WorkSmarts Half-Day Seminar

And the Survey Says: Developments from the Courts & Practical Takeaways

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Overview

Case Law | Summary of Jurisdictions Covered

- **United States Supreme Court**
- **4th Circuit**: West Virginia, Virginia, North Carolina, South Carolina
- **5th Circuit**: Texas, Louisiana, Mississippi
- **6th Circuit**: Tennessee, Kentucky, Ohio, Michigan
- **8th Circuit**: Missouri, Minnesota, Nebraska, Iowa, Arkansas, North Dakota, South Dakota
- **10th Circuit**: Kansas, Oklahoma, Colorado, New Mexico, Utah, Wyoming
- **11th Circuit**: Florida, Georgia, Alabama
- **Nevada Supreme Court**

Important Developments In L&E Law

- Ending Forced Arbitrations of Sexual Assault and Sexual Harassment Act ("EFASA")
- NLRB's Revised Joint Employer Standard
- Colorado Family and Medical Leave Insurance Program
- Equal Pay Act Claims – Prior Salary History
- Florida Individual Freedom Act (aka the "Stop-WOKE law")
- Colorado Wage & Hour Law Amendments – Late Pay & Wage Theft
- Crown Laws

United States Supreme Court

Dobbs v. JWHO

- **Facts:**
  - Under prior case law, state governments and the federal government could not place restrictions on pre-viability abortions because doing so would violate the individual's constitutional right to privacy.
  - It is undisputed that a fetus is not legally viable at 15 weeks.
  - Nonetheless, in 2018, the state of Mississippi passed a law that generally prohibits abortions performed after the 15th week of pregnancy (the Gestational Age Act, "GAA").
  - Jackson Women's Health Organization ("JWHO") sued the state of Mississippi and sought to have the GAA declared unconstitutional.

Dobbs v. JWHO

- **Issue:** Does the constitutional right to privacy prevent the government from prohibiting and/or regulating pre-viability abortions?
- **Holding:** No.

Dobbs v. JWHO | State “Aiding & Abetting” Laws

- **Texas** – Tex. Health & Safety Code Ann. § 171.208
- **Oklahoma** – Okla. Stat. Ann. tit. 63, § 1-745.39 (West)
  - Provides for private right of action
  - “Aiding and abetting” expressly includes “paying for or reimbursing the costs of an abortion through insurance or otherwise”
  - $10,000 in statutory damages per abortion that was aided and abetted
  - Costs and reasonable attorneys’ fees

Dobbs v. JWHO | Open Questions

- Whether and to what extent can employers lawfully offer extended health/travel benefits to employees that live in states that prohibit abortions and/or severely restrict access to abortions?
- Whether and to what extent can employers continue offering and/or contributing to health insurance plans that cover abortion-related expenses?

Kennedy v. Bremerton School District

- **Facts:**
  - An assistant high school football coach had a routine practice of kneeling in prayer at mid-field after games concluded. He would also, at times, lead the team in prayer in the locker room.
  - Over the course of the 2015 football season, a dispute arose between the coach and the school district regarding whether and to what extent he could pray at mid-field and/or encourage students to pray with him.
  - The coach and the school district were ultimately unable to reach agreement as to how to accommodate the coach's religious practices while also ensuring that the school district was not directly and/or indirectly endorsing the coach's religious views/practices.
  - The school district suspended the coach for the final few games of the 2015 season in response to the coach's continued on-field post-game praying with the team. The coach refused to return for the 2016 season and sued the school district.

Kennedy v. Bremerton School District

- **Issue:** Did the school district violate the coach's constitutional rights by suspending him for conducting on-field post-game prayers with students?
- **Holding:** Yes.

  - "The Free Exercise and Free Speech Clause of the First Amendment protect an individual engaging in personal religious observance from government reprisal. . . . When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech 'ordinarily within the scope' of his duties as a coach."

4th Circuit Court of Appeals

Walton v. Harker

- **Facts 1 of 2:**
  - Cathy Walton was employed by the Navy as an Administrative Specialist in the Contracts Administration section.
  - In 2005 and 2007, Ms. Walton filed internal EEOC charges of discrimination. The 2005 charge was dismissed with a no probable cause finding and the 2007 charge was resolved via a negotiated settlement.
  - During a meeting in 2012, Ms. Walton's supervisor (Ms. Johnson) allegedly said the following about why she was not placing Ms. Walton on a contracting process improvement team:
    - "*I basically don't want anything to do with Cathy. I am not going to talk to Cathy unless I have to. Because I'm afraid she will file a lawsuit, another EEOC lawsuit.*"

Walton v. Harker

- **Facts 2 of 2:**
  - In 2013, the Navy reassigned Ms. Walton to a position within the Task Orders section of the Contract Division in response to changes caused be a new statutory requirement. Her pay and benefits remained the same.

