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Nothing in this newsletter should
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Manier & Herod Moves Forward Firm Expands Employment Law Practice

Manier & Herod is pleased to announce that it has undertaken a targeted effort to enhance its employment law practice section, which is actively handling a broad band of employment and labor-related litigation and counseling matters. Manier & Herod's most recent step in ramping-up its employment law practice was to bring aboard attorney Matthew Salada, whose sole focus over the past eight years has been representing employers in employment and labor matters. Salada, along with Manier and Herod principal John Quinn and others, is ready to assist employers and insurers respond to all state and federal employment concerns, including those involving Title VII, FMLA, ADA, ADEA, FLSA, NLRA, and independent contractor relationships. Please call Manier & Herod with

any employment and labor law questions you may have.

NEWSLETTER LAUNCHED TO SERVE CLIENTS

As part of Manier & Herod's service to its clients, the firm, starting with this inaugural issue, will publish a quarterly newsletter, *Employee Relations Matters*. The newsletter will highlight pertinent developments in state and federal employment and labor law in Tennessee, the Southeast region, and around the country. Manier & Herod hopes this service will help management keep abreast of the changes constantly taking place in the employment law landscape. Please contact Manier & Herod for a thorough review of the labor and employment issues facing your business.

Anti-Litigant Hiring Policies Could Face Trouble

The Sixth Circuit Court of Appeals reversed a trial court's dismissal of a plaintiff's employment-related retaliation lawsuit. The plaintiff, Cline, had been laid off during an RIF. He filed a related age discrimination claim. Cline's former employer later considered hiring Cline for another job. However, when the decision-maker, Mack, told another manager that Cline was being offered the job, the other manager told Mack that Cline

was in unspecified litigation with the company, and due to the "litigation factor," Cline was not the best person to hire. Mack, who was not told the nature of Cline's litigation, informed Cline that the offer of employment was withdrawn.

The Court of Appeals ruled that evidence that the decision-maker refused to hire a job applicant because he was aware that the applicant was involved in unspecified litigation with the

employer was sufficient evidence to permit a jury to conclude that the applicant was not hired because he had engaged in protected activity. The court held that a facially neutral policy of not hiring applicants involved in litigation against the employer, regardless of the topic of the litigation involved, creates an issue of fact as to whether unlawful retaliation motivated the hiring decision.

(Cline v. BWXTY-12, LLC)

Anti-Fraternization Policies Painful, but Essential *Court rulings confirm employers need strict rules*

Employers have implemented strict anti-fraternization policies to protect themselves from having to arbitrate failed romantic relationships between employees that have, in turn, led to workplace discord. In addition to the lost productivity of everyone involved in such a situation, resolving the workplace discord in such situations has often left well-meaning employers fending off sex discrimination claims by one of the discontented former paramours.

To add to those concerns, the United States Court of Appeals for the Sixth Circuit (which covers Tennessee, Kentucky, Ohio, and Michigan) recently became the first Circuit Court of Appeals to hold that when an individual has engaged in activity protected under Title VII, any closely related or associated third-party (e.g. a relative, a friend, closely-aligned co-workers) employed by the same employer is protected under Title VII's retaliation provisions. In this case, Thompson, the plaintiff, met his wife,

Regalado, when she was hired by their mutual employer, North American Stainless ("NAS"). Regalado filed an EEOC charge claiming that her supervisor discriminated against her because of her sex. Three weeks after the EEOC notified NAS of Regalado's charge, it terminated Thompson.

APPEALS COURT EXPANDS TITLE VII PROTECTIONS

The Court of Appeals reasoned that, although the plain language in Title VII's retaliation provision does not protect third-parties, Title VII's purpose would be undermined if third parties were not afforded protection. The dissent, noting that the Third, Fifth, and Eighth Circuit Courts of Appeals have rejected third-party retaliation claims, succinctly opened its remarks by stating: "From time to time, we should remind ourselves that we are judges, not legislators.

The potential for third party liability for retaliation claims is another reason to prohibit employees from engaging in romantic relationships with coworkers.

