

WCPA: Legal Update

February 9, 2006

James R. Korom
von Briesen & Roper, s.c.
411 East Wisconsin Avenue, Suite 700
Milwaukee, Wisconsin 53202
(414) 276-1122
(800) 622-0607
(414) 287-1231 (Mr. Korom's direct line)
jkorom@vonbriesen.com

I. DISABILITY DISCRIMINATION

- A. ***Karraker v. Rent-A-Center, Inc.*, 411 F.3d 381 (7th Cir. 2005).** Personality tests, that are part of an application process, may qualify as “medical examinations” under the ADA if the personality test inquires about or measures a mental disorder. The employer required applicants for a promotion to take a series of nonphysical personality tests (MMPI) that measured personality traits and could be used to help diagnose certain psychiatric disorders. Although the test was not interpreted by a psychologist, the test was a “medical examination” under the ADA because it was designed, at least in part, to reveal mental illness and had the effect of hurting the employment prospects of one with a mental disability.
- B. ***Van den Elsen v. Brown County*, ERD Case No. CR2001000007 (2005).** An employer’s decision to terminate an employee because the employer anticipated that accommodating the employee would lead to grievances based on violations of the seniority provision of a contract, was improper. An employer may not prematurely terminate an employee before a situation arises where the employee could not perform his tasks and no more senior worker would voluntarily trade jobs with the worker. The employer must wait for the need for an accommodation to arise before determining whether to discharge a worker. The employer does not need to wait for a grievance to be filed.
- C. ***Estate of Szleszinski v. Labor & Indus. Review Comm’n*, 2005 WI App 229, ___ Wis. 2d ___. 706 N.W.2d 345.** The employee, who had Wilson’s disease, was hired as a driver by a leasing company, which leased trucks and drivers to the transportation company. After the transportation company received two complaints of erratic driving against the employee, it requested that he receive a medical evaluation. The examining physician concluded that he was able to operate a vehicle. The transportation company sent the employee’s medical records to a second physician, who, without interviewing the employee, recommended that he not drive a commercial vehicle. The transportation company terminated the employee. The second physician’s report was found to be insufficient under the WFEA, because the WFEA required a case-by-case assessment of each individual. The second physician did not make an individualized determination about the employee’s ability to drive, but recommended disqualification simply because a department of transportation report said that all Wilson’s patients should be disqualified.
- D. ***Doepke-Kline v. Labor & Indus. Review Comm’n*, 2005 WI App 209, ___ Wis. 2d ___. 704 N.W.2d 605.** The diagnosis of asthma alone may not establish a disability within the meaning of the WFEA. The employer terminated the employee for unsatisfactory attendance for absences based on sickness, stomach flu, back pain, asthma, pneumonia, and a cold. The court rejected the employee’s argument that the employer violated the WFEA by discharging her because of her asthma, refusing to accommodate her disability, and discriminating against her in the terms and conditions of her employment because of her disability.

II. SEXUAL HARASSMENT

- A. ***Whitaker v. Northern Illinois University, et al.*, No-04-3759, (7th Cir. 2005).** No harm, no foul, no sexual harassment case. An objectively hostile work environment will not be found where most of the conduct consists of derogatory statements made by supervisors or co-workers out of the complainant's hearing, and relatively isolated instances of non-severe misconduct will not support a claim of a hostile environment. In this case, supervisors referred to the complainant in explicit, derogatory, and sexist terms, but the references were made outside the complainant's presence, and there is no evidence that she was aware of the remarks while working for the employer. Even arguably offensive comments that were made in the complainant's presence—namely, her supervisor's propositions that she join him on his boat for “a weekend of drinking and other things”—the behavior, while questionable, was relatively isolated, and alone not actionable.
- B. ***Sanderson v. Handi Gadgets Corp.*, ERD Case No. CR200201194 (LIRC 3/31/2005).** While sexual harassment claims brought under Title VII permit employers to raise an affirmative defense to the sexual harassment claim, LIRC will no longer recognize the federal court-created affirmative defense under sexual harassment claims brought under the WFEA. In *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court held that an employer may raise an affirmative defense claiming the employer took reasonable steps to prevent harassment in the workplace, if the employer shows it exercised reasonable care to prevent and promptly correct harassing behavior and if the complainant unreasonably failed to take advantage of preventative opportunities or other failed to take reasonable measures to avoid the harm. There is no affirmative defense available under the WFEA, because under the WFEA the employer is liable for sexual harassment by its agent whether or not the employer addressed the matter and without regard to whether the complainant availed herself of opportunities to complain.

