.
  - It wasn't until Freeman reported it to HR that any action was taken. Freeman was promised that he would be permanently banned from the premises. He was banned temporarily and Koester was allowed in so long as he made arrangements in advance with Freeman's supervisor.
  - Freeman was so distressed about the thought of having to encounter Koester that she resigned and sued.

Other Discrimination/Harassment Cases

- Held
  - The Court of Appeals overruled the trial court's grant of summary judgment to the employer on all grounds except the constructive discharge claim. Freeman had presented ample evidence to establish that she had been subjected to harassment based on her sex and race, that her employer knew about it and that her employer had failed to take prompt, effective action.

Lessons Learned

- Train line supervisors to recognize and report inappropriate behavior and transmit complaints to HR
- Empower employees so that they know that they do not have to put up with inappropriate behavior

Anticipated Revisions to the FLSA

Threshold Salary

The *current threshold salary* is $455/week or $23,660/year.

This *minimum salary* will likely significantly increase, and possibly double.

The "*highly paid professional*" threshold salary (now $100,000) will likely increase.

Anticipated Revisions to the FLSA

White Collar Exemption Test

The DOL will likely remove or significantly revise the "*concurrent duties*" section under the executive exemption test.

The "*primary duty*" test under all of the exemptions – which does not require that one spend a specific % of time performing exempt work – may be replaced with a quantitative test similar to California law that requires an exempt manager to spend more than 50% of his time supervising employees.

Public Sector Issues – First Amendment

- **Adverse Action – What Is Trivial; What Is Not?**

  Thomas v. County of Riverside (9th Cir. 2014)

  - Thomas, a county employee, engaged in speech which her employer opposed. She claimed that there were 30 adverse actions which were in retaliation for her protected speech. On a motion for SJ, the employer prevailed. The Ninth Circuit overturned the ruling and noted that the following could be adverse employment actions:
    - Removing her from a community college teaching assignment impacting her wages by $9,000
    - Prohibiting her from using break time to travel between work sites causing her to travel on unpaid time
    - Rescinding previously approved vacation
    - Removing her from an unpaid committee position
    - Instigating an investigation about an email with "rude" tone
    - Transferring her three times including two position transfers and one transfer from graveyard to day shift

Public Sector Issues – First Amendment

- Held
  - The definition of an adverse action is one which is "reasonably likely to deter" protected conduct. The Court also found that here there is "evidence suggesting that some of these actions were taken as part of a more generalized campaign and hence might in context have greater materiality than when viewed in isolation."

Lessons Learned

- Be thoughtful about even seemingly minor employment actions that follow protected conduct

Public Sector Issues – First Amendment

- **Social Networking and the First Amendment**

Facebook Posts – Not Protected

Graziosi v. City of Greenville, Miss (5th Cir. 2015)

- Graziosi, a police officer, took on her chief after he decided that for budgetary reasons patrol cars could not be used by the officers wanting to attend a funeral in a neighboring town of a police officer killed in the line of duty.
- She eventually reposted her original post to the Mayor's public page and said of the chief, "if you cannot lead, just go."
- The chief instituted an IA investigation that concluded that Graziosi violated 3 departmental policies and she was terminated.
- Graziosi sued claiming that she was terminated for exercising her 1st Amendment rights.

Public Sector Issues – First Amendment

- Held
  - Although Graziosi was speaking as a member of the public and not in her role as a police officer, she was not speaking about a matter of public concern. Rather the court describe her postings as a "rant" more akin to a personal grievance. Therefore, her Facebook posting were not protected speech.

Lessons Learned

- The usual – be careful what you post on social media!

Public Sector Issues – First Amendment

Social Networking and the First Amendment

Facebook "likes" Can Be Protected Speech

Bland v. Roberts (4th Cir. 2013)

- Six deputy sheriffs lost their jobs after the Sheriff was re-elected; they had been supporters of his opponent.
- Two of them had "liked" the Sherriff's opponent on his Facebook page and one had posted a comment.

Public Sector Issues – First Amendment

- Held
  - "On the most basic level, clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance." The Court compared a Facebook "like" to placing a political sign in your front yard which is protected speech.

Lessons Learned

- Public Employees' online postings may, in appropriate circumstances, be protected speech for which they could not be terminated.

Trending In California

Bullying

- Effective January 1. 2015, California employers must now train their supervisors in the prevention of "abusive conduct."

Abusive conduct is described as:

> . . . conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. [It] may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance.

Trending In California

Bullying

- Currently pending before the legislatures of 10 states is a model anti bullying "Healthy Workplace Bill." This bill and similar bills are designed to prevent bullying in the workplace and give employers the right to discipline offenders and to hold employers accountable for "psychological safety" in the workplace.
- In a recent case in Wisconsin, a hearing officer upheld the termination of a correctional officer for a pattern of bullying that lead to the suicide of fellow officer shortly before he retired.

Trending In California

Religion

- Two years ago, the California legislature "clarified" the law in California requiring employers to provide accommodations to religious observances and beliefs unless the accommodation would impose an undue hardship. The clarification was that undue hardship had the same precise meaning that it does in the disability law context.

Marijuana in the Workplace

- **In California and other states, the Use of Medical Marijuana Is Not a Required Accommodation**

Ross v. Raging Wire (2008 California Supreme Court)

> The **Compassionate Use Act** (Health & Saf. Code § 11362.5), as we have explained, simply does not speak to employment law. Nothing in the act's text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees. Because the act articulates no such policy, to read the FEHA in light of the Compassionate Use Act leads to no different result.

Marijuana in the Workplace

- Since that time, a number of Courts, among them, Washington, Montana and Michigan, have come to the same conclusion regarding their medical marijuana statutes which are similar to California's compassionate use statute.
- But two states (Rhode Island and Arizona) do have laws which protect employees in the workplace who use medical marijuana.

Stay Tuned!

Marijuana in the Workplace

The Drug Free Workplace Act

- Applies to any university that is a federal contractor
- This Act does not prohibit hiring of employees who test positive for drugs or employing those who use medical marijuana.
- What it does prohibit is the "unlawful manufacture, distribution, dispensation, possession or use of controlled substance in the covered workplace."

But Remember …

- Even when using state protected medical marijuana, disabled employees need to come to work unimpaired.


Question