Labor Letter

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Year-End Look Back – The Lowlights

By Michael S. Mitchell (New Orleans)

Every year at this time it's traditional to look back and review the year's highlights. Our list is a bit of a twist, however. If there is anything that sets labor and employment law apart from other areas practiced by our legal brethren, it seems to be the high percentage of odd fact situations that crop up. Here are a few that we'll reminisce about for a long time.

Some of these cases are "golden oldies" that occurred quite awhile back. Others are as recent as a few weeks ago. Here they are in no particular order:

"Could You Repeat That For Me?"

The plaintiff was a black male, terminated for using the "N" word. Curiously, his lawsuit alleged that when he complained that a white supervisor had used the "N" word, the company fired the supervisor. At his deposition he testified how offensive the word was to him personally – and that he would never use it – but that the supervisor was his friend and he never meant to get her in trouble. He was sure that she had only used it because "she must have forgotten I was black."

When his deposition concluded and the parties were off the record, the plaintiff became very gregarious and began telling stories about his youth and how the first company he worked for had been so nice because they hired so many . . . yes, the "N" word flew out of his mouth roughly a dozen times.

The company's HR director, an African-American herself, was taking notes faster than the court reporter had.

"Wake Me When It's Over"

At a car dealership a salesman was found sleeping in the customer lounge. The sales manager woke him up and asked if he was okay, to which he replied he was fine, just tired, and "leave me alone." The sales manager informed the general manager, who then woke him up again and asked if he needed to go to the hospital, and if he was sick. The salesman again said that he was fine and just tired. The general manager fired him on the spot, and asked if he needed a ride home, which the salesman refused.

Two days after being fired, the employee went to the hospital and was diagnosed with migraines and syncope (fainting). He sued under the Americans with Disabilities Act (ADA) claiming the employer fired him for being disabled after he was hospitalized.

After reading our motion to dismiss, opposing counsel voluntarily dismissed the lawsuit with prejudice.

"Scoot Over"

Over the years, McDonald's has received bad press from some activists who claim that their menu is calorie laden and therefore causes obesity. The owners of the White Castle fast food chain were surprised to receive a different kind of lawsuit filed by a customer. He apparently has no beef with how fattening the food is. His lawsuit alleged that he was being discriminated against under the ADA. At 290 pounds, the White Castle booths just weren't big enough.

"Hold The Onions"

In another ADA case, the plaintiff testified during the morning half of her deposition that she had irritable bowel syndrome and that there were a few foods that she had discovered triggered the condition. Of those three or four foods, two were mayonnaise and cheese.

As a courtesy, the defense lawyers offered to order and pay for lunch for the opposing side. After reviewing the lunch menu, plaintiff wrote down her order of a turkey sandwich with roasted peppers, *sharp provolone, and mayonnaise.* As a result, plaintiff's handwritten lunch order ended up as an exhibit to her deposition and an exhibit to a motion for summary judgment.

"He Attacked Me, Dude"

A few years ago an employee of Great Bear Adventures in Montana smoked marijuana before arriving at work. When he entered the bear's pen he was attacked and had to be hospitalized. The owner of the tourist attraction argued that the employee was a volunteer and that his use of marijuana caused the accident.

But the state Workers' Compensation Court disagreed and the judge ruled the employee eligible for benefits.

"We Support *All* Our Members"

A story from our friends at *Labor Relations Ink* is so good we'll quote the original blog post verbatim:

"The Teamsters in Oakland, California, filed a grievance against Mills College, complaining that the school had violated its collective bargaining agreement by hiring non-union workers to clear brush. The Teamsters demanded that the college either 1) award backpay to the union members who lost out on the work or 2) require the 500 non-union workers to join the union."

"The only problem? The 500 non-union workers were – and we're not making this up – goats. 'If the college opts to have the goats become members,' said a Teamsters spokesperson, 'we intend to represent them in the same aggressive manner as we do every member.'"

