Understanding Employment Law

by

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I. EMPLOYMENT LAW OVERVIEW

A. Employment-At-Will And The Common Law

Under the common law, it was believed that since employees could quit their jobs whenever they wanted to for no reason, then employers should be able to fire their employees whenever they wanted regardless of whether or not they had "just cause" to do so. This philosophy was referred to as the "employment-at-will doctrine" and it was widely recognized as being the current status of the law regarding employment law for many years.

Additionally, in those states where the employment-at-will doctrine is still alive and well, there is often a strong presumption under the law that *all* employment relationships are terminable at will unless the terms of the employee's contract or other facts or circumstances clearly manifest the parties' intent to bind each other to the relationship or to change this relationship in some way. (Henkel v. Educ. Research Council (1976), 45 Ohio St.2d 249). Therefore, in many employment-at-will states, the law begins with the presumption that every employment relationship is at-will.

However, over the years, the employment-at-will doctrine has eroded to the point that it is now not nearly the "all-protecting" doctrine that it once was for employers. In fact, in some states, the employment-at-will doctrine does not exist at all anymore. In such states, employers may be required to have "just cause" for terminating an employee, which is commonly documented by using a progressive discipline procedure (i.e., verbal warning, written warning, termination).

In states where the employment-at-will doctrine still exists, it has been greatly weakened by legislation and various court decisions. Therefore, the best way to think of the employment-at-will doctrine is to envision a shield protecting the employer from wrongful discharge suits by employees; however, today, this shield is riddled with holes.

B. Statutory Rights Exception

Today, many statutes exist that protect the rights of employees based upon their protected class status or based upon certain activities in which employees choose to engage. The employment-at-will doctrine will not protect an employer who has violated the statutory rights of an employee. Examples of such statutes

include:

1. Title VII of the Civil Rights Act of 1964,

   Title VII of the 1964 Civil Rights Act is the primary federal law that prohibits discrimination in employment practices. Title VII applies to any employer engaged in an industry affecting commerce who has **15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.** Under Title VII, it is unlawful to fail or refuse to hire or to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

2. Age Discrimination in Employment Act of 1967,

3. Americans With Disabilities Act of 1990 and The Rehabilitation Act of 1973,

4. Employee Polygraph Protection Act of 1988,

5. Equal Pay Act of 1963,

6. Family and Medical Leave Act of 1993,

7. Occupational Safety and Health Act of 1970,

8. National Labor Relations Act of 1935,

9. Pregnancy Discrimination Act of 1978,

10. Uniformed Services Employment and Reemployment Rights Act of 1994,

11. Employee Retirement Income Security Act of 1974,

12. The Opposition and Participation Clauses of these Acts and

13. Various state discrimination laws, as well as various whistleblower laws, state laws which prohibit employers from taking any retaliatory acts against employees for filing Workers' Compensation claims, and so on.

C. Right vs. Wrong & Employee Relations vs. Legal: BUSINESS JUDGMENT RULE

The courts have ruled again and again that it is management's right to run its operations as it sees fit. That includes setting whatever standards are necessary within the law in order to run the organization as it desires. As long as management is not discriminating against employees based on their protect class status, it is all fair game.

This is referred to as the

"Business Judgment Rule"

For instance, Coca Cola has adopted a very stringent rule regarding employees who "consort with the enemy":

If you drink a Pepsi product…
even on your own time, you are FIRED!

(Of course, if you test positive for "crack," you go into rehab.)

Is this fair? Fairness has nothing to do with it. From a legal perspective…

"Fair" is where you show PIGS!

This is why the courts have ruled again and again that there is no doctrine of "fairness" in employment law. Why? Because people's opinions differ on what is "fair." An employee's definition of what is "fair" does not trump its employer's ability and right to run its workplace as it sees fit. Employers are allowed to exercise their "business judgment" and make decisions…even if employees view these decisions that affect their employment as being "unfair."

"Fairness" is an **EMPLOYEE RELATIONS** consideration…**NOT A LEGAL ONE!**

Employers have the right and responsibility to set the direction of the organization, WHICH INCLUDES…

1. Maintaining discipline, morale, and good order and

2. Requiring employees to carry out the directives of their superiors.

II. NEW RETALIATION STANDARD

In Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), Sheila White applied for a job as a forklift operator with Burlington Northern & Santa Fe Railway Company in its Maintenance of Way Department in Memphis, Tennessee. Burlington hired White for the job. White was the only female forklift operator in this department.

