GET *OUT!!!!!!*

THE TOP FIVE THINGS YOU WOULD NOT BELIEVE ABOUT EMPLOYMENT LAW

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HOOPS2008

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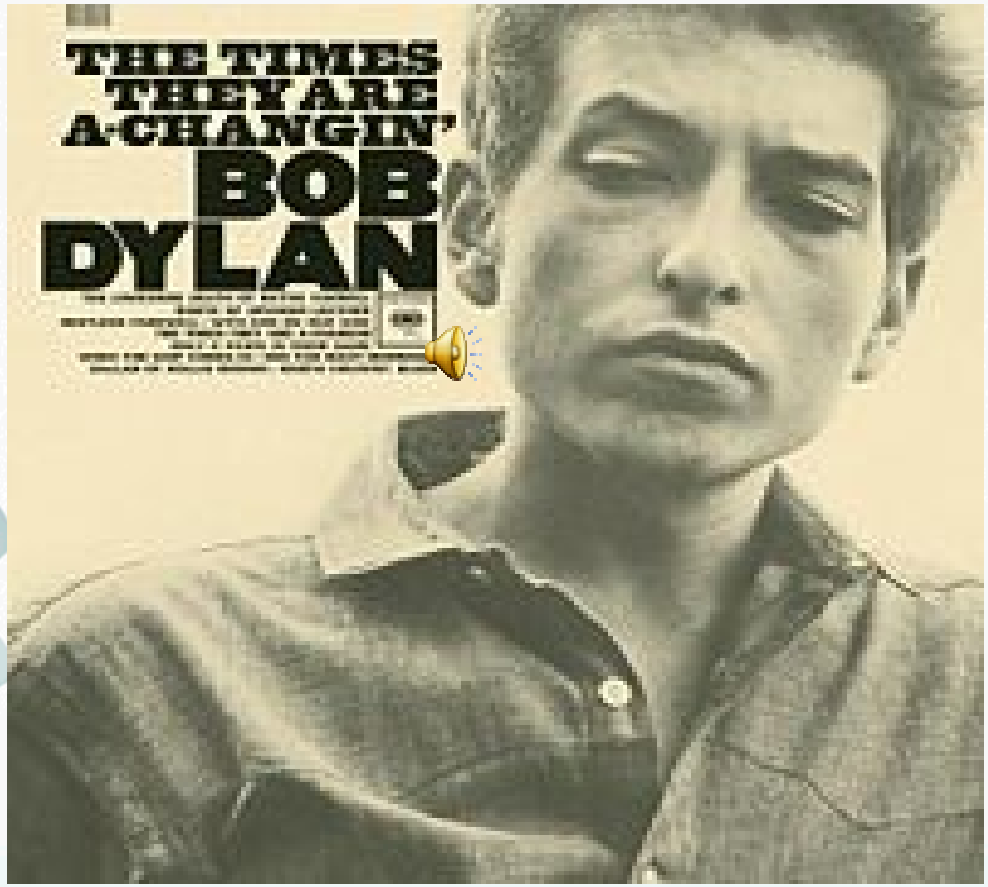
"The Times They Are A-Changin" – B. Dylan, 1964



FIVE SURPRISES

SURPRISE #1

"YOUR RELEASE IS RETALIATORY"

SURPRISE #1

EEOC Position on Releases

- Employer may not prohibit employee from filing an EEOC charge or participate in EEOC investigation.
- Releases that require, as a condition of severance, that employees confirm they will not, have not, or have no present intent to file a claim of discrimination with the EEOC is void ***and is retaliatory on its face***.

