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EMPLOYMENT LAW UPDATE

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U.S. Supreme Court Grants Review of Employee Privacy/Text-Messaging Case

The Supreme Court has granted review in the case of *Quon v. Arch Wireless Operating and The Ontario Police Department*, 529 F.3d. 892 (9th Cir. 2009). The scope of the opinion could impact privacy rights of U.S. citizens, employee rights, public record disclosure rights, and electronic discovery.

The Ninth Circuit Court of Appeals ruled that a City police department violated the Fourth Amendment and the state constitutional rights of employees and the people they exchanged text messages with, when the City reviewed “personal” text messages created on pagers owned and issued by the police department. The Ninth Circuit also found that the text messaging provider, Arch Wireless, violated the Stored Communications Act (SCA) by providing transcripts of these messages to the employer without the permission of the users. Although the City had a written policy in place that stated pager devices were limited to City business and employees had no expectation of privacy, the employee argued that he and others relied on a lieutenant’s verbal assurance that text messages would not be audited so long as employees paid for any overages incurred. The Ninth Circuit held that the verbal assurances of the lieutenant trumped the written policy and created a reasonable expectation of privacy by employees and individuals who sent messages to the employees. The Ninth Circuit also held that the City’s reading of text messages was not reasonable in scope because there were other, less intrusive methods to conduct the audit. The Supreme Court will review whether a reasonable expectation of privacy existed where the City had a formal policy but an informal policy allowed some personal use of pagers.

U.S. Supreme Court to Review Arbitration Agreement Clause

The Supreme Court has agreed to review *Rent-A-Car, West, Inc. v. Jackson*. The Court will decide whether the federal district court is required to determine whether an arbitration agreement subject to the Federal Arbitration Act is unconscionable even when the parties have clearly assigned the issue to an arbitrator.

Outback Steakhouse Pays \$19 Million to Settle **EEOC Gender Discrimination Lawsuit**

In a settlement of a gender lawsuit filed by the EEOC on behalf of over a thousand female employees against Outback Steakhouse, Outback has agreed to pay \$19 million. The lawsuit alleged that Outback treated female employees differently than male employees by denying female employees equal opportunities for advancement within the company. The EEOC claimed that females were denied favorable job assignments that precluded them from advancing into upper management. Females who worked at a corporately owned Outback restaurant from 2002 to the present and who have at least three years tenure may receive money from the settlement.

Age Discrimination Suit Settled for \$70 million

Hollywood writers involved in a lawsuit against 24 networks, production studios, and talent agencies alleging systematic age discrimination by talent agents who aided and abetted networks and studios by refusing to represent and refer older writers for work at the studios have settled their suit for \$70 million. The suit involved 165 plaintiffs.

Albertsons to Pay \$8.9 Million to Settle Race, Color, and National Origin Discrimination and Retaliation Suit at Distribution Center

The EEOC filed three employment discrimination suits against Albertsons, LLC., a national grocery chain. The three lawsuits involved claims arising from incidents alleged to have occurred at Albertsons' Aurora, Colorado distribution center. The first suit alleged a pattern or practice of workplace harassment and discrimination based on race, color, and national origin. It asserted minority employees were subjected to derogatory comments, offensive epithets, and offensive graffiti that included racial and ethnic slurs, depictions of lynchings, swastikas, and white supremacist and anti-immigration statements. The suit also charged that minority employees were given harder work assignments and were more frequently and severely disciplined than their white co-workers. It alleged that management was aware of and participated in the harassment and discrimination. The second suit alleged that many employees who complained about the discrimination were retaliated against and given harder job assignments, were passed over for promotion, and even terminated. The third suit, was filed on behalf of one African American who worked at the distribution center and was terminated.

\$20 Million Restitution in Workers' Compensation Fraud Case

A California court has ordered Staffing Services, Inc., a Bellflower-based temporary agency accused of misrepresenting the types and number of employees in order to pay a smaller amount in premiums to pay \$20 million in restitution following a plea bargain.

“Business owners have to realize that they have a moral and legal obligation to report the correct number and types of employees and then make sure they have adequate workers’ compensation insurance for those employees,” said California Insurance Commissioner Steve Poizner.

Eleventh Circuit Finds Claim of Generalized Hostility to Women May Create Hostile Work Environment

Reeves v. C.H. Robinson Worldwide, Inc., No. 07-10270 (11th Cir. Jan. 20, 2010)

The Eleventh Circuit unanimously vacated a summary judgment decision and returned for jury trial a Title VII sex harassment case involving conduct not targeted at a particular female employee, but hostile to women in general. The court determined that years of epithets and foulness combined with graphic descriptions of sexual behavior, public displays of pornography, and endurance of every variation of the F- and C- words targeted at females and employees in general created “an environment that a reasonable person would find hostile or abusive.” The court held that the evidence allowed one to infer that the offending conduct was based on the sex of the employee. The court noted that nearly every day, male employees turned the office radio to a crude morning show, which featured regular and graphic discussions of women’s anatomy. Although the employer argued that the same antics and behavior occurred before Plaintiff arrived at the workplace, the Court determined that once Plaintiff arrived at work, the discriminatory conduct became actionable under the law.

