McMAHON•BERGER
2730 N. Ballas Rd., Suite 200
P.O. Box 31901
St. Louis, MO 63131-3039
(314) 567-7350 – Phone
www.mcmahonberger.com

Labor & Employment Newsletter

MISSOURI COURT OF APPEALS CONTINUES TO ISSUE PRO-EMPLOYEE DECISIONS

In another example of the increasing number of decisions that are potentially harmful to employers, the Missouri Court of Appeals affirmed a plaintiff's verdict and an award of significant attorneys' fees in Alhalabi v. Missouri Dept. of Natural Resources, 2009 WL 4278916 (Mo.App. E.D. 2009). Alhalabi brought suit against his employer, the Department of Natural Resources (DNR), alleging discrimination, retaliation, and hostile work environment. The jury found in favor of DNR on the discrimination and retaliation claims, but found in favor of Alhalabi on the hostile work environment claim. Alhalbi was awarded $187,000 in actual damages, $150,000 in punitive damages, and $474,949 in attorneys' fees, for a total judgment of $811,949.

On appeal, DNR argued that Alhalbi failed to exhaust his administrative remedies with respect to the hostile work environment claim because his Charge of Discrimination only alleged discrimination and retaliation. The Court ruled that Alhalbi's Charge encompassed a hostile work environment claim because he referenced "several complaints of discrimination," as well as "previous complaints." In addition, the Court found that, by checking a box on the Charge form indicating that the discrimination was continuing, Alhalabi sufficiently alleged pervasive discriminatory conduct. The Court concluded that discrimination could create a hostile work environment if it interfered with the individual's work performance, so by alleging continuing discrimination, Alhalbi also alleged a hostile work environment.

DNR also argued that the jury instruction on the hostile work environment claim was inadequate because it did not require the jury to find that the harassment was "severe and pervasive." The instruction only required the jury to find that the harassment "affected a term, condition, or privilege of employment." In a bit of circular logic, the Court found that, by definition, harassment which affects a term or condition of employment is severe and pervasive. Thus, the failure to instruct the jury on the "severe and pervasive" element was not erroneous. Furthermore, the Court found that, because the jury awarded punitive damages, which are intended to punish outrageous conduct, the inclusion of the "severe and pervasive" language would not have made a difference in the jury's decision.

Finally, DNR argued that the attorneys' fee award was excessive because Alhalabi prevailed on only one of his three claims and the amount that DNR was ordered to pay was greater than the amount the attorney charged for most of her work on the

(CONTINUED ON PAGE 2)

EMPLOYER MAY BE LIABLE FOR THE ACTS OF AN INDEPENDENT CONTRACTOR IN ITS EMPLOY

In Halpert v. Manhattan Apartments, Inc., 580 F.3d 86 (2nd Cir. 2009), the United States Court of Appeals for the Second Circuit reversed the district court's grant of summary judgment where the district court held that the defendant was not an "employer" within the definition of the Age Discrimination in Employment Act ("ADEA"). An independent contractor retained by the defendant interviewed the plaintiff for a position to show rental apartments. The plaintiff alleged that during the interview, the independent contractor told him he was "too old" for the position. In reversing the district court's ruling,

(CONTINUED ON PAGE 2)

Inside this Issue:

Case Summaries	4,5
Employee Benefits ..	6,7
Illinois ………….....	3
Labor Relations......	5
MB in the News…...	8
Missouri…………....	1, 2

ARBITRATION PROHIBITED FOR CERTAIN FEDERAL CONTRACTORS

Pursuant to the recently enacted Department of Defense Appropriations Act, 2010, federal contractors who have contracts in excess of $1 million with the Department of Defense may not enter into or enforce any agreement with any employee or independent contractor that requires resolution of certain claims through arbitration. Such non-arbitrable claims include any claims brought under Title VII of the Civil Rights Act, any tort related to or arising out of sexual assault or harassment, intentional infliction of emotional distress, false imprisonment, and negligent hiring, supervision, or retention. Contractors also must certify that they require all subcontractors with subcontracts over $1 million to agree not to enter into or enforce any such arbitration agreements with individuals performing work related to the covered subcontract.

