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Employment Law Bulletin

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Your Workplace Is Our Work®

Inside this issue:

Discrimination Claims Based On "Family Responsibilities" Increasing

Discrimination claims against employees based upon family care responsibilities are increasing, according to the Center for Worklife Law. The Center reports that 2,100 cases are pending alleging such claims, an increase of 400% during the past decade. According to Joan Williams, founder of the Center, "These cases have a 50% success rate… the average verdict is over $570,000.00. There were 21 verdicts over $1 million and four over $10 million."

Approximately 67% of the cases involve claims related to pregnancy or maternity leave, 9.6% elder care, 7% a sick child and 4% a sick spouse. The types of claims include pregnancy discrimination, failure to promote, disparate treatment for a female caregiver employee compared to a male, stereotyping under the Americans with Disabilities Act and stereotyping based upon women of color or their national origin.

Williams identified three key trends leading to these claims. First is the "new supervisor syndrome." This is where an employee has been able to manage family responsibilities but a new supervisor changes that dynamic, creating workplace conflicts for the employee. The second factor promoting cases is what Williams calls the "second child bias." She states that employers are supportive of employees until they start to have additional children, which employers subjectively conclude shows an employee's lack of commitment to her job. The third factor is what Williams calls the "elder care effect." This involves adverse actions directed toward an employee for taking leave to care for an aging parent.

We expect family responsibilities discrimination (FRD) claims to increase. Individuals who previously may have left the workforce due to family responsibilities may decide either that they do not want to leave or cannot afford to. Employer pressure to maintain a lean workforce will create low tolerance levels for absences due to family care issues. Finally, employers may not realize that family care is a fair employment practices issue, but rather consider it exclusively an attendance issue. Questions about disparate treatment and disparate impact regarding leave and attendance policies will be raised and may be problematic for the uninformed employer.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor

Montgomery .....September 9, 2010
Birmingham .....September 22, 2010
Huntsville.....September 30, 2010

No EFCA? No Problem: President Obama's "Thank You" To Labor

The Service Employees International Union alone spent approximately $60 million in support of President Obama's campaign and those of other key Democratic candidates. No wonder that the President of the SEIU who just retired, Andrew Stern, spent more nights as a guest in the Obama White House than anyone else outside of the President s family. Although the Employee Free Choice Act (EFCA) has stalled in Congress, the President has begun to deliver his "thank you" to labor on several other fronts.

Last month we discussed the President's recess appointments of Democrats Craig Becker and Mark Pearce to the National Labor Relations Board, but not the Republican, Brian Hayes. The sole Republican, Peter Schaumber, will conclude his term in August. How long will a three Democrat member Board Function?

On April 13, pursuant to the President's Executive Order 13502, the United States Department of Labor announced new procedures for project labor agreements (PLAs) involving government construction projects of more than $25 million. The new rules, were created by the Defense Department, the General Services Administration and the National Aeronautics and Space Administration, which collectively maintain the Federal Acquisition Regulation council. In their implementation of the President's Executive order, they stated that "in all cases, the decision to use a PLA on a specific project is left to the discretion of the [contracting] agency. The final Rule provides guidance on various factors the agency may use in deciding whether the use of a PLA is appropriate."

A PLA is a unique feature in the construction industry. It provides that an employer and union may enter into a bargaining agreement for a construction project, even where no employees have been hired and employees who have been hired expressed no desire for unionization. Once the construction project terminates, usually the project labor agreement terminates as well. During the life of the agreement, the employees may initiate efforts at union representation that would last beyond the life of the project agreement. Therefore, this "encouragement" to contracting agencies to "go union" as part of the bid and award process is bound to increase the number of unionized employees in construction, currently an industry where 85% of the workforce is union-free.

An additional payback to labor is developing rapidly in Congress through public sector unionization legislation. Known as the Public Safety Employer-Employee Cooperation Act of 2009 (S. 3194, H.R. 413), this Bill would require cities and towns to recognize a union as the bargaining representative of police officers, firefighters and emergency medical technicians. The employer will be required to collectively bargain regarding wages, hours and terms and conditions of employment and to arbitrate if a bargaining impasse is reached.

