



HUMAN RESOURCES POTPOURRI

In sexual harassment cases, severe and pervasive conduct remains alive and well. In *EEOC v. T.JX Cos. d/b/a Marshalls*, E.D.N.C., 1/22/09, the court determined that the manager's conduct was "sufficiently severe and pervasive to alter the conditions" of the employee's employment and create an abusive work environment. The Court stated, "The objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." Those circumstances included the "frequency of the discriminatory conduct; its severity; and whether it unreasonably interferes with an employee's work performance." When these factors exist, the result will be left to "a reasonable jury."

Local Employer Fined for Hiring Illegal Workers. As recently reported in the *South Bend Tribune*, Janco Composites and its president pleaded guilty to federal charges stemming from an immigration raid at the company's Mishawaka plant in March 2007. Janco agreed to pay a \$210,000 fine, and the company president agreed to a year of probation and a \$30,000 fine.

Some of the allegations involved a company employee helping illegal workers complete I-9 employment forms, avoiding a response to government requests for "No Match Letters," employees switching shifts to avoid daytime raids, and company suspension of its attendance policy when a large number of Mexican workers were absent after an employee's arrest. The raid on the company was carried out by Federal Immigration and Customs enforcement agents and resulted in 36 arrests.

Source: *South Bend Tribune*, Feb. 4, 2009

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EFCA: THE DEBATE CONTINUES

The campaigns to pass or defeat the proposed Employee Free Choice Act (EFCA) are becoming louder and more intense. Where you fit into this equation depends on your union, management or political viewpoint, and, as you might expect, there are major differences. Proponents of the bill continue the "real pushback" of management opposition to EFCA and the media blitz is ongoing. Management, on the other hand, claims that the arguments of supporters are false and misleading, and that the audience hearing these claims should consider the source. The point in question: "The Employee Free Choice Act absolutely protects workers' right to choose a secret ballot election. But the choice would be the workers', not their bosses'." Yeah. Right. A look at the text of the proposed legislative amendment is to the contrary.

Under the EFCA, a union that has secured written authorization from a majority of employees in an appropriate unit can petition the NLRB to review the employee authorizations and identify the labor union as the employees' bargaining agent if the signed authorizations were "valid." The card check procedure is not available if another union already has been certified or recognized as the bargaining representative of the same employees. So what are we missing that the proponents of the law see as a fair entitlement to a secret ballot election? It does not exist.

Will the "worker-to-worker" encounter that leads to a card signing be a cheerful experience, or will it be confrontational? Will there be coercion by the union, or will the employees happily roll over and allow the card signing to occur? Do the workers really want to organize themselves and have the process made easier, or is the current system that requires a secret ballot election still the best alternative? Many questions, and so few answers. Two interesting surveys with results that you might find interesting:

In a Hart Research Association poll commissioned by the AFL-CIO, it was reported that 73% of 1,007 respondents favored legislation that "makes it easier for workers to bargain with their employers for better wages, benefits and working conditions," because "they get it." However, opponents of the bill see it differently and have their own assessment of public opinion on EFCA. The Coalition for a Democratic Workplace found in a poll conducted by McLaughlin & Associates that 74% of respondents opposed the passage of EFCA. Everyone has an opinion, and we respect these opinions. However, it remains our opinion that without substantial changes and modifications to the proposed Employee Free Choice Act, it is bad legislation and will have a very negative impact on employers and the so-called creation of jobs. The opposite effect is likely.

Questions involving labor and employment issues should always be referred to an experienced attorney who practices in this area of the law.

OTHER PROPOSED EMPLOYMENT LEGISLATION

Respect Act (The Re-Employment of Skilled and Professional Employees and Construction Trades Workers)

- This law would modify (narrow) the definition of "supervisor" under the National Labor Relations Act and likely allow working foremen to join a union instead of treating them as part of management.

The Patriot Employers Act

- This law would provide a federal income tax credit for employers that maintain their headquarters in the U.S., pay at least 60% of each employee's health care premiums, and maintain a policy requiring neutrality in employee organizing drives.

The Working Families Flexibility Act

- This law would permit employees to request, and employers to consider, requests for flexible work times and conditions. It would also allow any reconsideration of denied requests to go to the DOL or federal court.

Civil Rights Act of 2008

- This law would remove the existing statutory cap which was originally part of Civil Rights Act of 1990, on discrimination claims leaving employers exposed to unlimited compensatory and punitive damages

Employment Non-Discrimination Act (ENDA)

- This law would allow sexual orientation and gender identity and expression to become protected classes, just like race, sex, age, national origin, religion and disability.

Paycheck Fairness Act

- This law was signed into law on the same day as the Ledbetter Fair Pay Act. It is intended to expand damages under the Equal Pay Act and proposes voluntary guidelines to allow employers to evaluate jobs with the goal of eliminating wage disparities. It would apply to unintentional pay disparities and will lift caps on compensatory and punitive damages.

If you have not already figured it out, the employment landscape is changing, and it is likely that with the passage of any of the above laws, individually or collectively, there will be a major impact on businesses, especially small businesses, from management, legal and monetary perspectives. The likely result: more costs to employers, which means fewer jobs for workers.