"Paging Mayor Nagin"

A nurse for a New Orleans hospital was fired for poor performance. Her lawsuit alleged lots of claims including disability discrimination, interference with Family and Medical Leave Act rights, sexual harassment (from a male, openly gay, co-worker), and retaliation. In her deposition she noted that she had applied for a job with the City of New Orleans as its public health director. She didn't get the job, but in a reference to Hurricane Katrina stated, "you would have been a lot better off here if I had [gotten the job] because I would have advised our Mayor a little differently than the advice he received."

It's hard to imagine the aftermath of Katrina being any worse than it was, but we can all be glad she was nowhere near the decision-makers after the storm.

"God Bless Us, Everyone"

An Orange County, California, inmate requested special meals free from salami, which he disliked. He had originally requested kosher meals,

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Tips For Protecting Your Workers From The Cold

By Edwin Foulke (Washington, D.C.)

Recent temperatures in the northeast were near record lows, meaning employees working in cold temperatures could face serious health risks. Cold weather is particularly dangerous to employees spending long hours outside, such as construction workers. Prolonged exposure to freezing or cold temperatures can result in serious health problems like trench foot, frostbite, hypothermia, and in extreme cases death. With winter bearing down upon us, it is a good time to familiarize yourself and your employees with the danger signs and important tips to protect them from the cold weather and potentially serious health threats.

The Science Of Cold Weather

First, some science to help understand the dangers. An individual gains body heat from food and activity, and loses it through convection, conduction, radiation and sweating to maintain a constant body temperature. If the body temperature drops slightly below its normal temperature of 98.6°F, the blood vessels constrict, decreasing blood flow to reduce heat loss from the surface of the skin. The body shivers to generate heat by increasing the body's metabolic rate.

The environmental conditions that cause cold-related stress are low temperatures, high/cool winds, dampness and cold water. Wind chill, a combination of air temperature and speed, is critical to evaluate when working outside. For example, when the actual temperature is 40°F and the wind is at 35 mph, it feels like 11°F to exposed skin. A dangerous situation of rapid heat loss may occur for someone exposed to high winds and cold temperatures.

The Dangers Of Cold Weather

Trench foot is caused by long, continuous exposure to a wet, cold environment, including actual immersion in water. Work involving small bodies of water or working in trenches with water pose particular threats. Symptoms include a tingling and/or itching sensation, burning, pain, and swelling, sometimes forming blisters in more extreme cases.

Frostbite occurs when the skin tissue actually freezes, causing ice crystals to form between cells and draw water from them. This typically occurs at temperatures below 30°F, but wind chill can cause frostbite at above-freezing temperatures. Initially, frostbite symptoms include uncomfortable sensations of coldness; tingling, stinging or aching feeling of the exposed area followed by numbness.

Hypothermia occurs when body temperature falls to a level where normal muscular and cerebral functions are impaired. While hypothermia is generally associated with freezing temperatures, it may occur in any climate where a person's body temperature falls below normal. The first symptoms, which begin when the individual's temperature drops more than one degree, include shivering, an inability to do complex motor functions, lethargy, and mild confusion.

How To Protect Employees

Obviously, employees should watch for the symptoms described above, including uncontrolled shivering, slurred speech, clumsy movements, fatigue and confused behavior. If the employee observes the danger signs, emergency help should be called.

There are many methods to protect your employees from the cold, including protective clothing, engineering controls, and common safe work practices. The Occupational Safety and Health Administration distributes a free "Cold Stress Card" with tips on handling cold weather. Some tips include:

- recognize environmental and workplace conditions that can be dangerous;
- learn the signs and symptoms of cold-induced illnesses/injuries and what to do to help workers;
- train workers about cold-induced illnesses and injuries;
- encourage workers to wear proper clothing for cold, wet, and windy conditions including layers so they can adjust to changing conditions;
- be sure that workers take frequent short breaks in warm dry shelters to allow the body to warm up;
- try to schedule work for the warmest part of the day;
- avoid exhaustion or fatigue because energy is needed to keep muscles warm;
- use the buddy system – work in pairs so that one worker can recognize danger signs;
- drink warm, sweet beverages (sugar water, sports-type drinks) and avoid drinks with caffeine (coffee, tea, sodas, or hot chocolate) or alcohol; and
- eat warm, high-calorie foods such as hot pasta dishes.