  - Shortly after the reassignment, Ms. Walton filed another EEOC charge alleging that the reassignment was a demotion in retaliation for the filing of her previous EEOC charges.

Walton v. Harker

- **Issue:** Did Ms. Johnson's alleged statement constitute direct evidence of discriminatory animus behind the decision to transfer Ms. Walton to the Task Orders position?
- **Holding:** No.
  - Ms. Johnson had no involvement in the 2005 or the 2007 EEOC charges.
  - Ms. Johnson was not a decision maker in the 2013 reassignment process.

Williams v. Kincaid

- **Facts 1 of 2:**
  - Kesha Williams is a transgender woman with gender dysphoria.
  - She was incarcerated in an adult detention center for six months.
  - She was initially assigned to women's housing but was subsequently moved to men's housing when the prison learned she was transgender.
  - While incarcerated, the prison failed to timely provide Ms. Williams with her hormone medication. Additionally, she was harassed/bullied by male inmates and guards.

Williams v. Kincaid

- **Facts 2 of 2:**
  - Ms. Williams sued the prison under § 1983 asserting violations of the ADA.
  - The prison moved to dismiss the lawsuit on the grounds that gender dysphoria is not a disability under the ADA.
  - The district court granted the motion and held that gender dysphoria is an identity disorder not resulting from physical impairments and, therefore, did not qualify as a disability under the ADA.

Williams v. Kincaid

- **Issue:** Does gender dysphoria qualify as a disability under the ADA?
- **Holding:** Yes.
  - In 2013, the American Psychiatric Association abandoned the definition of gender identity disorders it had adopted in the 1990s and stopped recognizing it as a valid psychiatric diagnosis. At the same time, it created and adopted a definition for gender dysphoria and began recognizing it as a valid psychiatric diagnosis.
  - The new definition "focuses on dysphoria as the clinical problem, not identity per se."
  - Ms. Williams allegations raised a reasonable inference that her gender dysphoria has some physical basis and, therefore, qualifies a disability.

Sempowich v. Tactile Sys. Tech., Inc.

- **Facts 1 of 2:**
  - Tracy Sempowich was employed by Tactile Systems Technology as a Regional Sales Manager
  - In 2014, Tactile hired Greg Seeling as a Regional Sales Manager. His base salary was higher than Ms. Sempowich's.
  - In 2018, Tactile informed Ms. Sempowich that:
    - Mr. Seeling was being promoted to Area Director
    - Her sales region (the Mid-Atlantic Region) was being re-assigned to Mr. Seeling
    - She was being transferred into a newly created position called Market Development Manager. Unlike her prior position, there was no opportunity for incentive compensation.
  - Ms. Sempowich responded by filing a complaint with the HR department.

Sempowich v. Tactile Sys. Techs., Inc.

- **Facts 2 of 2:**
  - Tactile subsequently gave Ms. Sempowich an ultimatum, accept the new position or her employment would be terminated. Ms. Sempowich refused and her employment was terminated.
  - Ms. Sempowich sued Tactile and asserted a variety of claims including an Equal Pay Act claim.
  - The district court held that the EPA claim failed as a matter of law because, although Mr. Seeling was paid a higher base salary than Ms. Sempowich, he ultimately earned less money overall once commission compensation was taken into consideration (i.e., no claim because total wages were equal).

Sempowich v. Tactile Sys. Techs., Inc.

- **Issue:** When determining whether an employer paid different wages to employees of the opposite sex, do you compare total wages received or the rates of pay?
- **Holding:** You compare the rates of pay.
  - An employer may not pay a female employee a lower salary than a similarly situated male employee and then hope to avoid liability if the employee works hard enough to earn extra money through commissions or bonuses.

5th Circuit

Hamilton et al. v. Dallas County

- **Facts:**
  - The Dallas County Jail employs male and female prison guards.
  - In April of 2019, the DCJ adopted a gender-based scheduling policy where female officers were allowed two weekdays off or one weekday and one weekend day off per week whereas male officers were given two full weekend days off per week.
  - Nine female prison guards sued the DCJ under Title VII alleging unlawful sex discrimination.
  - The district court held that the plaintiffs failed to state a claim because they did not suffer an adverse employment action and granted DCJ's motion to dismiss.

