

LEGAL AND LEGISLATIVE UPDATE ON EMPLOYMENT LAW

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by

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LEGISLATION

Wisconsin to Have Punitive Damages for Discrimination Cases

The Wisconsin Legislature has amended the Fair Employment Act to conform with Federal Title VII and allow up to \$300,000 in compensatory and punitive damages in state EEO cases. Until now, the WFEA allowed only the award of pay loss, reinstatement and attorney fees. The extra damages will be on the same “sliding scale” as Title VII, depending on the size of the employer.

Unlike federal law, the new Wisconsin amendments will require *two trials*. The original decision on whether discrimination occurred will be made by an Administrative Law Judge at the State Equal Rights Division. Then a second trial on the extra damages will occur in Circuit Court. This will dramatically escalate the costs and turn what was a reasonably user-friendly administrative process into a Federal Court type of litigation. This will certainly be more expensive for employers and make employment practice liability insurance more important. The new process may also backfire on plaintiffs. The old, less formal administrative process was designed for use by unrepresented plaintiffs, with smaller issues, who often achieved favorable decisions. The new process will generate a “high stakes” expensive legal defense from the start. Small-case plaintiffs who cannot attract an attorney may well be “blown out” of the process. Thus, the people the WFEA was intended to help may have lost in the long run.

LITIGATION

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing conclusions. So

a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

Theme of the Month: Contrasts

Government agencies and courts have recently issued rulings which address similar issues but with contrasting results. The slightly different facts of the situation often lead to a contrasting result. However, two courts had exactly the same situation before them and reached opposite decisions. This month's contrasts include training pay, hearing tests, speaking English at work and filing retaliation suits over sexual harassment complaints.

Training

The Department of Labor's recent Opinion Letters show that employee training, including homework, may or may not be paid time, depending on who requires the training.

"Voluntary" Homework Is Paid Time. Training which enhances the employees' ability to do their current jobs is paid time. Even if it is voluntary, it is directly and immediately beneficial to the employer. When the training requires homework or other non-standard time study, that, too, is "hours worked." The employer and employee can agree, in writing, to a reasonable number of study hours and a training pay rate, but the hours must be paid — and counted toward overtime calculation.

Training To Meet State Requirements Is Not Paid Time. Employees who are required to maintain government licenses or certifications must complete required training on their own time, if their employer does not wish to pay. Even though they cannot keep their jobs without the training/certification, it is the government which imposes the requirements, not the employer (as long as the employer is not mandated to provide the training). [The rule is different if the employer decides on its own that its staff must be certified or licensed. Then all training is paid time.]

Department of Justice Hearing Test Is – Or Is Not – Disability Discrimination

The DOJ's new hearing standards for court security officers were challenged in two cases. Courts in different parts of the United States reached opposite conclusions.

Joint Employment-Discrimination Against Leased Employee. The U.S. Marshalls Service leases court security officers from a private employment agency. It decided to stop using one officer because he could not pass a hearing test without his hearing aid. He sued under the Rehabilitation Act. A jury awarded \$257,000. The officer performed well with the hearing aid. The Marshalls Service could show no safety reason or business necessity to require the test be taken without the hearing aid or to preclude officers with hearing aids. Though he worked for a

private agency, the Marshalls Service was liable as a joint employer because it made the decision as to the type of testing, and to terminate the employment. *Rutz v. Dept. of Justice* (S.D. Texas, 2009).

U.S. Marshalls Service Hearing Test Ruled Justified. In *Almond v. Akal Security, Inc. and Dept. of Justice* (11th Cir., 2009), a different Federal Court heard a similar case and reached a different conclusion on the same hearing test. The 11th Circuit Court ruled that banning hearing aids in the testing was “consistent with business necessity.” It was persuaded that security officers needed a certain level of unaided hearing to effectively and safely perform the job.

English Proficiency

“Speak American” Comments Create Case. An immigrant from Mexico with limited English had a good work record in a packing operation. He then was placed under a new supervisor who eventually fired him for alleged poor performance. The evidence in the ensuing Title VII national origin discrimination case included several comments by the new supervisor. During a performance meeting, the supervisor told the employee’s interpreter to be quiet and insisted the employee “speak American.” The supervisor made comments to others that the employee should go back to Mexico if he couldn’t speak English. There was no requirement or need to speak English on the job. It could be done, and had been done, well by the employee without any language skill. The court found the supervisor’s comments were evidence of national origin discrimination. *Avila Jostens, Inc.* (10th Cir., 2009).

