

Year-End Lowlights

By Michael S. Mitchell (New Orleans)

Instead of listing some of the highlights of 2009 (we'll be doing that in our January, 2010 issue), we thought we'd list here for your amusement some of the more far out facts in a few cases we handled this year. These aren't necessarily the cases that made new law or placed our clients the most at risk. These are the ones that really had us scratching our heads about why some people bring lawsuits in the first place.

“What Are We, Psychic?”

An employee claimed he was fired for complaining to the EEOC about sexual harassment. In a lawsuit brought by the EEOC, the company decision maker testified that he was completely unaware of the charge when the termination decision was made for business reasons. The EEOC admitted that it notified the company of the charge **after** the discharge decision was made.

So it all came down to the ex-employee. Did he notify the company that he was filing a charge, or not? And if so, when? He testified not only that he did not notify the company about the charge, but that his attorney specifically advised him not to. Nevertheless he was “sure” that the company knew about the charge. Why? “Well, things just seemed to change.”

The EEOC voluntarily dismissed the case.

“Pick Me Up At Eight, And Don't Be Late”

One of our attorneys scheduled a psychiatric examination of a plaintiff who did not drive. The cheapest option was to hire a limousine to take her from her home to the doctor's office, about 40 miles away, and then to hire another driver to take her back home after the exam, eight hours later. It didn't make sense to have one driver wait around the whole day.

The plaintiff staged a sit-in in the limo and refused to come out when she found out the same limo driver was not coming back to pick her up. After multiple calls to her attorney, she was finally convinced that we weren't going to abandon her at the doctor's office without a ride home.

“And Just When Did You Become Disabled?” Part One

A hostler in a rail yard whose job it was to move shipping containers around the yard fell asleep while driving and crashed his vehicle into a row of parked vehicles. He was fired for the accident. He filed a claim with the state EEO agency, claiming disability discrimination. The disability? The injuries he received as a result of the accident!

The ~~Twinkie~~ Swiss Cake Roll Defense

An employee of a retail chain was terminated for stealing a Swiss cake roll. She argued that she was diabetic, a disability that the company should have accommodated because she needed the sugar in the cake. FYI,

allowing theft is not considered a reasonable accommodation. [Note: this case also had allegations of the employee's need to urinate in a bucket behind the layaway counter – we've left those details out in the interest of good taste].

Breaking Up Is Hard To Do

When a slot technician at a Las Vegas casino broke up with his girlfriend, also an employee of the casino, she threatened to get back at him by posting photographs of his private parts throughout the workplace. Although there was never any evidence that she followed through with her threat, the slot tech, convinced that everyone he worked with had seen a picture of his privates, and that they were all involved in a cover-up conspiracy, filed claims including sexual harassment, intentional infliction of emotional distress, and negligent supervision.

After a number of his co-workers and supervisors testified under oath that they had no idea what his private parts looked like, having never seen any pictures, the employee voluntarily dismissed his case. Another example of why it is a bad idea to date a co-worker.

“And Just When Did You Become Disabled?” Part Two

A garbage truck driver was on his route collecting trash when the compactor blade stuck. The truck has all sorts of safety-interlock devices to turn everything off when

someone needs access to the moving parts. For example, opening the access door on the side of the truck will cut the power to the blade.

But instead of turning the engine off and taking advantage of the safety-interlock devices, this employee left the motor running and hopped over the top into the truck – bypassing all of the safety devices. When he pulled the stuck piece of cardboard out of the compactor, the hydraulic compactor blade engaged and – surprise! – nearly crushed him.

Thankfully, the employee was not killed, although he was seriously hurt. The company investigated the accident, determined it was a gross safety violation on the employee's part, and fired him. He filed a disability discrimination charge, which was dismissed. No word about his Darwin Award nomination.

Jumpin' Jack Flash Drive

A former employee of our client misappropriated trade secret information by transferring the secrets from corporate computers to his personal flash drive. After representing to the judge that his client did not take any information, the employee's first attorney was compelled to cease representation and send a self-correcting letter to the judge when he found out the truth.

