HR / ALA

Employment Law Update

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Objectives:

- Basic refresher on overarching principles
- What has been happening recently?
- What do we expect to happen soon?
- What should you do about it?

Employment At-Will

- It remains the law
- Termination at any time for any reason or no reason at all
- Written contracts can take employment out of at-will status
  - That's why we have disclaimers in handbooks
- The "stupid lawyer trick" of *Elizabeth Welborne, P.A.*

Most common mistakes:

1. Putting up with abusive employee conduct for too long
2. Delayed or incomplete documentation of employee misdeeds
3. Employee misclassification under the FLSA
   a) Contractors v. Employees
   b) “Administrative” exemptions
4. Line managers who go off on their own
5. Not talking to a lawyer if it is complex

Who is an employee?

DOL Opinion Letter April 29, 2019:

- The nature and degree of the potential employer's control;
- The permanency of the worker's relationship with the potential employer;
- The amount of the worker's investment in facilities, equipment, or helpers;
- The amount of skill, initiative, judgment, or foresight required for the worker's services;
- The worker's opportunities for profit or loss; and
- The extent of integration of the worker's services into the potential employer's business.

Who is an employee?

- "Virtual Service Providers" are not employees
  - Allowed to set own schedule
  - Allowed to decline any assignment
  - Allowed to work for other VSPs
  - Opportunity for profit and loss
  - Radical change from Obama Era guidance
  - Obama Era guidance (2015-2016) essentially said just about anyone is an employee
  - ***Example:* "Exotic Dancers" obey rules**

What is “administrative” for FLSA exemption?

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455* per week ($679/$35,308 per year) (January 2020)
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Administrative: discretion and independent judgment

- Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out **major assignments** in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has **authority to commit the employer in matters that have significant financial impact**; whether the employee has authority **to waive or deviate** from established policies and procedures without prior approval
- "Administrative Assistants" are not exempt!

NLRB follows along:

- January 25, 2019 Board Decision over-rules Obama-Era precedent and makes “independent contractor” status much easier to keep
- *SuperShuttle DFX* overrules *FedEx*: opportunity for economic gain and loss, ownership of own vans, set own hours

Basic Concepts

- Discrimination
  - Most basic: “No Irish Need Apply”
  - More subtle: Glass Ceiling
- Harassment
  - The word never appears in any law
  - “Hostile Environment” and quid pro quo
- Retaliation
  - The most dangerous
  - Includes less egregious conduct

Company policies

- There is a wide variety of inappropriate conduct that may not violate federal or state law, that Credit Union policy simply will not permit
- Employees do not have to wait until they believe they have a federal case in order to raise a concern with management

But first --

- What is harassment and why is it unlawful?
- *Meritor Savings Bank // Forklift Systems, Inc.*

Who knows what it is?

- “Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. . . . As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. . . . Be that as it may, I know of no alternative to the course the Court today has taken. ”
  - » Justice Scalia, concurring in *Harris v. Forklift Systems*

What is not sexual harassment?

- Holding a door or a chair
- Saying “Good morning”
- Smiling

Hidden Harassment

- Common workplace-based responses by those who experience sex-based harassment are to ***avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.*** The ***least common response to harassment*** is to take some formal action – either to report the harassment internally or file a formal legal complaint. ***Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.***
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- Approximately 90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or a complaint.
- *"Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace." (2016)*
-

Hidden Harassment

2017-18 Presidential Initiative, American Bar Association:

- 49% -- just about half – of female lawyers in the nation's 350 largest law firms "received unwanted sexual contact" at work;
- **28% of female lawyers in the nation's 350 largest law firms "avoided reporting sexual harassment."**

We all know all of the protected classes:

- Race, sex, color, national origin, religion (Title VII of the Civil Rights Act of 1964)
- The Ku Klux Klan Act
- 1967: Age Discrimination in Employment Act
- 1977: Pregnancy Discrimination Act
- 1990: Americans with Disabilities Act
- 2008: ADAAA – everybody

But we don’t:

- GINA ($2.2 million jury verdict in June 2015)
- USERRA (“who you callin’ an at-will employee?”)
- FMLA retaliation
- FLSA retaliation
- NLRA (even non-union employers)
- SOX (even non-public companies)
- Affordable Care Act anti-retaliation/lactation

But we don’t, continued:

- VA: childbirth, marital status, lactation
- NC: lawful use of lawful products outside work; absence because getting domestic violence order
- TN: “creed” as well as “religion;” defines “familial status” but does not prohibit discrimination for it; tardy volunteer rescue workers; sex “as on birth certificate”
- PA: “ancestry” as well as “national origin;” “handler or trainer” of a guide or support animal (mini-horses?)
- DC: matriculation, personal appearance

Protected classifications

- You will never be able to memorize all of them
- ***That does not matter***
- All persons must be treated with dignity and respect
- All workplace decisions must be made solely on the basis of workplace merit

Upcoming cases/sexual orientation gender identity:

- Certiorari Granted April 22, 2019 to two sexual orientation cases: *Bostoc / Altitude Express*
- Certiorari Granted April 22, 2019 to gender identity/transgender case, *Harris Funeral Homes*
  - Transgender protections?
  - Scope of Sexual Stereotyping paradign
  - Not on religious issue!

