Neel, Hooper & Banes, P.C.

Counsel Leaders Trust

VOL. XXXI, No. 2 **FALL UPDATE – LABOR & EMPLOYMENT** **December 2012**

"NHB" NEWS:

Bryant S. Banes has been recognized as a leader in the field of labor and employment law in the upcoming 2012 edition of Chambers USA, and has recently become a Fellow of the Litigation Counsel of America and a member of the Wage & Hour Defense Institute.

According to Martindale Hubbell's peer review, Bryant S. Banes, Sean D. Forbes and Paul T. Gregory have received AV® Preeminent ratings in their respective fields of government contract, labor and employment law, and commercial litigation.

Linda Evans was selected as a Super Lawyer® in 2012.

Wage & Hour Defense Institute Blog

Check out Bryant S. Banes' posts to the Wage & Hour Defense Institute's (WHDI) blog including: Peering Over the Fiscal Cliff; Ascertaining the Scope of a Conditionally Certified Class in Texas and Elder Care; and the Companionship Service Exemption to FLSA at http://wagehourdefense.wordpress.com.

Posting Deadline Postponed Again! The NLRB was going to require all employers to post notices in the workplace informing employees of their rights to unionize. This requirement has now been postponed indefinitely.

FAIR LABOR STANDARD ACT (FLSA)

FLSA and Settlement Agreements: The Fifth Circuit recently held that a private settlement agreement for FLSA claims can be binding without approval from the Department of Labor (DOL) or a court in certain situations. In this Louisiana case, the plaintiffs were four guys who were employed as part of a movie production crew and made claims that they were not paid wages for all the work they performed. The plaintiffs must have been living in their own fantasy world and had problems with their case from the beginning. First, their own union, the International Alliance of Theatrical Stage Employees (IATSE) did an investigation and had doubts if any money was owed. Second, even co-workers disputed that the hours were worked. But the company and the union finally reached a settlement agreement. Both parties acknowledged that disputes still remained as to the amounts that might have been due, but both parties ultimately agreed to the terms of the agreement in order to settle the matter. The plaintiffs received the payments as outlined in the agreement and cashed the checks. Then they had buyer's remorse. One argument the plaintiffs used was that the agreement was unenforceable because they had not signed it…the union representative had signed it. The plaintiffs also argued that even if they released their rights to pursue the FLSA claims, the release was invalid because individuals may not privately settle FLSA claims. The Fifth Circuit said they were wrong on both counts. The plaintiffs were members of the union and recognized it as the representative of employees, plus the plaintiffs received and accepted full payment under the agreement. Additionally, the court said that a private compromise of FLSA claims is permissible when there is a bona fide dispute (as there was in this case) as to the amount of wages owed. Because there was a dispute as to the amount that might be owed, the agreement was not a compromise on guaranteed FLSA rights themselves.

Another factor in the court's decision was that there was little danger of these plaintiffs being disadvantaged by unequal bargaining power. The plaintiffs had attorneys who were advising them at the time the agreement was signed.

TAKE AWAY TIP: It is still illegal for FLSA rights to be waived in the bargaining process. However, private FLSA agreements are permissible when

there is a bona fide dispute over what is owed and when plaintiffs are represented by attorneys.

More FLSA – Don't Say We Didn't Warn You! A Houston employer was lucky in an overtime case. Employees claimed to have worked overtime hours for which the company did not pay them. The company did not keep good records of hours worked. But, luckily for the company, the court found the employees failed to present sufficient evidence regarding the number of hours of overtime they claimed to have worked. Also in one case the undisputed facts showed the employer had no knowledge that the employee was working overtime. The employer did have a policy prohibiting overtime work without advance approval of the supervisor. We have reminded our clients of these points before…be sure to keep good records of the hours your employees work. If the employer does not have the records, courts will often allow the employees to submit their own records as proof of overtime. Also, your handbook should have clear language that no overtime is allowed unless there is advance approval from management…and requiring it to be in writing is even better! Then, make sure you enforce the policy.