Because the majority has rewritten the Civil Rights Act of 1964 to conform it to their notion of desirable public policy, I respectfully dissent."

Clearly, the potential for third-party liability for retaliation claims by disgruntled intimately associated coworkers in the workplace is another reason to prohibit employees from engaging in romantic relationships with co-workers, or from employing multiple family members. (*Thompson v. North American Stainless, LP*)

From the Other Side of the Fence *Notable Employment Law Cases from around the country*

- It was lawful for the employer to terminate an alleged harassment victim for refusing to discuss the substance of her allegations with the employer's investigator unless specific additional individuals were present. *Eye v. Oklahoma Corporation Commission* (10th Cir. (Okla.) 2008)
- The plaintiff's pay discrimination claim failed because the comparator had a college degree, but the plaintiff did not; and the comparator had superior computer skills. It was irrelevant that those differences did not relate to job duties. *Warren v. Solo Cup Company* (7th Cir. (Ill.) 2008)
- A manager's isolated inquiry about the plaintiff's sexual preference, and the manager's comment that two coworkers at another facility want to "make a sandwich" out of the plaintiff did not constitute sexual harassment. *Anda v. Wickes Furniture Co.* (8th Cir. (Minn.) 2008)
- Co-worker's one-time use of a racial epithet while attempting to strike the plaintiff does not constitute severe or pervasive harassment. *Johnson v. Riverside Healthcare Systems, LP* (9th Cir. (CA.) 2008).

Court rulings offer advice for limiting discrimination litigation

In a five recent federal district court decisions around the Sixth Circuit (which includes Tennessee, Ohio, Kentucky, and Michigan), employers defended – with varying degrees of success – difficult hiring, promoting, and RIF decisions. The facts of those five cases are too lengthy to recount here. In sum, however, the courts’ decisions and reasoning in those five cases, if followed by decision-makers, may help them fend off employment discrimination litigation when they are faced with their own difficult RIF, hiring, and promotion choices:

- Before creating a very specific set of hiring criteria for decision-makers to utilize, make sure the criteria accurately reflects how you will evaluate individuals
- Make sure your decision-makers understand the evaluation criteria they are utilizing to judge individuals
- If you have a written policy that sets forth the criteria for how individuals will be evaluated, make sure that the evaluation process does not deviate from that written criteria or neglect parts of the criteria
- Make sure that poor employee performance is documented in writing and available in case those employees need to be evaluated in the future

(Profitt v. Butler County Board of Mental Retardation and Developmental Disabilities; Dunlap v. Tennessee Valley Authority; Kline v. Tennessee Valley Authority; Briordy v. Chloe Foods Corp.)

A Not-So-Reasonable Accommodation

Due to a disability, Stewart, the plaintiff, was unable to perform her assembly line job. Stewart proposed that Daimler accommodate her disability by adding an assistant to help her perform her job. Daimler Chrysler initially acquiesced to the proposal, but budget constraints made it inefficient and costly, so the accommodation was discontinued. The court ruled that the plaintiff’s proposed accommodation was not reasonable because it was costly and because it essentially eliminated at least one essential function from the plaintiff’s position, which, as the court noted, the ADA does not require.

(Steward v. Daimler Chrysler Corporation)

Distribute Employee Handbooks ... or Big Bucks

Many employers go to the trouble of creating an employee handbook or a set of employee policies and then fail to consistently distribute them to their employees. The courts’ decisions in two recent cases highlight why it is important for employers to:

1. have a comprehensive employee handbook in place; and
2. make sure you obtain documentation showing that each of your employees has received and read the handbook.

SEXUAL HARASSMENT SUIT GOES FORWARD

In the first case, the plaintiff, Briordy, filed a sexual harassment claim against her former employer. The plaintiff had received no sexual harassment training and she did not receive a copy of the employer’s employee handbook. The plaintiff did not report the sexual harassment to upper management, and her supervisor – the alleged harasser – told her not to do so. The trial court permitted the plaintiff’s claim to go to trial because, despite the fact that she did not internally report the harassment before filing suit, she was never given any information on how to address sexual harassment concerns.

