Employment and Labor Law Conference

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Owatonna Country Club

GISLASON & HUNTER LLP

Sexual Harassment

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Overview

- Defining sexual harassment
- Establishing a policy
  - Minimizing Employer Liability
- Complaint procedures in a #MeToo world
- Investigation procedures
- Hypotheticals

The Law

- Sexual harassment is a form of sex discrimination
  - Title VII
  - MN Human Rights Act

Unlawful for employer to discriminate against an employee with respect to terms, conditions, and privileges of employment because of that employee's sex.

Elements of Sexual Harassment Claim

- Quid pro quo
- 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

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 interfering with the employee's performance or creating an intimidating, hostile, or offensive work environment

Unwelcome Conduct

Unwelcome when the employee:

- Did not solicit;
- Did not encourage or incite; and
- Conduct was is 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

Defining Sexual Harassment:
Hostile Work Environment

- Sufficiently severe or pervasive to alter the employee's conditions of employment
  - Not a general civility code
  - Single occurrence (not quid pro quo) – does not establish a hostile work environment; but, must be investigated
- Environment must both objectively and subjectively offensive:
  - "[O]ne that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993))

Hostile Work Environment: Factors Considered by the EEOC & Courts

- Frequency of the discriminatory conduct
- Severity of the conduct
- Whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and
- Whether the conduct unreasonably interferes with an employee's work performance
  - Keep him from advancing in his career
  - Discourage employee from remaining at the job
- Effect on the employee's psychological well-being
  - Considered, but a showing is not required

Employer Liability

- Harasser is a Proxy for the Employer
  - High-ranking member of management
    - Ex. CEO, President,
  - *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) – President made sexual innuendos, dropped objects requesting women to bend over for them, suggested employee offered sex to make sales, "You're a woman, what do you know;" "We need a man as the rental manager;" Let's go to the hotel and negotiate your raise
- Associated with Tangible Employment Action / Quid Pro Quo
  - Employer strictly liable for harassment by supervisor that results in tangible employment action
  - Piggybacks on Proxy theory – in employee's eyes, supervisor is deemed to act on behalf of the company
    - Termination, promotion, raise

Employer Liability

- Knew or Should have known of the Harassment
  - Hostile work environment
  - Evaluated pervasiveness of the harassment to provide notice to employer:
    - Remoteness of the location of the harassment as compared to location of management
    - Whether harassment occurred over a long period of time
- **Faragher/Ellerth Affirmative Defense**
  - Hostile work environment harassment
  - Employer exercised reasonable care to prevent and correct workplace harassment; and
  - Employee failed to take advantage of the employer's preventative or corrective mechanisms provided

Faragher/Ellerth Affirmative Defense

- Effective preventative program (EEOC Guidance)
  - Explicit anti-harassment policy "clearly and regularly communicated to employees and effectively implemented"
  - Designed to encourage victims to report harassment
  - Does not require the victim to confront the accuser before reporting
- Immediate and Appropriate corrective action
  - Disciplinary action proportionate to the offense
    - Suspension
    - Transfer of accused
  - Training – employees and supervisors

I - Policy

- Define sexual harassment
- Express a zero-tolerance approach
- Complaint procedures – 2 avenues
- Anti-retaliation
- Limited Confidentiality
- Investigation

Sample Policy

Discrimination and Harassment Prohibited

Company expressly prohibits and it is illegal to discriminate against and harass others on the basis of sex, . . . sexual orientation (including gender identity), . . . or membership or activity in a local commission. Harassment includes, but is not limited to physical conduct, jokes, derogatory comments, visual behavior (e.g. staring or looking an individual up and down), posters, and drawings.

Sample policy - Harassment

Sexual harassment is also prohibited and illegal, for it is a form of unlawful discrimination on the basis of sex. Sexual harassment includes, but is not limited to, any unwelcome sexual advance, request for sexual favor, and other verbal or physical conduct of sexual nature when:

- An employee's submission to this conduct is made a term or condition of employment either explicitly or implicitly; or
- The employee's submission or rejection of this conduct is used against such an employee as a factor in any employment decision which affects that employee; or
- This conduct either has a purpose or the effect of unreasonably interfering with the employee's work performance; or
- This conduct creates an intimidating, hostile or offensive working environment for the employee.

Sample policy - Harassment

A violation of this policy will result in disciplinary action up to and including immediate termination of the violating employee.

Complaint Procedures

If you believe you were discriminated against or harassed in violation of this policy, you should report the violating behavior to your direct supervisor or Company's HR director. You will not be retaliated against or face any adverse employment action for reporting harassment or discrimination. You will also not be retaliated against for participating in an investigation of harassment or discrimination.

Sample policy - Harassment

Investigation Procedures

Company will investigate reports of discrimination and harassment. Investigations are completed on a case-by-case basis and may involve interviews with the alleged victim, accused, the reporter, his/her co-workers, and supervisors. To the extent possible, Company will respect a reasonable request for privacy made by the individual reporting the harassment or discrimination. However, a request for privacy will not be accommodated if such would impede Company's ability to investigate the report and take appropriate action regarding the report, or such request for privacy is in violation of applicable federal or state law.

Employee Handbook Tip

- Ensure your disciplinary policy is flexible to reflect a zero-tolerance policy for harassment and discrimination
- Avoid step disciplinary plans and point systems, when possible
  - Include a disclaimer that the steps/system is only a guideline. **Employer reserves the right to take any disciplinary action it deems necessary and appropriate under the circumstances, up to and including immediate termination**.

Should Your Company Review and Accept #MeToo Complaints?