MISSOURI COURT OF APPEALS (CONTINUED FROM PAGE 1)

case. Alhalabi's attorney raised her rate from $300 per hour to $400 per hour one month prior to trial, and the majority of the work on the case was performed at the lower rate. However, the trial court awarded fees based on a rate of $400 per hour for all work performed in the case. The trial court found that the attorney's rate was reasonable and found that the contract between Alhalabi and his attorney provided for the attorney to be compensated for all work at the rate in effect at the time the judgment was entered, rather than the rate that was in effect at the time the work was performed.

This case is just one of multiple opinions from Missouri courts in recent years that are making it increasingly difficult and expensive for employers to defend against discrimination, harassment, and retaliation claims. Using the Court's reasoning, employees may now assert harassment claims in a lawsuit even if they did not file a Charge of Discrimination alleging harassment, so long as they filed a Charge alleging several instances of discrimination. It is now more challenging for employers to predict and defend against lawsuits because an employee is no longer limited by the allegations made in a Charge of Discrimination. In addition, if a harassment claim goes to trial, employers no longer are guaranteed a jury instruction which requires the jury to find that the conduct was "severe and pervasive," meaning a jury is now free to find that even minor or isolated inappropriate conduct constitutes harassment. Finally, this case illustrates the increasing risk of large attorneys' fees awards in discrimination cases, as evidenced by the fact that the attorneys' fees award was larger than the award for actual and punitive damages. Now more than ever, it is important for employers to seek counsel early in the process of investigating discrimination, harassment, and retaliation claims to preserve defenses and minimize risk in any future lawsuit.

WORKERS COMPENSATION AN AFFIRMATIVE DEFENSE IN MISSOURI

In McCracken v Wal-Mart, 2009 WL 3444894 (Mo. 2009), the Missouri Supreme Court held an individual's negligence claim was a civil claim that should be litigated in a State Circuit Court and not before the Labor and Industrial Relations Commission as a traditional workers' compensation claim. The plaintiff was an employee of a bread products delivery company who delivered products to Wal-Mart. After getting hurt while making a delivery at a Wal-Mart store, he filed and settled a workers' compensation claim with his employer. He then filed a personal injury lawsuit against Wal-Mart alleging a Wal-Mart employee negligently pushed a bread rack into his shoulder. On the day the jury trial was set to begin, Wal-Mart contested the circuit court's jurisdiction to hear the matter and asserted the plaintiff was a statutory employee subject to the Workers' Compensation Act's exclusivity provisions. The circuit court granted Wal-Mart's motion to dismiss based on these arguments.

The Supreme Court reversed, concluding the issue of subject matter jurisdiction should be raised as an affirmative defense to the circuit court's statutory authority to proceed with resolving the claims. The Court held the circuit court has authority to determine whether the claim involves an employer/ employee relationship. The Court concluded that failure to plead as an affirmative defense that the Workers' Compensation Act applies may constitute a waiver of that defense.

The Court further held that the plaintiff was not a statutory employee of Wal-Mart because his role was to equip Wal-Mart for business, not to engage in its business himself. In other words, delivering bread was part of his actual employer's regular work, not Wal-Mart's. In so holding, the Court adhered to recent amendments to the Workers' Compensation Act that "reviewing Courts shall construe the provisions of the Act strictly." § 287.800, R.S.Mo.

EMPLOYER LIABILITY FOR INDEPENDENT CONTRACTOR ACTS (CONTINUED FROM PAGE 1)

the Second Circuit held that an employer potentially could be held liable for discrimination by an independent contractor who acts for the employer.

The Court explained that, under the ADEA, an employer may be liable for discrimination "regardless of whether an employer uses its employees to interview applicants for open positions, or whether it uses intermediaries, such as independent contractors, to fill that role." Therefore, "[i]f a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable if that individual improperly discriminates against applicants on the basis of age."

