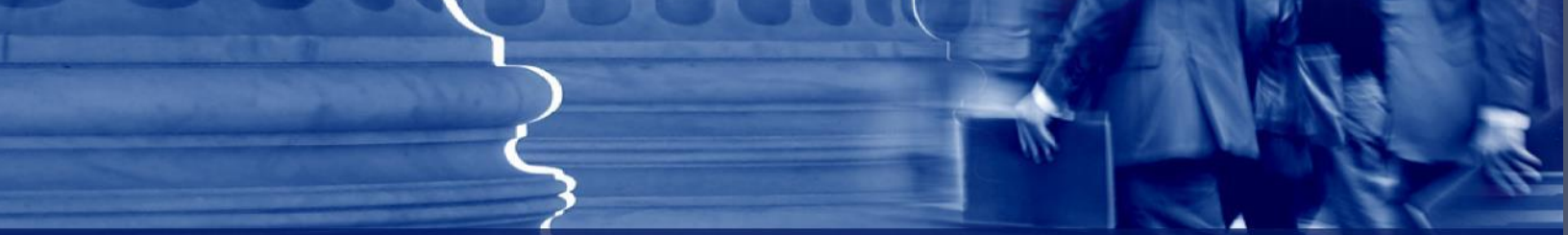

Managing Workplace Risk

Monthly Newsletter February 2016

I. New Mexico Court Holds Employers Need Not Accommodate Medical Marijuana Use

A federal court in New Mexico dismissed the lawsuit of an employee who was fired after testing positive for marijuana due to his use of medical marijuana as permitted by state law. The Court held that the employer did not wrongfully terminate the plaintiff because employers in New Mexico are under no duty to accommodate employee's use of medical marijuana.

During the interview process for a position with Tractor Supply, Mr. Garcia informed the Company of his participation in the New Mexico Medical Cannabis Program due his having HIV/AIDS. Upon hire, Mr. Garcia tested positive for cannabis metabolites and was terminated. Mr. Garcia filed a complaint alleging that Tractor Supply terminated him based on his "serious medical condition and his physicians' recommendation to use medical marijuana." Tractor Supply moved to dismiss the case. The Court rejected Mr. Garcia's argument that use of medical marijuana is an accommodation promoted by the public policy of New Mexico and, therefore, required under the New Mexico Human Rights Act. Additionally, the Court rejected the argument that Mr. Garcia was terminated because of his serious medical condition, as "using marijuana is not a manifestation of HIV/AIDS." The Court further noted that requiring the Company to accommodate marijuana use would require it to permit conduct that is prohibited under federal law and would likely require the Company to modify their drug-free policy for each of the 49 states in which it operates.

This case joins a growing body of case law, such as the *Raging Wire* case in California, upholding dismissal of employment discrimination claims brought by users of medical marijuana.

II . Seventh Circuit Sends Reverse Racism Case To Jury

The Seventh Circuit last week issued a reminder to employers that they should remain aware of the potential for reverse racism claims, and also that reliance on alleged minority "quotas" when making personnel decisions will not insulate an employer from a lawsuit. The case is Deets v. Massman Construction Co.

The plaintiff, Terry Deets, alleged he was laid off as an oiler because his employer had fallen short of its federally mandated goals for participation by women and minorities under its contract with the Missouri Department of Transportation. The Company was required to make a good faith effort to meet the goals by, among other things, keeping a file of the names and contact information of minority and female referrals from the union, and developing on-the-job training opportunities that expressly included minorities and women.

In support of his claim, plaintiff alleged that his supervisor told him "My minority numbers aren't right. I'm supposed to have 13.9% minorities on this job and I've only got 8%". The lower court found that this comment "did not point directly to discrimination", and dismissed the case at the summary judgment stage.

The Seventh Circuit overruled the lower court's decision finding this comment to be direct evidence that Massman laid off Mr. Deets because of his race. There would have been no issue had the supervisor told Deets he was not qualified for the job, or that he was being replaced by someone more qualified. But the Seventh Circuit found that the comment went directly to the reason for the termination of Deets' employment and that, however well-intentioned the quota was, it indicated Deets was discriminated against based upon his race. The Seventh Circuit's decision in Deets is a clear reminder that participation goals are not the equivalent of rigid quotas. Moreover, employers should train supervisors to understand the difference between goals and quotas to avoid similar remarks to the ones made by Deets' supervisor.

III. Fourth Circuit Court Of Appeals Finds Isoltaed Instances Of Racial Utterances Sufficient To Create An Issue of Fact For Trial In Title VII Racial Harassment Case

Are isolated incidents involving the utterance of one or two sexually or racially offensive remarks in the workplace sufficient for a plaintiff to establish a *prima facie* case of harassment under Title VII of the Civil Rights Act of 1964?

For many years, employers have defended harassment claims by asserting that a "mere single utterance" or "isolated incident" generally is insufficient to establish an actionable workplace harassment claim. However, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, recently held that a cocktail waitress's claim of racial harassment could proceed to trial based on her allegation that a white manager, on two separate occasions, used an extremely racially derogatory term when referring to her. Following a recent trend in federal court cases, the Fourth Circuit recognized that employer liability can stem from single or isolated incidents of harassment if it is "unusually severe" in nature. While it remains unclear what constitutes a single or isolated but "unusually severe incident," this ruling reflects the continuing challenge to employers and their insurance carriers. In this instance, like almost all employment-related litigation, the alleged harassment or discrimination was not undertaken by senior management. Yet, the corporate employer is exposed to liability.

To limit exposure, employers should ensure that protective anti-harassment policies are published, publicized and reiterated. The next layer of protection is mandatory preventive education for members of management about those policies (and employee-directed training about the employer's prohibition of workplace misconduct and the availability of remedial internal procedures).

IV. Proposed EEOC Regulations On Workplace Retaliation Make Defending Retaliation Lawsuits More Difficult

Employers should be aware of new proposed guidance from the EEOC on workplace retaliation issues, and their potential impact on the workplace and resulting litigation. The proposed guidance issued by the EEOC, among other things, formally expands the scope of "protected activity" in which an employee can

participate. For example, the guidance provides that an employee has engaged in "protected activity" even if an internal harassment complaint falls "far short" of the severe and pervasive standard required to prove a hostile work environment. The concern for employers in that the EEOC's use of the phrase "far short" includes potentially any internal complaint of harassment. The proposed guidance further provides that "broad or ambiguous complaints" of unfair treatment can be protected activity "if the complaint reasonably would have been interpreted as opposition to employment discrimination." The EEOC appears explicitly to be placing an additional burden on employers to examine an employee's complaint to rule out any possibility at all that the complaint could be one for discrimination before taking an adverse employment action.

The proposed guidance is concerning in other areas as well, including its discussion of the quantum of evidence a charging party will be required to offer to support an inference of retaliatory animus (broadly described in the guidance as a "convincing mosaic of circumstantial evidence"). Although the proposed guidance was made public only recently, and there will be opportunity for comment through the end of this month, now more than ever employers must remain vigilant when considering adverse employment actions against employees who have made internal complaints involving workplace issues, even if those complaints don't obviously implicate unlawful discrimination or harassment.

Questions?

Jackson Lewis attorneys are available to answer questions about employers' compliance obligations. Please contact Paul J. Siegel, at siegelp@jacksonlewis.com, John Porta, at portaj@jacksonlewis.com, Ana Shields, at shieldsa@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work. Visit us at www.jacksonlewis.com.

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