Hot Topics in Employment Law
Fall, 2012

By

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Agenda

I. Recent Laws

II. Supreme Court Top rulings

III. Coming Attractions and Trends: A heads up and "fair warning" on emerging employment law issues

IV. Significant Recent Cases: FMLA; regulation of employee social networking; discrimination; employment contracts; privacy, personal liability and the strangest cases of the year.

Legislative and Administrative Action

- Pregnant Workers Fairness Act introduced.
- Congress questioning e-verify
- Wisconsin revises discrimination law -- back to 2008.
- EEOC'S mediation program has 70% success rate.
- Protecting Older Workers Against Discrimination Act proposed.
- White House issues order to ease burden on employers.

Trends

- Asking for applicants' private access codes. Illegal? Or soon to be illegal? Social Network On-Line Protection Act. *Knop v. Hawaii Airlines* (9th Cir., 2009).

Rep. Elliott Engel (D-NY) has gone further and introduced HR 5050, the Social Network On-Line Protection Act to prohibit this practice.

Is this a "real issue?"

Independent Contractor

- Security guards were not independent contractors. *Solis v. International Detective and Protection Services, Inc.* (N.D. Illinois, 2011).
  - Audits are increasing.
  - Double jeopardy: DOL will tag team with IRS on independent contractor audits.

Supreme Court

- Affordable Care Act. *National Federation of Independent Business, et al v. Sebelius*

- Federal court finds U.S. Defense of Marriage Act unconstitutional. *Golinski v. U.S. Office of Personnel Management* (N.D. Cal., 2012).

- State employees are not eligible for the self care part of FMLA. *Coleman v. Maryland (S. Ct., 2012).*

Supreme Court to consider who is a "supervisor" under Title VII. According to most lower courts, the definition is different under Title VII than under other labor laws. One does not need authority to hire or fire; a "supervisor" is anyone with functional authority to direct others daily work. Lead workers, often co-union members who are clearly not management under the labor laws, can still be considered "supervisors" for Title VII. The court is hearing the appeal of the 7th Circuit ruling in *Vance v. Ball State University,* a racial harassment case.

Personal Liability

- Company president personally liable for off-the-clock work practices. *Lyles v. Burt's Butters Shoppe & Eatery, Inc. (M.D. GA, 2011).*

- Branch manager may be personally liable for FLSA violations. *Speert v. Proficio Mortgage Venture LLC* (D. Maryland, 2011).

Fair Labor Standards Act

- Walmart pays $5.3 million to settle misclassification claim.

Child Labor

- First child labor enhancement penalty. *Matford Progressive Protein LLC* (Department of Labor, Sept. 2011).

- Mall sweep for child labor: first of a new enforcement program.

- Restaurant must post "guilty notice" in spite of appeal. *EEOC v. Management Hospitality of Racine, Inc.* (E.D. Wis., 2011).

Privacy and Electronics

- Deputy Chief Sheriff's video of disrobed officer at hospital violated privacy rights. *Doe v. Luzerne Co., et al.* (3rd Cir., 2011).

- EEOC advice on use of electronic storage providers.

- NLRB considering rules on employees' company email rights.

- Confidentiality policy was too broad. *In re Trinity Protection Services, Inc.* (NLRB 2011).

- Facebook posting is not a protected "complaint." *Morse v. J.P. Morgan Chase* (M.D. Florida, 2011).

- Employee's private social media threatening comments cascade into the work environment. *Airtran Airways, Inc. v. Council 57, Assoc. of Flight Attendants* (2012).

Age Discrimination

- 71-year-old lifeguard should not have been let go. *EEOC v. Naseau County Dept. of Parks* (E.D. NY, 2012).

- Old pumpkin wins case against hotel. *Diaz v. Jiten Hotel Mgt.* (1st Cir., 2012).

- Stray remarks don't make a case, but employer's failure to follow its own procedures does. *Welborn v. Shelby County Government* (W.D. Tenn., 2011).

