



HUMAN RESOURCES POTPOURRI

• Too Many Accidents, No Claim for Retaliation

A truck driver who was fired for having several accidents was not allowed to proceed with his claim that he actually was fired because he filed multiple workers' compensation claims. *McDannell v. Thos. Somerville Co.*, 29 IER Cases 421, M.D. Pa., June 2009.

In February 2007, the company issued a policy stating that an employee who had three accidents within a three-year period was subject to immediate discharge. The Federal Court stated the plaintiff was "wrong" in thinking "that any employee who has ever filed for workers' compensation benefits, at any point during his employment, has an automatic cause of action for wrongful discharge if he is later terminated by his employer, even if the termination has nothing to do with the filing of a workers' compensation claim."

• Arbitrator Upholds Discharge in Positive Drug Test

Using logic and a rationale that would be applied in any objective investigation or claim of invalidity of drug testing results, a labor arbitrator upheld the employer's right to discharge the employee. Some positive points from the arbitrator's decision follow:

- Drug test was valid.
- Adequate chain of custody was established by proof that the

(Article continued on back.)

EEOC Caseload—It Is Growing!

It is projected that private sector discrimination charges filed with the EEOC will reach a record high in fiscal 2010, 102,000 cases. More bad news: the EEOC's record-setting pace for charges filed will not likely let up in the next few years. For those who wanted change, it is happening on every front in the area of labor and employment law. Who is the likely target? The employer.

How the EEOC numbers compare with prior years.

- Fiscal 2008, EEOC received 95,402 discrimination charges.
- Through March 31, 2009, EEOC has received 43,956 charges.
- Through March 31, 2009, EEOC had a pending case inventory of 80,994 charges.
- Average processing time, 258 days as compared to the EEOC's target of 180 days.

To help the agency deal with this surge of cases, it received a budget increase to \$344 million for fiscal 2009, and \$367 million for fiscal 2010. This will allow the agency to begin a recruitment drive to hire more front-line investigators, attorneys, and mediators. It is expected that the EEOC's employment will increase by approximately 300 employees over fiscal 2008.

The most "popular" charges:

- Age discrimination, as employers tend to lay off older employees.
- Race discrimination, the most frequent claim following termination and the most frequent complained-of employment action.
- Sexual harassment, still very popular. Usually involves male executives harassing female subordinate employees.
- Pregnancy discrimination, charges filed by women primarily in their 20's. "Tell the employer you are pregnant and you are out the door," and the discrimination charge follows.

More fact-finding conferences and mediations aimed at trying to settle charges without the usual extended agency investigation. Their purpose? Define the issues and clarify any disputed facts.

What should you be doing as an employer to avoid being part of this process? Establish a strong EEO policy, have the policy endorsed by top management, train your supervisors and managers regarding policies including those related to workplace harassment of every kind, hold the supervisors and managers accountable, effectively communicate your policies to all employees, and of the utmost importance, promptly investigate any and all complaints of suspected discrimination. This is serious business; never "take it lightly." Employers are also encouraged to promote respect and dignity in the workplace and to create a culture that embraces the diversity that we encounter in today's work environment.

In all instances when labor and employment issues in the workplace arise, it is advisable to contact an attorney experienced in these areas of the law.

EFCA Update—A Crack in the Wall?

The proposed Employee Free Choice Act must contain a "fair and just process" for workers to express themselves on whether they want a union, or not, but it does "not necessarily have to be card check" authentication, so says AFL-CIO (outgoing) President John J. Sweeney. Sweeney also stated "there are different ways" that employees can express their desires for a union, but the process must be fair. In addition to a fair and just process, the AFL-CIO president stated the bill must have "strong penalties for violations" and protection of the collective bargaining process. "We don't have to have everything that was in our original proposal." The unions remain committed to major labor law reform and continue to have the support of President Obama and Vice President Biden who have both pledged "to deliver the message" on the need for EFCA after they get health care overhaul legislation passed. Is this more of the same? Does overhaul mean a greater burden on the employer? Stay tuned. "It ain't over till it's over!"

Keep your labor and employment lawyer's phone number close at hand.

