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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

CONCERTED ACTIVITY AND THE NLRB – WHAT'S NEXT?

We heard it enough to know that "concerted activity" under Section 7 of the National Labor Relations Act means activity undertaken by or on behalf of two or more employees, or by a single employee to initiate or prepare for group activity. But does the (il)logical Board follow the rules? Look at this fact situation and you decide.

A teacher at a private, non-profit religious school, yells on behalf of herself to herself, "THIS PLACE SUCKS" when asked to provide proper documentation for reimbursement for expenses. The teacher reacted to her own frustration and was not intending to initiate or prepare for group action. She was alone, made the comment to herself, and nobody heard it.

Sounds simple, but nothing with this Labor Board is when it comes to decisions that expand employee rights and protections against the "evil" employer.

In this case, the Board denied the school's Motion for Summary Judgment (Dismissal) holding that the Motion was insufficient to even justify a response. This means that a decision on the merits, to determine whether a teacher making (yelling) a statement to herself constitutes "concerted" activity will take place. An adverse ruling is a very real possibility. Stay tuned to see if the Board will indeed stretch the definition of concerted activity from its intended meaning to one that borders on absurdity. It's even money at this time.

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Attorneys

Accessible. Experienced. Versatile.

Labor and Employment Team

Bradley L. Varner
Robert F. Conte
Brett R. Hummer
Michael E. Doversberger

4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
PH: (574) 243-4100
FAX: (574) 232-9789
www.maylorber.com

A SINGLE RACIAL SLUR MAY CREATE A HOSTILE WORK ENVIRONMENT

The Fourth Circuit Court of Appeals (Maryland, Virginia, West Virginia, North Carolina, and South Carolina) recently held that a manager's use of racial slurs twice over a course of a few hours (Caucasian supervisor called the employee a "porch monkey" on one work day), was sufficient to constitute a hostile work environment under Title VII (*Boyer-Liberto v. FontaineBleau Corp.*, No. 1301473 (May 7, 2015)). The Court stated that a plaintiff possesses a "reasonable belief" that he/she had been subjected to a hostile working environment if the conduct at issue is "physically threatening or humiliating", noting that even an isolated incidence of harassment, if serious enough, can create a hostile working environment when accompanied by a threat to fire the employee.

This case is of significance for employers because the federal courts typically required some form of touching for a single act to be severe enough to meet the threshold for harassment under Title VII. Yet despite the absence of touching in this case, the Fourth Circuit stated that "perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet in the presence of (her) subordinates". Of equal importance is the fact that there does not need to be an actual violation of an anti-discrimination law, only a good faith belief that a violation (of the law) has occurred.

To stay ahead of the discrimination charge it is recommended that employers have their anti-discrimination and anti-harassment policies in place; they invest the necessary time to train their employees regarding these policies; that the policies be consistently enforced through prompt and thorough investigations and remedial action; and finally, avoid any retaliatory action against an employee who has raised such complaints.

When discrimination issues arise in your workplace, a call to experienced employment counsel is recommended.

AMBUSH ELECTIONS UPDATE: BY THE NUMBERS

Recently released information confirms that the union petitions have surged in the month following the NLRB's April 14, 2015 implementation date.

Prior to the effective date of the new rules there were 212 petitions for an election filed (average of 42 petitions per week). For the month following the effective date of the new rules there were 280 filings (average of 60-70 petitions per week), an increase of 32%. The new average time period between petition filing and date of election (42 petitions) was 23.5 days. Prior to the new rules, the average was 38 days. Although it is early in the process, it appears that the new rules are consistent with the Board's latest objective, to make it easier for unions to organize employers through the expedited (ambush) rules process.

Employer Caution: The early numbers can be deceptive because they are new and temporary. What is important is the fact in only three weeks following implementation of the new rule, the unions and NLRB have decreased the average organizing campaign period by 40% (23.5 days vs. 38 days) which is likely to contract further as time passes. Employers must be vigilant, proactive and prepared to act now. Have your company's procedures and campaign plan in place before notice of the representation petition reaches your front door.

When union organizing issues arise in your workplace, a call to experienced labor counsel is recommended.