After a few months on the job, White filed a complaint of sexual harassment against her supervisor, Bill Joiner. The company investigated and determined that Joiner had in fact sexually harassed White. Joiner was suspended without pay for 10 days and was required to go to sexual and illegal harassment training.

However, as a result of its investigation, Burlington discovered that there were a great many complaints about White working in the forklift position. The forklift position was much cleaner and physically less demanding than the other jobs in the department. Other employees complained that a less senior person should not have been given this job.

As a result, Burlington removed White from the forklift position. White was replaced by a more senior male employee. Burlington did not change White's pay or benefits when she was transferred. However, White's new job was much dirtier and much more physically demanding than that of a forklift operator.

White filed a charge of retaliation with the Equal Employment Opportunity Commission. Afterwards, White filed this charge with the EEOC, she got into a dispute with her supervisor, and she was suspended without pay for the offense of insubordination, pending Burlington's investigation.

After Burlington investigated White's suspension for insubordination, management determined that White had not been insubordinate. Burlington therefore reinstated White with back pay, which equaled 37 days.

White then filed suit against Burlington for retaliation under Title VII. The trial court held for Burlington.

White then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held for White.

Burlington appealed to the United States Supreme Court. The Court held for White.

Specifically, the U.S. Supreme Court held that:

> "The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."

The Supreme Court then went onto hold in Burlington that a plaintiff must demonstrate that he suffered a "materially adverse" retaliatory action, which it defined as one that:

"**well might have dissuaded a reasonable worker from making or supporting a charge of discrimination**."

In this case, however, even though White's pay and benefits were not changed, she was transferred to a job that was harder, dirtier and had less prestige. Ever since White started working at Burlington there was great resentment amongst the other workers that she received the forklift position. It was only **after** White filed her sexual harassment complaint that Burlington took action and removed White from the forklift position.

Also, suspending White without pay for 37 days was no small matter. It is clear that White was suspended because she was seen as a "trouble-maker" for filing a charge with the EEOC. Even though Burlington later recognized the error and reinstated White with back pay, the harm had been done. White had to sit at home for over one month without pay and wondering whether or not she would still have a job.

Therefore, the Court held that Burlington had in fact retaliated against White for filing a sexual harassment complaint and a charge of illegal discrimination with the EEOC.

III. THE HONEST BELIEF RULE

In Hitt v. Harsco Corp., 356 F.3d 920 (8th Cir. 2004), William Hitt was a 65 year old employee with Harsco. Hitt also worked with his son-in-law, Mark Odom, age 34. However, Hitt filed to gain legal custody of Odom's son, which was also Hitt's grandson. Since then, Odom denied Hitt any access to his grandson. As a result, there was a great deal of tension between Odon and Hitt.

On the morning of August 23, 2000, Hitt allegedly sought out Odom in the company's lunchroom. The discussion, which centered on Odom's son, became quite heated. Witnesses reported that Hitt told Odom that he was going to kick Odom's "ass." Odom then said they should "take it outside."

The two left the lunchroom. Witnesses reported that Hitt then took a swing at Odom and Odom kicked Hitt. Both men were terminated based on these eye witness accounts.

Hitt then filed suit against the company, claiming that he was fired in violation of the ADEA. Still, the court held for the employer, Harsco.

The court reasoned that the key question is not whether the plaintiff actually participated in the fight, but instead whether the employer **BELIEVED** that the employee had been a participant. Even though terminating an employee based on faulty information might be unfair, it is not illegal age discrimination.

WHAT DOES THIS MEAN TO EMPLOYERS?

Employees should be instructed to tell the truth in all investigations. Lying subjects the company and the employee him or herself to liability for defamation. To lie in an investigation should result in the employee's termination. Human resource people should include in their policies that refusing to give full and honest responses in an investigation may result in immediate termination.

However, in order to protect themselves, employers should document such statements. This documentation is vital since it can later be used to show exactly what information the employer relied upon that in making its employment decisions.

IV. "HONEST BELIEF RULE" USED AS GROUNDS FOR TERMINATION

In Seeger v. Cincinnati Bell Telephone Co., 681 F. 3d 274 (6th Cir. May 8, 2012), Tom Seeger was employed as a network technician by Cincinnati Bell Telephone Company (CBT). In August 2007, Seeger began experiencing pain and numbness in his left leg. On September 5, 2007, a physician confirmed that Seeger had a herniated lumbar disc, and Seeger started an approved FMLA leave of absence the same day.