Hamilton et al. v. Dallas County

- **Issue:** Did the DCJ violate Title VII by expressly discriminating on the basis of gender as to scheduling days off?
- **Holding:** Under current 5th Circuit precedent, no.
  - "The conduct complained of here fits squarely within the ambit of Title VII's proscribed conduct: discrimination with respect to the terms, conditions, or privileges of one's employment because of one's sex. . . . Yet we are bound by this circuit's precedent, which requires a Title VII plaintiff to establish a prima facie case of discrimination by showing, *inter alia*, that she suffered some adverse employment action."
  - The 5th Circuit has previously held that "[a]dverse employment actions include ***only*** ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating."

Hamilton et al. v. Dallas County

- **Important Note:** The court of appeals judge expressly encouraged the plaintiffs to seek *en banc* review of this issue.

Saketkoo v. Admin. Tulane Edu. Fund

- **Facts 1 of 3:**
  - Lesley Saketkoo was hired as an associate professor at the Tulane School of Medicine in 2014. Her one year employment contracts were continually renewed until 2019.
  - Dr. Saketkoo started in the Allergy and Immunology Section but was transferred to the Pulmonary Section in 2017. After the transfer, her supervisor was Dr. Joseph Lasky.
  - Dr. Lasky regularly engaged in abrasive and unprofessional conduct that was directed at Dr. Saektkoo as well as other male and female colleagues.

Saketkoo v. Admin. Tulane Edu. Fund

- **Facts 2 of 3:**
  - The conduct directed toward Dr. Saketkoo included the following:
    - Cut her off during a conversation and told her it was “not her place” to discuss the needs of clinic
    - Flailed his arms and yelled that he was “sick of this” when being asked about use of funds by her
    - Hovered over her shoulder and shouted “I already told you what it was” while documenting heart catheterization results
    - Told Dr. Saketkoo that “we don’t need you thinking, we need you working!”

Saketkoo v. Admin. Tulane Edu. Fund

- **Facts 3 of 3:**
  - In 2018, Dr. Saketkoo reported Dr. Lasky's behavior to multiple people including the HR department.
  - In February of 2019, Tulane informed Dr. Saketkoo that it would not be renewing her contract due to budgetary issues.
  - Dr. Saketkoo sued Tulane alleging unlawful sex discrimination, retaliation, and harassment under Title VII.

Saketkoo v. Admin. Tulane Edu. Fund

- **Issue:** Was Dr. Lasky's conduct so severe and pervasive that it qualified as actionable harassment under Title VII?
- **Holding:** No.
  - "[The 5th Circuit has] routinely held that similarly sporadic and abrasive conduct is neither severe nor pervasive."
  - Additionally, "the record shows that Dr. Lasky treated male physicians in a similarly abrasive manner and that they also complained about his behavior. . . . Dr. Lasky's workplace demeanor is lamentable, but that circumstance does not supplant a plaintiff's burden to satisfy each element of a Title VII cause of action."

EEOC v. Wal-Mart Stores, Texas, LLC (S.D. Tex.)

- **Facts 1 of 2:**
  - Jessi Landry is a congenital amputee who is missing her right forearm and hand.
  - She applied and was interviewed for a stocker position at Wal-Mart.
  - Ms. Landry was not selected for the position. She filed a charge of discrimination and later sued because the initial interviewer allegedly told her that she would not be able to do the job because of her disability.
  - Wal-Mart filed a responsive position statement and supplemented it two different times.

EEOC v. Wal-Mart Stores, Texas, LLC (S.D. Tex.)

- **Facts 2 of 2:**
  - In its first position statement, Wal-Mart stated that it interviewed Ms. Landry but it did not hire her because it selected a better qualified candidate.
  - In its second supplemental position statement, Wal-Mart stated that it now had reason to believe that Ms. Landry was likely never interviewed for the stocker position.
  - In its third supplemental position statement, Wal-Mart provided additional details explaining its position that the interview never occurred.
  - The EEOC brought suit on behalf of Ms. Landry. It and Wal-Mart both moved for summary judgment.

EEOC v. Wal-Mart Stores, Texas, LLC (S.D. Tex.)

