Your Monthly Legal Update – September 2009

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THE FAIR LABOR STANDARDS ACT REQUIRES A WRITTEN COMPLAINT TO CONSTITUTE PARTICIPATION IN PROTECTED ACTIVITY

Last month my legal update referred to a case that opined that informal sexual harassment complaints needed to be taken seriously. Now, the Seventh Circuit Court of Appeals decides to dissect the FLSA and opines that the express statutory language requires an employee to submit a written complaint to have participated in protected activity. *Kasten v. Saint-Gobain Performance Plastics, Corp.* (Appeal from Western District of Wisconsin) *08-2820.*

The Court interpreted "file any complaint" to be more limited when compared with Title VII and the Age Discrimination in Employment Act, which forbid employers from retaliating against any employee who "has opposed any practice that is unlawful" under the statutes. The Court opined that this broader phrase, "has opposed any practice" does not require a filing and therefore protects verbal complaints. The Seventh Circuit Court of Appeals determined that Congress could have crafted broader language in the FLSA and chose not to.

This case is certainly not binding on State jurisdiction and it is not a US Supreme Court decision. If you believe it to be splitting hairs, then assume that another court may agree with you and do not change your practices based upon one decision. When someone complains about a matter related to the FLSA, take it seriously and remedy the situation. If a company continues to perpetuate an illegal practice, there are far greater legal ramifications at stake than just a retaliation claim. Courts can always clarify a factual scenario in the future if they do not like what an employer does.

AN EMPLOYEE MUST PROVE THAT THE INTERVIEW PANEL HAD KNOWLEDGE OF THEIR PARTICIPATION IN PROTECTED ACTIVITY IN ORDER TO ESTABLISH RETALIATION

In, *Stephens v. Erickson, 08-1416*, the Court of Appeals required the employee to prove that the persons conducting the interviews actually knew that he had previously filed a Title VII complaint back in 1997. His failure to prove this element was a death knell to his lawsuit.

This case is nothing new and the fact that the original participation in protected activity went back to 1997 certainly caused a remoteness in time defense. This means that the more time that has lapsed between the filing of a complaint of discrimination (participation in protected activity) and the new allegation, the more difficult it will be for a plaintiff to tie the two together.

This employer took action to make sure the interview panel knew nothing of the prior matter and thereby had four witnesses who could clearly attest to no knowledge. Employers in this situation should take note of this best practice.

SEX DISCRMINATION RELEVANT TO EMPLOYER PORN INVESTIGATION

In, *Farr v. St. Francis Hospital & Health Centers 08-3203*, an employer was not deemed to have committed gender discrimination when investigating pornography on workplace computers and investigating the only male first in the department. The court in this case found that Farr's complaint did not clearly allege that he was terminated because of his sex but that he was harassed when a pornography computer investigation investigated him first. The Court noted that this complaint would have more value if Farr were not also the only person logged onto the computer at the time the pornographic sites were accessed. However, just because the hospital investigated the male first, does not in and of itself substantiate sex discrimination unless he was fired because of his sex. In this case, the court found that the employer legitimately terminated Farr because they had good faith to believe that he had accessed the porn sites while on work time and on work property. This was a nondiscriminatory basis for his termination.

Well, that closes out this month's legal update. The kids are back in school and I hope everyone enjoys the change of seasons!!! Have a great month!!