On September 19, Seeger was examined by Dr. Michael Grainger, his primary care physician. Dr. Grainger observed that it was difficult for Seeger to change positions, get in and out of a chair, and walk. The following day, Dr. Grainger's office left a message for CBT that Seeger was unable to perform any restricted work.

On September 23, Seeger attended an Oktoberfest festival in Cincinnati for approximately 90 minutes, during which time he admittedly walked a total of 10 blocks. While at the festival, Seeger encountered several co-workers. One co-worker observed that Seeger was able to walk, seemingly unimpaired, for approximately 50 to 75 feet through the crowd, and the co-worker reported his observations to CBT's HR Manager. On October 15, 2007, Seeger reported to Dr. Grainger that he had been asymptomatic for two days, and Dr. Grainger authorized his return to work. Seeger resumed his full-time position on October 16, 2007.

Meanwhile, CBT investigated the matter by obtaining sworn statements from Seeger's co-workers and by reviewing his medical records, disability file and employment history. Based on the inconsistency between Seeger's reported medical condition and his behavior at

Oktoberfest, CBT decided to suspend Seeger's employment and scheduled a suspension meeting with him. At the meeting, Seeger defended his actions and denied committing disability fraud. CBT invited Seeger to submit any relevant information, and Seeger provided a letter from Dr. Grainger. The letter stated, in part, that "[w]alking for one and a half hours at one's own pace doesn't equal working for an eight hour day nor is it reasonable to assume that he could perform even limited duties for an eight hour day."

Ultimately, CBT concluded that Seeger had "over reported" his symptoms and terminated his employment. Seeger filed a lawsuit alleging that he was fired in retaliation for taking protected leave. The trial judge dismissed the suit and Seeger appealed.

While the Sixth Circuit determined that Seeger established a *prima facie* case of retaliatory discharge due to the short amount of time between his return from FMLA leave and his termination, it also concluded that CBT articulated a legitimate, nondiscriminatory reason for discharging Seeger. In the court's words, "Fraud and dishonesty constitute lawful, non-retaliatory bases for termination."

The court then considered whether Seeger produced adequate evidence demonstrating that CBT's professed reason was a pretext for discrimination. Essentially, Seeger attempted to show that there was no factual basis for CBT's proffered reason for discharging him because CBT had ignored medical evidence in its possession that Seeger was responding to treatment, and his pain had improved before Oktoberfest.

Under the "honest belief rule," the inference of pretext is not warranted where the employer can show an honest belief in the proffered reason. The court explained that an employer's professed reason is deemed honestly held where the employer can show that it made a reasonably informed and considered decision before taking the adverse action. The court cautioned that an employer's invocation of the honest belief rule does not automatically shield it from liability because the employee must be given a chance to produce evidence to the contrary.

The Sixth Circuit held that CBT demonstrated that it reasonably relied on specific facts in determining that Seeger had committed disability fraud, and Seeger failed to refute CBT's honest belief. The court emphasized that Seeger's argument and presentation of competing medical evidence were misdirected. "The determinative question [was] not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did." Accordingly, the Sixth Circuit upheld the judgment in favor of CBT.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The significance of this decision is that employers can protect themselves from employees who are exaggerating or misrepresenting a medical condition to get off work. To substantiate a 'reasonably informed and considered' belief of FMLA fraud, employers should conduct a thorough investigation, including whether the off-work activity is actually inconsistent with the medical restrictions, and give the employee an opportunity to defend his or her actions. An employer cannot 'jump the gun' and act precipitously on a suspicion no matter how well founded. Here the quality of the employer's investigation, and affording the employee an opportunity to explain his actions, were instrumental in upholding the discharge decision."

V. STUPID COMMENTS DEFEAT HONEST BELIEF RULE

In Stewart v. Kettering Health Network, 576 Fed. Appx. 518 (6th Cir., Aug. 13, 2014), 59-year-old Doug Stewart was the oldest security officer working at Grandview Hospital.

On February 22, 2011, Grandview Hospital had a patient in a padded room that was becoming very upset and was cursing loudly. Dr. Robert Hunter asked Stewart and another officer, Officer Mardy White, to undress the patient and put him into a hospital gown. After blows were exchanged, Stewart was forced to use his stun gun to subdue the patient.

