

STATE/FEDERAL LAW UPDATE –

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SUPREME COURT DEVELOPMENTS



BACKGROUND CHECKS v. RIGHT TO PRIVACY

- *NASA v. Nelson*
- In-dept background investigations for “low-risk” contract employees
- 28 employees sued—had no access to classified information and no security clearance.
- NASA required background checks
- Employees claimed violation of right to informational privacy

Nasa v. Nelson—cont'd.

- Court says governmental employer has interest in security of facilities, managing internal operations and employing competent workforce
- Inquiries were reasonable and employment related to further government interests
- Open-ended inquiries ok—aimed at identifying capable employees
- These inquiries commonplace in private sector and for federal civil service employees
- **Impact: employer whether public or private may request broad range of background information for applicants or employees so longed as related to interest in employing competent, reliable workforce.**
- Concurrence- no federal constitutional right to informational privacy—rare unanimous decision

EMPLOYER CAN BE LIABLE IN CAT'S PAW SITUATION

- *Staub v. Proctor Hospital*-Jean de La Fontaine fable about monkey convincing cat to steal chestnuts from fire. Cat burns paws and monkey eats chestnuts.
- Now employer is the party who is burned
- Supervisor performing act motivated by unlawful animus and intended to cause adverse employment action
- Employer liable if supervisor's act is proximate cause of adverse action—even if decision maker didn't share the animus
- USSERA decision—likely to be applied in Title VII and other discrimination cases

“CAT’S PAW”—cont’d.

- Lower level supervisor’s animus tainted decision maker who relied on information
- False accusation of performance deficiencies on account of animus regarding military service
- Decision maker investigated performance deficiencies, rejected employee’s accusations of unlawful animus and considered Staub’s personnel file
- Test is whether military service was “a motivating factor” in adverse action
- If yes—it is a proximate cause of termination and leads to employer’s liability
- **Bottom line: makes independent investigations of discrimination even more important, along with proper documentation.**
- **No more rubber-stamping of recommendations from lower level supervisors to fire or discipline an employee**
- Unanimous opinion of Supreme Court—will make HR jobs more difficult

RETALIATION CLAIM PERMITTED EVEN THOUGH NO PROTECTED ACTIVITY BY PLAINTIFF

- *Thompson v. North American Stainless*
- Plaintiff's fiancée filed EEOC charge against NAS and three weeks later, Company fired Thompson
- Thompson claimed retaliatory discharge on account of fiancée's EEOC charge
- Supreme Court reversed 6th Circuit decision in favor of Company

THIRD PARTY RETALIATION—cont'd.

- Court first considered and concluded Thompson's firing constituted unlawful retaliation
- Court relied on earlier *Burlington Northern* decision—would reasonable worker be dissuaded from engaging in protected activity if she knew fiancé' would be fired
- Court creates “zone of interests” test—enables lawsuit by plaintiff with an interest “arguably sought to be protected by Title VII”
- Court concludes Thompson is person aggrieved because he was within zone of interests protected by Title VII

IMPLICATIONS OF THIRD PARTY DISCRIMINATION

- 36% of EEOC charges include a retaliation charge—more than any other type of claim
- Expect number of retaliation claims to increase
- This is an expansive decision—person can bring Title VII retaliation claim if he had interest arguably sought to be protected by Title VII—even if no protected activity by Plaintiff
- Decision restricts potential for employer's winning summary judgments in retaliation cases
- Decision means virtually anyone can fall into one or more protected classifications for anti-discrimination claims
- Practice tip: follow employer's stated procedures and conduct thorough investigations before acting
- Unsure whether person must be a family member or just a work-place friend to be protected
- This case is another reason for employers to have anti-nepotism hiring rules—public and private sectors—ask on applications about relatives

ANOTHER EMPLOYEE-FRIENDLY DECISION

- *Kasten v. St. Gobain Performance Plastics Corp.*
- Supreme Court rules 6/2 oral complaints to supervisor about wage and hour violations are protected from retaliation.
- Court looked to other employment laws permitting oral complaint to erect shield against retaliation.
- Court looks at public policy: don't eliminate illiterate complainants.