Things I Have Learned:

- That whenever I decide something with an open heart, I usually make the right decision.
- That it doesn't cost anything to be nice.
- That everyone has something to teach.
- That putting things in a safe place doesn't mean you can find them again when you look.
- That broken cookies have fewer calories.
- That you leave a little piece of yourself with everyone you teach.
- That the easiest way to find happiness is to quit complaining.



UNISEX BATHROOM HARASSMENT CLAIM

A female technician for Verizon Communications was not able to show that the employer's often dirty unisex bathrooms rendered the workplace "objectively hostile" to women, so says the Southern District Court in New York (*Dauer v. Verizon Communications Inc.*, Jan. 2009). The Court did not find the complained of conduct "created an environment that a reasonable person would find hostile or abusive." The Court said that the complaints about unclean unisex bathrooms and the employee's need to sometimes wait while male employees used them, were about a "mere inconvenience" that does not trigger a Title VII claim. Source: BNA, Daily Labor Report, Feb. 4, 2009

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LILLY LEDBETTER EQUAL PAY ACT: Is It Equal and Is It Better?

This new act, signed into law on January 29, 2009, is intended to make it easier for employees to bring pay bias claims against their employers. In signing this bill, President Obama stated, "I intend to send a clear message: Just making our economy work means making sure it works for everyone." Translated, this means employers can likely expect an onslaught of litigation from a law that has been called by many as "too broad."

The law, which addresses time limits faced by workers alleging pay discrimination in the workplace, amends Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to provide that the charge filing periods—300 days in most states and 180 days in the few states that do not have a state fair employment agency—are triggered each time compensation is paid pursuant to a discriminatory compensation decision or practice. This law essentially overrules the 2007 U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that the time limits for filing a discrimination charge with the EEOC start to run when the employer makes a discriminatory decision about the employee's compensation, not each time the employee receives a paycheck.

Will this law increase the number of wage litigation claims, allowing an employee to bring an Equal Pay case covering pay for years after the alleged continuous acts of discrimination occurred, if the employee did not have reason to know about the disparity until later in the employment and never had a period of more than 180 days after a paycheck was received from the employer? Only time will tell whether the real effect of this law will result in an increased number of frivolous complaints. One thing is certain, the law expands the scope of equal pay beyond sex discrimination and into other federally protected classes, such as race, age and disability.

Questions concerning pay discrimination and related Title VII matters should always be referred to an experienced employment attorney.

WHAT'S GOOD FOR THE GOOSE

Getting a little bit of what they dish out, the NLRB announced that it will display an American flag at all representational elections conducted by the organization, a patriotic decision indeed. However, the union representing agency employees called the decision "hypocritical" in light of its current bargaining position with the Board.

The Board believes that the display of the flag will "lend dignity to the election process and communicate to all participants that they are involved in an official activity of the government of the United States. . . ." and employees who cast ballots will see that the government is truly serious about the promise of employee free choice guaranteed by Section 7 of the National Labor Relations Act. This is a hypocritical statement, in view of the proposed EFCA legislation, which would take away the right of a secret ballot election. Nevertheless, the union representing the agency employees disagreed; now that is a surprise. The agency union calls the Board's decision "hypocritical" when management is "deliberately violating the law by refusing to bargain" with its own union. Noteworthy is the fact that the NLRB general counsel had directed its bargaining representatives not to bargain with the NLRBU in order to obtain judicial review of an earlier Federal Labor Relations Authority decision certifying a bargaining unit that combines employees who report to the general counsel and employees who work for the five-member board. Interestingly, an FLRA administrative law judge ruled that the NLRB violated federal labor law by refusing to bargain with the NLRBU. Is this just any form of management getting the short end of the stick, or does the Board really not like getting done to them what they often do to the employer?

Source: BNA, Daily Labor Report, Feb. 25, 2008

ECONOMIC DOWNTURN PROMPTS EMPLOYER REACTION

Not a startling revelation, but the worsening recession in the last half of 2008 and a weakening financial performance have caused employers to reduce their salary budget increases for 2009 to 3.1% on average. However, there is a silver lining in this dark economic cloud. Many employers remain committed to rewarding employees, "especially high performers." The message to employees: business leaders are trying to do their part by freezing salaries for officers and executives by sharing the pain brought on by these difficult times.

Source: BNA, Daily Labor Report, Feb. 4, 2009

QUOTES OF THE MONTH

Courage is being scared to death—but saddling up anyway. *John Wayne*

Great men (and women) are rarely isolated mountain-peaks; they are the summits of ranges. *Thomas Wentworth Higginson*

To educate a man in mind and not in morals is to educate a menace to society. *Theodore Roosevelt*

Let us not look back in anger or forward in fear, but around in awareness. *James Thurber*

Never bend your head; always hold it high. Look the world straight in the face. *Helen Keller*

A prejudice is a vagrant opinion without visible means of support. *Ambrose Bierce*

He knew the precise psychological moment to say nothing. *Oscar Wilde*

The rest is silence. *William Shakespeare*

