Your Monthly Legal Update – May 2007
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LEGISLATIVE UPDATE, LEGAL UPDATE & BALANCING FAMILY AND PROFESSIONAL CAREER

Legislative Update

Sorry I missed last month but I had to undergo torture of the sinus surgery kind and recovery was a bit more than I bargained for, especially after being infected with a cold two weeks out and into recovery. With that said, I now have the opportunity to inflict my torture upon you once again.

Now that March madness has ended, I thought I would give all of us employers some potentially good news regarding office gambling. The current Wisconsin statute makes this activity illegal in regards to betting on sporting events. Wis. Stat. sec. 945.01(1) defines a bet as: "a bargain in which the parties agree that, dependent on chance even though accompanied by some skill, one stands to win or lose something of a value specified in the agreement."

The current exceptions to this statutory rule, Wis. Stats. Sec. 945.01(1)(a)-(e) are:

1. bona fide business transactions;
2. prizes awarded to contestants in skilled competitions;
3. pari-mutuel wagering; and
4. state sponsored or multi-jurisdictional lotteries.

Did you know that the current penalty for a violation is a fine up to $1,000 or imprisonment for up to 90 days or both? Further, the penalty for running an illegal commercial gambling operation is a fine of not more than $10,000 and imprisonment of up to 3.5 years or both. Sounds pretty scary regarding a standard run of the mill office pool. In reality, do you know anyone that has ever been prosecuted for an innocent office pool? Probably not, but the law is still good on the books. However, there is a proposal to amend this statute by eliminating the penalty for participating in sports office pools, provided the pool meets the following criteria:

1. All participants must be employed by the same employer
2. The fee for participation may not exceed $50.00;
3. The pool must relate to a specific sporting event or series of events [what about baby pools?];
4. the manager of the pool must not gain personally beyond the prizes paid to participants.

The actual proposed legislation which has not yet been passed above would create subparagraph 5m of Chapter 945.01, Wis. Stats. You can research this bill currently by No. LRB 22371.

I am not writing this article to state what employers can or cannot do, just to inform of the actual law, the well known failure of law enforcement to actually enforce the law for office baby pools,

etc. and the proposed legislation that would legalize something that could be a tool to build office employee morale.

Legal Update

It has been declared by the Seventh Circuit of Appeals that for a workplace to be hostile pursuant to sexual harassment hostile work environment claims, the plaintiff must be within the target zone of the offensive behavior. *Yuknis v. First Student, Inc.* Case No. 06-3479 (You can obtain a full text of this appeal at www.ca7.uscourts.gov.)

In this case the Court opined:

One is put in mind of the distinction famously drawn by John Stuart Mill, in chapter 4 of On Liberty (1859), between 'self regarding' and 'other-regarding' conduct. The former term refers to acts that inflict a direct harm on one, such as an assault, or a breach of contract, or an insult, and the latter to acts that harm one only in the sense that one is offended to learn about the conduct. The example Mill gave of an other-regarding act was the distress that people in Britain felt upon learning that Mormons in Utah (this was before the Mormon Church renounced polygamy) were practicing polygamy six thousand miles away. The counterpart today would be a worker offended by the fact that a coworker was of a different race or religion. The manager's watching pornography likewise in the nature of an 'other-regarding' act so far as the plaintiff was concerned.

Intermediate between a 'self-regarding' and an 'other-regarding' act is the situation in Leibowitz v. New York City Transit Authority, 252 F.3d 179, 189-90 (2d. Cir. 2001), where the plaintiff learned of a hostile (to women) working environment in another workplace, though of the same employer.

The more remote or indirect the act claimed to create a hostile working environment, the more attenuated the inference that the worker's working environment was actually made unbearable, as the worker claims. Offense based purely on hearsay or rumor really is 'second hand'; it is less credible, and, for that reason and also because it is less confrontational, it is less wounding than offense based on hearing or seeing (for example, seeing the pornographic pictures with which the workplace is festooned); and it is also more difficult for the employer to control.

The American workplace would be a seething cauldron if workers could with impunity pepper their employer and eventually the EEOC and the courts with complaints of being offended by remarks and behaviors unrelated to the complainant except for his having overheard, or heard of, them. The pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend people around them, but not all workers are civilized all the time. Title VII is not a code of civility."

Affirmed.

What can we take from this opinion? While we as employers clearly have a responsibility to keep our workplace professional and "civilized", employers will not be impugned with liability

from those who are not first hand victims. Also, you never know what old resource the Court will use in making its decisions.

Balancing Family and Professional Career

While I was quoted recently in the *La Crosse Tribune*, I admit I am no expert as I write this column on a day when I have a child sick again with a virus triggering asthma and trying to do it all. Until next month!!! May the force be with you!!!