The Court noted that, while a company will not be liable for the hiring decisions of an independent contractor hiring on its own behalf or where the circumstances do not authorize the contractor to make decisions on behalf of the company, the company nonetheless will be liable regardless of "whether the individual hiring for the company as its agent is an employee or an independent contractor." Thus employers are advised to review any contracts or agreements they may have with independent contractors to minimize potential liability for the conduct of such third parties.

ILLINOIS

Illinois Clarifies Prevailing Wage Act

The Illinois Prevailing Wage Act requires public contractors and subcontractors to pay laborers, workers and mechanics employed on public works construction projects no less than the general prevailing rate of wages (consisting of hourly cash wages plus fringe benefits) for work of a similar character in the county where the work is performed. In 2009, the Illinois General Assembly passed three pieces of legislation, effective January 1, 2010, clarifying and encouraging compliance with the Act. The new laws clarify that "public works" includes all projects funded in whole or in part through bonds, grants, loans or other funds made available by or though the State or any of its political subdivisions. Previously, doubt existed as to whether projects financed through public funding mechanisms not specifically enumerated in the Act were "covered" work, which resulted in millions of dollars in back wages penalties and legal costs being incurred by contractors. The political subdivisions referenced in the new law include traditional public bodies such as municipalities, counties and state agencies, as well as non-traditional public bodies such as the Illinois Finance Authority, the Illinois Housing Development Authority and regional economic development authorities.

Additionally, the Act was amended to cover explicitly all demolition work undertaken by a public body, regardless of whether or not the demolition work is in conjunction with a public works construction project. Finally, under the new Prevailing Wage laws, all public bodies will be held responsible financially for any interest, penalties or fines assessed by the Department of Labor if they fail to provide proper written notification to a contractor that a project is subject to the Prevailing Wage Act.

Illinois Allows Employers To Use E-Verify

Effective January 1, 2010, the Illinois General Assembly amended the Right to Privacy in the Workplace Act to allow Illinois employers to use Employment Eligibility Verification Systems, including E-Verify and the Basic Pilot program. The new amendments to the Act urge employers to consult the Illinois Department of Labor's (IDOL) website for current information on the accuracy of E-Verify. Additionally, employers enrolling in E-Verify must submit an IDOL form verifying receipt of the Basic Pilot or E-Verify training materials from the Department of Homeland Security, and that all employees who will administer the program have completed the Basic Pilot or E-Verify Computer Based Tutorial (CBT). Also, employers must post notice of enrollment in a prominent place visible to employees. Employers must take reasonable steps to prevent an employee from circumventing the requirements to complete the CBT by assuming another employee's E-Verify or Basic Pilot user identification or password.

Employers are prohibited from using an Employment Eligibility Verification System to verify employment eligibility of applicants prior to hiring and prior to completion of a Form I-9. Under the new amendments, employers also must notify affected employees, in writing, of the employer's receipt from Homeland Security of a tentative non-confirmation notice. Finally, neither the State of Illinois nor any of its political subdivisions can require an employer to use an Employment Eligibility Verification System. The IDOL is charged with enforcement of the Act and can file suit in the appropriate circuit court to enforce the Act and compel compliance. Additionally, affected employees and applicants can file an action in the circuit court if conciliation efforts are unsuccessful at the administrative level. Available remedies include actual damages, costs and reasonable attorneys' fees.

$23 Million To Be Added To EEOC Budget For Fiscal Year 2010

The U.S. House of Representatives passed a bill on December 10, 2009 which would add $23 million to the Equal Employment Opportunity Commission's budget for fiscal year 2010. The bill later was passed by the U.S. Senate on December 13, 2009. The stated reason for the appropriation is to help enable the EEOC to properly address the more than 70,000 unresolved discrimination complaints. The EEOC's files indicate that a record number of 95,402 discrimination complaints were filed in 2008. This is a nearly 20% increase from the 79,896 complaints filed in 2007.