Disability Discrimination

- Race discrimination leads to disability case. *Lucas v. City of Philadelphia* (E.D. Pa., 2012).
- Court rules for deceased employee: morbid obesity is a disability. *EEOC v. Resources for Human Development, Inc.* (E.D. La., 2011).
- Montana rules that obesity is a disability. *BNSF Railway Co. v. Felt* (Mont. S.Ct., 2012).
- Essential function can depend on number of other employees to bear the burden. *Azzam v. Baptist Healthcare Affiliates, Inc.* (W.D. KY, 2012).

- Wellness programs must be truly voluntary under ADA. *Seff v. Broward* (S.D. Fla., 2011).

- Safety evaluation is not a medical examination. *Margharita v. FedEx Express* (E.D. NY, 2011).

- Non-disabled employees can challenge drug test as improper medical exam. *Bates, et al v. Dura Auto Systems* (M.D., Tennessee, 2011)

- Supervisor could not effectively work from home. *Hanion v. Missouri Dept of Health & Human Services* (W.D. Mo., 2012).

- Failure to Produce is not a "refusal." *Greater Dayton Transit Authority and Amalgamated Transit Authority* (2012).

- Nurse could do job on wheeled scooter and support boot. *Sydnor v. Fairfax County* (E.D., Virginia, 2011).

Religion Discrimination

- Perceived as Jewish, plus harassing supervisors change story when caught on video**.** *Cowher v. Carson & Roberts* (N.J. Superior Ct., 2012).

- Muslim convert wins $5 million -- state gets a windfall -- company had no one in charge. *Bashir v. S.W. Bell Telephone Co.* (Mo. Cir. Ct., 2012).

- Staffing agency discriminated against Baptist woman who refused to wear pants. *EEOC v. Patty Tipton Co.* (E.D. KY, 2012).

Gender Discrimination

- Unequal severance can be sex discrimination. *Gerner v. County of Chesterfield* (4th Cir., 2012).

- Male employee denied child care leave has case. *Ehrhardt v. LaHood and Department of Transportation* (E.D. NY, 2012).

- Union can be liable for retaliation against painter who complained about sexual harassment. *Dalton v. Painters Dist. Council #2* (E.D. Mo., 2011).

- Hostile employment environment cannot exist the moment employment ends. *Overly v. Key Bank National Ass'n.* (7th Cir., 2011).

- Transgender wife cannot be denied health insurance. *Radtke v. Drivers & Helpers Union Local #638 Health Welfare Fund* (D. Minn., 2012).

Family & Medical Leave Act

- Double damages for failure to give proper notice of change in FMLA policy. *Thom v. American Standard, Inc.* (6th Cir., 2012).
- University denies intermittent leave for adoption. *DeLuca v. Trustees of the University of Pennsylvania* (E.D. Penn., 2011).
- After-the-fact remedy and liability. *Sysco Food Services-Chicago & Teamsters Local 710* (2012).

- Key employees still entitled to proof of reason for non-reinstatement. *Johnson v. Resources for Human Development, Inc.* (N.D. Pennsylvania, 2011).

- Forced FMLA leave is valid when employee cannot perform job. *Kleinser v. Bay Park Community Hospital* (N.D. Ohio, 2011).

Strangest Cases of the Year

- Assistant Chief fired for harassment of firefighters' wives. *In re Brookfield Township and International Association of Firefighters* (2012).
- Teacher fired for late night bar brawl with a student. *In re Monroe County Board of Education and Alabama Education Association* (2011).
- Pot smoking park employee granted WC for being mauled by grizzly bear. *Hopkins v. Employer's Fund* (Mont. S.Ct., 2011).

- Radioactive fishing lures warrant discharge. *In re U.S. Enrichment Co. & Service Workers International Union (2011).*

- Terrible haircut leads to unfair discharge case. *NLRB v. White Oak Manor* (4th Cir., 2011).

The ADAAA: Key Impacts on Employers

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THE ORIGINAL ADA

- Passed in 1990 as the first comprehensive civil rights law for people with disabilities.