- Review and Investigate
  - When seen or brought to your attention.
  - Can identify a party involved
    - Alleged victim
    - Accused
    - Reporter
- Minimize your exposure
  - Do not friend, follow, or monitor employees' social media
- Use #MeToo posts as Training Tools
  - Send a memo to staff reminding them of the policy and complaint procedures
  - Schedule anti-harassment and discrimination training

II - Investigations

- Begin Immediately
- Impartial investigator
  - Not the accused, victim, reporter, direct supervisor
  - Consider the depth of the complaint and whether 3rd party investigator (i.e. counsel) is appropriate
- Separate the Parties
  - Caution – an adverse employment action in response to an individual's complaint to harassment or discrimination is a violation of the law
  - If the alleged victim and accused work together
    - Consider changing the accused's shift / facility
    - Consider placing the accused on a leave of absence

Investigations

- Interview the Parties Involved
  - Advise the parties to not discuss with others
    - Who have you discussed the allegation(s) with?
    - When, why?
    - Content of the conversation; Whether the conversation was memorialized in any way (e.g. notes, text message, audio recording, email)
  - Remind interviewees that you cannot guarantee confidentiality; disclosure to the extent necessary
- Interview Supervisor
- Interview Co-workers
  - Remind <u>all</u> interviewees they cannot be retaliated against for their participation or report

Investigation Tips

- Use a private location
  - No windows
  - Be discrete when possible (i.e. Do not require a walk of shame)
- Show Interest and Concern
- Gather the facts
- Take Notes
  - To best of your ability, include quotes
  - Record the facts – impressions and opinions should not be included in your interview notes
    - Notes may be given to others
    - Notes may become evidence
    - Opinions and impressions should be noted separately
  - Avoid audio and visual recording when possible
    - Discoverable in lawsuit
    - You may discover that investigation becomes a training moment for supervisors

Sample Investigation Questions: Victim

- EEOC Vicarious Employer Liability Guidance
  - Who, what, when, where, how often, how did this affect you?
  - What was your response?
  - Witnesses
  - Documentation regarding the harassment?
  - When did you report?
  - How would you like the matter resolved?

Sample Investigation Questions: Accused

- What is your response to the allegations?
- Explanation
- Witnesses
- Documentation
- Remind accused of policy and disciplinary action

Sample: Investigation Questions Coworkers

- Have you witnessed harassment while employed at Company?
  - What is your definition of harassment?
    - If incomplete, provide definition of harassment.
- A report was made that individual(s) within the Company have engaged in behavior that may constitute sexual harassment:
  - Comments
  - Drawings
  - To your knowledge, have these activities occurred?
    - Basis of that knowledge
    - Witnesses
    - Dates – How do you remember it occurred on that date?
    - Did you report the behavior? (When, to whom, why not?)

Investigation Objectives

- Was the conduct complained of sexual harassment?
  - Unwelcome;
  - Behavior of a sexual nature; that either

(a) was explicitly or implicitly used as a basis of an employment decision; or

(b) was severe and pervasive enough to:

- (1)either explicitly or implicitly effect a term or condition of employment
- (2)unreasonably interfere with the employee's performance or create an intimidating, hostile, or offensive work environment for the employee

Investigation Objectives

- Was there a tangible employment action during time of the alleged harassment?
  - Promotion
  - Performance review
  - Facility transfer
  - Employee place on probation
  - Leave of absence denied
- What was the reasoning for this employment decision?

Investigation Objectives

- What actions were taken by the supervisor and/or individual receiving the report of harassment, prior to the investigation?
  - *Faragher/Ellerth* defense

Investigation Process: Training Tool

- At the conclusion of every interview, remind the employee that harassment and discrimination is prohibited at the Company
  - Read the anti-harassment and discrimination policy
  - Remind employees where they may access the policy
- Remind employees of the reporting procedures
  - Report harassment whether he is individual harassed or witnessed another being harassed
  - Ask if they know who to report to – 2 options
- Remind supervisors of their responsibility to address harassment and discrimination
  - Whether reported or only seen
  - Report to HR representative or higher-level of management
  - Document the report

Take Action
Additional Liability Concerns

- Discipline
- Retaliation – alleged victim
- Defamation - Plaintiff must show: statement was false, communicated to an individual other than plaintiff, and harmed the plaintiff's reputation and lowered him in the eyes of the community
- Libel – Plaintiff must show:
  - Disclose reason for termination or transfer with caution
  - Limitations –
    - Notice of termination / truthful reason for termination. Minn. Stat. § 181.933, subd. 2 cannot be basis for libel (written), slander (verbal), or defamation lawsuit
    - Personnel record information disclosed pursuant to Minn. Stat. § 181.967
      - Request for information (ex. EEOC investigation)

Hypotheticals

- The Attractive Male Secretary
  - Bryan is Ann's secretary
  - Ann frequently tells Bryan how attractive she finds him, and suggests that he wear tighter shirts to flex his muscles
  - Repeatedly comments how about how great she believes Bryan would be in bed. Ann's comments have continued over the last 6 months
  - In response to Bryan's request for a raise, Ann states that she would only consider a raise if Bryan has dinner with her
  - Bryan is uncomfortable and reports Ann to HR. When Ann discovers the report, she transfers Bryan

The Attractive Male Secretary

- Did Ann sexually harass Bryan?
  - Unwelcome behavior of a sexual nature
  - Severe or pervasive as to create hostile work environment
  - Objective: Reasonable person would find her comments offensive, given that they are unwelcome and sexually suggestive
  - Subjective: Bryan found them unwelcome and offensive

The Attractive Male Secretary

- Was Ann's transfer of Bryan to another department unlawful retaliation?
  - Bryan reported what he believed was sexual harassment
  - Actionable retaliation – determine whether transfer is an adverse employment action (change in pay, less desirable position, affects career advancement)
  - Regardless, employers should frown on such behavior

Hypotheticals

- The Lone Wolf
  - David worked in the hog barn with 10 other males
  - David was flamboyant and was frequently picked up from work by his husband because David did not have a driver's license
  - His co-workers began placing a sign on David's locker that read, "Heterosexual replacement on duty"
  - This persisted for 2 weeks before David reported the behavior to Supervisor
  - Supervisor laughed and said, "It's just a joke. Get over it!"
  - David quit the next day

The Lone Wolf

- Did David's co-worker's behavior constitute harassment?
  - Unwelcome behavior
  - Done on the basis of either
    - David's sexual orientation; or
    - David's "failure" to conform to the stereotypes of a heterosexual male
  - Offensive
    - Objectively: Reasonable person would find the co-workers' behavior was offensive and humiliating
    - Subjectively: David found it offensive
  - Severe or pervasive to cause a hostile work environment
    - Persisted for 2 weeks; replaced

The Lone Wolf

- Did Supervisor handle the situation appropriately?
  - Supervisor's feelings about behavior should not hinder their compliance with anti-harassment and discrimination policies and procedures
  - All supervisors should be instructed to forward reports to HR, regardless of severity

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.

