EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF "SUBSTANTIAL FAULT" IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what "substantial fault" means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for "substantial fault by the employee connected with the employee's work." The statute defines "substantial fault" as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment." Wis. Stat. 108.04(5g)(a).

In O*perton v. Labor and Indus. Review Comm'n et al.*, 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC's arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes "substantial fault." The Court of Appeals found that there had been no evidence presented that the cash handling errors were "infractions" that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee's cash handling errors fell into the second category of what is not substantial fault because they were "inadvertent," and it did not matter that warnings had been given because that is not a part of the "inadvertent error" analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if

repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.

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EMPLOYMENT LAWSCENE ALERT: DANE COUNTY JUDGE FINDS RIGHT-TO-WORK LAW UNCONSTITUTIONAL

On March 9, 2015, Governor Scott Walker signed Act 1 (Wisconsin's Right-to-Work legislation) into law, which allows workers covered by a collective bargaining agreement to not pay union dues if they choose not to do so (our previous blog on the law can be found here). Opponents of the law immediately went to work trying to defeat the new law. In late March, the Dane County Circuit Court denied the Wisconsin State AFL-CIO and two labor unions' bid for a preliminary injunction that would have halted implementation of the law. However, this past Friday, the same Court ruled that Wisconsin's Right-to-Work law is unconstitutional (full opinion here).

The unions argued that Act 1 effects an unconstitutional taking of their property without just compensation in violation of Article I, § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representative service which unions continue to be obligated to provide" by law. Article I, § 13 of the Wisconsin Constitution provides "[t]he property of no person shall be taken for public use without just compensation therefor." The unions successfully argued that their service of providing collective bargaining representation to all employees constitutes "property" subject to a protectable interest under

Wisconsin's Constitution. The unions then successfully convinced the circuit court that Act 1 effectuates a taking of their property by requiring the unions to provide services to non-paying nonmembers, because the exclusivity principle of Section 9 of the National Labor Relations Act requires that a union elected by a majority of workers in a bargaining unit must represent all employees, whether or not such employees support the union. The circuit court then opined that Act 1 creates a "free-rider" problem whereby non-union members could refuse to pay for services that the unions are required, by law, to provide to them under the duty of fair representation.

Right-to-Work laws have been enacted in twenty-four other states, and none have been struck down. The Seventh Circuit, which Wisconsin is a part of, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), rejected similar arguments brought by unions challenging Indiana's recently enacted right-to-work law. The circuit court, however, was not persuaded by the decisions in other jurisdictions and expressly held that it was not obligated to reconcile its decision with the Seventh Circuit's decision in *Sweeney*. In justifying its decision, the circuit court found that one important difference between the Indiana and Wisconsin laws is what qualifies as "just compensation." Applying Indiana law, the Seventh Circuit ruled that the ability to exclusively bargain on behalf of employees was a special privilege that qualified as "just compensation;" whereas, under Wisconsin law, the circuit court rejected such a theory and found that Wisconsin has a long history of equating "just compensation" with the payment of money.

Wisconsin's Attorney General and the Department of Justice have already stated that the State will appeal the ruling, which is likely to be overturned on appeal. In the meantime, the Department of Justice is likely to file a motion to stay the ruling until a higher court can decide the issue. We will keep you posted as matters develop.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ENACTS LAW ON FRANCHISOR JOINT EMPLOYER LIABILITY

Although federal administrative agencies such as the National Labor Relations Board, the Occupational Safety and Health Administration, and the Department of Labor have recently pushed to expand the definition of "joint employer" under their respective laws, employers in Wisconsin can take some solace in recent legislation. Under Wisconsin Senate Bill 422, which became effective March 2, 2016, there is now a presumption that a franchisor is not an employer of a franchisee's employees for the purposes of Wisconsin unemployment

insurance, Wisconsin workers' compensation, Wisconsin wage and hours laws, and Wisconsin fair employment laws. A franchisor can only be subject to liability for its franchisee's employees under those laws if 1) it agrees in writing to assume liability or 2) it exercises a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised for the purpose of protecting the franchisor's trademarks and brand.

