HRHero.com
A division of BLR®

FLORIDA
EMPLOYMENT LAW LETTER

Part of your Florida Employment Law Service

Tom Harper, Managing Editor • Law Offices of Tom Harper
Lisa Berg, Andrew Rodman, Co-Editors • Stearns Weaver Miller, P.A.
Robert J. Sniffen, Jeff Slanker, Co-Editors • Sniffen & Spellman, P.A.

Vol. 26, No. 2
April 2014

What's Inside

What's Online

Regional Map
Which states have social media accounts privacy laws?
http://ow.ly/tMfHA

Expert Interview
Should employers allow e-cigarettes in the workplace?
http://ow.ly/tK7kF

Immigration
Be sure to avoid these pitfalls in the I-9 process
http://bit.ly/18mBznD

Find Attorneys
To find the ECN attorneys for all 50 states, visit
www.employerscounsel.net

ECN EMPLOYERS COUNSEL NETWORK
EMPLOYERSCOUNSEL.NET

LEGISLATION

High times: Medical marijuana may soon be legal in Florida

by Robert J. Sniffen and Jeff Slanker
Sniffen & Spellman, P.A.

The legal use of marijuana for medicinal purposes may be a real possibility in the very near future for Florida residents after state legislators introduced bills that would implement by law the proposed constitutional amendment Florida voters will see on the ballot in November. Legalized medical marijuana use in Florida would have wide-reaching effects on consumers, businesses, and employers in the state.

Lead-up to the bill

Public support for legalizing medicinal marijuana use has been building in Florida over the past several years. Signature collection, a necessary precondition of placing the proposed constitutional amendment on the ballot for a vote, has already been completed. More than 683,000 people signed petitions to place the medical marijuana constitutional amendment on the November 2014 ballot. Election authorities have validated that a sufficient number of signatures were obtained to put the constitutional amendment to a vote.

The language of the proposed ballot summary of the constitutional amendment was soon challenged as unclear, overbroad, and misleading. The challengers, led by the state of Florida and Attorney General Pam Bondi, argued that the summary omitted language in the full constitutional amendment that specifies and defines the exact nature of the illness or infirmity that might be treated with medical marijuana, leaving it unclear whether medical marijuana could be used only to treat debilitating diseases. The challenge to the ballot summary language failed before the Florida Supreme Court, which held in a 4-3 opinion that the language, when read in its entirety, wasn't too unclear to go on the ballot in November.

If at least 60 percent of voters approve it, the constitutional amendment will become law. According to the polling data, Florida voters appear ready to approve the proposed constitutional amendment.

Proposed bills and the constitutional amendment

Senator Jeff Clemens (D-Lake Worth) and Representative Joe Saunders (D-Orlando) have introduced bills that would implement by statute the constitutional amendment allowing the medicinal use of marijuana. This is the fourth year in a row that a bill that would legalize medical marijuana has been introduced in the Florida Legislature without success, but support for the bill is growing.

Indeed, both Democratic and Republican legislators in Florida are beginning to support the legalization of

medical marijuana and the bills recently introduced to implement the proposed constitutional amendment. This movement reflects the views of most Floridians, who appear to support legalized marijuana for medical purposes.

The amendment "allows the medical use of marijuana for individuals with debilitating diseases as determined by a licensed Florida physician." According to the text of the amendment, covered debilitating diseases include cancer, glaucoma, HIV/AIDS, and "other conditions for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient."

The proposed amendment would require a patient to get a certification or recommendation from a doctor that he is in need of medical marijuana. Once a patient gets that certification, the Florida Department of Health would issue him an identification card that would allow him to purchase marijuana from registered state-regulated centers.

Voters will also elect the next Florida governor this fall. Current Republican Governor Rick Scott will be running for reelection, most likely against former Republican Governor Charlie Crist, who has switched parties and would be running as a Democrat. Governor Scott hasn't publicly supported the effort to legalize medical marijuana, and his office hasn't indicated whether he would sign a bill that passes the legislature. Crist supports the effort to legalize medical marijuana in Florida.

Medical marijuana in other states

Twenty states and the District of Columbia have legalized medical marijuana. States that currently allow the use of marijuana for medicinal reasons include Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Two of those states, Colorado and Washington, have legalized marijuana for medical and recreational use.

Medical marijuana legislation is pending in several other states, including Georgia, Kentucky, Maryland, Minnesota, Missouri, New York, Ohio, Pennsylvania, Tennessee, Utah, West Virginia, and Wisconsin.

