THE WILAW CONNECTION QUARTERLY NEWSLETTER

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EMPLOYMENT LAWSCENE ALERT: HONESTY IS THE BEST POLICY IN PERFORMANCE REVIEWS

On February 10, 2015, the *Wall Street Journal* published an article entitled “Everything Is Awesome! Why You Can’t Tell Employees They’re Doing a Bad Job” extolling the virtues of praising employees’ strengths and scaling back on criticism. Although this may be good for employees’ confidence levels, it is bad for companies when they have to defend a discrimination lawsuit or oppose a bid for unemployment benefits.For example, in September 2011, a New York woman sued in federal court claiming that her employer “mommy-tracked” her by attempting to demote her, refusing to promote her, and cutting her bonus after she took maternity leave, despite repeatedly earning positive performance ratings during her career with the company. The company argued that she was lawfully terminated because her reviews were done by an “easy grader” and she was not meeting the company’s other metrics. In January 2015, the federal judge overseeing the case stated that the case looked strong enough to go to trial due in part to the questions of fact presented by the positive performance reviews.

Performance reviews are valuable tools for employers. While they may be used to boost an

employee's self-esteem and confidence, employers should carefully train their supervisors and manager to give honest feedback and critiques when necessary. Problems should not be sugar-coated; the issue, the steps to correct the issue, and the consequences for failing to correct the issue need to be included in evaluations and reviews. These honest assessments on an employee's performance are essential to being able to discipline and terminate an employee if that becomes necessary, as well as defending the company from a lawsuit or claim for unemployment compensation.

ATTORNEY GUMINA PRESENTS TO THE HFTP GREATER MILWAUKEE CHAPTER

On March 25, 2015, Joseph E. Gumina, who leads the firm's labor and employment practice, spoke to the Greater Milwaukee Chapter of the Hospitality Financial and Technology Professionals. Attorney Gumina spoke about the latest developments in labor and employment law affecting the hospitality industry, including the latest developments before the NLRB and the EEOC. Attorney Gumina also spoke about wage and hour compliance and workplace harassment issues in the hospitality industry.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT ISSUES RULING ON ACCOMMODATING PREGNANT EMPLOYEES

On Wednesday, March 25, 2015, a divided U.S. Supreme Court issued a ruling in *Young v. UPS*. The Supreme Court was asked to decide whether the Pregnancy Discrimination Act ("PDA"), which amended Title VII of the Civil Rights Act of 1964, allows an employer to have a policy that accommodates some, but not all, workers with non-pregnancy related disabilities but does not accommodate pregnancy-related conditions. We covered the background of the case here. The majority opinion from the Supreme Court overturned the Fourth Circuit's decision to affirm summary judgment for the employer and returned the case to the Fourth Circuit.

The employer argued that the PDA Act doesn't require accommodations or special treatment for pregnant employees and that it was, therefore, entitled to treat pregnant employees the

same as it treated employees with restrictions stemming from off-the-job injuries. The employee argued that employers who provide work accommodations to non-pregnant employees must do the same for pregnant employees who are similarly restricted in their ability to work. The majority opinion did not find either the employee or the employer's interpretation of the PDA persuasive.

The majority opinion rejected the employee's interpretation of the PDA because it essentially gave pregnant employees an unconditional "most-favored-nations" status because pregnant employees would have to receive the same accommodations that any other employee received for any reason. The majority agreed with lower courts that this was not Congress' intent in passing the PDA. Although the EEOC had supported the employee's position and published guidelines in line with her arguments, the majority stated that the guidelines were promulgated after certiorari was granted, took a position on which previous EEOC guidance had been silent, were inconsistent with positions long advocated by the government, and the EEOC did not explain the basis for the guidance; therefore, they found such guidance unpersuasive.

The Supreme Court's majority opinion disagreed with the employer's interpretation as well, holding that it would cause the first clause of the PDA to be superfluous and would fail to carry out a key objective in passing the PDA.

