Employment Law Conference

October 25, 2018

Courtyard Marriott ~ Mankato, MN

Cory A. Genelin
cgenelin@gislason.com

Jennifer G. Lurken
jlurken@gislason.com

Brock P. Alton
balton@gislason.com

Brittany R. King-Asamoa
bking-asamoa@gislason.com

GISLASON & HUNTER LLP

Sexual Harassment

Presented By

Brittany R. King-Asamoa

bking-asamoa@gislason.com

GISLASON & HUNTER LLP

Overview

- Introductions
- Defining Sexual Harassment
- Minnesota's Contemplated Removal of Severe & Pervasive
- Investigating Sexual Harassment
- Hypotheticals

What is Sexual Harassment?

- Unwelcome sexual advances, requests for sexual favors, and conduct of a sexual nature when:
  - Submission to the conduct is either explicitly or implicitly a term or condition of the employment;
  - Submission or rejection of such conduct is used as a basis for employment decisions (Quid pro quo); or
  - Conduct has the purpose or effect of unreasonably/substantially interfering with the employee's performance or creating an intimidating, hostile, or offensive work environment and employer knew or should have known of the harassment but failed to take immediate and appropriate action

Unwelcome Conduct

Unwelcome when the employee:

- Did not solicit;
- Did not encourage or incite; and
- Conduct was undesirable or offensive

Defining Sexual Harassment

- Overt comments – rumors, jokes, slurs, regardless of speaker's intent, commenting on appearance, using names of endearment
- Physical conduct – touching of sexual nature, purported/simulated touching, following someone
- Visual – staring, posters, drawings, stickers

Elements of Sexual Harassment Claim

- **Hostile work environment**
  - Member of protected class
  - Occurrence of unwelcome harassment
  - Harassment occurred was caused or due to plaintiff's membership in protected class
  - **Harassment affected a term, condition, or privilege of employment**; and
  - Employer knew or should have known of the harassment and failed to take prompt and effective remedial action

Liles v. C.S. McCrossan, Inc., 851 F.3d 810 (8th Cir. 2017)

Title VII – Sexual Harassment; Hostile Work Environment

- Harassment must affect a term, condition, or privilege of employment
  - "Hostile work environment harassment occurs when the workplace is **permeated** with discriminatory intimidation, ridicule, and insult that it is **sufficiently severe or pervasive** to alter the conditions of the victim's employment and create an abusive working environment." *Liles*, 851 F.3d at 823 (internal quotations omitted and emphasis added).
  - High threshold requiring proof of both a subjectively and objectively offensive environment
  - "Demanding and does not prohibit all verbal or physical harassment and **is not a general civility code** for the American workplace." *Id.* (emphasis added).

- *Liles v. C.S. McCrossan, Inc.*
- *Hales v. Casey's Marketing Co.*, 886 F.3d 730 (Minn. 2018)

Liles v. C.S. McCrossan, Inc., 851 F.3d 810 (8th Cir. 2017)

Facts

- Mandy Liles was hired as a project engineer; Promoted to assistant project manager
- 2009 – Junior made romantic advances; Liles turned him down; Believing Junior thereafter began harassing her she reported
- 2010-2011 – Senior became enraged
  - Called her nasty names – "rotten" & "tuna fish"
  - Instructed another employee to "put the screws to her"
- 2010 – Gabrielson's comments
  - "Never worked with a female assistant project manager"
  - "Are you going to cry," "Are you aroused?"
  - "I like that shirt on you," "Those jeans look nice"

Liles v. C.S. McCrossan, Inc., 851 F.3d 810 (8th Cir. 2017) cont…

- Facts cont…
  - Liles reports Gabrielson's harassment, 1 month after he stops harassing her
  - Liles reassigned to field work to provide her field experience to develop skills necessary to perform the project manager role
  - Liles receives an ok performance review & action plan (8 months after her complaints)
  - Liles didn't complete the plan and was terminated in 2012
- Liles sues Employer alleging hostile work environment and retaliation

Liles v. C.S. McCrossan, Inc., 851 F.3d 810 (8th Cir. 2017) cont…

- Issue
  - Whether Junior, Senior and Gabrielson created a hostile work environment subjecting Liles to sexual harassment
- Application
  - Harassment affected a term, condition, privilege of employment
    - Subjectively, objectively offensive
    - Extreme in nature not just merely rude or unpleasant
    - Court reasoned that Liles failed to show comments were so offensive as to alter the terms and conditions of her employment

Hales v. Casey's Marketing Co., 886 F.3d 730 (Minn. 2018) – rehearing en banc denied May 21, 2018

Hales v. Casey's Marketing Co., 886 F.3d 730 (Minn. 2018) – rehearing en banc denied May 21, 2018

- Facts
  - Hales worked late night shift at Casey's General Store
  - Approx. 2am customer she'd never seen entered the store
  - Shopped and flirted with Hales
    - Commented on her appearance
    - Questioned relationship status
    - Boasted about his car and camera
  - Hales alleged that she attempted to elude the customer
    - Asked co-worker to "keep an eye on her"
    - Customer followed her and continued inappropriate talk
    - Hales asked him to "back off" and threatened him with her cigarette
    - Customer was burned and filed a report

Hales v. Casey's Marketing Co., 886 F.3d 730 (Minn. 2018) – rehearing en banc denied May 21, 2018 cont…

- Facts cont…
  - Manager questioned Hales about the burning
  - Hales claimed self-defense; She was terminated
  - Hales alleged sexual harassment based on hostile work environment and retaliation
- Issues
  - Whether Hales was subjected to a hostile work environment based on the customer's activities.
  - Whether Casey's knew or should have known about customer's conduct and failed to take action.

Hales v. Casey's Marketing Co., 886 F.3d 730 (Minn. 2018) – rehearing en banc denied May 21, 2018 cont…

- Rule – Successful hostile work environment claim
  - Member of a protected group;
  - Was subject to unwelcome sexual harassment;
  - A casual nexus existed between the harassment and protected group status;
  - Harassment affected a term, condition, or privilege of employment; and
  - Employer knew or should have known about the harassment.

Hales v. Casey's Marketing Co., 886 F.3d 730 (Minn. 2018) – rehearing en banc denied May 21, 2018 cont…

- Affected term or condition of employment
  - "[T]he conduct must be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive and that actually altered the conditions of the victim's employment." *Hales*, 886 F.3d at 735.
- Not severe
  - Customer never touched or threatened Hales
- Employer took prompt action
  - "An employer's liability turns on whether the employer was aware of the conduct and whether it took appropriate action to remedy the circumstances in a timely and appropriate manner." *Id.*
  - Complaint on previous occasion by another employee – Employer took immediate action informing customer he would be banned from the store & police would be called

MINNESOTA HUMAN RIGHTS ACT – SEXUAL HARASSMENT

Amendments to Minnesota Human Rights Act
HF 4459, SF4031

- Minn. Stat. § 363A.03, subd. 43

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

…

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . .

2017 Proposal:

The existence of an intimidating, hostile, or offensive environment "does not require the harassing conduct or communication to be severe or pervasive."

