THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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EVERY WORD YOU TYPE, EVERY KEY YOU STRIKE, I'LL BE WATCHING YOU...

Metropolis, Inc. was concerned about the productivity of its employee, Lex Labor. So, it asked IT guru, Kent Clark, to monitor Labor's e-mail usage. As it turns out, Labor was spending at least 4 hours a day on a fantasy football website, and sending trade secret information to friends.

When Clark brought this to the attention of Metropolis' owner, Lois Lane, he expected her to demand Labor's immediate termination. Instead, Lane seemed distressed by the news and fretted to Clark "isn't that some sort of invasion of privacy, looking at Lex's e-mails? We'll get sued!"

Clarke breathed a sigh of relief, "Oh, is that all you are worried about? We took care of that when we revised our handbook. On the advice of our attorneys, we added a computer policy giving our employees explicit notice that the computer and its contents belong to Metropolis, that the use of Metropolis' computers and e-mail account may be monitored, and that employees can not expect any privacy when working on our computer system. Further, I have Labor's signature that he read and understood the policy." Smiling, Lois said, "Kent Clark, you are so Super!!"

Courts consistently hold that a key factor in determining whether an employee has privacy rights in employer-owned computer e-mails is whether the employer had a stated policy like the one described above. If you don't have such a policy, adopt one now.

Note: It does not take much to create an expectation of privacy. For example, in one recent case, the court suggested that a reasonable expectation of privacy depended on whether the employer told employees they could purchase the computer at the end of their employment.

Also Note: If an employee is deemed to have some privacy rights, courts will scrutinize the reason for an employer's intrusion into that privacy. The key issue is whether an employer's need to invade an employee's privacy outweighs the employee's privacy rights. The employer is more likely to prevail when (1) its motivation is protecting confidential information, (2) its search is limited to making sure no unauthorized activity that would damage the company has occurred, and (3) it keeps the search as private as possible by restricting who views the contents. In short, an employer's search is more likely to comply with the law when the employer can show a clear business-related reason to invade the employee's privacy and the actions taken are limited to what is necessary for the company's protection.

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Interestingly, another recent case suggested that in the public sector, a search is justified when there are reasonable grounds to suspect that the employee is guilty of work-related misconduct or that the search is necessary for other work-related purposes, such as retrieving a file, but often is not justified if the search is part of a criminal investigation or other non-work-related matter.

U.S. SUPREME COURT WEIGHS IN ON EMPLOYMENT ISSUES

This last term was a busy one concerning employment issues decided by the Supreme Court. Here's a brief review of those decisions:

CBOCS West, Inc. v. Humphries – *Employees can bring retaliation claims under 42 U.S.C. 1981(a)*. In *CBOCS*, an African-American employee sued his employer alleging, in part, that it retaliated against him for complaining to managers that it terminated an African-American co-employee for race-based reasons. 42 U.S.C. 1981(a) gives all persons the same right to make and enforce contracts. This statute is often implicated when a member of a protected class is discriminated against, and that discrimination impedes his or her ability to make or enforce a contract. But in this case, the Court was being asked whether an employee who complained about another employee's termination, and was then dismissed himself, could bring a retaliation claim under this same statute. The Court supported a retaliation claim under this statute.

Gomez-Perez v. Potter – *Federal employees can bring retaliation claims under the federal-sector provision of the ADEA*. In *Potter*, a U.S. Postal Service employee sued her employer claiming it retaliated against her for filing an administrative age discrimination complaint. The ADEA's federal-sector provision prohibits discrimination based on age for federal employees who are at least 40 years old. Similar to *CBOCS* , the issue was whether the provision includes claims of retaliation. The Court held that it does.

Impact these cases have on Employers: Virtually none. After all, courts already consider retaliation illegal when it is for complaining about protected-status discrimination. These cases are notable because they confirm the Supreme Court's support for retaliation claims. In fact, retaliation claims are huge and growing. Employers must ensure that actions taken against an employee who complain about workplace discrimination are well supported by facts proving the employer's legal justification for the decision. Be prepared!

