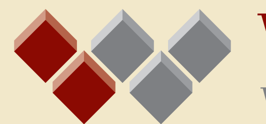

Wimberly Lawson
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June 2012 Volume 12, Issue 06

JUDGE REJECTS NLRB "QUICKIE ELECTION" RULES

Howard Jackson

"The Board lacked the authority to issue the new rule, and so the rule is invalid and therefore unenforceable, according to the ruling."

On May 14, 2012, a federal court judge in the District of Columbia rejected the NLRB's new "quickie election" rules, finding that the National Labor Relations Board (NLRB) lacked a quorum when it passed the regulations last year. *Chamber of Commerce of the U.S. v. NLRB*, Civil Action No. 11-22-62 (5/14/12). The Supreme Court ruled two years ago that three members of the Board are necessary to constitute a quorum, although other cases have recognized that members need not necessarily vote in order to form part of the quorum. In the current case, Republican Member Hayes was notified electronically that the final rule was being circulated for a vote, but he took no action in response. The NLRB's usual practice is to reach out or ask that member for a response where a member has not voted, but none of this happened in the December 22, 2011 rule-making vote. The other two Board Members, both Democrats, voted in favor of adopting the final rule. Because Member Hayes had previously voted against the rule, the Board determined that he had "effectively indicated his opposition" and passed the "quickie election" rule.

The federal court judge finds that the vote by two members of the Board was simply not enough to constitute a quorum, and that Member Hayes cannot be counted towards the quorum merely because he held office and that his participation in the earlier decisions relating to the drafting of the rule did not suffice. The Board lacked the authority to issue the new rule, and so the rule is invalid and therefore unenforceable, according to the ruling.

Editor's Note- It is likely that the NLRB will take steps in the near future to meet the court's objections with the procedures involving the adoption of the rule, and get the "quickie election" rule issued with the proper authority. In the meantime, however, the ruling places into question any actions taken by the NLRB under the "quickie election" rule, between the effective date, April 30, and the date of the court's ruling.

The NLRB announced on May 15th that it has temporarily suspended the implementation of the quickie election rules, and further indicated that the parties involved in the 150 election petitions that were filed under the new quickie election rules would be given the opportunity to reinitiate the case under the prior procedure, rather than be bound by any arrangements or stipulations entered into during the brief period the new quickie election rule was in effect.

LABOR BOARD EXPANDS ITS REACH TO VARIOUS FORMS OF EMPLOYER POLICIES

Most employers are aware that company policies on solicitation and distribution of literature for various causes must be strictly written to conform to National Labor Relations Board (NLRB) policies. In recent years, most employers have also become aware that the Labor Board has expanded its reach to various forms of company work rules and employee handbooks, and considers many common provisions to constitute an unlawful "chill" on union and other protected concerted activities. Even common policies such as a prohibition of a work stoppage and/or a solicitation of a work stoppage have been held to interfere with the rights of non-union employees to engage in union and other concerted protected activities. The significance of having an illegally overbroad policy is primarily to taint or render unlawful the discipline of an employee under such a policy. Also, such policies in existence during a union election campaign can lead to the filing of objections to an election won by an employer, possibly giving the union a "second bite at the apple" of winning the election.

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

EMPLOYER MAKING TWO MISTAKES IN GRANTING FMLA LEAVE RENDERS TERMINATION UNLAWFUL

Jerry Pinn

"Lawyers are justifiably concerned about communicating employee terminations or the reasons of terminations to parties that do not have a 'need to know.'"

In a recent case, an employee was granted a medical leave from April 27 through June 27, but the employee was terminated prior to June 27 because he was not eligible for FMLA leave after June 13, based on the employer's method of calculating the 12-month period of time during which employees are permitted leave under the FMLA. The court noted that when calculating the 12-month period, employers are permitted to use one of four methods. The employer claimed it used the "rolling" method of calculating an employee's leave year backward from the date the employee uses any FMLA leave. Under this method, the FMLA leave would have expired on June 13th. However, under the "calendar" method, allowing an employee 12-weeks of leave per calendar year, the leave could have extended through July 14th.

