March 2014
Volume 27, Issue 1

Veritas™

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

Human Resources Potpourri

Accommodation Need Not be Tied to Job Function

Reasonable accommodations are not restricted to modifications that enable a worker to perform essential job functions, so says the 5th Circuit Court of Appeals (*Feist v. Louisiana*, 5th Cir., 2013). To prevail in a failure-to-accommodate claim, the plaintiff must prove that she has a disability that the employer failed to make a reasonable accommodation. In the instant case, plaintiff requested a free onsite parking space to accommodate her disability, osteoarthritis of the knee.

Reversing the district court, the 5th Circuit ruled that the plaintiff need not show how a proposed accommodation enables the performance of an essential function in order to show that it is "reasonable." The court noted that the ADA does not specify that an accommodation must facilitate performance of essential functions. Under the ADA, a reasonable accommodation may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." In some instances "providing reserved parking spaces" may constitute a reasonable accommodation.

MAY • OBERFELL • LORBER
Attorneys

Accessible. Experienced. Versatile.

Labor and Employment Team

Bradley L. Varner
Christopher R. Putt
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

NOW SHOWING AT A WORKPLACE NEAR YOU

Much has been written about the NLRB and DOL joining forces in what appears to be the administrations payback to labor groups for their support in the last Presidential campaign. The attempt to change the representation rules through the Employee Free Choice Act failed, but through their combined efforts, the NLRB and DOL have created a "witches brew" that will have a very similar effect on any employer that wants to fight a Union organizing campaign:

The Problem Regulations:

"Ambush or Quickie" Election Rules

The NLRB is changing the rules to reduce the time that employers have to communicate with their employees once a Union petition has been filed, a time when a Union is at its peak strength and the employer, usually unprepared, its weakest.

Bargaining Unit Determination

In a very controversial decision, *Specialty Healthcare*, it was determined that the NLRB will likely approve small, fragmented bargaining units as small as single job descriptions petitioned for by the Union unless the employer can demonstrate that other employees, excluded by the Union, have an "overwhelming" community of interests. Complicating this very difficult burden is the fact that the unit determination would not be made until after the Union election has already occurred.

"Persuader Activity" Rules

The DOL's revision of the Rules under the Labor-Management Reporting and Disclosure Act of 1959 threatens the current reporting and disclosure exemption. Under the proposed rules, employers and their outside legal or labor relations counsel would be required to publicly disclose attorney-client confidences, including services rendered regarding legal advice concerning Union organizing, collective bargaining, and concerted activity, or risk civil and criminal penalties. The proposed "persuader" rules, combined with the short deadlines imposed by the NLRB's new "ambush" election rules, will make it more difficult for employers to respond to Union petitions. Employers, as a result of the changes in the "persuader" rules, will also find it more difficult to get legal advice when they need it most, during Union organizing campaigns, collective bargaining, or strikes.

The time for employers to act is now by evaluating their policies and procedures, and being ready to handle the Union's organizing efforts when they occur.

Source: DRI Today, Harold P. Coxson, Ogletree, Deakins, February 11, 2014.

SAY WHAT?

When an employee applies for, and gets, a job transfer (one he requests), has the employer subjected the employee to an adverse employment action? According to the Sixth Circuit, the answer to this question might be, Yes. *DeLeon v. Kalamazoo County Road Commission* (6th Cir., January 14, 2014). In this case, the plaintiff claimed he suffered an adverse employment action under Title VII and the ADEA when his employer transferred him to a more hazardous position, a position for which the employee applied. Plaintiff knew when he applied for the position, he was not fully qualified for the job and the position involved exposure to loud noises and diesel fumes. However, after being assigned to the job he requested, plaintiff complained about the work conditions and asserted that the transfer (to the new job) was an attempt by the employer to set him up to fail, because he was not qualified for the job.

Taking this case from the ridiculous to the absurd, the 6th Circuit Court of Appeals agreed that plaintiff had a point, a transfer might be an adverse employment action, even though the plaintiff requested the transfer, if the conditions of the transfer would have been objectively intolerable to a reasonable person. Does this mean that a transfer might be a constructive discharge, even when the employee asks for it?

Source: Lori Keffer, Sherman & Howard, L.L.C., DRI Legal Updates, January 17, 2014.

QUOTES OF THE MONTH

- Democracy, four wolves and a lamb voting on what to have for lunch – Anonymous
- The covers of this book are too far apart – Ambrose Bierce
- Action may not always bring happiness, but there is not happiness without action – Anonymous
- There is no great writing, only great rewriting – Justice Louis D. Brandies
- Success is when your name is in everything but the phonebook – Unknown
- Nothing is a waste of time if you use the experience wisely – Anonymous

Things I Have Learned

•That in every face-to-face encounter, regardless of how brief, we leave something behind.

•That the best way to succeed is to do small things well.

•That if you cut your meatloaf into pieces, other will think you ate some of it.