Meachem, et al. v. Knolls Atomic Power Laboratory – *Employers have the burden of proving that reasonable factors other than age resulted in an employee's termination*. In *Meachem*, the Government ordered contractor Knolls to reduce its workforce. To determine who would be laid off, Knolls scored its employees based on "performance," "flexibility," and "critical skills." As it turned out, 30 of the 31 employees let go were over the age of 40. A group of those employees sued under the ADEA claiming that Knolls discriminated against them based on age. Knolls defended that it relied on "reasonable factors other than age," citing the scoring system. The issue before the Court was whether the employer must prove that reasonable factors other than age were the true basis for its choices, or whether the employee must show that it was age rather than these other factors – in other words, which party has the burden of proof. The Court held that it was the employer's burden to prove that its selection was based on factors unrelated to age.

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Impact on Employers: Employers should take measures to ensure that age is left out of the equation when making layoff decisions and that actual non-age-related reasons are well documented and provable.

Kentucky Retirement Systems, et al. v. E.E.O.C. *Treating employees differently on the basis of pension eligibility is not discrimination under the ADEA.* Kentucky has a retirement system that provides normal retirement benefits to anyone who has worked for 20 years or has attained the age of 55 and has worked at least 5 years. Kentucky also provides disability benefits by adding to a disabled employee's actual years of service the number of years needed for retirement eligibility, but adding no more than the number of years the employee has previously worked. For example, if an employee is 47 and worked for 12 years when he or she became disabled, Kentucky would impute 8 years of service making the employee eligible for normal retirement benefits.

A 61-year old employee sued when he became disabled and no years were imputed to his years of service. He argued that a younger employee in the same situation would have had years of service imputed and that this imbalance discriminated against older workers The Court held that the plan did not discriminate on the basis of age. Rather, the disparity was based on pension eligibility, which is not the same as age.

Impact on Employers: This ruling is significant in that it reinforces the Court's earlier ruling in *Hazen Paper* that an employer may discriminate on the basis of pension status so long as it is not a "proxy for age." Essentially, the Court seems willing to support plans that, overall, benefit older workers.

PLAYING DOCTOR WITH EMPLOYEE CREATES ADA CLAIM.

Phoenix Company hired Jimmy Wilson in 1988. Ten years later, Wilson's doctors diagnosed him with Parkinson's disease. Despite some minor complications that this disease caused him (e.g., he had a few panic attacks at work after receiving the diagnosis), Wilson was able to perform all the essential functions of his job and received a medical report from his doctor that he could continue work without any restrictions.

After receiving this information, Phoenix's President sent an email to the company's human resources assistant telling her that, "Wilson qualifies for ADA designation and we will have to consider accommodations." Additionally, Phoenix's company doctor, without examining Wilson, restricted Wilson to working only half-time. In fact, the only accommodation that Wilson needed, and requested, was that the company provide him a 21-inch computer screen, instead of the standard company-issued 17-inch screen.

Then, 6 months later, the company installed a new computer system that it used company-wide. Thereafter, senior management became concerned that Wilson had difficulty utilizing the information on the computer screen and that he was unable to adequately input information into the computer. So, instead of training Wilson, senior management barred Wilson from inputting data into the computer.

After another six months passed, Wilson's doctors advised him that his Parkinson's symptoms had been stabilized by medication. Wilson was still able to write, albeit with some difficulty, play

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golf, coach youth sports, and complete normal, daily activities. In fact, some managers commented that Wilson was "a dependable employee who often worked six to seven days a week." Shortly thereafter, the Company announced that it was undertaking a reduction in force and that two supervisory positions would be eliminated: Wilson's and another employee's. The other employee was permitted to transfer to an hourly position. Wilson requested a similar transfer, but the Company denied the request.

