EMPLOYMENT LAWSCENE ALERT: DOCUMENTATION MATTERS!

If you call your employment lawyer and tell her that you want to terminate an employee for performance issues, one of the first questions will be “What documentation do you have?” Recently, the Seventh Circuit confirmed just how crucial documentation can be when defending an employment lawsuit.

In *Rozumalski v. W.F. Baird and Associates*, decided August 22, 2019, the employee had been sexually harassed by her supervisor, who was investigated by the employer and terminated once the investigation confirmed the allegations. However, after her supervisor’s termination, the employee was eventually terminated from her job and filed a federal complaint alleging that she had been retaliated against for her original sexual harassment claim and for other complaints stating that her previous supervisor who had been terminated had negatively influenced her new boss in retaliation. The company testified that the employee was terminated for legitimate, non-discriminatory reasons, namely, performance issues. The company stated that the employee struggled with her business development responsibilities, submitted a report that was grossly below company standards and required significant reworking, and was consistently late to work. These performance issues were documented in her written performance evaluation and listed as “needs improvement.” The employee then continued to receive negative performance evaluations, which provided specific examples to support the company’s concerns about her work, and was eventually placed on an Employee Improvement Plan. When she violated a term of her Employee Improvement Plan, she was terminated.

The Seventh Circuit acknowledged that a prior complaint of harassment could impact a victim long after the incident. However, it found that the employee’s new supervisor was not aware of her original harassment complaints until at least five months after the first negative performance review and, therefore, could not have been motivated by a retaliatory animus. Additionally, the individual who made the ultimate decision to terminate the employee’s employment did not know about the original complaints and was motivated solely by the employee’s violation of the Employee Improvement Plan. Finally, the Seventh Circuit observed that the employee’s complaints that her new supervisor was negatively impacted by her previous supervisor could not have been a basis for retaliation because her documented performance issues predated her complaints.

This case stresses the importance of employers properly documenting employee performance issues and creating honest performance evaluations that accurately describe and document employee performance issues. Performance evaluations should be focused on critical performance issues measured against the employer’s legitimate business

expectations. When an employee fails to meet a legitimate business expectation, the performance evaluation should reflect that deficiency. Too often, employers want to terminate underperforming employees without supporting documentation. For example, when an employee's most recent performance evaluations are reviewed prior to termination and there is absolutely no indication or evidence of poor or underachieving performance, the company's business records do not match the reality of the employee's performance, and the termination decision becomes more problematic.

The Seventh Circuit's decision could have been much different for this employer if the employee's performance issues had not been documented or had not been documented accurately. As demonstrated, good and accurate documentation is vitally important—it may be the difference for your company in winning or losing a lawsuit.

EMPLOYMENT LAWSCENE ALERT: RULING ON MARQUETTE PROFESSOR CONTAINS LESSONS FOR PRIVATE EMPLOYERS

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required

procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

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 *Operton 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.

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: WISCONSIN PASSES SOCIAL MEDIA PROTECTION ACT – HOW WILL IT AFFECT YOUR EMPLOYMENT PRACTICES?

On April 8, 2014, Governor Scott Walker signed into law the Wisconsin Social Media Protection Act (the "Act"). 2013 Wisconsin Act 208. The new law, which went into effect on April 10, 2014, Wis. Stat. § 995.55, prohibits employers from requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's "Personal Internet account," defined as an

"Internet-based account that is created and used by an individual exclusively for purposes of personal communications."

Specifically, under the new law, employers may not:

- Request or require an employee or applicant for employment to disclose access information for a Personal Internet account or otherwise grant access to or allow observation of that account as a condition of employment;
- Discharge or otherwise discriminate against an employee for:
    - Exercising his or her right to refuse to disclose access information, grant access to, or allow observation of his or her Personal Internet account;
    - Opposing a practice prohibited under the Act;
    - Filing a complaint or attempting to enforce any right under the Act; or
    - Testifying or assisting in any action or proceeding to enforce any right under the Act.
    - Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's Personal Internet account.

The Act does, however, permit an employer to do any of the following:

- Request or require an employee to disclose access information to allow the employer to gain access to an account, service, or electronic communications device that the employer supplied or paid for (in whole or in part) in connection with the employee's employment or used for the employer's business purposes;
- Discharge or discipline an employee for transferring the employer's proprietary or confidential or financial information to the employee's Personal Internet account without the employer's authorization;
- Conducting an investigation or requiring an employee to cooperate in an investigation if an employer has reasonable cause to believe that there has been:
    - Any alleged unauthorized transfer of confidential, proprietary, or financial information to the employee's Personal Internet account; or
    - Any other allege employment-related misconduct, violation of the law, or violation of the employer's work rules, as specified in an employee handbook, if the misconduct is related to activity on the employee's Personal Internet account.

(Although an employer can require an employee to grant access to or allow observation of the employee's Personal Internet accounts for this purpose, the employer may not require the employee to disclose access information for that account.)

- Restrict or prohibit an employee's access to certain internet sites while using an electronic communication device supplied or paid for in whole or in part by the employer or while using the employer's network or other resources;
- Comply with a duty to:
    - Screen applicants prior to hiring; or
    - Monitor or retain employee communications as required by state or federal laws,

rules, and regulations or the rules of a self-regulatory organization.
    - View, access, or use information about an employee or applicant for employment that can be obtained without access information or is available in the public domain; and
    - Request or require an employee to disclose his or her personal e-mail address.

An employee or applicant who believes he or she was discharged or otherwise discriminated against in violation of the Act may file a complaint with the Department of Workforce Development in the same manner as other employment discrimination complaints are filed and processed with the Department.