ADA

- **"Essential function"** now much more important: *Stephenson v. Pfizer* (4th Cir. March 2016) (drive or arrive?)

ADA

- Factors considered in determining “essential functions”
  - Employer’s judgment
  - **Written job descriptions**
  - Time spent on the job performing the function
  - Terms of any collective bargaining agreement
  - Work experience of past and current employees in similar jobs

ADA

- In considering reasonable accommodations, an employer should:
  - Distinguish between essential and non-essential job functions
  - Obtain the opinion of the disabled employee
  - Assess and document reasonableness

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How to Respond to a Request for Reasonable Accommodation

1. Determine essential functions of employee's job.

2. Collect necessary medical information.

3. Consult with employee to determine how limitations impact performance of essential job functions.

ADA - EEOC v. Advanced Home Care, Inc. (2018)

- Teleworking may be a reasonable accommodation for employee who is sensitive to work place smells
- Employers have an *obligation* to engage in an interactive process with the employee
  - Can't just say you'll get back to them and then never do it

Mauback v. City of Fairfax (E.D. Va. 2018)

Employee who refuses to engage in the interactive process loses lawsuit!

Emerging issue: ADA Leave after FMLA leave

- Employee takes 10 weeks FMLA leave, then does not return on Monday. What do you do?
- 825.311(c) – "reasonable notice"
- Employee takes ALL FMLA leave, then does not return on Monday. What do you do?
- EEOC Guidance: Must consider ADA leave as an accommodation // interactive process

ADA Leave / accommodation

- "indefinite leave . . . Will constitute an undue hardship and so does not need to be provided as an accommodation." EEOC Guidance May 9, 2016
- FMLA is for an employee unable to perform the essential functions of the position. 825.123(a).
- *Severson v. Hartine Woodcraft* (7th Cir. 2017) (inability to work for multimonth period removes the person from ADA protected class); 4th Cir. Case but not since 1994

Race – Idiots Harass

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- Novellus Systems settlement of $168,000 in racial harassment claim
- “Harasser” was 27-year-old Vietnamese-American who constantly played and sang rap music, including music containing the “n-word”
- Company failed to take action for six months

National Origin:

- Traditionally a less-used provision
- After 9/11, spike in cases (particularly from evil, but also from stupid – Sikh)
- Has been covered since the Civil War, since the Reconstruction-Era Congress thought “races” are what we now think are “national origins”
- Continuing challenge of apparel or symbology associated with a particular group

Case study:

- Sesquicentennial of the Civil War; British Government: “what is more, they have made a nation”
- Complaints: displays of Confederate Battle Flag regalia in the office, or on cars in the company-owned parking lot, create a hostile environment for other employees
- Flag-owners claim national origin discrimination based on “Confederate-American” status

What happens to the flag?

- Numerous cases make it clear that this is not what the Civil Rights Acts were intended to protect – particularly not the anti-Ku Klux Klan act! (But so what? We expand laws all the time. And remember why “sex” is in Title VII.)
- Numerous cases make it clear that “Confederate American” is not a national origin
- Creative plaintiffs: well, then, it’s a religion!

Religion:

- The Confederate Americans lose, but. . .
- *Cloutier v. Cosco* (CBM)
- *Brown v. Pena (*personal creed: Kozy Kitten)
- *Schwartzentruber* (KKK membership)
- *Peterson v. Wilmer* (white supremacy)
- *EEOC v. Papin* (Nuwabian nose ring)
- *EEOC v. Red Robin* ("My Father Ra is Lord" tattoo)

Religion:

- American Religious Identification Survey 2008 (used by Census Bureau)
  - 1.6 million Atheist, 1.98 million Agnostic
  - Quaker 130,000 v. Wiccan 340,000
  - Sikh 78,000 v. Pagan 340,000

Religion:

- Jedi Knight:
  - Australia 2006: 65,000
  - New Zealand 2001: Second largest after Christian
  - United Kingdom 2012: Seventh largest; was fourth largest in 2001 with 177,000, larger in UK than Sikh, Buddhism, Judiaism

