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The NAMWOLF Labor & Employment PAC Presents:

Employment Law Think Tank

February 9, 2015

EMPLOYMENT LAW THINK TANK

The Employment Law Think Tank event was organized by the Labor & Employment PAC's *Marketing, Branding & External Communications* Subcommittee.

We would also like to recognize our L&E PAC members and in-house counsel who volunteered for this event:

Moderators:

Jamie Rudman (Sanchez & Amador)
Scott Johnson (PCT Law Group)

Table Facilitators:

In-House Counsel

David Deitchman (HP - VP & Associate General Counsel, Employment & Benefits)
Susanna Gray (The Prudential Insurance Co. of America - VP, Corporate Counsel)
Kim Hensley (Nationwide Mutual Insurance Co.- AVP, Associate General Counsel)
Monica Lerma (iHeartMedia, Inc. - Senior Employment Counsel)

Law Firm Members

Jon Andrews (Andrews, Lagasse, Branch, Bell)
Sheryl Axelrod (The Axelrod Firm)
Allison Bowers (Hutcheson Bowers)
Jen Branch (Andrews, Lagasse, Branch, Bell)
Andrew Brown (Brown Hutchinson)
Lori Carr (Estes Okon Thorne & Carr)
Kelly Charles-Collins (Hamilton, Miller & Birthisel)
Jessica Chasin (Wilson Turner Cosmo)
Holly English (Nukk-Freeman & Cerra)
Maurice Grant (Grant Law)
Shannon Hutcheson (Hutcheson Bowers)
Chad Lang (Liebler, Gonzalez & Portuondo)
Sarah Perez (Perez Morris)
Carolyn Rashby (Miller Law Group)
Radha Thiagarajan (Lam, Lyn, Philip)

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HYPOTHETICAL #1

Contributed by: Shannon Hutcheson & Allison Bowers - *Hutcheson Bowers,* **www.hutchesonbowers.com**

Evan Barnes, an African-American employee for Wright Widgets, returned to work after a two-week absence. Bill West, a Caucasian hourly employee, tells Barnes upon his return: "I hope you don't have that Ebola virus." Barnes thinks West's comment was motivated by Barnes's race, and complains to HR manager Harry Rogers.

Rogers emails West and asks him to meet the following day to discuss the Ebola comment. West forwards Rogers's email to Susanna Munoz, an hourly Hispanic employee, asking for her advice because "Rogers is on his back." Munoz responds to West's email stating: "Rogers is a jerk. This is just like Wright Widgets' management. We need to stand up to them. You know Barnes was out because he was on vacation in Africa. Why don't you just tell Rogers that you were just concerned about Barnes's health?"

The following day, West and Rogers meet. Rogers tells West that his comment was discriminatory and violated the Wright Widgets' EEO policies. West tells Rogers that his comment wasn't about race; rather, he knew that Barnes had been in Africa on vacation and was just concerned about Barnes's health (and that of all employees).

As part of his investigation, Rogers pulls the last 30 days of West's email and finds the exchange between West and Munoz. Rogers terminates West's employment for disparaging him and lying during the investigation and gives Munoz a written warning for disparaging him and for using company email to complain about management in violation of company policy.

West hires counsel, who sends a demand letter to Wright Widgets alleging that West was fired because he was a White male when Munoz, a Hispanic female, was only given a written warning, and because he engaged in protected concerted activity with Munoz. Rogers tells Wright Widgets' lawyer that he wants him to settle with West and get an agreement that "buttons everything up" and ensures that West doesn't go causing problems at the EEOC or NLRB. Also, Rogers is concerned that West will give his girlfriend and former colleague, who Wright Widgets also recently terminated, ideas about claims she could assert. Heeding Rogers's advice, the lawyer negotiates a settlement and includes in the agreement broad non-disclosure and non-disparagement provisions, as well as a covenant not to "initiate, file, or cause to be initiated or filed" any action with any federal, state, or local court or agency against Wright Widgets.

1) Did West's Ebola comment to Barnes merit an investigation?