Free copies of OSHA's Cold Stress Card may be obtained through OSHA's website (www.osha.gov) or by calling 1-800-321-0SHA. The card is available in both English and Spanish.

Remember that certain workers face increased risk because of numerous factors including age, if they are taking certain medications, if they are in poor physical condition or suffer from illnesses such as diabetes, hypertension or cardiovascular disease. Other more obvious risk factors include wearing inadequate or wet clothing, or having a cold.

For more information contact the author at efoulke@laborlawyers.com or 404.231.1400. Mr. Foulke is a former director of OSHA under the George W. Bush administration.

Pros and Cons of Severance Agreements

By Rich Meneghello (Portland, OR)

Employers who pay out severance to their employees run certain risks that need to be considered beforehand. Some employers have learned the hard way that severance agreements aren't always the best course of action. Last year, the University of Oregon received bad press when it was discovered that former head coach Mike Bellotti received a substantial payout upon his departure.

More recently, the mayor of Cornelius, Oregon, was recalled by voters who were upset that his firing of a City Manager cost the city over $100,000 in severance payouts. Although these examples come from public employers who need to report their actions, private employers can still run into hot water when trying to sever employment relationships.

What's Involved?

Before we look at the risks, let's define what we're looking at. Broadly, a severance agreement is any contract that is entered into between an employer and a departing employee, usually providing some form of compensation to the departing worker in exchange for something.

Some employers pay employees a lump sum at the end of their tenure in order to tide them over until they find a new job, and never enter into a contractual agreement with them. This is perfectly legal, but it should be seen as a gift and nothing more. That employee is free to sue the employer for any reason and the severance payout has no legal significance at all. There are some employers that choose to make the "gift" payout because they believe it is the right thing to do, or because it is a standard practice. Some of these employers also hope that this will help convince the employee that the company is a good and professional employer, less likely to be the target of a lawsuit by that employee.

But most employers who use severance payouts ask their employees to sign a document essentially releasing the company from any and all legal liability upon acceptance. This way, the relationship can be considered to be completely and forever severed, each party moving on in the world, never again to have to deal with each other.

What are the pros and cons to entering into such an agreement? The pros are fairly obvious. For a simple payout and a signature, the employer avoids possible messy legal action in the future. It can get rid of the headache by buying some freedom, or at least buy some certainty that a lawsuit will not follow. A good night's sleep, free from the worry of a threatened lawsuit, is the clear upside of such agreements.

But severance agreements are not right for every employer and every situation, and the following considerations should be taken into account. First off, how much is enough to induce the employee to sign? This is one of the most common questions we receive from clients. Unfortunately, there is no local standard, and most industries have no such standard either. It is a case-by-case situation, usually tied to either some round figure that sounds enticing enough for the employee to sign, or sometimes tied to a number of weeks or months of the employee's pay.

Second, will the employee sign the document? This is the big question. Many times, if the employment relationship is rocky, and the employee is fearful, and possibly litigious, offering them a severance agreement could be a bad step. The employee might start to think that "where there's smoke, there's fire," and begin believing a conspiracy theory exists where you must be trying to hide something by buying them off. Sometimes we recommend that you simply terminate the employee and cross your fingers, for fear that handing them a severance agreement will plant ideas in their head that you must be covering up something.

Third, what happens if they don't sign the document? The employee might take the unsigned document and try to use it as evidence in a legal proceeding later on. You can imagine an employee arguing to a jury, "Hey look – if they didn't have anything to hide, why were they trying to shut me up and keep me out of court?" For these reasons, employers must be cautious in using a severance agreement.

