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HAPPY HOLIDAYS!

From all of us at The Kullman Firm, have a safe and joyous holiday season and a prosperous new year. We look forward to working with you during 2005!

NEW DEVELOPMENTS

Board Reverses Direction, Requires Consent For Voting Units of Temporary and Regular Workers

In a decision that reverses four years of precedent regarding temporary workers, the National Labor Relations Board (NLRB) has ruled that both the staffing firm and the user employer must consent to a representation election involving voting units that consist of both jointly employed temporary and regular workers employed solely by the user employer. The decision reverses the Board’s 2000 holding in *M. B. Sturgis*, which held that it was permissible to fashion a voting unit comprised of both temporary workers jointly employed by supplier and user employers and regular employees employed solely by the user employer without employer consent. In finding that the *Sturgis* decision was “wrongly decided,” the Board explained that such a voting unit would constitute a multiemployer unit that requires the consent of both employers. The new decision reverts to the practice previously announced in NLRB decisions issued in 1973 and 1990, before *Sturgis*.

Military Leave Law (USERRA) Does Not Give Reservist Right to Rest Before Job Return

On the evening U.S. Army Reservist Willie Gordon was returning from weekend guard duty, he stopped by his place of employment, a convenience store, to pick up his schedule and was ordered by his supervisor

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to work the late shift that night. Gordon complied with the directive, but after completing his shift and while driving home, Gordon lost consciousness and died in an automobile accident allegedly caused by his fatigue. His surviving family members brought suit against his employer under USERRA, claiming that the Act required the employer to provide Gordon with an eight-hour rest period between returning from guard duty and reporting to work and that the failure to provide the rest period and the demand that he work or be fired was an adverse employment action under USERRA. The estate argued that the provision in the Act requiring a returning reservist to notify his employer of his intent to return to work “not later than the beginning of the first full regularly scheduled period on the first full calendar day following completion of the period of service and the expiration of eight hours after a period of allowing for the safe transportation of the person from the place of that service to the person’s residence . . .” created this right to an eight-hour rest period. The court rejected this argument, holding that there is no “right to rest” and no “affirmative duty” on the part of an employer to prevent the employee from returning to work less than eight hours upon his return from service. At most, according to the court, the “eight-hour” language is merely the outer limit imposed on a returning reservist to notify his employer of the intention to return to work. The court viewed USERRA as an inappropriate vehicle for addressing the deceased employee’s possible tort claims against the company. In sum, USERRA protects employment rights, and the wrongful death allegations did not implicate Gordon’s employment rights.

You Mean I Have to *Speak* to My Coworker?

Not including the dreaded spam, the volume of e-mail messages in the United States has tripled since just 1999 to 11.9 billion per day. In the workplace, many employees may be seen busily tapping out electronic messages to coworkers seated 10 feet away, with answers being received days later. Some companies have had enough and are taking dramatic action to encourage face-to-face contact among employees. U.S. Cellular has banned the sending of most e-mails on Fridays through the end of the year and may extend that ban. The marketing division of Veritas Software has also banned e-mails between same-site employees on Fridays. The result so far—gasp!—has been an upswing in in-person conversation and collaboration.

A Lifesaving Addition to Your Workplace?

Looking for that special holiday stocking stuffer for your office? Why not try an “automated external defibrillator (AED)!” One company alone—Medtronic—has sold such AEDs to approximately half of the Fortune 500 companies and 63 of the Fortune 100 businesses. AEDs are small, lightweight pieces of equipment that are capable of both measuring an individual’s heart rhythm and shocking a stopped heart back into beating. Some experts say that 100,000 lives could be saved annually if the use of defibrillators was more widespread. All 50 states have passed some form of legislation encouraging the use of defibrillators, and some are even requiring their installation in public schools and health clubs.

FMLA DEVELOPMENTS

Employee’s Fleeing The State to “Get Her Life Back Together” Constitutes Notice of Need for FMLA Leave

Talk about an employee—and employer—with problems: Anchorage, Alaska, police officer Theresa Gregg suffers a car accident while pregnant with the child of a fellow employee. Gregg’s then-husband threatens her boyfriend and places her in what she describes as a “hostage” environment, whereupon she flees Alaska for Florida to “work things out” and spend some quality time with her mother. Sound like an FMLA-qualifying absence to you? It didn’t to the employer, but it did to the Alaska Supreme Court. Gregg contacted her employer from out of state and asked to be placed on unpaid leave to “get her life back together,” and later was diagnosed with post-traumatic stress disorder. The court noted that the employer was aware of Gregg’s car accident, pregnancy, and alleged spousal abuse and held “when an employee is actually incapacitated by illness, the failure to get a correct [current] diagnosis cannot disqualify the employee from the Act’s protection To hold that a doctor must agree, contemporaneously and at all times, that the employee is unable to work, places a burden on the employee that we find nowhere in the plain text of the Act” We bet a lot of employers think otherwise.