The patient appeared unaffected by the Taser, but shortly afterwards Stewart and White were able to tackle the patient to the floor and handcuff him with his hands in front of his body.

The door to the exam room was open during the incident. Stewart did not see anyone in the hall but medical staff came rushing in all of a sudden. Stewart recalls Dr. Hunter and Sergeant Jones ("Jones"), among others, coming into the room.

At this point, what happened to the patient is disputed.

Jones, Dr. Hunter and Dr. Fish testified that Stewart kicked the restrained patient in the head. Jones described the event in his report to Miller. Officer D. Stewart then took what appeared to be his right foot and moved it to the patient's face in a quick motion. It appeared that his foot had struck the patient in the area of his forehead and nose...."

Jones also reported that Doctors Hunter and Fish confirmed that they saw Stewart kick the patient's head.

Stewart testifies to a different story. According to Stewart, the patient was spitting blood on everybody and everything. Dr. Hunter, in an effort to redirect the patient's head to avoid possible disease from the patient's blood, pushed his foot on the patient's head. Stewart told Dr. Hunter that "we" had the situation under control and he needed to remove his foot from the patient's head.

Dr. Hunter refused.

Stewart then placed his foot on the patient's head but he says he had no pressure on the patient's head.

When the patient calmed down, Stewart removed his foot and Stewart also removed Dr. Hunter's foot.

During the follow-up investigation, Stewart denied kicking the patient.

White's incident report mentions nothing of Stewart kicking the patient's head.

Dr. Fish's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

Dr. Hunter's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

During an interview following the incident, the patient said nothing about Stewart kicking him.

Finally, according to Stewart, the only injury that the patient had was a bloody nose and the bloody nose was from being punched by White, the other security officer.

Following an investigation headed by its chief of security, David Miller, Grandview fired him for using excessive force.

Stewart sued Grandview for age discrimination.

In support of his claims, he pointed to a number of incidents in which Miller allegedly made remarks about his age. Grandview didn't dispute that Miller had remarked that he generally wanted to hire younger officers.

According to Stewart, Miller told him he wanted "young bulls" instead of "old guys."

Further, another officer testified that Miller had asked him to "keep an eye on" Stewart and that he felt Stewart's "days were numbered."

The trial court dismissed Stewart's lawsuit, finding that he failed to present sufficient evidence to refute Grandview's position that it appropriately terminated him based on its "honest belief" of the truthfulness of the witnesses' accounts of the patient altercation.

Stewart appealed that decision to the Sixth Circuit.

The Sixth Circuit reversed the trial court's ruling and found that Stewart came forward with enough evidence to warrant a trial. The heart of the issue was the honest belief rule.

Under that rule, an employer's termination or other disciplinary decision isn't unlawful if it was based on its "honest belief" of the facts, even if the employer makes a mistake about the facts.

According to the court, the "employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." Therefore, Grandview argued, even if Stewart did not actually kick the patient in the head, it was reasonable for it to determine that he did based on the doctors' statements.

However, the Sixth Circuit found that in this case, a jury, rather than a judge, should have the opportunity to determine whether Grandview could rely on the honest belief rule.

The court was particularly bothered by three things in this case.

First, Stewart was able to point to several comments by his supervisor that suggested a prejudice against his age.

Second, "the fact that neither doctor present at the time of the incident giving rise to [the] termination saw fit to mention [the alleged misconduct] in his contemporaneous notes undercuts the credibility" of their subsequent testimony.

Third, Miller, who was the primary person heading up the investigation, was the same person who allegedly made comments that suggested he was prejudice against older employees.

Taking all of that into consideration, the court found that there were plenty of reasons that reasonable minds could differ on the employer's true motives. Therefore, Stewart should be allowed to present his claims to a jury.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Under the Sixth Circuit's interpretation of the honest belief rule, an employer is not required to show that its decision-making process was "optimal or that it left no stone unturned."

However, the courts will not "blindly assume that an employer's description of its reasons [for an adverse action] is honest." The decision must be based on "particularized facts" rather than on "ignorance and mythology."

Grandview should have made sure that its physicians did a better job of documenting this incident. When their notes and their statements did not match, much doubt was cast on the truthfulness of their testimony.

Also, Miller's previous discriminatory comments are simply absurd. His credibility was destroyed.