2) How would you evaluate Harry Rogers's handling of the investigation of Barnes's complaint? Anything he should have done differently?

3) Were Munoz and West engaged in protected concerted activity? Did Rogers run afoul of the NLRA by pulling their email and/or by using it as the basis for employee discipline?

4) How would you evaluate West's attorney's demand and legal claims?

5) Is there any problem with getting a settlement agreement that "buttons this up"? With the provisions the lawyer included?

6) How would you evaluate a claim by Munoz over her final written warning?

HYPOTHETICAL #2

Contributed by: Jen Branch - *Andrews, Lagasse, Branch & Bell,* **www.albblaw.com**

Sarah and her workplace friend Jason work for a large commodities trading company, We-Trade. In its employee handbook, We-Trade has a "cell phone and email policy" that provides:

Employees will be provided with cell phones, as well as email accounts on the We-Trade email system. Employees are to use their company-provided cell phones and email accounts for We-Trade business purposes only. Personal use of company-provided cell phones and email accounts is strictly prohibited. Employees have no expectation of privacy while using company-provided cell phones or the We-Trade email system. We-Trade reserves the right to monitor all use of company-provided cell phones and email accounts.

Three years ago, Sarah and Jason both signed acknowledgments indicating they understood and would abide by this policy.

Last year, Sarah and Jason were paid bonuses at the end of the year. They were both very unhappy with their bonuses. Right before and after they received their bonuses, they engaged in the following email exchange:

> **From Sarah to Jason on December 23, 2014 at 1:45 pm:** *Well, I got screwed again! I've done so much work for this company, including trading at an all-time high, and once again they gave me measly $50 bonus and a gift certificate for a turkey dinner! What a joke. I deserve so much more.*
>
> **From Jason to Sarah on December 23, 2014 at 1:47 pm:** *Our CEO is a total jerk. I got a little more than that, but that's probably because I'm a man and you're a woman. We both know how he is. Don't worry, though, it wasn't much more. We should band together and approach them about these issues.*
>
> **From Sarah to Jason on December 23, 2014 at 1:50 pm:** *Maybe we should. Bah-humbug! I'm going home for the day to stew. See ya later.*

The next day, Sarah and Jason exchanged texts on their company-provided cell phones:

> **From Sarah to Jason on December 24, 2014 at 3:26 pm:** *Hi there! Merry Christmas Eve. Hope you have a wonderful Christmas with your fam. See you at work on Monday!*
>
> **From Jason to Sarah to December 24, 2014 at 3:27 pm:** *U2! Cheers to your parents from me!*

The following week, after realizing they had many disgruntled employees, We-Trade decided to audit employee emails and company-issued cell phones. When We-Trade's CEO saw both the texts and emails above, he immediately terminated Sarah and Jason for violation of the company "cell phone and email policy."

1) Is We-Trade's "cell phone/email policy" legal? If not, how should it be changed?

2) Did Sarah and Jason engage in a legally protected email exchange?

3) Did Sarah and Jason engage in a legally protected text exchange?

4) Did We-Trade lawfully terminate Sarah? Did We-Trade lawfully terminate Jason?

HYPOTHETICAL #3

Contributed by: Nicole M. Torrado - *Sanchez & Amador,* **www.sanchez-amador.com**

In January 2013, Big Brew Co. tells supervisor Sally that, over the next two years, BBC will reduce and eventually close the Oakland payment processing facility. Larry, from BBC's layoff committee, tells Sally to evaluate her team members to determine the layoff order. In March, 2013, Sally's two lowest scoring team members were laid off. Pattie was the fourth lowest performer, so her job was spared.

The next week, Pattie trips over a pile of documents that she left behind her desk chair and breaks her leg. She takes medical leave from March 31 to June 10, when she returns to work without restrictions. While on leave, Pattie learns she is pregnant but she does not tell anyone at BBC. Upon return from leave, Pattie accumulates seven tardies between June 11 and September 1. Sally counsels Pattie for her tardiness, but Pattie never explains the cause.