Lack of FMLA Eligibility Precludes FMLA Retaliation Claim

Employees are not eligible for leave under FMLA if their employer has fewer than 50 employees in a 75-mile radius of the worksite. In this case from Michigan, an employer demoted and terminated an employee after the employee claimed that she sought medical leave under the FMLA in good faith despite not being eligible for FMLA leave due to the fact that the employer had fewer than 50 workers. She alleged that even though she was not eligible for FMLA leave, she could bring an FMLA retaliation claim against her former employer. In support of her argument, the employee cited statutory language that she suggested would protect noneligible employees from termination. The court rejected her arguments on the basis that as an ineligible employee in the first place, she could not have been “exercising a right” provided under the FMLA.

LABOR NOTES

Hospitals Unlawfully Refused to Hire Nurses Striking at Other Hospitals

Seven Minnesota hospitals violated the National Labor Relations Act by refusing to consider or hire for temporary employment nurses who were on strike against two other hospitals in the area, the NLRB has ruled. The Board upheld an administrative law judge’s decision in holding that the hospitals did not have a “legitimate and substantial business justification” for refusing to consider for hire a number of nurses who had engaged in a strike at two other hospitals. Due to nursing shortages in the Minneapolis-St. Paul area, it is not unusual for hospitals to augment their nursing staff by hiring temporary nurses on a day-to-day basis. Many nurses who work on a temporary basis at one hospital have full-time jobs at other area hospitals. The hospitals admitted that they refused to hire the striking nurses but contended that they did so as a means of achieving coordinated bargaining objectives with other hospitals in the area. However, the hospitals that refused to hire striking nurses were not engaged in bargaining at the time. The Board rejected this explanation

LABOR NOTES (CONT'D.)

and found that the refusal to hire the striking nurses “was to influence the outcome of the ongoing dispute” between the union and the other hospitals where the strike took place. The Board emphasized that its holding in this case was limited in nature: “Today, we hold only that employers who, like the respondents, are not involved in collective bargaining may not violate the Section 7 rights of individuals who are engaged in a strike against another employer who is engaged in collective bargaining, where the substantial and legitimate interest asserted is an interest in the terms and conditions agreed to by the other employer. To hold otherwise would endorse the expansion of labor disputes and the accompanying use of economic weapons in an unprecedented manner.”

Union Victory Overturned Due to Altered Sample Ballots

The NLRB has overturned a victory in a representation election by the Service Employees International Union (SEIU) because at least nine employees received a copy of the printed Spanish-language sample ballot in the mail that was part of an official NLRB notice posted in the workplace with a handwritten “X” in the “yes” box and a written statement in Spanish encouraging employees to vote in favor of union representation. The SEIU won the election, which involved housekeeping workers at a California hotel, by a margin of only three votes. The Board found that the handwritten markings on the sample ballots were not clearly attributable to the union, and therefore, the ballots had the tendency to mislead employees into believing that the NLRB favored the union in the election. The Board ordered a new election based on its findings.

Work Rules Prohibiting Profane Language and Harassment Do Not Violate Federal Labor Law

The NLRB has held that an employer’s work rules that prohibit “abusive and profane language,” “verbal, mental and physical abuse,” and harassment were lawful rules designed to maintain order in the workplace and did not prohibit employees from exercising their Section 7 rights under the National Labor Relations Act. The Board found that the rules were not unlawful on their face because they did not explicitly or implicitly prohibit employees from engaging in concerted activity, and the mere maintenance of rules of the type at issue in this case were not unlawful because employees would not be “reasonably chilled” from exercising their Section 7 rights. “There is no evidence that the challenged rules have been applied to protected activity or that the respondent adopted the rules in response to protected activity. Rather . . . the rules serve legitimate business purposes: they are designed to maintain order in the workplace and to protect the respondent from liability by prohibiting conduct that, if permitted, could result in such liability.”