TERMINATION UPHELD DUE TO HANDBOOK DISTRIBUTION

In the second case, the plaintiff, Eskridge, had been provided with a copy of her former employer’s employee handbook, which clearly set forth the employer’s absenteeism policy. The plaintiff was a no-call/no-show for several weeks and she was later terminated after failing to provide documentation to support the claim that her absences constituted protected medical leave. The trial court dismissed the plaintiff’s claims against the employer on the grounds that: (1) the employer had a valid leave policy in place; (2) the employer disseminated it to the plaintiff; and (3) the plaintiff clearly violated that policy.

(Briordy v. Chloe Foods Corp.; Eskridge v. Nissan North America, Inc.)

The Salada Queue

I love to laugh, and over the years I have watched what I would consider to be some pretty funny television shows. Over my wife’s protests I recently put some old M*A*S*H episodes in our Netflix Queue. As I watched and laughed, it occurred to me that the show portrayed workplace behavior that, while making for extremely funny television, could translate into significant litigation nightmares for employers if it were to happen in a real workplace. Hence, “The Salada Queue” was born. In each issue, I will take a look at how Hollywood depictions of various workplaces might fair in court. **Here is this month’s Salada Queue:**

T.V. SHOW	WHAT HAPPENED	FAN REACTION	REAL LIFE
M*A*S*H Season 2, Episode No. 22 “George” Aired: February 16, 1974	<i>Frank Burns expressed his anti-homosexual sentiments to his co-workers:</i> Frank: [about George] “There’s one of those in camp.” Trapper: “‘One of those’, Frank?” Hawkeye: “Which one of those ‘thoses’ do you mean, Frank?” Frank: “One of those types that don’t like girls.” [elbows Hawkeye] “Get it?” Hawkeye: “Ooh, one of those those.” . . . Frank: [about George] “He’s not one of us. He’s one of them.” Henry: “Who are them, Frank, that’s not one of us?” Frank: “He’s not a man!” . . . “Sir, a non-heterosexual.”	M*A*S*H won an Emmy in 1974 for Outstanding Comedy Series, and it was the 4th highest rated show on television that year.	\$31,000.00 award to the plaintiff in <u>Smith v. Century Concrete</u> (a manager referred to African-Americans as “those people,” which led to a successful hostile work environment claim).

About Editor Matthew A. Salada

Matthew A. Salada is an associate with Manier & Herod. Salada’s practice focuses primarily on labor and employment litigation and counseling, representing employers, self-insured employers, and insurance carriers in federal and state courts and administrative agencies.



Salada received his J.D. from the Dickinson School of Law of the Pennsylvania State University (1999), where he was recognized for his membership on the School’s National Trial Moot Court Team, Appellate Moot Court Board, and Trial Moot Court Board. He was admitted to the State Bar of Tennessee in 1999.

Salada has represented numerous national and regional media and distribu-

tion clients, including MediaNews Group, Gannett Co., Inc., Lee Enterprises, and Chattanooga Publishing Company. Mr. Salada has a depth of experience representing management in Title VII, Family Medical Leave Act (“FMLA”), Americans with Disabilities Act (“ADA”),

Age Discrimination in Employment Act (“ADEA”), and Fair Labor Standards Act (“FLSA”), disputes, as well as experience in traditional labor arbitration and National Labor Relations Board (“NLRB”) matters.

He also has been very actively involved in the creation, management, and defense of independent contractor relationships, including the successful

representation of management in cases wherein hundreds of individuals’ independent contractor status was at issue.

Salada provides representation in proceedings before the United States Department of Labor, the Tennessee Department of Labor, and the National Labor Relations Board, and in defense of discrimination charges before the Equal Employment Opportunity Commission, the Tennessee Human Rights Commission, and state and federal trial and appellate courts.

Additionally, Salada is involved in defending wrongful discharge claims related to workers’ compensation claims, or arising under state and federal anti-discrimination statutes, including the ADA, ADEA, FMLA, Title VII, Civil Rights Act of 1964, and the Tennessee Human Rights Act.