The law is meant to prevent franchisors who use a traditional franchisor-franchisee model from being held legally responsible for matters over which they did not exert control. Wisconsin franchisors should make sure that they are not taking any control over day-to-day operations of their franchisees, as that could expose them to liability under Wisconsin laws. Additionally, this does not impact how such franchisors would be treated under federal law, as mentioned above.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN SUPREME COURT ISSUES DONNING AND DOFFING DECISION

On March 1, 2016, the Wisconsin Supreme Court issued a decision in *United Food and Commercial Workers Union, Local 1473 et al. v. Hormel Foods Corporation*. The majority determined that the time employees spent putting on and taking off clothes and equipment for their jobs was "work" under the Wisconsin statutes and that employees should, therefore, be compensated for that time.

The Court took into consideration the fact that the employer's work rules required that such clothing and equipment be worn so that the company met food and work safety regulations. Because the Court's majority determined that the employees' "principal activity" was producing food products and that the clothing and equipment was necessary for that production, the Court's majority held that the putting on and taking off of these items was "integral and indispensable" to the work and should, therefore, be compensated. The dissent disagreed, based, in part, on the U.S. Supreme Court's decision in *Integrity Staffing v. Busk*, stating that putting on and taking off the clothing was not a part of safely cleaning and canning food and, therefore, did not need to be compensated.

The Court also rejected the employer's arguments that such time was "*de minimis*" because the case involved more than $500 in unpaid wages per year for each employee. Additionally, the majority noted that, although the "*de minimis*" defense is frequently used under the federal Fair Labor Standards Act, no Wisconsin court has ever applied to it Wisconsin wage

and hour laws.

Employers must carefully consider what pre- and post-shift activities must be compensated. Although this decision helps clarify requirements related to donning and doffing for Wisconsin employers, our advice to employers remains the same—time spent performing activities related to an employee's duties, which includes donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated.

EMPLOYMENT LAWSCENE ALERT: HOW WISCONSIN'S KNIFE LAW REFORM IMPACTS EMPLOYERS

On February 7, 2016, 2015 Assembly Bill 142 became law, amending the Wisconsin Statutes related to how knives are, among other things, regulated by concealed carry permits. The law no longer requires an individual to have a concealed carry permit in order to lawfully carry a concealed knife, including a switchblade or automatic knife. There is, however, an exception where the individual is not allowed to possess a firearm under state law (i.e., a felon), then that individual is also not allowed to carry a concealed knife that is a "dangerous weapon." Local ordinances are not permitted to impose stricter laws than the state law, other than in buildings or parts of a building that are owned, operated, or controlled by a political subdivision of the state.

Although the State of Wisconsin will no longer require that knives, including switchblades, be subject to conceal carry permits, employers still have a duty to make sure that their workplaces are safe for their employees, customers, and visitors. If appropriate, employers should review their handbooks and policies to see if they have a Weapon-Free Policy that prohibits employees from carrying weapons, including knives, inside company buildings and other areas where the employer conducts business.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES DRAFT PROPOSED ENFORCEMENT GUIDANCE

ON RETALIATION AND RELATED ISSUES

Recently, the U.S. Equal Employment Opportunity Commission ("EEOC") published Draft Proposed Enforcement Guidance on Retaliation and Related Issues in order to get public input. The EEOC handles employment discrimination laws, including retaliation claims by employees who engage in "protected activity," such as employees who complain about discrimination, file a charge of discrimination, or participate in an employment discrimination proceeding. Despite the fact that retaliation is the most frequently alleged type of charge filed with the EEOC, it last published guidance on the matter in 1998. It has used this Draft Proposed Guidance as a way to clarify its stance on certain points of law and an attempt to expand the definition of retaliation.

Among the proposed changes is the EEOC's rejection of the "manager rule," whereby an employee who has a job responsibility that involves policing discrimination in the workplace (e.g., human resource manager) is not engaged in "protected activity" if that person is simply performing his or her job. The EEOC proposes to focus on the "oppositional nature of the employee's complaints or criticisms" instead of the employee's job duties. Therefore, while someone such as a human resources manager would not always be protected under the retaliation provisions, that person would also not have to step outside of their role and assume a position adverse to the employer to receive protection.

