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Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

Human Resources Potpourri

Supervisory Conduct – When is the Employer Liable?

According to the Eleventh Circuit Court of Appeals, the long established rule that an employer can be held liable for safety violations when an employee in a supervisory position knows of employees' conduct does not always apply when the only person committing the violation is the supervisor. (*ComTran Grp., Inc. v. DOL*, 11th Cir., 7/24/13).

Writing for the Court, Judge Vinson ruled that the employer's knowledge of a violation cannot be established based on misconduct of a supervisor. When it comes to misconduct by the supervisor himself, however, the picture is different. In this case the DOL had to do more than merely point to an act of misconduct to prove employer liability. There must be something more, such as evidence of the employer's lax safety standards.

The Court stated that five other Circuit Courts have held that an employer is not necessarily liable for the actions of a supervisor. The cited decisions noted that the supervisor must be held to represent his or her employer in liability cases, but the burden of the Secretary (DOL) is to provide additional evidence in cases where only the supervisor is violating safety standards. In reaching its decision, the Court relied on *Mountain States Telephone & Telegraph Co. v. OSHRC*, 623 F.2d 155 (10th Cir. 1980) for the proposition that imputing knowledge of the violation to the employer, based on the obvious fact that the supervisor knew he or she was committing a violation, would shift the burden of proof to the employer. The employer would have the duty of proving it did not know of the misconduct, when it is the job of the DOL to prove that it did.

SOURCE: Bloomberg BNA Daily Labor Report®, August 1, 2013

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SEVENTH CIRCUIT AND RELGIOUS DISCRIMINATION

The Seventh Circuit Court of Appeals ruled on July 31, 2013 that Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of religion. The law requires a covered employer to provide a reasonable accommodation for an employee's request to participate in a religious observance or practice if an accommodation would not cause the employer undue hardship. The Court's decision was based on an appeal of a factory worker who was fired after taking several weeks of unauthorized leave to bury his father in Nigeria. The Court determined that the case raised a triable question of whether the discharged employee gave notice to his employer that he was seeking a religious accommodation when he requested the time off from work. (*Adeyeye v. Heartland Sweeteners, LLC*, 7th Cir., 7/31/13). The company denied the employee's two written requests for four to five weeks of mostly unpaid leave to participate in his father's funeral ceremony, which included sacrificing goats in the third week, cutting off his mother's hair and anointing her head with snail oil, as well as leading an extended procession through the family's village. The Court's decision provides a good summary of religious accommodation requirements under Title VII.

According to the Court, Title VII prohibits employers from discriminating against employees and job applicants based on their religion. The statutory definition of "religion" in Title VII combines a broad substantive definition of religion with an implied duty to accommodate employees' religions and an explicit affirmative defense for failure-to-accommodate claims if the accommodation would impose an undue hardship on the employer. The Court cited a helpful definition of religion in *United States v. Seeger*, which provides that the test "is whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God," 380 U.S. 163, 165-66 (1965) (citing, *Redmond v. GAF Corp.*, 574 F.2d 897, 901n.12 (7th Cir.,1978)). The Court explained that a religious belief is a belief that is considered religious "in the person's own scheme of things" and is "sincerely held." This definition, according to the Court, "applies to all religious beliefs that are sincerely held… the claim of the registrant that his belief is an essential part of a religious faith must be given great weight… the validity of what he believes cannot be questioned…" Thus, a genuinely held belief that involves matters of the after-life, spirituality, or the soul, among other possibilities, qualifies as a religion under Title VII.

When determining whether a belief is in fact religious for purposes of Title VII, three factors should be considered: (1) the belief necessitating the accommodation must actually be religious, (2) that religious belief must be sincerely held, and (3) accommodation of the employee's sincerely held religious beliefs cannot impose an undue hardship on the employer. Title VII protects conduct that is "religiously motivated" and includes "all forms and aspects of religion however eccentric," quoting *Cooper v. General Dynamics*, 533 F.2d 163, 168 (5th Cir. 1976). The Court also noted that "[a] sincere religious believer does not forfeit his religious rights merely because is he not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigals sons?"

As it relates to the employee's request for leave, the Court noted that the Supreme Court has recognized unpaid leave as a reasonable and generally satisfactory form of accommodation for religious faith and practice as "it eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day he did not in fact work… the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work…" *Ansonia Bd. of Edu. V. Philbrook*, 479 U.S. 60, 70-71 (1986). Title VII requires proof not of minor inconveniences but of hardship, and "undue" hardship at that.

When Title VII and religious accommodation issues arise in your workplace, a call to experienced employment counsel is recommended.