- It applies to private employers with 15 or more employees, all state and local government programs, including public schools and places of public accommodation.

THE ORIGINAL ADA (cont.)

- Title I of the ADA prohibits covered employers from discriminating on the basis of disability.

- Employees are also protected under the ADA if:
  - They have a record of a disability; or
  - Are regarded as disabled.

THE ORIGINAL ADA (cont.)

- Case law under the original ADA was not generally favorable to employees.
- *Sutton v. United Airlines*.
- *Toyota v. Williams*.
- As a result of the *Sutton* and *Toyota* cases, lower courts often found that impairments, even serious impairments, were not disabilities under the law.

THE ADAAA

- Signed by President Bush on September 25, 2008; became effective January 1, 2009.

- Landmark legislation to return to a liberal interpretation and broad reach of the ADA.

WHAT STAYED THE SAME?

- Basic definition of disability remains: "a physical or mental impairment that substantially limits one or more major life activities of such individual."
- Employees may be protected if they are disabled; if they have a record of a disability or if they are regarded as disabled.
- Congress overturned key U.S. Supreme Court disability decisions.

KEY AMENDMENTS

- “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”
- Congress changed the concept of “major life activities.”
- Congress rejected consideration of mitigating measures.

KEY AMENDMENTS (cont.)

- Congress rejected the inappropriately high level of limitation necessary to obtain protection under the ADA.
- The question of whether someone is disabled under the ADA *should not demand extensive analysis*.
- An impairment that substantially limits one major life activity need not limit other major life activities to be a disability.

KEY AMENDMENTS (cont.)

- An impairment that is episodic in nature or in remission is a disability if it would substantially limit a major life activity when active.
- Common episodic conditions include:
  - Epilepsy
  - Hypertension
  - Asthma
  - Diabetes
  - Major depressive order
  - Bipolar disorder
  - Schizophrenia
  - Cancer

REGARDED AS DISABLED

- The ADAAA expanded the third prong or the regarded as disabled provision of the ADA.
- Prior to the ADAAA, an employee asserting that he was regarded as disabled had to show that the employer perceived him as substantially limited in the ability to perform a major life activity.
- Under the ADAAA, an employer regards an individual as having a disability if it takes an adverse action based on the individual's impairment or perceived impairment that is not transitory and minor.

REGARDED AS DISABLED (cont.)

- Transitory means lasting or expected to last for six months or less.
- The plaintiff need not prove the employer's beliefs regarding the severity of the impairment.
- The employer will only be found to have discriminated under the ADA if the individual is qualified for the job he holds or desires.
- Individuals "regarded as" having a disability are not entitled reasonable accommodations but are entitled to protection from discrimination, retaliation and harassment.

KEY AMENDMENTS

- Congress directed the EEOC to revise its guidelines to make it easier for employees to establish that they are disabled under the ADA.
- Congress directed the EEOC to revise its definitions of “substantially limits” as “significantly restricted” to broaden the reach of the law.

EEOC'S RULES OF CONSTRUCTION

- The term "substantially limits" shall be construed broadly in favor of coverage.
- An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
- The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred not whether an individual's impairment substantially limits a major life activity.
- The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical or statistical analysis.

DISABILITY UNDER THE ADAAA?

- Physical impairment.
- Mental Impairment.
- Exceptions: personality traits such as irritability, poor judgment, or chronic lateness which are unrelated to a disability are not protected by law.

MAJOR LIFE ACTIVITIES

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working

Reaching, sitting, and interacting with others were newly added by the EEOC.

MAJOR LIFE ACTIVITIES

- A new category of major life activities was added that will make it easier for employees to seek protections.

MAJOR LIFE ACTIVITIES (cont.)

- Major life activity includes:
  - Functions of the immune system
  - Special sense organs and skin
  - Normal cell growth;
  - Digestive
  - Bowel
  - Bladder
  - Neurological
  - Brain
  - Respiratory
  - Circulatory
  - Endocrine
  - Lymphatic
  - Musculoskeletal
  - Reproductive functions

MAJOR LIFE ACTIVITIES (cont.)