Wilson sued the Company claiming that it discriminated against him because it "regarded him" as disabled, a violation of the Americans with Disabilities Act. In agreeing with Wilson, the District Court and Court of Appeals focused on a number of actions undertaken by Phoenix Company. First, the courts cited the President's email wherein he stated that Wilson "qualifies for ADA designation," despite the fact that a week earlier the Company received information from Wilson's doctor that he could return to work without restrictions. In essence, the Court found that the Company's perception led it to discount the specialist's medical opinion in favor of its own.

Second, the Court credited Wilson's testimony that senior management treated him "like he was a handicapped person" after his panic attacks. This testimony was also bolstered by evidence that other supervisors avoided Wilson whenever possible, and some refused to even look at him. Such treatment, the Court found, "shows that the very myths and fears about disability and disease can result in a person being regarded as having a disability."

Finally, the Court determined that the Company's decision to deny Wilson access to the Company's computer system based on its belief that Wilson was substantially limited in the major life activities of performing manual tasks and seeing, further established that it regarded him as disabled. After all, Wilson and his doctor both testified that he could perform those activities without accommodation.

Accordingly, the Court determined that Phoenix Company regarded Wilson as disabled and his claim will now be heard by a jury.

Practical Tip. A while back, there was a commercial on television wherein an actor who played a doctor on a television soap opera started the commercial off by saying, "I'm not a doctor, but I play one on TV..." While such may be acceptable credentials on television, employers should refrain from acting like doctors, even if they are doctors, when it comes to their employees' health issues.

TATTOOS, BODY PIERCINGS AND MEN IN WOMEN'S CLOTHING

What is the world coming to when employers get sued for requiring employees to dress and groom themselves in a professional manner that will not frighten or distract customers?

Take the case of *Roberts v. Ward*, 468 F.3d 963. William Leslie worked for the state parks department (a public entity) when it passed a dress code prohibiting visible tattoos at work and requiring that all shirts and blouses be tucked in. Leslie had a tattoo on his arm reading "USN" for U.S. Navy. He refused to cover the tattoo or to tuck in his shirt. After he was fired for his conduct, he sued claiming that the termination violated his First Amendment right of free speech. Leslie explained that the tattoo expressed his "support, loyalty and affection for the U.S. Navy."

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Because support for the military could be a matter of public concern, the court said that it might, in fact, be protected free speech. Nevertheless, it found that Leslie was justifiably terminated for not tucking in his shirt. This insubordinate conduct clearly did not involve free speech on a matter of public concern. Had Leslie tucked in his shirt and been fired only for the exposed tattoo, this case may have gone against the employer.

Employees of private employers are not protected by the First Amendment regarding work-place speech. But an employee with a tattoo could claim discrimination on the basis of sex, race, religion, military, or other protected status if a "no visible tattoo" policy is not enforced uniformly. If displaying the tattoo concerns a religious belief, "reasonable accommodation" may be required.

Speaking of religion, did you know that there is a religion called the Church of Body Modification (CBM)? No? Well, neither did Costco, until one of its employees, Ms. Cloutier, refused to remove her eyebrow ring in violation of the dress code prohibiting employees wearing facial jewelry at work. Initially, she cited no religious belief in support of her insubordination, but she soon wised up and told her supervisor that eyebrow piercing was part of her CBM religion.

Costco checked into her alleged religion and discovered that CBM was established in 1999 and counts approximately 1,000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation "to promote growth in minds, body, and spirit." After Cloutier filed a religious discrimination charge with the EEOC, Costco agreed that she could wear a clear plastic post in the piercing at work to prevent it from closing; or she could wear a bandage over the jewelry. Cloutier refused this offer and maintained that the only reasonable accommodation was to exempt her from the no-body-piercing rule. The court rejected Cloutier's argument and found that reasonable accommodation goes both ways. Cloutier's refusal of Costco's offer was unreasonable. Demanding that she be exempted from the rule would place an undue hardship on the employer. See *Cloutier v. Costco Wholesale Corp*, 390 F.3d 126.