Severe and Pervasive

Implemented into application of the MHRA by case law

> We have **relied on federal law interpreting Title VII in our interpretation of the MHRA**. . . . Thus, in determining whether the conduct had the purpose or effect of substantially interfering with a plaintiff's employment or created an intimidating, hostile, or offensive employment environment under the MHRA, **we consider whether the conduct was sufficiently severe or pervasive to objectively do so and whether the plaintiff subjectively perceived her employment environment to be so altered or affected**.

Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790, 796-97 (Minn. 2013).

Severe and Pervasive Implemented by Case Law

To prevail on a hostile work environment claim, a plaintiff must establish that

(1) she is a member of a protected group;

(2) she was subject to unwelcome harassment;

(3) the harassment was based on membership in a protected group;

(4) the harassment affected a term, conduction or privilege of her employment; and

(5) the employer knew of or should have known of the harassment and failed to take appropriate remedial action.

Even if a plaintiff demonstrates discriminatory harassment, such conduct is not actionable **unless it is so severe or pervasive as to alter the conditions of the plaintiff's employment and create an abusive working environment**.

Goins v. West Group, 635 N.W.2d 717, 725 (Minn. 2001) (internal quotations omitted and emphasis added).

What was Severe and Pervasive?

- Required a totality of the circumstances evaluation:
  - Frequency of the discriminatory conduct;
  - Severity of the conduct;
  - Whether conduct is physically threatening or humiliating, or a mere offensive utterance;
  - Whether it unreasonably interferes with an employee's work performance

Questions for Your Business

- How do you determine whether conduct affects term, condition or privilege of employment?
- How do you determine unwelcome conduct?
- How do you determine employer liability?
  - Proxy of the employer
  - Quid pro Quo / Harassment associated with tangible employment action
  - Employer knew or should have known of the harassment (remember Faragher/Ellerth Affirmative defense)

Faragher/Ellerth Affirmative Defense

- Effective Preventative Program
  - Anti-harassment policy
  - Appropriately disseminated in the workplace
  - Encourages reporting of harassment – 2+ avenues
  - (EEOC latest focus) Discuss bystander intervention
    - Bystander advising harasser that actions are inappropriate
    - Bystander steps in / helps remove the victim from the situation
    - Bystander informs employer of the harassing behavior
- Employer takes Immediate Appropriate Action
  - Investigation
  - Disciplinary action proportionate to offense
  - No retaliation
  - Additional training

INVESTIGATING SEXUAL HARASSMENT

Preliminary Decisions

- Who conducts the investigation?
- What do you do with the alleged
  - Victim
  - Accused
- Who should be interviewed?
- When should the interviews begin?
- What should be the policy regarding confidentiality?

Goals of Investigation

- Determine whether harassment has occurred?
- Determine what additional training is needed?
  - Minimize harassment / discrimination / retaliation
  - Increase bystander intervention
  - Supervisors
- Ensure supervisors are doing their jobs
  - Overseeing their staff appropriately
  - Documenting and addressing inappropriate behavior
  - Implementing company policies
- Provide constructive criticism to supervisors

Objectives for Each Interview
Sexual Harassment

- Was the conduct complained of (1) unwelcome; (2) of a sexual nature; and (3) either
  - Used as a basis of an employment decision; or
  - Enough to affect a term or condition of employment and unreasonably interfere with an employee's performance or create a hostile, intimidating, or offensive work environment
- What actions were taken by the supervisor, victim, and all individuals involved prior to the investigation?

HYPOTHETICALS

Questions for Each Hypothetical

1. Should the issue be investigated?
2. Who
   a) Conducts the investigation
   b) Is interviewed
3. What should be asked?
4. Would a court consider this to be sexual harassment?

Goins

- Goins is a transgender woman who recently transferred to your facility
- Your facility has two restrooms – (1) Male; (2) Female
  - Goins uses the female restroom
  - 3 women complain to you that they feel uncomfortable
- You implement a new policy that all employees will use the restroom based on their biological gender
- Goins complains about
  - The new policy
  - The frequent stares she receives
  - Comments about “Which restroom will Goins use today?”
  - She does not comply with the policy

Questions

1. Should the issue be investigated?
2. Who
   a) Conducts the investigation
      i. Third party – because of newly created policy
      ii. Preferably an attorney
   b) Is interviewed
      i. Goins, individuals she names as participants, supervisor, individuals seated close to restroom, previous reporters that they were uncomfortable
3. Would a court consider this to be sexual harassment?

Not Severe & Pervasive

Goins v. West Group, 635 N.W.2d 717 (Minn. 2001)

- Transgender woman transferred to MN facility
- Employees reported they were uncomfortable with Goins use of women's restroom
- Implemented policy (fearful of hostile work environment) use restroom according to biological gender
- Goins alleges she was subjected to scrutiny, gossip, stares & glares {details not provided}
- Among other claims, alleged hostile work environment based on sexual orientation
- Although inappropriate, coworkers' conduct not severe or pervasive to interfere with work performance

> *"Goins' claim fails because the alleged conduct of coworkers, however inappropriate, was not of the type of severe or pervasive harassment required to sustain an actionable hostile work environment claim."* *Goins*, 635 N.W.2d at 726.

Be Careful!

- Goins involved a risky policy that was implemented
  - Not unlawful to designate “employee restroom use based on biological gender”
- Talk to an attorney before implementing any policy that would be created because of an individual or group of individuals

LaMont

- LaMont is 1 of 2 female custodians for Company
- Her supervisor John is mean
  - He yells at everyone
  - Micromanages everyone
- John requires LaMont and Susie to radio in during breaks
  - Asks their status, etc.
  - Prohibited from talking while working
- LaMont reports that over the past year – 2 comments
  - John said, “The only screwing I do is of my wife.” Jokingly in response to LaMont’s warning that John could “screw” up his back
  - Company is not a place for women

Questions

1. Should the issue be investigated?
2. Who
   a) Conducts the investigation
   b) Is interviewed
3. Would a court consider this to be sexual harassment?

Not Severe & Pervasive

LaMont v. Independent School Dist. No. 728, 814 N.W.2d 14 (Minn. 2012)

- LaMont is a female custodian at Elk River high school
- Miner is her supervisor
- Miner yells at all employees (males and females alike)
- Miner comments over 1 year:
  - May 2006: Only place for women is the kitchen & bedroom
  - The only screwing I do is with my wife
  - Dec. 2006: Elk River high school is not the time or place for women [?]
- Miner required women to work in different areas and complete radio checks during breaks

MN Cases – Not Severe & Pervasive: *LaMont v. Independent School Dist. No. 728*, 814 N.W.2d 14 (Minn. 2012) cont…

- LaMont claimed hostile work environment, based on gender – 6 months
  - Offensive, but infrequent
  - Yelled at men and women alike
  - Not severe or intimidating
  - Not physically threatening
  - Likened comments to "mere offensive utterances"
  - Comments did not unreasonably interfere with her ability to do her job

*Involved other allegations

LaMont v. Independent School Dist. No. 728, 814 N.W.2d 14 (Minn. 2012)

*"We conclude that Miner's comments . . . were offensive and inappropriate **but** . . . were infrequent and **not severe**. The rules about not talking during work hours and checking in before breaks were not abusive, either objectively or subjectively, and LaMont did not show that the rules interfered with her ability to perform the duties of her job. In sum, the **totality of the circumstances** of LaMont's claim of a hostile work environment are not sufficiently hostile or abusive to withstand summary judgment." LaMont*, 814 N.W.2d at 23-24 (emphasis added)

Company Picnic

- Tom supervises the product line on 2nd shift
- During a company picnic, he believed Susie, one of his subordinates was eyeing him during the company soccer match
- He asks Susie out on a date
- Susie declines and reports to HR that she feels uncomfortable on Tom's line
- Tom has not treated Susie any different

Questions

1. Should the issue be investigated?
2. Who
   a) Conducts the investigation
   b) Is interviewed
3. Would a court consider this to be sexual harassment?