- Some examples include:
  - Cancer (affects normal cell growth);
  - Ulcerative colitis;
  - AIDs;
  - ADHD; and
  - Epilepsy.

MAJOR LIFE ACTIVITIES (cont.)

- An employee who can show a limitation in one of these functions need NOT show a limitation as to “daily living activities.”
- Because of the broader definition of major life activities, fewer employees will have to make the argument that they are substantially limited in the major life activity of “working.”

“SUBSTANTIALLY LIMITED” IN A MAJOR LIFE ACTIVITY

- An employee must be “substantially limited” in a major life activity as compared to most people in the general population.
- Facts such as the condition, manner or duration under which an individual performs a major life activity are relevant to determine whether the individual has a substantial limitation.

“SUBSTANTIALLY LIMITED” IN A MAJOR LIFE ACTIVITY (cont.)

- The condition under which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity.
- The difficulty, effort, or time required to perform a major life activity;
- The pain experienced when performing a major life activity;
- The length of time a major life activity can be performed; and/or
- The way an impairment affects the operation of a major bodily function.

DEFINITION OF DISABILITY UNDER THE WISCONSIN FAIR EMPLOYMENT ACT

- Wisconsin's definition of disability was interpreted more broadly than the definition under the pre-amendment ADA definition:
  - A physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
  - Someone who has a record of such an impairment; or
  - Someone who is perceived as having such an impairment.

WISCONSIN DEFINITION OF DISABILITY

- Wisconsin courts have held that an impairment that “makes achievement unusually difficult” refers to a substantial limitation on a major life activity.
- Wisconsin agencies and courts have interpreted the phrase “limits the capacity to work” to protect employees who can show that their impairments limit their capacity to perform the specific job at issue. This means that more people are considered disabled under state law.

COMPLYING WITH THE ADAAA

- Recognizing Requests for Accommodation

- Pursuing the Interactive Process — determining whether an employee has a disability — addressing reasonable accommodations.

REQUESTS OF ACCOMMODATION

- Requests need not be in writing.
- Employee need not mention disability laws or use term “reasonable accommodation.”
- Employers should not proactively ask whether an accommodation is needed.
- Do not confuse requests for accommodation with requests for FMLA leave.

DETERMINING WHETHER AN EMPLOYEE HAS A DISABILITY

- Unless the disability is obvious, the employer can request information from the employee's health care provider about the nature of the disability, the functional limitations caused by the disability, and what reasonable accommodations might exist.
- Employers should avoid sharing personal opinions, histories, or speculations when addressing a possible disability with an employee.

DETERMINING ACCOMMODATIONS IN THE WORKPLACE

- An accommodation is a change in work environment or the way in which things are customarily done that allows the individual to successfully perform his/her position and to enjoy equal employment opportunities.
- An accommodation is reasonable if it is effective and does not cause the employer undue hardship.

ACCOMMODATIONS THAT MIGHT BE REQUIRED

- Making existing facilities accessible;
- Job restructuring/reallocation of certain job functions;
- Part-time or modified work schedules;
- Acquiring or modifying equipment;
- Changing tests, training materials, or policies;
- Providing qualified readers or interpreters;
- Possible reassignment to a vacant position;
- Extended, unpaid leave of absence;
- Temporary “forbearance” regarding performance; and/or
- Work at home requests.

ACCOMMODATIONS THAT WILL GENERALLY NOT BE REQUIRED

- Longer-term lowering of job standards;
- Bumping another employee out of a job;
- Repeatedly excusing prohibited behavior on the job; and/or
- Indefinite leaves of absence.

REASONABLE ACCOMMODATIONS

- Input from the employee, the employee's physician, management of the employer, and others may be instructive.
- The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.
- Accommodation requirements under the Wisconsin Fair Employment Act generally demand more of employers than the ADA's requirements. The "essential functions" analysis does not apply under Wisconsin law.