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Politics and Free Speech in the Workplace

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Methodology

- Picked the topic because it interested me (Yes, it's all about me.)
- I took real world politics and free speech in the workplace problems I've addressed in recent years
- Added some recent cases from the news
- Subject matter is a mixed bag

Overview

- Motivations
- Real Life Problems
- Solutions
- Deal with substance as we go
- Your questions, comments, war stories welcome any time

Motivations for ERs to Deal with Politics and Speech (In case it wasn't obvious)

- "Politics is war by other means."—Jeff Deist, (Corollary to Carl von Clausewitz's statement "War is politics by other means." *On War*, 1823)
- Harmony
- Productivity
- Public Perception of ER

Real Life Problems

- All of these happened
- To me or someone else
- Some facts changed to protect the innocent or make things more interesting
- Some you will recognize from the media
- We'll just state the all the problems first, then discuss

DENNIS WON'T SHUT UP

Dennis Won't Shut Up.

- "A fanatic is one who can't change his mind and won't change the subject." - Winston Churchill
- Dennis is a member of the Anarcho-Syndicalistic-Communitst Party.
- Dennis hates the R and D parties and talks politics constantly.
- He doesn't say anything in direct violation of company policy but he just has no other setting—everything turns into a discussion of politics.

Dennis Won't Shut Up. (Cont.)

- Example: https://www.youtube.com/watch?v=JvKIWjnEPNY
- Dennis usually manages to avoid getting people openly mad at him, but he just won't take the hint.
- Can ER ABC Corp tell Dennis that he must stop talking politics in the workplace?

DENNIS WON'T SHUT UP SOLUTION

Dennis Won't Shut Up.

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Legal Framework—Since this is an easy one

- Common Law Starting Point—Employment at Will
  - The employment relationship is a consent based relationship.
  - In the absence of a restriction to the contrary, ERs may hire, fire, discipline, promote etc. based on any criteria chosen by the ER including political affiliation.
  - ER may absolutely prohibit and require speech.
  - ER may hire, fire, etc. for off duty behavior with no work nexus.

The First and Fourteenth Amendments (and State Equivalents)

- Do not directly alter common law
- Are restrictions on the Federal (or state) Government, not on citizens or ERs.
- But can give us some insight into the kind of behavior our society values and protects

First Amendment—Freedom of speech

- "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourteenth Amendment

- The Constitution protects political association as well as individual political expression. One of those precious associational freedoms is the right of "like-minded persons to pool their resources in furtherance of common political goals." *Buckley v. Valeo*, 424 U.S. at 15, 22, 96 S.Ct. at 636.
- Political parties enjoy a constitutionally protected right of association, and any interference with that right is an interference with the rights of the party's adherents. *Cousins v. Wigoda*, 419 U.S. 477, 487, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975).
- Any restriction on either of these dual rights "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968) must be subject to strict judicial scrutiny. *Minnesota Fifth Cong. Dist. Indep.-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650, 652 (Minn. 1980)

Statutes alter the common law

- Make some discrimination illegal (CRA, ADA, MN HRA, etc.)
- Some statutes "protect" 1A and 14A "rights" as against ER
  - Wait, what?
  - Most amendments act as things that the government can't do. Then governments turn around and say that citizens can't do them?
- Some statutes are limited in what they can do, because of the 1A.
- Some statutes explicitly limit other statutes (RFRA)

Minnesota Statues 10A.36 REPRISALS PROHIBITED; PENALTY.

- **“**[Employers] must not engage in economic reprisals or threaten loss of employment . . . against an individual . . . because of that individual’s . . . political contributions or political activity.” “An individual or association that violates this section is guilty of a gross misdemeanor.”
- “contributions” are fairly easily defined.
  - Money
  - In kind donations
- But what makes something “political”?
  - DFL/GOP—of course
  - Explicitly non political—of course not
- Mixed? (nearly every trade group has a lobbying arm)
  - Given the context of 10A.36, most reasonable interpretation is that if contribution would be reportable under Campaign Finance Disclosure law, Minnesota Statute section 10A.20, then it is a “political contribution.”

Is Dennis Protected?

- Is Dennis's workplace advocacy protected political activity under Minn. Stat. 10A.36?
  - No.
  - Even if it's political, ER may control workplace activity.
- Is Dennis's membership in Anarcho-Syndicalistic-Communitst Party protected political activity under Minn. Stat. 10A.36?
  - Yes.
  - It's political activity but Manager isn't looking to stop or punish Dennis's membership, he's looking to change his work place behavior.
- As in all adverse employment actions, why the ER is taking the action is the most important piece.

Solution:

- Yes, ER can tell Dennis to shut up about politics in the workplace.

But what if?

- Politics as a proxy for a protected class:
  - Minn. Stat. 363A.02 and Title VI of the Civil Rights Act of 1964. 42 U.S.C. 2000e-2 both prohibit
    - "Albanian American Organization Chameria"
  - Politics as a perceived proxy for a protected class
- Unequal enforcement of a no politics policy resulting in a claim of protected class discrimination.
  - What if Dennis, and all other men in the office, are told to shut up but women are not?
- We will see that there are some forms of "political" speech the ER can't prohibit.

Dennis won't shut up.

Questions/Comments?

