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EMPLOYMENT LAW DIGEST

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NATIONAL LABOR RELATIONS BOARD STRIKES AGAIN

In yet another controversial decision, the National Labor Relations Board (NLRB) held that the common employer practice of keeping ongoing workplace investigations confidential violates employees' rights under the National Labor Relations Act. This latest ruling is along the same lines as previous controversial rulings from the NLRB (which have been described in previous Newsletters from this firm) all of which are stemming from the Board's seemingly radical view of what is "concerted activity." As with previous rulings, this new rule applies to union and non-union employers since virtually any employer engaged in interstate commerce is covered by the National Labor Relations Act.

In this particular case, the employee in question, James Navarro, was a sterile equipment technician at a hospital in Phoenix, Arizona. Because of equipment issues, Mr. Navarro believed that he could no longer properly sterilize surgical instruments and he simply quit sterilizing them. The hospital disagreed and had someone else sterilize the instruments using a low temperature chemical sterilization machine in combination with hot water from a coffee machine.

After learning later that someone had sterilized the instruments, Navarro spoke with a co-worker, another supervisor and a nurse about the matter. After being angrily confronted by his Department Senior Manager, Navarro met with an HR representative about the entire matter and eventually Navarro was given non-disciplinary coaching.

Later that same week, Navarro's Department Manager conducted his yearly performance evaluation which was not as high as Navarro thought it should be. When Navarro complained to HR, he was instructed not to discuss the still on-going investigation concerning the sterilization issue with co-workers. Navarro filed an unfair labor practice charge with the NLRB's Phoenix Regional Office alleging that the hospital had violated Section 8(a)(1) of the National Labor Relations Act which provides that it shall be an unfair labor practice for an employer to interfere with,

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What's Inside?

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restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 7 is the section of the law which allows for employees to engage in "concerted activity" in the workplace. According to the NLRB, an employee is engaging in "concerted activity" when he or she is discussing the investigation (even an ongoing one) with co-workers or supervisors whether positive or negative.

In finding the hospital in violation of the law, the NLRB basically condemned the typical "blanket approach" of requiring confidentiality during active ongoing internal investigations. Instead, and according to the NLRB, employers must consider each investigation individually to decide whether confidentiality is required for any of the following reasons:

- protection of witnesses
- avoiding destruction of evidence
- testimony is in danger of being fabricated
- preventing a cover-up.

At this time, this decision remains unchallenged to our knowledge. Unfortunately, this decision does appear to fly in the face of the modern day workplace and the realities of employers with Title VII harassment investigations and the protection of witnesses and complainants against various forms of retaliation. It is this firm's advice that you continue to maintain investigations as confidential as possible. Before disciplining in any fashion an employee for discussing an ongoing investigation, we advise that you confer with your favorite consultant or labor attorney first. ****

BAD FACTS MAKE BAD LAW

Recently, the Federal Appellate Court which covers Texas has answered the question of whether or not a hostile work environment claim may be brought on the basis of age discrimination. Unfortunately, the answer is a resounding yes. After only working three (3) months, Milan Dediol resigned complaining that this manager subjected him to constant inappropriate comments based on his age. Dediol was sixty-five years old at the time of the lawsuit.

Examples of comments made by the supervisor included "Old mother f – r," "Old man," and "Pops." These types of comments occurred allegedly six (6) times a day during his entire employment with the car dealership. In addition to these comments, his supervisor also allegedly made inappropriate comments about his religion. Dediol is a Christian and testified that his supervisor repeatedly made comments such as: "go to your God and [God] will save your job;" "God will not put food on your plate;" and "go to your f – ing God and see if he can save your job."

Shortly before his resignation, Dediol and others testified that his boss bragged in an office meeting that he was going to "beat the f___ out of [Dediol]." The supervisor then physically charged Dediol in the presence of several employees.

Incredibly, Dediol had actually asked to be transferred to a different department which was denied. After telling co-workers he could no longer work under these conditions and that they were good people, he resigned. Shortly thereafter he filed a charge of employment discrimination with the EEOC and eventu-

ally filed suit claiming hostile work environment based on age and religion along with a constructive discharge claim.