On August 22, 2013, Pattie brings in a doctor's note stating that she should not lift any items over 15 pounds, the typical weight of document boxes that Pattie regularly has to lift. Frustrated with Pattie's tardies and now the doctor's note, Sally snaps at her, "How long will you be burdening your co-workers this time?" When Pattie states that she does not know, Sally threatens to call Pattie's doctor, to which Pattie responds, "Please don't."

Sally calls the doctor's office, which refuses to divulge any information about Pattie's condition and tells her that it was "illegal" for her to call. Worried that she made a mistake, Sally calls Henry in HR and admits that she called Pattie's doctor. Henry tells Sally she must have Pattie call HR to request an accommodation. Sally relays the information to Pattie, and the requested accommodation is immediately granted.

On August 29, Larry tells Sally to score her employees for another layoff. On September 8, Sally emails Larry the scores and Pattie has the lowest one.

On September 15, Pattie tells Sally that she is pregnant and wants to start her maternity leave on January 15, 2014. Sally congratulates Pattie and agrees that Pattie should start maternity leave on that date, but tells her to "run it by Henry." Pattie immediately calls Henry, submits the paperwork and HR approves her maternity leave.

Sally and the layoff committee are unaware that HR approved Pattie's maternity leave. On September 30, Larry tells Sally that Pattie and one other Oakland employee were selected for the next round of layoffs. Sally then informs Pattie that she will be laid off effective January 7, 2014. Pattie asks Sally about the pre-approved maternity leave, and Sally replies, "I'm so sorry but there is nothing we can do now." On July 1, 2014, BBC closes the Oakland facility and all remaining employees, including Sally, are terminated.

1) How strong is BBC's argument that it had a legitimate business reason for laying off Pattie in January? Does it help BBC that the scoring was done before Pattie revealed she was pregnant? Why or why not?

2) Was BBC obligated to permit Pattie to take the maternity leave prior to layoff?

3) Did Sally violate the law by calling Pattie's doctor?

4) Does Pattie have a claim that BBC failed to properly engage in an interactive process, even though her accommodation was granted? Did BBC even have an obligation to accommodate Pattie, since her problems obviously were due to pregnancy and not her prior leg injury? Would the answer be different if BBC's facility was located outside of California?

HYPOTHETICAL #4

Contributed by: Sheryl Axelrod - *The Axelrod Firm,* **www.theaxelrodfirm.com**

Tom Briber has been working at the Center for Supportive Children's Services for the past four years. The Center is a non-profit dedicated to providing a supportive, fun, and educational environment to severely emotionally disturbed young people, who range from 13 to 20 years old. The Center classifies Tom as exempt and pays him $17.99/hour for working four hours a day, seven days a week.

Tom works at the facility and resides there. His duties call for him to provide everything from security to oversight of the young residents. Tom is also responsible for helping each resident with a weekly crafts project and ensuring that they complete it on time.

In accordance with his job classification, Tom is entitled to time off from noon to 4 pm every day. He is free to spend his time off as he sees fit, but he carries a Center-issued cell phone at all times because he is required to be on call 24/7. On occasion, Tom spends his time off working with Rosy, a 13-year old girl who has yet to speak. Tom has never received a phone call from the Center during his daily time off period.

While Tom enjoys working at the Center, he is not a perfect employee. For example, one of Tom's job duties is to supervise the kids during weekly movie nights. However, Tom finds the movies boring and the evenings generally uneventful, so he either sleeps in the back of the room or pays his co-worker, Peter Paymenoff, to cover for him so he can visit his girlfriend, who lives three blocks from the Center. Similarly, although Tom is supposed to sleep each night at the Center in case trouble arises, he regularly pays Peter to cover for him so he can sneak off and spend the night with his girlfriend.

One morning, Center manager Chris Swifty caught Peter letting Tom back into the Center after Tom had spent the evening at his girlfriend's apartment. Upon questioning, Peter confessed everything to Chris about the payments that he had received from Tom. Chris confronted Tom, who admitted his transgressions. Chris then terminated Tom.