The majority laid out that a pregnant employee can still use the *McDonnel Douglas* framework to prove a case of disparate treatment under the PDA by showing that she belongs to a protected class, that she sought an accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work. The employer may then justify its refusal to accommodate by relying on legitimate, nondiscriminatory reasons, although claims that it is more expensive or less convenient will generally not suffice. The employee may then show that the alleged legitimate, nondiscriminatory reason is pretextual. The Supreme Court sent the case back to the Fourth Circuit to determine whether there were genuine issues of material fact as to whether the employer's reasons for not accommodating her were pretextual.

The majority did make an interesting note that their holding may be of limited significance because of the change in the Americans with Disabilities Act expansion in 2008 and the EEOC's guidance that employers are required to accommodate employees whose temporary lifting restrictions originate off the job. Although the Court expressed no view on the statutory or regulatory changes and although pregnancy is generally not considered a disability but conditions related to pregnancy can be, this could cause employees to raise ADA claims when denied accommodations related to their pregnancies and pregnancy-related conditions.

Employers should carefully consider their policies on how to handle employee requests for

accommodations. Although the ruling did not fully side with either party, it is likely to lead to additional litigation on accommodation requests by pregnant employees.

ATTORNEY WALSH TO PRESENT AT UPCOMING SFSP MILWAUKEE CHAPTER MEMBERSHIP MEETING AND NETWORKING EVENT

Attorney Peter J. Walsh will be presenting at the SFSP Milwaukee Chapter Membership Meeting and Networking event on Tuesday, March 24, 2015.

Mr. Walsh is a member of the Tax and Succession Planning Practice Group and will be presenting on how insurance products, such as life insurance and long term care insurance, can be used in asset protection planning for long term care. He first presented this topic to the Elder Law Section of the Wisconsin Bar in September 2013 and his upcoming presentation will be updated to reflect recent changes in the law.

ATTORNEY LAING SPEAKS AT MARQUETTE UNIVERSITY LAW SCHOOL SEMINAR

On March 6, 2015, Dean Laing spoke at the 2015 Marquette University Law School Civil Litigation and Evidence Conference for attorneys. The topic of his presentation was “Deposition Practice,” and included discussion on errata sheets, sequestration, videotape depositions, telephonic depositions and behavior at depositions. The presenters at the Conference included some of the top trial attorneys in Wisconsin.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ASSEMBLY PASSES RIGHT-TO-WORK BILL —

GOVERNOR WALKER EXPECTED TO SIGN BILL ON MONDAY

Today, Friday, March 6, 2015, the Wisconsin State Assembly after a marathon session passed right-to-work legislation by a vote of 62 to 35. The State Senate had previously approved the right-to-work legislation by a vote of 17 to 15 the previous week. The votes were cast according to party lines. The fast-tracked bill will be sent to Governor Scott Walker for signature, which could occur as early as Monday. The bill is aimed at making Wisconsin more attractive to businesses by prohibiting as a condition of employment membership in a labor organization, and, accordingly, provides employees the freedom to choose as to whether they want to pay union dues. Union supporters strongly opposed the bill arguing that the bill harms unions and slows job growth. However, Republican Assembly Speaker Robin Vos said that in Indiana, which passed a similar bill in 2012, unions have not shrunk and jobs have grown.

Once Governor Walker signs the bill, Wisconsin will become the 25th right-to-work state in the country following recent right-to-work legislation passed in Indiana and Michigan. The right-to-work legislation will affect only private-sector workers. The Wisconsin bill would make it a crime punishable by up to nine months in jail to require a worker who is not in a union to pay dues.

Right-to-work is an often misinterpreted concept, as it does not guarantee any right to employment. Under federal labor law, a union that is elected to represent a bargaining unit must represent all workers, even those who have voted against the union. In states that do not have right-to-work laws, all employees in the bargaining unit are required to pay their fair share of union dues for that representation, even if they voted against the union and do not wish to pay union dues. In right-to-work states, however, which Wisconsin will soon be, employees cannot be compelled to pay any union dues or fees in a workplace where an union represents employees through a collective bargaining agreement even though such employees will be covered by the collective bargaining agreement. Wisconsin's right-to-work legislation also makes it unlawful to require any individual to become or remain a member of an union.