It has been reported that the EEOC currently is hiring 200 new investigators. Thus, it appears likely that in 2010 the EEOC will investigate more vigorously and promptly complaints of discrimination that have been filed with the EEOC.

EMPLOYER'S REASSIGNING PLAINTIFF SEVERED ANY PRE-REASSIGNMENT LIABILITY

In Stewart v. Mississippi Transp. Com'n, 586 F.3d 321 (5th Cir. 2009), the United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of summary judgment in favor of the employer where the plaintiff alleged that, following a report of sexual harassment and her subsequent reassignment away from her alleged harasser-supervisor, she was again placed under her former supervisor's control and the verbal harassment resumed. In so holding, the Fifth Circuit held that: (i) plaintiff's reassignment was an "intervening action" which cut off the employer's liability for the earlier harassment; (ii) the earlier alleged harassment did not create an actionable hostile work environment; and (iii) plaintiff was subject to no materially adverse retaliatory action.

First, the Court held that the plaintiff's allegations of harassment were limited to those alleged acts which occurred after her reassignment in that the reassignment constituted an intervening act which severed the acts that preceded it from those which followed. Since the alleged pre-reassignment acts of harassment took place more than 180 days before the filing of her charge of discrimination, relief for said acts was time-barred. Here, the Court found that, while the alleged acts of harassment prior to and following her reassignment were sufficiently "related," "[t]he two periods of alleged harassment are, however, severed by the intervening acts of [plaintiff's] employer." The Court explained that the company's prompt remedial action to protect her was an intervening act even where she later was reassigned back to her former supervisor. Thus, the defendant was not liable for the alleged harassment which occurred prior to the reassignment.

Next, the Court held that the incidents of harassment following the reassignment in and of themselves were not severe or pervasive enough to create a hostile work environment. The supervisor's alleged statements that he and plaintiff should be "sweet" to each other and that he loved her six times in the period of a month "did not create a hostile work environment because they were not severe, physically threatening, or humiliating; at most, they were unwanted and offensive." Therefore, even in light of the earlier offensive behavior on the part of her supervisor, the statements at issue were insufficient to support her claim.

Finally, the Court ruled that summary judgment was proper as to plaintiff's retaliation claim because she failed to establish she suffered an adverse employment action. The Court held the defendant's actions in placing plaintiff on paid administrative leave, reassigning her to a position with equal pay and hours, taking personal items from her desk, changing the locks on her office so that she would be unable to close her office door, and/or the alleged chastisement from superiors and co-workers, did not constitute adverse impact on her employment.

EMPLOYER'S RESPONSE PRECLUDES TITLE VII HARASSMENT LIABILITY

In EEOC v. Xerxes Corp., 2009 WL 4348589 (D.Md. 2009), the EEOC brought suit on behalf of three African-American employees alleging they were subjected to a racially hostile work environment. Each of the employees had complained to various members of management about the conduct. The conduct—all perpetrated by coworkers—consisted of racial slurs, derogatory comments, name calling, references to the KKK, whipping, lynching, and other threats.

In response to the various complaints, the employer promptly investigated each allegation. Managers, as well as the employer's general counsel and chief financial officer, participated actively in the investigation. As a result of the investigation, some employees were disciplined. Thereafter, the investigators followed up with the employees who had complained and contacted local law enforcement when additional conduct occurred that could not be attributed to any specific person. The employer also posted a notice at the facility reminding everyone of its anti-harassment policy.

The Court granted the employer's motion for summary judgment, concluding there was no basis for imposing liability based on its response to the complaints. Because only coworkers and not supervisors had engaged in the offending conduct, the employer could avoid liability by demonstrating that once it became aware of the harassment, it took effective action to stop it. The Court concluded that the employer's response to each employee's complaint was quick and reasonably effective in ending the conduct. Thus, this case reinforces the importance of having in place a clear policy against harassment and an effective procedure for investigating complaints. Further, the employer's actual response to the complaint is crucial to avoiding liability.