As a result, the credibility of this entire process was tainted.

In the end, a lack of supervisor and physician training cost the employer.

VI. DISCRIMINATORY INTENT: WHAT IS PROOF?

However, in Reeves v. Sanderson Plumbing Products, Inc., No. 99-536 (2000), Roger Reeves, 57, had worked for Sanderson Plumbing Products, Inc. for 40 years…most recently as a supervisor. Reeves was then terminated by the company for allegedly making timekeeping errors. Reeves, on the other hand, claimed he was terminated due to his age and sued the company.

At trial, Reeves offered evidence that he had properly maintained the company's timekeeping records and that any errors that were made were not his fault, which included showing that the time clock was not working properly.

Reeves also cast doubt on the reasonableness of the employer's legitimate business reason offered to the court for terminating his employment (poor timekeeping records) by introducing circumstantial evidence of derogatory, age-based comments directed at Reeves ("You're too old to do this job."). Reeves was also able to demonstrate to the court that he was treated more harshly than younger employees for the same types of alleged offenses.

The jury then returned a verdict for Reeves. Reeves was awarded $70,000 in damages.

However, on appeal, the 5th Circuit Court of Appeals overturned the trial court's verdict for Reeves and found for the employer. Specifically, the 5th Circuit found that Reeves had failed to carry his burden of proof required under Hicks.

The 5th Circuit Court of Appeals discounted this evidence presented by Reeves since only one decision-maker allegedly made the derogatory comments, and even then these comments were not made related to Reeves' termination but occurred in another context. No evidence was presented that indicated the other decision-makers were motivated by a prejudice against age.

Further, the 5th Circuit found that when Reeves was terminated, many of the employer's management positions were filled were by individuals over the age of 50. Also, two of the managers who decided to terminate Reeves were also over the age of 50.

As a result, the 5th Circuit found that even though Reeves had cast doubt on the credibility of the employer's legitimate business reason offered to the court (pretext), as well as cast doubt on whether the employer's true motivation for terminating him was based upon his and not poor timekeeping records, Reeves had not **proven** these burdens. The 5th Circuit Court reasoned that since it was Reeves' burden to prove these points, and since he failed to carry this burden of proof, Reeves must lose this case.

The U.S. Supreme Court disagreed.

The Court reasoned that the 5th Circuit misconstrued Mr. Reeves' burden, and thus the plaintiff's burden, in such disparate treatment cases. The U.S. Supreme Court held that plaintiff's are not required to present **explicit evidence** to prove their cases to the jury, which includes proving that the employer's legitimate business reason offered to the court is unworthy of credence and that the employer was motivated by an illegal reason in making its decision adverse to the plaintiff.

Instead, the Court reasoned that many times, illegal discrimination is subtle and difficult to prove…so plaintiffs are not required to present to the court a "smoking gun." Many times, such direct evidence as a "smoking gun" will simply not exist. Therefore, plaintiffs are only required to present evidence that the jury could **infer** that the employer's legitimate business reason offered to the court is pretextual and that the true motivating factor behind the employer's decision was based on the plaintiff's protected class.

In this case, the Court found that Reeves had established a prima facie case under McDonnell Douglas, he had presented enough evidence that a reasonable jury could reject the employer's legitimate business reason offered to the court, and he had presented evidence that indicated that at least one of the decision–makers may have been motivated by an animus towards Reeves' age. Having presented this evidence, circumstantial or not, the ultimate questions of whether the employer terminated Reeves on account of his age should be a question left to the jury to decide.

The Reeves case is an important decision to employers and employees alike. Plaintiffs are now only required to present enough credible circumstantial evidence for the jury to **infer** that employer committed illegal discrimination. No direct evidence will be required from the plaintiff.

The problem for employers is that juries are inherently pro-employee.

Employers must therefore document their actions taken against employees now more than ever before. In reality, even though the ultimate burden of proof always remains with the plaintiff in disparate treatment cases, after Reeves, employers truly must be able

to prove that they did not illegally discriminate against the employee.

This is done through documentation.

VII. WHY DO NONUNION EMPLOYERS HAVE TO WORRY ABOUT THE NLRA & SERA?

Under Section 7 of the National Labor Relations Act, rank-and-file employees have the right to unionize. Employers are not permitted to unlawfully interfere with employees as they exercise this right.

Likewise, Section 8(a)(1) of the NLRA says that employees are permitted to discuss the "**wages, terms and conditions of employment**" amongst themselves and with others.

Therefore, not only are unionized employers covered by the NLRA, but so are nonunionized employers because their employees ***may*** want to unionize one day.

Since the SERA in Ohio's public sector was modeled entirely on the NLRA back in 1983, this same logic applies to the SERA.

VIII. NLRA FINDS FACEBOOK POSTING TERMINATION LAWFUL

In Karl Knauz Motors Inc., (NLRB ALJ, No. 13-CA-46452), a National Labor Relations Board ("NLRB") administrative law judge (ALJ) found that Knauz BMW lawfully terminated the employment of Robert Becker, a salesperson, after he posted pictures and comments on his Facebook page about two different workplace incidents -- an automobile accident and a dealership sales event.

The first incident Becker posted on his Facebook page concerned an accident at a Land Rover dealership also owned by Knauz on an adjacent property. Becker posted pictures of the accident, as well as comments such as, **"This is your car: This is your car on drugs."**

The same day, Becker also posted pictures of a dealership sales event. Becker and other salespersons disagreed with the General Sales Manager's choice of food and beverages for the event, including hot dogs and chips. Becker posted pictures of the other salespersons with the food and beverages, as well as several comments on his Facebook page, such as:

> **"The small 8 oz bag of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch…but to top it all off…the Hot Dog Cart. Where our clients could attain an over cooked wiener and a stale bunn [sic]…"**

Although both posts were made on the same day, managers of the dealership testified that Becker's employment was terminated because "[he] had satirized a very serious car accident that occurred at our Land Rover facility on his Facebook page by posting pictures of the accident accompanied by rude and sarcastic remarks about the incident."

The ALJ held that the termination for the posting of the accident was lawful because the posting did not amount to protected or concerted activity under the National Labor Relations Act ("NLRA"). Rather, Becker posted it "apparently as a lark, without any discussion with any other employee of the Respondent and [it] had no connection to any of the employees' terms and conditions of employment."

On the other hand, the ALJ opined that had the dealership terminated Becker's employment for the Facebook postings regarding the **sales event**, the termination would have been unlawful. According to the ALJ, the sales event posting constituted protected concerted activity that could have affected Becker's compensation. Although it would be unlikely, a customer may have been "turned off" by the food offered at the event and may not have purchased a car or may have given the salesperson a lower rating.

Further, Becker and another salesperson both spoke up during a meeting about what they considered to be the inadequacies of the food being offered at the event and salespersons also discussed the subject after the meeting. Although only Becker complained about it on his Facebook page, the ALJ equated Becker's posting to an individual employee bringing a group complaint to the attention of management, which is protected concerted activity. The ALJ concluded, however, that Becker had been terminated for the first, unprotected posting and not the second, protected posting.

IX. OFF THE JOB CONDUCT

The language and harassing acts in the following Hawkins case are extremely disturbing. I left this language in this handout since it demonstrates a tremendous change in 6th Circuit law. If you are bothered by truly horrendous language and harassing acts, please skip this case and move on to the next. However, if you do read the case, you will better understand why the court expanded Title VII Retaliation Law the way it did.

In Hawkins, et. al. v. Anheuser-Busch, 517 F.3d 321 (6th Cir. 2008) Diana Chiandet, an employee at the Anheuser-Busch's plant in Columbus, Ohio, reported sexually harassing behavior from one of her co-workers, Bill Robinson, while working on Production Line 75. Chiandet complained to brewery management in July of 1993 that she had received three harassing and threatening anonymous notes. The first note stated:

> "Are you looking for a real good hot time with a real hard body man? [I]f so I'm your man. Call my line to nite [sic] for some read [sic] hot sex talk. 1-800-334-1256. I'll be waiting."

The second note read:

> "Hi - Are you lonely and looking for a real hot time? [I]f so I'm the man for you. If you want something Hot and Hard call meat 1-800-335-666. They call me Mr. Big Daddy."

The final note stated:

> "What's up sexy. So are your ready for something nice and hard because I think it's about time we got together so we can have a good time all nite [sic] long. I no [sic] you like it *long and* Hard. And I have tools to do that all nite [sic] thing. P.S. Don't worry I will make real good to you. I no [sic] what you like *PAIN*."

On August 4, 1993, shortly after reporting these notes to management, Chiandet told her supervisor that her car had been "sideswiped" at work.