**CONGRESS:
EMPLOYMENT
LEGISLATION
THANKFULLY
STALLED**

Public Employees Can Bring Guns to Work

- Effective September 1, 2011
- Employee with valid concealed handgun license may bring guns onto City parking lots, parking garages and parking areas
- Vehicle must be locked
- City may continue to forbid employee to possess guns or firearms in City buildings.
- Ok to bar employees from possessing or storing guns in city-owned vehicles if it is used in course and scope of employment

Guns to Workplace—Cont'd.

- City does not have duty to inspect or secure parking lots or areas
- Driveways, streets, sidewalks and walkways—questionable whether city may prohibit
- Presence of firearms legally possessed by employees in compliance with law does not constitute failure to provide safe workplace
- Review policies re firearms
- Revise policies to prohibit guns and firearms
- Draft policies to demand strict compliance with concealed handgun laws and employee will be fired if law is violated.
- Escort all fired employees off the city property and monitor parking area.
- Question: can you require those with concealed handgun permits to reveal their identity to you?
- Visitors—the public—can be banned from bringing weapons onto city' parking lots
- Bill did not define a penalty for noncompliance—so question whether an employee fired for bringing guns in the car could sue for wrongful discharge

**FEDERAL AGENCIES
“LEGISLATING” AT
A FAST CLIP**

EEOC

ACTIVE AS ALWAYS



RECORD NUMBER OF EEOC CHARGES FILED IN FY 2010

- Nearly 100,000 charges filed—most ever in 45 year history of EEOC
- 7.2 percent increase
- Backlog has remained constant
- 210 claims already filed under GINA
- EEOC is Plaintiff in 201 lawsuits on behalf of individuals claiming discrimination

EEOC Enforcing ADA More Vigorously Than in the Past

- EEOC had record-breaking number of charges filed in 2009
- Backlog of charges increased less than one percent because of more funding for hiring and training of employees.
- EEOC calls its progress “remarkable”

ADAAA-FINAL Regulations

Effective May 25, 2011

- Several improvements made in employers' view
- Disability construed in favor of broad coverage of the Act
- Duration of several months is sufficient to show a substantial limitation—may be fewer than six months
- But temporary impairments with little or no residual effects are not disabilities
- Pregnancy not a disability
- “Major life activities”—basic activities—major bodily functions that most people in general population can perform with little or no difficulty

ADAAA Regulations—cont'd.

- Major bodily functions
- Finding of disability should be fairly routine in certain cases—such as cancer, diabetes, epilepsy, heart conditions, mental illness, MS and MD

FINAL ADA AAA Regulations—cont'd

- Recommendation for employers to shift focus from determining whether person has disability to whether accommodation is available
- Focus of litigation to shift from question of disability to whether discrimination occurred.
- Disability status requires an individualized determination

EEOC Interested in Leave Policy Compliance with ADA

- 2011 – Two large EEOC settlements for unlawful paid disability leave policies that provided for termination if employee unable to return to work without restriction or accommodation in one year
- EEOC says policy violates need for individual analysis that employer must perform to determine if reasonable accommodation can be made
- Vacant light duty jobs cannot be reserved only for on-the-job injuries
- Settlements of \$6.2 and \$3.2 million last year

EEOC-Leave as Reasonable Accommodation-

Four Actions Steps

- Determine if leave policy has a definite maximum duration and consider whether to revise
- Create reasonable accommodation policy with clear procedure for making accommodation request
- Keep posted on EEOC's position on leave
- Get competent legal advice when issues arrive

EEOC Operations Letter

November 17, 2011

- Employers who require high school diploma
- Applicant unable to graduate high school due to a learning disability
- Even if diploma requirement is job-related and consistent with business necessity, employer may still need to determine if applicant can perform essential job functions with or without reasonable accommodation
- How does an employer know why an applicant does not graduate?