LABOR RELATIONS

SUPREME COURT TO RESOLVE BOARD'S AUTHORITY TO ISSUE ORDERS

As indicated in a previous newsletter, the authority of the National Labor Relations Board to issue orders is in question because it currently lacks the minimum statutory requirement of a three-member quorum. To date, four Courts of Appeal—the First, Second, Fourth, and Seventh—have upheld the Board's power to issue orders despite the fact there currently are only two members. The D.C. Circuit, however, held that decisions and orders issued by the two-member board are invalid.

The Supreme Court granted certiorari on November 2, 2009, agreeing to hear the matter and determine whether a two-member Board lacks the authority to issue decisions. Although the matter has not yet been set for oral argument, it is anticipated that a ruling will be issued by the Court by June 2010.

Of course, if President Obama's nominees for the Board are confirmed, the issue of the Board's authority will be moot. President Obama nominated Craig Becker, Mark G. Pearce, and Brian E. Hayes to fill the three Board vacancies in July 2009. On October 21, 2009, the Senate Health, Education, Labor, and Pensions Committee approved the nominees; however, to date the full Senate has not acted on the nominations. In response, Senator McCain placed a "hold"—an informal request preventing the Senate from voting on a matter—on Becker's nomination because the Committee did not hold a public hearing on Becker. On December 24, 2009, the Senate sent back to the White House Becker's nomination. President Obama could renominate Becker, nominate someone else, or make short-term recess appointments before the Senate returns January 19.

UNION PETITIONS DROPPED IN FISCAL YEAR 2009

Recently, the National Labor Relations Board released a summary of its activities for Fiscal Year (FY) 2009. According to the report, the Board conducted 1,690 initial representation elections in FY 2009, compared to 2,085 initial elections in FY 2008—a decrease of 18.9%. The reasons for the drop, however, remain unclear. It is not known whether the decrease is a result of a diminished need—whether actual or perceived—for union representation, a hope on the part of unions that the Employee Free Choice Act, in some form or another, will pass, or other considerations.

Likewise, petitions in certification and decertification cases decreased 14.6%. Meanwhile, the number of unfair labor practice charges filed increased slightly, from 22,501 in FY 2008 to 22,941 in FY 2009.

COURT LIMITS USE OF CERTAIN SERVICE ANIMALS

In Rose v. Springfield-Greene County Health Department, Cox Health System, and Wal-Mart Supercenter, 2009 WL 3461296 (W.D.Mo. 2009), plaintiff alleged the defendants discriminated against her by denying access to various establishments while accompanied by a service animal—a small primate which she claimed assisted with her various mental disorders, including agoraphobia and anxiety. Plaintiff claimed the monkey alleviated her anxiety disorder and allowed her to function normally in public and thus took the monkey nearly everywhere with her. After the Health Department determined the monkey did not qualify as a service animal, Plaintiff sought relief under the Americans with Disabilities Act ("ADA").

In denying the plaintiff's claim, the Court held that plaintiff was not disabled because her anxiety disorder did not substantially limit a major life activity. The Court further held that plaintiff did not suffer from any physical limitations due to her mental disorder. In rejecting plaintiff's claim that the monkey was a service animal, the Court stated the tasks the monkey performed did not involve assistance in physical activities but rather merely involved the provision of comfort. An animal that merely provides comfort cannot be considered a service animal because it does not aid in physical activities. Essentially, the Court equated the monkey to a household pet with no formal training in service animal functions. Moreover, the Court held that Wal-Mart's and Cox Health Systems' barring of the monkey from their premises, pursuant to the Health Department's denial of service animal status, was proper and that they had no duty to publicly accommodate Plaintiff and her animal.

