BODMAN, LONGLEY & DAHLING LLP **Fall 2000**

Recent Developments In Employment Law

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COURT OF APPEALS UPHOLDS EMPLOYEE'S RIGHT TO SUE FOR SEXUAL ORIENTATION DISCRIMINATION BASED ON LOCAL ORDINANCE

In a two to one published opinion in *Mack v City of Detroit* (October 27, 2000), the Michigan Court of Appeals ruled that a Detroit police officer can sue the city for sexual orientation discrimination based on a city charter provision prohibiting discrimination in employment on the basis of sexual orientation.

Discrimination on the basis of sexual orientation is not prohibited by state or federal law. Several municipalities, however, including Detroit, Ann Arbor, East Lansing and Flint, do prohibit sexual orientation discrimination in employment. Until now, claims based on local ordinances have routinely been dismissed. The trial court in this case ruled that the Detroit City Charter did not authorize private lawsuits, only investigation by the Human Rights Department and a "cease and desist" order and other "affirmative action" in appropriate cases.

The appeals court recognized that the "general rule" is: where a new right is created by statute, the statutorily prescribed remedy is exclusive. It noted, however, that the courts have previously created exceptions to this rule, especially in cases involving so-called "civil rights." The court here decided to create an exception and ruled that the officer was "entitled to pursue a civil action for damages" against the city for any wrongful discrimination she may have experienced based on sex or sexual orientation.

Inside . . . . .

A Pre-Holiday Review: Handling Requests for Time Off for Religious Observance 2
Employer Not Liable for Employee's Misunderstanding of Financial Data 2
NLRB Extends Weingarten Rights to Non-Union Employees 3
Structure Restrictive Employment Agreements Carefully to Assure Enforceability 3
The Year 2000 Brings Another Successful Employment Law Update 4

A PRE-HOLIDAY REVIEW: HANDLING REQUESTS FOR TIME OFF FOR RELIGIOUS OBSERVANCE

As a general rule, employers are required to make "reasonable accommodation" for employee religious practices unless the accommodation imposes an "undue hardship," (*i.e.,* more than minimal cost). Regarding requests for time off:

- Generally, unpaid time off for religious observance is required. Employers need not allow employees to make up time lost due to religious observance. In cases involving a regular day off (*e.g.,* to observe the Sabbath) the employer may offer the employee a transfer to a position not requiring work on the Sabbath.
- Not all requests for time off require accommodation. An employer was not required to provide time off for an employee to assist with arrangements for a children's Christmas Eve play and liturgy because it was not required by her religion.
- Employers do not have to accommodate an employee's request for time off if the employee does not say it is for religious reasons. An employee must indicate the request is related to a religious practice.
- An employer need not provide the requested accommodation if an alternative, less disruptive, accommodation would suffice.

EMPLOYER NOT LIABLE FOR APPLICANT'S MISUNDERSTANDING OF FINANCIAL DATA

The Michigan Supreme Court has ruled that an employee's misunderstanding of information received during a job interview is insufficient to hold the employer liable for fraudulent misrepresentation or silent fraud.

In *Hord v Environmental Research Institute of Michigan* (October 10, 2000), the employee alleged that the employer misled him regarding its financial soundness. During his employment interview in fall 1992, a manager gave the employee a copy of the Environmental Research Institute of Michigan ("ERIM") operating summary for the fiscal year ending September 30, 1991. The employee testified at trial that he believed this financial information represented ERIM's current financial situation. ERIM hired Mr. Hord in January 1993 and laid him off a year later.

The court of appeals affirmed the jury's award of lost wages to the employee, ruling that ERIM fraudulently induced him to accept the position based on outdated financial information. The supreme court reversed the court of appeals, ruling that the employee failed to establish either fraudulent misrepresentation or silent fraud.

Fraudulent misrepresentation requires a false statement by the employer. There was none here. The report contained no false information. Rather, the employee had inferred that the operating summary he was given reflected the current financial status. The court refused to hold ERIM liable for fraud where the employee interpreted information that on its face was not false or misleading.

There also was no silent fraud on the part of the employer. To be liable for silent fraud, the employer must have a legal duty to make a disclosure; mere non-disclosure is insufficient. Thus, furnishing the summary to the employee was not an implied representation that the information reflected ERIM's current financial status and did not constitute silent fraud.

A legal duty to disclose most commonly will arise where: (1) the applicant makes inquiries; and (2) the employer makes truthful replies but omits material information. In this case, the employee did not inquire about the financial condition of the employer or request updated financial information. Thus, the employer was under no duty to provide additional or updated financial information.