Employers should review and revise their policies and practices to ensure that they are in compliance with the Act. For more information about the Wisconsin Social Media Protection Act or if you have questions about whether your practices comply with the new law, please contact us.

EMPLOYMENT LAWSCENE ALERT: SHOULD YOU CHANGE YOUR WORKPLACE POLICIES TO ADDRESS E-CIGARETTES?

As “e-cigarettes” grow in popularity, employers must decide how to address the use of e-cigarettes in the workplace. Electronic cigarettes or “e-cigarettes” are battery-operated devices that deliver nicotine or other substances to its user in the form of a vapor that is then inhaled. Many e-cigarettes are manufactured to look just like everyday objects that can be found in the workplace, such as pens or USB sticks.

E-cigarettes are currently unregulated by the U.S. Food and Drug Administration, which means the FDA has not evaluated any e-cigarettes for safety or effectiveness. A number of recent independent studies on the effects of e-cigarettes and the emissions from those devices have yielded mixed results, with some indicating that the vapor emitted by e-cigarettes contains some of the same carcinogens that you find in traditional cigarette smoke. So, as an employer, how can you know whether you should be regulating the use of these devices in the workplace?

Currently, there is no federal law regulating the use of e-cigarettes and no state has completely banned their use. Twenty-four (24) states, including Wisconsin, and the District of Columbia currently have “smoke-free” laws that prohibit smoking of traditional tobacco cigarettes in the workplace. Because e-cigarettes are still fairly new, most of these “smoke-

free" laws do not address whether the use of e-cigarettes is also prohibited in the workplace. Recently, a number of municipalities and some states have enacted new laws or amended their "smoke-free" laws to ban the use of e-cigarettes in the same way use of traditional tobacco cigarettes is prohibited in the workplace.

Wisconsin's legislature has taken an approach quite different from the trend toward banning the use of e-cigarettes in the workplace and other public places. The Wisconsin legislature has introduced a bill that, if passed, would exclude e-cigarettes from the types of smoking devices that are prohibited under Wisconsin's "smoke-free" law, which would mean that using e-cigarettes would be permitted in those places where smoking traditional cigarettes is now prohibited. It is not likely, however, that this bill would require private employers to allow employees to use e-cigarettes in the workplace.

With more employees bringing e-cigarettes into the workplace, employers are faced with the decision whether to permit or ban employees' use of e-cigarettes at work. Some employers find that permitting employees to use e-cigarettes cuts down on the number of smoking breaks employees take each day, thereby increasing some employees' productivity, while other employers find that e-cigarettes create a distraction for users and non-users alike. Absent legal restrictions regarding the use of e-cigarettes in most cities and states, employers in those jurisdictions are free to create their own reasonable policies addressing the use of e-cigarettes just as they would maintain policies addressing or restricting other activities and conduct that could interfere with employees' ability to do their jobs or otherwise disrupt the workplace.

Employers should stay up to date on state and municipal laws and ordinances that could affect how employers may be required to treat the use of e-cigarettes in the workplace.

WILL WISCONSIN BE NEXT TO BAN EMPLOYERS FROM ACCESSING EMPLOYEE SOCIAL MEDIA ACCOUNTS?

Wisconsin may soon join fourteen other states that have adopted laws prohibiting employers from requesting usernames and passwords to access an employee's or job applicant's social media accounts, including Facebook® and Twitter®.

On Tuesday, August 20, 2013, the Wisconsin Senate Committee on Judiciary and Labor held a public hearing to discuss a bipartisan bill that would prohibit employers from accessing and monitoring the personal internet accounts of employees and job applicants. The bill would

make it unlawful for employers to ask employees and applicants for their personal social media account passwords and would permit employees and applicants to file a complaint against their employer for violations of this law with the Wisconsin Department of Workforce Development in the same manner as an employment discrimination complaint. Besides restricting access to employees' personal social media accounts, Senate Bill 223 would also make it unlawful for an employer to discharge or otherwise discriminate against any person for exercising the right to refuse a request for access to such accounts.

Although seen as a prohibition, Senate Bill 223 provides a number of protections for employers. The bill would not prohibit employers from accessing electronic communications devices, accounts, or services that the employer provides to its employee by virtue of the employment relationship or that are paid for by the employer and used for business purposes. Senate Bill 223 would also permit employers to restrict employees' access to certain internet sites and monitor, review, or access electronic data stored on the employer's own network and on devices provided by the employer. The bill would also afford employers certain protections to permit discipline or discharge of employees who transfer the employer's proprietary or confidential information or financial data to the employee's personal internet account without the employer's authorization. Finally, Senate Bill 223 provides employers with a shield to legal liability against claims that an employer should have known, or should have monitored, an employee's social media account in relation to claims for negligent hiring or negligent retention.

According to the National Conference of State Legislatures, similar laws have been introduced or are pending in at least 36 states. Eight states, including Arkansas, Colorado, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington, have enacted legislation so far in 2013.

A federal law prohibiting employers from requesting or requiring employees and applicants to provide usernames, passwords, or any other form of access to personal social media accounts, is also being pushed through Congress. The Social Networking Online Protection Act was initially introduced in April 2012, but never made it to the House or Senate. The Act was re-introduced and assigned to the Congressional committee on February 6, 2013. If the Act passes committee, it will be passed on and considered by Congress.

Stay Tuned . . .

Employers should stay tuned to both the state and federal legislation that could potentially change the way employers conduct background checks for prospective employees and investigate allegations of misconduct regarding current employees. Please continue to check the Employment LawScene® for updates on these important anticipated changes in state and federal law.