Tom filed an FLSA lawsuit against the Center, alleging that he should have been classified as non-exempt. He sought four years' of back pay for: a) working 20 hours a day, seven days a week; b) minimum wage for being on call four hours a day, seven days a week; and c) overtime pay.

1) Did the Center properly classify Tom as exempt, under the FLSA or state law?

2) As counsel for the Center, what arguments would you make for limiting the amount of any back pay that the Center may owe to Tom?

3) How many hours each day could the Center legitimately argue that it should not be held accountable for paying Tom? (Is the Center liable for the hours that Tom is supposed to have off every day? Is it liable if Tom spends his time off working with Rosy? Is Tom entitled to compensation for being on call 24/7 and, if so, at what rate? Is he entitled to overtime pay and, if so, for what hours?)

4) For what timespan (if any) is the Center liable for back pay?

5) If you can get Tom to agree to privately settle the claim with the Center for the hours you believe it owes him, would you recommend that the Center have the settlement approved by the court or the Department of Labor? Why or why not?

6) What recommendations would you make to the Center with respect to employees who have the same job duties, pay, etc. as Tom?

HYPOTHETICAL #5

Contributed by: Scott Johnson - *PCT Law Group,* **www.pctlg.com**

Golf Kingdom, Inc. ("GKI") is the number one retailer of golf equipment in the country, with over 200 stores in 42 states. Each GKI store has twelve employees, including a Store Manager and an Assistant Store Manager. GKI is in competition with two other national companies who operate similarly sized stores. All three companies treat their Assistant Store Mangers as exempt from overtime.

Jim Greens is an Assistant Store Manager at GKI's Chapel Hill, North Carolina location, which is one of the most profitable and popular GKI stores in the United States. Despite his fancy title, Jim does not have any management functions as part of his job duties. He doesn't supervise employees as he is always scheduled to work with the Store Manager or the Regional Manager. He does not handle any personnel matters, which means that he cannot hire, fire, authorize an employee's request for a schedule change, or make any wage decisions. For the most part, Jim's primary job duties are the same as the store's other employees; he provides customers with information on various golf clubs and rings up customer sales. The only perk of Jim's position as an Assistant Store Manager is that he is paid a salary, instead of by the hour. Jim makes $400 per week, which comes to $20,800 a year. Unfortunately for Jim, however, he regularly works over 60 hours a week.

Jill Williams was recently hired by GKI as employment counsel in its legal department. Upon visiting the Chapel Hill store and talking to Jim, she begins to suspect that GKI may be in violation of the Fair Labor Standards Act. After investigating the job duties and functions of GKI's Assistant Store Managers, Jill concludes that the Department of Labor and courts would most like find GKI in violation of the FLSA and, quite possibly, in willful violation. Jill raises her concerns to GKI's General Counsel, who then meets with GKI's CEO. In the meeting, the General Counsel explains the potential ramifications to the company, which includes paying millions of dollars in unpaid overtime and liquidated damages. In response, the CEO says that each store's budgets are set and that paying Assistant Store Managers overtime would blow them out of the water. Furthermore, the CEO strongly objects to reclassifying the Assistant Store Managers to nonexempt because the added cost would place GKI at a competitive disadvantage. Although the CEO tells the General Counsel that GKI will continue to classify its Assistant Store Managers as exempt, the CEO promises to revisit the issue in advance of the company's next fiscal year.

1) Are GKI's Assistant Store Managers exempt or nonexempt under the FLSA? Why?

2) Is there any liability in addition to unpaid overtime? What about for Assistant Store Managers at GKI's California stores?

3) What should GKI's General Counsel do in light of the CEO's position?

4) Assume that GKI's General Counsel convinces the CEO to reclassify Assistant Store Managers as nonexempt. What is GKI's best approach to remedy the situation?

5) Assume that Jim is terminated and then complains to the Department of Labor before a new approach is adopted. What should GSK do given that Jim's claims appear to be valid?

HYPOTHETICAL #1 - ANSWER KEY

Contributed by: Shannon Hutcheson & Allison Bowers- *Hutcheson Bowers,* **www.hutchesonbowers.com**

1) **Did West's Ebola comment to Barnes merit an investigation?**
   Yes, because Barnes believed the comment was motivate by his race and complained. Accordingly, Wright Widget had an obligation to investigate. Even if Barnes had not complained, an inquiry into the motivations behind West's comment would be appropriate.

