Cases to watch: October 2022 legal round-up

It can be difficult to keep up with the many lawsuits constantly being slung at businesses. Which ones are important? What cases could have insights that impact our business? Is this too niche to have a broader impact? With the business landscape rapidly changing, it's not always enough to look at existing case law. In fact, many lawsuits are pushing limits that would have been unforeseeable just a few years ago.

That's why our team has done the legwork for you. We've looked through recent cases and pulled out a few that we think you should know about. While most haven't been settled yet, there are still tangible implications and insights to glean. Even more important, you may be able to take steps now to ensure you don't find yourself in a similar position down the road.

Overreacting to union talk often backfires

You may have read about recent high-profile companies and their responses to unionization efforts. The NLRB, which enforces the nation's primary union rights law, the NLRA, has ordered Starbucks and Amazon to reinstate workers the companies fired during unionization after concluding both employers carried out the firings to quash unions. Smaller employers also face NLRB unfair labor charges over their handling of unionization efforts.

For example, the NLRB recently required Strategic Technology Institute, a small minority-owned business targeting federal contracts, to rehire 18 workers it discharged or otherwise discriminated against for attempting to unionize the workplace. Their reinstatement includes back pay. If the positions have been filled, the company must find an equivalent position within the company.

The company also must post what amounts to a *mea culpa* announcement. That document includes the statement, "The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice." The notice includes letting employees know they can form, join or assist a union and that the company won't punish those who do. (*Strategic Technology Institute*, No. 15-CA-249872, NLRB, 2022)

Final note: Employers can discourage creating a union but cannot punish those who support the effort. Employers should contact experienced labor counsel for help if facing a union drive. If you go too far in discouraging forming or joining a union, expect NLRB scrutiny.

How not to respond to coming out

After the Supreme Court's 2020 decision that transgender discrimination and harassment amount to illegal sex discrimination under Title VII of the Civil Rights Act of 1964, employers should have implemented workplace rules that make it clear that employees coming out as transgender should not be harassed or discriminated against.

The gender identity case involved a transgender woman, Aimee, who had worked as a male funeral director before she announced she was transgender and would return from a scheduled vacation as a female. She told her boss that she would adhere to the funeral home's dress code for females, which required wearing a dress, suit or skirt and jacket. Aimee was fired, and her case landed in the Supreme Court. It sided with Aimee.

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Another recent case settlement provides lessons on how to respond. Jennifer worked as a teacher in Prince George's County, Maryland schools. She quit in 2017—before the Supreme Court decision—and sued, alleging that she had been driven out by the treatment she received at the middle school where she taught English after coming out as transgender in 2011.

Jennifer's lawsuit claimed that students called her a pedophile, and an administrator told her she should not wear dresses or skirts because it would make people uncomfortable. Worse yet, the lawsuit alleged that a human resource professional at the school district called her transition "garbage" and told her to look male.

Jennifer's lawsuit was finally scheduled for trial at the end of September. The school district and Jennifer's lawyers reached a confidential settlement before trial. Meanwhile, the school district has implemented policies to prevent the harassment Jennifer endured before the Supreme Court's decision. (*Eller v. Prince George's County Public Schools*, No. 8:18-CV-03649, DC MD, 2022)

Bottom line: At the bare minimum, employers must educate employees on transgender rights, require everyone to refrain from harassment and change dress and grooming codes to allow transgender employees to dress and groom in a way that reflects their gender identity.

Replace supervisor to prevent retaliation

Workplace sexual harassment takes many forms. Sometimes, the harasser is a co-worker. That's an easy case to handle. But other times, the allegations involve a supervisor. For this, there are fewer defenses. You can, however, stop the case from escalating into a retaliation lawsuit with one simple tactic. Replace the supervisor who allegedly harassed the complaining subordinate and don't let him or her know anything about the prior complaint. That way, you not only stop ongoing harassment, but also free the new supervisor to discipline the subordinate appropriately as needed without the specter of a retaliation lawsuit for allegedly punishing the worker.

Recent case: Schwayn worked for an Alabama post office until he was discharged in 2016. Before, Schwayn had been in a romantic relationship with his then-postmaster, Monica. But the relationship didn't last. After Schwayn broke up with Monica, he filed numerous internal and EEOC complaints, alleging Monica had essentially sexually harassed him.

The U.S. Post Office assigned a different postmaster to the post office, where Schwayn continued to work while his various complaints moved through the system. The new postmaster wasn't told anything about the prior complaints. Eventually, the new postmaster recommended Schwayn's termination. He immediately sued, alleging that the U.S. Post Office retaliated against his earlier complaints by firing him.

The trial court and the 11th Circuit Court of Appeals dismissed the lawsuit. They concluded that the new postmaster, because they had no prior knowledge of the sexual harassment claims and the affair, could not have retaliated against Schwayn. (*Bradley v. Postmaster General*, No. 21-12833, 11th Cir., 2022)

Final note: It's also a good idea to have rules against supervisor/subordinate romantic entanglements. Post-breakup bitterness can wreak havoc in the workplace and spur lawsuits.

Consider accommodation request as illness

Here's a warning to share with managers and supervisors. An employee with a medical issue may be disabled and entitled to reasonable accommodations but doesn't have to request one. It's enough that he lets someone in management know about the condition and requests a change in the workplace.

For example, a worker returning from a hospital stay who tells his supervisor he experienced a heart attack and

would like to work from home has provided enough information to trigger the ADA. That supervisor must begin the interactive accommodations process by letting the HR office know. Under no circumstances should the supervisor nix the request. That's a separate ADA violation of failing to engage in the interactive accommodations process.

Recent case: Jimmy went to work for the city of Sunrise, Florida as the Chief Electrical Inspector. He was to serve a nine-month probationary period. After five months on the job, Jimmy had a heart attack. He spent four days in the hospital, followed by two weeks of rest. Jimmy returned to work with his doctor's note that he should be "on light duty." He requested permission to work from home. Instead, he was informed that he was "not a good fit" and that his probationary term would not be converted to a permanent one.

Jimmy sued, alleging he was disabled under the ADA and that the city had refused to consider his reasonable accommodation request to work from home. The city claimed Jimmy hadn't made a reasonable accommodation request. The court disagreed. It said the employer knew about a potential disability triggered by the heart attack, and it should have assumed a request for telework was an accommodation request. The appellate court ordered a jury trial. (*Sugg v. City of Sunrise*, No. 20-13884, 11th Cir., 2022)

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