WARNINGS FOR EMPLOYERS
(Ten Key Issues of the Past Year)
2012

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1. Personal Liability
2. Snatching Defeat from the Jaws of Victory
3. No Policy/No Training Dooms Case
4. You May Be Right, But
5. Dumb Statements
6. Be Prepared When the Burden of Proof is Against You
7. Equality
8. Spoilation
9. Liability to Others
10. Off the Job Social Issues have Consequences

1. Personal Liability

- Company president personally liable for off-the-clock work practices. *Lyles v. Burt's Butters Shoppe & Eatery, Inc.* (M.D. GA, 2011).

Why would someone sue you?

- Adding a personal “tort” action can increase damages (*i.e*., exceeding the “caps” in the
- federal discrimination laws)
- The company may be shaky. If the company goes bankrupt, the individual sued is a back-up source of payment in an award of damages.
- Taxes. Damages collected from the individual are tax free (at least at the time of payment).
- Revenge.

The major causes of managers generating personal liability

1. Failure to understand the laws.
2. Failure to understand the reasons for employment policies.
3. Failure to check with HR.
4. Putting personal or department goals ahead of employment policies.
5. Wishful thinking or stretching one's interpretation of the law to fit the situation.

2. Snatching defeat from the jaws of victory

- Firefighter fired for setting fire to father's house can pursue ADA case—employer garbles discharge. *Worski v. City of Erie* (W.D. Penn., 2011).

Adding extra issues also often adds extra laws onto the case, as in this firefighter example. More fronts to defend. More ways to be attacked. More ways to lose. In this case, there was no ADA issue at all -- until the chief introduced it! Keep it simple. If there is a strong case, stick to it.

3. No policy and no training dooms case

No policy - no training dooms company to liability. *EEOC v. Boh Brothers Construction Co.* (E.D. Louisiana, 2011).

Training is the Key!

- The employer has an effective policy and procedure to deal with harassment or other key issues;
- All employees know about the policy and procedure (training);
- Managers received training regarding the policies;
- The complainant unreasonably failed to use the process; or
- The employees used the process and management effectively addressed the issue.

4. You may be right, but you can't do it that way

There are situations in which an employee is legally and morally right, but the way the person handles the issue overcomes that valid foundation. Uncivil or violent reactions turn their right into a wrong and can result in discharge.

You may be right, but you can't say it like that. *Ohio Power Company and Utility Workers Union of American* (2011).

- Racial names do not justify slapping customer. *Lee v. Kmart Corp.* (D. Minn., 2012).

5. Dumb statements

- Be sure you really hang up before you say what you really think—race and sex comments warrant discharge and union's refusal to pursue grievance. *Robeson v. U.S. Steel Corp*. (E.D., Mich., 2011).

- Let sleeping dogs lie. In *Brunell v. Gater Rubber Co.* (7th Cir., 2011).

- Trashing harassment complaint creates case. *Young-Lousee v. Graphic Packaging Int., Inc.* (8th Cir., 2011).

Rash statements cannot be retracted. Even the best efforts of Human Resources could not undo the damage.

6. Be prepared when the burden of proof is against you

- Employer has burden of proof in non-reinstatement cases. *Sanders v. Newport, Oregon* (9th Cir., 2011).

Other cases in which the employer has the burden of proof -- and the plaintiff has to do less to win

- Uniformed Services Employment and Reemployment Rights Act
- Worker's Compensation reinstatement or retaliation cases
- ADA denials of accommodation
- Certain employment contracts (non-compete agreements)
- Retaliation and whistleblower cases (there is a presumption by the courts that any adverse action within a short time following any protected activity is wrongful)

7. Equality

- Female deputy who allowed escape has sex discrimination case. *Wainwright v. Holladay* (E.D. Ar, 2012).

- Teacher's firing for failure to report intoxicated student was discriminatory. *Mitchell v. Sacramento City Unified School District* (E.D. CA, 2012).