EMPLOYEE BENEFITS

GENETIC INFORMATION NON-DISCRIMINATION ACT TAKES EFFECT

The Genetic Information Non-Discrimination Act ("GINA"), effective November 21, 2009, covers employers with 15 or more employees, employment agencies, labor unions, and apprenticeship or training programs. GINA prohibits three types of conduct: (i) discrimination on the basis of genetic information; (ii) intentional gathering of genetic information about employees or applicants; and (iii) retaliation against employees who complain about a violation of any GINA provision. GINA also creates new rules regarding the protection of genetic information to the extent it is obtained by employers.

In addition, GINA restricts how group health plans and health insurers collect and use genetic information. Genetic information includes the following:

- Genetic tests, counseling or education requested or received by an individual or family member
- Family medical history – any disease or disorder manifested by an individual's family members (an individual's own medical history is not included)

Under GINA, group health plans and insurers cannot:

- Collect any genetic information before or in connection with enrollment
- Collect genetic information at any time to:
  - ◊ Determine plan eligibility or coverage, including basing deductibles or other cost-sharing mechanisms on activities such as completing a Health Risk Assessment or participating in a wellness program;
  - ◊ Compute group premiums or employee contributions, including offering discounts, rebates, payments in kind or other premium differentials;
  - ◊ Impose pre-existing condition exclusions; or
  - ◊ Establish, renew or replace health benefits or insurance contracts.
- Require or request an individual or family member to undergo genetic testing at any time.

Despite these prohibitions, GINA contains some exceptions for group health plans:

- Claims substantiation - Group health plans can request genetic test results, if needed, for claims substantiation or other payment purposes.
- Medical appropriateness - Plans can request genetic information to determine whether a service or treatment is medically appropriate.
- Incidental collection - No GINA violation occurs if a plan "incidentally" collects genetic information while asking for or receiving other information before enrollment. However, this exception will not apply if the plan reasonably could have anticipated that its request would elicit genetic information but did not specifically instruct individuals not to provide genetic information.

GINA could have a significant effect on current plan practices related to health questionnaires and risk assessments. Employers should take these steps to review their plan for compliance:

- Identify plan practices that include requests for family medical history or other genetic information.
- Revise practices and forms to comply with GINA.
- Discuss GINA compliance with all relevant third-party administrators and vendors, and modify vendor contracts, if needed, to include compliance obligations.
- Discontinue any practice of using genetic information to set group premiums or contributions.

MICHELLE'S LAW PROVIDES EXTENDED MEDICAL COVERAGE FOR STUDENTS

Michelle's Law prohibits a group health plan from terminating a dependent child's health coverage due to a medically necessary leave of absence from, or any other change in enrollment at, a postsecondary education institution. The leave or reduction in hours must commence while such child is suffering from a serious illness or injury and must cause such child to lose coverage under the plan. The law does allow for termination of coverage in two instances, whichever occurs earlier: (1) one year after the first day of the medically necessary leave of absence; or (2) the date on which such coverage would otherwise terminate under the terms of the plan.

A medically necessary leave of absence includes a leave of absence, as well as any other change in enrollment at the institution such as a reduced course load, that: (1) begins while the student is suffering from a serious illness or injury; (2) is medically necessary (as confirmed in writing by the student's treating physician); and (3) causes the loss of student status under the terms of the plan or health insurance coverage.

The law requires health plans to continue coverage on the same terms as coverage is provided for other dependent children, including inclusion in a family insurance rate and employer payment of a portion of the premium (if applicable). Any change in health insurance coverage, insurer, or funding that occurs while the student is on a medically necessary leave of absence must carry over to the student.

(CONTINUED ON PAGE 7)

EMPLOYEE BENEFITS (CONTINUED)

CONTRIBUTING VACATION AND SICK LEAVE PAY TO 401(K) PLANS

The IRS has provided specific guidance on several arrangements under which vacation and sick leave pay (PTO) may be contributed to 401(k) plans.

