Cut and Paste Post
September, 2011

Montana Human Rights Commission Retaliation Cases

Welcome to GVHRA's first Fall meeting! I hope everyone had a great summer. This *Cut N Paste* focuses on a few cases recently decided by the Montana Human Rights Commission. The first is a follow up from a case I previously told you about. The other two reviewed the Montana's anti-retaliation provisions.

Groven v Eagles Club

I first told you about this case in the March/April *Cut N Paste* Post. Groven filed a complaint with the Department of Labor and Industry (DOL), which alleged discrimination in employment on the basis of gender (sexual harassment), which created a hostile work environment at Havre Eagles Club, No. 166. Following investigation, the DOL determined that a preponderance of the evidence supported Groven's allegations. The case went before the Hearings Bureau of the DOL, which held a contested case hearing.

In a decision issued April 8, 2011, the Hearings Officer determined that the Eagles discriminated against Groven on the basis of gender, in violation of the Montana Human Rights Act and that the sexual harassment was perpetrated by the Club's general manager Thomas Farnham. The Hearings Officer further concluded that the Eagles had constructively discharged Groven from her employment because working conditions had become both subjectively and objectively intolerable. The Hearings Officer awarded Groven damages in the amount of $193,502.47, including $75,000 in emotional distress damages and proposed specific actions that the Eagles take to ensure that no further discrimination occurred. As you will recall, despite it all, Farnham remained employed by the Eagles.

The Eagles filed an appeal with the Montana Human Rights Commission (Commission), which considered the matter on July 20, 2011. The Eagles did not dispute the liability of the Eagles for the sexual harassment and hostile work environment against Groven, but argued that the Hearings Officer's award for compensatory damages was inappropriate.

The Commission agreed with the Eagles that the damages were inappropriate but rather than reducing the damages, the Commission increased them. In its Order, the Commission said it was left with "a definite and firm conviction that the Hearings Officer made a mistake in his determination that $75,000 is sufficient to compensate Groven for the extreme emotional distress that she experienced over the years of her employment with Havre Eagles Club No. 166." The Commission found "collusion" between the Eagles Board of Trustees and the perpetrator of the sexual harassment and sexual assault, and that this collusion exacerbated the distress and hopelessness that Groven experienced.

In the end, the Commission concluded that the severity of the abuse, the intensity of Groven's suffering, and length of time that the sexual harassment persisted supported a ***higher*** damage award and remanded this matter to the Hearings Bureau for further consideration of the compensatory award for emotional distress damages. The Bureau is now in the process of further consideration. Stay tuned for an update!

Retaliation Nation?

The Montana Human Rights Act prohibits "Unlawful and retaliatory actions against a person who has engaged in protected activity" including 'coercion, intimidation, harassment . . . or other interference with the person or property of an individual.' Federal law has a similar provision. Retaliation is increasingly becoming alleged in discrimination-related claims being filed at the national and State level. Here are two cases in which the Human Rights Bureau found that retaliation had occurred, and awarded huge damages to the charging parties.

Wilson v MT Dept of Corrections (DOC)
This whole thing started when DOC's Legal Bureau Chief and Deputy Bureau Chief, for whom Wilson worked, learned Wilson had made statements to an internal investigator that supported aspects of another employee's discrimination complaint. The retaliation continued when Wilson "refused to recant the statement and give or agree to give a contrary statement in the formal investigation of that discrimination complaint and/or any subsequent hearing or trial regarding that complaint."

In the Decision, the Hearings Officer said, "None of the primary participants looked good during this progressive meltdown of an apparently tense but previously functioning unit." The Officer added, " Of greatest import to this decision, DOC's appointed supervisors continued to fuel the fires at every step of this conflagration, with unrelenting efforts to force Wilson to recant her statements … undertaken with escalating hostility toward Wilson." Despite what was described as dysfunctional workplace, the Hearings Officer found no evidence that Wilson had behaved in any combative or dysfunctional ways before her superiors began to retaliate against her.

The Hearings Officer found that retaliation had occurred and, after comparing the circumstances and awards granted in other cases, awarded Wilson $37,500.00 to remedy emotional distress. The DOC was also ordered to prepare a plan for 4 -hour training of its Bureau Chiefs and Deputy Bureau Chiefs (and comparable supervisors with other titles) designed to eliminate the risk of future violations of the Montana Human Rights Act.

The Hearings Officer described this case as an 'unfortunate workplace drama' where 'none of the participants … demonstrated clear judgement'. You really need to read this case, as it will probably make you love your job and the employees you work with!