SEXUAL HARASSMENT

Same Sex Harassment … Stop It! The Fifth Circuit recently found for the employee in a same-sex sexual harassment claim. In answering the question of whether the harassing behavior rose to the level of "severe and pervasive," the court considered the harasser's sexual inclination. Horseplay between two men is hardly an uncommon occurrence, even within the workplace. But, when does horseplay become sexual harassment? The Court followed a small line of cases that have held that a plaintiff may support a claim of same-sex sexual harassment by providing credible evidence that the harasser is homosexual. In other words, the motivation behind that harassing behavior must be sex.

Apparently the Fifth Circuit is saying that if the harasser is homosexual even infrequent occurrences of inappropriate touching and pervasive language could be sufficient to meet the harassment burden. But if the harasser is not homosexual and the actions are just sexual humiliation, it is not enough to make the claim. In this case, the alleged harasser's behavior was actually fairly egregious, as the defendant repeatedly touched the plaintiff, sent the plaintiff lewd text messages, and made numerous sexual overtures to the plaintiff.

This case seems to say it will be a little harder to show same sex harassment without homosexual overtones. While the majority of jurisdictions do not follow this requirement, it remains to be seen if we are witnessing a new trend in same-sex sexual harassment cases for the Fifth Circuit. Regardless, our advice is still the same…if you see horseplay in the workplace…with or without sexual overtones…put a stop to it! It can lead to all kinds of problems…injuries, retaliation, violence and claims of discrimination are a few that come to mind. If your employees insist on horseplay at work, send them back to the 8th grade locker room!

DISCRIMINATION

Adverse Actions – Do You Know It When You See It? Sometimes employees claim any change in their work situation is an adverse action. This is especially true when, due to business needs, an employee is transferred to a different job or a different location. But we now have cases from the Fifth Circuit that make it a little easier for employers to make such moves without fear of being found guilty of taking adverse action. Naturally the facts in each situation need to be examined, but here are two examples which the court said do not rise to the level of adverse action. One case involves the transfer of an employee to a different position within the same location. The employee had claimed race discrimination because she received a lateral transfer and she tried to categorize it as a demotion. The court said every transfer is not a demotion. The employee also tried to say that because other managers from her former unit later received promotions it showed the employer had reduced her potential for advancement. Again the court disagreed. The other case involved an employee being transferred to a new work location and under the facts of that case it did not fit a claim of discrimination or retaliation. The change of location was temporary and necessary as part of an emergency plan in the wake of a hurricane and did not reduce the employee's pay or benefits.

EEOC: So The Charge Is Dismissed … Then What? Fortunately for us and our clients, the vast majority of the EEOC charges we handle end with the agency dismissing them and giving the employee the right to sue. In our experience very few of the employees file a lawsuit on the charge and it all goes away. But what are other alternatives to a dismissal of an EEOC charge? One of the worst possibilities from an employer's stand point is when the EEOC itself decides to bring the lawsuit. This is exactly what happened when employees filed charges of national origin discrimination against their Dallas employer, a regional airline. It is rare for the EEOC to file the lawsuit itself, but when it does it is usually because the EEOC feels the employer's conduct was really outrageous or because it involves a large number of employees. In this case, the EEOC filed the lawsuit and the court dismissed the action. The EEOC then issued a notice of right to sue to the plaintiff, and the plaintiff brought his own private action. But the court held that the EEOC's issuance of a right to sue notice did not revive the plaintiff's right to sue, and it dismissed the plaintiff's action.

SOCIAL MEDIA

Technology Issues – The Good, The Bad And The Ugly. Technology issues can change at the speed of light and the law connected with technology in the workplace changes too. It's hard to keep up! Some employers have started requesting employees or applicants to give the employer access to the employee's social media account. Checking Facebook accounts has almost become an informal type of background check. But there are definitely problems with this approach and employers need to be very careful!

Here is the latest from California which recently became one of only a handful of states to restrict employers' access to their employees' social media accounts. The new California law prohibits an employer from requiring or requesting an employee or applicant to disclose a username or password for purposes of accessing personal social media, to access personal social media in the presence of the employer or to divulge any personal social media. Furthermore, the law prohibits employers from firing, threatening or disciplining any employee who refuses to comply with any demands to access their social media account. There is a caveat to the law however: an employer may still request an employee to divulge personal social media information reasonably believed to be relevant to an investigation of allegations of employee's misconduct or employee's violation of applicable laws and regulations, provided the social media is used solely for purposes of the investigation. Also, it should be noted that the law does not apply to employer-issued electronic devices, so in this age of BYOD (Bring Your Own Device) that is going to be important.