III. ARREST AND CONVICTION RECORD DISCRIMINATION

- A. ***Blunt v. Dept. of Corrections*, ERD Case No. CR200302691 (2005).** The employer was not entitled to use the *Onalaska* defense, because the employer's investigation into the employee's arrest and drug conviction merely consisted of reviewing the criminal complaint and very limited questioning of the employee.
- B. ***McClain v. Favorite Nurses*, ERD Case No. 200302482 (2005).** Typically, the passage of time since the commission of the crime is irrelevant in the substantial relationship analysis, in finding a nurse's ten-year record of satisfactory job performance following a misdemeanor battery conviction was not germane to the substantial relationship analysis.
- C. Or is it . . . ***Robertson v. Family Dollar Stores*, ERD Case No. CR200300021 (2005).** LIRC stated, “the fact that twenty years have elapsed since the conviction

without the complainant's having reoffended, during which time it can be presumed that he has come into contact with females, would seem to indicate that he does not pose a general threat to all females, such that the mere presence of females in the workplace would create a risk of recidivism for him."

IV. **OTHER DISCRIMINATION ISSUES**

A. Age: *Smith v. City of Jackson*, 125 S.Ct. 1536 (2005).

The bad news: The U.S. Supreme Court determined that a municipality's proposal to raise the salaries of employees up to a comparable average which caused younger employees to receive proportionately greater raises when compared to their former pay than older employees with more seniority, could be challenged under the ADEA as age discrimination based on a disparate impact theory. The complainants must allege the specific employment practices that generate the adverse effect.

The good news: The municipality's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding communities was a decision based on a "reasonable factor other than age" that responded to the municipality's legitimate goal of retaining its employees.

B. *Washington v. Illinois Dep't of Revenue*, 420 F.3d 658 (7th Cir. 2005). An "adverse employment action" must materially alter the terms and conditions of employment. A transfer or a change in working hours without a change in job responsibilities or pay may constitute an "adverse employment action" necessary to sustain a discrimination charge. The threshold for a sufficient "adverse employment action" in a retaliation claim may be lower than in a discrimination claim.

C. *Merta v. Labor & Indus. Review Comm'n*, 2005 WI App 59, 280 Wis. 2d 558, 694 N.W.2d 510 (Unpublished). LIRC found the employee was terminated because of her own behavior, rather than because of gender discrimination, despite the employee's assertion that the employer treated similarly situated male employees who engaged in misconduct more favorably than it treated her. The employer alleged that no male employee engaged in the same severe insubordinate misconduct as the employee, such as slamming a door, sending a derisive email, challenging a supervisor to write up a disciplinary report, hanging up on a supervisor, and failing to comply with a last chance agreement. While the complainant drew inferences that her male counterparts' conduct was equally insubordinate in other ways, the commission was entitled to make its own credibility determinations about witness testimony and find the employer did not base its decisions on her gender.

V. **UNION/MANAGEMENT ISSUES**

- A. ***MMAC v. Milwaukee County, 2005 U.S. App. Lexis 26467.*** Milwaukee County Ordinance required certain firms having contracts with the County to negotiate labor-peace agreements with any union that wanted to organize employees who worked on county contracts. The Court found the County's spending power could not be used as a pretext for regulating labor relations. Although the county had a legitimate interest in avoiding interruptions in services, ordinary contract remedies were adequate. The County could not substitute its own labor-management philosophy for that of the NLRA, and the labor-peace agreements were as likely to increase as to decrease work stoppages.
- B. ***State of Wisconsin, Univ. of Wisconsin, No. 30534-B (WRC 2005).*** An employer does not act with unlawful union animus when it revokes a job offer for a position misclassified as a nonunion position, because scheduling completion of the work would be delayed by posting and reinterviewing candidates for the union position. WERC noted the employer's decision was akin to an employer's decision to not offer the position in the first place. While WERC noted the possible "chill" on union activity, when the employer acts based on legitimate reasons, a unionized employee's understandable but mistaken impression that the employer acted to "chill" union activity does not render the employer's action as unlawful.
- C. ***Edgerton Fire Protection District, No. 30686-B (WERC 2005).*** Employer's decision to eliminate three full-time firefighter positions (constituting the entire bargaining unit) and rely solely on volunteers was, in part, based on unlawful union animus. The employer contended its decision was based solely for budgetary reasons. WERC noted the suspect timing and manner of the employer's decision. For example, the employer took immediate action at meeting scheduled with 24 hours notice to eliminate the positions mid-year, even though the positions were fully funded for the entire year. WERC also determined that the decision to eliminate its full-time firefighters while continuing to provide the same level of service through less expensive labor is a mandatory subject of bargaining (noting a similarity to subcontracting and distinguishing from a decision to layoff).
- D. ***Waukesha County, No. 30799-B (WERC 2005).*** Employer's decision to layoff union president was not based on unlawful union animous, although the circumstances aroused suspicion. WERC noted the person recommending the layoff was unaware the union president would be affected by eliminating the position, and County officials made considerable efforts to minimize the impact of the layoff by offering a shared position and by encouraging the employee to apply for several other vacancies for which she was eligible. Additionally, the layoff was very brief and resulted in no economic losses based on the severance package and the employee's ability to find work in a different department.