Acrophobic Bridge Worker Protected by ADA

- *Miller v. Ill. Dept. of Trans.*—7th Cir. 2011
- Highway Manager assigned to bridge crew
- Informed boss of fear of heights
- Informal accommodation for 5 years
- Panic attack trying to change bulb from bridge beam
- Doctor said he could do his work if IDOT provided same accommodation as it had in past
- IDOT refused accommodation and fired him for making statement against female employee
IDOT perceived as threat

Fright on the bridge

- 7th Circuit reversed summary judgment and remanded
- Bridge crew worked as team—no one permanently assigned to one task
- Actual experience of past and present incumbents in these jobs conflicts with IDOT's judgment about what tasks are essential
- Miller's accommodation was reasonable
- Pretext for dismissal-inconsistent treatment with another employee; ambiguous nature of threat

Recurring Employer Dilemma: Can More Than cursory Information Be Required in Doctor's Notes

- Second Circuit says “yes”
- Company asked for medical documentation supporting employee's claim she could not staff the receptionist desk because of a hearing problem
- Doctor's notes with minimal response submitted
- Company unsuccessfully tried to contact her doctor several times.
- Company decided she could do the job and fired her when she refused.

EMPLOYER'S DILEMMA-cont'd.

- Court agreed with Employer's argument that it met obligation to engage in interactive process
- Court says employer can explore reasonableness of employee's accommodation request and its necessity
- No liability for company because it was not responsible for breakdown of interactive process
- Performance evaluation not retaliatory and not an adverse employment action

Fitness for Duty Under ADA

Brownfield v. City of Yakima

- Former Police Officer sued under ADA
- City required him to undergo fitness for duty psych exam
- Mental issues developed several years after head injury
- “anger and fear” reported
- Disruptive arguments, “losing control”, struck wife with a door, “it doesn’t matter how it ends”

Brownfield—cont'd.

- Psych exam revealed mood disorder and ruled unfit for duty and permanent disability
- Officer refused to attend another fit for duty exam with second doctor and was fired.
- Claim of ADA violation for requiring fit for duty exam
- “prophylactic psych exam can sometimes satisfy business necessity standard-especially when employer is engaged in dangerous work”
- Unknown—how many “warning signs” required
- Unknown—applicability outside public safety jobs

WORKING AT HOME NOT FOUND TO BE REASONABLE ACCOMMODATION

- Employee who had accommodation of working at home sought promotion to higher level HR position
- She also asked to perform duties of sought-after position from home
- Company declined saying on-site work was necessary
- Court held no showing that teleworking would be reasonable accommodation because employer showed in-person attendance was essential function of the position.
- Company required all higher level job holders to be available for on-site events and travel
- Her subjective belief of essential functions “not evidence” says the court
- No retaliation because no adverse employment action

No Pretext for ADA Discrimination Where Employee Violates Employer's Policy

- Employee had been permitted to work from home due to a back problem—presumably a disability
- Employer discovered opening of checking account and redirection of contributions—violation of policy—serious breach—but she did not respond.
- Appeals court concludes accommodation request not reasonable and reason for firing not a pretext for discrimination
- Employee knew opening account would violate policy and she did not tell Board about opening it

OTHER CASES OF INTEREST



NO DISCRIMINATION AGAINST FLIGHT ATTENDANT WHO SMUGGLED DOG ABOARD A FLIGHT

- *Smith v. Airtran Airways*
- Flight Attendant tried to avoid paying extra fee for carrying her dog on board when she flew free.
- She listed dog as an infant, which was free instead of \$414
- Smith pushed dog in stroller; another flight attendant “busted” her
- Flight attendant refused to pay and claimed dog was an ESA
- Dog was her “alarm clock” when she mixed sleeping pill with wine and Xanax
- Airline fired her for dishonesty
- No evidence of pretext in her dismissal

Texas Supreme Court Holds in Favor of Houston Fire fighters in Contract Dispute

- *City of Houston v. Williams*—Tex. 2011
- Fire fighters sued for breach of contract for City's alleged underpayment of lump sum amounts due upon retirement.
- Question whether Legislature waived City's immunity from suit in Section 271.152 TLGC
- Were the claims based on written contract?
- Court held ordinances, CBA and 2 M&C Agreements were “written contracts”

Houston Fire fighters-Cont'd.