•That it's never too late to improve yourself.

•That it's better to be decisive, even if it means I'll sometimes be wrong.

•That learning to forgive takes practice.

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

HR Potpourri

EEOC by the numbers:
Employers Take Notice

The EEOC recently released its fiscal report for 2013 related to enforcement and litigation highlights:

- 93,727 charges filed, down 5% from 2012
- prevalent charges filed: retaliation, race discrimination; sex discrimination (decrease by 2,600 charges), and disability discrimination
- overall "reasonable cause" findings, 3.6% down from 3.8% in 2012; GINA, 8.8%; sexual harassment, 7.6%; race, 2.8%, ADEA, 2.4%
- claimants recovered $372 million through the EEOC administrative process
- EEOC filed 131 merits lawsuits; Title VII, 78 lawsuits, ADA, 51 lawsuits

Based on the numbers, Employers should: provide sufficient training on retaliation claims and periodic sexual harassment training.

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

CRYING SPELLS, A BASIS FOR AN FMLA CLAIM

Employee "crying spells" or potential "flare-ups" of an "emotion" nature may be enough to substantiate a claim for Family and Medical Leave Act (FMLA) leave, so says an Ohio Federal Court, *Nelson v. Clermont County Veterans Serv. Comm'n.*, 2013 U.S. Dist. LEXIS 156935 (S.D. Ohio, 2013). Query: Does this make it easier for some employees with ambiguous health or emotional issues to qualify for FMLA leave? This ruling seem to indicate that courts are willing to focus on an employer's response to FMLA leave or an employee's request for FMLA leave rather than the severity of the employee's health condition as a threshold for such leave.

In this case, the employee (mother) requested FMLA leave to provide "emotional support" for her daughter who had been sexually assaulted. The employee/mother also claimed that her own condition warranted FMLA leave, and provided the employer with a doctor's note that described her condition as "crying spells, no energy, can't concentrate, cannot focus."

When the employee returned to work, she brought her daughter into the office and was repeatedly warned not to do so. When she refused to comply, she alleged she was "overloaded" with assignments and told she could either resign or be fired. The employee, following a disciplinary hearing was terminated for insubordination, declining job performance and manipulation of time records prior to taking FMLA leave. The employee sued the employer alleging interference with her FMLA leave and retaliation. The employer defended by arguing that it had "legitimate business reasons" for terminating the employee. The court found that the employer may have violated the FMLA because of the timing of the employee's termination, nine days following her return from leave, combined with an increased work load upon her return. The court also found that the doctor's note sufficiently established the employee's entitlement to leave, despite the ambiguous nature of her "crying spells."

Lesson Learned: The decision appears to be in line with the DOL's promise to step up FMLA enforcement against employers. Accordingly, employers should focus on their response to an employee's request for leave and how they treat employees who take leave. Employers should always strive to demonstrate empathy for employees, to accommodate them in the workplace and where possible, to ease the employee back into the work environment following a leave to avoid claims of unfairness or retaliation.

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

TRAINING—IT'S STILL VERY IMPORTANT

"Discrimination" can be complicated and ignorance is not a defense. As discrimination claims increase, the claim filing process is made easier, verdicts are becoming larger and courts are defining and redefining the scope of retaliation claims, the definition of supervisor and harassment. The legal playing field continues to change, making anti-harassment training more critical to the claim defense process.

It is hard to imagine an employer defending a sexual harassment claim without having anti-harassment training and a written complaint procedure to protect them. In these cases and to avoid liability, an employer must show that its training was effective, the reporting procedure in place, and that it works. If harassment complaints by employees are not addressed, or employees did not know how and to whom to report a complaint, the employer is likely to lose its defense to such claims. Courts have taken notice and held that an employer who has not monitored the workplace, failed to respond to complaints, failed to provide a system of registering complaints, or effectively discouraged complaints from being filed, will be hard pressed to argue that it exercised reasonable care to prevent workplace harassment.

So what should an employer be doing? Provide anti-harassment training for all new employees, create a complaint procedure that will work, provide anti-harassment training for supervisors and managers on changes in the law, regulations and court decisions which will affect the employers claim defenses.

Bottom-line: all employers should train their supervisors and managers on the cost and time consuming nature of discrimination claims and the importance of avoiding/eliminating costly discriminatory acts as part of their regular job duties and responsibilities. A proactive employer is a wise employer. Doing nothing is neither a prudent nor a viable option.

UPDATE YOUR SOCIAL MEDIA POLICY

The continued rise in social media use makes it important for employer's to stay on top of new developments in legislation and litigation and consider revising their social media policy. The NLRB's involvement in social media policy development (Section 7 rights), legislation prohibiting employers from requesting employee passwords and the ownership of social media accounts as it relates to potential misappropriation of trade secrets when an employee leaves the company, are sources of consideration for change.

Keeping your handbook policies up to date is an essential part of a successful employee relations program.