LABOR AND EMPLOYMENT LAW UPDATE

DID YOU KNOW THAT YOU CAN BE SUED FOR . . .?

As with other practice areas, labor and employment law includes regulations which can be described as ironic or, in the opinion of many employers, just plain absurd. Here is a sampling:

. . . AN OVERLY FAVORABLE PERFORMANCE REVIEW? In *Vaughn v. Edel,* an African American employee alleged that she had been discriminated against on the basis of race over a two-year period in which she received satisfactory performance evaluations and merit pay increases. In truth, the employee was performing below expectations, but her employer was fearful of a lawsuit. Supervisors were directed to withhold their criticism.

So, what was the basis of the African American employee's suit? Ultimately, she was terminated as part of a layoff based upon merit. She claimed that, since she had received overly favorable reviews, she had not been afforded the same opportunity to improve her performance as her white counterparts. Had she been duly criticized, she theorized, she could have remedied her deficiencies and avoided inclusion in the layoff. The Fifth Circuit agreed and denied the employer's motion for summary judgment.

. . . A DEFAMATORY STATEMENT MADE BY A FORMER EMPLOYEE ABOUT HIMSELF? As a general rule, three persons are necessary to a claim of defamation: (1) the maker of the defamatory statement, (2) the person who is the object of the statement, and (3) a witness to the statement. Many states, and some Texas appellate courts, however, have recognized an exception to this general rule which allows a person to sue for self defamation.

In the employment context, a potential claim for self defamation arises when:

(1) a false statement is made by an employer to an employee as to the basis for his termination;

(2) the circumstances indicate that the terminated employee is likely (or, in some jurisdictions, will be compelled) to repeat the statement to another person, such as a prospective employer;

(3) the terminated employee repeats the false statement to a prospective employer;

(4) the terminated employee is unaware of the defamatory nature of the statement made to the prospective employer; and

(5) the terminated employee is not hired by the prospective employer as a result of the defamatory statement.

Many states, including Texas, recognize a qualified privilege for communications made to prospective employers. To be actionable, such statements must be made with malice.

. . . PAYING TOO MUCH TO AN EMPLOYEE FOR OVERTIME WORK? The U.S. Department of Labor takes the position that, under the Fair Labor Standards Act, a non-exempt employee must be paid 1½ times his regular hourly rate for overtime hours worked. An employer who regularly offers to and pays a nonexempt employee a lump sum for all overtime work hours in an amount greater than the prescribed rate is subject to being punished twice for its generosity. First, the employer will be required to pay an additional amount as overtime pay. Second, the overtime pay due will be recalculated to include the lump sum payments as part of the employee's regular hourly rate.

. . . AGE BIAS BY A CLAIMANT WHO HAS SIGNED A RELEASE OF ALL CLAIMS AND KEPT THE MONETARY CONSIDERATION FOR THE RELEASE? The Older Workers Benefit Protection Act ("OWBPA") provides that a release does not affect age discrimination claims under the Age Discrimination in Employment Act ("ADEA") unless certain enumerated requirements are satisfied. In *Oubre v. Entergy Operations, Inc.* a release set forth in a severance agreement signed by the claimant was deficient under the OWBPA. The employer nevertheless argued that the release was enforceable because the claimant had been fully paid under the release and had not returned the money.

The U.S. Supreme Court ruled that the claimant could proceed with his ADEA claim without repaying any settlement monies. The Court surmised that the employer could have claims for restitution, recoupment or setoff, but declined to address the merits of such claims.

. . . AN EMPLOYMENT DECISION BASED UPON A RUMOR? Many discrimination laws prohibit an employment decision based upon the mistaken perception that an applicant or employee belongs to a protected class. For example, the Americans With Disabilities Act ("ADA") defines the persons protected by the Act as including those who have no disability at all but who are regarded by an employer as having a disability. In regulations promulgated by the Equal Employment Opportunity Commission, the agency acknowledges that a rumor that an applicant or employee is disabled is sufficient to shield him from discrimination.

THE LESSONS FOR EMPLOYERS: Those who make employment decisions without a full understanding of the intricacies of labor and employment laws do so at their own peril. All employers should heed the following basic recommendations:

* Continuous education regarding applicable laws and regulations.
* Periodic audits of employment policies and practices.
* Consultation with legal counsel before undertaking risky employment decisions, such as discharges.

HAPPY HOLIDAYS!

All of us at Campbell & LeBoeuf, P.C., wish you a happy holiday season and a prosperous new year.

December also marks our two-year anniversary. The firm wishes to thank all friends and clients who have made our business a continuing success story.

DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

CAMPBELL & LEBOEUF
A PROFESSIONAL CORPORATION

BRUCE A. CAMPBELL
NICOLE T. LEBOEUF
ROBERT G. CHADWICK, JR.*
JASON A. SCHMIDT
SHELLY L. SKEEN
MARTY B. LEEWRIGHT †

3939 BELT LINE ROAD, SUITE 510
ADDISON, TEXAS 75001
TELEPHONE: 972.277.8585
FACSIMILE: 972.277.8586
WWW.CAMPBELLLLEBOEUF.COM

* BOARD CERTIFIED, LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

† OF COUNSEL

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