- **Issue:** Is there a genuine issue of material fact as to whether the reasons proffered by Wal-Mart for not hiring Ms. Landry are a pre-text for unlawful disability discrimination?
- **Holding:** Yes.
  - "Wal-Mart has not been consistent with its reasons for failing to hire Landry. Although Wal-Mart now claims Landry was not hired for the stocker position . . . because she expressed no preference for that position in her application materials, in its first position statement to the EEOC, Wal-Mart stated that Landry was interviewed – but not hired – for the stocker position because she was not the most qualified candidate."

6th Circuit

Bledsoe v. TVA Board of Directors

- **Facts 1 of 2:**
  - Robert Bledsoe was employed by the Tennessee Valley Authority (TVA) as a nuclear-plant operator
  - The TVA is a federally owned corporation that provides utilities to the Tennessee Valley region.
  - In October 2016, Mr. Bledsoe took medical leave to manage his liver cirrhosis.
  - Upon his return from medical leave, Mr. Bledsoe's supervisor (Mr. Dahlman) made numerous comments about his health and suggested he was too old and/or sick to do the job.

Bledsoe v. TVA Board of Directors

- **Facts 2 of 2:**
  - Starting in 2017, Mr. Dahlman began lobbying to have Mr. Beldsoe demoted to a different role. In February of 2018, the TVA Board decided to remove Mr. Bledsoe from his instructor position and transferred him to a job that substantially decreased his salary.
  - Mr. Bledsoe filed a complaint with the TVA's Equal Opportunity Commission as well as filing a lawsuit in district court alleging claims under the ADEA and the Rehabilitation Act (§ 501 – applies to federal employees).
  - The district court granted summary judgment in favor of TVA on all of Mr. Bledsoe's claims.

Bledsoe v. TVA Board of Directors

- **Issue:** When bringing claims under § 501 (as opposed to § 504) of the Rehabilitation Act, must the plaintiff establish "but for" causation or "sole cause" causation?
- **Holding:** But for causation.
  - "Applying this standard here, federal-employee plaintiffs like Bledsoe who bring § 501 claims must show that they would not have been subject to the adverse action but for the discrimination."

Wethington v. Sir Goony Golf of Chattanooga, Inc. (E.D. of Tenn.)

- **Facts 1 of 3:**
  - SGGC is a family fun center with various amusement attractions such as go-karts and miniature-golf courses.
  - Randy Wethington was employed there as a manager.
  - In November of 2018, Mr. Wethington's wife was diagnosed with stage 4 colorectal cancer.
  - Mr. Wethington requested 17 days off in August of 2019 so that he could take his wife to various appointments.
  - Mr. Wethington never requested FMLA leave and he was paid his fully salary during this time. In August, no one at SGGC complained about his job performance or absences.

Wethington v. Sir Goony Golf of Chattanooga, Inc. (E.D. of Tenn.)

- **Facts 2 of 3:**
  - On October 18, 2019, Mr. Wethington had a meeting with the president of SGGC (Mr. Magrath). The content of the conversation during that meeting is hotly disputed:
    - Mr. Wethington claims that Mr. Magrath criticized his job performance, said the company couldn't take the absences any more, and that he had a business to protect.
    - Mr. Magrath claims that Mr. Wethington said he "can't do this anymore" but that he didn't want to resign because then he wouldn't get unemployment.

Wethington v. Sir Goony Golf of Chattanooga, Inc. (E.D. of Tenn.)

- **Facts 3 of 3:**
  - SGGC terminated Mr. Wethington but cited “lack of work” as the reason for the termination. Additionally, Mr. Magrath wrote a very complimentary letter of reference for Mr. Wethington.
  - Mr. Wethington subsequently sued SGGC and, among other things, asserted an associational discrimination claim under the ADA.
  - The financial records produced during discovery showed that SGGC was profitable during the entire time Mr. Wethington was its manager.

Wethington v. Sir Goony Golf of Chattanooga, Inc. (E.D. of Tenn.)

- **Issue:** Was there a genuine issue of material fact as to whether SGGC terminated Mr. Wethington's employment because of his association/relationship with his disabled wife?
- **Holding:** Yes.
  - SGGC claimed that Mr. Wethington was being terminated due to lack of work but the accounting records showed that it was financially sound.
  - Even if SGGC tried to claim the termination was performance related, that position is undermined by Mr. Magrath's letter of recommendation.

