Labor, Employment & Immigration Vantage Point

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From the Editors, Margaret R. Kurlinski & Tom O'Day

In this edition, look for comments on legislation changing Wisconsin's Family and Medical Leave law, as well as proactive tips following a case involving a harassment complaint. Employers reviewing policies can add value to the human resources process — and avoid potential litigation costs down the road — by preparing in advance for harassment complaints and retaliation complaints (which are on the rise, as evidenced in the article on new EEOC statistics).

Note also the dates for our upcoming Godfrey & Kahn Labor and Employment Seminars — who doesn't like free legal advice?

In This Issue:

22nd Annual Labor & Employment Law Update, Spring 2011 Seminar

Focus:

The 22nd Annual Labor & Employment Law Update will focus on practical approaches to preventing and managing employment law problems. It is further designed to provide employers with information concerning recent changes in labor and employment law and suggested strategies to deal with these changes. The seminar is designed to serve the needs of executives, in-house counsel, human resource professionals and front-line supervisors.

Dates and Locations:

Tuesday, March 15, 2011	Wednesday, March 16, 2011	Thursday, March 24, 2011
Monona Terrace, Madison	Hotel Sierra, Green Bay	InterContinental Hotel, Milwaukee

Sessions:

2011 Labor & Employment Law Update
The DOL's "Plan/Prevent/Protect" (Litigation) Agenda - What it Means to You
Making Sense of Health Reform
How to Prepare For and What to Expect From ERD Hearings and EEOC Investigations
Tips & Tricks to Successfully Complying with the New FMLA Regulations

Amending the Wisconsin Family and Medical Leave Act

By: Margaret Kurlinski

On January 21, 2011, Senate Bill 8 was introduced to the Wisconsin legislature in an attempt to conform Wisconsin's current family and medical leave law to the federal Family and Medical Leave Act (FMLA). The proposed amendments to the Wisconsin Family and Medical Leave Act (WFMLA), Wis. Stat. § 103.10, although touted as a simplification of Wisconsin's leave laws, will not, as drafted, relieve Wisconsin employers of additional leave obligations under state law.

For example, while the bill amends the eligibility and leave entitlements (a total of 12 weeks for one or more covered leaves) to conform to federal law, the bill fails to update the definition of a serious health condition to mirror the detailed definition of a serious health condition found in the federal regulations. The effect of this omission is that Wisconsin employers may still be required to provide leave in circumstances in which federal leave is not available. Perhaps these omissions will be addressed in implementing regulations that will be published in the event the bill becomes law, but, for now, employers in Wisconsin are faced with the possibility that they may have to provide 12 weeks of leave for employees who suffer from a serious health condition, as broadly defined under the revised Wisconsin statute.

The bill proposes many revisions to the Wisconsin law that will likely be well received by Wisconsin employers, including provisions which will update Wisconsin law to allow for employers to force the use of available paid leave during otherwise unpaid family and medical leave and tightening Wisconsin's notice and certification requirements. These amendments, however, do not provide Wisconsin employers all the rights they have under federal law. Notably, the proposed revisions to the Wisconsin law do not allow employers to seek clarification or authentication of medical certification forms, a right that was incorporated into the federal implementing regulations in 2009.

The bill also preserves certain Wisconsin-specific leave such as leave to care for a domestic partner, a leave that is not available under federal law. In addition, the bill incorporates the federal provision that allows employees to take leave to care for an individual for whom the employee stands in place of a parent or for an individual who stood in place of the parent when the employee was a child. This provision of the federal law was the topic of a recent U.S. Department of Labor Administrator's Interpretation that clarified that, under this provision of the FMLA, non-traditional caretakers such as unmarried same-sex or opposite-sex partners may take leave to care for their partner's child. Accordingly, the incorporation of this provision could represent an expansion of leave benefits for unmarried partners in Wisconsin.

The proposed amendments, only briefly summarized above, will undoubtedly affect leave administration in Wisconsin should the bill become law.

Wal-Mart Case Demonstrates Adequate Response to Harassment Complaint

By: John Kalter

In a recent decision by the United States Court of Appeals for the Seventh Circuit, the court, in a ruling in favor of Wal-Mart, focused on the adequacy of an employer's response to an employee complaint of unlawful harassment. In *Sutherland v. Wal-Mart Stores, Inc.* (7th Cir. Jan. 21, 2011), the court found that Wal-Mart had undertaken a timely and adequate response to the complaint of its employee, Maria Sutherland, that she had been sexually assaulted by a co-worker at work. The court's decision represents an instructive reminder for employers of the actions an employer can take to avoid liability for unlawful harassment, even when the conduct at issue is severe.

Maria Sutherland and Arturo Aguas were co-workers in the deli section of an Indiana Wal-Mart. Unbeknownst to Sutherland, Wal-Mart had investigated a complaint of sexual harassment against Aguas several years earlier in which he was accused of leering at another co-worker, asking her personal questions and presenting her with a gift and card. Wal-Mart's response to this first complaint against Aguas had been to give him two warnings, a response which successfully ended his unwelcome behavior toward the first complaining co-worker.