EEOC POLICY GUIDANCE – SEXUAL HARASSMENT POLICIES AND TRAINING
June 2018 and 2016

GISLASON & HUNTER LLP

EEOC Task Force – Harassment in the Workplace – June 2018 and 2016

- June 11, 2018 – Transforming #MeToo Into Harassment-Free Workplaces
  - Panel – highlighted protection gaps presented by harassment laws (e.g. Independent contractors; **no individual liability for harassment** (use of Faragher/Ellerth defense))
- June 2016 – The task force released report outlining
  - Guidance for anti-harassment policies, procedures & training
  - Risk factors for harassment

EEOC Recommendations on Anti-Harassment Policies

- Address social media behavior
  - If content would violate the policy done in person, also violation of policy when posted on social media
- Multiple methods for reporting complaints
  - Detailed identification of how to report
  - Train and remind employees of report methods
- Anti-retaliation provision – train managers on appropriate behavior following report
  - Separation of alleged victim and accused
  - Temporary suspension/leave

EEOC Recommendations on Anti-Harassment Policies cont…

- Investigation procedures
  - Prompt and objective
  - Consider third-party / outside counsel if member of high-level management or HR professional is involved
- Proportionate discipline
  - Case-by-case basis
  - Confidentiality
    - Defamation
    - Raise concerns about inconsistency or favoritism, when investigation details are not disclosed

Application to Your Business

- Revise sexual harassment policies
  - Train employees and supervisors
- Modify investigative procedures
  - Every complaint must be investigated
  - Accuser, accused, and anyone else possibly involved
  - Following every complaint send out reminder of the harassment policies and complaint procedures

Questions???

THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.

Employment Law Conference

October 25, 2018

Courtyard Marriott ~ Mankato, MN

Cory A. Genelin
cgenelin@gislason.com

Jennifer G. Lurken
jlurken@gislason.com

Brock P. Alton
balton@gislason.com

Brittany R. King-Asamoa
bking-asamoa@gislason.com

GISLASON & HUNTER LLP

Social Media in the Workplace: Link in Your Employees

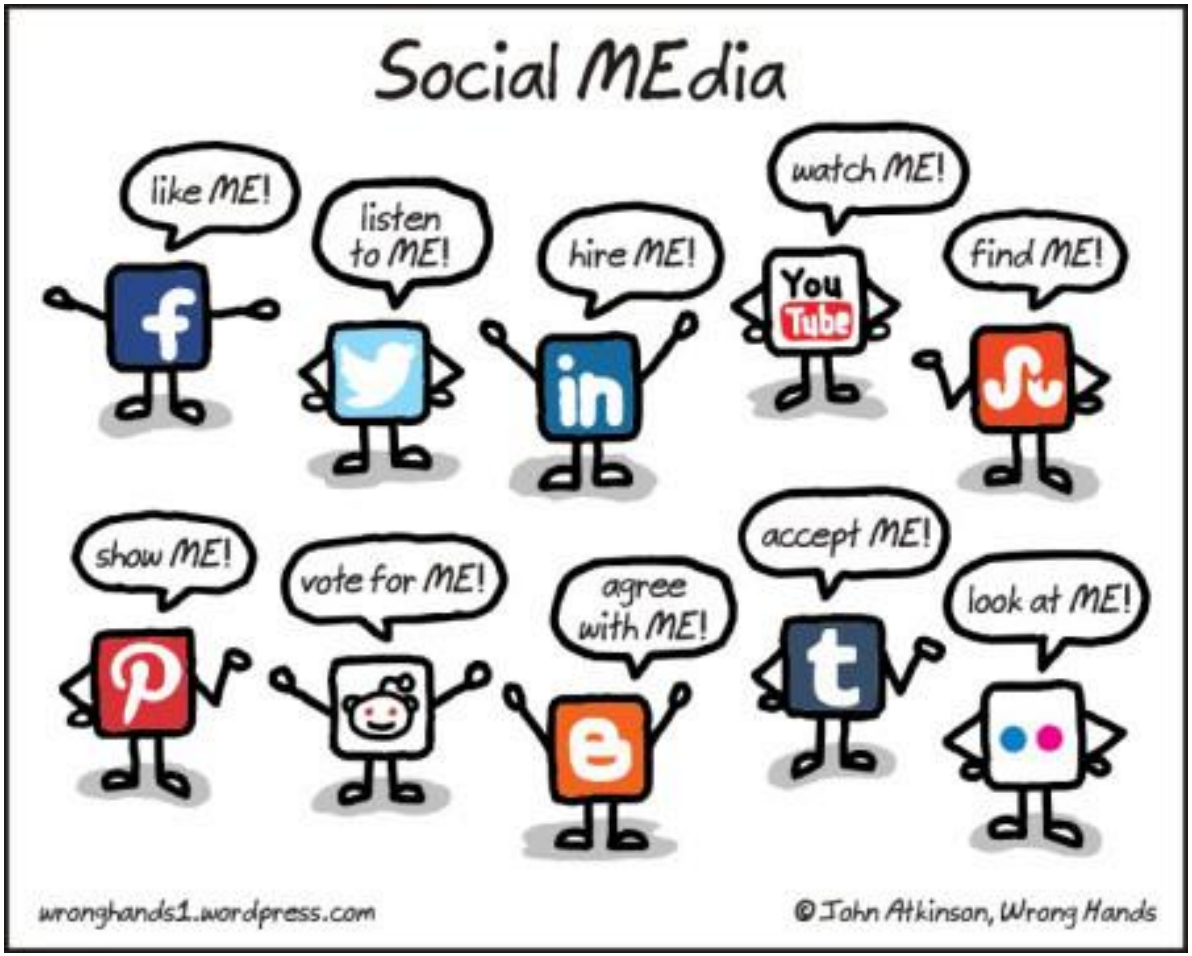
Presented By

Jennifer G. Lurken

jlurken@gislason.com

GISLASON & HUNTER LLP

Social Media



Considerations

- Rights and protections of the employer:
  - Harassment between employees
  - Disclosure of trade secrets or other confidential information
  - Brand negativity
- Weighed against rights of the employee:
  - Freedom of speech
  - Protection against harassment

Employee Rights

- Generally, for an at-will employee, an employer may impose discipline for any off-duty conduct as long as the conduct is not protected.
- Employees subject to collective bargaining agreement or employment contract may have more rights.

Employee's Rights

- Right "to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection" (NLRA, Section 7)
- A "protected concerted activity" is generally an activity undertaken together by two or more employees, or by one on behalf of others, "when they seek to improve terms and condition of employment or otherwise improve their lot as employees…."
- An employer violates an employee's rights if it maintains workplace rules that would reasonably tend to "chill employees in the exercise of their Section 7 rights."