Employer takeaways

Legalizing medical marijuana in Florida would have a wide-reaching impact on employers. Indeed, employers will have to balance medicinal marijuana use with policies addressing employees' and applicants' drug use and drug testing in the workplace. Special care will have to be taken when employees' medical marijuana use intersects with coverage under laws such as the Americans with Disabilities Act (ADA) or any applicable state laws.

Some states have enacted laws that forbid employment discrimination against medical marijuana users, while other states permit employers to discharge medical marijuana users for violating workplace drug policies under certain circumstances. Still other states have enacted laws forbidding discrimination against medical marijuana users while permitting employers to take some actions when employees violate drug policies under certain circumstances.

One of the proposed Florida bills forbids employers from refusing to employ individuals who legally use medical marijuana. Should the constitutional amendment approving medical marijuana be adopted by Florida voters in November, the contours of permissible employer conduct will depend on the nature of the final language of the law. You should monitor the outcome of the constitutional amendment and the related legislation to ensure your company is prepared to comply with legal medical marijuana use in Florida, which at this point appears likely.

Robert J. Sniffen is the founder and managing partner of the Tallahassee firm of Sniffen & Spellman, P.A. He can be reached at 850-205-1996 or rsniffen@sniffenlaw.com. Jeff Slanker is an attorney with Sniffen & Spellman, P.A., in Tallahassee. He can be reached at 850-205-1996 or jslanker@sniffenlaw.com. ✤

CONFIDENTIAL INFORMATION

Kids say the darnedest things: Daughter mouths off about Dad's settlement

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Art Linkletter and Bill Cosby were right—kids say the darnedest things. Unfortunately, some of those "things" may not be as cute, innocent, and humorous as Linkletter and Cosby thought. In fact, some of the things kids say may be outright boorish and malicious. A former private school headmaster in Miami found that out the hard way.

Settlement with a promise of confidentiality

Gulliver Preparatory High School, a private school in Miami, didn't renew headmaster Patrick Snay's contract. Snay sued Gulliver for age discrimination and retaliation under the Florida Civil Rights Act. (FLCRA) In November 2013, the case was settled, with Gulliver agreeing to pay Snay $80,000 plus back pay and attorneys' fees.

Along with a general release of claims, the settlement agreement contained a detailed confidentiality provision under which Snay agreed not to discuss or disclose the existence or terms of the settlement to

anybody, directly or indirectly, except his attorneys, professional advisers, and spouse. Under the agreement, a breach would "result in disgorgement of [his] portion of the settlement" payments.

It sounds like a fairly typical story up to this point, right? This is where it gets interesting.

'Suck it,' says former headmaster's college-age 'kid'

Four days after the settlement agreement was signed, Gulliver notified Snay that he was in breach of the agreement's confidentiality provision by virtue of his college-age daughter's Facebook post stating, "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The Facebook post went out to approximately 1,200 of the daughter's Facebook "friends," many of whom were current or former Gulliver students.

Clearly not amused by Daughter Snay's antics, Gulliver refused to pay its former headmaster his $80,000, citing the confidentiality provision of the settlement agreement. Predictably, Snay filed a motion with the court to enforce the settlement agreement and its payment provisions. The trial court agreed with him. Gulliver appealed, however, and the appellate court agreed with the school that Snay breached the clear and unambiguous confidentiality provision of the settlement agreement.

According to the appellate court, the breach occurred when Snay admittedly told his daughter that the case settled and he was happy with the result. His daughter then did precisely what the confidentiality provision was designed to prevent: She advertised to the Gulliver community her father's success on his discrimination and retaliation claims. At the end of the day, Gulliver was relieved of its obligation to pay Snay $80,000 under the settlement agreement. *Gulliver Schools, Inc. v. Snay.*

Takeaways

There are many lessons to be learned from this case, some legal and some practical. On the legal side,

ASK ANDY

FMLA leave eligibility for same-sex partners

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Q *Are employees in Florida entitled to take leave under the Family and Medical Leave Act (FMLA) to care for a same-sex partner with a serious health condition? What if the employee and his same-sex partner were legally married in a state that recognizes same-sex marriage?*

A Under the FMLA, an eligible employee generally is entitled to take up to 12 weeks of job-protected leave to care for a "spouse" with a serious health condition (among other qualifying reasons). As the result of a 2013 U.S. Supreme Court decision striking down as unconstitutional a provision of the Defense of Marriage Act (DOMA) that defined "spouse" to exclude same-sex partners, the definition of "spouse" under the FMLA now depends on the law of the state where employees reside.