Once Governor Walker signs the bill, the new right-to-work law will apply upon the renewal, modification, or extension of any private sector collective bargaining agreement. This means that for collective bargaining agreements currently in place as of the time of enactment of the law, employees would still be required to pay their fair share of union dues and remain members of the union for the remaining term of the agreement. However, for any collective bargaining agreement entered into, renewed or modified after enactment of the legislation, any union security clause requiring employees to be members of the union or any

requirement for employees to pay union dues would no longer be enforceable.

EMPLOYMENT LAWSCENE ALERT: THE FMLA, WFMLA, AND SAME-SEX SPOUSES

On February 25, 2015, the Department of Labor (DOL) issued a Final Rule revising the definition of "spouse" under the FMLA. Currently, a "spouse" is defined as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." The Final Rule amends the FMLA definition of "spouse" to include eligible employees in same-sex marriages, even in states that do not recognize same-sex marriages. Importantly, same-sex marriages will be deemed valid based on the place in which the marriage was entered into, instead of the state in which the employee lives or works. Marriages will be valid if they are performed in any state or country that deems the marriage legal. Wisconsin, through a series of recent federal court decisions, recognizes same-sex marriages. Therefore, if an employee in a same-sex marriage was married in a place that legally recognizes same-sex marriages, an employer in any state, even those that do not currently recognize same-sex marriages, must grant that employee FMLA leave for the care of a same-sex spouse if the employee is otherwise eligible for that leave.

The amendment to the meaning of "spouse" under the federal FMLA does not affect the Wisconsin Family Medical Leave Act (WFMLA). The WFMLA is broader in scope than the federal FMLA as it not only recognizes the right of an employee to take a leave of absence for the serious health condition of a "spouse," defined as "an employee's legal husband or wife" (including a same-sex spouse), but also provides leave rights to employees engaged in domestic partnerships. The WFMLA defines "domestic partner" in one of two ways. First, domestic partner can mean two individuals who: (i) are 18 years or older and competent to enter into a contract; (ii) are not married to or in a domestic partnership with anyone else; (iii) are not related by blood in a way that would prohibit marriage; (iv) consider themselves each other's immediate family; (v) agree to be responsible for each other's basic living expenses; and (vi) share a common residence. Second, domestic partners can be those who have signed and filed a declaration of domestic partnership in the office of the registrar of deeds of the county in which they reside. In Wisconsin, domestic partnerships can apply to same-sex couples who are not married as well as to opposite-sex couples who are not married. Therefore, even employees who are not legally married can be eligible for up to two weeks of WFMLA leave if they are part of a domestic partnership recognized under state law.

The new FMLA regulation goes into effect on March 27, 2015 and the WFMLA is already in

effect for Wisconsin employers, so employers should review their policies and educate supervisors, managers, and human resources personnel on the Final Rule as well as Wisconsin law so that they can be applied properly.

EMPLOYMENT LAWSCENE ALERT: HOW FMLA LEAVE SHOULD—AND SHOULD NOT—AFFECT YOUR EMPLOYEES' PERFORMANCE EVALUATIONS

Under the Family Medical Leave Act, employers are not permitted to take an employee's FMLA-protected absences into consideration when making employment decisions such as discipline and termination. However, if performance deficiencies are discovered while an employee is on FMLA leave and would have resulted in termination or discipline had the employee not been on leave, the employer is permitted to follow through with the same discipline or termination. Determining which category an employee's performance issues fall into can be very challenging.