The court ruled in favor of the employee on two grounds. First, the court noted that during the leave process, the employer never notified the employee that its leave time would be governed by a "rolling" 12-months. Additionally, the court noted that the only written documentation he received from the company stated his leave would expire June 27. While the employer argued that it always used the "rolling" method and that the employee should have known, the appeals court ruled otherwise. The court found that employers must inform their employees of which method they are using in writing. *Thom v. American Standard, Inc.*, 666 F.3d 968 (CA 6 2012).

SHOULD THE REASONS FOR TERMINATIONS BE DISCUSSED WITH OTHERS?

Lawyers are justifiably concerned about communicating employee terminations or the reasons of terminations to parties that do not have a "need to know." However, in many cases, co-workers or customers want to know why someone is no longer employed, and insist upon some kind of answer.

The most obvious risk in such communications is defamation, which includes hurting a person's livelihood by making a false statement about that person. In some cases, there may be a "qualified privilege" to make a statement in good faith to a small group of co-workers or in response to a job reference, but state rules differ in this regard. The ideal solution, of course, is to come up with some statement that does not defame the employee and yet provides enough information to satisfy the co-worker or customer, without creating a legal risk. One strategy is to be vague about the reason. Sometimes general statements such as "the parties were moving in different directions and we respect each person's privacy" are sufficient.

Another danger in communicating reasons for terminations is that it creates possible contradiction in what the employee was told. If the terminated employee is told one thing and the others are told something entirely different, the employee may argue that such contradictory statements show the reasons are pre-textual, thus suggesting the real reason was a prohibited discriminatory factor.

Sometimes employers will actually negotiate or agree with terminating employees, as to what others will be told. This type of approach often works to minimize some of the issues that could arise.

SHOULD TERMINATION LETTERS BE USED?

In many states, some type of termination notice is legally required by the unemployment compensation rules or other state laws. Usually the punishment for failure to meet the requirements of such termination notices are not severe. In any event, termination notices are routinely expected by employees, judges, and juries. A termination notice can also limit the employers' liability where a terminated employee gives a false explanation for the termination. Surprisingly, there are no federal laws that require employers to furnish termination letters.

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SOME EMPLOYERS WITH INSURED HEALTH PLANS WILL RECEIVE REBATES THIS AUGUST

Cathy Shuck

"In Tennessee, plans have done a better-than-average job of staying in compliance with the requirement, and thus the expected rebates are lower than average."

One of the provisions of the new healthcare law is a requirement that insured healthcare plans meet standards requiring 80% of premiums to be devoted to medical care and quality improvements (85% for insurers serving large groups). If the insured plans do not meet these standards, they must offer refunds to participants. Insurers must disclose this June how much the rebates will be, and they are expected to be paid during August. Rebates for group plans are expected to go to employers, and a share is supposed to be passed through to employees, possibly via future premium discounts. The provision does not apply to self-insured plans.

Among small employers, the rebates are expected to go to employers covering around 28% of people with such plans, at an average of $76 per enrollee for a full year. For larger employers, the totals are estimated to be around 19% of people with such coverage, and $72 per enrollee. Rebates are calculated separately for each insurer and each line of business, by state. In Tennessee, plans have done a better-than-average job of staying in compliance with the requirement, and thus the expected rebates are lower than average. Only five small-group plans in Tennessee are expected to owe a rebate, with an average rebate of $66 per enrollee. Only three large-group plans are expected to owe a rebate, with an average rebate of $99 per enrollee.

KNOW YOUR ATTORNEY
MARY DEE ALLEN

MARY DEE ALLEN is a Member in the Cookeville, Tennessee office of the Firm, which she joined in 2003. Mary Dee is a practicing trial attorney since 1992, handling primarily workers' compensation defense and employment discrimination defense, in state and federal Courts and administrative agencies. She obtained an Associates Degree in Nursing from Union University in 1988, a Bachelor's Degree in History from Union University in 1989, and a Doctor of Jurisprudence Degree from the University of Memphis in 1992. Mary Dee is a member of the Tennessee Bar Association, the Putnam County Bar Association, the Cookeville Chapter of Business and Professional Women, the Tennessee Lawyers' Association for Women, and Kiwanis. Mary Dee was named Co-Chair of the Legislative Committee of the Upper Cumberland Society of Human Resource Management for 2012.

