Legal Update Supplement and Cases of Interest

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I. NLRB POSTER RULE STRUCK DOWN

A. The National Labor Relations Board (NLRB) declared in a rule that it issued in 2011 that employers subject to NLRB jurisdiction would be guilty of an unfair labor practice if they did not post on their properties and on their websites a "Notification of Employee Rights under the National Labor Relations Act."

B. The required poster would have informed employees of their right to form, join, or assist a union; to bargain collectively through representatives of their choosing; to discuss wages, benefits, and other terms and conditions of employment with fellow employees or a union; to take action to improve working conditions; to strike and picket; or to choose not to engage in any of these activities. The rule further required the poster to include NLRB contact information and information concerning basic enforcement procedures. In addition, employers who customarily communicate with their employees electronically were required to publish the NLRB's notice on their intranet or internet sites.

C. The NLRB rule was challenged legally in several courts, and the Court of Appeals for the District of Columbia ruled last week that the poster requirement violated § 8(c) of the National Labor Relations Act. That section provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit."

D. Section 8(c) precludes the NLRB from finding non-coercive employer speech to be an unfair labor practice, or evidence of an unfair labor practice. The Court noted that the poster rule does exactly that because it makes an employer's failure to post the Board's notice an

unfair labor practice, and because it treats such a failure as evidence of anti-union animus in cases involving, for example, unlawfully motivated firings or refusals to hire—in other words, because it treats such a failure as evidence of an unfair labor practice.

II. CASES OF INTEREST

A. James v. Hyatt Regency, 707 F.3d 775 (7th Cir. 2013).

1. James was employed as a banquet steward at Hyatt since 1985. James has severe nearsightedness and Hyatt had provided certain accommodations for his nearsightedness. The job required James to lift pots and pans and to transport garbage cans around the banquet and food-service area.

2. James's eye was injured in a non-work-related altercation in March of 2007. He had surgery for a detached retina in April of 2007.

3. On May 9, 2007, James provided Hyatt with disability benefit paperwork that said he was unable to work in any capacity. On May 10, 2007, James's doctor wrote a note stating that James could return to "light duty," but did not specify any restrictions and did not indicate how long the light duty would last. Then on May 11, 2007, James submitted FMLA paperwork stating that he was unable to work in any capacity. The form stated his condition was probably longstanding and could incapacitate him permanently.

4. James used up his 12 weeks of FMLA, but was under a collective bargaining agreement that gave him up to one year of job-protected leave from the date of his original absence.

5. James's doctor wrote to the Hyatt stating that James was allowed to return to work on August 5, 2007 with the restriction of being "visually impaired." Hyatt told James he could not return to work with restrictions. James did not return to work and subsequently submitted paperwork stating that he was totally incapable of working.

6. On September 25, 2007, another doctor wrote a note stating that James could return to work with "no heavy lifting or excessive bending." This note did not mention anything about visual impairment.

7. Hyatt tried to contact James in September and December of 2007 to seek clarification of the paperwork and conflicting information. James did not respond with additional information.

8. On January 15, 2008, Hyatt wrote to James's first physician to get clarification of James's medical condition. The doctor responded that James could return to work, but could not perform any task that required vision better than 20/200. Hyatt then met with James to discuss his return to work. On February 17, 2008, James returned to the same position, shift and seniority level as before his leave.

9. James sued under the FMLA and the ADA, claiming that he was kept out on leave too long and that Hyatt was obligated to return him to work in April of 2007 when his physician first released him to work.

10. The Court rejected James's claims. The Court noted that once an employee submits a statement from a health care provider which indicates that the employee may return to work, the employer's duty to reinstate the employee has been triggered under the FMLA. However, an employer has no duty under the FMLA to return an employee to his position if the employee cannot perform essential functions of the job. In other words, there is no obligation to return an employee on FMLA to a light-duty assignment. Since James's paperwork stated he was released for "light duty," with no further specifics, Hyatt was not obligated to reinstate him at that time.

11. The Court also noted that in a short period of time, James had submitted conflicting paperwork stating that he was released to "light duty," that he was completely incapable of working, and that it was unknown when James would be able to return to work. Based on the inconsistent and confusing nature of the paperwork submitted, and the fact that there was no indication that James could return to work to perform his essential job functions, Hyatt did not violate the FMLA by refusing to reinstate James.

12. The Court similarly rejected James's claim that Hyatt violated the ADA by failing to return him to work. The Court noted that James's simultaneous submission of conditional doctor releases along with paperwork indicating that he was completely incapable of working, as well as his failure to respond to Hyatt's request for clarification as to his medical condition, meant that Hyatt did not fail to provide reasonable accommodation.

> Practical Pointer: When presented with inconsistent, vague and/or confusing paperwork from an employee regarding a medical condition, it is critical that employers be diligent in following up to get accurate information regarding the employee's condition, work restrictions, and applicable timelines.
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> Bonus Question: At what point in this case did Hyatt potentially misstep in its communications with James?