Florida doesn't recognize same-sex marriage. Consequently, an employee residing in the state isn't the "spouse" of her same-sex partner under Florida law and isn't entitled to take FMLA leave to care for her same-sex partner if she develops a serious health condition. The same holds true even if an employee now residing in Florida was legally married to her partner in a state that recognizes same-sex marriage.

It's important to keep in mind that for FMLA purposes, the operative fact is the state where the employee resides, not the state where he works, where he was married, or where the company is headquartered. Therefore, if a Florida-based company employs a regional salesperson who lives in California, where same-sex marriage is legal, the California employee would be entitled to FMLA leave to care for his same-sex spouse with a serious health condition.

Some employers, as a matter of policy, have voluntarily extended FMLA-type leave to employees with same-sex partners. Also, you should be aware that some states and localities have enacted laws that extend leave rights to same-sex couples.

If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com. Your identity will not be disclosed in any responses. This column is not intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

AGENCY ACTION

EEOC sees record year for monetary recovery. The Equal Employment Opportunity Commission (EEOC) has released data for the 2013 fiscal year showing that the agency obtained the highest monetary recovery in agency history—$372.1 million. During the fiscal year, which ran from October 1, 2012, to September 30, 2013, the agency handled 93,727 charges of workplace discrimination, a 5.7% decrease from the 99,412 charges received in fiscal year 2012. As in previous years, retaliation under all statutes was the most frequently cited basis for discrimination charges, increasing in both actual numbers (38,539) and as a percentage of all charges (41.1%) from the previous year. This was followed by race discrimination (33,068/35.3%); sex discrimination, including sexual harassment and pregnancy discrimination (27,687/29.5%); and discrimination based on disability (25,957/27.7%).

OSHA focusing on cell tower safety. The Occupational Safety and Health Administration (OSHA) has announced it is collaborating with the National Association of Tower Erectors and other industry stakeholders to ensure that communication tower employers understand their responsibility to protect workers. An OSHA statement said that the agency is concerned about an increase in injuries and fatalities at communication tower worksites. In 2013, OSHA said there were 13 fatalities, more than the previous two years combined. Also, there were four worker deaths in the first five weeks of 2014. The agency has sent a letter to tower employers urging compliance and strict adherence to safety standards. It also has created a webpage targeting the issues surrounding communication tower work. Of the 13 fatalities in 2013, the majority were a result of falls.

JPMorgan Chase pays $1.45 million to resolve sex discrimination suit. The EEOC has announced that financial giant JPMorgan Chase will pay $1.45 million and revamp its procedures to settle a sex-based harassment lawsuit. The EEOC charged in its suit that JPMorgan Chase maintained a sexually hostile work environment toward female mortgage bankers assigned to its Polaris Park facility outside Columbus, Ohio. The EEOC alleged that female mortgage bankers not participating in sexually charged behavior and comments became ostracized and suffered economic consequences by being deprived of lucrative sales calls, training opportunities, and other benefits of employment. In addition to the monetary relief, the employer is to develop a call data retention system so that assignments of sales calls can be accessed and analyzed to ensure they are being equitably distributed among mortgage bankers. ✤

the decision teaches that confidentiality agreements—or at least those with teeth—may be worth more than the paper on which they're written. Often, employers (and their lawyers) opt to include watered-down, "toothless" confidentiality provisions in settlement agreements, reasoning that proving a breach may be an uphill battle or that enforcement may be futile or prohibitively expensive. As this case demonstrates, social media may greatly improve an employer's ability to learn about and prove a breach of confidentiality.

And while the cost of enforcement may be expensive, what's the alternative? Paying the former employee a nice chunk of money, turning a blind eye to the fact that he may blatantly ignore the terms of settlement, and accepting the potentially negative publicity from the breach of confidentiality?

On the practical side, this case reminds us never to agree to settlement terms with which we can't abide. For employers, that may include nondisparagement and neutral reference provisions that purport to bind the entire company. If you don't think you'll be able to control what supervisors might say if, for example, they receive a job reference inquiry about a former employee who signed a settlement agreement, then it may be prudent to limit the scope of any nondisparagement and neutral reference provisions. State in the settlement agreement that references will be provided by a specific person or by HR personnel only.