DOES A DISABLED EMPLOYEE HAVE THE RIGHT TO TAKE A VACANT JOB WITHOUT COMPETING WITH OTHER EMPLOYEES?

Employers are generally familiar with the concept that an employee with a disability is entitled to a reasonable accommodation to enable him to perform the essential functions of his job. If the employee is not able to perform the essential functions of his current job with or without an accommodation, he is entitled to be considered for transfer to a vacant position for which he is qualified. In 2002, the U.S. Supreme Court ruled in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), that an employee is not entitled to be transferred to a vacant job if doing so would contravene a well-established, bona fide seniority system. The Court ruled that violating such a seniority system would pose an undue hardship, and thus was not required by the ADA. Barnett did not directly address, however, the question of whether an employee with a disability must compete with other qualified employees for a vacant job.

In a recent case, the EEOC argued that *Barnett* requires an employer to give preference to a disabled employee in filling an open job. The EEOC sued to challenge an employer's accommodation guidelines, which provided that although reassignment to

Continued on page 4

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"NATIONAL LABOR RELATIONS BOARD POLICIES" continued from page 1

Even more recently, the NLRB has made a big issue of employer policies not unduly interfering with employees' use of social websites, such as Facebook, including in many instances finding employee uses of such websites to be protected activity and employer discipline for such use often considered to be an overbroad restriction on such activity. It is fair to say that the use of social media by employees currently has intense interest from the NLRB.

Still more recently, the NLRB has ruled that the requirement in many employment arbitration agreements providing for a waiver of any class actions is an undue restriction on concerted employee activity. In a decision this April, the NLRB has ruled that an employer's confidentiality agreement was overbroad and therefore unlawful, because it prohibited employees from disclosing compensation and other personal matters to third parties, thus interfering with their right to discuss wages and other terms and conditions of employment.

Editor's Note – It may surprise employers to learn that almost every company has policies that the Labor Board would deem to be overbroad, illegal, and therefore unenforceable. Often these issues arise at non-union employers, where most employers feel they are immune from such issues. Employers are advised to have their policies reviewed by competent labor law counsel to insure that their policies do not run afoul of these principles. As more and more employees become aware of their rights even in a non-union environment, more cases are expected to be brought in the future.

"MISTAKES IN GRANTING FMLA LEAVE" continued from page 2

Employers must be careful with the wording of a termination letter, as the best advice is to be able to back up with a factual showing, the reasons for the termination as set forth in the letter. That is, if the employer puts one thing in the termination letter, but then claims later the real reasons were something else, an employer losses credibility and the reasons look pre-textual, suggesting illegal discrimination.

On the other hand, there is no need to go into great specifics in the termination letter. Reasons should be expressed broadly enough to include all matters that might be relied upon to justify the termination, however. Sometimes a broad term such as "failure to meet expectations of management" is sufficient. It is also generally helpful to make some type of reference to prior warnings that were issued.

Another factor to consider is whether others have been terminated for the same reason. In any type of discrimination case resulting from termination, the EEOC or plaintiff's lawyer is likely to ask (1) how many others were terminated for the same offense, listing names and dates; and (2) how many others committed the same offense and were not terminated? Therefore, it sometimes helps to make the wording in the separation notices consistent with the employer's past practices regarding terminations.

"DOES A DISABLED EMPLOYEE HAVE THE RIGHT TO TAKE A VACANT JOB" continued from page 3

vacant job may be a reasonable accommodation for an employee who cannot perform his current job due to disability, the process is "competitive" and the disabled employee will not automatically receive the vacancy if a better-qualified candidate applies. The EEOC argued that the ADA, as well as the Supreme Court's reasoning in *Barnett*, requires the reassignment of a disabled worker over a more qualified non-disabled candidate if the disabled individual is "at least minimally qualified" for the job and the employer cannot prove undue hardship.