NLRB EXTENDS WEINGARTEN RIGHTS TO NON-UNION EMPLOYEES

In its recent decision in *Epilepsy Foundation Of Northeast Ohio* (2000), the National Labor Relations Board ("NLRB") determined that non-union employees have the right to have a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The NLRB further determined that an employer commits an unfair labor practice if it disciplines an employee for requesting the presence of a coworker at such an investigatory interview. In *Epilepsy Foundation*, for example, the employer committed an unfair labor practice when it discharged an employee for insubordination when the employee refused to meet with his supervisor without the presence of a coworker.

The above rights were first established by the U.S. Supreme Court in *NLRB v Weingarten, Inc.* Known as "Weingarten rights," they were initially limited to unionized employees. The NLRB extended Weingarten rights to non-union employees in 1982, but reversed itself in 1985. In its decision to reverse itself yet again, and to extend Weingarten rights to non-union employees in *Epilepsy Foundation,* the NLRB relied on §7 of the National Labor Relations Act which gives employees "the right . . . to engage in . . . concerted activities for the purpose of mutual aid or protection."

An employer has the following alternatives to granting an employee's request to have a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action:

- An employer may continue its investigation without speaking to the employee; or
- An employer may give the employee the choice of continuing the interview without the presence of a coworker or of having no interview at all, thereby losing any benefit the interview may have provided the employee.

An employer does not have to allow a coworker to be present at a meeting to merely inform an employee of disciplinary action already decided upon.

STRUCTURE RESTRICTIVE EMPLOYMENT AGREEMENTS WITH CARE TO ASSURE ENFORCEABILITY

Protecting your business from unfair competition by former employees is an important goal in employment agreements. Properly drawn employment agreements should not only attempt directly to prevent employees from accepting positions with competing companies, but they also should prohibit the disclosure of your trade secrets to a new employer or a third party, solicitation of your customers, and solicitation of other employees to leave your company. Restrictive employment agreements, however, are not easily enforceable in courts which are reluctant to prevent individuals from engaging in their occupations.

The case of *EarthWeb v Schlack* describes some of the obstacles to enforcement of non-compete and non-disclosure agreements. In *EarthWeb,* the vice president for web site content left the company to work for a competitor. EarthWeb sought to enjoin him from commencing employment with his new employer, but the federal court in New York declined to enforce the non-compete clause because it prohibited the employee only from taking a position with a <u>direct</u> competitor. The court concluded that the companies were not direct competitors because EarthWeb provided online products and services <u>of others</u> to business professionals in the information technology industry, and the competitor, while planning to expand its business to the online provision of similar services, only planned to offer its <u>own</u> products online. In addition, the on-line provision of services would constitute only a very small percentage of the alleged competitor's business operations. The court supported its strict application of the employment agreement by citing a lack of a provision for severance pay, and EarthWeb's reservation of the right to modify the terms of the agreement on a quarterly basis, subject to notice and acknowledgment by the employee.

The court observed that even if the new employer were a direct competitor, the one year duration of the restriction was too long given the dynamic nature of the industry and unreasonable in its lack of geographic borders.

This case demonstrates that writing enforceable restrictions on the behavior of former employees is a difficult exercise in balancing the employer's interest against the individual's right to employment. Non-compete agreements must be reasonable in the length of time of the restrictions, geographical limits and definition of the competition. Courts also hesitate to presume that a former employee will disclose confidential information absent a showing that the competitor's business virtually requires it.

YEAR 2000 BRINGS ANOTHER SUCCESSFUL EMPLOYMENT LAW UPDATE

Thanks to all of our faithful readers who helped make Bodman, Longley & Dahling LLP's Employment Law Update 2000 a success. Nearly 250 of the Firm's clients and friends attended our annual seminars, held September 20 in Dearborn, September 21 in East Lansing and September 22 in St. Ignace.

We would especially like to thank those in attendance who took the time to provide us with detailed evaluations. We consider your comments carefully when planning each year's seminar. In fact, we chose four of this year's six topics based in large part on comments received in last year's evaluations.

Please keep in mind that some of Michigan's most respected and experienced employment law attorneys, members of our Labor & Employment Law Practice Group, are available throughout the year to provide custom, in-house seminars to your supervisors and managers on a wide variety of employment law topics. For more information on our seminar offerings, please contact Anthony Allegrina of our Detroit Office at (313) 393-7564 or by e-mail at *info@bodmanlongley.com.*

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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