QUIET PARTY ACTIVIST

Quiet Party Activist

- ABC Corp is nonpolitical and has no desire for a politically charged workplace or political identity.
- Manager Moe is the Chair of his County Republican Party. He has never been a candidate but he runs the local party.
- Moe never talks politics at work and if you knew him you would never guess he was involved in politics.
- Moe contributes about $2,000 a year to local candidates. In the past he has contributed to contentious ballot issues including opposition to the gay marriage amendment. He never talks about these things with other employees.
- ER provides all managers with: cell phone, cell number, personal computer, server, and email address.

Quiet Party Activist (Cont.)

- Moe uses all of these in his role as Party Chair (and for all of his personal needs; he doesn't have his own phone, number, computer, email address).
- Moe is salaried and occasionally takes calls and emails on Party business from his office.
- ER has a "community service and marketing" requirement of 200 hours per year. Moe logs his time serving as Party Chair as CS hours.
- The County Republican Party usually meet's at a local bar. Sometimes, these meetings include a teleconference or need AV equipment. ER lets Moe host these meetings in ER's board room after hours.
- Problem?

QUIET PARTY ACTIVIST SOLUTION

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- Problem?

Believe it or not, your employees can put your name on a political cause . . . sort of . . . indirectly.

- Campaign Finance Disclosure: Minnesota Statute section 10A.20
  - "The treasurer of a political committee, political fund, principal campaign committee, or party unit must" file Campaign Reports including "the name, address, **employer, .** . . , of each individual . . . that has made . . . contributions . . . , that in aggregate within the year exceed $200 for legislative or statewide candidates or more than $500 for ballot questions,"
  - "A donation in kind must be disclosed at its fair market value."

Subd. 8.Exemption from disclosure.

- “The board must exempt a member of or contributor to an association or any other individual, from the requirements of this section if the member, contributor, or other individual demonstrates by clear and convincing evidence that disclosure would expose the member or contributor to economic reprisals, loss of employment, or threat of physical coercion.”
- “An association may seek an exemption for all of its members or contributors if it demonstrates by clear and convincing evidence that a substantial number of its members or contributors would suffer a restrictive effect on their freedom of association if members were required to seek exemptions individually.”

But does this exemption protect an ER's image?

- Commission's public decisions (where non disclosure is approved) try to keep ER and EE anonymous, but they need to delve deep into specific facts.
- Result: Instead of public learning "Moe Manager contributed to Cause X and Moe Manager works for ABC Corp." public learns "Mr. Doe works for ABC Corp and there is substantial evidence that ABC Corp is the type of employer that would punish employees for their political views."

What about Moe's use of cell phone, etc.?

- These would be reportable political contributions under Minnesota Statute section 10A.20 if they exceed the dollar thresholds.
- Minnesota political parties love to hit each other with these kinds of violations.
- The political entity would be the subject of the complaint but the ER's name would be all over the complaint and any media coverage.

Solutions:

- Better monitoring of “public service” program. Don’t prohibit political activity but don’t reward it.
- Define appropriate uses of company devices and resources . . . but be careful, there are limits to the limits. As per next section.

Quiet Party Activist

Questions/Comments?

COMMON SENSE FACEBOOK REGULATION

GISLASON & HUNTER LLP

ER wants to:

- 1) Maintain harmony in the workplace
- 2) Have employees working during work hours and not politicking
- 3) Avoid having its resources used for any purposes other than its own
- 4) Maintain a non political, non controversial public image

ER enacts the following policies:

- "Zero Tolerance" Bullying Policy
- Subjective Harassment Policy: "EE's will not engage in any behavior which other EEs perceive as harassment."
- "EEs may make incidental personal use of company provided cell phones, computers, and servers. At no time may EEs use company technology for political purposes."
- "EEs shall not mention ER in any social media format. Keep workplace issues in the workplace. We have an open door policy, if you have a problem with a coworker or employer, please deal with it professionally and in house. Don't air our dirty laundry on Facebook"
- Problem?

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- Problem?

Yep, here's the problem,

- Dennis has a beef with Moe
- On his day off, Dennis posts on his Facebook page "I'm tired of Moe treating every EE like an inferior and repressing me. He's running ABC Corp into the ground and it's time we did something about it!"
- Most ABC EEs aren't actual friends with Dennis but they are Facebook Friends because Dennis puts out some quality cat videos, one pot dinner recipes, and dank memes. They post dozens of comments. Some attack Moe's management style, some attack his haircut, most employees support Moe and say that Dennis is the problem.

Yep, here's the problem (Cont.)

- Some of the comments are pretty offensive including . . . well . . . use your imagination.
- Moe feels harassed and threatened by these posts.
- ABC Corp fires Dennis for violation of its bullying, harassment, and social media policy.

What's the problem?

- At common law, ABC Corp is free to do this
- The 1A protects Dennis's right to speak but only against the gov't
- The 14A protects Dennis's right to associate but only against the gov't
- ?

National Labor Relations Act

- Significant departure from common law.
- Some say significant departure from 1A and 14A
- Doesn’t just apply to EEs in unions
- Section 7 of the NLRA guarantees EEs "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,"

An ER may not discipline or discharge an EE for activity if:

- (1) the activity engaged in by the EE was "concerted";
- (2) the ER knew of the concerted nature of the activity;
- (3) the concerted activity was protected by the NLRA; and
- (4) the d or d was motivated by the EE's concerted, protected activity.

Was Dennis's post "concerted activity"?

- "engaged in with or on the authority of other EEs, and not solely by and on behalf of the EE himself;"
- or
- "circumstances where individual EEs seek to initiate or induce or prepare for group action;"
- EE doesn't need to label his speech as concerted activity or even understand the nature of what he's doing. If it calls or prepares for group action, it is concerted.
- Dennis was calling for group action so yes, it was concerted
- Even if no one liked or responded to his post, it would be concerted.

The rest of the calculus

- ER “knew” it was concerted because on its face it met the criteria for concerted. This bar of ER knowledge is very low. ER does not have to understand that the action is protected or for organizing purposes
- It is protected by the NLRA because it was for the “purpose of mutual aid or protection.”
- ABC Corp’s discharge of Dennis was motivated by the post.
- ABC Corp’s discharge of Dennis was in violation of the NLRA

The policy was probably wrong too.