Although public sector unionization now exceeds the private sector, that does not include police officers, firefighters and first responders in many locations throughout the United States. Because over half of the states in our country have some form of public sector unionization, we think there is a strong chance this legislation will pass.

Improper Restoration To Returning Servicemember: Employer Owes $1.6 Million

Under the Uniformed Services Employment and Re-Employment Rights Act (USERRA), a returning service person must have the opportunity to return to work at a position with the same earnings or earning potential as when he or she left. The case of *Serricchio v. Wachovia Securities, LLC* (April 5, 2010) involved a commission-based financial advisor who returned to work at a position of limited commission potential.

Serricchio was a financial advisor for Prudential Securities. During his time in Iraq, Wachovia acquired Prudential. Prior to his deployment, Serricchio handled more than 200 accounts, managed over $9 million and earned approximately $6,500 per month. When he returned, Wachovia offered him the opportunity to manage few accounts against which his "draw" would be charged. In concluding that he was not reinstated to a

position of comparable earning potential as at the time he left for Iraq, a jury awarded approximately $390,000 in back pay, an equal amount in liquidated damages due to Wachovia's willful violation of USERRA, $830,000 in attorney fees and $37,000 in interest. The court said that under USERRA, "Serricchio must be provided the opportunity to reenter the workforce with comparable earning potential and chance for advancement as his own book of business provided prior to his service, regardless of whether the same clients are in the substituted books."

An employer's USERRA responsibilities are uncompromising. Returning an individual to the same or comparable position with the same or comparable earning power is more complex for certain positions, such as an investment broker, than others. However, that does not diminish the employer's overall responsibility to place the individual in the workplace as if he or she had never left.

Impermissible Medical Inquiry Leads To ADA Violation

The case of *Hurgan v. Simmons* (April 12, 2010) involved an HIV-positive employee whose condition did not interfere with his job duties. However, questions about the individual's condition were admissible evidence to support the claim that responses to those questions were the basis for the employee's termination.

The HIV-positive employee had a record of AIDS, but the condition was in remission. Under the American's with Disabilities Act Amendments Act, a condition that is in remission that involves an individual's immune system or major bodily functions is considered a "major life activity" case.

The employee, Hurgan, worked for seven years as a sales manager for the employer at its Chicago facility. For approximately ten years, the employee was HIV-positive, but maintained the confidentiality of his medical condition. The president of the company met with Hurgan and stated that Hurgan needed to disclose to the president "If there was something medical going on." After further pressure from the president, Hurgan told him about his HIV condition. The president expressed concerns about whether Hurgan could "lead if the employees knew about his condition" and could continue to work "with a terminal illness." The following day, Simmons terminated Hurgan.

The court stated that an employer's right to inquire about an employee's medical condition must be "job-related and consistent with business necessity." The president's medical questions of Hurgan violated that limitation because there was no work-related issue compelling the president to make the inquiry. Thus, the inquiry violated the ADA. Furthermore, under the ADA Amendments Act, a condition that is in remission is a disability if it would affect major life activities when active. Such is the case with HIV and AIDS. Therefore, the Court ruled that the impermissible inquiry combined with termination due to the disclosure of an HIV-positive condition justified the case proceeding to a jury trial.

Workers' Compensation Corner: The Employee Misrepresentation Defense

This article was written by Don Harrison, whose practice is concentrated in Workers' Compensation and OSHA matters. Don can be reached at dharrison@lehrmiddlebrooks.com or 205.323.9276.

In many states, including Alabama, employee misrepresentation of a physical condition can be a defense to a workers' compensation claim. Usually the elements an employer must prove to prevail on such a defense: 1) In the course of an employee's entering into his employment relationship with an employer; 2) the employer provided a written warning regarding misrepresentation of preexisting physical or mental conditions; 3) the employee knowingly and falsely misrepresents his or her physical or mental condition; 4) the employee's misrepresentation was made in writing; and 5) the employee's condition was aggravated or re-injured in an accident arising out of and in the course of employment.

