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“Employee Briefs”
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Union Membership

Local, state and federal employees now make up 51.5% of all union members in the United States. This is the first time that government workers constitute the majority of unionized employees. 37.4% of federal workers were union members in 2009, up from 36.8% in 2008. Congress is now considering whether to grant bargaining rights to the Transportation Security Administration's (TSA) approximately 50,000 workers. Overall, union membership has declined by 2.5 million people since the Bureau of Labor Statistics started keeping records in 1983. Unionized employees, now represent 12.3% of the U.S. workforce. Unions represent 7.2% of private sector employees. According to participants at a recent U.S. Chamber of Commerce conference, unions are increasingly turning to so-called corporate campaigns to pressure companies to recognize them without secret ballot elections. Corporate campaigns utilize the media and religious and other organizations, as well as contacting customers to apply pressure.

Pre-Employment

The Eleventh Circuit held in Harrison v Benchmark Electronics Huntsville, Inc that a disabled employment applicant based on allegedly unlawful questions asked during the pre-employment process can go to trial on his allegation of a violation of the Americans with Disabilities Act. In this case Harrison, who has epilepsy (under control through barbiturates), applied for a job and agreed to take a drug test as part of the pre-employment process. The test came back positive and Harrison explained his use of barbiturates to medical personnel with a plant supervisor in the room. The supervisor decided not to make an offer of employment. Previously, Harrison was being temporarily assigned to work at Benchmark as an employee of a subcontractor. After the positive drug test, the supervisor contacted the subcontractor and told them to no longer send Harrison to Benchmark. Harrison filed charges of the ADA violation with the EEOC. The EEOC concluded that he was not disabled. Harrison then sued Benchmark claiming that subjecting him to an unlawful pre-employment medical inquiry was in violation of the ADA. The District Court dismissed the case. Harrison appealed and a panel of the Eleventh Circuit reversed the District Court's decision. The court explained that in the pre-offer stage, an employer may not conduct a medical examination or ask questions of an applicant as to whether the applicant is disabled or as to the nature of such disability, but only if the applicant is able to perform job-related functions. The ADA does have an exemption making pre-employment drug test permissible as well as follow up questions asking the applicant what drugs the applicant has taken which would result in a positive test. Disability questions are still prohibited. In this case, because the supervisor was in the room when the applicant explained to medical personnel why he had a positive drug test, a jury could conclude that the supervisor was attempting to elicit information about a disability in violation of the ADA. Therefore, the court held the case could go to a jury.

Appearance Discrimination

A female hotel desk clerk was fired after a female company executive decided that the clerk did not have the “Midwestern girl” look that the company wanted at the front desk. The female employee had successfully performed the day shift’s front desk job for one month when she was fired. The female clerk did not wear makeup and wore men’s button down shirts and slacks. Prior to being put on the front desk, the female employee had worked the night shift. After the executive determined that she did not have the “look,” she was offered the opportunity to return to the night shift. She refused and was fired because she was “hostile toward company policies.” The employee sued asserting that the company fired her for not conforming to sexual stereotypes. The District Court granted the employer’s motion for summary judgment. The Eighth Circuit reversed and held that sexual stereotyping can violate Title VII when it influences employment decisions. Under Title VII, an unlawful employment practice occurs when it can be proven that an adverse employment action is due to the employee’s gender. The court held that an adverse employment decision based on the employer’s perception of what a female should look or dress like was indeed a decision based on gender. Lewis v Heartland Inns of America

Performance

The Seventh Circuit held that when an employee’s performance is proven to be deficient and an adverse employment action is based on those deficiencies, other factors which by themselves might be discriminatory are trumped by the deficiencies resulting in claims of discrimination being dismissed. In Senske v Sybase, a 58 year old sales manager was terminated when, after several years of being the top salesman, he had a year that fell 80% below reasonable company sales expectations. The employee sued claiming age discrimination. The court affirmed the dismissal based on the performance deficiencies.

In another case, the Eighth Circuit dismissed a lawsuit brought by two reporters of a newspaper who were terminated and sued based on their allegation that the employer terminated them because of “their traditional Christian beliefs about homosexuality.” The employer was able to prove that the reporters did not meet legitimate performance expectations and that was the real reason for their terminations. Patterson v Indiana Newspapers

Damages

The Ninth Circuit held that the Americans with Disabilities Act does not allow a plaintiff to recover compensatory damages for emotional distress or punitive damages for asserted retaliation. Only equitable damages such as reinstatement, front pay and back pay are allowable damages under the ADA. Alverado v Cajun Operating Company. There is some movement in Congress to overturn this decision and allow for both compensatory and punitive damages in ADA cases.

Agenda

The Department of Labor has announced increased audit and enforcement procedures against employers related to the misclassification of employees as “exempt” from the application of the FLSA as well as the misclassification by employers of individuals as “independent contractors.” The proposed budget for the next fiscal year includes increased funds in order to allow the DOL to hire additional investigators to strictly enforce these provisions of the FLSA. The additional audits may lead to more class action cases and criminal prosecution of management employees for willful violations of the law. The EEOC has announced that it will focus on disability and equal pay issues as well as pattern or practice discrimination.

Professional

The FLSA specifies that “professionals” are exempt from the overtime provisions of the law, however, the FLSA does not define what a professional is. The Second Circuit in Young v Cooper Cameron Corp ruled against an employer who contended that a plaintiff with 20 years of service with the employer who performed a type of engineering design work on a sophisticated piece of equipment used on a oil rig was a professional and therefore exempt from the payment of overtime pay for the hours worked in excess of 40 in a work week. The court relied on DOL regulations which provide that the work done by an employee must be in a field of science or learning customarily acquired by a prolonged course of specialized study and the best evidence of this is a specialized academic degree. The employee in question did not have such a degree. The court opined that in rare cases, a degree might not be necessary if other individuals performing the same work typically held such a degree. That was not true in this case.

Words

The Eleventh Circuit held in Reeves v C.H. Robinson World Wide, Inc that words and conduct, even if not directed to a co-worker, may constitute a hostile work environment. In this case, some male employees in a workplace played offensive radio shows, displayed a picture of a nude woman on a computer screen and used derogatory words to refer to women generally. No derogatory word or actions were directed toward a female co-worker. After the employer failed to put a stop to these words and actions after she complained, the female employee sued. The court held that the words and actions created an objectively hostile work environment for any woman. The majority of circuit courts have reached this same conclusion. While Title VII does not address sexual remarks, vulgarity or boorishness, employers may be held liable if after receiving a complaint or complaints they do not put a stop the frequent use of derogatory language that is gender based or actions that might be offensive. Court decision after court decision reach the conclusion that employers will be liable for discrimination if they do not promptly investigate complaints of discrimination and, where warranted, take effective steps to respond to the complaints.

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