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# Case Law Update

# Larsen v. Davis County

- Facts:
- County Prosecutor engaged in misconduct at trial.
- Had prior instances of misconduct, that were resolved.
- During pre-termination meeting, supervisor brought up prior conduct.
  - This was not in the pre-termination notice.
- The County terminated the employee, and stated:
  - “We tried, but we cannot ignore the past in assessing the current [misconduct] (even though your misconduct during this trial and preparation are self-evident and alone require this termination action.”
- CSC affirmed termination
- Employee filed suit for failure to provide procedural due process.

# Larsen v. Davis County (cont.)

- CLAIMS:
- Did not have notice that would discuss prior conduct, which contributed to the termination.
- Colorable Procedural Due Process claim; won at the lower level.
- HOLDING:
- Court of Appeals reversed and upheld termination.
- The employee's misconduct during the trial (for which he was given notice) was, standing alone, so grievous as to justify his termination.
- The employee failed to adequately explain how the deficiencies in the notice inhibited his ability to respond to the allegations against him.

# Larsen v. Davis County (cont.)

- Take-Away Lessons
- Attorneys:
  - Even if a prior, unnoticed, act was raised during the pre-termination meeting, it should not violate the employee's procedural due process if it reasons given in the notice justify, alone, the termination.
- County:
  - Do not bring up anything during the pre-termination meeting that was not listed as a subject for discussion in the pre-termination notice.
  - Avoid the lawsuit altogether.
  - Resist the urge to "pile on" during the pre-termination meeting.

# Young v. UPS

- United States Supreme Court decision
- Interprets the Pregnancy Discrimination Act (“PDA”) and the Americans with Disabilities Act (“ADA”).

# Young v. UPS, FACTS

- Peggy Young, delivery driver for United Parcel Service (UPS)
- Got pregnant and doctor gave restriction: "should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter."
- UPS requires that delivery drivers be able to lift parcels up to 70 pounds.
- UPS made Young stay home without pay during most pregnancy.
- Because of her time away, Young lost her employee medical coverage.
- Filed suit: "UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction."

# Young v. UPS (Cont.)

- Justice Breyer: key inquiry was “whether the nature of the employer’s policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination.”
- Announced a new balancing test for the PDA:
  - Employee must show that she sought an accommodation,
  - her company refused, and
  - then granted accommodations to others suffering from similar restrictions.
- The company, in turn, can try to show that its reasons were legitimate — but not because it is more expensive or less convenient to add pregnant women to the categories of workers who are accommodated.
- Court remanded to the Fourth Circuit.

# Young v. UPS (Cont.)

- Take-Away Lessons:
- Still no “one size fits all” application of the PDA or ADA to formation of policy and practice.
- Ensure that you use a case-by-case evaluation of an employee’s medical and pregnancy-related leave and accommodation requests.
- Engage in ongoing individualized interactive process with employee to determine what accommodation; goal is REDUCING BARRIERS TO PERFORMING WORK.

# Graziadio v. Culinary Institute

- HR Director may be individually liable under Family and Medical Leave Act (“FMLA”).
- The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reason.
- Continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.
- Twelve workweeks of leave in a twelve month period.

# Graziadio v. Culinary Institute, FACTS

- Employee initially took leave to care for a sick child.
- Later took leave to care for another child with broken leg.
- Employer had issues with the FMLA paperwork submitted.
- Would not let employee return without new documentation.
- Documentation was provided, but HR director did not respond and ultimately terminated the employee for job abandonment.
- Employee sued for interference and retaliation under FMLA

# Graziadio v. Culinary Institute (cont.)

- Findings:
  - Possible that HR Director was an “employer” and interfered with the employee’s FMLA rights under “economic-reality test”
- Reasoning:
  - HR director “played an important role” in termination.
  - HR director exercised control of the employee’s schedule and conditions of employment by reviewing paperwork and communicating with the employee.

# Graziadio TAKE-AWAY LESSONS

- United States Supreme Court, not weighed in yet.
  - Tenth Circuit.
- Employers should inform HR personnel and supervisors handling FMLA requests of their potential liability.
- Ensure regular and correct training on FMLA compliance.
- If challenge FMLA paperwork, must be prepared to provide specific reasons justifying actions.