Sources: *The Devil at our Doorstep*, David Bego; Hunter & Williams, LLP Employment & Labor Law Perspectives Blog. (May, 2015)

Things I Have Learned

That by the time I can afford it, I don't want it anymore

That every day we are offered twice as many opportunities as misfortunes

That you never get rewarded for the things you intended to do

That the purpose of criticism is to help, not to humiliate

That if your life is free of failures, you're probably not taking enough risks

That as long as you keep music in your life, you'll never need a psychiatrist

HR Potpourri

The Background: Employee embezzles nearly $20 million from his employer. Employer keeps employee's profit sharing account of approximately $21,000 as an offset to the embezzlement amount. Employee sues employer claiming a violation of ERISA's anti-alienation provisions and seeks attorney fees.

The Court: Employee wins protection of his profit sharing funds but loses on the attorney fee claim despite the allowance of same under ERISA. The Court's rationale for refusing to award attorneys' fees: the employee stealing almost $20 million dollars, which he will not likely be able to pay is a special circumstance that renders an award of attorneys' fees to the participant unjust (ya think!).

Lesson: As an employer, you should not use qualified plan (ERISA) monies to offset debts owned by the employee.

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Robert F. Conte, Esq.
MAY • OBERFELL • LORBER
4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
E-mail: rconte@maylorber.com
Web sites:
www.maylorber.com

ASSOCIATIONAL DISCRIMINATION AND THE ADA

We all know that the Americans with Disabilities Act (ADA) makes it unlawful to discriminate against or fail to accommodate an employee with a covered medical condition or "disability", but did you know that the ADA also prohibits "associational discrimination"? What is that you ask? It is the taking of adverse action against an employee because of his or her "association" or "relationship" with an individual who has a known disability.

The issue was brought to the forefront in the U.S. District Court, Southern District of New York case, *Manon v. 878 Education LLC*. In this case, the employee was terminated because "her job performance, attendance and behavior were consistently unsatisfactory." The plaintiff filed her lawsuit claiming disability discrimination on the basis of her association with, and caregiver status for, a disabled individual (her daughter) in violation of the ADA (and the NYC Human Rights law).

The Court, in denying the employer's attempt to dismiss the case, determined that there was direct evidence of associational disability discrimination pursuant to the ADA, which was an indication of discriminatory animus toward her disabled daughter.

Lesson for Employers: Recognize the broad reach of the ADA, as well as local civil rights laws, prohibiting actions against employees not only for their own disabilities, but also the disabilities of others with whom the employee has an "association" or "relationship".

The law's protection is broad and extends not only to family members, but to boyfriends, girlfriends or other individuals "associated" with the employee.

When ADA issues arise in your workplace, a call to an experienced employment attorney is recommended.

WORKING FROM HOME – PART II

As reported in the June 2014 Edition of Veritas™, the Sixth Circuit Court of Appeals, in a case involving Ford Motor Company, determined that telecommuting was a reasonable accommodation under the ADA. In its ruling, the Court stated that the "workplace" is anywhere that an employee can perform their job duties. An en banc (full court) hearing was requested and granted, resulting in an 8-5 decision and a new ruling, bringing the Sixth Circuit back in line with the other Circuit Courts. Interestingly, the 20 page majority opinion, which was accompanied by a 22-page dissent, found companies can say no to workers seeking telecommuting arrangements to accommodate a disability without violating the ADA. In its ruling, the Court noted regular in-person attendance was an essential function of most jobs, an important element for employers fighting telecommuting and failure to accommodate claims.

The Court also noted that technology is changing the workplace and regular on-site attendance is essential to most jobs, a premise consistent with the ADA and "common sense". **Of note to employers:** employees still must be able to perform the essential functions of the job, with or without reasonable accommodation, to obtain the ADA's protections (this includes engaging in the interactive process). ADA situations of this nature will require a case-by-case analysis to determine if attendance is really an essential function of the job.

When ADA and reasonable accommodation issues arise in your workplace, a call to an experienced employment attorney is recommended.

QUOTES OF THE MONTH

The heart wants what the heart wants, or else it does not care – Emily Dickinson

Never miss a good chance to shut up – Will Rogers

You never know when you're making a memory – Rickie Lee Jones

Mistakes are part of the dues one pays for a full life – Sophia Loren

There's a better way to do it. Find it. – Thomas Edison

Great works are performed not by strength, but by perseverance – Samuel Johnson