- NLRB has criticized policies which could be interpreted as discouraging or prohibiting concerted action.
- NLRB has criticized “overly broad” policies
  - “Zero tolerance” bullying policies
  - Subjective harassment policies
- Where legitimate management concerns about harassment and harmony conflict the free exercise of Section 7 rights, Section 7 wins.
- *Most of these decisions were Obama era, many included dissents*

Via the NLRA, the FG limits ER's ability to limit EE speech

- all non-supervisory employees have the right to engage in concerted communications about such matters as pay, benefits, and workplace safety as long as they do so in a lawful and proper manner.
- Doesn't protect "purely political" speech, but does protect "Mixed communications."
  - "Vote for Sally" Not protected
  - "Fight for $15!" Protected
  - "Vote for Sally, she'll fight for $15!" Probably protected

Solution

- Social media policy may prohibit EEs from speaking or appearing to speak on behalf of ER.
- If EEs can use SM and technology for personal purposes, then they may use them for Section 7 purposes
- “Savings” clause: “Nothing in this policy should be construed as discouraging EEs from engaging in concerted activity as defined in the NLRA.”
- Give more thought to terminations than perfect policies

Social Media/NLRA

Questions/Comments?

PETA PERSON IN A HOG BARN

PETA Person in a Hog Barn

- Pork confinement operations have been targeted by undercover cameras—PETA members get jobs in barns and then film conditions.
- ER Porky Producer wants to do social media investigation of all applicants and refuse to hire anyone affiliated with PETA.
  - Can Porky do this? Should Porky do this?
- Porky also wants to explicitly ask “Are you a member of PETA, ASPCA or the Humane Society?
  - Can Porky do this? Should Porky do this?

PETA Person in a Hog Barn (Cont.)

- Greta Granola applies for a job as a nursery tech. The job pays $35K/year. Greta has a BA in political science and a master's degree in sociology.
- ER looks at Greta's Facebook page. It says nothing about PETA but Greta has 17 cats, once liked a post about "Justice for Harambe" and generally looks like a tree hugger.
- Greta lives over an hour away and says she plans to commute. She has no ties to the local area.
- Greta is completely qualified for the job but ER is convinced that Greta is "one of those people" and will not hire her.
- Problem?

PETA PERSON IN A HOG BARN SOLUTION

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- Greta is completely qualified for the job but ER is convinced that Greta is "one of those people" and will not hire her.
- Problem?

Legal Framework:

- Is PETA association protected class under Minn Stat 363A.02 (MN HRA)?
  - No.
- Is PETA association protected under 42 USC 2000e-2?
  - No.

But: Minnesota Statues 10A.36 REPRISALS PROHIBITED; PENALTY.

- “[Employers] must not engage in economic reprisals or threaten loss of employment . . . against an individual . . . because of that individual's . . . political contributions or political activity.” “An individual or association that violates this section is guilty of a gross misdemeanor.”

Is PETA association political activity under Minn. Stat. 10A.36?

- Ehhhhhhhhh . . . probably need a close look.
  - Web page urges supporters to contact politicians, provides their contact information, advocates for and against specific ballot measures and legislation
  - So, probably, yes.
- And keep in mind, Greta hasn't done anything at work yet so inherently we're talking about membership, not any work activity.

Is there a bona fide qualification defense under Minn. Stat. 10A.36?

- "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."
- Not litigated yet, but very likely, yes.
- But do you want to be the test case? No.

Solution: So what do you do?

- Directly ask the question?
  - If applicant is set on espionage/sabotage, are they going to answer honestly?—probably not.
  - If they answer honestly, and you refuse to hire, and they are set on fighting you, hello lawsuit . . . you'd probably win.
  - If they answer dishonestly, and you later find out, you can fire for providing false information . . . but that might be after the damage is done.
- Use social media to determine applicant's feelings?
  - What if you find information regarding a protected class?
- Use a "screening service"?
- What if you do all of the above and find nothing definitive?

- No really, what would you do?

Overqualified—Is that a thing? Is that just a dodge? Is that a cover for illegal discrimination?

- With nothing else to go on, can you turn Greta down and, if called to answer why, say she was over qualified?
- Why is someone with a masters applying for this job?
- Refusing to hire for “overqualified” is not expressly prohibited by any statute or case law.
- But it sure shows up a lot in discrimination cases; lends itself to allegations of “pretext.”
- “Overqualified” does turn up in UI cases as a valid reason for an EE to turn down replacement work.
- So there’s at least the beginnings of an argument that “overqualified” is a legitimate position for the ER to take.

So really, what does a pork producer do?

- 1. Explicitly state that the job includes caring for animals in a confinement setting including euthanizing animals in a manner approved by the USDA and in keeping with industry standards.
- 2. Get applicants to acknowledge in writing that they have no objection to the above.
- 3. Have screening service prescreen applicants.
- 4. Have strict no device in the workplace policy.
- 5. For any adverse employment action, focus on the objection to the bona fide required work, and not on any political affiliation—It's not because she's a member of PETA, its because she's stated opposition to what we do.

PETA person in a hog barn

Questions/Comments?

INAPPROPRIATE INTERVIEW

Inappropriate Interview

- ER is non political and has no desire for a politically charged workplace.
- Manager Moe (Republican County Chair) is hiring for a middle management position.
- Nothing about this position or process is political.
- A quick google search of Manager Moe show his political affiliation.

Inappropriate Interview (Cont.)

- Applicant Al interviews. Al goes out of his way to make it clear that he is a Republican. Mentions that he will be attending the state convention, and other things. None of this is in any way connected to the interview.
- Moe finds this inappropriate and, because of this, doesn't want to hire Al.
- Problem?

INAPPROPRIATE INTERVIEW SOLUTION

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- Moe finds this inappropriate and, because of this, doesn't want to hire Al.
- Problem?

What would you do?