An example of the written warning is which that provides Alabama's Workers' Compensation Act, the employer's written warning to the employee. Specifically, the employer's written warning must state: "Misrepresentations as to preexisting physical or mental conditions may void your workers' compensation benefits."

The Americans with Disabilities Act precludes an employer at the time of application from inquiring into past medical conditions or past workers' compensation claims. However, the ADA does not preclude post-offer, pre-employment inquiries. After an applicant is given a conditional job offer, but before s/he starts work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. And if the employee misrepresents his or her medical history, the employer may have a viable defense to a subsequent workers' compensation claim.

EEO Tips: What To Expect From The EEOC's New Leadership

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

According to the EEOC's budget projections for 2010 through 2013, the agency is facing a staggering workload mainly because of the increased statutory authority resulting from the passage of the ADA Amendments Act of 2008 (ADAAA). From this source alone, charge receipts are expected to increase by 9% in fiscal year 2010 and up another 8.4% in fiscal year 2011. To a lesser extent, the agency anticipates some increased charge activity attributable to GINA and the Lilly Ledbetter Fair Pay Act. Notwithstanding the hiring of approximately 225 additional investigators, pending charge inventories are projected to climb from 85,768 at the end of FY 2010 to 110,339 at the end of 2013.

With the appointment of three new Commissioners and a new General Counsel during the month of April, the EEOC will finally be back to full strength after operating for a significant period with only two Commissioners and a vacant General Counsel position. As with NLRB appointments, three Commissioners are of the same party as the President. The question is what difference, if any, will the new Commissioners make in steering the EEOC in one direction or another? Will the EEOC pivot toward more intense enforcement or merely housekeeping to reduce the burgeoning backlog of cases? Clearly each of the new Commissioners will bring a distinctly different background to the Commission and to the resolution of the Commission's mounting workload.

On April 7 **Jacqueline Berrien** and **Chai Feldblum**, two Democrat recess appointees by President Obama, were sworn in bringing the number of active Commissioners up to four. A final recess appointee, **Victoria Lipnic**, Republican was sworn in on April 20 to make up the full complement of the five-member commission.

P. David Lopez, another recess appointee, was sworn in April 7 as the EEOC's General Counsel. By law, the position of General Counsel is the sixth and last position subject to Presidential Appointment at the EEOC.

Jacqueline Berrien, is the Chair of the Commission. For the past five years, she was the Associate Director-Counsel of the NAACP Legal Defense and Educational Fund (LDF). She received her undergraduate degree from Oberlin College and a law degree from Harvard Law School where she served as a General Editor of the Harvard Civil Right-Civil Liberties Law Review. Her legal experience includes representation of clients in cases involving employment law, voting rights act violations, and teaching trial advocacy. She has an Alabama connection in that she served as a law clerk to Judge U. W. Clemon in the U. S. District Court for N. D. of Alabama. Thus, she brings a strong civil rights background to the Commission, which in my opinion suggests that she would be inclined to proactively enforce all of the federal anti-discrimination statutes for which the EEOC is responsible.

Since 1991, **Chai Feldblum** had been a Professor of Law at Georgetown University. While there, she founded the Federal Legislation and Administrative Clinic, which was designed to train students to become legislative lawyers. Feldblum is a graduate of Barnard College and earned her law degree from Harvard Law School. Her background includes a working interest in mental health law. Reportedly she played a leading role in drafting certain provisions contained in the Americans With Disabilities Act of 1990 while serving as Legislative Counsel to the AIDS

Project of the ACLU. Additionally, Feldblum has exhibited strong support for legislation pertaining to gay and lesbian employment rights including the Employment Non-Discrimination Act (ENDA) which is currently pending in the Congress. She clerked for Judge Frank Coffin of the U. S. Court of Appeals for the First Circuit and Supreme Court Justice Harry A. Blackmun. Thus, her background suggests that she will take a broad view of employment rights, stretching them, where possible, to include non-discrimination regardless of an employee's sexual orientation and/or gender identity.