In the first scenario, an employer's PTO plan is a "use it or lose it" design, under which the employee forfeits any unused PTO at the end of the year. The employer may amend its 401(k) plan to provide for a contribution equal to the dollar value of the unused PTO at the end of the year. The contribution is allocated as of the last day of the year in which the PTO accrued, but is not actually made until early in the following year. The IRS concludes that such a contribution is permissible and will be treated as an employer contribution for the year in which it is actually contributed (not allocated). Because the contribution would be subject to general testing and may not meet any design-based safe harbor, such a design would require expensive testing and is likely not to pass such tests. Offering the PTO contribution program solely to non-highly compensated employees, however, would avoid this problem.

The IRS also addresses a PTO plan that provides for a limited carryover of unused PTO and a cash-out of unused PTO that exceeds the carryover allowance, with the cash-out paid in the following year. The employer may amend its 401(k) plan to permit employees to elect to receive the PTO cash-out or contribute the PTO cash-out to the 401(k) plan. Although the PTO relates to a year, it is to be paid in cash or contributed to the 401(k) plan in the following year. The employee's election will be treated as a cash-or-deferred election under Code section 401(k), subject to the Code section 402(g) limitation for the year in which it is actually contributed and other requirements for elective contributions.

In a separate ruling, the IRS addressed contributions of leave following termination of employment. The IRS found that the accrued leave could be contributed to the plan, subject to the applicable limits on contributions. In all cases, the employer's plan must be amended to permit such a contribution.

MICHELLE'S LAW (CONTINUED FROM PAGE 6)

The provisions of Michelle's Law are effective for plan years beginning on or after October 9, 2009; therefore, plans operating on a calendar year will need to be amended effective immediately. Employers should also revise their summary plan descriptions to provide notice of this coverage.

CREATING (OR UPDATING) YOUR COMPANY'S CELL PHONE POLICY

Overwhelming statistical evidence demonstrates that the likelihood of an automobile accident greatly increases if the driver is talking on a cell phone or texting. As a result, over half the states have responded to this dangerous trend by banning drivers from sending text messages, sending or checking emails, and/or using a cell phone while operating a vehicle.

Employers certainly will expose themselves to greater liability if they are required to defend an employee-related accident without a sufficient cell phone policy. Moreover, juries may award extensive punitive damages to encourage other employers to adopt a sufficient cell phone policy. As such, it is important to limit a company's liability by creating (or updating) a cell phone policy immediately.

To comply with the laws in all jurisdictions, employers' cell phone policies should prohibit employees, at a minimum, from using any hand-held electronic device while operating a company vehicle. Employers with union employees may have to discuss the proposed policy with the union before implementation.

States banning text messaging for all drivers:	Alaska, Colorado, Louisiana, Maryland, Minnesota New Hampshire, Utah, Virginia
States banning use of hand-held cell phones and texting for all drivers:	California, Connecticut, Hawaii, Maine, New Jersey, New York, Oregon, Washington
States banning use of hand-held cell phones for bus drivers only:	Arizona, Delaware, Georgia, Kentucky, Massachusetts, Rhode Island, Texas
States banning text messaging for all drivers and hand-held cell phones for bus drivers only:	Arkansas, Illinois, North Carolina, Tennessee, Washington, D.C.
Source: Governors Highway Safety Association and www.handsfreeinfo.com	

* This does not include local ordinances, which can further limit the use of an electronic device. Also, some states have created limited exceptions for hands-free devices and drivers over a certain age.

McMahon Berger In The News . . .