2) **How would you evaluate Harry Rogers's handling of the investigation of Barnes's complaint? Anything he should have done differently?**
   Rogers should not have given West advanced notice of his intent to interview him regarding the comment. Rogers also should not have drawn the legal conclusion that West's comment was "discriminatory," even at the conclusion of his investigation. And, he should not have reached a conclusion that the comment "violated the Wright Widgets' EEO policies" prior to the conclusion of his investigation.

3) **Were Munoz and West engaged in protected concerted activity? Did Rogers run afoul of the NLRA by pulling their email and/or by using it as the basis for employee discipline?**
   In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the NLRB ruled that "… employee use of e-mail for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their e-mail systems…." The emails between West and Munoz would be considered protected concerted activity because they were discussing the terms and conditions of their employment, including protesting supervisory action and appealing to for assistance in preparation for a meeting with management, their emails constituted protected concerted activity. *See, e.g., Hispanics United of Buffalo, Inc.*

4) **How would you evaluate West's attorney's demand and legal claims?**
   As set forth above, West and Munoz were engaged in protected concerted activity in their email exchange. Accordingly, the NLRB would likely find that West's termination by Wright Widget, Inc. was an unfair labor practice. As for West's reverse discrimination claim, Wright Widget, Inc. can likely differentiate Munoz's situation because she was not interviewed as part of the investigation and was disciplined only for the email exchange. Of course, the full analysis of that claim depends on how Wright Widget, Inc. has treated other similarly situated employees in the past.

5) **Is there any problem with getting a settlement agreement that "buttons this up"? With the provisions the lawyer included?**
   In early 2014, the EEOC filed suit against CVS alleging that certain provisions of CVS's separation agreement violated Title VII, including a non-disclosure provision and several provisions that the EEOC deemed to limit employees' ability to participate in or cooperate with any agency investigation. While the CVS lawsuit was dismissed for procedural reasons, the EEOC has made clear that it will be actively litigating cases over settlement agreements that it deems to violate Title VII rights. Accordingly, the EEOC would most likely find that Wright Widget, Inc.'s settlement agreement that "buttons this up" and purports to prevent West from disclosing information to his girlfriend and to file charges with the EEOC or NLRB, would violate West's Title VII rights.

6) **How would you evaluate a claim by Munoz over her final written warning?**
   As set forth above, West and Munoz were engaged in protected concerted activity in their email exchange. Accordingly, the NLRB would likely find that Munoz's final written warning from Wright Widget, Inc. was an unfair labor practice.

HYPOTHETICAL #2 - ANSWER KEY

Contributed by: Jen Branch - *Andrews, Lagasse, Branch & Bell,* **www.albblaw.com**

1) **Is We-Trade's "cell phone/email policy" legal? If not, how should it be changed?**
Answer: No. According to the NLRB, employees have a right, protected by the National Labor Relations Act (NLRA), to use an employer's email system during non-working time to engage in protected concerted activity (e.g., to discuss union issues, pay, working conditions, etc. – discussions of all such topics constitute protected concerted activities under Section 7 of the NLRA).

   However, an employer may justify a total ban on non-work use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline. (Purple Communications, Inc., N.L.R.B. No. 21-CA-095151 (Dec. 11, 2014).)

   As such, the cell phone and email policy should be changed to reflect that cell phones and emails should be used only for business purposes and only during working time.

2) **Did Sarah and Jason engage in a legally protected email exchange?**
Yes. Employees have the right to act together to try to improve their pay and working conditions, with or without a union. This is known as concerted activity. Here, Sarah complained to Jason about her pay/bonus and Jason suggested there was discrimination at work and that they band together to address the issue. This is concerted activity and it is protected. (For example, in a similar case, the NLRB found that an employee engaged in concerted activity when she posted negative comments about her supervisor on her Facebook page and coworkers responded to her postings. The NLRB held that because the employee "discuss[ed] supervisory actions with coworkers in her Facebook post," her activity was both protected and concerted. (Am. Med. Response of Conn., Inc., N.L.R.B. No. 34-CA-12576 (Oct. 5, 2010).)