8th Circuit

Muldrow v. City of St. Louis

- **Facts:**
  - Jatonya Muldrow worked in the St. Louis Police Department's Intelligence Division
  - In June of 2017, a newly named supervisor (Captain Deeba) began making personnel changes and, as a part of those changes, transferred Ms. Muldrow to a position in the 5th District.
  - Ms. Muldrow's salary remained the same but she lost certain privileges that were unique to her role in the Intelligence Division (e.g., had to return FBI-issued vehicle and credentials).
  - On June 22, 2017, Ms. Muldrow filed a charge of discrimination with MCHR and the EEOC. At the same time, she began requesting transfers out of the 5th District.
  - After submitting multiple requests, Ms. Muldrow was ultimately transferred out of the 5th District and back into the Intelligence Division.

Muldrow v. City of St. Louis

- **Issue:** Did Ms. Muldrow's transfer from the Intelligence Division to the 5th District constitute an adverse employment action?
- **Holding:** No
  - "This Court has repeatedly found that an employee's reassignment absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action. . . . Sergeant Muldrow's transfer to the Fifth District did not result in a diminution to her title, salary, or benefits. She offers no evidence that she suffered a significant change in working conditions or responsibilities and, at most, expresses a mere preference for one position over the other. . . . This is insufficient to show her transfer constituted an adverse employment action."

10th Circuit

Ford v. Jackson Nat. Life Ins.

- **Facts 1 of 3:**
  - LaTonya Ford was employed by Jackson National Life Insurance (JNLI) as a Business Development Consultant.
  - In 2009, Ms. Ford submitted eleven internal applications for promotion to higher level positions. Ms. Ford made the short-list and was interviewed for the majority of these positions but, each time, was not selected.
  - JNLI said she was not selected because the other candidates performed better in the interviews.

Ford v. Jackson Nat. Life Ins.

- **Facts 2 of 3:**
  - On September 10, 2009, Ms. Ford's supervisor (Mr. Corey) placed her on a performance improvement plan (e.g., failing to meet her talk time requirement, being unwilling to help peers, and failing to complete management requests).

  - Ms. Ford responded to the PIP by filing a four page complaint with the HR department alleging sex and race discrimination. The HR department investigated the allegations and concluded there was no evidence of discrimination. However, the PIP was rescinded and Ms. Ford was assigned to a new supervisor to give her a fresh start.

Ford v. Jackson Nat. Life Ins.

- **Facts 3 of 3:**
  - Ms. Ford continued to experience conduct that she believed was discriminatory and filed a charge of discrimination with the EEOC in December of 2009.
  - The EEOC found probable cause and filed suit against JNLI in 2016. Ms. Ford and multiple other former employees intervened in the case.
  - In 2020, JNLI and the EEOC reached agreement on a consent decree that resolved all claims against it. However, Ms. Ford refused to join into the consent decree and was allowed to pursue a separate lawsuit against JNLI as to her claims.
  - The district court gratin JNLI's motion for summary judgment on all of Ms. Ford's claims.

Ford v. Jackson Nat. Life Ins.

- **Issue 1 of 2:** Did JNLI unlawfully retaliate against Ms. Ford when it placed her on the PIP?
- **Holding:** No.
  - "In our circuit, a PIP, standing alone, is not an adverse employment action. . . . [A] PIP may be an adverse employment action if it effects a significant change in the plaintiff's employment status. . . . Ford's protected activity, like her EEOC complaint and four-page letter to HR, *post*-dated the PIP. . . . Because Ford's protected activity occurred after Walker imposed the PIP, she cannot maintain her retaliation claim on that basis."

Ford v. Jackson Nat. Life Ins.

- **Issue 2 of 2:** Did JNLI's reliance on some subjective criteria during hiring process (i.e., interview performance) create a fact issue as to whether its legitimate and non-discriminatory reasons for not promoting Ms. Ford were actually a pretext for unlawful discrimination?
- **Holding:** No.
  - "We typically will infer pretext from employers' use of subjective evaluation criteria in the hiring process ***only when*** the criteria on which the employers ultimately rely are ***entirely subjective in nature***. [JNLI] has given *some* objective measurements for hiring candidates over Ford. For example, May preferred candidates with a strong connection to, and deep knowledge of, the territory in question. Selecting candidates based on their familiarity with an area is an objective criterion."

11th Circuit

Brown et al. v. Nexus Business Solutions, LLC

- **Facts 1 of 3:**
  - In 2013, General Motors (GM) launched “Operation Conquest” – an initiative aimed at increasing business for its dealerships. The plan involved recruiting business development managers who would specialize in finding new corporate customers and persuading them to purchase GM vehicles.