For example, in a recent decision out of the United States District Court for the Eastern District of Michigan, the period in which the employee was on FMLA leave factored into the employer's calculation of her achievement of performance goals, which eventually led to her termination. As an Account Executive, the employee was assessed based on her revenue-to-budget figure, which was calculated on a three-month rolling average. Because the employee was on leave for five weeks, the court found that her numbers were affected for not only those specific weeks but also the following five months in which the revenue that could have been generated in those weeks would have shown up as part of her assessment. Because of this, the Court granted summary judgment to the employee finding that "no reasonable juror could conclude that [the employer] did not use [the employee's] FMLA leave as a negative factor in its decision to discipline and then terminate [the employee]."

However, employees who take FMLA are not entitled to greater rights than they would have been if they had been continuously working. "Therefore, if, while the employee is on leave, an employer happens to discover a performance issue or other offense for which the employee would have been disciplined or terminated had he or she been working at the time, the employer is still entitled to terminate or discipline that employee." As the Seventh Circuit Court of Appeals has said "the fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee."

Employers need to be very careful in handling how they discipline and terminate employees who are either taking or have recently taken FMLA leave. If the employee's FMLA leave could affect an objective performance criterion in a negative way, employers need to be cautious of using that criterion to terminate an employee. However, if the employer can show that they would have taken the action independent of the leave and merely discovered the issue while the employee was on leave, it will have a solid defense to an FMLA claim.

EMPLOYMENT LAWSCENE ALERT: SEVERANCE AGREEMENTS REMAIN IN EEOC'S CROSSHAIRS

In February 2014, the EEOC filed suit in Illinois federal court against CVS Pharmacy, Inc. alleging that the company's separation agreements constituted a pattern or practice of unlawfully discouraging employees from exercising their rights under Title VII of the Civil Rights of 1964 to communicate with the EEOC or to file discrimination claims. The EEOC's complaint stated that CVS had used a five-page, single-spaced separation agreement that included, among other things, a requirement that employees notify CVS if they became part of an administrative investigation, a promise to not disparage the company or its officers, directors, or other employees, a non-disclosure agreement, a release of claims, and a covenant not to sue. Although the agreements contained express language stating that nothing in the agreement was meant to interfere with the employee's right to participate in any legal proceedings or cooperate with an agency's investigation, the EEOC claimed that that language was not sufficient because the non-disparagement and nondisclosure provisions made cooperation impossible.

In April 2014, CVS filed a Motion to Dismiss the EEOC's complaint calling their severance agreements "run-of-the-mill" and stating that they did not violate the law. CVS further argued that the agreements, even if they restricted employees unlawfully, were not a pattern or practice of interfering with employees' rights but merely constitute unenforceable contracts. CVS' Motion to Dismiss was given support by an *amicus* brief filed by the Retail Litigation Center, Inc., which said that the language used by CVS was substantially similar to agreements used by employers nationwide and a ruling for the EEOC could result in the invalidation of agreements far beyond CVS and result in a flood of litigation.

The federal district court judge dismissed the EEOC's suit, however, not on its merit. The EEOC's case was dismissed because the EEOC failed to meet its pre-suit conciliation efforts before bringing the lawsuit. The federal district court found that the EEOC did not engage in any conciliation procedure and, as a result, was not legally authorized to commence suit. The EEOC, in response, acknowledged that it had not engaged in any pre-suit conciliation efforts

but argued that it was proceeding under a portion of Title VII that did not require the agency to conciliate.

The EEOC has appealed the district court's decision to the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin. Given that the federal district court dismissed the case on procedural grounds, it is very unlikely that the Seventh Circuit, on appeal, will address the merits of the EEOC's claim regarding the legality of CVS's severance agreements. If the EEOC is successful with its appeal at the Seventh Circuit, then it would be most likely that the case will be remanded back to the district court for further proceedings.

This leaves the question open of whether the EEOC will stay the course and continue to press its case against CVS or whether it will select another employer as its target in pursuing its claim that "run-of-the-mill" severance agreements violate Title VII in preventing individuals the full enjoyment of rights afforded by Title VII.

Until a decision on the merits is reached on this issue, it is recommended that employers include explicit and express provisions in their severance agreements that make clear (i) that employees are allowed to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws.