

change the schedule or assignment of the complaining employee, in order to “separate” involved parties. Unknown to the employer, the change affects the complaining employee’s ability to arrange daycare for his/her children. Under the Court’s new standard, the apparently reasonable solution of a schedule or assignment change can form the basis for a retaliation claim because, under the particular circumstances of the complaining employee, the solution imposes a non-work-related hardship on the employee.

As a result of this ruling, what may seem to be relatively incidental changes in an employee’s status (change in hours, work assignments, work location) are now fodder for retaliation claims if the employee has filed a charge of discrimination or complained internally about perceived discrimination or harassment.

Practical tip: Most employers know to be careful in disciplining an employee who has engaged in protected activity, (e.g., complained about perceived discrimination) and understand that they should have good and provable reasons for disciplining, demoting, firing, etc. Employers now should be equally careful about any change in the work circumstance of an employee who has complained. Increasingly, an employee who knows he is in trouble at work will make a seemingly meritless discrimination or harassment complaint in anticipation of discipline or termination, so that when the axe does fall, he has set himself up nicely for a retaliation claim. In handling an employee who has engaged in protected activity, do your homework – why are you changing the employee’s status, hours, assignment – is there a good reason that will hold up under scrutiny? Is it a change that routinely affects all or most similarly situated employees, or will an employee be able to claim he has been singled out?

The potential for low-risk discrimination complaints becoming high-risk retaliation complaints also demands that employers be careful how they package the messages they wish to get across to their employees. An employer faced with disciplining or managing the performance of an employee who has complained of discrimination or harassment must do so in a manner that reduces the risk of a retaliation charge and documents a defense to such a charge, yet gets the necessary message to the employee.

Locked and Loaded: Weapons in the Workplace

Workplace Violence

In the last few years, many states have passed laws that permit licensed individuals to carry concealed weapons. However, regulating this conduct in the workplace can be tricky. Some laws, such as those in Oklahoma, Kentucky, Minnesota and Alaska, expressly forbid employers from prohibiting employees from keeping firearms in their locked vehicles while on company property. Others do not. As one recent federal case in Oklahoma illustrates, the law is constantly changing in ways that affect an employer’s ability to effectively maintain a safe workplace.

In Oklahoma, workers at a paper mill were fired for violating a company policy that prohibited employees from keeping firearms in their vehicles which were parked on company property. The workers sued the company, claiming, among other things, that the company violated their right to bear arms under the Oklahoma Constitution and the Oklahoma Self-Defense Act (“Act”). At the time the workers were fired, the Act permitted employers to prohibit the possession of weapons on property owned or controlled by the employer.

However, in 2004, after the workers were terminated, the Act was amended to provide that “no . . . employer . . . shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.” Fortunately, the court dismissed the case against the employer, stating that the amendment did not apply to the workers because another court temporarily enjoined the state from enforcing the 2004 amendment, casting doubt on its constitutionality. The court also stated that the employer did not unlawfully infringe upon any right of the workers in enforcing its no-firearms policy.

Practical tip: The legal landscape in this area is ever-changing as lawmakers and the courts try to balance an individual’s right to bear arms with an employer’s obligation to secure its workplace. To minimize the risk of weapons-related tragedies at work, employers should stay up-to-date on legal developments and put into place well-designed safety/security and violence prevention policies.

SUPREME COURT WATCH

Boy Oh Boy...

Racial Discrimination

Depending on the circumstances, calling someone “boy” in the workplace can lead to liability. In a case which started out in Alabama District Court, two African-American men sued their employer, Tyson Foods, Inc., under federal law for discriminatorily denying them promotions on the basis of their race. The men claimed that their plant manager referred to them as “boy,” and that their qualifications exceeded those of the two white men who were promoted over them.

The case was appealed all the way up to the U.S. Supreme Court. In February 2006, the Supreme Court found that the plant manager, who also made the decisions not to promote these men, did in fact refer to each of the black employees as “boy.” Referring to an employee as “boy,” the Court held, even without a modifier like “white” or “black” could be evidence of racial animus because “[t]he speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.” Given that the plaintiff employees also asserted that their qualifications were better than the two white employees who were promoted, the Supreme Court sent the case back to the lower court to determine whether, under the specific circumstances of the case, this action was a pretext for discrimination.

Practical tip: Racially or sexually loaded comments in the workplace can spell trouble for an employer. To reduce the risk of liability, employers should periodically train employees on harassment prevention and decorum in the workplace.

Vacationing in Vegas While on FMLA Leave? — Don’t Bet on it!

The Family and Medical Leave Act

A former employee who feigned sustaining a knee injury so that he could vacation in Las Vegas with his fiancée failed to convince the United States Court of Appeals for the Seventh Circuit that his employer, Whirlpool Corp., unjustly discharged him for requesting time off under the Family and Medical Leave Act (“FMLA”). Crouch v. Whirlpool Corp., 2006 U.S. App. LEXIS 9876 (7th Cir. April 20, 2006).

The employee, Harold Crouch, submitted multiple requests for time off to coincide with the vacation time that was granted to his fiancée who also worked at the company. However, his vacation requests were denied. Thereafter, Crouch requested disability leave under Whirlpool’s disability leave policy claiming that he sustained a disabling injury to his knee while performing yard work. He requested disability leave for the same times that he had requested, and been denied, time off for vacation.

Under Whirlpool’s policies, an employee who qualifies for disability leave automatically qualifies for leave under the FMLA and the time periods run concurrently. As required under Whirlpool’s policy, Crouch provided the Company a note from his physician certifying that he was unable to work, and the company approved his FMLA leave request.