  - GM did not directly employ the Business Development Managers (BDMs). It outsourced the hiring and managing to a separate entity (Nexus Business Solutions, “NBS”) and then provided data and resources to that entity.

Brown et al. v. Nexus Business Solutions, LLC

- **Facts 2 of 3:**
  - The Business Development Managers:
    - Were paid on a salary basis at a rate greater than $684 per week
    - Regularly worked far more than 40 hours per week
    - Made cold calls following NBS's pre-made call scripts
    - Had discretion in choosing which sales leads to develop
    - Performed customized research before meeting with leads
    - Revised pre-made presentations so that they were tailored to needs of each lead
  - NBS classified the BDMs as exempt and did not pay them any overtime.

Brown et al. v. Nexus Business Solutions, LLC

- **Facts 3 of 3:**
  - A group of BDMs sued NBS under the FLSA alleging they had been misclassified and had not been paid proper overtime compensation.
  - It was undisputed that the BDMs were paid above the salary threshold and that they mainly performed office or non-manual work directly related to the management or general business operations of NBS.
  - However, the BDMs argued that they did not exercise sufficient discretion and independent judgment with respect to matter of significance to qualify as exempt under the administrative exemption.

Brown et al. v. Nexus Business Solutions, LLC

- **Issue:** Did the BDMs have sufficient discretion and independent judgment with respect to matters of significance to qualify as exempt under the FLSA's administrative exemption?
- **Holding:** Yes.
  - "A worker need not have limitless discretion or a total lack of supervision to qualify as an administrative employee. . . . [The BDMs] had a hand in choosing which leads to develop, performed customized research before meeting with selected leads, and delivered presentations that necessarily required some amount of customization. . . . One employee testified that even though he was given a particular set of steps to follow, he would choose to go out of order so he could do whatever would be best for the customer . . ."

State Supreme Court Decisions

Ceballos v. NP Palace, LLC

- **Facts 1 of 3:**
  - Nevada has legalized adult recreational marijuana use. But . . .
    - Nevada law authorizes employers to prohibit or restrict recreational marijuana use by employees (Nev. Rev. Stat. § 678D.510(1)(a)).
    - And Nevada created a private right of action in favor of an employee who is discharged from employment for engaging in "the lawful use in [the state of Nevada] of any product outside the premises of the employer during the employee's non-working hours" (Nev. Rev. Stat. § 613.333).

Ceballos v. NP Palace, LLC

- **Facts 2 of 3:**
  - Danny Ceballos worked at Palace Station Casino as a table games dealer. He had good job performance and no disciplinary issues.
  - On June 25, 2020, he slipped and fell in the employee breakroom and, as a result, was required to take a post-accident drug test.
  - Mr. Ceballos tested positive for marijuana and Palace Station responded by terminating his employment for the positive test.
  - It was undisputed that Mr. Ceballos was not impaired when fell in the breakroom and that he had no used marijuana within 24 hours of the shift.

Ceballos v. NP Palace, LLC

- **Facts 3 of 3:**
  - Mr. Ceballos sued Palace Station under Nevada's lawful off-duty use law and asserted a common law tortious discharge claim.
  - The district court granted Palace Station's motion to dismiss for failure to state a claim upon which relief can be granted and the court of appeals affirmed.

Ceballos v. NP Palace, LLC

- **Issue 1:** Did Mr. Ceballos have a claim under NRS § 613.333?
- **Holding:** No.
  - "Lawful use in this state" must be interpreted to mean "lawful under both state and federal law."
  - Marijuana use/possession is still unlawful under federal law and, therefore, Mr. Ceballos's off-duty conduct was not protected by NRS § 613.333.

Ceballos v. NP Palace, LLC

- **Issue 2:** Did Mr. Ceballos have a common law tortious discharge claim?
- **Holding:** No.
  - "In Nevada, tortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy. . . . Ceballos asserts a statutory right to engage in adult recreational marijuana use under NRS Chapter 678D when not at work, . . . [T]his asserted right is personal to Ceballos. It does not concern employer-coerced criminal activity, workers' compensation for an on-the-job injury, or public service, . . . With no public dimension or tie to dangerous or illegal working conditions, Ceballos's claim differs fundamentally from the rare and exceptional cases [recognized in the relevant case law]."