The brewery concluded that the notes were "inappropriate, lewd, suggestive and

threatening," and launched an investigation into the incident. A handwriting expert promptly determined that Robinson was the author of the notes. Although Robinson originally denied writing them, he later admitted to being the author after he was confronted with evidence from the handwriting expert. This caused Anheuser-Busch to terminate Robinson's employment in early September of 1993. Robinson pursued a union-backed grievance.

Under the collective bargaining agreement at the brewery, management may terminate employees only for "just cause." Employees who wish to challenge a disciplinary action taken against them can file a grievance. Grievances are first heard by a department head, then by a human resources manager, and finally by a Multi-Plant Grievance Committee. The Grievance Committee is composed of two company representatives, two union representatives, and a mutually agreed-upon arbitrator.

Following Robinson's appeal, the Grievance Committee reinstated him after a six-month suspension.

Jackie Cunningham was hired by Anheuser-Busch in May of 1996. In 1999, Cunningham began working with Robinson on line 75. Cunningham became concerned about Robinson's conduct after she saw him near her residence and believed that he was following her. She alleged that, shortly after she saw Robinson near her home, he began to harass her at work.

Specifically:

- Cunningham said that during a training session in 1999, Robinson sang a rap song to her with the lyrics: "Baby, won't you back that thing up," and then held money in his hand and said: "Is that what it's gonna take?"

- Robinson also tried to put his hand on her shoulder, but she moved away.

- Robinson then said to her: "I will suck your !#@@ but you got to suck my !@#@."

- Robinson later caressed her back and she responded by screaming at him: "Don't touch me."

- Robinson told Cunningham to come over to his vehicle at work and, when she refused, he chased her around and tried to grab her as she ran away.

- Robinson asked Cunningham: "Why don't you just suck my !!@#?"

- Robinson told Cunningham that he was getting rid of his girlfriend, and asked her: "Why don't you just make up your mind?" while trying "to feel on her." Cunningham also said that she could not remember every instance of harassing behavior, but that Robinson would harass her "on and off" and would "push on and on."

She allegedly complained to her supervisor, Eric Steinberg, "a few times" about Robinson's behavior and contacted the plant operations manager Richard Sambecki to request a transfer. Cunningham also asserted that she told her supervisors that life was "unbearable" working with Robinson since he was "really trying to make [her] job difficult."

She also talked with her union steward, Leslie Schoenian, about Robinson's behavior. Schoenian advised Cunningham of the things that Robinson "was capable of" and suggested that the best solution would be to simply move to another brewery line.

Shortly thereafter, Cunningham told Schoenian that she wanted to move lines, and Schoenian discussed the matter with management. The brewery then transferred Cunningham to a new line. Even after the transfer, however, Cunningham alleged that she felt harassed by Robinson's friends and said that "stuff still followed [her]" to her new position.

Cherri Hill began working at the brewery in August of 1999. In January of 2000, she started working with Robinson. She alleged that Robinson began harassing her in November of 2000. In her deposition, Hill recounted numerous instances of touching—stating that Robinson touched her arms, rubbed her shoulders, and walked up close behind her—and that he regularly made "lewd and explicit" comments. When Hill asked Robinson to stop, he said that he knew she "liked it" and that he "wanted to have sex" with her. Hill stated that Robinson would walk close to her, touch her on the backside, and that on one occasion he rubbed against her with "his private area" and grabbed her around the waist. Hill also said that on three or four occasions Robinson told her "she had big breasts" and a "big butt." On another occasion, Robinson told her "he wanted to @!#!" her and said, "I bet you have some good !@#!$ and I know that you would like this. You should let me take you away from your boyfriend." In addition to recalling theses specific incidents, Hill testified that Robinson made lewd and sexual comments "all the time."

Hill told a coworker in November of 2000 that Robinson was bothering her. She also contacted Schoenian, her union steward, to complain about Robinson's conduct. Hill then asked her supervisor, Don Schlarman, if she could transfer lines after telling him that Robinson "had been touching her and talking dirty to her." Donald Manley, the brewery's human resources manager, was informed of Hill's complaint and ordered Cortlin Davidson, a human resources investigator and assistant manager, to look into Hill's allegations.

Davidson interviewed Robinson as part of his investigation into Hill's original allegations of harassment. When Robinson was informed of Hill's complaint, he denied harassing her. Robinson was apparently never asked about the fire.