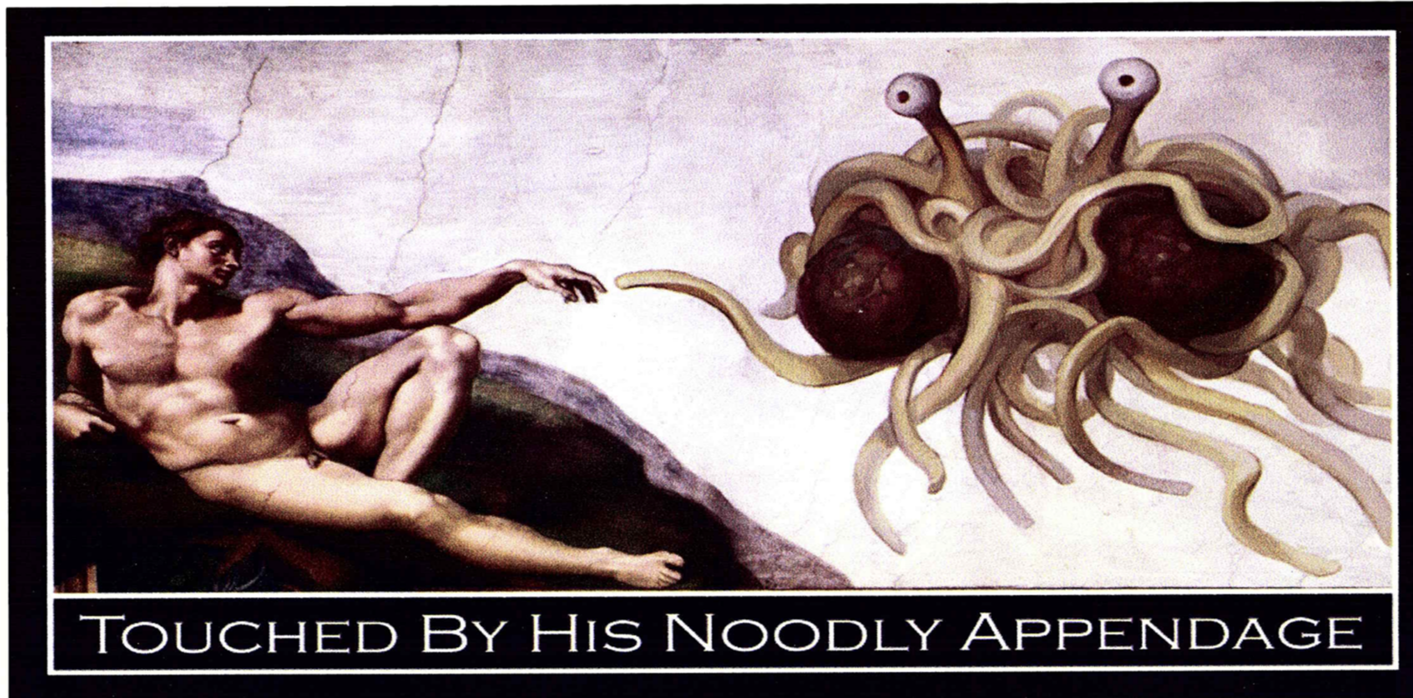
Case study:

- Chesterfield County Board of Supervisors
- Random selection from ministers to start Board meeting (phone book)
- Cynthia Simpson: "Reclaiming Tradition of Wicca," "Broom Riders Association"
- Monotheistic and pantheistic, invoke Diana, Hecate, Pan as "aspects of the one"

Does Cynthia win?

- No, but not for the reason you might think. Special exception for “legislative prayer” (that’s the *Town of Greece* case from 2014 – and they had invited a Wiccan!)
- Hiring practices would be different. Might well have won if challenging job action.

What about religious satire?



Procedural issue: should we arbitrate claims?

- On May 21, 2018, the U.S. Supreme Court issued its opinion in *Epic Systems v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018), holding that the NLRA does not restrict employers from enforcing arbitration agreements under the FAA which include class action waivers.

Lamps Plus case:

- U.S. Supreme Court in *Lamps Plus, Inc. v. Varela*, ___ U.S. ___, No. 17-988 (April 24, 2019)
- Pre-dispute agreement to arbitrate a claim that does not mention the availability of a class action mechanism in arbitration, does not authorize class arbitration
- Extent to which at least a 5-4 majority of the Court will go in interpreting away state-law contract principles that would reach a "no arbitration" result.

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