3) **Did Sarah and Jason engage in a legally protected text exchange?**
Most likely not. This text exchange did not involve two employees acting together to improve wages or working conditions. Presumably, they would try to make an argument that it was an extension of their earlier conversation, but this argument would not likely succeed.

   What about the fact that it was text message? In the Purple Communications decision, the NLRB's holding was aimed solely at email, but the NLRB hinted at the possibility of extending the holding to other types of electronic communication systems, stating that it "question[ed] the validity" of the well-established principle that employers may generally prohibit all non-work use of its equipment – a sign that additional changes may be occurring in the near future. As such, if the email exchange had occurred by text message, we believe the result likely would be the same.

4) **Did We-Trade lawfully terminate Sarah? Did We-Trade lawfully terminate Jason?**
No. We-Trade terminated Sarah and Jason in part because of the legally protected email exchange (in which they engaged in concerted activity) and it would likely be considered an unfair labor practice to terminate them for this reason. (Additionally, Jason could likely argue that the termination was retaliatory for engaging in protected activity by suggesting to Sarah that she was being discriminated against based on her gender.) It does not matter that Sarah was the one who originally complained or that Jason was the one who suggested they band together and approach management.

HYPOTHETICAL #3 - ANSWER KEY

Contributed by: Nicole M. Torrado - *Sanchez & Amador,* **www.sanchez-amador.com**

1) **How strong is BBC's argument that it had a legitimate business reason for laying off Pattie in January?**
   BBC has a strong argument that it had a legitimate business reason for the layoff in January. However, Sally's comment, "How long will you be burdening your co-workers this time?" will make it easier for Patti to defeat any motion for summary judgment because this comment demonstrates Sally's frustration that Pattie requested an accommodation and goes to animus.

   Does it help BBC that the scoring was done before Pattie revealed she was pregnant? Why or why not?
   With regards to any pregnancy discrimination claims, it is helpful that Sally scored Pattie before Pattie announced her pregnancy. However, if Sally had any inclination that Pattie was pregnant prior to Pattie revealing her pregnancy, BBC could still face pregnancy discrimination charges from the EEOC. Under the newly issued EEOC guidelines, "even if the employee did not inform the decision makers about her pregnancy before they undertook the adverse action, they nevertheless might have been aware of it through, for example, office gossip or because the pregnancy was obvious." With regards to a disability discrimination claim, Sally's comments and actions surrounding Pattie's request for an accommodation provide Pattie with a strong evidence of animus to support her disability discrimination claim.

2) **Was BBC obligated to permit Pattie to take the maternity leave prior to layoff?**
   No. However, BBC may have been able to avoid expensive litigation by waiting to lay her off until after the leave ended.

3) **Did Sally violate the law by calling Pattie's doctor?**
   Yes – this would violate the ADA, equivalent state laws and Pattie's right to privacy.

4) **Does Pattie have a claim that BBC failed to properly engage in an interactive process, even though her accommodation was granted?**
   With regards to Pattie's lifting restrictions, because BBC granted the requested accommodation, BBC satisfied its interactive process obligations.

   Did BBC even have an obligation to accommodate Pattie, since her problems obviously were due to pregnancy and not her prior leg injury?
   Yes. Under California's FEHA and the EEOC's new Pregnancy Guidelines, BBC has an obligation to accommodate Pattie's pregnancy related conditions.

   Would the answer be different if BBC's facility was located outside of California?
   Most likely. Under the Pregnancy Discrimination Act, BBC must treat Pattie as it treats all other employees who have an injury that occurred outside of work. Per the EEOC guidelines: "An employer does not violate the PDA when it offers benefits to pregnant workers on the same terms that it offers benefits to other workers similar in their ability or inability to work. Therefore, if an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, as long as it also applies the same restrictions to other workers similar in their ability or inability to work."