Scenario #1

If an employee in Minnesota were to talk about the recent minimum wage increase on social media.

Would this be a protected activity?

Employee Rights

- Protection from discrimination
- Minnesota – Protects from discrimination based upon political activity.
- About 50% of the states have laws protecting employees from political activity discrimination.

Employee's Rights

- Minn. Stat § 10A.36.
- An individual or association must not engage in economic reprisals or threaten loss of employment or physical coercion against an individual or association because of that individual's or association's political contributions or political activity. This subdivision does not apply to compensation for employment or loss of employment if the political affiliation or viewpoint of the employee is a bona fide occupational qualification of the employment. An individual or association that violates this section is guilty of a gross misdemeanor.

Employer's Rights

- Policies against harassment
- Policies against use of social media while on the job.
- But what if a post includes political activity that is protected by § 10A.36 but also harasses other employees?

Scenario #2

- If an employee endorses President Donald Trump's travel ban.
  - Is the employee making comments expressly or by way of inference that could be perceived as anti-Muslim?
  - What is the impact of those comments in the workplace?
  - Would this be considered harassment?
  - Is this a declaration of political activity that is protected by Minnesota Statute § 10A.36?

Recommendations

- Implement a social media policy.
  - New Test- *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017).
  (1) the policy's potential impact on protected concerted activity; and
  (2) the employer's legitimate business justifications for maintaining the policy.
- Train managers and educate employees.

Scenario #3

- Chipotle Employee:
- "@ChipotleTweets, nothing is free, only cheap #labor. Crew members make only $8.50hr how much is that steak bowl really?"
  - *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72 (Aug. 18, 2016).

Scenario #4

- A white employee posted the following on her personal Facebook page:
- "All lives matter. Period. I will not be preached to. I never said Black lives don't [sic] matter. I believe Black lives matter is stoking the fire of racial tension and hate by exploiting deaths and encouraging division. Period. Look again at my words and do not put words in my mouth."
- *Squitieri v. Piedmont Airlines, Inc. et. al.*, No. 3:17CV441 (W.D.N.C., filed Feb. 16, 2018).

Scenario #5

- Bob, BMW employee posts snide comments and photos on Facebook that the dealership serving hot dogs and Doritos at a kickoff event for the redesigned BMW 5.
- Bob expressed his concerned the food would affect BMW's image and his commissions would suffer.

Scenario #5.2

- Days later, at the employer's Range Rover dealership across the street, a 13-year-old boy drives a Range Rover into a pond located next to the dealership. Bob posts a photo of a Range Rover in the pond on Facebook with snide comments about the employer.
- *Knauz Motors, Inc.*, 358 NLRB No. 164 (2012).

Gislason & Hunter LLP can help:

- Review policies and procedures
- Train employees
- Respond to EEOC and MDHR Charges

Jennifer G. Lurken
Gislason & Hunter LLP
Phone: 507-387-1115
jlurken@gislason.com

Questions???

THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.

Employment Law Conference

October 25, 2018

Courtyard Marriott ~ Mankato, MN

Cory A. Genelin
cgenelin@gislason.com

Jennifer G. Lurken
jlurken@gislason.com

Brock P. Alton
balton@gislason.com

Brittany R. King-Asamoa
bking-asamoa@gislason.com

GISLASON & HUNTER LLP

Top 10 Basics and Ways to Improve

Presented By

Cory A. Genelin

cgenelin@gislason.com

GISLASON & HUNTER LLP

Overview

1. Hiring
2. Discipline
3. Reviews
4. Deductions from Wages
5. Policy Development
6. Leave
7. Accommodation
8. Termination
9. Severance/Releases
10. Unemployment

1. Hiring

- Accommodative Application Process!?
- Application/Interview
- Marital Status/Familial Status
- Declining
- Marital Status/Familial Status
- Credit Scores under federal FCRA and MN Access to Consumer Reports

2. Discipline

- Investigation
- Documentation
- Solution
- Preparation for Termination

3. Reviews

- Process
- HR/Operations
- Purpose
- Where is this Employee going?

4. Deductions from Wages

- Benefits
- Work related expenses
- Reimbursement for losses

5. Policy Development

- Process
  - Who is involved
- Publication
- Enforcement
- Contract

6. Leave

- Sick Leave
  - Documentation?
  - Required sick leave?
- FMLA
- Interaction of types of leave

7. Accommodation

- Pregnancy
- Focus on outcomes
- “Pressure to Return”

8. Termination

- Why
- WARN/OWBPA
- Obscure protected classes

9. Severance/Releases

- Economics
- Fine points

10. Unemployment

- How to Win
- How much to fight
- Bringing up new issues

Conclusion

1. Hiring
2. Discipline
3. Reviews
4. Deductions from Wages
5. Policy Development
6. Leave
7. Accommodation
8. Termination
9. Severance/Releases
10. Unemployment

Questions???

THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.

Employment Law Conference

October 25, 2018

Courtyard Marriott ~ Mankato, MN

Cory A. Genelin
cgenelin@gislason.com

Jennifer G. Lurken
jlurken@gislason.com

Brock P. Alton
balton@gislason.com

Brittany R. King-Asamoa
bking-asamoa@gislason.com

GISLASON & HUNTER LLP

Recent Employment Law Cases and Legislative Update

Presented By

Brock Alton

balton@gislason.com

GISLASON & HUNTER LLP

Overview

- Legal news, roughly in order of importance/time
  - Legislative/regulatory changes first
  - Caselaw second
- Probably run out of time before material
- Means we'll end with a fizzle
- Ask questions at any time

Fair Credit Reporting Act Changes

Economic Growth, Regulatory Relief and Consumer Protection Act
(Pub.L. 115–174, S. 2155)

FCRA Changes

- Regulatory Relief and Consumer Protection Act Legislative/regulatory
  - Signed into law May 24, 2018
  - Overall goal: ease regulations imposed by Dodd-Frank after financial crises.
- Altered FCRA in manner that will impact some employers

FCRA Changes

- FCRA requirements:
  - Applies to employers using third-party consumer reporting agencies for background information
  - Requires certain notices be provided before background checks take place.
  - Must:
    - Obtain written authorization
    - Inform applicant/employee in writing that the report may be used for employment decisions.
    - Certify to reporting agency that you will comply with the forging and not mis-use report.

FCRA Changes

- FCRA requirements, Cont.:
  - Before taking adverse action, must provide the employee/applicant with a copy of the report, and a notice entitled “A Summary of Your Rights under” the FCRA.
  - After taking adverse action, must inform the person:
    - That adverse action was taken;
    - Of the name, address, and number of reporting agency.
    - That the adverse decision was not made by the reporting agency; and
    - State that individual may dispute the background check at no cost.

FCRA Changes

- Under new changes:
  - Agencies now have one year to include a fraud alert in the employees file, up from 90 days; and
  - Reporting agencies must provide national security freezes on accounts free of charge to consumers.
- Impact on employers?
  - Minimal. Both changes incorporated in “Summary of Your Rights” form.
  - Obtain new forms online, provide as required.