(Source: BNA, Daily Labor Report September 8, 2009)



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Things I Have Learned:

- That to ignore the facts does not change the facts.
- That if you want to remember your wedding anniversary forever, just forget it once.
- That there is no advertising as effective as something recommended by a friend.
- That the less time I have to work with, the more things I get done.
- That people place too much importance on progress and not enough on maintenance.
- That people allow themselves to be only as successful as they think they deserve to be.
- That if you don't know the answer, it's best to say, "I don't know."

HR Potpourri (cont'd)

sample was handled properly until it reached a qualified independent testing laboratory.

- CBA provided (or equally applicable company rule or policy) "an employee who tests positive shall be subject to discharge at the sole discretion of the company."
- Company acted consistently in applying the rule, where a substance abuse agreement/policy established a penalty of discharge for all failed drug tests.

(Source: BNA, Daily Labor Report, August 10, 2009)

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Workplace Monitoring Policies: Proceed with Caution

Thinking about developing and implementing a workplace monitoring policy in your organization? If so, you should be explicit, transparent, and realistic. Use care in preparing a policy that is clear and concise, and that honestly and succinctly informs employees about the limits of their personal privacy at work. In doing so, be cautious of the possible unintended consequences of uncovering personal information about employees. While there is no "one size fits all" policy that will fit the needs of every organization, the policy statement should clearly advise your employees that they should not have an expectation of privacy when utilizing company resources such as e-mail and computers that may be subject to monitoring by management. Any such policy developed must also be published and consistently applied. Also be aware of possible liability under the Stored Communication Act (18 USC §§ 2701-2711) which addresses access to an employee's personal Web site. Liability under the Act does not depend on showing an unlawful or wrongful discharge.

So what should your organization consider when it decides to develop an electronic monitoring/communication policy? The first things are transparency and consistency in enforcement. Here are some other suggestions:

- Establish who owns the computers and related equipment.
- Inform employees (clearly) that they will have no expectation of privacy in communications sent with the company-owned equipment, even if a file is marked as "private" or has a personal attachment.
- Inform employees of the monitoring techniques that the company may use.
- Alert employees to prohibitions on using company facilities for sexually explicit, harassing, or discriminatory communications, as well as any company policies against solicitation of employees during working hours.
- Advise employees that they are not permitted to download software programs onto company computers without authorization from management, or bypass spam filters or other security features on the company-owned computer.
- Prohibit peer-to-peer file sharing on company computers without permission from management.

When developing an electronic monitoring/communications policy, avoid any appearance of selective enforcement. It can easily become the "kiss of death." Do, however, focus your attention on employees who spend excessive time on personal affairs at work, rather than on the substance of their personal communications. One final reminder: be honest, accurate, and consistent in all of your applications of company policies.

Questions related to such policies should be referred to an experienced attorney who practices in the area of labor and employment law.

(Source: ABA, Section of Labor and Employment Law Conference, August 2009)

Reality Check

Employers beware! A reality check on what is happening in the EEOC's area of enforcement.

The two most recent appointees by President Obama to the EEOC, one to lead the agency and the other a commissioner, were both formerly associated with the American Civil Liberties Union. If that is not enough, the current acting chairman of the EEOC has stated, in a case involving an alleged "inflexible medical leave policy" at United Parcel Service, Inc., this case "should send a wake up call to corporate America that violating the Americans with Disabilities Act will result in vigorous enforcement by the EEOC ... and employers simply have no excuse for failing to abide by its provisions."

They are coming—DOL, EEOC, NLRB, OSHA, etc.—and they have the employers in their sights. You heard it here. Take heed and keep the telephone number of an experienced labor and employment lawyer nearby!

Quotes of the Month

What's right isn't always popular, and what's popular isn't always right. ~Unknown

Character may be manifested in the great moments, but it is made in the small ones. ~Phillips Brooks

Life isn't about finding yourself. Life is about creating yourself. ~George Bernard Shaw

Efforts and courage are not enough without purpose and direction. ~John F. Kennedy

Everyone can afford to give away a smile. ~Unknown

He who limps is still walking. ~Stanislaw J. Lee

Don't find fault. Find a remedy. ~Henry Ford

