This Week In Labor And Employment Law - Marx Brothers Edition

By Robin E. Shea on January 13, 2012

It's been another zany week or so in the world of labor and employment law, rivaling Groucho, Harpo, Chico and Zeppo. Here are a few items that jumped out at me. *(Each subhead is a line from a Marx Brothers movie or the title of a Marx Brothers movie. Answers at the end.)*

"Hurry up, or you'll be late for jail!" Pepsi Beverages (formerly Pepsi Bottling Co.) agreed to a pre-litigation settlement of $3.13 MM to resolve charges that it considered arrest records in making hiring decisions, which, according to the U.S. Equal Employment Opportunity Commission, meant that approximately 300 otherwise-qualified African-American applicants were rejected. The rejected applicants will be offered positions with the company as part of the settlement. The EEOC is on record as strongly opposed to the use of virtually *any* criminal background information in connection with employment decisions. However, it appears that the company was using arrest as well as conviction information, which has been a no-no for a long time, and was flatly rejecting anyone with a "history" instead of considering the impact of the conviction on the particular job . . . another no-no. The company has agreed to revise its employment policies as part of the settlement.

Horsefeathers. A federal judge in Chicago denied a motion to compel in a class action filed by the EEOC against carrier DHL, alleging widespread racial segregation in job assignments. DHL requested detailed information and documents from each class member about subsequent employment, as well as personal medical information. The judge denied the request for information about subsequent employment because the EEOC had abandoned its claim for back pay or front pay -- therefore, that information was not "reasonably calculated to lead to the discovery of admissible evidence." Although the EEOC was seeking compensatory damages for emotional distress, the judge held that the medical information did not have to be produced because the agency was seeking only "garden-variety emotional distress" based on humiliation, embarrassment, and the like. Not all courts have bought this "garden-variety emotional distress" argument. Some have found that if a plaintiff pursues an emotional distress claim, he or she has opened the door to discovery of evidence regarding her medical, mental, and emotional condition.

"The party of the first part shall be known in this contract as the party of the first part." National Labor Relations Board Chairman Mark Pearce and now-ex-Member Craig Becker

invalidated an arbitration agreement that precluded employees individually from pursuing class or collective actions. (Member Brian Hayes, the only Republican on the Board at the time, had recused himself.) Pearce and Becker said that the agreement interfered with employees' rights under Section 7 of the National Labor Relations Act to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .." Significantly, the employer was non-union and the agreement was not collectively bargained. The two-member panel invoked the same "protected concerted activity" clause that has been used against non-union employers who crack down on employees who use social media to rant about their employers.

Monkey Business. Speaking of the NLRB, President Obama and the Republican members of Congress have been in quite a battle over recess appointments. Yesterday the U.S. Department of Justice released an internal memorandum that supported the President's position. A recap: As we have reported before, Member Becker's recess appointment to the NLRB expired at midnight December 31, and his last day at work was January 3. Becker's departure left the Board with only two members (Pearce and Hayes) and three vacancies, and the Supreme Court has said that a three-person quorum is necessary for Board action. In an attempt to prevent Obama from making more recess appointments, the Republicans held *pro forma* sessions every three days during their holiday break. No business was conducted during the *pro forma* sessions, which lasted about one minute each. Technically, this meant that Congress was not "in recess" for the whole break and that Obama therefore would not be authorized to make any recess appointments. However, Obama outmaneuvered the Republicans (for now, anyway) and, armed with the DOJ memorandum, which declared the *pro forma* sessions a technical maneuver that could be ignored, made recess appointments to fill the three vacant positions. Legal challenges are sure to ensue. Bring your popcorn.

"Hail, hail Freedonia, land of the brave . . . and . . . free!" In a nice victory for religious employers, the Supreme Court unanimously held that there is indeed such a thing as a "ministerial exception" to the federal anti-discrimination laws arising from the Establishment and Free Exercise clauses of the First Amendment, and that it applies to people other than the clergy. The plaintiff in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* was a teacher who was formally considered a "minister" in the church and taught religion and led devotions and worship services, but who spent the majority of her time teaching "secular" subjects. She alleged that her employment was terminated in retaliation for exercising her rights under the Americans with Disabilities Act. Although many lower courts had recognized the ministerial exception, the Supreme Court had not addressed the issue. The EEOC and the government had argued unsuccessfully that the exception was unnecessary. The decision means that, if a court finds that the ministerial exception applies to a case, the case will be dismissed. (Religious employers who are not Protestant Christians will be particularly interested in the concurring opinion by Justices Samuel Alito and Elena Kagan -- not a combination you see every day! -- in which they provide an excellent discussion of how the exception should apply to employees who perform religious functions but are not "ministers.")

"I'll see my lawyer about this as soon as he graduates from law school." The U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment in a lawsuit filed by a library employee of Ohio State University who alleged that he was ostracized and constructively discharged after he

recommended a "freshman-reading" book that had a chapter describing homosexuality as aberrant behavior. The Court found that the plaintiff had waived his claims for damages by first having filed a state-court lawsuit. (Under Ohio law, this results in a waiver of the right to recover damages in any other forum.) His First Amendment retaliation claim was subject to dismissal because, although his speech pertained to a matter of public concern, he spoke in connection with his job duties and not as a "citizen." He also could not establish "adverse action" because both his dean and his immediate supervisor had supported him, even though many of his peers were vocally critical of him and had called for his termination. Finally, the Court rejected his claim that the OSU sexual harassment policy was unconstitutionally overbroad and vague.

MARX BROTHERS TRIVIA:

"Hurry up, or you'll be late for jail!" *A Night at the Opera*, 1935.

Horsefeathers, 1932.

"The party of the first part shall be known in this contract as the party of the first part." *A Night at the Opera*, 1935.

Monkey Business, 1931.

"Hail, hail, Freedonia [etc.]" *Duck Soup*, 1933.

"I'll see my lawyer about this as soon as he graduates from law school." *Duck Soup*, 1933