Solution:

- Don’t hire, or at least feel free to use inappropriate interview behavior as a reason to not hire.
- But there is danger; analogue to EE who brings up any other protected class information in interview (kids, race, religion, etc.)
- Need to think:
  - Can you actually articulate the true reason?
  - Is the lack of judgment a reason to not hire?

Questions/Comments?

“DOXING”

"Doxing"

- EE Joe Bagadonuts participated in a rally last week. The rally "turned violent."
- Joe did not break any law, didn't hurt anybody, and didn't really do anything; he was just there.
- Someone took Joe's picture, knew his name, and posted his picture at the rally with his name, on the internet.
- Joe is a member of the Nationalist Socialist Workers Party of 'Merica, which hosted the rally. The Party "has been described as fascist and racist."
- Joe has donated money to the Nationalist Socialist Workers Party of 'Merica.
- In the past 24 hours, ER's service line has been going non stop with people telling ER that EE Joe Bagadonuts is a fascist and that they will not shop at ER until Joe is fired.

"Doxing" (Cont.)

- Chairman of an organization called "We're Not Fascists, YOU ARE!" says a protest is planned for your business tomorrow if you don't fire Joe.
- ER uses PayBuddy to receive payments. PayBuddy's CEO calls and says: "you have 48 hours to fire Joe or we discontinue service."
- Moe Manager says: "Joe is making $12.00 an hour running a punch press. He can find another job. We can't survive the bad publicity this is bringing us. Get rid of Joe."
- Problem?

“DOXING” SOLUTION

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- Problem?

What would you do?

How far is this from reality?

- Cole White was photographed at a “white supremacists” rally.
- According to the Washington Post, Employer Top Dog:
  - “The restaurant’s Facebook page has been deluged with complaints about White, and its Yelp page is under “active cleanup alert,” due to the high number of people posting negative comments about him (Yelp’s note says it tries to remove comments related more to news events than users’ experience with the business). One sample review: “Great place for Neo-Nazis. For people who aren’t Neo-Nazis? Not so much. A hot dog is a hot dog, but a hot dog place that not only employs Neo-Nazis but posts alt-right screeds on their webpage is a place that makes me want to vomit. But if you hate minorities, you might have a friend in Berkeley’s Top Dog.””
- ER fired Mr. White

Can they do this?

- Statutory protection?
- Is this political activity under Minn. Stat. 10A.36?
- Can the ER say “we’re not firing him for the rally, we’re firing him because our customers demand it.”?

Solution:

- If this were in Minnesota, it would be a close call.
- In Mr. White's case, we know nothing about his political affiliation. We know there was a riot, and he was there so ER can probably claim ignorance of politics.
- In our hypo, EE is affiliated with a political party, could be more of a problem.
- ER would probably have a good defense if it knew of party affiliation before but did nothing.
- Very thin margin between reasons here.

Questions/Comments?

TRUMP INDUCED DEPRESSION

GISLASON & HUNTER LLP

Trump Induced Depression.

- All of ER's managers attend an annual conference in Las Vegas.
- Conference is at a resort owned in part by Donald Trump.
- Rooms in the resort are at a deep discount for the conference
- Sally says "I can go to the conference but I can't stay at the resort because Donald Trump is a part owner. If I stay at a hotel owned by Donald Trump I will have a nervous breakdown."
- Sally has a diagnosis of depression. In the past she has had some rough times and ER has accommodated time off as FMLA. Sally claims that she has a disability and we need to accommodate her.
- She demands that the ER pay for a room in a nearby hotel and provide transport to and from the conference.
- Yes, this really happened.

SOLUTIONS AND SUBSTANCE

TRUMP INDUCED DEPRESSION SOLUTION

GISLASON & HUNTER LLP

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- Yes, this really happened.

Trump Induced Depression.

- Imponderable: How did she know DT owned this hotel? It didn't have Trump in the name. Did she research this so that she could be upset?

What would you do?

Solution:

- Treat like an ADA request for accommodations.
- Tell her you'd be happy to accommodate her needs but you will need medical evidence of this restriction.
- Done, right?
  - 'cause there's no way this is real and so there's no way Sally comes back with a note,
    - right?
      - Right?

WRONG!

- Sally's doctor provides a note saying that Sally will suffer a nervous breakdown if she has to stay in a Trump hotel
- He "prescribes" an accommodation of a separate hotel and cab fare.

So Now What?

- Get a second opinion?
- Accommodate as written?

Solution:

- Tell Sally: "We are paying $50 per night for everyone's room. We are not paying anyone's cab fare. We will pay you $50 per night and you can stay where you want; you are on your own getting to and from the conference."
- *This is iffy*
- Sally couldn't find a hotel she wanted to pay for, stayed at the Trump resort, didn't die.

Trump Induced Depression

Questions/Comments?

Bonus Problem: NFL Players Not Kneeling

- Can they be fired for this?
- What if they were kneeling to bring attention to TBI/concussions in the NFL?

FIN

- Any last comments or questions?

THANK YOU!

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Employment and Labor Law Conference

Thursday, February 22, 2018

Owatonna Country Club

GISLASON & HUNTER LLP

When They Come For You: Responding to Government Audits and Charges

Jennifer G. Lurken
jlurken@gislason.com

GISLASON & HUNTER LLP

Wage and Hour Audit Request

- Process:
  - Complaint is filed with the MN Dept of Labor and Industry (“DOL”).
  - Employer receives notice and request for self-audit.
  - Employer responds to notice and request for self-audit.
  - Employer received Notice of Initial Findings.
  - Respond to Notice of Initial Findings or request an informal conference with DOL.
  - Receive decision.
  - Appeal?

Wage and Hour Audit Request

Wage and Hour Audit Request

- Stay calm.
- Collect the information.
- Review the information.
- Call in reinforcements.

Wage and Hour Audit Request

- What information to collect?
  - List of all employees employed in the relevant time frame.
  - Hours worked for each employee.
  - Amount each employee was paid.

Wage and Hour Audit Request

- Make sure each employee was paid for each hour worked.
- Make sure each employee was paid minimum wage for each hour worked.
- Make sure each employee was paid for overtime worked.
- Make sure calculation of overtime pay was correct.