Perhaps the most important lesson from this case is, never tell your children something you don't want showing up on the Internet.

The author can be reached at arodman@stearnsweaver.com. ✤

TOBACCO USE

Where there's smoke, you're fired: tackling rising costs of tobacco use

If there's one thing on which smokers and nonsmokers can agree, it's that smoking is an expensive habit. While tobacco companies and trade groups challenge coupon and discount bans on cigarettes, employers have taken up a different fight against the rising costs of smoking.

For several years, employers have begun offering smoking-cessation programs as part of company wellness efforts, and many companies have moved to create smoke-free work campuses. More recently, however, employers have taken a firmer "stick" approach—assessing health benefits surcharges for smokers and, in some cases, refusing to employ smokers at all.

Half of smoking costs attributed to lost productivity

In 2004, the Centers for Disease Control and Prevention (CDC) reported that cigarette smoking cost more than $193 billion annually. Unsurprisingly, half of those costs represented healthcare expenses related to smoking, and those costs have only increased in recent years. The other half of the costs measured—$97 billion—was attributed to lost productivity.

More recent studies back up the aging CDC data. A study completed last year by Ohio State University researchers found that businesses pay an average of $6,000 more per year per employee who smokes. More than half of those costs are attributed to lost productivity from smoke breaks alone, while other costs are attributed to absenteeism due to illness, lower productivity while on the job due to nicotine withdrawal, and, of course, additional healthcare costs.

Growing number choosing stick over carrot

In efforts to reduce employers' share of those costs, many companies started offering smoking-cessation programs to help workers quit. But now some employers are simply kicking the habit cold turkey.

Healthcare organizations in particular, citing the desire to have their employees serve as role models to patients and clients while reducing exposure to second- and third-hand smoke, have started screening for nicotine before hire. Applicants who report tobacco use on a preliminary application may be told "thanks, but no thanks" and directed to reapply in 90 days—if they can answer that they're now smoke-free. Upon a preliminary employment offer, potential hires undergo drug testing, which may include a screening for cotinine (a metabolite of nicotine) to detect use of any nicotine product within the prior week.

Currently, approximately four percent of companies that operate in states that don't protect smokers from employment discrimination refuse employment to smokers. And the number is expected to rise another two percent this year.

Isn't smoking legal off-duty conduct?

Tobacco use in any form isn't a protected activity under federal law. That means that absent an intervening state or local law, you generally have broad freedom in banning smoking both in and out of the workplace. However, intervening state laws do exist. For example, South Carolina specifically prohibits mandatory nicotine or tobacco testing.

SAME-SEX MARRIAGE

Suit filed over Florida's refusal to recognize same-sex marriage

by Tom Harper
Law Offices of G. Thomas Harper, LLC

On March 14, a group of same-sex couples who allege that they were legally married outside Florida filed suit in Tallahassee against Governor Rick Scott and several other state officials over Florida's refusal to recognize their marriages. The couples brought suit to challenge the constitutionality of Florida's refusal to recognize same-sex marriages performed in other states.

The couples allege in their suit that the state's failure to recognize their marriages violates the Florida Constitution (Article I, Section 27) as well as Florida law (Florida Statutes, Section 741.212) and the U.S. Constitution. Florida law currently states, "Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state."

Florida's Constitution was amended in 2008 to prevent recognition of same-sex marriages entered into in other states. Thus, Article I, Section 27, of the Florida Constitution provides: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."

In the suit, the couples claim that the state's refusal to recognize their marriages denies them many of the legal protections available to opposite-sex couples. For example, the two named plaintiffs, Sloan Grimsley and Joyce Albu, state that they have been together for nine years and were married in 2011 in New York. They live in Palm Beach Gardens and have adopted two- and five-year-old daughters. Grimsley is a firefighter and paramedic for the city. If she is injured or killed in the line of duty, Albu would not receive the insurance and benefits that a spouse in an opposite-sex marriage is entitled to. She alleges that it would be financially difficult to raise their daughters without Grimsley. Consequently, they claim the state is guilty of gender discrimination and sexual orientation discrimination in violation of the U.S. Constitution.

The lawsuit has been assigned to U.S. District Judge Robert L. Hinkle. We'll monitor rulings in the case since the outcome has the potential to change employee rights and personnel policies in Florida. *Sloan Grimsley and Joyce Albu, et al. v. Rick Scott, et al.,* Case No.: 4:14-cv-00138-RH-CAS (N.D. FL, March 14, 2014).