New Union Fails to Deliver For Pizza Delivery Drivers

A new union formed with the goal of organizing pizza delivery drivers across the country has stumbled out of the starting gate by losing its first two representation elections. The Association of Pizza Delivery Drivers (APDD) was formed four years ago by pizza delivery drivers who met in an Internet chat room to discuss ways to change their working conditions. After requests for assistance from the United Steelworkers

LABOR NOTES (CONT'D.)

were turned down, the individuals formed their own union. The APDD's first two elections—one in Ohio and one in Nebraska—both took place in November. The union was unsuccessful in both elections. While no other elections have been scheduled at this time, nearly 700 drivers in 46 states representing every major pizza chain have joined the union. The organization is being funded entirely through contributions rather than dues at this time.

DISCRIMINATION NOTES

Self-Avowed “Confederate Southern American” Loses National Origin and Religious Discrimination Case

In Pennsylvania, a security guard attempted to state a claim for national origin and religious discrimination after being fired for refusing to remove or cover stickers on his lunch box and pickup truck that depicted the Confederate flag. The stickers stated “The South Was Right” and “Heritage not Hate.” The company requested that the employee remove or cover the stickers in accordance with the company's zero tolerance diversity initiative pertaining to symbols that offend other employees. The employee refused and was thereafter terminated. In his lawsuit, he claimed that being a “Confederate Southern American” constituted a valid “national origin” under Title VII, the Confederate flag was a Christian symbol, and his display of the flag was protected religious expression. Based on the complaint, the federal court rejected the notion that the display was protected under the cloak of national origin and religious expression because the employee admitted that he displayed the stickers not because of national origin or religion, but because he was proud of his “heritage” and passionate about sharing it with others. According to the court, had he simply covered the images up, he would have remained employed as a Confederate Southern Christian American. In a concurring opinion, the court also rejected the notion that former regional or political groups within the United States can serve as the basis for a valid national origin classification.

Equal Opportunity Harasser Defense Is Alive and Well

In a surprisingly moderate opinion from the California court system, a former Intel Corporation attorney of Chinese descent lost his bid to prove race discrimination in a state court proceeding. The employee claimed that he was treated in an abusive manner, disciplined, and ultimately discharged because he is Chinese. The employee received a poor performance evaluation and claimed that the manager was abrasive towards him from the start, yelled at him, ignored him, referred to him as “you people,” and treated him far worse than other subordinates. In affirming a lower court's dismissal of the case, the California Appellate Court found that the treatment was mere hostility and the evidence showed only that the manager terminated him because she did not like him, rather than racial motivation. According to the court, a personal grudge can serve as a legitimate nondiscriminatory reason for termination. Additionally, the court found the “you people” remark to be too ambiguous to support his case and found—*a la* the old “Vince Lombardi” theory—that the manager treated almost everyone in an abusive manner, and whether she treated this employee worst of all did not change the outcome of the court's analysis.

ERISA NOTES

Please, Please Fire Me: Court Finds No Breach of ERISA Fiduciary Duties in *Not Terminating Employees*

A federal district court in Mississippi has ruled that Chevron did not breach its fiduciary duties in deciding not to terminate 26 employees who, had they been involuntarily discharged, would have been eligible for enhanced retirement benefits. The enhanced benefit plan had been adopted in anticipation of a reduction in force (RIF), but the plaintiffs were not included in the RIF. The named plaintiff in the suit, Joseph Ferrer, later voluntarily retired but sued Chevron, claiming the company violated its ERISA fiduciary duties in not affording him the enhanced benefits that would have flowed from being terminated. The court disagreed, finding that “Chevron was free to exercise its discretion in making employment decisions related to its proposed reduction in force.” The court added that even had there been evidence of some misrepresentation by Chevron to Ferrer regarding whether he would be discharged, such evidence would be irrelevant since Ferrer “had no legal right to insist that Chevron select him for involuntary termination.”

KULLMAN KLIPS

- “Arnie’s army” may be growing: In a somewhat surprising move, California citizens voted to overturn a law signed in the waning days of the Gray Davis administration which would have required employers to provide health insurance for their employees.
- A Congressional appropriations bill approved in late November will provide 20,000 exemptions to the already reached annual cap of H-1B visas. The exemptions will be available only for foreign doctorate and master’s degree candidates already enrolled in U.S. colleges.
- OSHA Administrator John Henshaw announced that his agency had issued 3% more “serious” violation citations to employers in fiscal year 2004, and 14% more “willful” violation citations, in spite of conducting fewer audits than in fiscal year 2003. This trend may be attributable to OSHA’s “site-specific targeting” for audits of workplaces with the highest illness and injury rates.