Department of Labor Guidance:
Unpaid Internships
January 2018 Update (“Fact Sheet 71”)

GISLASON & HUNTER LLP

Unpaid Interns Guidance

- Internships and the FLSA
  - For profit employers must pay minimum wages to employees
  - In case of interns/student works, may not qualify as “employees” under FLSA
  - Courts have established “primary beneficiary test” to assist in determination. The question: what is the economic reality of the relationship, and who primarily benefits, intern or potential employer?

Unpaid Interns Guidance

- DOL issued guidance on Primary Beneficiary Test
- Seven factors
  - Clear understand that there is no expectation of compensation?
  - Training similar to that of educational institutions?
  - Explicit ties to school work, such as via academic credit?
  - Does internship accommodate coursework?
  - Duration: beyond point of education to intern?
  - Intern complement or replace other workers?
  - Any promise/inducement of future employment?
- If analysis of these factors indicates employer/employee relationship, then intern is entitled to minimum wage

Minnesota Worker's Compensation Changes:

Expanded Protection for Post-Traumatic Stress Disorder, New Disability Requirements

GISLASON & HUNTER LLP

PTSD

- Minnesota has offered Worker's Compensation Benefits for post-traumatic stress disorder since 2013.
- To qualify, the PTSD must:
  - Arise from course and scope of employment.
  - Be diagnosed by licensed psychiatrist or psychologist.
  - Meet the DSM definition.
  - PTSD is not considered a "personal injury" if it arises out of good faith disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement or similar action taken

PTSD

- Following 2018 changes, if an employee from the following types of employment has PTSD, it is presumed to arise from employment:
  - Firefighter;
  - Paramedic/EMT/licensed nurse providing EMS.
  - Public safety dispatcher; corrections/treatment facility officers;
  - Sheriffs, deputy sheriffs, State Patrol

Other Changes

- Other work comp. changes:
  - 225 week cap on Temporary Partial Disability Benefits was raised to 275 weeks.
  - Dollar values for Permanent Partial Disability were increased five percent.
  - Presumed age of retirement for those with Permanent Total Disability raised from 67 to 72 (may be rebutted).

Minneapolis Sick and Safe Time Ordinance
St. Paul Earned Sick and Safe Time Ordinance
Effective July 1, 2017*

GISLASON & HUNTER LLP

Sick and Safe Time Ordinances

- Minneapolis and St. Paul Sick and Safe time Ordinances over one year old.
- One new development in 2018:
  - The Minneapolis ordinance required that sick leave be provided to any employee working in the city for 80 hours or more per year, regardless of Employer's location.
  - Court has ruled that the Minneapolis ordinance cannot be enforced against non-Minneapolis employers.
  - Interest of City residents outweighed by burden on non-City employees.

Minneapolis Minimum Wage: Upheld

Minneapolis Minimum Wage

- Minneapolis minimum wage increasing to $15.00, with phased increases effective January 1, 2018.
- Challenged by a number of employers. One still fighting: Graco Corp.
- Argued, among other things, that the rule conflicted with the Minnesota FLSA.
  - MN FLSA statewide minimum wage: of $9.65 for large employers, and $7.87 for small employers.
  - Rejected argument, holding no conflict by providing for more than the mandated state minimum.

Minneapolis Minimum Wage

- Also held that “extraterritorial reach” was permissible.
- Thus, minimum wage rule applies even to employers not located in the city.
  - Applies to work performed within the city limits, if employee works there at least two hours a week.
- Compare to Safe and Sick Time.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)

- Question: Whether an employer may compel arbitration agreements with employee in order to avoid class action lawsuits under the FLSA.
- Background:
  - Three separate lawsuits brought against three employers were consolidated for hearing before the United States Supreme Court.
  - In each, class action plaintiffs were suing employers for alleged violations of the FLSA.
  - In each, the employers sought to enforce arbitration clauses waiving collective action procedures under the FLSA and class action procedures under state law.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)

- Holding:
  - Federal Arbitration Act strongly favors arbitration
  - NLRA does not reflect a clearly and manifest congressional intent to displace the FAA or to outlaw class action waivers.
    - In other words, no right to a class action under the NLRA.
  - Court: although policy implications of decision were debatable, "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." Doing so, answer clear.

Communications Workers of America v.

T-Mobile US, Inc.

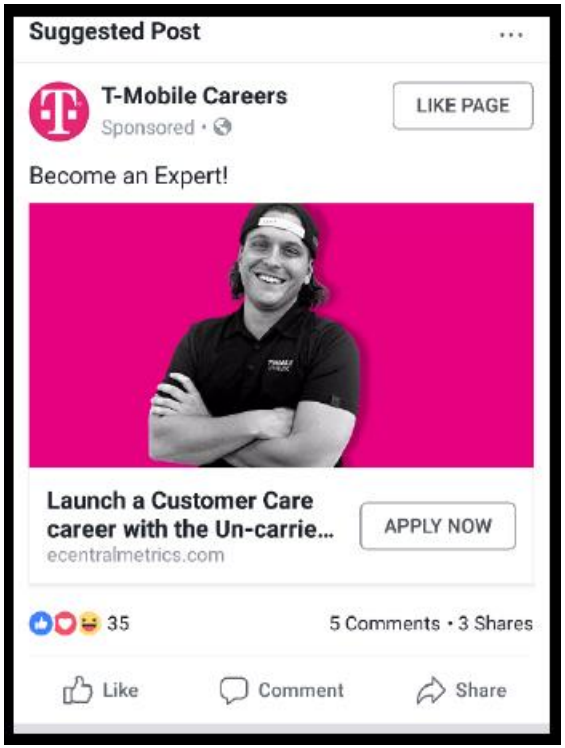
Filed December 12, 2017

Comm.'s Workers of Am. v. T-Mobile US, Inc.

- Question: Whether T-Mobile and other employers are violating the Age Discrimination in Employment Act with targeted advertisements on social media.
- ADEA: Unlawful to refuse to hire, to discharge, or otherwise discriminate against workers over 40 on basis of age.
- Suit: T-Mobile and others allegedly advertise on Facebook in manner that "routinely exclude older workers from receiving their employment and recruiting ads."

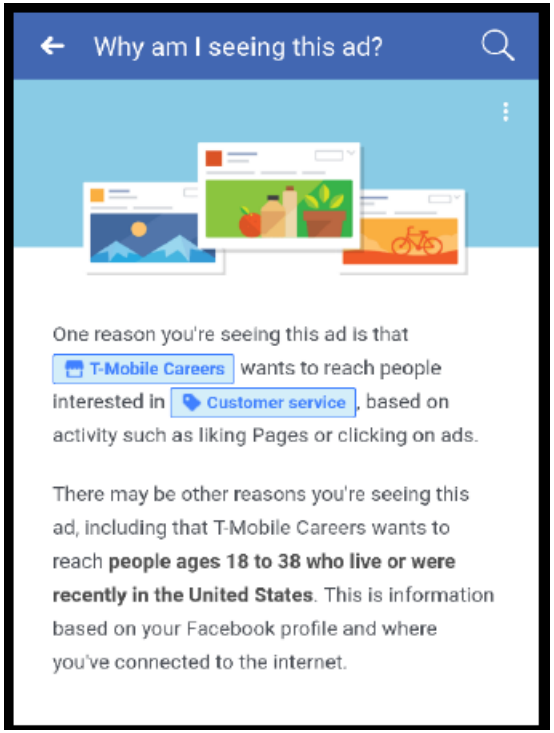
Comm.'s Workers of Am. v. T-Mobile US, Inc.