At the end of his report, Davidson concluded: "Based on the interviews conducted, I believe that Bill Robinson did behave in a sexually inappropriate manner with both Cherri Hill and Jackie Cunningham."

Despite the report's conclusion, the brewery did not discipline Robinson.

Across the next few years, Robinson continued to harass several female coworkers. Again and again, Anheuser-Busch would simply transfer the victim to another position and move another female employee into her place. In order to intimidate anyone who complained, Robinson would key their cars, threaten them, assault them and slash their tires. Even the supervisors knew that Robinson was dangerous and had regularly harassed and retaliated against women.

On June 2, 2003, Robinson was terminated. Robinson's termination became final on July 21, 2003 after a grievance was field by the union. Robinson later shot his girlfriend and

then killed himself.

Amanda Grace-Hawkins, one of Robinson's victims, along of several other of his victims, filed suit in the Franklin County Common Pleas Court against Anheuser-Busch in June of 2005.

The district court granted summary judgment in favor of Anheuser-Busch. The employees appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit held that in order to actionable, **the harassment must consist of more than words that simply have sexual content or connotations**. Instead, the workplace must be permeated with "discriminatory intimidation, ridicule or insult" sufficiently severe or pervasive to alter the conditions of employment. **A non-exhaustive list of factors for the court to consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."**

This court also held that harassment involving an "element of physical invasion" is more severe than harassing comments alone.

As for the retaliation claims set forth by the plaintiffs, the court held that Robinson's alleged involvement in setting fire to Hill's car, as well as other off-duty retaliatory acts he committed, could be considered in relation to Hill's retaliation claim under the United States Supreme Court's ruling in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding that employers may be held liable for off-premises acts of retaliation under Title VII's anti-retaliation provision).

In reaching its decision, the Sixth Circuit reasoned that when determining whether retaliatory acts committed outside the work area or directed towards others counts towards making a case of retaliation, the courts may consider such factors as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff.

The court then reasoned that more weight should be given to acts committed by a ***serial harasser*** if the plaintiff knows that the same individual committed offending acts in the past. If a serial harasser is left free to harass employees, then everyone gets the clear impression that this harassment is tolerated, which supports a plaintiff's claim that the workplace is both objectively and subjectively hostile.

In order to hold an employer liable for the illegally harassing acts between co-workers, the employer must have known of the harassment or should have known. In this case, the court held that management at Anheuser-Busch either knew or should have known that Robinson was sexually harassing its employees. It was common knowledge on this production line that Robinson was sexually harassing these women. Furthermore, several of these women reported this illegal conduct over a 10 year period.

Contrary to Anheuser-Busch's assertion, simply separating the harasser and his victim is insufficient to preclude liability. Instead, companies must take affirmative steps reasonably calculated to prevent and put an end to a pattern of harassment—such as personally counseling harassers, sending them letters emphasizing the company's policies

and the seriousness of the allegations against them, training, and threatening harassers with serious discipline if future allegations are substantiated—are more likely to be deemed to have responded appropriately.

Other reasonable responses calculated to end harassment might include:

(1) Formulating an "observation network" designed to monitor the harasser,

(2) Checking in with the victim daily to ensure that she had not been further bothered by the harasser, and

(3) If further complaints arise, meeting with the harasser the next day to give him written notice that this was his "one and only" warning, that further harassment would result in immediate termination, and that harassment "absolutely will not be tolerated."

The court then noted that in this case, the brewery did not do ***anything*** other than take the most remedial steps by removing the victims from Robinson's production line ... and then putting someone else in their place.

Ever since the U.S. Supreme Court's decision in Burlington Northern, under Title VII, the "adverse employment action" requirement in the retaliation context is not limited to an employer's actions that solely affect the terms, conditions or status of employment, or only those acts that occur at the workplace. The retaliation provision instead protects employees from conduct that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Sixth Circuit held that an employer will be liable for the retaliatory acts of a coworker if:

1. The coworker's retaliatory conduct is sufficiently severe so as to "dissuade a reasonable worker from making or supporting a charge of discrimination,"

2. Supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and

3. Supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.

The court therefore held that Anheuser-Busch's failure to investigate the complaint of Robinson's violent acts of retaliation was both indifferent and unreasonable.

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The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Quotient Counsellor (CEQC) and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008, 2010 and 2012. Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

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