SURPRISE #1 – EEOC Position on Releases – Settled Cases

- *EEOC v. Land O'Lakes, Inc.*, 06-CV-3828 (D. Minn. 2006)
- *EEOC v. Ventura Foods, LLC*, 05-663-RHK (D. Minn. 2006)
- *EEOC v. Eastman Kodak*, 6:06-cv-06489-CJS (W.D.N.Y. 2006)
- *EEOC v. Sara Lee Corp.*, 1:06CV645 (S.D. Ohio 2006)

SURPRISE #1 – EEOC Position on Releases – Unsettled Cases

- *EEOC v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414 (D. Md. 2006)
  - Release prohibits "pursu[ing] . . . Charges" and letter confirms charge must be dismissed
  - Held facially retaliatory
- *EEOC v. Sundance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006)
  - Release prohibits pursuing charge
  - Held not facially retaliatory (2-1 decision)

SURPRISE #1 – EEOC Position on Releases – Unsettled Cases (Cont'd.)

- *EEOC v. Nucletron Corp.*, 563 F.Supp.2d 592 (D. Md. 2008)
  - Release states employee agrees not to file and complaints or "charges"
  - Held not enforceable, but conditioning severance on execution of release is not facially retaliatory

FIVE SURPRISES

SURPRISE #2

“THE UNION IS HERE AND THE ARBITRATOR JUST DECIDED THE TERMS OF YOUR CBA”

SURPRISE #2 – Current Law
Nat'l. Labor Relations Act (NLRA) - 1935

- Union Representation
  - "Card Check"
  - Secret ballot election
  - Unfair labor practice charges
- Contract Bargaining and Duration of Agreement
  - Obligated to meet reasonable times/places
  - NLRB authority

SURPRISE #2 – Proposed Employee Free Choice Act (EFCA)[1]

- **Union Representation**
  - Majority (50% plus 1) of bargaining unit
  - Unfair labor practice charges
- **Contract Bargaining and Duration of Agreement**
  - No agreement reached first 90 days - mediation
  - No agreement reached first 30 days - arbitration
  - Duration
  - Subsequent contracts and bargaining

1. H.R. 800 (passed 241-185); S. 1041 (filibuster)

FIVE SURPRISES

SURPRISE #3

"YOU JUST COMMITTED AN ADVERSE EMPLOYMENT ACTION (AND YOU DIDN'T EVEN KNOW IT)"

SURPRISE #3

- *Burlington Northern* Standard – 548 U.S. 53 (2006)
  - Employee alleges reassignment to "dirtier" and less prestigious job was adverse employment action and retaliatory
  - New standard – whether employer action would "dissuade a reasonable worker"

SURPRISE #3

- Adverse employment action – *Burlington* applied
  - *Kessler v. Westchester County Dep't of Social Services*, 461 F.3d 199 (2d Cir. 2006)
  - *Hare v. Potter*, 220 Fed. Appx. 120 (3d Cir. 2007)
  - *Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed.Appx. 424 (6th Cir. 2007)
  - *Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37 (1st Cir. 1999)
  - *Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008)

FIVE SURPRISES

SURPRISE #4

"This Isn't Your Daddy's ADA"

SURPRISE #4

- Sexual Relations Is A "Major Life Activity"
  - *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008)
  - Fact issue – whether plaintiff had "record of" impairment where she alleged she was "substantially limited" in activity of engaging in sexual relations
  - Decided under the Rehabilitation Act of 1973

SURPRISE #4

“HOW DID WE GET HERE?”

SURPRISE #4

D.C. Circuit Relied On:

- Spiritual and Emotional Considerations
  - "Cornerstone of family and marital life"
  - "Conduit to emotional and spiritual fulfillment"
  - "A crucial element in intimate relationships"
- Precedent: *Bragdon v. Abbott*, 524 U.S. 624 (1998)
  - Held: Human Reproduction is a "major life" activity
- Other Courts agree with the D.C. Circuit
  - *See, e.g.*, *McAlindin v. County of San Diego,* 192 F.3d 1226 (9th Cir. 1999)
  - *Sussle v. Sirina Prot. Sys. Corp.*, 209 F. Supp. 2d 285 (S.D.N.Y. 2003)
  - *Powell v. City of Pittsfield*, 221 F. Supp. 2d 119 (D. Mass. 2002)