- E. ***City of Princeton, 31041-B (WERC 2005)***. An employer violates its duty to maintain the status quo while awaiting a pending interest arbitration decision by unilaterally implementing a tentatively agreed upon insurance plan design change in order to meet the plan design deadline imposed by the insurance carrier. While awaiting the interest arbitration decision, the employer was informed by the insurance carrier that plan changes must be implemented by May 1 or the employer would have to wait one additional year before it could implement the agreed upon changes. The Union refused to agree to implement the insurance changes on May 1, and arguably, the Union delayed the interest arbitration decision from being issued in a timely manner by filing its brief two weeks late. The Arbitrator issued the decision on May 3. The employer argued the changes were *de minimis* and the union should be held responsible for causing the delay. In addition to rejecting these arguments, WERC determined the employer failed to show necessity for changing the plan before the decision. WERC did state the employer could have signed the agreement with the insurance carrier and simply held the employees harmless from the plan changes until the award was issued (which is part of the remedy WERC ordered).

More important, WERC sent this warning to all employers regarding unilateral changes in the status quo and the possible impact to the employer's unilateral action:

... the Commission's case law is now well developed that unilateral changes in the *status quo* regarding health insurance during a contract hiatus are unlawful, even if the changes are consistent with both parties' tentative agreements, unless the parties have specifically agreed that a change may be implemented prior to receiving an interest arbitration award or otherwise concluding negotiations. The parties are free to try to negotiate over handling foreseeable contingencies during a hiatus, but they are expected to know by now that they may not impose unilaterally a solution that suits their own sense of practicalities. Accordingly, the Commission is likely to look favorably at future requests for attorney's fees in cases of this nature, where the issues involve settled questions of law.

- F. ***Barlow v. Bd. of Police & Fire Comm'rs, 2005 Wisc. App. LEXIS 986; Madden v. Bd. of Police & Fire Comm'rs, 2005 Wisc. App. LEXIS 1136***. The firefighter made an as-applied vagueness challenge and claimed the board's previous application of the rules failed to give him fair notice that his use of cocaine was a violation of the rules and subjected him to removal as a firefighter. To conclude that a rule was unconstitutionally vague as-applied required a showing that the past application of the rules would have led a person to believe that the conduct at issue was not subject to the discipline imposed. The record did not reflect that someone engaging in conduct comparable to the firefighter's was or was not discharged. Furthermore, under the rules, the firefighter could have reasonably expected that dismissal was within the range of authorized penalties for his rule violations.

VI. WISCONSIN'S PUBLIC RECORDS LAW

- A. ***Local 2489 v. Rock Co.*, 2004 WI App. 210, 277 Wis. 2d 208, 689 N.W.2d 644.** Appealing discipline to arbitration does not bar the release of records, but the names of employees can be redacted. The only “investigation” that triggers an exception to disclosure is the employer’s personnel investigation, because the statute cannot be interpreted so broadly as to encompass the entire grievance resolution process through its completion as an “investigation.” Additionally, the public has a strong interest in disclosure of records regarding misconduct allegedly occurring in a location where the public had entrusted the employees to perform their public duties.
- B. ***Robinson v. Racine Unified. Sch. Dist.* 2004 Wisc. App LEXIS 924, 277 Wis. 2d 876; 690 N.W.2d 886 (Unpublished).** A record relating to a current investigation may be released when the information in the record is already public knowledge. Additionally, disclosure of records that the complainant believes would implicate his ability to receive a fair trial may not be a compelling public policy reason to prevent disclosure of such records.