Shortly after Crouch began his disability leave, his supervisor realized that the dates for which Crouch was given disability leave covered the same dates for which he had sought vacation. As a result, Whirlpool hired a private investigator who videotaped Crouch performing forty-eight minutes of yard work several days before he was scheduled to return to work.

Upon Crouch’s return from leave, Whirlpool’s management and director of personnel met with him to show him the videotape and discuss his falsification of need for leave. Crouch admitted to vacationing in Las Vegas with his fiancée while on disability leave. Whirlpool discharged Crouch for fraudulently applying for leave in violation of company policy.

Crouch filed a lawsuit against Whirlpool alleging, in part, that Whirlpool violated his substantive FMLA rights by not restoring him to his prior position upon his return from leave. In its defense, Whirlpool argued that it terminated him because he violated company policy when he fraudulently obtained disability leave. Whirlpool demonstrated that it had terminated other employees who committed fraudulent acts while not on FMLA leave. The court sided with Whirlpool. Thus, if an employer could lawfully discipline an employee for violating policy while at work, it can also discipline an employee who is out on FMLA leave for a similar violation, without violating his FMLA rights.

The court noted that the FMLA's "return to work" provision applies only to employees who are on leave from work "for the intended purpose of the leave." Therefore, an employer's honestly held suspicion that an employee is not using medical leave for its intended purpose is enough to defeat a substantive rights claim under the FMLA. Whirlpool was under no obligation to reinstate one of its employees whom it honestly suspected, based on the evidence, was not using his medical leave for its intended purpose.

Practical tip: An employer that honestly suspects that an employee is fraudulently misusing FMLA leave should not hesitate to conduct an investigation to either confirm or disprove its suspicions. If suspicions are confirmed, an employer whose policies prohibit fraudulent workplace conduct may be able to lawfully discipline the violating employee up to and including termination of his/her employment.

The Perils of Arbitration? — Just Cause Standard is Just Crazy

Labor Arbitration

On appeal, a New York Federal District Court ruled that an arbitration panel did not err when it ordered the reinstatement of an employee to his job of mixing and handling explosive chemicals, even though the employee had a history of aggressive behavior and felony indictments for murder. Independent Chemical Corp. v. International Brotherhood of Teamsters, Local 807, 2006 U.S. Dist. LEXIS 22137 (E.D.N.Y. April 21, 2006).

Anthony Bennett, a member of International Brotherhood Teamsters, Local 807 ("Local 807"), worked for Independent Chemical Corporation ("ICC") in the company's warehouse. Some of Bennett's duties involved mixing and handling chemicals that qualified as explosives, including ammonium nitrate. During his employment, Bennett had a history of aggressive behavior, including physically assaulting a non-employee during working hours, bringing his 9 millimeter handgun to work, and verbally threatening his supervisor after being disciplined for poor work performance. Several of Bennett's coworkers expressed that they were afraid of Bennett.

On July 22, 2004, Bennett was arrested and indicted on a number of felony charges (including murder) after he admitted to an investigating police officer that he had shot his common law wife in front of their daughter and discarded the gun in a trash compactor. Bennett was later acquitted of all felony charges and convicted on two counts of criminal possession of a weapon and endangering the welfare of a child. ICC terminated Bennett's employment and Local 807 grieved his discharge as "unjust" in violation of the collective bargaining agreement ("CBA"), including, but not limited to, Article 44 (a specific provision of the CBA).

After a brief hearing, an arbitration panel issued a one-page decision finding no violation of Article 44 but sustaining Local 807's grievance. The arbitration panel's one-page decision contained no explanation or reasoning for its decision. ICC appealed the arbitration panel's decision to a New York Federal District Court.

The court held that the arbitration panel's lack of explanation or reasoning for its ruling was not fatal to its decision. The court also agreed with Local 807's argument that ICC had failed to follow the CBA's progressive policy of providing an employee at least one written warning notice for conduct that may warrant discharge or suspension but did not rise to the level of conduct that warranted summary termination as that type of conduct had been listed elsewhere in the CBA. The court determined that Bennett's conduct did not fit within the conduct listed elsewhere in the CBA that warranted summary termination. According to the court, Bennett should have received at least one (1) written warning notice that his aggressive (and violent) behavior would not be tolerated and could lead to his discharge. Therefore, in accordance with the arbitration panel's decision, the court ordered Bennett reinstated to his former position with back pay.

Practical tip: Failing to comply with a notice provision as required by a CBA can be fatal to an employer's argument that its discharge of an employee was just and proper. Before issuing any discipline that would result in the suspension and/or discharge of a represented employee, an employer should take great care to ensure that it has strictly followed its policies and the provisions of the CBA regarding the enforcement of discipline.

OBERMAYER'S WINNING WAYS

ORM&H's Labor Relations and Employment Law Department recently:

- Won the dismissal of a disability discrimination claim filed against a client with the Massachusetts Commission Against Discrimination.
- Successfully defended a client at a Michigan labor arbitration concerning that client's decision to discharge an employee for placing the health and safety of a customer at risk.
- Convinced the California Department of Fair Employment and Housing to dismiss a charge of disability discrimination filed by a former employee against a client because the client's decision to terminate the employee was part of a corporate restructuring and unrelated to the employee's alleged disability.
- Persuaded an arbitrator to deny a union's grievance challenging a client's change in health care insurance providers, because the client's action did not violate the applicable collective bargaining agreement.
- Defended a national transportation provider against a union's allegations that an employee was unjustly discharged after a wheelchair passenger was seriously injured during transport. The arbitrator denied the union's grievance because ORM&H proved that the employee was grossly negligent in performing his job duties which resulted in the injuries to the wheelchair bound passenger.

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**The Supreme Court's Increase in
Employer Risk of Retaliation Liability**

THIS ISSUE HIGHLIGHTS:

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