- City's unilateral contract qualifies as enforceable contract
- City ordinance saying certain compensation "shall be paid" is a written unilateral contract
- Chapter 143 is not a written contract
- M&C Agreements grant third party beneficiary rights to fire fighters—gives standing to sue
- Individual fire fighters can sue to enforce CBA because no grievance/arbitration procedure
- Impact of this decision in the future

Texas Supreme Court Aids Cities in Workers Comp Retaliation Claims

- *Travis Central Appraisal District v. Norman*—2011
- Supreme Court overruled *LaPorte v. Barfield*-1995
- Amendments to Workers Comp Act in 2005
- “Nothing in this chapter waives sovereign immunity or creates a new cause of action”
- Effect of this amendment made previously clear law unclear
- Waiver of governmental immunity must be “clear” to be effect
- No more retaliation lawsuits against cities.

Expansive View of Misconduct Bars Receipt of Unemployment Benefits

- *Murray v. Texas Workforce Com'n*—Dallas
- Employer had an attendance policy that required employee's discharge after a particular number of tardy arrivals
- Employer applied the policy and employee filed for unemployment benefits
- Employer claimed employee not entitled due to “misconduct” exemption in Unemployment Act
- Court held attendance policy was a “policy or rule adopted to ensure orderly work and safety of employees”
- VIP ruling—as many prior TWC decisions have reached opposite conclusion
- Make sure and document violations of attendance policy and perhaps amend to state “timely arrival at work aids the orderly work and safety of all employees.”

FMLA and the Family Vacation

- *Pellegrino v. CWA* (a union by the way)
- Employee on approved FMLA leave for surgery.
- While on FMLA—she traveled to Cancun for a week and was fired after Union learned about it
- Termination because of violation of policy re use of sick leave which ran concurrently with FMLA
- She did not tell Union nor ask permission
- Sick leave rules required employee to remain in immediate vicinity of home while using sick leave unless permission obtained from Union

Cancun here we come!!

- Court agreed employee's leave was protected by FMLA BUT
- CWA had right to enforce its own policies
- Employee's conduct would have been improper whether or not FMLA was involved
- Decision tells us:
 - Obtain complete medical certification
 - Enforce call-in procedures
 - Apply policies consistently
 - Conduct thorough investigation

What is an Adverse Employment Action?

- *Ellis v. Compass Group USA* –5th Cir. 2011
- Ellis tried to get employees to support her by signing statements and they refused and complained against Ellis
- Written counseling resulted after investigation
- Race discrimination charge filed at EEOC
- Ellis claimed she was assigned heavier workload and no other employees assigned to help her
- Court held: no adverse employment action on account of heavier work load and refusal to provide other employees to help with her work load

No adverse action—Cont'd.

- Court also held no unlawful retaliation on account of Ellis' temporary suspension during investigation
- Court finds Ellis not engaged in protected activity at time she was suspended
- “Unreasonable for Ellis to believe Company engaged in unlawful employment practices if only alleged consequence was increased workload.
- No EEOC charge filed until after alleged retaliatory suspension occurred so not participating in an EEOC process at time of alleged retaliatory act.
- Legitimate reason to suspend—Ellis harassing co-workers to provide tape recorded statements to support her claims.

Economic Development Employee Loses Job over Her Tweet

- Economic Development agency partly funded by tax dollars in Pennsylvania
- Twitter post suggested employees left early on Fridays to go play golf
- Employee was a social media specialist
- Agency Head called the Tweet out of line and denied employees left early on Fridays, unless they were flexing time for the week.
- Agency had lots of twittering to do to clean up its image after her tweet hit the air
- VIP to have a Social Media policy with guidance on content of messages and identification of City

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