The EEOC considers internal complaints to be included in the "participation" aspect of retaliation, regardless of whether a formal charge is filed. Additionally, the EEOC proposes that an individual engaged in "participation" in an employment discrimination proceeding does not have to be "reasonable" in either the belief that discrimination occurred or in how the employee presents himself. In fact, the participation could be wrong, defamatory, or malicious. Oppositional activity must still be objectively reasonable to be protected.

In a nod to the National Labor Relations Board, which has held that discussing compensation among employees constitutes protected, concerted activity, the EEOC's Draft Proposed Guidance state that conversations about pay "may constitute protected opposition under the equal employment opportunity laws, making employer retaliation actionable based upon the facts of a given case." The EEOC gives the example of an employee who discusses the fact that she is being discriminated against due to her gender, as evidence by her lower pay than similarly situated male employees.

The Draft Proposed Guidance also expand on the definition of "materially adverse employment action" to include: disparaging the employee to others or in the media; making false reports to government authorities; threatening reassignment; scrutinizing the employee's work or attendance more closely than that of other employees, without justification; giving an inaccurately lowered performance appraisal or job reference, even If

not unfavorable; removing supervisory responsibilities; engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment; requiring reverification of work status, threatening deportation, or initiating other action with immigration authorities; and taking any other action that might deter reasonable individuals from engaging in protected activity. Although the EEOC acknowledges that some courts would find these actions insufficient to constitute a materially adverse employment action, it believes that this interpretation is supported by Supreme Court reasoning.

The public has until February 24, 2016 to submit input, and after that, final guidance will be published. Although, even when finalized, the guidance is simply a reference tool for investigators and not law, employers should be aware of the EEOC's new proposed guidance, particularly the above points. Not only will the EEOC be using these in order to issue initial determinations, but these are items the EEOC is likely to aggressively pursue in litigation as well.

EMPLOYMENT LAWSCENE ALERT: NLRB HOLDS THAT POLICY PROHIBITING RECORDING DEVICES IN THE WORKPLACE VIOLATES EMPLOYEES' SECTION 7 RIGHTS

In a recent decision, the National Labor Relations Board (NLRB) struck down an employer's work rule that prohibited employees from recording workplace meetings and conversations without management approval, finding that such a policy could prevent employees from engaging in protected activity, which is protected by Section 7 of the National Labor Relations Act (NLRA).

In this case, the employee handbook had, like many employee handbooks, a policy prohibiting employees from recording company meetings and other aspects of the workplace. These policies are typically put in place to protect employees' privacy and to protect employers' confidential information and trade secrets. However, a 2–1 majority of the NLRB found that employees could reasonably understand such a rule to prohibit unionization efforts or engagement in other collective or concerted activities to advance their job-related interests. The NLRB held that photo, audio, and video recording at the workplace could be a protected activity under certain circumstances, such as documenting picketing activities, unsafe working conditions, discussions regarding terms and conditions of employment, or an employer inconsistently applying workplace rules. Because the rule in question was simply a

blanket rule prohibiting recording, the NLRB ordered the company to remove the policy.

The NLRB is showing no signs of slowing down in its quest to expand the reach of Section 7 far beyond the traditional view of "protected, concerted activity." Employers should carefully review and consider their workplace policies in light of this ruling and other NLRB decisions that have found other workplace rules infringing upon employees' Section 7 rights. Employers' rules restricting use of recording devices need to either be tied to particular employer interests, such as maintaining a customer's privacy or an employer's trade secrets, or be narrow enough to only prohibit recording in limited circumstances. Otherwise, employers, even non-union employers, could be subject to an NLRB unfair labor charge challenging their workplace recording policies.

EMPLOYMENT LAWSCENE ALERT: IRS DELAYS AFFORDABLE CARE ACT REPORTING

On December 28, 2015, the IRS extended the deadlines for insurers, self-insuring employers, other coverage providers, and applicable large employers to file reports regarding health care information required by the Affordable Care Act. The information required to be reported relates to whether and what health insurance was offered to full-time employees to determine whether the employer met its shared responsibility requirements under the Affordable Care Act and whether employees are eligible for the premium tax credit. For each month, applicable large employers must report certain information, including, but not limited to, how many employees they had, whether the employees were offered health coverage, and the cost of that coverage. The IRS determined that covered entities needed additional time to "adapt and implement systems and procedures to gather, analyze, and report this information." The applicable forms must now be furnished to individuals by March 31, 2016 and to the IRS by May 31, 2016 (or June 30, 2016, if filing electronically). If these forms have already been prepared, the IRS is ready to receive them in January 2016 and encourages providers to file them now instead of waiting for the new due dates.