Aguas' conduct toward Sutherland occurred several years after this first incident when he confronted her in a cooler at the store, gave her an inappropriate Christmas card, grabbed her, tried to kiss her and sexually assaulted her. Sutherland escaped and told her co-workers about the incident. The next day, she and one of her co-workers reported the assault to a Wal-Mart supervisor.
Wal-Mart policy on the investigation of harassment complaints involved three steps in the following order:

1. Interview the complaining employee.
2. Interview any witnesses.
3. Confront the accused employee with all information acquired during the investigation.

The same day that it received Sutherland's complaint, Wal-Mart initiated this process by interviewing Sutherland and

a co-worker who was a witness to some of the events. Subsequently, Wal-Mart conducted additional witness interviews and interviewed Sutherland again. Because Aguas had taken an extended vacation during the investigation, Wal-Mart did not interview him until approximately two weeks later on the day he returned from vacation.

During Wal-Mart's interview with Aguas, he admitted hugging Sutherland, putting his face against hers and giving her a gift, but he denied touching her inappropriately or giving her an inappropriate card. After additional follow-up interviews, Wal-Mart concluded its investigation.

While Wal-Mart concluded that the conduct to which Aguas admitted violated its harassment policy, it was unable to confirm the most serious allegation — that Aguas had sexually assaulted Sutherland. Because the assault was not witnessed by anyone else and because Aguas denied it, Wal-Mart concluded that it could not determine that the assault had occurred.

Wal-Mart issued its most severe discipline — short of termination — to Aguas and adjusted Aguas' and Sutherland's work schedules so as to reduce the overlap of their work to about 90 minutes each week. When their schedules did have them working at the same time, Wal-Mart assigned them to different parts of the store that were 80 feet apart. Sutherland admitted that the company's chosen response resulted in no further contact occurring between her and Aguas.

After Wal-Mart had concluded its investigation, Sutherland filed a complaint with the police. Under questioning, Aguas admited the assault to them and ultimately pled guity to sexual battery. Wal-Mart then fired him for lying during its initial investigation of the incident.

In reviewing these facts, the court made a number of observations that are instructive for employers:

- An employer is not liable for an instance of severe harassment — in this case the assault — simply because it had notice of an earlier, less severe allegation of harassment. Wal-Mart had, according to the court, responded "reasonably and effectively" to the first complaint about Aguas' leering and personal questions (which the court stated "almost certainly alleged no behavior rising to the level of actionable harassment").

- Wal-Mart conducted a sufficiently prompt investigation of Sutherland's complaint. Even though the investigation took approximately two weeks, Wal-Mart began it by interviewing Sutherland the day she complained and Aguas the day he returned from vacation.

- Under the facts of the case, the court essentially approved of Wal-Mart's three-step approach to conducting harassment investigations and the fact that, under the policy, "management should confront the alleged harasser only after acquiring all information available from other sources."

- The court determined that Wal-Mart's initial decision to end the harassment by disciplining Aguas, arranging minimal overlap in schedules and separating him from Sutherland at work when their schedules did overlap was reasonably likely to end the harassment. In fact, according to Sutherland, following this response by Wal-Mart, Aguas did not harass her again. While Sutherland argued that Wal-Mart should have terminated Aguas, given the information it had at the conclusion of the investigation, the court confirmed that termination is not necessarily the only appropriate response to a finding of inappropriate conduct.

EEOC Statistics and the Rise of Retaliation Claims

By: John Kalter

On January 11, 2011, the United States Equal Employment Opportunity Commission (EEOC) released statistics that confirm what labor and employment attorneys have been recognizing — that filings of discrimination charges have been on the rise. In fact, the EEOC's statistics report that more discrimination charges were filed in fiscal year 2010 — which ran from October 1, 2009 through September 30, 2010 — than in any previous fiscal year in the EEOC's history. In total, the EEOC reports that 99,922 discrimination charges were filed with the agency during that time frame.

In reporting these statistics, the EEOC does not speculate as to the cause of the increase. The EEOC's historical data, however, suggests that a noticeable uptick in EEOC discrimination charges actually began in fiscal year 2008 (October 1, 2007 through September 30, 2008) when charge filings jumped over 15% from fiscal year 2007. Last year's record numbers are only a modest increase from fiscal year 2008's numbers. In other words, while fiscal year 2010 was a banner year for the EEOC, that fact is not entirely surprising. Whether the 2008 increase was attributable to the state of the economy, a new administration in Washington and/or other reasons, the increased filing level of the past three fiscal years seems to be the norm for the time being.

Of greater significance in the EEOC's 2010 statistics is the fact that, for the first time, retaliation claims surpassed race discrimination claims to become the most common type of claim made when a charge is filed with the EEOC. Retaliation claims constituted a whopping 36.3% of the charges filed with the EEOC in 2010 — over 1/3 of all charges filed. This

percentage has risen dramatically over the past decade and constitutes a tangible threat to employers, especially given the fact that retaliation claims carry with them damages that are essentially identical to primary discrimination claims (such as race, sex and disability claims). Because an employee can lose his or her primary discrimination claim while succeeding with a retaliation claim, retaliation claims provide an extra avenue for employees to potential recovery against employers. Of all of the numbers reported by the EEOC in mid-January, this one should cause employers to take notice.

Of additional note, religion, disability and age discrimination claims also were on the rise in 2010, and the EEOC reports that it received 201 total charges under the new Genetic Information Nondiscrimination Act (GINA). GINA went into effect on November 21, 2009, and charge-filing statistics under it will surely rise.

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