If you would like a copy of the 21-page complaint, e-mail Tom Harper at Tom@EmploymentLawFlorida.com. ✤

WORKPLACE TRENDS

Survey highlights staffing challenges. A nationwide survey released in February shows that employers are facing significant staffing challenges. The survey, conducted on behalf of CareerBuilder, found that more than half of the employers surveyed said they had positions for which they couldn't find qualified candidates. Other top staffing challenges included retaining top talent (32%), lifting employee morale (31%), providing competitive compensation (27%), worker burnout (26%), maintaining productivity levels (25%), managing organizational changes (20%), employee engagement (17%), providing upward mobility (17%), providing enough training opportunities to employees (15%), cutting down on cost per hire (12%), lack of succession planning (11%), limited recruitment budget (11%), and adapting to new ways to source/recruit candidates (8%).

Poll shows many employed workers staying out of job hunt. Forty-eight percent of employed workers participating in a survey by staffing service Accountemps haven't looked for a job in at least five years. Thirty percent of those surveyed haven't sought work in more than a decade. But 19% of those polled said they plan to look for a new job in the next 12 months. Seventy percent of those planning a job search expect the effort to be somewhat or very challenging. The survey garnered responses from more than 400 employees at least 18 years old who work in an office environment in the United States.

Employees report on bosses behaving badly. Employees can tell a variety of stories detailing bad behavior on the part of their bosses, including tales of being verbally abused and made to work unpaid overtime. A survey from recruitment firm FindEmployment found 41% of those surveyed had been shouted at by their boss in the course of a work-related discussion. Twelve percent reported being sworn at and verbally abused, and 8% said they had been blackmailed or threatened. Other infractions included bosses who reduced workers' salary without reason or authorization, bosses who made employees work unpaid overtime, bosses who made workers do the bosses' work in addition to their own, and bosses who repeatedly belittled workers in front of colleagues. Workers also were asked for the worst thing their boss made them do. Responses included deliberately overcharging a client so the boss could keep the extra amount, lying to clients to protect the company image, lying on time cards reported to the state, and being instructed to return to work the moment the employee was discharged from the hospital. ✤

In addition, 29 states and the District of Columbia either specifically prohibit employers from refusing to hire or firing an employee for off-duty tobacco use or prohibit employment discrimination for engaging in "a lawful activity." Note, however, that some of those laws exempt nonprofits and healthcare employers. Remember that Florida has a Clean Indoor Air Act that protects non-smokers. However, this Florida law can be argued as also giving rights to smokers!

Isn't addiction a disability?

Smoking itself is considered an activity rather than a medical condition. However, under the amended Americans with Disabilities Act (ADA), a disability is a mental or physical impairment that substantially limits one or more major life activities. Both alcoholism and drug addiction (but not current illegal drug abuse) have been found to meet that definition. Therefore, you may be prohibited from discriminating against an employee based on her alcoholism or drug addiction.

Nicotine certainly is as addictive as many drugs and alcohol, so an employee who could demonstrate that she has a nicotine addiction that substantially limits one or more major life activities could ostensibly establish the presence of a protected disability. However, this hasn't yet been tested in practice, nor has the Equal Employment Opportunity Commission (EEOC) issued guidance on the subject of tobacco use and the ADA.

Nonetheless, as with alcoholism and drug addiction, the presence of a nicotine addiction wouldn't require you to permit smoking while in the workplace or during work hours. You simply would be prohibited from discriminating against the employee on the basis of her disability—namely, addiction to nicotine.

Smoking surcharges under ACA

Under the Affordable Care Act (ACA), insurers are allowed to charge higher rates (up to 50 percent higher) for tobacco users. Additionally, these surcharges aren't eligible for coverage by federal subsidies, effectively eliminating the subsidies' benefit for smokers. In other words, smoking and tobacco use are the only preexisting conditions insurers are still allowed to discriminate against.

Insurers that assess these smoking surcharges as well as all new (nongrandfathered) private health insurance plans *are* required to cover preventive services, including tobacco cessation. However, it isn't clear which types of treatment do and do not qualify as tobacco cessation—for example, noncarcinogenic nicotine replacement forms such as the patch or gum, medications such as Chantix and Zyban, and/or counseling.

Bottom line: What's right for your workplace?

Health organizations such as the American Lung Association and the American Cancer Society worry that the punitive approach will do more harm than good by preventing smokers from obtaining health insurance and other resources they need to quit smoking and protect their overall health.