EMPLOYMENT LAWSCENE ALERT: SEVENTH CIRCUIT RULES THAT EEOC MUST TRY TO

RESOLVE DISPUTES THROUGH CONCILIATION BEFORE FILING SUIT

On December 17, 2015, the Seventh Circuit held in *EEOC v. CVS Pharmacy Inc.* that the EEOC was required to first attempt to resolve its dispute with CVS through conciliation before bringing suit over whether CVS's language in its severance agreements constituted a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII. The EEOC alleged that CVS's standard severance agreement was overly broad, misleading, and intended to deter terminated employees from filing charges with the EEOC even though the agreement provided a carve-out recognizing the employee's right to "participate with any appropriate federal, state or local government agency enforcing discrimination laws."

We have previously blogged about this specific case here and other attempts by the EEOC to broaden their enforcement powers by skirting its conciliation duties here, here, and here.

In February 2014, the EEOC filed suit in federal district court in Illinois alleging that CVS's severance agreements constituted a "pattern or practice" in violation of Section 707(a) of Title VII by interfering with an employee's full enjoyment of the rights afforded by Title VII. In granting CVS's motion to dismiss the complaint, the district court determined that the EEOC was first required to conciliate its claim before bringing a civil suit—a prerequisite that the EEOC claimed it did not have to meet because "pattern or practice" claims brought under Section 707(a) authorizes the agency to bring such actions without following the pre-suit procedures in Section 706—including conciliation. The district court granted CVS summary judgment dismissing the EEOC's suit finding that the agency was required to conciliate its claims before filing its civil suit. In dismissing the EEOC's suit, the district court also questioned whether or not an employer's decision to offer a severance agreement could be the basis for a "pattern or practice" discrimination suit without any allegation that the employer had actually engaged in retaliatory or discriminatory employment practices—an allegation that was missing from the EEOC's complaint.

On appeal, the Seventh Circuit rejected the EEOC's position that Section 707(a) relieved it from any obligation to follow the pre-suit procedures found in Section 706. In addition, the Seventh Circuit held that the prohibition against "pattern or practice" discrimination found in Section 707(a) did not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes but, rather, simply permits the EEOC to pursue multiple violations of Title VII. Because several circuits, including the Seventh Circuit, have found that conditioning benefits on a promise not to file charges with the EEOC is not, in itself, retaliation under Title VII, the court found that simply offering the severance agreement was not discrimination, and therefore, the EEOC failed to state a claim under Title VII. The Seventh Circuit's holding is in line with the recent Supreme Court decision in *Mach*

Mining, LLC v. EEOC, which found that the EEOC can only resort to litigation when informal methods of dispute resolution fail because conciliation is a "key component of the statutory scheme" of Title VII.

Although this case was decided in the employer's favor regarding the waivers contained in its severance agreement, it is still recommended that employers include explicit and express provisions in their severance agreements that make clear: (i) that even though a severance agreement may provide that an employee may waive his or her right to sue in any court or agency, an employee should still be permitted by the express language of the agreement 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. Until the U.S. Supreme Court ultimately rules on the issues presented in the CVS case, employers should expect that the EEOC will continue to be aggressive on these issues regarding whether the use of covenants not to sue under Title VII violate an employee's rights to the full enjoyment of protections afforded by Title VII. Including the above recommended carve-out language in severance agreements places an employer on defensible ground against any EEOC attack regarding the lawfulness of covenants not to sue used in severance agreements. For now, the Seventh Circuit's recent decision is an important victory for employers in Illinois, Indiana, and Wisconsin with regard to their ability to effectively use severance agreements to protect themselves from future suits by terminated employees without fear that such agreements may be considered retaliatory by the EEOC.