Victoria Lipnic most recently was of counsel to a labor and employment law firm in Washington, D.C., representing employers. Prior to that position, Lipnic was the Assistant Secretary of Labor for Employment Standards from 2002 to 2009, appointed by President George W. Bush. She was responsible for oversight of the Department of Labor – Wage and Hour Division. OFCCP, The Office of Labor Management Standards and The Office of Workers' Compensation programs. She previously worked as staff counsel for members of the House Committee on Education and Labor. She received her undergraduate degree from Allegany College, and her law degree from George Mason University.

P. David Lopez, who was sworn in as General Counsel, actually, has had some direct EEOC experience, both as an Administrative Assistant and as a Supervisory Trial Attorney. He worked as an Administrative Assistant to Gilbert Casellas, a former Chair of the agency, and for the past twelve years he has served as a Senior and Supervisory Trial Attorney in the EEOC's Phoenix District Office. Lopez's caseload while serving as a Supervisory Trial Attorney had been very active. He successfully litigated a number of cases including some jury trials and settlements across virtually the whole spectrum of statutes enforced by the EEOC. Thus, he brings some practical litigation experience based upon the Commission's approach to enforcing the statutes under its charge. Lopez earned his undergraduate degree from Arizona State University in Political Science, graduating, magna cum laude, and a law degree from Harvard Law School. Combine the EEOC's efforts to hire additional investigators and attorneys with Lopez's record as an active litigator, and you get a Commission likely to increase--substantially--the number of cases it chooses to litigate under all statutes.

Stuart J. Ishimaru has been an EEOC Commissioner since 2003. He had been nominated by President George W. Bush, but was recommended for a second term by Senate Leader, Harry Reid. President Obama designated him the Acting Chair until Jacqueline Berrien was sworn in on April 7. During the last year or so, Ishimaru has capably carried on the business of the Commission along with just one other member, **Constance S. Barker**. Incidentally, Constance Barker also has an Alabama connection in that immediately prior to her nomination to the Commission by George W. Bush, she was a shareholder in a Montgomery, Alabama law firm. Ms. Barker has displayed a strong interest in issues affecting women especially workplace violence against migrant female farm workers. Additionally, she has expressed concern for the specialized needs of small businesses during the present economic downturn.

In summary, although the Commission must pay immediate attention to its growing backlog of charges to process, in my judgment the overall thrust of this new Commission (given the backgrounds of the new Commissioners) will be to show high enforcement visibility with respect to charges involving disability claims, racial harassment and sex discrimination involving promotions and equal pay issues.

EEO TIPS: In its budget projections for 2010 through 2013 the EEOC placed particular interest in enhancing two of its enforcement programs: its Systemic Program, and its Mediation Program.

Systemic Cases. The EEOC's budget justifications suggested that while cases involving "individual harm" would still be pursued, the Commission could get more enforcement visibility and effectiveness by developing cases "where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." The number of charges designated as "Systemic" rose from 1,947 in 2008 to 2,390 in 2009. Expect the new Commissioners to push for a considerable increase in these cases in 2010, 2011 and 2012.

Mediation. Although the number of cases mediated by the Commission decreased from 8,840 in FY 2008 to 8,498 in FY 2009, the EEOC was encouraged by the fact that mediation and other alternative dispute resolution

programs resolve EEOC charges more quickly and more efficiently (less costly) than prolonged investigations under the normal charge processing system. Moreover, according to the EEOC's survey, 96% of participants liked the program and stated that they would use the program again if the occasion arose. In short, mediation is very cost effective as far as the Commission is concerned. Look for another strong push for this program in 2011 through 2013.

If you have any questions about any of the foregoing matters, or how they might affect your firm please don't hesitate to call this office at (205) 323-9267.

OSHA Charts Course

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

On April 7, 2010 OSHA invited everyone to a live internet chat. The purpose was to allow its stakeholders an opportunity to have input into the formulation of OSHA's Strategic Plan for fiscal years 2010-2016. Such a plan is required by the Government Performance and Results Act (GPRA) of 1993. On hand to receive and react to the questions and comments of participants were the Assistant Secretary of Labor for Occupational Safety and Health, David Michaels, his deputy assistant secretaries, and others in top leadership roles with OSHA.