Stearns v Family Services Inc (FSI)
Stearns was the Finance Manager for FSI, with an exemplary personnel record. After FSI provided its employees non-discrimination training, Stearns was approached by an employee who indicated she may have been subject to sexual harassment. The employee was afraid to go to management so Stearns told the employee to draft a statement about the harassment and she would give the statement to management. Stearns did as promised and, as a result, was subjected to adverse employment actions, up to and including termination, caused in part by her supervisor falsely reporting to the Board of Directors that Stearns had failed to submit a required report.

The Hearings Officer found that FSI retaliated against Stearns after and because of her opposition to illegal discrimination at her place of employment. The Hearings Officer found that Stearns was subjected to a hostile work environment and eventually wrongfully discharged from her position. The Hearings Officer awarded Stearns $90,480.80, representing $51,916.51 in lost wages and benefits, $3,564.29 in prejudgment interest and $35,000.00 in emotional distress damages, and $335.19 in post judgment lost wages and benefits FSI was also permanently enjoined from retaliating against any person for opposing illegal sexual harassment of employees, and was ordered to adopt policies regarding discrimination in the workplace that are acceptable to the Human Rights Bureau, and to arrange and pay for four hours of training to all management, staff, and employees.

NLRB Issues Final Rule Requiring Posting of NLRA Rights

As of November 14, 2011, private-sector employers (including labor organizations) whose workplaces fall under the National Labor Relations Act will be required to post an employee rights notice where other workplace notices are typically posted. The notice states that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities. The notice also provides examples of unlawful employer and union conduct and instructs employees how to contact the National Labor Relations Board with questions or complaints.

So, do you know if you're subject to the National Labor Relations Act and are, therefore, subject to this posting requirement? Neither do I! ☺ but here's what I can tell you.

According to the regulations,

- Covered employees ***exclude***: agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act

- Covered employers ***exclude:*** the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, any person subject to the Railway Labor Act, any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

- The most commonly applicable jurisdictional standards for employers are:

  (i) The retail standard, which applies to employers in retail businesses, including home construction. The Board takes jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.
  (ii) The nonretail standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called "outflow") or goods or services purchased by the employer from out of state (called "inflow"). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either Direct —to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.

The Rule (http://www.federalregister.gov/articles/2011/08/30/2011-21724/notification-of-employee-rights-under-the-national-labor-relations-act) includes a Table which describes the conditions under which the Board takes jurisdiction for many specific industries. A fact sheet with further information about the rule is available at https://www.nlrb.gov/news-media/fact-sheets/final-rule-notification-employee-rights.

A more complete discussion of the Board's jurisdictional standards may be found in An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's Web site, http://www.nlrb.gov.

I would strongly encourage you to review these regulations and supporting documents, and take action by November 14th if necessary, to comply with the posting requirement.

And, finally, on the lighter side….

Hiring Managers Share Most Unusual Resume Mistakes

From the Ceridian August 31, 2011 HR Compliance Solutions Abstract

With 13.9 million Americans seeking work, according to the Bureau of Labor Statistics, grabbing an employer's attention quickly and leaving a positive impression is critical. According to a recent CareerBuilder study, nearly half (45 percent) of human resource managers said they spend, on average, less than one minute reviewing an application. The survey, which was conducted by Harris Interactive© from May 19 to June 8, 2011, included more than 2,600 employers nationwide.

When asked to recall the most memorable or unusual résumés, human resource managers and hiring managers shared the following:

1) Candidate said the more you paid him, the harder he worked.

2) Candidate was fired from different jobs, but included each one as a reference.

3) Candidate said he just wanted an opportunity to show off his new tie.

4) Candidate listed her dog as reference.

5) Candidate listed the ability to do the moonwalk as a special skill.

6) Candidates -a husband and wife looking to job share -submitted a co-written poem.

7) Candidate included "versatile toes" as a selling point.

8) Candidate said that he would be a "good asset to the company," but failed to include the "et" in the word "asset."

9) Candidate's email address on the resume had "shakinmybootie" in it.

10) Candidate included that she survived a bite from a deadly aquatic animal.

11) Candidate used first name only.

12) Candidate asked, "Would you pass up an opportunity to hire someone like this? I think not."

13) Candidate insisted that the company pay him to interview with them because his time was valuable.

14) Candidate shipped a lemon with résumé, stating "I am not a lemon."

15) Candidate included that he was arrested for assaulting his previous boss.

I'll bet some or all of these sound familiar! ☺ Enjoy the rest of your summer. See you next month!