Auditor Validly Fired For Refusal To Improve English Proficiency. A Nigerian immigrant obtained an auditor position for Defense Department contracts. The job required frequent verbal communication with contractors and other Defense Department contract employees. The auditor’s English and accent was such that others had a good deal of difficulty in understanding him. The Defense Department requested the auditor to take communication training, at its expense, to improve the situation. He refused, stating that he did not need training, that other people would simply get used to his speech style and would then understand him. He was eventually fired for audit errors. He sued, claiming the discharge was discriminatory and in retaliation for his stand against the discriminatory request of having to take training because of his national origin accent. The court dismissed the case. It found nothing discriminatory in the underlying training request, which seemed consistent with business operations. He had not stated a valid case for retaliation. *Zokari v. Gates* (10th Cir., 2009).

Dueling Counterclaims

Sometimes a harassment complaint generates a counter-attack by the accused. The following cases of complaint/counter-complaint both ended up in court as retaliation cases, with different outcomes.

She Complains; He Sues Her; She Sues Him. Title VII prohibits suit of individuals in discrimination cases. State laws, however, can allow those suits. A female police officer filed an

internal complaint that a male officer was sexually harassing her and was intoxicated on duty. He received disciplinary action. He then filed a state defamation suit against her. She then filed a counter suit under state law, claiming that his case constituted retaliation for her harassment complaint. The court agreed that his suit could be considered retaliation. It dismissed his defamation case, on other procedural grounds, and left her civil suit to proceed against him. *Hughes v. Miller* (Oklahoma Ct. App., 2009).

They Complain About Him; He Complains About Them; He Sues. Female university employees made internal sexual harassment complaints about a male co-worker's alleged sexual advances. He then filed an internal sexual harassment complaint against them, alleging that one of the women was "jealous and possessive" of him and spreading lies because he had rejected her advances; another dressed provocatively and flirted with him and was upset because he had asked her to stop. The university investigated both complaints. A number of witnesses directly contradicted his allegations. Witnesses supported the allegations of the female employees. He was then fired for harassment. He sued for retaliation, claiming that his complaint gave him a protected status, and he had been fired for having made his own harassment complaint. The court found otherwise and dismissed the case. The court found that the university could validly fire him for harassing behaviors. His counter-complaint did not provide some magical insulation to protect him from standard discipline for violating the employment policies. *McCullough v. U. of Arkansas for Medical Sciences* (8th Cir., 2009).

OTHER LITIGATION

Technology – Privacy

Invasion Of Personal Email Account Results In Verdict, But Plaintiff Must Show Actual Damages To Get Full Award. The Stored Communication Act (SCA), a part of the Federal Electronic Communication Act, allows punitive damages, compensatory damages, actual damages, attorney fees and statutory penalties of \$1,000 per instance of violation. An employee of an IT company rebuffed the sexual advances of her manager. He then started illegally accessing her personal home Internet account. He continued to do so after she left the company. When she filed a state discrimination complaint for sexual harassment, the company then used the illegally-accessed information in defending its case. The ex-employee sued both the company and the manager, personally, for violating the SCA. A jury awarded \$150,000 in statutory damages and \$75,000 in punitive damages, plus \$135,723 in attorney fees against the manager, personally. It also awarded \$50,000 against the company. On appeal, the court ruled that one must prove actual damages in order to qualify for the \$1,000 per instance statutory penalty. The plaintiff had not shown any actual damages resulting from the illegal access, so the appeal's court deleted the statutory damages from the verdict. It allowed the other amounts to stand. *Van Alstyne v. Electronic Scriptorium Ltd.* (4th Cir., 2009).

U.S. Supreme Court – Contracts

Union Contract Eliminates Worker’s Ability To File Discrimination Cases In Court. A collective bargaining agreement provided that employee disputes, including those under the Title VII and the Age Discrimination in Employment Act (ADEA), must be arbitrated under the contract; union members could not bring them in court. In a 5 to 4 decision, the Supreme Court ruled that the contract bound all the employees and was the “sole and exclusive remedy” for all the sorts of employment cases named in the agreement. *Plaza v. Pyett* (U.S. S.Ct., 2009).