Attorney number two admitted that his client did indeed take the information. “Produce it,” was our obvious next request. But the



Continued on page 4

PDA After Hours

By Steve Bernstein and Janine Toner (Tampa)

Depending on who you ask, PDAs are either the greatest workplace innovation since desktop computers, or the bane of an employee's existence. In today's wireless environment, BlackBerrys, iPhones, and other handheld devices increasingly provide employees with round-the-clock access to email from remote locations. While wireless gadgets allow us to maximize productivity in competitive economic times, they may also give rise to overtime, minimum wage and other wage payment claims.

Managing tech-savvy employees has become the latest compliance challenge under the Fair Labor Standards Act (FLSA).

The New Lay Of The Land

The FLSA requires covered employers to pay non-exempt employees at least the federal minimum wage for all hours worked, along with an overtime premium of one and one-half times the regular rate of pay for "all hours worked" in excess of 40 in any workweek. For purposes of the FLSA, "hours worked" are comprised of all hours that the employee is "suffered or permitted to work." With the exception of *de minimis* activities (small, trivial, or token amounts), any work that benefits the employer is likely to meet this standard, so long as the employer knows, or has reason to believe that it is being performed.

"Hours worked" are compensable as a matter of law, regardless of whether you require an employee to perform them. Failure to compensate an employee for "all hours worked" may give rise to a claim for two years of backpay, or three years in the event of a willful violation, along with attorneys' fees and costs. In the event that those hours end up boosting an employee beyond 40 hours worked in any given workweek, there is liability for unpaid overtime compensation as well. To make matters worse for the employer, the FLSA also provides for the recovery of liquidated damages in the amount of double the backpay award.

The concept of *de minimis* activity remains a murky area: time spent sending and receiving emails can really add up. Consequently, failure to adequately compensate employees for such activity can prove to be a costly proposition. Adding more fuel to the wage-payment fire, collective actions are often available in these cases. Such actions have become increasingly prevalent in states such as Florida, a hotbed for FLSA litigation in recent years.

Since handheld devices capture electronic time-entry data, employees who expect to be paid for time spent tapping away at their BlackBerrys after hours may have a built-in mechanism for tracking time within these devices. In the event that the employee chooses to utilize the device on the way to and from work, the work day itself could become further expanded. These same considerations may apply to employees who choose to remotely access their emails via desktop computer, check voicemail, or even call into the office for work updates.

As times change, 20th century policies designed to regulate conventional time computation practices may no longer fit today's workplace. With the rapid growth of a "perpetual workplace," employers are finally confronting the proposition of evaluating just how many hours these employees are actually working, and evaluating whether they are properly classified from an exemption standpoint.

A Few Defensive Ideas

To reduce exposure, we advise re-examining all positions to ensure that the employees occupying them are properly classified. You should then develop or revise pay policies and procedures to encapsulate review, preparation and transmission of email outside of standard business hours.

Those employers that don't require utilization of BlackBerrys or other "smart phones" can limit their legal exposure even more by prohibiting server linkage to these devices after hours, and establishing that prohibited use can lead to disciplinary action up to and including termination. Even in the event of a policy violation, however, the employer should still pay any overtime or other wages due. Moreover, increasingly savvy employees may establish server access even in the absence of furnished devices. Check with your IT specialist to gain a better understanding of your company's vulnerabilities, along with any means for blocking remote system access.

On the other hand, many employers not only permit the use of PDAs, but actively encourage connectivity by purchasing such devices. Such employers should consider a policy clearly stating that non-exempt employees are required to report all hours worked, including time spent on BlackBerrys, cellular phones, email, the internet, etc., for business purposes.

You might also consider requiring employees to copy supervisors on all work-related emails to help track time worked. Although this should not serve as a substitute for reporting actual hours worked, a time and date stamp on emails may help to further preserve records in the event of subsequent litigation. And

consider including a policy which provides clear expectations on how employees should manage their time when using the devices after hours to conduct work. For example, employees may be required to spend the minimum amount of time necessary to complete a task, and to work in consecutive blocks of time instead of the sporadic intervals that can complicate time keeping.

Lastly, regardless of whether remote access is permitted or prohibited, your policy should be clear as to what constitutes PDA "use," and the types of activities that should be reported for purposes of hours worked.