- Facebook permits companies to choose to whom they advertise using a number of criteria. Among them, age.
- T-Mobile used the following ad on Facebook:



Comm.'s Workers of Am. v. T-Mobile US, Inc.

- When users checked why received ad, saw this:



- Other employers had similar ads with similar explanations

Comm.'s Workers of Am. v. T-Mobile US, Inc.

- Early indications are that the companies will argue that such ads are similar to advertising in magazines with younger readership.
- Case still in early stages.
- Facebook, however, has begun making changes to prohibit ads that violate various federal laws, including the ADEA.
  - Separate investigations showed that Facebook could be used to advertise on the basis of race, gender, nationality, and other characteristics in a manner that could violate the Fair Housing Act
  - Though not directly liable, Facebook must consider corporate partners and public image.

McClellan v. Midwest Machining, Inc., 900 F.3d 297 (6th Cir. 2018)

McClellan v. Midwest Machining, Inc., 900 F.3d 297 (6th Cir. 2018)

- Question: Whether employee who signed separation agreement could nevertheless pursue claim for pregnancy discrimination (among other items).
- Background:
  - Jena McClellan worked for Midwest Machining, Inc., as a telemarketer.
  - McClellan announced her pregnancy in August of 2015, and claimed she was harassed thereafter.
  - One day she was presented with a separation agreement, including a severance agreement (for $4,000), which she signed. She was then terminated.

McClellan v. Midwest Machining, Inc., 900 F.3d 297 (6th Cir. 2018)

- McClellan later sued on a number of grounds, including under Title VII for pregnancy discrimination.
- The defense argued she was barred from suing, especially as McClellan had not "tendered back" the money.
  - District Court agreed and granted summary judgment.
- Sixth Circuit reversed.
  - It held that there is no "tender back doctrine" for federal statutes such as Title VII or Equal Pay Act.
  - Further determined that post-suit return tender was effective.

Muse v. New Flyer of Am., Inc., No. A17-2068

(Minn. Ct. App. Aug. 27, 2018)

Muse v. New Flyer of Am., Inc., No. A17-2068 (Minn. Ct. App. Aug. 27, 2018)

- Question: Whether employee who missed two days of work while in jail was entitled to unemployment benefits.
- Background:
  - Farah Muse worked as an assembly technician for New Flyer of America, Inc.
  - On August 22, 2017, Muse was arrested following a domestic dispute that Muse characterized as the fault of his wife.
  - As a result, Muse missed two days of work. By employer's policy, he was considered to have "quit."

Muse v. New Flyer of Am., Inc., No. A17-2068 (Minn. Ct. App. Aug. 27, 2018)

- Must sought unemployment benefits.
- ULJ denied the benefits, and held that being incarcerated was, in essence, de facto proof of misconduct.
- MN Court of Appeals overturned that portion of the ruling, and mandated that ULJs look at each case, even those involving incarceration, on their facts.
- Court went even further, and held that since Muse was not convicted at the time of his hearing, and no proof was offered of reason for arrest, no substantial evidence supported holding of misconduct.

Faidley v. United Parcel Serv. of Am., Inc.,
889 F.3d 933 (8th Cir. 2018)

Faidley v. United Parcel Service of America, Inc., 889 F.3d 933 (8th Cir. 2018)

- Question: Whether UPS violated the ADA when it refused to accommodate 8 hour workday for driver
- Background:
  - Faidley worked for UPS for nearly 20 years
  - October 2011, had hip surgery.
  - After returning to work (without restrictions), Faidley had difficult with long days required of drivers.
  - Physician determined appropriate to restrict him to eight hour days.

Faidley v. United Parcel Service of America, Inc., 889 F.3d 933 (8th Cir. 2018)

- Faidley attempted to return to work, sent home.
- Following investigation, UPS determined working at least 9.5 hour days was an essential function of the job.
  - Weather, traffic, large volume days all out of company control.
  - Even if planned for a shorter day, could not guarantee it.
  - Would have to send driver out to get him at 8 hours?

Faidley v. United Parcel Service of America, Inc., 889 F.3d 933 (8th Cir. 2018)

- Faidley applied for other positions, none available.
- Offered part-time work, but would lose union seniority.
- Court agreed with UPS: essential function of job to work overtime. No requirement to accommodate to 8 hour days.
- Although route often finished in less than eight hours, at times that was impossible.

Lawson vs. Grubhub, Inc.,

February 8, 2018

Lawson vs. Grubhub, Inc., 15-cv-05128 (N.D. Cal., February 8, 2018)

- Question: Whether Grubhub employed Raef Lawson, or hired him as an independent contractor
- Background:
  - Independent Contractor tests
  - Growth of industry
  - Grubhub: internet-based food delivery service
  - Retained Lawson under "Delivery Services Contract"
    - Stated that he was an IC
    - Not restricted from driving for others
    - No availability requirements
    - Lawson permitted to subcontract work
    - Used his own transportation (but described for grub hub)
    - Some standards in place re: accepting and making deliveries

Lawson vs. Grubhub, Inc., 15-cv-05128 (N.D. Cal., February 8, 2018)

- So, IC or employee?
- Court held he was an IC.
  - Heart of decision: minimal control of Grubhub over time, place, manner of deliveries (both by agreement and practice)
  - Comparison: FedEx (which controlled schedules of full-time employees, controlled routes, work was exclusive, etc.)
  - Other factors also assisted Grubhub (did not provide equipment, supervise work) which outweighed other factors (payment was, in practice, hourly, termination provision at will, akin to employment, work performed was part of Grubhub's regular business).

Burt v. Rackner, Inc.,

October 11, 2017

Burt v. Rackner, Inc., 902 N.W.2d 448 (Minn. 2017)

- Question: Whether employee who was terminated after refusing to share tips with fellow employees could bring a claim under the Minnesota Fair Labor Standards Act
- Background:
  - "At-will state," and thus no claims unless authorized
  - MFLSA – contains "tip-sharing statute" that makes forced tip sharing illegal.
  - Tip-sharing statute silent on issue of whether it authorizes a claim for wrongful discharge.
  - Other provisions of MFLSA specifically provide that employee can make wrongful discharge claims in particular circumstances.
  - Thus, employer argued that no claim was authorized here.

Burt v. Rackner, Inc., 902 N.W.2d 448 (Minn. 2017)

- MFLSA, however, has a provision allowing employee to "seek damages and other appropriate relief" for violations
- Minnesota Supreme Court determined this abrogated common law, and authorized employees to sue not just for back pay but double damages and attorney fees.
- Dissent disagreed, based on more specific provisions in the statute
- Given ruling, any and all MFLSA violations can now be litigated.

Severson v. Heartland Woodcraft, Inc.