The final consideration to take into account is the age of the employee. If departing employees are age 40 or above, they receive special legal protections when it comes to severance agreements under a law called the Older Worker Benefit Protection Act (OWBPA). The severance document must contain certain language advising the employees of their rights under federal law, and must advise them to take the document to a lawyer to have it reviewed.

Also, the OWBPA provides for a mandatory waiting period of at least seven days between the time you originally enter into the agreement and the time when the agreement can be countersigned and the severance paid. This cooling-off period could be used for the employee to go to a lawyer, who might advise them of their opportunity to file a legal claim or threaten a lawsuit instead, when the payout might be much higher. In any event, employers should talk to their employment lawyer to make sure you are jumping through all of the necessary hoops with these agreements.

With all of these warnings, many employers might be skittish about severance agreements, and rightfully so. They are not a one-size-fits-all tool, and they should be used only after great deliberation and consideration. When used effectively, however, they can be a great way to save money and spare your company from legal headaches.

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Top Ten Ways To Hold A Company Party – Without Getting Sued

By Michael S. Mitchell (New Orleans)

With the Holiday Season in full swing, many employers ask us about the wisdom of holding company parties where alcohol will be served. They generally want to know about the risk involved if an employee drinks too much at the party and misbehaves, or worse, injures or kills someone on the way home. In the interest of answering these questions generally, and with apologies to David Letterman, we are re-running here an article which has appeared in our newsletters several times over the years.

There is always a risk involved in holding any company-sponsored function. Serving alcohol compounds the problems. According to one study, 36% of employers reported behavioral problems at their most recent company party. These problems involved everything from excessive drinking to off-color jokes to sexual advances to fist fights. As a result, more and more employers now hold alcohol-free parties.

Since most employers still want to hold holiday parties, you can reduce your legal liability by observing as many of the following recommendations as possible:

10. If possible, don't serve alcohol. This is easier to do if you simply have a catered lunch at the company's offices.
9. Invite spouses and significant others so that there will be someone there to help keep an eye on your employees and, if necessary, get them home safely.
8. Always serve food if you serve alcohol, and always have plenty of non-alcoholic beverages available.
7. If your party is a dinner, consider serving only wine or beer (plus non-alcoholic alternatives) with the meal.
6. If you do serve alcohol, do not have an "open bar" where employees can drink as much as they want. Instead have a cash bar or use a ticket system to limit the number of drinks. Close the bar at least an hour before you plan to end the party. Switch to coffee and soft drinks from there on.
5. Let your managers know that they will be considered to be "on duty" at the party. They should be instructed to keep an eye on their subordinates to ensure they do not drink too much. Instruct managers that they are not to attend any "post party" parties.
4. Consumption of alcohol lowers inhibitions, and impairs judgment. This can result in employees saying and doing things that they would not ordinarily do. Remind employees that, while you encourage everyone to have a good time, your company's normal workplace standards of conduct will be in force at the party, and misconduct at or after the party can result in disciplinary action.
3. Hire professional bartenders (don't use supervisors!) and instruct them to report anyone who they think has had too much. Ensure that bartenders require positive identification from guests who do not appear to be substantially over 21.
2. Arrange for no-cost taxi service for any employee who feels that he or she should not drive home. At management's discretion, be prepared to provide hotel rooms for intoxicated employees.
1. Never, never, hang mistletoe! Yep, we're not kidding. Take a look at item number 4 again, and you'll see why.

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but according to sheriff's officials, those are reserved for inmates with a specific religious requirement. When he sued the jail, the judge demanded a religious reason for the convicted drug dealer to get special treatment.

His quick-thinking response: a devotion to "Festivus," an imaginary holiday invented for the television show "Seinfeld" in which participants stand around an aluminum pole and air their grievances against other family members. The inmate received salami-free meals for two months until the county got the order thrown out.

To submit your own off beat or unusual item contact the author at mmitchell@laborlawyers.com or 504.522.3303. We'll be happy to memorialize it here next year.