- **JAMES N. FOSTER, JR.** and **JOHN J. MARINO, JR.** obtained a favorable arbitration award in Phoenix, Arizona. The grievant alleged he was unjustly terminated because the company audited his employment application and found that he had lied about previous felony convictions and terms of incarceration. The Arbitrator held that because the company conducted a universal audit of all employee files, the grievant was not prejudiced and the discovery of the misrepresentations in his file justified his termination.
- **JAMES N. FOSTER, JR.** and **JOHN J. MARINO, JR.** successfully defended a discrimination claim at a hearing on appeal from the Florida Commission on Human Rights. The claimant alleged the company had failed to properly administer her FMLA request and discriminated against her on the basis of race for failing to notify her of exhaustion of her FMLA leave. The ALJ held that the company properly terminated the claimant and that the claimant could not establish a *prima facie* case of race discrimination.
- **AMY R. BROWN** prevailed on an appeal of a summary judgment before the Eighth Circuit Court of Appeals. The court agreed with the employer's arguments that it was not subject to Title VII and that the individuals named in the suit could not be held liable for discrimination.
- **JAMES N. FOSTER, JR., DANIEL G. FRITZ,** and **AMY R. BROWN** prevailed in an arbitration of a discharge grievance. The arbitrator agreed with the company's position that the employee's last chance attendance agreement did not provide for an excused absence in the particular circumstances at issue, despite his claim that he was absent due to a family emergency and the company should have been lenient.
- **THOMAS O. McCARTHY** and **KEVIN J. LORENZ** were recognized as Super Lawyers in Employment and Labor Law in the 2009 edition of Missouri/Kansas Super Lawyers. **AMY R. BROWN** was named a Rising Star in Employment and Labor Law by the same publication.
- **JAMES N. FOSTER, JR.** and **DANIEL G. FRITZ** obtained summary judgment in the Middle District of Tennessee on a race and gender discrimination claim under Title VII. The Court held the plaintiff could not establish a *prima facie* case and could not prove that the employer's legitimate, nondiscriminatory reasons for assigning him transitional work and discharging him were a pretext for discrimination.
- **JAMES N. FOSTER, JR.** and **DANIEL G. FRITZ** obtained voluntary dismissals in the Middle District of Tennessee in three (3) separate matters. After receiving summary judgment in a fourth lawsuit, the district court granted Plaintiff's request to dismiss the Plaintiffs' claims of race and gender discrimination under Title VII and the Tennessee Human Rights Act. The Plaintiffs' stated in their requests to the Court, "Plaintiff cannot continue to pursue this action given its increasing costs versus potential outcome."
- **JAMES N. FOSTER, JR.** and **DANIEL G. FRITZ** successfully defended the company's position in a contract interpretation arbitration. Agreeing with the company, the Arbitrator relied upon the express contractual language and the company was not required to make any sick leave payments due to the grievants' failure to comply with the requirements set forth in the collective bargaining agreement.
- **JAMES N. FOSTER, JR., DANIEL G. FRITZ and JOHN J. MARINO, JR.** successfully defended the company's position in a contract interpretation arbitration. The consolidated grievances challenged the company's assignment of extra work. The Arbitrator relied upon the clear and unambiguous language in the bargaining agreement, rather than the past practice argument advanced by the Union regarding the assignment of extra work.
- **JAMES N. FOSTER, JR. and JOHN J. MARINO, JR.** successfully argued in the Missouri Court of Appeals that the claimant's use of a racial slur while at the workplace disqualified her from receiving unemployment benefits because the severe nature of the language constituted misconduct. The Court agreed that this type of language was beyond the reasonable conduct an employer may expect of its workers.
- **JAMES N. FOSTER, JR.** and **DALLAS W. CUPP** prevailed at arbitration in Dallas, Texas, where an employee was terminated for violating the employer's leave of absence and maximum number of allowable absences policies. Upon expiration of her workers' compensation leave, the employee had failed to notify the employer that she would not be returning to work because she was on Short Term Disability leave. She argued that, despite her failure to give notice, the employer effectively was on notice of her STD leave due to an agency relationship between it and the STD benefits administrator. The Arbitrator ruled that despite the existence of any such agency relationship, the notice provisions set forth in the bargaining agreement and employee handbook controlled, warranting discharge for violating these clearly defined policies.

DISCLAIMER: The results obtained by any of the aforementioned attorneys, as highlighted on this page of the McMahon Berger, P.C., Labor & Employment Newsletter, are reports of past cases and in no manner should be interpreted or construed as a guarantee of future results. Every case is different and must be judged on its own merits.