Quotes Of The Month

- Without risk there is no hope for achieving anything positive. - Gen. Albert Sidney Johnson
- It takes many good deeds to build a good reputation, and only one bad one to lose it. - Benjamin Franklin
- Life is a great canvas, and you should throw all the paint you can on it. - Danny Kaye
- Mistakes are the portals of discovery. - James Joyce
- Children are like wet cement, whatever falls on them makes an impression. - Haim Ginott
- Excellence is to do a common thing in an uncommon way. - Booker T. Washington
- Insanity: Doing the same thing over and over again and expecting different results. - Albert Einstein

Things I Have Learned

- That when someone tells you it's the principle of the thing and not the money, it's usually the money
- That nothing is more fun than a job you enjoy
- That kindness is more important than perfection
- That eating chocolate won't solve your problems, but it doesn't hurt anything either
- That it's better to be decisive, even if it means I'll sometimes be wrong
- That you shouldn't waste too much of today worrying about yesterday

HR Potpourri

In promoting their agenda the National Labor Relations Board has made public a webpage that describes the rights of employees to act together for their mutual aid and protection, even if they are not in a union. According to the NLRB Chairman Mark Gaston Pearce "a right (to engage in protected concerted activity) only has value when people know it exists."

According to Gaston Pearce "the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act."

Source: NLRB Newsletter "Circle City-River City News," Summer 2013 Issue

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THE EEOC AND GINA—TOO MUCH INFORMATION MAY TRIGGER A VIOLATION

An attorney from the Equal Employment Opportunity Commission stated at a recent EEOC sponsored workshop that social media accounts and the interpretive process for leave as a reasonable accommodation (ADA) could expose employers to information regarding a person's family medical history, which is prohibited by Title II of the Genetic Information Nondiscrimination Act (GINA). The EEOC noted that when you ask an employee for medical information to support a reasonable accommodation request you could end up with information prohibited by Title II of GINA. The law, enacted in 2008, prohibits employers from using genetic information, including a person's family medical history, to make employment decisions. It also restricts employers from requesting, requiring, or purchasing genetic information about job applicants and employees. However, Title II of GINA provides an exception for an "inadvertent acquisition of genetic information" that does not violate the Act. As a safeguard to GINA compliance it is recommended that employers include in their information request language that states "to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information… Any receipt of genetic information in response to this request for medical information will be deemed inadvertent." The EEOC has also noted that the wording in the provision is "good language" for the employer to use when requesting documentation concerning a reasonable accommodation.

As it relates to the inadvertent acquisition exception for genetic information obtained through social media sites, there is statutory language (§ 1635.8(b)(1)(ii)(1)). A social media site, like Facebook, can provide information about the user's family medical history. You can acquire genetic information about someone by just looking at a posted picture, i.e. someone wearing a t-shirt with the saying "Racing for the Cure." The EEOC representative noted "something as simple as looking at someone's Facebook profile can get your company or organization in trouble."

When GINA questions arise in your workplace, a telephone call to an experienced employment attorney is recommended.

SOURCE: Bloomberg BNA Daily Labor Report®, July 22, 2013

THE NLRB & SOCIAL MEDIA — MORE OF THE SAME!

In another advice memorandum released by the NLRB on July 18, 2013, the Board stated that a company (Grocer Giant Ford, LLC) can include in its social media guidelines a prohibition on employees disparaging its products and services, but it may not establish a broad ban on the use of confidential information or the company logo, or prohibit a video on its premises. The Memorandum was written to address allegations made by Teamsters Locals that the company's "social media guidelines" violated Section 8(a)(1) of the National Labor Relations Act, which prohibits employer interference with employee rights under Section 7 of the NLRA which protects the rights of workers to engage in concerted activity for their mutual aid and protection. The Board determined that the company's policies would "reasonably tend to chill" employees in the exercise of their statutory rights.

Addressing the company's use of a policy savings-clause that said the company would not apply any policy in a manner that violated applicable law, the advice Memorandum stated "an employer may not prohibit specific employee activity protected by the Act and then escape the consequences of the prohibition by a general reference to rights protected by the Act… Furthermore, with regard to overbroad prohibitions that reasonably would be interpreted to prohibit protected activities, a general disclaimer is insufficient when employees would not understand from the disclaimer that protected activities are in fact permitted."

An exercise of employee freedom or another regulation of employer rights? You decide!

When Labor law issues arise in your workplace, a call to experienced Labor counsel is recommended.

SOURCE: Bloomberg BNA Daily Labor Report®, July 31, 2013

MISCONCEPTIONS AND GUIDANCE ON CRIMINAL BACKGROUND CHECKS

Trying to clean up the confusion, an EEOC attorney at a July 2013 workshop noted that having a criminal record in itself does not grant someone protected status under Title VII of the 1964 Civil Rights Act, but the use of those records "can get employers in trouble" under disparate impact and treatment analyses. Rejecting Blacks or Hispanic applicants because of their criminal record but hiring White applicants with similar records and job qualifications, is inviting trouble. Disparate impact discrimination occurs when an employer has a neutral policy or practice that disproportionately screens out or disadvantages Title VII – protected individuals, does not relate to the job in question, and is not consistent with business necessity.

Addressing misconceptions about the guidance, the EEOC stated that it does not prohibit employers from using criminal histories when making employment decisions. Secondly, the guidance "does not require companies to hire anyone," but "advises employers how they can avoid Title VII liability if they use applicants' or employees' criminal records to make employment decisions." Thirdly, the guidance does not impose new Title VII requirements on employers noting that the use of criminal records in employment decisions is a well-established commission practice.

SOURCE: Bloomberg BNA Daily Labor Report®, July 19, 2013