SURPRISE #4

- What are the lessons here?
  - A “major life activity” is more than you thought it was!
  - Employers don’t have to know how an impairment substantially limits a major life activity in order to be liable for disability discrimination
  - The “interactive process” is more important than ever

SURPRISE #4

- Just When You Thought You Understood the ADA …
  - New ADA Amendments Act of 2008
  - President Bush signed into law on September 25, 2008
  - Go into effect on January 1, 2009

SURPRISE #4

- What do you need to know about the Amendments to the ADA?
  - Amendments Clarify that ADA is intended to provide a broad scope of protection for employees

SURPRISE #4

- "Major Life Activity" Defined
  - Prior version of the ADA did not define the term "major life activity"
  - New Amendments include a (non-exhaustive) laundry list of major life activities
  - An impairment that substantially limits one "major life activity" is sufficient to establish a disability

SURPRISE #4

- "Substantially Limits" Definition Narrowed
  - "Substantially limits" ≠ "significantly or severely restricted"
  - Terms "Major" and "Substantially Limits" should not be "interpreted strictly to create a demanding standard for qualifying as disabled"

SURPRISE #4

- Employer Must Ignore Mitigating Measures
  - Prior to the Amendments, an impairment did not rise to the level of a disability if mitigating measures could control the impairment
  - Examples: Medication, Hearing Aids, Prosthetic Devices, etc.

SURPRISE #4

- Broader Definition of "Regarded As"
  - Employer can be liable if it "perceives" an employee as having a mental or physical impairment.
  - Doesn't matter if the perceived disability doesn't substantially limit any major life activity.

SURPRISE #4

- Episodic Impairments Can Constitute a Disability
  - Impairments that, when active, substantially limit a major life activity qualify as a disability.
  - This is true even if impairment is in remission or the employee is not currently suffering from symptoms of impairment.
- No Reverse Disability Discrimination
  - Employees cannot file claims alleging that they were treated less favorably than disabled colleagues.

SURPRISE #4

- What Do These Recent Developments Mean?
  - More ADA lawsuits likely and more will likely get past initial stages of litigation
  - The "interactive process" will change and more accommodations are likely
  - Legitimate, non-discriminatory reasons for employment actions are more important than ever

SURPRISE #4

- What Should Employers Do Right Now?
  - √ Review and Revise ADA Policies.
  - √ Review other pertinent internal documents (e.g. Job Descriptions).
  - √ Create procedures for responding to requests for reasonable accommodations.
  - √ Create procedures for documenting interactive process!
  - √ Train and *re-train* Managers and HR Professionals.
  - √ Be on the lookout for new EEOC Regulations – coming in January 2009.

FIVE SURPRISES

SURPRISE #5

YOU REALLY DO NEED TO ENFORCE THAT ELECTRONIC COMMUNICATIONS POLICY

SURPRISE #5

- *Quon v. Arch Wireless*, 529 F.3d 892 (9th Cir. 2008)
  - Employees may have a reasonable expectation of privacy in text messages stored on the service provider's network

    Even if:
    - Employer pays for the device
    - Employer has an electronic surveillance policy

SURPRISE #5

- Court's holding also extended 4th Amendment protection against unreasonable searches and seizures to emails and text messages.
- What does this mean for private employers?

SURPRISE #5

- So … Does all this mean employers can no longer monitor workplace communications?

  NO, BUT….

  √ Make sure workplace surveillance policies are clear and comprehensive

  √ Enforce policies uniformly and consistently

  √ Avoid informal practices that create an expectation of privacy

  √ Get consent from employees to monitor workplace communications

  √ Educate workforce and train management

SURPRISE #5

- Other Lessons of *Quon v. Arch Wireless*
  - Clarifies the importance of getting legal counsel before monitoring electronic communications
  - Just because you pay for it, doesn't automatically mean you get to monitor it!
  - Make sure you include "text messages" in your electronic surveillance policy

Questions?

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