How It All Adds Up

Although litigation regarding this issue is relatively new and the majority of courts have yet to take a definitive position, it appears that even reading or monitoring a BlackBerry or cell phone can amount to time worked under the FLSA. Keep this in mind, along with the unique aspects of your business, when drafting your policy.

For more information email either author at sbernstein@laborlawyers.com and jtoner@laborlawyers.com or call 813.769.7500.





Real World HR

This is the second in our new series of articles designed to alert employers to the challenges they will face in remaining union-free in a potentially radically changed legal environment.

Union Avoidance + Improved Employee Relations = As Good As It Gets

By John McLachlan (San Francisco)

While our crystal ball is no better than anyone else's, change in our country's labor laws appears to be drawing ever closer. While EFCA as it was originally proposed with its elimination of secret-ballot elections is undergoing change, a lot of other tweaking has been going on lately in the Senate reflecting unions' desire to find some form of legislation which will pass and which will give them the stimulus they need to revitalize their efforts to halt the continuing loss of union jobs and members.

While no one knows exactly what new legislation will ultimately emerge from the Washington, D.C. sausage grinder, the lack of certainty should not induce ostrich-like behavior. Nor should the absence of details stop the prudent employer from preparing for change which, if it happens, is guaranteed to make it more difficult for employers to effectively oppose unions' efforts to organize employees.

Quickie Votes?

One of the current proposals which seems to have a significant amount of backing is the shortening of time between a union's filing of a petition for election and the holding of the currently-secret-ballot election. Under current NLRB procedures the goal is to conduct an election within approximately 42 days of the time the union files a petition for election with the NLRB. Union supporters believe that delay gives the employer far too much time to communicate its views to employees. They believe they could win more elections if the employer did not have so much time to communicate its views about the realities of union representation.

What will be the new interval between petition and election? We don't know how long it might be – in fact, we don't know for certain that it will be changed. We do know that it is very possible that the period will be radically shortened. Such a constriction of time could come about as the result of legislation coming out of Congress or conceivably, it could come by administrative regulation passed by the Democratic-leaning NLRB. Whatever the outcome, you are not defenseless during this between-time with the significant possibility of legislative change.

American corporations plan everyday for uncertainties and factor in unknown outcomes into their operating plans, by establishing and setting aside reserves and by creating alternative operating plans to

address unknown contingencies. That's essentially what we urge management to do in the realm of union organizing by focusing intently on positive employee relations. A union's decision to target your work force is certainly an unknown, somewhat out of your control, and is a decision which could have a significant operational impact on your business.

But there are a number of actions which can be taken, including letting your elected representatives know your position on the subject and just as importantly letting your employees know your position as well as your reasons for your desire to remain union free.

Start Campaigning Now

If you're going to be in a race in which the other side is likely to have a head start (as would be the case where the union has total control of the timing of its campaign as well as of the timing of the election), it would be prudent to consider starting to run now. You won't have enough time to catch up if you start running from a complete stop when a union has reached full speed in its own campaign and decides to file a petition for election at your workplace.

Okay, so how do you begin to strategize to counter a possible campaign that hasn't started yet? In our view a very good place to start is to ensure that you are communicating effectively with your employees. In that communications process, a very important point to get across to your employees is the company philosophy concerning unions. Some employers are concerned that their use of the "U" word will put the idea in employees' heads to seek union representation. We believe that such an outcome is very remote in today's global information society, as long as there aren't other reasons for employees to be unhappy with their current job conditions.

And even if that were a vague possibility, we believe that the value of clearly communicating your company's position regarding unions far outweighs any theoretical risks such a communication might entail. In essence, if labor laws are changed and election periods are drastically shortened, very few employers will win a union organizing campaign if they are starting the race from a dead standstill while the union is going at full speed. If you've never addressed the subject before, it will be doubly hard to get traction off the line with a long way to go and a short time to get there.

It's perfectly legal for an employer to communicate its views on unions to its employees. The National Labor Relations Act provides that employers or anyone else can express views, argument or opinion on the subject of unions or unionization without violating the Act so long as the expression of those views "contains no threat of reprisal or force or promise of benefit."