September 20, 2017

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017)

- Whether the Americans with Disabilities Act requires an employer to provide unpaid leave as a "reasonable accommodation"
- Raymond Severson, employee, suffered serious back pain
- Heartland Woodcraft, employer, complied with FMLA but offered no further leave
- Severson complained to the EEOC, which investigated
- Multiple employers have settled with the EEOC, which contends that additional time off can be required under the ADA

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017)

- Heartland did not settle
- EEOC supported Severson in litigation, argued that long-term leave should constitute reasonable accommodation
- Seventh Circuit rejected their position. It held:
  - "Reasonable accommodation" is one that makes it possible for an employee to "perform the essential functions of the employment position." "Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."
  - Leave is province of FMLA

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017)

- Circuit split should be noted
  - Seeking Supreme Court review
- Open question: short-term leave? When does it cross into long-term disability?

Friedlander v. Edwards Lifesciences, LLC

August 9, 2017

GISLASON & HUNTER LLP

Friedlander v. Edwards Lifesciences, LLC, 900 N.W.2d 162 (Minn. 2017)

- Whether employer violated Minnesota Whistleblower Act for alleged retaliation after employee objected to contract.
- Friedlander fired after raising alleged "illegality" in contract. Employer claimed it was aware.
- The MWA bars employers from terminating an employee who "in good faith" reports a violation or suspected violation of law
- Old test: For many years, Minnesota courts had interpreted the "good faith" standard to entail a two-part test: (1) The report was not knowingly false or made in reckless disregard for the truth; and (2) The reporter acted with the "purpose of blowing the whistle, i.e., to expose an illegality."

Friedlander v. Edwards Lifesciences, LLC, 900 N.W.2d 162 (Minn. 2017)

- Employer claimed to be aware of alleged illegality. Under old test, could not meet "exposure" requirement.
- Friedlander argued that since the MWA was codified without that requirement, legislature established new rule involving only part one of the traditional test.
- Minnesota Supreme Court agreed.
- Impact obvious: any good faith report, even if not of truly illegal activity, now can provide the basis for a claim.

LaPoint vs. Family Orthodontics, P.A.

April 5, 2017

LaPoint v. Family Orthodontics, P.A., 892 N.W.2d 506 (Minn. 2017)

- Whether employer discriminated against employee after learning she was pregnant.
- LaPoint applied for work as orthodontic assistant.
- Dr. Ross, owner of Family Orthodontics, told her she was hired.
- LaPoint informed Dr. Ross she was pregnant during pone call accepting offer.
- The next morning, Dr. Ross left a voicemail stating that she needed time to figure things out. Then re-posted for position on Craigslist.
- Later admitted she was concerned about LaPoint missing 6 weeks, given her small practice.

LaPoint v. Family Orthodontics, P.A., 892 N.W.2d 506 (Minn. 2017)

- LaPoint sued under MHRA.
  - Makes it illegal to discriminate on the basis of sex, including pregnancy
- District Court ordered in favor of Employer
- Reversed by Court of Appeals
- Minnesota Supreme Court:
  - LaPoint entitled to prevail if she showed pregnancy "actually motivated" withdrawal of offer
  - Need not prove that it was the sole reason
  - Need not prove animus, as district court required
  - Thus, remanded for new trial

Hively v. Ivy Tech Comm. College of Indiana

April 4, 2017

Hively v. Ivy Tech Comm. College of Indiana, No. 15-1720, 2017 WL 1230393 (7th Cir. April 4, 2017)

- Whether refusing to promote an employee because of her sexual orientation is unlawful discrimination on the basis of sex.
- Kimberly Hively – lesbian
- Hired as part-time adjunct professor in 2000
- Applied for **six** full-time positions between 2009 and 2014
- Filed charge with EEOC December 2013; received right-to-sue letter
  - *Important* – EEOC began interpreting discrimination on the basis of sex to include sexual orientation discrimination in 2015
- Adjunct position not renewed in 2014
- Hively sued Ivy Tech alleging college discriminated against her because of her sexual orientation
  - Case dismissed in district court
  - Hively appealed

Hively v. Ivy Tech Comm. College of Indiana (April 4, 2017)

Issue and Rule

- Title VII – unlawful employment practice "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex"
  - Discrimination on the basis of sexual orientation is discrimination on the basis of sex

Hively v. Ivy Tech Comm. College of Indiana (7th Cir. April 4, 2017)

- Comparative method – "The discriminatory behavior does not exist without taking the victim's biological sex . . . into account."
  - *Price Waterhouse v. Hopkins* – gender stereotyping
- Associational theory – "a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."
  - *Parr v. Woodmen of the World Life Ins. Co.*
  - *Holcomb v. Iona College*

Hively v. Ivy Tech Comm. College of Indiana (7th Cir. April 4, 2017)

- Judicial interpretive updating – Justice Posner's concurrence
  - *Missouri v. Holland* – When interpreting statute, "[w]e must consider what this country has become in deciding" what the law means. 252 US 416
  - "[C]ompelling social interest in protecting homosexuals . . . 'interpretation' of the word 'sex' in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in the light of . . .'what this country has become[.]"
- Definition of "homosexuality"
  - Justices Flaum & Ripple
    - "One cannot consider a person's homosexuality without also accounting for their sex"
  - "Of or relating to, or characterized by a tendency to direct sexual desire toward another of the same sex." Merriam-Webster
  - "Having a sexual propensity for persons of one's own sex." Oxford English

Hively v. Ivy Tech Comm. College of Indiana (7th Cir. April 4, 2017)

- Decision - Court held that Hively set forth a recognizable claim and reversed the lower court's dismissal of her employment discrimination claim
- Your Business
  - Minnesota already prohibits discrimination on basis of sexual orientation and gender identity
  - Use methods outline in *Hively* as tools to double check motives of employment decisions

Liles v. C.S. McCrossan, Inc.

March 21, 2017

Liles v. C.S. McCrossan, Inc. 851 F.3d 810 (8th Cir. 2017)

- Whether demotion and termination of an employee for poor work performance months after employee's complaints of sexual harassment is unlawful retaliation under Title VII or the Minnesota Human Rights Act.

Facts

- Mandy Liles was hired as a project engineer
- Promoted to assistant project manager
- 2009 – Co-worker made romantic advances; Liles turned him down; Co-worker began harassing her & Liles reported the harassment
- 2010 – Liles complains she is not receiving sufficient training on equipment
- 2010-2011 – Co-worker's father also worked there but was not Liles supervisor; Father began making derogatory comments – Liles was "rotten" & "tuna fish"
- 2010 – 2nd Co-worker began harassing Liles
  - "Never worked with a female assistant project manager"
  - "Are you going to cry," "Are you aroused?"
  - "I like that shirt on you," "Those jeans look nice"

Facts cont...