Title VII protects against adverse action based on sex stereotyping

Lewis v. Heartland Inns of America, L.L.C., No. 08-3860 (8th Cir. Jan. 21, 2010)

The Eighth Circuit Court of Appeals has ruled that an employer violated Title VII when it removed a front-desk clerk's daytime hours because she allegedly did not dress like a conventional female and instead dressed like Ellen DeGeneres and lacked a "Midwestern girl look." Although it was undisputed that Ms. Lewis' work performance was excellent, her new director, Ms. Cullinan, was heard to boast about the appearance of women staff members, and indicated that staff should be "pretty," a quality she considered vital for women who worked the front desk. Ms. Cullinan had also advised a hotel manager not to hire a particular applicant because she was not "pretty enough." The court ruled the employer imposed a sex-stereotyped stigma on a protected employee. Prior to the Eighth Circuit ruling, the Ninth, Seventh, Sixth, and Third Circuits had ruled that an employer discriminated or condoned harassment of employees who did not dress or behave according to gender stereotypes of females or males.

Retaliation for Participating in Sexual Harassment **Investigation results in \$1.5 million jury award**

Crawford v. Metropolitan Government of Nashville and Davidson County

Vicky Crawford alleged she was fired in retaliation for participating in a sexual harassment investigation. The district court and the Sixth Circuit Court of Appeals found that the employer's action did not violate Title VII because merely answering questions during an investigation did not rise to opposition to harassment and because Ms. Crawford had not filed a charge with the EEOC. The U.S. Supreme Court reversed and remanded the case, and held that the ordinary meaning of "oppose," includes giving a "disapproving account" of unlawful behavior, even when the employee takes no further action on her own to seek to stop or remedy the conduct. The Court concluded, "When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity."

Approximately one year later, a jury returned a verdict of \$1.5 million in Ms. Crawford's favor.

Federal Court Enters \$428,500 Consent Decree Against Eagle Wings for Sexual Harassment, Retaliation, and Disability Bias

The federal district court in Urbana, Illinois, entered a consent decree under which Eagle Wings Industries, Inc., will pay \$428,500 to a class of female employees, provide training to employees, post a notice of settlement, and maintain records of discrimination complaints and report them to the EEOC for a period of two years. The consent decree followed a lawsuit filed by the EEOC against Eagle Wings, alleging that the automobile parts manufacturer discriminated against a class of females by subjecting them to sexual harassment, retaliated against one woman for engaging in protected activity, and required one woman to undergo a medical examination in violation of the Americans with Disabilities Act.

EEOC Sues Wal-Mart for Disability Discrimination

The EEOC filed suit in the U.S. District Court for the Eastern District of Virginia, seeking compensatory and punitive damages, as well as injunctive and other non-monetary relief against Wal-Mart for allegedly refusing to provide a reasonable accommodation to a deaf employee at Wal-Mart Store #2258 in Alexandria, Virginia. The EEOC suit claims that Wal-Mart refused to provide an ASL interpreter and/or comprehensive written notes to allow the former employee to communicate with other employees, managers, and customers, despite the employee's repeated request that it do so.

In a written press release, Lynette Barnes, an EEOC Regional Attorney stated, "Employers must recognize that they have an obligation to provide reasonable accommodations to employees with disabilities. It is unfortunate that twenty years after the enactment of the ADA, some employers still haven't gotten the message that disability discrimination is unlawful and will not be tolerated. This suit should remind employers that the EEOC will not waiver in enforcing the ADA."

EEOC Sues Law Firm for Age Discrimination and Retaliation

The EEOC has sued a New York based law firm, alleging the firm significantly underpaid attorneys when they reached 70 solely based on their age. The agency alleges that attorneys who practiced law after turning 70 years of age received dramatically reduced compensation compared to similarly productive younger attorneys. The agency also alleged that the law firm retaliated against one attorney who had practiced law at the firm for over 40 years by reducing his compensation after he complained of the discrimination and filed a charge with the agency. “More and more attorneys are effectively practicing law into their 70s and beyond. This is also seen by the fact that most current Justices on the U.S. Supreme Court are over 70 years old,” said Spencer H. Lewis, director of the EEOC New York district office.

In fiscal year 2009, the EEOC received 22,778 charges alleging age discrimination, the second highest level ever, accounting for 24% of its private sector caseload.