Keep It Real

In order to have a philosophy or opinion on the subject, it will be necessary to give some thought to the subject, which we assume you've already done: but maybe not. The statement "We hate unions because they are un-American. . . ." is not a particularly effective expression of company philosophy. But where an employer has given thought to the subject and made a decision that it genuinely wishes to treat employees fairly and as well as it is able under its operating circumstances; where it has taken the time to institute fair policies and systems to ensure that employees' reasonable needs are addressed; then that employer can do a better job addressing its employees' needs than can a third party who has no stake in the success or failure of the enterprise. Tell them that.

The employer who genuinely cares for its employees and for their working conditions, and who recognizes employees for the crucial business partners they really are, should be able to effectively express the view that employees do not need to pay a third party to ensure that they will receive fair treatment on the job. An employer who believes that unions more often divide than facilitate teamwork should be able to speak convincingly about the division a union could cause

Continued on page 4

Year-End Lowlights

Continued from page 1

information was not forthcoming. The new attorney related that his client had placed the flash drive in a vise grip in his garage and cranked the vise until it pulverized the flash drive into tiny shards. Our technician expert deadpanned, "Geez, I don't think I'm going to be able to recover anything from that flash drive."

And this last one. Not handled by our law firm, but it deserves a special place on the list.

The Model Employer

The employer was faced with cutbacks that led to a 25% reduction in its workforce. Of course, like most employers, it still needed to keep up production. Unfortunately, it did so by requiring employees to "volunteer" their services and failing to pay overtime. The union representing the employees filed a grievance, and at the arbitration hearing, the testimony established that the employer effectively forced employees to volunteer their work by statements such as "just look at what's on your desk," and "being a success in this job is about the numbers."

Nothing really puzzling about this one you say? Right, except for one thing; the name of the employer. It was the Equal Employment Opportunity Commission.

For more information email the author at mmitchell@laborlawyers.com or call 504.522.3303.

The *Labor Letter* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

Office Locations

Atlanta phone 404.231.1400	Houston phone 713.292.0150	Orlando phone 407.541.0888
Charlotte phone 704.334.4565	Irvine phone 949.851.2424	Philadelphia phone 610.230.2150
Chicago phone 312.346.8061	Kansas City phone 816.842.8770	Portland ME phone 207.774.6001
Columbia phone 803.255.0000	Las Vegas phone 702.252.3131	Portland OR phone 503.242.4262
Dallas phone 214.220.9100	Louisville phone 502.561.3990	San Diego phone 858.597.9600
Denver phone 303.218.3650	New Jersey phone 908.516.1050	San Francisco phone 415.490.9000
Fort Lauderdale phone 954.525.4800	New Orleans phone 504.522.3303	Tampa phone 813.769.7500

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Labor Letter* or any of our other publications, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.

Real World HR

Union Avoidance + Improved Employee Relations = As Good As It Gets

Continued from page 3

in the company's ability to compete in an ever-more-challenging market.

For employers who have these or similar views, there is nothing preventing you from communicating them to employees. And it's essential that you do express your views on the subject. The expression of such views is not illegal, nor does it prohibit employees from taking the opposite view. But a clear expression of the employer's views can have an impact, it can lead to a productive dialogue, and it clearly lets employees know where you stand on this subject.

Keep It Current

Some employers may say "We have a statement in the employee handbook about our opposition to unions." To that we reply: "You have a lot of statements about a lot of topics in the employee handbook. How long has it been since any of your employees have read the handbook since their hire date?" This is an important subject and it deserves to be treated as such.

If you have not already done so, we urge you to carefully examine the history of your company, where it came from and where it's going, to examine in detail your attitude toward your employees and the systems that are in place to support them in their jobs. After that examination we urge you to consider adopting and communicating the rationale for your position on unions.

The articulation of the company's view about a union is an important step. But it's only a first step in a more comprehensive review of employee relations for the employer who wishes to remain union-free in the new world which is very rapidly approaching.

For more information email the author at jmclachlan@laborlawyers.com or call 415.490.9000.