Wage and Hour Audit Request

- Notice of Initial Findings- stating employer violated the law.
- Response
  - DOL's facts correct?
  - Exemption apply?

Wage and Hour Audit Request

- Facts:
  - Missing facts? Incorrect fact?
  - If so:
    - Collect documents
      - Job descriptions
      - Time cards or documentation showing hours worked
      - Pay stubs or documentation showing amount paid
      - Proof of the actual work performed

Wage and Hour Audit Request

- Respond to the Notice of Initial Findings
  - Concede your prior good-faith interpretation of the law was incorrect and voluntarily agree to pay the back wages, OR
  - Request an informal conference.
    - Submit a response to Notice referencing exemption if one applies and providing supporting documentation.
- Receive decision
- Decide whether to appeal.
  - By appealing, at risk for paying double the back pay.

EEOC/MDHR Charge

- Charge filed with EEOC/MDHR.
- Employer receives Notice of Charge letter
- Internal investigation
- Answer and position response to EEOC/MDHR
- MDHR Commissioner's Investigation

EEOC/MDHR Charge

- Stay calm.
- Collect the information.
- Review the information.
- Call in reinforcements.

EEOC/MDHR Charge

- Notice of Charge
  - Outline of charge filed.
  - Requirements for response.
  - Deadlines
    - MDHR- Usually 20 days after receipt
    - EEOC- Usually 30 days after receipt
  - Procedures for filing the response.

EEOC/MDHR Charge

- Internal Investigation
  - Who conducts the investigation?
  - Who should be interviewed?
  - Where should the interviews take place?
  - What information should be provided to employees?

EEOC/MDHR Charge

- Answer and Position Response
  - Factual Background
  - Disclosure of Internal Investigation
  - Legal Discussion
  - Supporting Documents

EEOC/MDHR Charge

- Commissioner's Investigation
  - May investigate. Not always.
  - May send requests to employer for written responses to questions or requests for documents.
  - May depose witnesses.
    - Employees should be notified of their obligation to comply with these requests.

Gislason & Hunter LLP can help:

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

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

Questions???

THANK YOU!

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Employment and Labor Law Conference

Thursday, February 22, 2018

Owatonna Country Club

GISLASON & HUNTER LLP

Recent Employment Law Cases and Legislative Update

Presented By

Brock Alton

balton@gislason.com

February 22, 2018

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

Key Themes (Excuses?)

- Federal Level
  - President Trump ordered a full stop to all rule making
  - Many agency vacancies remain
  - Not much legislation in works
  - 8 SC Justices
- State Level
  - R legislature, D governor
- E Law attorneys starving/rioting in the streets!
  - Too much certainty!
  - Fear lack of lawsuits!!
  - Demand new laws NOW!!!

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

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

Wage Theft Prohibition Bill

HF 1391 & SF 1329

Still in committee at House and Senate

Key Changes

- Gross Misdemeanor
  - Failure to pay wages due to employee totaling ≥ $10,000
- Retaliation Prohibited
  - Employer has committed wage theft by retaliating against employee for seeking redress for violation of employment payment practices or threatening to seek redress, constitutes
- Earnings Statement per pay period must now include
  - All rates of pay for respective pay period
  - Employer's contact info (main office address, mailing address, telephone #)
- Payment Schedule
  - @Least once every 16 days

Notice Required at start of employment

Amends Minn. Stat. § 181.032

(d)(1) the rate or rates of pay and basis thereof, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method; . . .

(3) paid vacation, sick time, or other paid time off accruals and terms of use;

(4) whether the employee is exempt from minimum wage, overtime, and other provisions of chapter 177, and on what basis; . . .

(6) the dates on which the pay periods start and end and the regularly scheduled payday; . . .

(9) the telephone number of the employer.

- Notice must be provided in English AND employee's native language
- Notice must be executed by employee
- Changes to information provided must be provided in writing 7 days before effective date

Payment Schedule

- HF 1391 https://www.revisor.mn.gov/bills/text.php?number=HF1391&version=0&session_year=2017&session_number=0

- SF 1329 https://www.revisor.mn.gov/pages/doctypes/bills/text.php?number=SF1329&version=0&session_year=2017&session_number=0

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

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Sick and Safe Time Ordinances Effective July 1, 2017

- Requires employers to offer leave to employees
  - "Employer" – private employers with at least ONE employee
    - Minneapolis: 6+ employees – leave must be paid
    - St. Paul: leave must be paid
  - "Employee" – works at least 80 hrs/yr in Minneapolis for the employer
- Accrual
  - begin to earn 1st day of employment or July 1, 2017
  - 1 hr for every 30 hrs worked
  - Max of 48 hrs per year
  - Carry over earned but unused for max of 80 hrs

Sick and Safe Time Ordinances Effective July 1, 2017

- Use of sick and safe time
  - After 90 days of employment
  - Employee's illness, injury, health condition, care or treatment thereof, or need to seek preventative care
  - Care for family member
  - Absence due to domestic abuse, sexual assault, or stalking of employee or family member
    - Seek medical attention
    - Obtain services from victim service org./counseling
    - Take legal action
    - Relocation
  - Closure of employer's business due to hazardous material or public health emergency
  - Employer's need to care for family member due to closure of school or daycare
    - Hazardous material or public health emergency
    - Bad weather, loss of power, heating, water, or other unexpected closure

Sick and Safe Time Ordinances
Effective July 1, 2017

- Administered by the Minneapolis Department of Civil Rights
  - (a) The director has broad authority to implement, administer and enforce this chapter. The director shall have broad authority to investigate possible violations of this chapter whenever it has cause to believe that any violation of this chapter has occurred, either on the basis of a report of a suspected violation or on the basis of any other credible information, including violations found during the course of an investigation.
  - (b) The director shall promulgate appropriate rules to implement, administer and enforce this chapter.
- St. Paul – Director of Human Rights and Equal Economic Opportunity