Important Developments in L&E Law

Ending Forced Arbitrations of Sexual Assault and Sexual Harassment Act

- Signed into law on March 3, 2022, and became effective immediately.
- Amends the FAA to give plaintiffs asserting sexual harassment and/or sexual assault claims the ability to opt-out of previously signed arbitration agreements.
- Court, not arbitrator, is empowered to decide EFASA's applicability to the relevant arbitration agreement regardless of whether arbitration agreement gives that power to arbitrator.
- Remains unclear whether an EFASA opt-out would only cover the sexual harassment and/or assault claims or all claims in the case.

NLRB | New Proposed Joint Employer Standard

- Proposes rescinding and replacing the final rule that was published on February 26, 202 and took effect on April 27, 2020.
- Proposal would allow “a party asserting a joint-employment relationship [to] establish joint-employer status with evidence of indirect and reserved forms of control, so long as those forms of control bear on employees’ essential terms and conditions of employment.”
- Broadens the type of conduct that can give rise to joint-employer status for NLRA purposes.

Colorado “FAMLI” Program

- Colorado’s new paid Family and Medical Leave Insurance Program
- Covered employers must begin withholding a 0.9% payroll tax from their Colorado employees beginning on January 1, 2023 and remitting those taxes to the state.
- Covered employers must register with My FAMLI+ (the state-run FAMLI leave software portal expected to launch in Q4 of 2022).
- Employers can choose to create and/or administer compliant “private plans.” Detailed regulations on private plans have yet to be released.
- Colorado employees entitled to benefits under FAMLI starting on January 1, 2024.

Colorado – Wage Theft & Late Pay Amendments

- Effective January 1, 2023, increased penalties for late payment of wages and/or failure to pay wages to employees:
  - If employer fails to pay wages owed within 14 days of employee making written demand or filing a lawsuit or administrative action then there is an automatic penalty of 2x the amount of the unpaid wages or $1,000 – whichever is greater.
  - If the employee can show the violation was willful then it is 3x the amount of unpaid wages or $3,000 – whichever is greater.

Colorado – Wage Theft & Late Pay Amendments

- Effective August 10, 2023, there is a private right of action for employees who believe they have been discriminated against or retaliated against for filing a wage complaint, testifying, or providing evidence.
- Available damages include:
  - Back pay
  - Reinstatement or front pay
  - 12 percent interest
  - Penalty of $50 per day per employee
  - Liquidated damages equal to the greater of 2x times the amount of unpaid wages or $2,000
  - Injunctive relief
  - Reasonable attorneys' fees and costs

Equal Pay Act | Prior Salary History

- Circuit split as to whether prior salary history is a “factor other than sex.”
- As of now, 18 states have passed laws prohibiting employers from inquiring into or considering a job applicant’s wage or salary history:

Alabama	California	Colorado
Connecticut	Delaware	Hawaii
Illinois	Maine	Maryland
Massachusetts	Nevada	New Jersey
New York	Oregon	Puerto Rico
Rhode Island	Vermont	Washington

Florida Individual Freedom Act

- Colloquially referred to as the “Stop-WOKE” law
- Purports to prohibit employers from presenting certain themes or ideas during diversity and/or anti-discrimination training
- Any attempted government enforcement of law was enjoined by a court order issued on August 18, 2022
- Private individuals can still potentially bring lawsuits under the statute

Crown Laws

- “Crown Laws” prohibit employers from discriminating against employees on the basis of their hair texture or hairstyle
- Numerous states have already passed laws that prohibit race or national origin discrimination on the basis of hairstyle and/or texture

California	Colorado	Connecticut	Delaware
Maine	Maryland	Nebraska	Nevada
New Jersey	New Mexico	New York	Oregon
Virginia	Washington	US Virgin Islands	

WorkSmarts

Top Tips

Developments from the Courts Practical Takeaways

- Review and analyze your healthcare benefit plans and travel benefit policies in light of state laws prohibiting the “aiding and abetting” of abortion.
- Review and analyze your hiring and compensation practices to ensure there are no gender-based pay disparities amongst similarly situated individuals. If there are then you should take steps to remediate them.
- When drafting position statements, make sure all statements of fact are accurate and have been fully vetted. The author of the position statement should interview all of the key witnesses. Do not rely on second hand information. Inaccurate information in position statements can be used against you in litigation and can lead to the denial of summary judgment motions that may have otherwise been granted in your favor.

Thank You

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