For employers, however, the right decision chiefly comes down to workplace culture. Medical and healthcare organizations have an important image to maintain, and permitting employees to smoke—or to smell of smoke—in the workplace contradicts that image. On the other hand, many employers may find the impact to employee morale for "invading" their private off-duty conduct just as detrimental to workplace productivity.

If you want to discourage smoking in your workplace, first look to state law to determine the rights, if any, of your employees who smoke. If you find that a zero-tolerance policy is right for your workplace, then you must also determine whether to follow "the honor system" or whether to begin annual (or more regular) testing.

As with any workplace practice, your testing policy should be fairly and consistently applied so as not to discriminate on the basis of characteristics or classes that *are* protected under federal antidiscrimination laws. In addition, in the interest of employee privacy, you should make employees aware of the testing policy, noting that random or for-cause tests may be administered. ✤

RACIAL HARASSMENT

Out with the trash: EEOC awarded $228K for harassment, termination of employee

by Tom Harper
Law Offices of G. Thomas Harper, LLC

A federal court in Pensacola has entered a judgment against Titan Waste Services, Inc., a Milton waste disposal company, in a lawsuit filed by the Equal Employment Opportunity Commission (EEOC) on behalf of Michael Brooks, a former Titan driver. Brooks alleged that he was a victim of race discrimination in the form of unequal terms and conditions of employment, racial harassment, and termination.

Appalling allegations

Brooks claimed in his suit that his supervisor, Larry Pellegrino, openly made racial comments to him in the workplace. According to his sworn testimony, Pellegrino referred to him as "boy," "nigger," "f___ing nigger," and "lazy nigger." Pellegrino also allegedly said to Brooks, "All niggers steal." When there was a problem with the company truck that Brooks drove, Pellegrino would say in his presence, "It was the nigger's fault." According to Brooks, Pellegrino was the highest level manager at the Milton facility.

Brooks was the only black driver at Titan. Indeed, there was only one other black employee at the Milton facility. Brooks would often arrive at work to find that the truck assigned to him had been reassigned to a white driver. When that occurred, he was sent home for the day without pay.

According to Brooks, Pellegrino didn't treat white employees in a similar fashion. When Brooks once missed a stop on

UNION ACTIVITY

UAW appeals Volkswagen representation election. A week after losing its bid to represent workers at Volkswagen's Chattanooga, Tennessee, plant, the United Auto Workers (UAW) filed an appeal with the National Labor Relations Board (NLRB) claiming interference by politicians and outside special interest groups. The NLRB will investigate the allegations to determine whether there are grounds to set aside the election results. The vote, conducted February 12-14, was 712-626 against the union. The union claims statements by elected officials constituted threats that state-financed incentives would be withheld if workers voted for the union. In particular, the union singled out statements by U.S. Senator Bob Corker (R-Tennessee).

2013 sees fewer major work stoppages. The U.S. Bureau of Labor Statistics (BLS) reported in February that there were 15 major strikes and lockouts involving 1,000 or more workers and lasting at least one shift during 2013. That's down from 19 major work stoppages beginning in 2012. The 2013 work stoppages idled 55,000 workers, which is fewer than the number of idled workers in 2012 (148,000). In 2013, there were 290,000 days idle from major work stoppages, also lower than 2013 with 1.13 million days idle. In 2013, two-thirds of major work stoppages lasted no more than three workdays. State and local government accounted for 60 percent of major work stoppages beginning in 2013. Over half of the major work stoppages beginning in 2013 occurred in California.

AFL-CIO head praises Gap, says Wal-Mart can do better. AFL-CIO President Richard Trumka released a statement in February calling clothing retailer Gap Inc.'s announcement that it will raise its own minimum wage to $9 an hour in 2014 and $10 next year "a major victory." "While Gap has more work to do both in the United States and with its supply chain in countries like Bangladesh, this wage increase is a turning point," Trumka said. He also called on Wal-Mart to raise wages. "As a first small step, Wal-Mart workers, like all workers, need a federal minimum wage of at least $10.10 an hour," he said. He also called for Wal-Mart to agree to pay a $25,000-a-year minimum salary.