And what's wrong with prohibiting men from dressing like women at work or visa versa? Last year, Colorado expanded the Anti-Discrimination Act by prohibiting discrimination based on "sexual orientation," which includes transgender discrimination. The new law provides that it does not "preclude an employer from requiring compliance with a reasonable dress code as long as the dress code is applied consistently." Does this mean that a reasonable dress code can require men and women to wear what is commonly associated with their biological sex? Or does it mean that men can wear high heels, dresses and panty hose to work if women are allowed to wear these items, and women can wear pants, ties and crew cuts if men are so allowed? There are no court cases in Colorado interpreting this new law. However, in other states, transgendered individuals have successfully filed claims against employers under Title VII based on a theory of sexual stereotyping regarding appearance.

In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.,* 542 F. Supp. 2d 653, a Texas court recently denied summary judgment to a medical clinic that hired Izza Lopez a/k/a Raul Lopez, Jr., and then withdrew its job offer when it learned that Lopez was a biological male living as a female. The court found that River Oaks' action would violate Title VII's prohibition against sex discrimination if it was motivated by the fact that Lopez did not conform to the stereotype of what males should look like. On the other hand, it would not violate Title VII if the motivation was that Lopez misrepresented himself as a female in the application process. This case indicates that a dress and grooming code that requires men to dress as men and women to dress as women may be illegal sexual stereotyping.

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Q & A

Q. *Did Colorado just pass a law making it illegal for employers to prohibit employees from talking about their wages?*

A. Yes. C.R.S. §24-34-402 makes it an unfair employment practice, unless otherwise permitted by federal law, for an employer to discharge, discipline, discriminate against, or interfere with any employee or other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages; to require as a condition of employment nondisclosure by an employee of his or her wages; or to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information. This prohibition does not apply to public entities or managers who are exempt from the National Labor Relations Act.

Q. *Our restaurant pays tipped employees $4.00 cash wages for every hour worked, and we take the $3.02 tip credit. When an employee works overtime, do we pay 1.5 time the $4.00 per hour, or 1.5 times the minimum wage of $7.02, or 1.5 times all income received by the employee, which generally far exceeds $7.02 per our?*

A. You should calculate overtime payments based on the cash wage plus tip credit only. So, if you pay $4.00 cash wage plus take a $3.02 tip credit, the regular rate is $7.02 per hour, with the overtime rate at $10.53. So, you pay $7.51 for each overtime hour ($10.53 - $3.02 = $7.51).

Q. *We give a longevity bonus to all employees. On each anniversary date, a non-management employee gets $100 and a management employee gets $500. Does this alter our overtime obligation?*

A. Because the bonus is non-discretionary, the company must include it in a non-exempt employee's regular rate of pay, which will increase the overtime rate for the relevant period. You will compute the additional overtime by dividing the bonus by the total hours worked during the period covered by the bonus (Anniversary Date to Anniversary Date) to determine the increase in regular rate of pay per hour. Additional overtime compensation is equal to .5 times this figure times the total hours of overtime during the year.

Q. *Can we withdraw an employment offer when a criminal background check discloses that the applicant has a felony conviction? And, if so, how?*

A. Unless you promised otherwise, you can withdraw the job offer based on the conviction. Assuming that you used a consumer reporting agency (CRA) to perform the background check, you must comply with the Fair Credit Reporting Act requirements. The Act requires that you first obtain the applicant's authorization to get the background report. And it requires that before you take an adverse action based on the report, you advise the applicant that you intend to take an adverse action based on the report, provide a copy of the report, and let the applicant know the CRA's name, address, and telephone number. The notice must also advise the applicant that the CRA does not know the reason you took the adverse action; and that the applicant can get a free copy of their credit file from the CRA if requested within 60 days and can dispute the report with the CRA.

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