In this particular case, the federal appeals court followed its own precedent and ruled against the EEOC, holding that it was lawful for the employer to award the job to the best qualified applicant for the vacant position. *EEOC v. United Airlines, Inc.*, 673 F.3d 543 (7th Cir. 3/7/12). However, the court noted that it was "likely" that "the EEOC's interpretation may in fact be a more supportable interpretation of the ADA." The court further noted that there is a difference of opinion among the federal circuit courts on the issue, and that the U.S. Supreme Court has not addressed it directly. Thus, in the absence of a well-established, bona fide seniority system, employers should conduct a careful, individualized assessment of whether transfer to a vacant position would be a reasonable accommodation or would constitute an undue burden.

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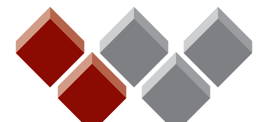

Wimberly Lawson

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We invite you to attend our 33rd Annual Labor and Employment Law Update

TARGET OUT OF RANGE

THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 15 & 16, 2012

BACK BY POPULAR DEMAND
OUR KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist
and author of
"Stress! Are You in Control?"

SPECIAL GUESTS

EEOC OFFICIALS

Opportunities to participate in
panel discussions entitled
"New Developments and Strategies for Working with the EEOC"
with guest speakers
Sarah L. Smith, Director, and
Sylvia Hall, Enforcement Supervisory
Federal Investigator,
with the Nashville, Tennessee
office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

"Hard to choose – so many great choices for breakout"

"Very informative!"

"Great information that's affordable for small employers"

"A great refresher – keeps me up to date!"

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The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

TARGET OUT OF RANGE

Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. A few of the thirty-five or more topics are:

- Boasts, Hosts, and Posts – Developments in Social Media for Employers
- Drug Testing Policies, Procedures and Issues
- Workers' Compensation in Depth Legislative and Case Law Update
- Supervisor/Manager Training and Tips on First Level of Prevention
- New Developments and Strategies for Working With the EEOC
- Employer Liability? Tort Reform, Negligence, and Premises Liability
- Affirmative Action, EEO-1 Reports and Service Contract Act Compliance
- Workplace Harassment – More Than You Want to Know
- Employment Policies – Handbooks, Handguns, Intra-Net, Tobacco, Electronic Communications Devices and More
- Internal Dispute Resolution Systems
- USERRA and Veteran's Issues
- HR Audit – Get Ahead of the Game

Join us in Knoxville on November 15th and 16th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

LexisNexis® Martindale-Hubbell® Peer Review Rated For Ethical Standards and Legal Ability

AGENDA

(Note: These are Pre-Conference Topics, Titles and Times.
They may change – Please Check Final Conference Program on Day of Conference.)

The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

Thursday, November 15, 2012 (9:00 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:00 a.m. - 10:45 a.m. - General Session
The Year in Review and Impact of Recent Election Results
Healthcare Reform - What's An Employer to Do?
Workers' Compensation - Current Trends and Emerging Issues
Wage & Hour Enforcement Activity Update

11:00 a.m. - 12:00 p.m. - Breakout Sessions
Employer Liability? Tort Reform, Negligence, and Premises Liability
FMLA Basic Course on Application of Law, Regs and Compliance
Drug Testing Policies, Procedures and Issues
Workers' Compensation In Depth Legislative and Case Law Update
ADAAA Basic Review and Developments of Law, Regs and Enforcement
Supervisor/Manager Training and Tips on First Level of Prevention
Wage and Hour – D.O.L. Initiatives, How to Comply and Avoid Liability

12:00 p.m. - 1:15 p.m. - Lunch *(As Guests of Wimberly Lawson)*

1:30 p.m. - 2:30 p.m. - General Session
Keynote Speaker, Dr. Farris Jordan

2:45 p.m. - 3:45 p.m. - Breakout Sessions
New Developments and Strategies for Working With the EEOC
Boasts, Hosts, and Posts - Developments in Social Media for Employers
Affirmative Action, EEO-1 Reports and Service Contract Act Compliance
Workplace Harassment - More Than You Want to Know
Employment Policies - Handbooks, Handguns, Intra-Net, Tobacco, Electronic Communications Devices and More
ADAAA Advanced Course and Application of Law, Regs and Enforcement
Immigration – The Executive Order, E-Verify and Tennessee Lawful Employment Act

4:00 p.m. - 5:15 p.m. - General Session
GINA Update
Internal Dispute Resolution Systems
Religion - The Bible in the Workplace
USERRA and Veteran's Issues
What Keeps Corporate Counsel Awake at Night?