Sick and Safe Time Ordinances
Effective July 1, 2017

- Penalties - highlighted
  - Reinstatement & backpay
  - Payment of sick and safe time not previously credited plus monetary award of hourly pay for the accrued time x 2; or $250, whichever is greater
  - $1,500 (MSP) / $1,000 (SP) administrative fine paid to employee for retaliation and violation of confidentiality

Sick and Safe Time Ordinances
Effective July 1, 2017

- Status
  - Minneapolis ordinance challenged by Minnesota Chamber of Commerce
  - Both District Court and Minnesota Court of Appeals declined to enjoin
  - Legal challenge is not yet over – Scheduling Order just entered in the case

Uniform State Labor Standards Act

Proposed – Passed Minnesota Senate

Uniform State Labor Standards Act

- Leaving authority to develop labor standards to state (in the absence of federal law requiring more)
- Purpose to prevent ordinances
  - Sick and Safe Time
  - City-based minimum wages
  - Minneapolis Working Family Agenda
    - Prohibits local government from establishing ordinances regulating hours or the scheduling of work, except business hours
  - Requiring an employer to provide a particular benefit, term of employment, or working condition
- Vetoed by Governor Mark Dayton

FLSA "White Collar" Overtime Exemptions

June 30, 2017

GISLASON & HUNTER LLP

Obama Overtime Rules – Update

- Exemption for Executive, Administrative, Professionals ("EAP" or "White Collar" exemption); Must meet all three:
  - 1) Salary Basis Test: EE must be paid on a salary with no variation based on quantity or quality of work performed.
  - 2) Salary Level Test: $23,660 annually ($455/wk)
  - 3) Duties Test: EE's duties must primarily involve executive, administrative, or professional duties
- Highly Compensated Employee ("HCE") Exemption:
  - $100,000 in compensation

Overtime Rules - Update

- Exemption for Executive, Administrative, Professionals ("EAP" or "White Collar" exemption); Must meet all three:
  - 1) Salary Basis Test: No change.
  - 2) Salary Level Test: $47,476 annually.
  - 3) Duties Test: No change.
- Highly Compensated Employee ("HCE") Exemption
  - $134,004 annually

Overtime Rules – Update

- States and businesses challenged the rule
- US District Court, E.D. Texas issued a summary judgment decision on August 31, 2017
  - Question: Whether the proposed rule exceeded DOL authority, as granted by congress
  - Holding: Congress defined exemption in part based on employee's duties; rule increase in salary requirement would "supplant[] an analyses of an employee's job duties." Millions of employees, with no change in duties, would become ineligible for OT exemption.
  - Trump administration announced: no challenge.

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.

Securitas Sec. Servs. Usa & Ryan Patrick Murphy,
September 28, 2017

GISLASON & HUNTER LLP

Securitas Sec. Servs. Usa & Ryan Patrick Murphy, 2017 WL 4334530 (Sept. 28, 2017)

- Question: Whether employer's "anti-gossip" policy violated the National Labor Relations Act
- Background:
  - Employer was the second largest security services provider in the Country
  - Employees were assigned to Samsung Austin Research Center
  - An employee filed a race-discrimination complaint with Employer
  - Employer told other Employees not to discuss the complaint amongst one another

Securitas Sec. Servs. Usa & Ryan Patrick Murphy, 2017 WL 4334530 (Sept. 28, 2017)

- The policy stated:

"Please refrain from gossiping and excessive none [sic] work related idle talk and rumor spreading while in the work place. Remain vigilant and helpful and keep our conversations professional, the work place [is] not the place for gossip and idle talk."

- Held: To ban employees from discussing investigations, need a legitimate and substantial business justification
- No such justification here.
  - Claimed that rule was made in response to a second complaint from the employee re: gossip. Timeline did not match.

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

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

GISLASON & HUNTER LLP

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

Brunozzi v. Cable Communications, Inc.,
851 F.3d 990 (9th Cir. 2017)

Brunozzi v. Cable Communications, Inc., 851 F.3d 990 (9th Cir. 2017) - March 21, 2017

- Matteo Brunozzi and Casey McCormick were Installation Technicians for Cable Communications, Inc.
- Compensation structure provided fixed rate for each installation/project completed plus production bonus
- Production bonus – OT premium paid
- Employees argued this violated FLSA by effectively reducing employees hourly rate when they are entitled to overtime pay

Brunozzi v. Cable Communications, Inc., 851 F.3d 990 (9th Cir. 2017)

Issue and Rule

- Issue: Whether use of a piece-rate payment plan with diminishing overtime-based bonus structure violates the FLSA
  - Overtime pay = 1 ½ times the employee's "regular rate"
  - "Regular rate" must reflect all payments an employee receives regularly during the workweek, exclusive of OT payments
- Rule:
  - Determine what pay agreement is for regular workweek
  - Determine whether ER calculates overtime pay by dividing that value by total hours worked for the week to calculate "regular rate"

Brunozzi v. Cable Communications, Inc., 851 F.3d 990 (9th Cir. 2017) - March 21, 2017

- Employment contract – Compensation for non-overtime workweek is as follows:
  - Technician receives total value of piece-work tasks completed (Piece Rate Total)

    plus
  - [(Piece Rate Total) * (1/6)] = Production Bonus
  - Where "bonus" is a portion of the regular wages the employee is entitled to receive (*i.e.* not reward for good work, gift, or addition to wages) it is not a bonus under FLSA
  - CCI violated FLSA by then miscalculate regular rate of pay for OT purposes
    - (Piece Rate Total + ((Production Bonus – OT paid))/# hours worked
- <u>Proper Calculation of Regular Rate for CCI</u>
  - (Piece Rate Total + (Production Bonus)) / # hours worked
  - Reversed summary judgment & remanded

Clarke v. Northwest Respiratory Servs., LLC

January 30, 2017

GISLASON & HUNTER LLP

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.

Employment and Labor Law Conference

Thursday, February 22, 2018

Owatonna Country Club

GISLASON & HUNTER LLP