Union calls for scrutiny of Comcast-Time Warner deal. The Communications Workers of America union is calling on federal regulators to carefully review the bid by Comcast Communications to acquire Time Warner Cable. The union released a statement in February saying that the deal would result in significant concentration in the industry and that regulators must review critical issues, including the effect on market power for content providers and consumers, the impact on innovation and market structure in the industry, the effect on jobs, and the effect on consumer cost and options. ✤

TRAINING CALENDAR

Call customer service at 800-274-6774 or visit us at the websites listed below.

FULL-DAY WEB SEMINARS

http://store.HRHero.com/events/virtual-conferences

4-21 Healthcare and Welfare Benefits Virtual Summit: A Compliance Primer for HR Professionals

4-23 Supervisor Bootcamp: Help Your Frontline Managers Master Performance Management, Conflict Resolution, and More

WEBINARS & AUDIO SEMINARS

Visit http://store.HRHero.com/events/audio-conferences-webinars for upcoming seminars and registration information. Also available on CD and in streaming audio after broadcast.

4-22 EEOC Position Statements Explained: Your Organization's Response to Discrimination and Retaliation Charges

4-23 National Origin Discrimination: How the EEOC's Renewed Focus on Title VII Violations Can Impact Your Organization

4-24 Conducting Legally Sound Background Checks: FCRA Requirements, EEOC Guidance, and Other Recent Developments

4-29 Sexism in the Workplace: Reduce Your Risk for Costly Harassment, Hostile Work Environment, and Unequal Pay Claims

4-29 Meal and Rest Breaks in California: Food for Thought on How to Handle Your Compliance Obligations

4-30 Are Your Employees Working the System? Learn How to Recognize, Combat, and Prevent FMLA/CFRA Abuse

4-30 Pay for Performance: Strategies for Successfully Embracing the "New Normal" in Compensation Design

4-30 Leave, Disability & Workers' Comp Laws: How to Maneuver the Treacherous Triangle of ADA, FMLA & More ✤

his route, Pellegrino fined him the fuel cost for a return trip to the customer. However, white drivers who missed stops weren't fined.

In 2008, Pellegrino asked Brooks, "If Obama wins [the election,] will he give you a job?" On October 31, 2008, Pellegrino directed Brooks to call in each day to see if there was work available for him. Brooks did as he was directed but wasn't given any subsequent work assignments. After about one week, Pellegrino told him that he was permanently laid off.

Company fails to defend itself

After the suit was filed in 2010, the EEOC and the company conducted discovery (exchanged relevant evidence) and participated in mediation in an attempt to settle the case. After mediation failed, Titan's lawyer withdrew, and the company missed deadlines imposed by the court. The EEOC filed for default, and Titan failed to respond despite being given several opportunities by the court.

A few weeks later, a new lawyer began representing Titan, but the lawyer didn't respond to the pending default motion by the EEOC. The court granted a default judgment to the EEOC, meaning that liability for the conduct alleged in the lawsuit was assigned to Titan. That left the question of damages.

Sworn testimony by Brooks was submitted to the court and reviewed by Chief U.S. Magistrate Judge Elizabeth Timothy. The judge found that the allegations in the complaint and Brooks' testimony established that racial harassment and discrimination occurred, and she recommended that judgment be entered in favor of the EEOC on behalf of Brooks. On March 10, U.S. District Judge M. Casey Rogers accepted Judge Timothy's report and findings and entered judgment for the EEOC in the amount of $228,603.75. *EEOC v. Titan Waste Systems, Inc.*, Case No. 3:10-cv-00379-MCR-EMT (March 10, 2014).

Takeaway

In our experience, most employment lawsuits are based on the statements and actions of a first-line supervisor or manager. In this case, Brooks alleged that the facility manager engaged in serious racial harassment and discrimination. Supervisory training helps you avoid problems, but if you don't enforce such training and tolerate racism by a manager, you'll eventually face consequences like Titan did.

The author can be reached at tom@employmentlawflorida.com. ✤

FLORIDA EMPLOYMENT LAW LETTER (ISSN 1041-3537) is published monthly for $447 per year plus sales tax by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094. Copyright 2014 BLR®. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

Editorial inquiries should be directed to G. Thomas Harper at The Law and Mediation Offices of G. Thomas Harper, LLC, 1912 Hamilton Street, Suite 205, Post Office Box 2757, Jacksonville, FL 32203-2757, 904-396-3000. Go to www.EmploymentLawFlorida.com for more information.

FLORIDA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Florida employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The Florida Bar does designate attorneys as board certified in labor and employment law.

For questions concerning your subscription or Corporate Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.

HRhero® a division of BLR BLR®