While the purpose of this session was to facilitate development of the required six-year plan, the exchanges were instructive in regard to current activities, areas of emphasis, and directions of the agency.

Topics drawing the greatest interest and prompting the most comments and questions were the concerns that OSHA might be abandoning compliance assistance programs while revving up enforcement and the resurrection of ergonomics.

With respect to compliance assistance and voluntary programs versus enforcement, OSHA acknowledged plans for some reallocation of resources. For example, when asked how the agency will balance enforcement with voluntary compliance, OSHA answered as follows: "We will be shifting field inspection staff from VPP (Voluntary Protection Programs) to enforcement." Other OSHA responses to concerns of reduced support for VPP noted that the program wasn't being eliminated, but that the agency was being forced by budgetary issues to direct its limited resources toward those employers who don't understand the importance of protecting their workers. It was also suggested that there may be efforts to gain non-government funding to support VPP.

Comments from chat participants reflected concerns that compliance assistance will be less available with the proposed transfer of Compliance Assistance Specialists to enforcement duties. OSHA, in their replies to these, voiced their continued support and belief in the importance of assistance programs. As evidence of this, they pointed out more than once the increase of one million dollars in funding for free on-site consultative assistance through the State Consultation Program.

Ergonomics generated much attention in this chat. A participant asked whether ergonomics would be on the agenda. Deputy Assistant Secretary Jordan Barab answered as follows, "We will be adding a musculoskeletal disorder column to the OSHA log next year and will be increasing our enforcement activities addressing ergonomic issues. Another question that was asked was, "How will OSHA be increasing ergonomic enforcement?" Assistant Secretary Michaels responded by noting that until recently such enforcement languished. He said that staff would be looking for ergonomic hazards on their inspections and at injury logs to see if musculoskeletal disorders are being accurately reported.

Noting that one point on OSHA's strategic plan calls for "an increased presence in the workplace," a participant asked what that means for employers and how will it be implemented. In his response, Deputy Assistant Secretary Fairfax pointed to an increase in compliance staff and a strong emphasis on industrial hygiene. He said that health inspectors would be looking at issues such as noise and hearing loss.

Responding to a comment on the strategic plan's mention of a restructuring of penalties, Fairfax replied, "OSHA will shortly be changing our penalty calculation method resulting in higher penalties."

Wage And Hour Tips: Are Interns Employees?

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

As we approach the summer, many students will be graduating and seeking employment. Due to the lack of available jobs, employers may have recent graduates approaching them who would like to gain experience by interning at the company. In many cases the person may offer to intern without being paid. There have been several articles recently indicating that persons, other than recent graduates, are also offering to serve as an unpaid intern. Your first inclination might be to think of this as free labor and to readily accept the person. However, before doing so employers should consider the possible ramifications of allowing someone to work at your business without being paid. As you know, all employees, unless otherwise exempt, must be paid at least the minimum wage of $7.25 per hour and time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek. Failure to do so could result in a requirement that you pay the intern's wages plus an equal amount of liquidated damages and attorney fees.

The definition of "employee" is very broad under the Fair Labor Standards Act (FLSA), but persons who, without any express or implied compensation agreement, work for their own advantage on the premises of another may not be employees. Workers who receive work-based training may fall into this category and may not be employees for purposes of the FLSA. The specific facts and circumstances of the worker's activities must be analyzed to determine if the worker is a bona fide "trainee" who is not subject to the FLSA or an "employee" who may be subject to the FLSA. The employer is responsible for complying with the FLSA, and an intern's participation in a subsidized work-based training initiative does not relieve the employer of this responsibility.

The Wage and Hour Division of the U. S. Department of Labor has developed the six factors below to evaluate whether a worker is a trainee or an employee for purposes of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

If all of the factors listed above are met, then the worker is a "trainee", an employment relationship does not exist under the FLSA, and the FLSA's minimum wage and overtime provisions do not apply to the worker. Because the FLSA's definition of "employee" is broad, the excluded category of "trainee" is necessarily quite narrow. Moreover, the fact that an employer labels a worker as a trainee does not make the worker a trainee for purposes of the FLSA unless the six factors are met.