- March 2011
  - 2nd Co-worker informs Supervisor that Liles was crying on the job & appears to be “overwhelmed by the complexity of the job”
  - The company owner echoed these remarks
  - Liles reports 2nd Co-worker’s harassment, 1 month after he stops harassing her
- April 2011
  - Liles reassigned to field work to provide her field experience to develop skills necessary to perform the project manager role
- June 2011 - Liles receives a satisfactory performance review & action plan
- January 2012 – Liles was terminated
- Liles sues Employer alleging sex discrimination, harassment, and retaliation
  - Employer granted summary judgment

Retaliation

- Title VII – Unlawful for employer to discriminate against employee that opposes an unlawful employment practice
  - To prove retaliation, employee must show opposition was the but-for cause of the adverse employment action
- MHRA – Suffice if employee presents evidence of a retaliatory motive
  - Ex. Evidence that "employer had actual or imputed knowledge of the protected activity and the adverse employment action occurred close in time"

Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 327 (Minn. 1995)

Retaliation

- Liles argues retaliation
  - 2010 complains she is not receiving adequate training; and March 2011 report of sexual harassment
  - 2011 given action plan & fired in 2012
- Retaliation claim fails because adverse employment actions were
  - 15 & 17 months after Complaint re: inadequate training
  - 8 & 10 months after 2011 sexual harassment report
- Retaliatory motive cannot be inferred based on this evidence or timeline
- Court characterized Liles's retaliation claim as Doomed
  - Lacked evidence of causation; and
  - Had a history of performance problems

Gender discrimination

- Unlawful to discriminate against employee because of their sex
  - Employer presents legit, nondiscriminatory reason for termination
    - Need only prove employer in good faith believed employee was guilty of performing activity leading to the adverse employment action
  - Employee's burden to prove reason offered was pretextual
    - Showing did not perform prohibited activity is not enough
    - Employee must present evidence showing Employer did not actually believe employee performed the activity

Gender Discrimination

- Liles argues terminated because she was female
- Employer's legitimate, nondiscriminatory reason for termination – inferior job performance
- Liles failed to prove this was not a good faith belief held by Employer

→ Liles's gender discrimination claim was dismissed

Clarke v. Northwest Respiratory Servs., LLC

January 30, 2017

Clarke v. Northwest Respiratory Servs., LLC, A16-0620, 2017 WL 393890 (Minn. App. Jan. 30, 2017).

- Whether employer can win at summary judgment stage with documented evidence of poor job performance in the face of employee's FMLA retaliation claims after termination 3 weeks after returning from FMLA leave and alleging supervisor identified "unpaid leave" as reason for termination

Facts

- Clarke was a service technician for Northwest Respiratory Servs., LLC
- Delivered to and serviced products at customers' residences
- Clarke suffered from PTSD
- Received numerous complaints regarding Clarke's troubled driving while working for Employer
  - Drove "like a maniac," issues tailgating, driving on motorists' bumpers, cutting motorists off, failing to use blinkers, speeding, etc.
- Clarke received numerous written warnings informing him that future incidents/complaints could result in immediate termination

Facts cont…

- Clarke took FMLA leave to receive inpatient treatment December 31, 2013 through March 5, 2014
- January 2014 – Customer requested that a different technician assist him because Clarke was rude, slammed his door, talked back to him, and made him uncomfortable
- March 2014 – Another customer complained and cancelled service with Employer because Clarke was “very rude” and also claimed Clarke reported that he delivered equipment he actually failed to deliver

Facts cont…

- Clarke's supervisor learned of the complaint on March 27, 2014
- Terminated March 28, 2014 (approx. 3 weeks after returning from FMLA leave)
- Clarke alleges that his supervisor said Clarke's time off was the reason for his termination
- Clarke sued for disability discrimination under MHRA and retaliation under FMLA

Application by the Court

- Clarke alleges FMLA retaliation because:
  - Took FMLA; Fired
  - There was a causal connection between his termination and his FMLA leave
    - Fired 3 weeks after taking leave
    - Supervisor's comment
- Employer argues – no causal connection
  - December 2013 – Clarke requested leave
  - March 28, 2014 – Clarke was terminated; not sufficiently close in time
    - *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012) – Eighth Circuit "looks to the date an employer knew of an employee's use (or planned use) of FMLA leave, not the date it ended" to determine temporal proximity.
    - *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 925 (8th Cir. 2014) – "[T]emporal proximity must be extremely close to establish the causal connection without other evidence of discriminatory animus."

Application by the Court cont…

- Summary Judgment standard
  - Allegations are reviewed in the most positive light for the party that does not seek summary judgment
- Clarke's allegation Supervisor identified FMLA leave as reason for termination, treated by the court as true for purposes of evaluating motion for summary judgment
- Court held:
  - 3 weeks between return from leave + Supervisor's statement = Prima facie case of unlawful retaliation

Application by the Court cont…

- Employer granted summary judgment
  - Legitimate & Nondiscriminatory reason for termination
    - Customer's decision to terminate service with Employer because of Clarke's poor customer service
  - Clarke failed to show reason was pretextual
    - Supervisor's statement "provides some weak evidence of discriminatory motive" in the face of the nondiscriminatory reason for termination provided
    - Clarke also failed to present evidence that other employees, that did not take FMLA, were treated differently

Application to Your Business

- Document job performance accurately
- Develop a termination letters
  - Clearly and succinctly list the complete reason for termination
  - REMEMBER FMLA leave and disabilities are not lawful reasons for termination

Diamond v. Hospice of Florida Keys, Inc.

January 27, 2017

Diamond v. Hospice of Florida Keys, Inc.,
No. 15-15716, 2017 WL 382310 (11th Cir. Jan. 27, 2017)

Issue

- Whether an employer's request for FMLA leave-related expense verification.

Facts

- Ms. Diamond social worker for Hospice of Florida Keys, Inc.
- She was the only full-time social worker on staff
- Took intermittent FMLA leave to care parents
- Employer's policy required Diamond to exhaust PTO, run concurrently with FMLA
- April 2014 – Diamond took FMLA leave with little notice to employer

Facts cont…

- HR Manager requested expense receipts from Diamond verifying she was where she said she would be for FMLA
  - *Food receipts in parents' city; hospital discharge papers; gas receipts in vicinity of parents' home*
- Email - "Your continued unpaid time away from the workplace compromises the quality of care we are able to provide as an organization."
  - … "These are document[ed] examples of quality of care" suffering due to repeated "emergent" leaves of absence."
- Fired 5 days later (2 weeks after latest intermittent leave) – reasons given included the "documented examples" of quality of care referenced in prior email

Legal Issue

- Diamond sued alleging
  - Unlawful interference with FMLA leave
  - Retaliation
- Unlawful for employer “to interfere with . . . the exercise of or the attempt to exercise, any right provided under the FMLA.” 29 U.S.C. § 2615(a)(1)

FMLA - Interference

- Employer's action that discourages employee from taking FMLA is unlawful interference
  - Vacated & remanded summary judgment in favor of ER
  - "Your continued unpaid time away from the workplace compromises the quality of care we are able to provide as an organization."
    - Jury could interpret that FMLA leave could place job in jeopardy
  - Expense verification
    - Beyond that required upon request for medical certification
    - No correlation to identifying whether condition qualified as serious health condition for purposes of FMLA
    - Jury could infer employer requested receipts to further discourage by making FMLA approval more difficult

FMLA Retaliation

- Circumstantial evidence of retaliation for leave
  - Temporal proximity – Fired two weeks after returning from intermittent leave
  - Employer's comments
    - Emergent leaves caused quality of care to suffer
    - Continued unpaid leave compromises quality of care

Application to Your Business

- Be careful
  - Limit requests to medical certifications
  - Clearly identify the notice expected
  - Always, and especially in situations where employee has utilized FMLA leave, document performance issues
  - **REMEMBER** regardless of staffing needs, employment decisions affecting a current employee cannot be made based on FMLA (*i.e.* Cannot fire employee for taking FMLA leave)

Questions???

THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.