B. Kasten v. Saint-Gobain Performance Plastics, (7th Cir. 2012).

1. Kasten worked as a non-exempt manufacturing and production employee for Saint-Gobain from October 2003 to December 2006. Non-exempt employees at Saint-Gobain punched in and out on a time clock to track their work time.

2. Saint-Gobain had a "Corrective Action Program" that provided for disciplinary action up to and including termination for employees who failed to punch in and out correctly. The company also had a separate "Attendance Policy" applicable to unexcused absences and tardies.

3. Kasten had received solidly good performance evaluations, but had been formally disciplined on 11 occasions for violations of Saint-Gobain's policies. In February of 2006, Kasten received a disciplinary action relating to failure to punch in and out correctly. Kasten was again disciplined in August of 2006 for punch in and out errors.

4. In the fall of 2006, Kasten claims he reported to Saint-Gobain's management that the location of the time clocks was illegal as it required employees not to account for donning and doffing time.

5. Management at Saint-Gobain had internal discussions regarding whether the location of the time clock was legal. They also exchanged emails indicating that the time clocks had to be moved for compliance with wage and hour law to allow employees to be punched in for the time used to "gown front/prepare for work."

6. Following Kasten's complaint, he was disciplined two additional times regarding punch in and out errors. On December 6, 2006, Saint-Gobain suspended Kasten on the ground that he had violated the time clock punch policy a fourth time. Kasten alleged that before the meeting regarding the suspension, his supervisor stopped him and said "just lay down and tell them what they want to hear, [they] can probably save your job."

7. Kasten alleged that at his suspension meeting, he told management that he believed the location of the time clocks was illegal and that Saint-Gobain would lose if it was challenged in court. He further alleged that on December 8, 2006, he had a telephone conversation with a member of management in which he told her he thought the location of the time clocks was illegal. That same day, one member of Saint-Gobain's management emailed another regarding Kasten stating that "he made the comment to me that if he does get fired his name will be widely known as he has many things in the works."

8. On Saturday, December 9, 2006, Kasten called his shift supervisor and asked whether she had read any articles about a class action lawsuit and time clock punches. The shift supervisor then emailed the Human Resources Team noting that Kasten had called her asking about class action lawsuits and time punches.

9. On December 11, 2006, Saint-Gobain Management called Kasten and told him he was being terminated. On that same day, Saint-Gobain time clocks were moved closer to the donning and doffing area. Saint-Gobain wrote Kasten a termination letter dated December 19, 2006 noting that his termination was in response to his repeated violation of the time clock policy.

10. On August 15, 2007, Kasten and others filed a class action lawsuit against Saint-Gobain for violations of the FLSA including failure to pay nonexempt workers for donning and doffing time. The employees won at the initial stage of the lawsuit, and the lawsuit was subsequently settled.

11. On September 12, 2007, Kasten filed the wage and hour complaint against Saint-Gobain claiming that he had been fired in retaliation for raising complaints of the legality

of the time clock location. He eventually filed suit under the FLSA, and Saint-Gobain argued that Kasten's oral complaints were not protected activity under the FLSA. That issue went all the way to the United States Supreme Court, which held that oral complaints are protected activity under the FLSA's anti-retaliation provision so long as they provide an employer "fair notice" that the employee is asserting rights under the FLSA. The case was sent back down to the district court, and the district court determined that Kasten failed to show a causal link between his complaints on the time clock issue and his ultimate termination.

12. The Court of Appeals reversed the district court, finding that Kasten was entitled to a trial on the issue of whether he was retaliated against due to making oral complaints under the FLSA. The Court pointed to the fact that during litigation, Saint-Gobain's Human Resources Manager admitted that those who decided to terminate Kasten "likely" discussed his protected complaints when deciding to terminate his employment.

13. The Court further stated that retaliation cases are often proven by the proximity in time of the protected activity and the adverse employment action. Here, the timing of Saint-Gobain's termination of Kasten was "suspicious." Before Kasten's complaints about the time clock, Saint-Gobain has selectively disciplined him for time clock errors. Once he raised legal issues about the time clocks, however, he was disciplined each and every time he had a time clock error. Moreover, Kasten was fired two days after emailing his shift supervisor inquiring about a class action lawsuit regarding time clock punches. The Court stressed that timing of adverse action in regard to engaging in protected activity is strong evidence of retaliation.

14. Finally, the Court pointed to the supervisor's statement to Kasten that he should simply tell them what they want to hear. The Court noted that it was for a jury to decide whether this ambiguous statement was merely innocent encouragement or was a message from the supervisor that Kasten had better "play nice" or face consequences.

C. Lang v. Lowe, 2012 WI App 94 (2012).

1. An employee (Lowe) had a company van from his primary employer. Lowe used the van for his part-time job delivering pizzas for Pizza Hut. Lowe's primary employer discovered that Lowe was using the van for his second job, and told him it was not fair. The exact nature of the conversation was not clear, but the employer testified that it would have been clear to Lowe from their meeting that he was not supposed to drive the van for his second job. Despite this conversation Lowe continued to drive the van to deliver pizzas.