If you have a person that you are contemplating allowing to work as an unpaid intern, I suggest that you look very closely at the criteria outlined above and make sure the person meets all of the factors set forth before allowing the intern to work at your operation.

On April 14, Wage and Hour announced they had resolved an investigation of Western WATS Center of Orem, Utah, with the firm agreeing to pay a child labor civil money penalty of $500,000. The market research firm had used almost 1,500 fourteen- and fifteen-year-old minors, also

including three minors who were 13, in its call centers located in several states in the Southwest and Northwest. The agency had assessed the penalty of more than $550,000 in 2009. As we approach the end of the school year, I am sure many employers will be approached my minors seeking work. Employing minors contrary to the child labor laws can get very expensive, thus prior to deciding to hire workers under the age of 18 you should make sure that their employment does violate either Alabama's child labor laws or the FLSA.

In early April, the Secretary of Labor announced a new emphasis on its "We Can Help" program. This is an effort to get employees to file complaints regarding their pay if they believe they have been improperly paid. This targeted effort is a result of Wage and Hour's hiring of 250 new investigators within the past year and probably involves the fact that the Government Accountability Office issued a very scathing report concerning their failure to follow up on complaints that were filed by employees. In view of this increased scrutiny it behooves employers to evaluate their pay practices to ensure they are paying in compliance with the Fair Labor Standards Act. If I can be of assistance do not hesitate to give me a call.

2010 Upcoming Events

EFFECTIVE SUPERVISOR®

Montgomery-September 9, 2010
Hampton Inn and Suites

Birmingham-September 22, 2010
Bruno Conference Center

Huntsville-September 30, 2010
U.S. Space and Rocket Center

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com.

Did You Know…

…that a California jury ordered a union that split from the Service Employees International Union to pay $1.5 million to the SEIU for breach of fiduciary duty? *SEIU v. Rosselli* (N.D. CA, April 9, 2010). The evidence showed that the leaders of the United Health Workers West planned to form a rival union and disaffiliate from the SEIU. NUHW was the largest SEIU Local, with approximately 120,000 members. UHW leaders were found individually liable in amounts ranging from $36,000.00 to $77,000.00.

…that SEIU President, Andy Stern, on April 14 announced he plans to retire? During his 14 years as President, the SEIU gained 1.2 million new members and formed the largest political action committee in the country. Under Stern's leadership, SEIU's grassroots political organizing initiatives galvanized 100,000 union members to get out the vote for President Obama. The union will vote on a successor during the next 30 days. Anna Burger, SEIU Secretary-Treasurer and President of the Change to Win Coalition, is a leading candidate to succeed Stern.

…that an employer's technology use policy did not extend to reading an employee's password protected e-mail account when she corresponded with her attorney? *Stengart v. Loving Care Agency, Inc.* (N.J. S. Ct. April 1, 2010)? The employer's electronic communications policy included the use of an employer issued laptop. The employee had a personal password protected Yahoo account, which she used to communicate with her attorney about work-related issues. She filed a discrimination claim against the employer and her attorneys sought to disqualify the employer's use of her attorney/client communications. In prohibiting the use of those communications, the court stated that the employer's electronic monitoring policy did not extend to the employee's web-based e-mail account. Furthermore, the court stated that the attorney/client privilege encourages the free exchange of information between the client and the attorney, and should not be subject to search by the employer. A message to employers: review the scope of your organization's electronic communications policy to determine whether it is broad enough to include employee communications on a separate account that is password protected.

…that a fire captain's First Amendment free association rights were not violated when he was demoted for having a sexual relationship with a subordinate? *Starling v. Board of County Commissioners* (11th Cir. April 6, 2010). The captain argued that such a relationship was his First Amendment Constitutional right to freedom of association. In rejecting that argument, the court stated that "the County's interest in discouraging extramarital associations between supervisors ad subordinates is so critical to the functioning of the Fire Department, that it outweighs the firefighter's interest in extramarital association with a subordinate, even if we assume arguendo that the First Amendment protects extramarital association as a fundamental right."

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