5:15 p.m. - 7:00 p.m. Reception *(please join us for scrumptious hors d'oeuvres)*

Friday, November 16, 2012 (8:30 a.m. - 1:00 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session
OSHA Crackdown - Recordability Requirements
Guidance on Internal Investigations/Privileged Information
Tips for Implementing Litigation Hold Requirements
Protected Concerted Activity - What's That?

9:45 a.m. - 10:45 a.m. - Breakout Sessions
FMLA Advanced Examination of Recent Case Law and Difficult Issues
Wage and Hour - Ask the Experts/Open Forum Re Compliance
Getting Thicker Skin - The Law on Retaliation
New Developments and Strategies for Working with the EEOC
Labor Law - Update on NLRB Rulemaking and Union Activity
Unemployment Claims and Hearings - Tactics for Employers
Making Performance Reviews More Meaningful and Effective

11:15 a.m. - 1:00 p.m. - General Session
HR Audit - Get Ahead of the Game
Independent Contractor Classification - The Continuing Saga
Class Action Waivers - Post *DR Horton Case*
EEOC's Guidance and Court Cases on Arrests and Convictions
Out and About - Issues Related to the Legal Protection of LGBT Persons

1:00 p.m. Conclusion

This program has been approved for 9.50 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.50 general credit hours.

This program has been approved for 9.50 general credit hours by the National Association of Legal Assistants (NALA).

Thirty-Third Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee
November 15-16, 2012

COST:

Early Bird (registration AND payment received by Oct. 15)
- $319 per person
- $309 for each additional person from same company
- $279 for eight or more from same company

Registration and payment received AFTER October 15
- $359 per person
- $349 for each additional person from same company
- $319 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 15, 2012

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 15. Cancellations made after October 31, 2012 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

HOTEL ACCOMMODATIONS

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Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of $109.00/standard.

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RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code WLWWLWA to reserve at the conference rate)

KEYNOTE SPEAKER

Dr. Farris Jordan

Licensed Psychologist and author of "Stress! Are You in Control?"

No one is immune from stress, but Dr. Farris C. Jordan can teach anyone how to make it productive instead of damaging. And he is a master at having fun and laughing while he does it.

Dr. Jordan is a licensed psychologist who knows what it means to take control of stress. After receiving four degrees from the University of Tennessee, he has been extensively involved in stress research.

Dr. Jordan is the author of four books and numerous articles on the prevention of mental and physical illness. He has received national recognition for his "hands on" research on the effects of stress by becoming personally involved in highly stressful events such as Brahma Bull riding, NASCAR race driving, sky diving, Giant Canadian Bear wrestling, alligator wrestling, 13 consecutive Boston Marathons, completion of the 2,150 mile Appalachian Trail from Georgia to Maine in 139 days, and the 2,552 mile Mississippi River in a small canoe in 57 days. These experiences have enabled him to teach others how to control stress and stay motivated without fear or hesitancy.

FIVE WAYS TO REGISTER

1. *Mail to:* Bernice Houle
   Wimberly Lawson Wright
   Daves & Jones, PLLC
   P.O. Box 2231
   Knoxville, TN 37901
2. *Fax to:* **865-546-1001**
3. *Email to:* bhoule@wimberlylawson.com
4. *Via website:* **www.wimberlylawson.com**
5. *Phone:* **865-546-1000**

Special Needs? If you should have any special needs, such as wheelchair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.

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Credit Card Code (3-digit number) ________
Name on Credit Card ______________________
Billing Street Address ______________________
City ______________ *State* ________ *Zip* ________
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