8. Spoliation

- Destruction of interview notes sinks case. *Talavera v. Shah (USAID)* (D.C. Cir., 2011).

Litigation rules

Failure to preserve evidence is spoliation. The sanctions for spoliation can be:

- You pay to have it restored.
- You pay penalties.
- The court "suppresses" your evidence.
- Presumption of guilt.
- You lose! Court grants summary judgment due to your bad faith.

9. Liability for acts by or toward non-employees

- Restaurant allows deputy sheriff to harass waitresses – pays $200,000. *EEOC v. 441 S.B. LLC, d/b/a Hurricane Grill & Wings* (S.D. Fla., 2012).
- Assistant Chief fired for harassment of firefighters' wives. *In re Brookfield Township and International Association of Firefighters* (2012).

10. Off-the-job social issues have consequences

- "Church boy" comments lead to harassment case. frequency of the negative comments prior to the discharge to create a viable harassment case. *Knox v. Sun Trust Banks, Inc.* (E.D. Tenn., 2011).
- Did carousing with drinking buddies create $260,000 liability? *EEOC v. High Tech Institutions, Inc., d/b/a Anthem College Online* (D. Arizona, 2011).

OFF THE CLOCK, BUT STILL ON THE HOOK (Liability For Employees' "Off-Work" Acts)

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What is “Off the Job”?

- On call
- Electronics
- “In the scope” of employment

Rulli v. C.B. Richard Ellis, Inc.

There is no “Off the Clock” Work

- On the email from home (it’s so easy and everyone does it)
- Have a clear policy about hours of work and what may not be done with electronics in “off hours”
- Develop recordkeeping system for those working at home or out of the office

Salaried/Exempt Employees

- Does checking the email convert a “sick day” to a regular paid day?
- Does counting this as a sick or vacation day or FMLA violate the salaried basis test?
- Interruptions can be an interference with rights

Example 1

Everyone talks about what happened at the holiday party. Kevin had a lot to drink and he kept saying how attractive Pat was. Pat tried to avoid him, but Kevin continued to come back with more and more overt and sexually suggestive statements. He started touching Pat's arms and shoulders. Pat then left the party with some other people, including a manager, who were going to a bar. Later, Kevin stopped by the bar and started making the same sort of comments to Pat. Pat poured a pitcher of beer over Kevin's head. Then Pat pushed Kevin hard into a wall, and left.

Off-the-Job Social Issues Have Consequences

"Church Boy" comments lead to harassment case.

Knox v. Sun Trust Banks, Inc.

(E.D. Tenn., 2011)

- Employment-related socializing is still within the scope of the employment laws
- The rules of conduct and liability still on, even though the time clock is off
- The organization may be liable for its employee's harm to other employees or to non-employees
- Harassment, fights, OWI, property destruction, etc.

- Employees may have rights not to participate in purely social company events

- Coercion can create:
  - Wage claim for “required attendance”
  - Harassment claims
  - ADA claims

Did carousing with drinking buddies create $260,000 liability?

EEOC v. High Tech Institutions, Inc.
(D. Az., 2011)

- Executives hampered investigation of sexual harassment complaints about their drinking buddies
- Corporate decisions made at and based on the social relationship

- A work-related discussion or decision made in a social setting is still an organizational action.

- Decisions made after a bit to drink may not be wise or legal.

- Decisions made in favor of the employees one is drinking with are generally less wise and more likely to be illegal.

- If extra-curricular activity leads to mentoring, the inside track and advancement, then it is not really “extra-curricular.”

- It may be illegally discriminatory unless there are efforts to assure diversity, variety and inclusiveness.

Policy

Social Functions. There are occasions in which employees attend work-related social functions, dinners or have other work-related interaction with clients, vendors, etc., in which alcohol is served. Employees may consume alcohol in these situations. However, that consumption will be moderate. No one will become inebriated. No one will drive a vehicle, organization-owned or personal, after consuming enough alcohol to be legally under the influence. You are also responsible for the appropriate behavior of guests you invite to work-related social functions.