The trial court dismissed the age related hostile work environment claim but the Fifth Circuit Court of Appeals reversed it. In finding that there was at least a fact question to go to a jury on the hostile work environment claim based on age, the court concluded that the "required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." In other words, in trying to decide whether a hostile work environment claim can be made under the Age Discrimination Employment Act, a few really bad comments can create a hostile work environment; however, a series of less offensive comments can create a hostile work environment if there are a lot of them over a period of time.

Even more troubling is the fact that the court remanded the issue of whether Dediol could establish his constructive discharge claim back to the trial court. In other words, the Fifth Circuit found that there was enough evidence to take to the jury the issue of whether Dediol was forced to quit his job. In particular, the court noted that Dediol acted reasonably by attempting to transfer to a different department before resigning. This, coupled with the possibility of physical violence by his own supervisor made the decision easy for the court.

This is yet another example of the old adage: bad facts make bad law. The Fifth Circuit is still relatively conservative and this is a bad case. Obviously, no supervisor should ever act in this manner toward any co-worker or subordinates under any circumstance. Any time an employee asks for a transfer someone should take a moment and try to understand why before simply dismissing the request out right. If someone with this car dealership had taken the time to do a brief investigation into the facts outlined above, any competent HR person would not only grant the transfer but would also strongly counsel (at a minimum) the supervisor in question. ****

ABSENCE CONTROL POLICIES MAY RUN AFOUL OF THE ADA

It is a very common practice for many employers (and many clients of this firm) to maintain a policy which places a cap or maximum amount of time that an employee can be away from work for any reason before they are discharged. Many companies have a policy which, for example, requires employees to return to work within ninety (90) days of the beginning of their leave of absence or be taken off the payroll (terminated). This remains a very effective policy for fighting off workers' compensation retaliation claims when employees who had been injured on-the-job are unable to return to work for many months and are then terminated under terms of an absence control policy.

However, the Equal Employment Opportunity Commission (EEOC) has attacked these types of policies in its aggressive enforcement of the Americans with Disabilities Act (ADA). The EEOC has now taken the position that a hard and fast absence control policy may violate the ADA when it automatically forecloses the possibility of conferring on a reasonable accommodation with a disabled employee. In other words, if an employee is about to be administratively discharged under one of these absence control policies, employers are well advised to determine whether or not the employee is in fact "disabled" under the ADA. As many of you know, the definition of disability under the ADA has been greatly expanded and it is quite easy to be considered disabled under this law. According to the EEOC, if

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an employee is terminated under the absence control policy and was unable to return to work within the time frame allotted in the policy due to a disability, this may run afoul of the reasonable accommodation requirements of the law.

It is therefore advisable that before any employee is administratively terminated under one of these policies, someone in HR should try to determine whether or not the person is suffering from a disability. If so, then the employer should engage in what the law calls the "interactive process" by trying to speak to the employee prior to the time period for returning to work under the policy in an effort to determine whether there is some sort of reasonable accommodation available to the employee to allow the employee to return to work even after deadlines placed in the absence control policy have passed. We do not believe the law would require the employer to extend the deadline in every case; however, the interactive process does require just that: some sort of interaction between management and the employee to at least discuss the possibility of a reasonable accommodation any time a disabled employee is about to be terminated under one these policies. ****

DO NOT FORGET ABOUT OSHA

Some employers are fortunate to never deal with the Occupation Safety and Health Administration (OSHA) but many are not so fortunate. As some of you may be aware, OSHA has become more active and in some cases more aggressive in enforcing its rules and regulations in the workplace.

In another example of how bad facts make bad law (and in this case the outcome), an employer has learned the hard way how repeated OSHA violations and cover-ups can be extremely costly and can even lead to prison sentences. In the case of *United States of America v. Maury, Davidson, Prisque, Faubert and Atlantic States*, the court found the following: an employee was run over and killed by a forklift. The operator had never received forklift training and OSHA found a document claiming that the forklift was in "perfect operating condition." However, other documents showed the forklift had several problems including defective brakes.