Beyond the workplace, California also passed a similar law which prohibits public and private postsecondary educational institutions, their employees and representatives from requiring students or prospective students to disclose personal usernames or passwords or to divulge personal social media information.

So far, Texas does not have such laws, but there is still reason to proceed with caution in trying to get access to employee's social media accounts. Another example: Costco had a policy in its handbook which prohibited employees from making negative statements about Costco in social media posts. The NLRB said that policy was invalid. Just one more call from the NLRB which shows this is a danger area for employers.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

FMLA: Employer Squeaks By Interference Claim. An employee of a Houston-area university claimed that her employer interfered with her FMLA leave rights by trying to discourage her from taking all of her leave and by pressing her to return to work early. The employee worked as a financial aid officer and alleged that when she told her supervisor she was pregnant, he became hostile towards her. Once she went on leave, co-workers told her that the supervisor was asking impatiently when she would return. She also received a telephone call from her supervisor while she was on FMLA leave, allegedly threatening that if she did not return to work early from her leave, she would not have advancement opportunities in the department. Once the employee returned from her leave, she was re-instated in her prior job, but she alleged she was greeted with hostility by management. She made complaints to both management and the human resource department about mistreatment and claimed that after her complaints, her relationship with her supervisor became more rude and insulting. She was eventually fired three months after returning from her FMLA leave. She sued her employer,

claiming among other things that the employer had interfered with her FMLA leave rights. The district court granted the employer's motion to dismiss. The court said the employee suffered no injury because she received all the FMLA leave to which she was entitled and was reinstated to her job. Under Fifth Circuit case law, in order to win on an FMLA interference claim, an employee must provide evidence that the employee was denied her leave, refrained from taking the leave or returned early from leave because of her supervisor's actions. None of these things happened in this case. However, we would not recommend that employers try to discourage employees from taking FMLA leave to which they are entitled. The employer here also took a risk in terminating the employee within three months of her return from FMLA leave. We don't have all the facts in this case, but under certain circumstances, the employer's actions of terminating the employee so soon after her leave could be grounds for charges of retaliation.

TAKE AWAY TIP: The employer in this case squeaked by. But a safer course of action is to have set procedures in place for employees to follow when requesting FMLA leave, follow those procedures and be very cautious about interfering with FMLA leave or in terminating an employee who has just returned from FMLA leave. If you have such a situation, better call us before doing anything rash!

Workers' Comp Retaliation: It Can Hurt You! Kyle had worked for the company for 18 years and was injured on the job when the truck in which he was a passenger in was involved in an accident. Due to his injuries he was off work for several months. On the day he returned to work, he was fired. He sued for retaliation and won, ultimately being awarded over $700,000. The employee said he was aware of the company's well-known hostility towards workers' compensation claims and that's why at first he paid the medical bills out of his own pocket. Other factors against the employer were: 1) in his evaluation after his injury, his supervisor gave him the worst evaluation of his career; 2) the supervisor claimed to be evaluating a year's work, but had only been the supervisor for three months; and 3) the company reorganized and allowed other employees with positions similar to Kyle's to transfer, but terminated Kyle. Also, Kyle had fulfilled his duty to mitigate damages by accepting other employment even though he earned less at his new job. The court also decided Kyle's damages did not have to be reduced by the amount he had recovered from a third party who caused his injuries and for medical expenses in the accident that led to his workers' compensation claim. Employers often dislike workers' compensation claims. But be very, very, careful about acting on that dislike!

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This update is a newsletter providing recent items of interest to our clients in the various areas of employment law. While the Update is to alert you to potential new problem areas or changes in the law, it is not to be considered legal advice or a legal opinion. Such can only be given after careful consideration of the facts unique to any situation. The contents of this newsletter are copyrighted and may not be used without express written consent of Neel, Hooper & Banes, P.C.

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** Neel, Hooper & Banes, P.C. is a member of WORKLAW Network. WORKLAW Network is comprised of independent law firms that devote their entire practice to representing management in all facets of labor and employment law. Formerly known as LABNET, the network was founded in 1989 to provide employers with access to high quality law firms throughout the U.S. specializing in labor and employment law matters.

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