Employer is NOT Liable for Injury in:

- To and from work
- Unpaid breaks
- Outside of work and work hours (no “coerced” social activities)

BUT . . .

- Errand on the way to and from work

- Unpaid break on premises where employer is lax on policies.

- Electronics while driving anytime/anywhere
- Policy:
  - Hands-free
  - Pull over to dial
  - Not in town/in traffic

Travel status

- 24/7 liability unless clear deviation.

Most common travel status areas

- Vehicle accidents
- Group activities
- Theft
- Harassment or assault of customer or vendor

Policy

Travel. Employees engaging in work-related social interaction or traveling for the organization are expected to abide by the "appropriate behavior" policies at all times, including "after hours." The anti-harassment policy, alcohol moderation policy and other rules of appropriate behavior are to be observed at all times in all interactions with all people while you are in travel status.

Negligent Supervision

- Illegal activities on the job which have off-work results. *Doe v. XYC Corp*.

Outgrowth of Employment

- Employer brought the victim and perpetrator together.

- Duty to conduct background checks
- Misuse of confidential information for personal purposes
- Family members access to business/ client documents

Have a Clear Confidentiality Policy

- A strong policy gives protection.
- Give training.

Policy

- No access except for business
- No use except for business
- Security

Privacy

- Not job related
- Expectation of privacy

GPS Tracking

- MySpace
- Facebook
- Twitter
- LinkedIn
- Blogs

Can You be Fired for Off-the-Job Behavior?

Example 3

Two police officers have been moonlighting. They go to Chicago on weekends and act in pornographic videos - some of their acting has been seen on “adult internet sites” by county employees and citizens. Others have now heard about the videos, and express upset. The two officers claim that they have rights of expression in their off-duty, out-of-uniform private lives. The videos with adult content are legal. Can you fire them? Or is it retaliation for their freedom of expression?

Spanierman v. Hughes (D. Conn., 2008)

Thaeter & Moran v. Palm Beach Co. Sheriff (11th Cir., 2006)

- Off-work social networking is generally not “private” except for secured access sites.

- Secured sites are private.

Protections for Employees' Private Lives

- Legal products laws
- Constitution (for public sector)
- Anti-retaliation laws
- Labor Relations laws
- Privacy laws

BUT . . .

Employment-Related Activities

- Conflict of interest
- Breach of confidentiality
- Unethical conduct
- Financial indiscretion
- Wearing of uniform / logo
- Arrest / conviction (but WFEA)
- Defamation

Example 4

Hilda invited several people from the office to her wedding. At the reception, Mary Jane, a department manager, was overheard telling racial jokes to the people at her table.

Richerson v. Beckman (9th Cir., 2009)

Off-Duty Conduct

Does the employee's off-duty conduct have a connection to the workplace?

- Injury to the employer's business or operations;
- Inability to report for work;
- Unsuitability for continued employment;
- Other employee(s) refusal to work with the off-duty offender or danger to other employees;
- Safety and security.

Social Networking Policy

Please be aware that your websites or social medical electronic usage is public. There is no expectation of privacy, and your usage may come to the attention of our customers, contractors or this company. [Company] does not actively monitor our employees off-work use of social media but does have the right to look and take action if it comes to our attention that usage violates company policy, harms our business, conflicts with your ability to perform your job, breaches confidentiality or trade secrets, or disparages our products and services. Please, also, do not represent yourself as an agent of [Company] on **[con't.]**

Social Networking Policy (continued)

your personal websites or social network use, without express permission of the company. Unauthorized representation could lead others to believe you had authority to make commitments for, or were speaking on behalf of the company. No one except authorized representatives may make statements for this organization. This policy does not prohibit your mention that you work for [company] nor prohibit communication with other employees about work or mutual work-related issues or concerns which are protected concerted activities under the National Labor Relations Act or other similar laws.

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