# Sexual Orientation Discrimination

- On March 1, 2016 EEOC announced first two sex discrimination lawsuits based upon sexual orientation.
  - First, constructive discharge: Anti-gay epithets drove employee to resign.
  - Second, retaliation: terminated employee after complained about derogatory comments about sexual orientation.
- Title VII of the Civil Rights Act of 1964
  - Theory: prohibition of sex discrimination encompasses sexual orientation.
- Utah Code Ann. 34A-5-106
  - Prohibits workplace discrimination, harassment, etc. . . because of “sexual orientation or gender identity.”

# Sexual Orientation Discrimination

- Take-Away Lessons
  - Update your policies and procedures.
  - Update anti-sexual harassment policy.
  - Possibly change your day-to-day practices.
  - EEOC litigation has the potential to increase employer exposure to legal liability.
    - Time limits are extended for filing claims.
    - Punitive damages.
- Future Outlook
  - Already prohibited by Utah state law and likely federal law (Title VII).

# Allen v. City of Chicago

- Fair Labor Standards Act (FLSA) overtime case
- Chicago police officers claimed not paid overtime for their off-duty use of smartphones.
- Work-related.
- No official policy of not paying, but officers claimed there was a unwritten rule that you did not submit the overtime.
- Was a general policy to submit all overtime.
- Department had paid OT for off-duty smartphone use.
- No proof of anti-overtime culture.

# Allen v. City of Chicago (cont.)

- Why is this case important?
  - Found that city employees were performing compensable overtime work on their devices while off-duty.
  - Even when the overtime work was voluntary, not authorized, or subject to discipline, still not an unwritten rule or culture of non-payment.

# Allen v. City of Chicago (cont.)

- Take-Away Lessons
  - Highlights the risks of issuing mobile work devices to hourly and salaried non-exempt employees.
  - Employers need to have a clear policy setting out reasonable process for employees to report overtime.
  - Make certain policy addresses use and reporting of off-duty work on mobile devices that is necessary for the job.
  - Make certain the policy is uniformly enforced.
  - Make certain there is no efforts to dissuade employees from REPORTING overtime.

# Medical Cannabis

- Medical marijuana (MMJ) is now permitted in 23 states and Washington D.C.
  - 4 of the 23 permit recreational use.
- Remains illegal on the Federal level.
  - U.S. Dept. of Justice recently announced the release of over 6,000 inmates convicted of nonviolent drug charges.
- Utah
  - S.B. 73 headed for a vote and likely passage.
  - Realized there was no money to implement it.
- All this begs the question:

# Are You Ready for Medical Cannabis in the Workplace?

- Most states with MMJ prohibit discrimination due to being a registered patient.
  - Regulate use and impairment at work; and
  - Consider whether underlying condition is a disability (ADA).
- Review philosophy toward MMJ and ensure proper training
- Review positions and re-designate Safety Sensitive Positions.
  - Good time to update job descriptions
- Update handbooks and P&P to reflect drug testing, workplace search, disability and other related policies.

# Craig v. Provo City

- Plaintiffs filed a notice of claim against Provo City.
  - Notice of claim was either denied or ignored.
- Plaintiffs filed a Complaint against the City.
- Dismissed without prejudice because no bond was submitted, statute of limitations expired prior to dismissal.
- Second Complaint was filed by Plaintiffs within a year of the dismissal under the Savings Statute.
- District Court dismissed second Complaint, holding that the Savings Statute did not apply to UGIA.
- Appealed.

# Craig v. Provo City (cont.)

- Court of Appeals of Utah REVERSED.
- City argued that UGIA language exclusively governed all claims against government entities, and did not contain a savings statute.
- Court of Appeals disagreed
  - Have to read UGIA in harmony with all other statutes
  - If UGIA is exclusive, then common law, rules of evidence, etc. would not apply and they clearly apply.
- The “Savings Statute is not an avenue to circumvent the UGIA’s notice and filing requirements; it provides a remedial safeguard to help prevent a claimant’s procedural misstep from terminating the cause of action.”

# Cink v. Grant County

- Re-affirms that, generally, Sheriff's Department employees will always be considered County employees.
- Recent strategy of Counties (not Utah)
- 10<sup>th</sup> Circuit not going for it.