VII. WAGE AND HOUR DECISIONS

- A. ***Shie v. City of Aurora*, 2005 U.S. App. LEXIS 28781, 04-2308 (7th Cir. 2005).** Time spent attending and traveling to and from mandatory counseling sessions by an employee during nonworking hours may be compensable under the FLSA. The employer was required to compensate the employee for any “(1) physical or mental exertion (2) controlled and required by the employer and (3) pursued necessarily for the primary benefit of the employer.”
- B. ***Milwaukee Police Ass’n, Local 21 v. Hegerty*, 2005 WI 28, 279 Wis. 2d 150, 693 N.W.2d 738.** Wisconsin statutes set forth a minimum timeframe when employees must be paid which is within 31 days of when compensation was earned, and also what compensation must be paid, which includes all remuneration including overtime. The City agreed to make its collective bargaining agreements “subject to” and “subordinate to” the City Charter in the event of a conflict. The City Charter required biweekly payment of compensation which was twelve days after the last workday of the pay period. Moreover, custom and past practice indicated that the city had historically paid overtime since 1972 on the payday immediately following the period in which it was earned. The union successfully argued that the City must follow the CBA, rather than the longer statutory time frame, because it established a shorter frequency for payment, 12 days after the end of the pay period in which the overtime was earned.
- C. ***IBP, Inc. v. Alvarez*, 546 U.S. ___, 03-1238 (2005).** Time employees spend donning and doffing gear and walking between changing stations and production areas is compensable time because it is “integral and indispensable” to

employee's work and is a "principal activity" under the FLSA. Time spent waiting to don the first piece of gear may not be compensable, because it is too far removed from the principal activity and is considered a preliminary activity. The Portal-to-Portal Act does not affect the time spent by employees walking to and from the production floor after donning and before doffing as well as the time spent waiting to doff.

- D. ***Wage/Hour Opinion Letters 1/13/06.*** City Code Compliance Officer allowed to volunteer as unpaid police officer without violating the FLSA.

VIII. THE STEPS OF AN EFFECTIVE HIRING PROCESS.

A. Defining the new or open position.

1. Job duties (essential vs. non-essential).
2. Qualifications (minimum v. desirable).
3. Ensure the documents you create (i.e. job description and job announcement) are consistent with your perception of the job.
4. Determine whether the position fits within a collective bargaining unit.

B. Solicit Applications.

1. Establish your application, interview, and screening process
2. Consider where to advertise to maximize the applicant pool you want.
3. Inform applicants of steps in the application process.
4. Invite accommodation in the application process.
5. Follow collective bargaining agreement posting practices.

C. Screen written applications.

1. Use objective criteria measuring minimum qualifications only.
2. Then use objective measures of desirable qualifications.

Note: make sure written application form is "sanitized" of improper questions.

D. Use of written tests.

1. Use the cut-off score recommended by the testing agency.
2. Be prepared to modify the process to accommodate disabilities on request.

E. Use of other screening mechanisms.

1. Caution: You may not solicit medical information or conduct a medical exam until a conditional offer of work is made; once it is made, medical or psychological disqualification is the only condition.
2. Background checks may reveal medical information. Consider use of a “Chinese Wall” to insulate the decision-maker from this data at this stage.
3. If criminal record is revealed, carefully investigate in light of Onalaska defense.
4. Drug tests are not medical exams.
5. Tests measuring “personality traits” only are not medical exams. *See Thompson v. Borg-Warner*, 1996 Lexis 4781 (D.C. Cal., 1996); *but see Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005).
6. Use of physical agility or job skills tests.
 - a. Are they truly job-related in light of actual demands of the job and the abilities of your present workforce?
 - b. Medical proof of fitness to take the test can be required.
 - c. Consider accommodations on demand in light of the essential functions of the job.

F. The Oral Interview.

1. Goal is to minimize subjective decision-making.
2. Develop lawful interview questions and the characteristics of the “best” answer.
3. Ask all applicants the same questions, in the same order (but see *Blise v. Kenosha*).
4. Interviewers should score each applicant on a written form at the conclusion of each interview; use the criteria previously established; do not write extraneous comments on the explanations on the form; each interviewer should score the applicant without discussion with the rest of the panel; forms should be collected after each interview.
5. After all interviews are completed, the scores can then be collated and discussed.

G. Make a conditional offer of work.

H. Conduct final screening.

1. Medical exams should be done by a physician who is willing to give a definitive opinion on fitness for duty.
2. Share and investigate background check information of a medical nature.

20355973_1.DOC