Discrimination

Age

Relaxing Standards For Pregnant Employee Results In \$16 Million Verdict For Older Male Manager. An older male manager was fired for poor performance. He filed an ADEA and State Discrimination Act suit. The jury considered evidence that he had requested and been denied short-term reduction of performance standards due to serious extenuating circumstances in his life. However, at the same time, the company excused the slump in performance of a young woman because she was pregnant. The jury found pretext and discrimination in the employer’s different treatment of the employees. The court did find the jury award to be excessive and cut it back to \$13 million. *Morgan v. New York Life Ins. Co.* (6th Cir., 2009)

Religion

Company Had Right To Insist Employee Use Only One Personality At Work. A newly-hired engineer insisted that he was three different beings. His legal name was Gary, but he also shifted into being Steward and Trustee. He claimed that all his property and pay were in a trust for The Kingdom of God On Earth. Immediately after starting he began emailing on different days as the different beings. He filled out personal payroll tax withholding forms as Trustee, insisting that no taxes could be taken out of his pay. Co-workers and customers quickly became confused as to who was sending them communications. The company requested that he use one, and only one, identity for professional communications. He refused, and was then discharged. The ensuing suit was for Title VII religious discrimination, refusing to accommodate his religious beliefs. The court found that the requested accommodations, including violating the IRS laws, were unreasonable and dismissed the case. *Lizalek v. Invivo* (7th Cir, 2009)

National Origin

Union Loses Case on Ethnic Racial Slurs. An employee was fired for referring to an Iraqi immigrant co-worker as a “Sand N___,” “terrorist” and “American killer.” The union contested the discharge contending that the comments were merely “shop talk,” had not been made directly to the Iraqi co-worker—only about him and were an isolated instance. The arbitrator ruled that standard profanity is excusable shop talk; racial slurs are not! Whether made directly to a person

or behind their back, overtly hostile racial or ethnic comments create an impermissible hostile environment. The offending worker stayed fired. *In re Alliant Techsystems* (2009).

Sex

Stereotypes About Mother Lose Case. In *Chadwick v. Well-Point, Inc.* (1st Cir., 2009), the court found that an employee was passed over for promotion because she had four children. A less experienced person with lower performance evaluations was chosen instead. The court found that managers making the selection, all female, made comments relating to the plaintiff's family responsibilities, and one of the managers told her, "You have the kids and you have a lot on your plate right now." The court ruled that "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities."

Disability

Impossible Standards Show Discrimination Against Bank Loan Officer. A loan officer was fired after 21 years of good performance. Four years before the discharge, he developed hyperkinetic dysarthria, a nerve condition which rendered him unable to talk above a whisper, which made talking at all often difficult. This did not harm his productivity or performance. When the bank determined it needed to cut staff, managers focused on him. He was informed that he needed to increase his productivity in order to keep his job. The bank gave him 90 days to meet a goal or be let go. In the ADA case following the discharge, the evidence showed the personal goal set for the loan officer was \$4 million, a number greater than the entire branch's several loan officers had ever generated all together. The entire branch had never done more than \$3.2 million. The court had no trouble finding pretext for discrimination in this "impossible goal." It also did not help the bank that there was evidence that another non-disabled loan officer in the branch had lesser production, but was retained. The other officer was not apparently given an impossible goal. *Willard v. First National of Nebraska, Inc.* (8th Cir., 2009).

Discharge For Abusive Behavior After Removal Of Accommodation May Be Discrimination.

A college counselor suffered a traumatic brain injury. On return to work, she had episodes of angry outbursts toward students and co-workers. Following assessment and accommodation, she again properly performed the job. The accommodation included less stressful scheduling and a one-hour per week job coach. A new supervisor removed the job coach, and the counselor's behavior reverted. She was fired after an angry outburst against the supervisor. The college fired her for "egregious and criminal conduct." She filed an ADA suit. The court denied summary judgment to the college, allowing the case to proceed to trial. The court first found that the college's description of the conduct was an overreaction. There had been no violence nor criminal conduct. Second, when removal of an effective accommodation results in deterioration of performance, the employer may well have an obligation to restore the accommodation instead of firing the employee. *Menchaca v. Maricopa Community College Dist.* (D. AZ., 2009).

Family and Medical Leave Act

Time Off Due To Wrongful Discharge Counts Toward FMLA Eligibility. An employee was fired. He grieved, and an arbitrator ruled in his favor and ordered reinstatement. Later, the employee requested FMLA leave and was denied. He had been employed 12 months but did not have the required 1,250 hours of actual work. The court ruled that the time off between the wrongful firing and reinstatement should count as hours toward FMLA eligibility. Employers should “not be rewarded for wrongful conduct” by later further penalizing the employee. *Magnuda v. Bell Vernon Area School Dist.* (W.D. PA., 2009).

Manager Fired On Day Of Return From FMLA. A trucking company manager used FMLA. During his absence, the company discovered that he had been covering up problems in his department. He was fired the day he returned from leave. He sued for the company’s failure to restore him to his position as required by the FMLA. The court disagreed. There was a valid non-FMLA reason for the discharge. The manager presented no evidence to show he would have been retained had he not used FMLA. *Cracco v. Vitran Express, Inc.* (7th Cir., 2009).