Another employee had been struck by a forklift and suffered severe leg injuries. The incident was not recorded on the plant's OSHA log and when the incident was later uncovered, managers took steps to conceal from OSHA the extent of the employee's injuries. Another employee lost his eye when a piece of rotating blade from a saw he was using broke off and struck him in the face. A guard was added to the machine after the injury and before the OSHA inspector arrived. Evidence showed that management worked to cover-up the fact that the saw did not have proper guarding when the employee was injured.

In yet another incident uncovered by OSHA during its investigation, an employee lost three fingers in an accident involving a cement mixer. The employee had been cleaning the machine when another worker activated it causing the employee's fingers to be amputated by a rotating blade. A manager testified under oath to OSHA that the mixer did not come with a safety shutdown switch when in fact the mixer did arrive at the plant with a safety switch. In fact the evidence showed that the same manager testifying had instructed a worker to bypass the switch because it slowed down production.

In addition to various fines and penalties, four former managers of this company were sentenced by a Federal District Court in the following manner:

- former plant manager Prisque six years in prison
- former HR manager Scott Faubert forty-one (41) months in prison (3.5 years)
- former maintenance supervisor Jeffrey Maury thirty (30) months of prison
- former supervisor Craig Davidson six (6) months prison time
- company placed on four (4) years probation and assessed an $8,000,000.00 fine.

Obviously, these are terrible facts. The injuries are bad enough but the cover-ups made it easy for OSHA and the district court to assess severe monetary and criminal penalties. Any time a supervisor is speaking to any governmental agency whether it be OSHA, Wage and Hour Division, EEOC, etc. it is imperative that nothing but the truth and the whole truth be given at all times. Even if the truth hurts. The best advice, of course, is to not let these types of problems get this far and be proactive and get in front of the investigation before it occurs and deal with the injuries and accidents in a reasonable and prudent manner. OSHA is getting more active and more aggressive and will most likely continue to do so for the next several years. ****

SEX CHANGE LEADS TO SUCCESSFUL LAWSUIT

On a lighter note, an employee in Georgia announced to his employer that he was going to have a sex change and would transition from being a male to a female. The employee, Glenn Morrison, had been diagnosed with gender identity disorder several years before deciding to transition to a female. Glenn began working with healthcare providers to transition from male to female which includes living as a woman outside the workplace before undergoing sex reassignment surgery.

During this process (before surgery) Glenn came to a company Halloween party dressed as a woman but his supervisor told Glenn to leave the office finding the appearance "unnatural." The supervisor learned from another supervisor that Glenn intended to complete a gender transition to female.

About a year later, Glenn told her supervisor that she was going to change her legal name and would start presenting as a woman in the workplace. This caused all kinds of problems including which restroom Glenn would be allowed to use. Obviously his/her co-workers have known Glenn as a male and yet Glenn would soon be using the women's restroom in the workplace.

Shortly after making the announcement of the name change and presentation as a woman in the workplace, Glenn was discharged because the gender transition was "inappropriate" and would be "disruptive." Management took the position that some co-workers will see it as a moral issue and would feel uncomfortable. Glenn immediately sued for sex discrimination and the court found in her favor.

Basically, the court stated that discrimination based on gender stereotyping constitutes sex discrimination. The court concluded: "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." This case is another example of the ever changing workplace and the need for employers to be patient and flexible when it comes to unusual workplace issues. These cases are more common than one might imagine and employers are wise to avoid taking any kind of disciplinary action employees based on any type of stereotyping of their gender or otherwise. ****

The Lighter Side of Law

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Boss, to four of his employees: *"I'm really sorry, but I'm going to have to let one of you go."*

Black employee: *"I'm a protected minority."*

Female employee: *"And I'm a woman."*

Oldest employee: *"Fire me, buster, and I'll hit you with an age discrimination suit so fast it'll make your head spin."*

They all turn to look at the helpless young, white, male employee, who thinks a moment, then responds: *"I think I might be gay..."*

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If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.

E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.