2. Lowe got in an accident while he was delivering pizzas, and the woman whom he struck in the accident sued Lowe, Pizza Hut and Pizza Hut's insurers for damages. Pizza Hut's insurer argued it had no duty to defend or pay damages on Lowe's or Pizza Hut's behalf on the theory that the insurance policy it issued did not cover Lowe's pizza delivery activities because Lowe did not have his primary employer's permission to use the van for his pizza delivery job.

3. A jury found that Lowe did not have permission to drive the van for his part-time job and thus Pizza Hut's insurer was dismissed as a defendant in the suit. The Court of Appeals upheld the ruling.

Practical Pointer: Be clear in your instructions to employees about the scope of their permission to use company property and vehicles for non-work related reasons. Setting these rules out in writing is best to remove ambiguity.

D. City of Appleton Police Department v. LIRC, 2012 WI App 50 (2012).

1. A City of Appleton police officer was injured doing push ups in his basement in preparation for a mandatory physical fitness test which required him to do push ups. The employee was available for cash and retirement incentives if he scored well, and was subject to discipline if he did not. The City prepared a DVD available to the employees which demonstrated the acceptable standard for push ups.

2. Under Wisconsin law, an employee is entitled to worker's compensation benefits if they are injured in the course of employment. Specifically, the injury must occur while the employee is "performing services growing out of and incident to his or her employment."

3. In regard to activities related to well-being, the employee will be considered to be performing services growing out of and incidental to his employment if the well-being event or activity is not voluntary or the employee is receiving compensation.

4. The Court rules that the push-ups activity was not voluntary, as the officer was practicing the very activity he would be tested on. If he did not perform well on the test, he would be subject to discipline. The Court also noted that Wisconsin's worker's compensation statutes are to be liberally construed in favor of awarding benefits to injured employees. (The fact that this was a police officer who risks his own being for the public's safety probably did not hurt his case).

E. Shea v. Chrysler Group LLC, LIRC (February 28, 2013).

1. Shea was employed by Chrysler Group and was off of work for health reasons. In February of 2005, Shea attempted to return to work when her doctor released her. The employer obtained an opinion of its own physician regarding Shea's ability to return to work. That doctor reported that due to multiple medical conditions, Shea would be unable to tolerate the prolonged walking and standing her job involved. Moreover, the doctor gave the opinion that Shea was an active alcoholic who would pose a safety risk to herself and others. Thus, despite the fact that the employee had been released by her own doctor to return to work, the employer refused to return her to work. The employee sued for disability discrimination under the Wisconsin Fair Employment Act.

2. In a disability discrimination claim under the WFEA, the employee must initially prove that she has a disability within the meaning of the Act and that the employer's adverse employment action was on the basis of the employee's disability. If the employee can

satisfy these two elements, the employer must establish a defense under the statute, one such defense being that even if an employment decision was based on a disability, that the disability reasonably related to the employee's ability to adequately undertake job-related responsibilities. In evaluating whether an individual with a disability can adequately undertake job-related responsibilities of a particular job, the present and future safety of the individual and of others may be considered. The employer in Shea's case relied on these defenses, arguing that both Shea was actually physically unable to adequately perform her job because of her medical impairments and that she posed a safety risk to herself and others because of her active alcoholism.

3. In reviewing the case, the Labor and Industry Review Commission found that the medical opinions of the employee's own physician were actually more persuasive than those of the doctor relied on by the employer. The employee's doctor was extremely familiar with her history and condition having treated her for several years. His opinion that the employee was physically capable of performing her job as a picker for the employer was persuasive to LIRC. He had conducted a number of physical examinations on Shea pertinent to her job duties and testified, to a reasonable degree of medical certainty, that she was subject to no restrictions regarding her job duties.

4. The court also considered that the employer never sought to have a functional capacity examination conducted on the employee. If indeed the employer's doctor believed the employee had functional limitations which prevented her from doing the job, it could have subjected her to such an examination that would have produced specific evidence on questions of whether she could do the walking, lifting and climbing tasks necessary for her job.

5. The employee's doctor was also persuasive that the employee was not an alcoholic and did not present any safety hazard in connection with consumption of alcohol. Her physician testified that he was aware that her psychiatrist had prescribed her a medication that was contraindicated for use in alcoholics. Moreover, her physician stated that as a routine matter, he questioned about her about her alcohol consumption, and had no indication that she had any problem with alcohol.

> Practical Pointer: Employers cannot assume that they are free to rely on physician opinions that they have obtained regarding an employee. Often, physicians will disagree about employee restrictions and abilities on the job. Employers must take care not to discount the opinions of an employee's physician and must follow up to ensure accuracy of information before making employment-related decisions.