Utah Employment Law Update

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Mobile Phone / Driving Laws

- **2012 Session – Text Messaging Law**
  - **Class B misdemeanor if cause serious bodily injury**
- **2013 Session – Younger than 18 – bars use of a mobile device while driving (effective May 1, 2013)**
- **2014 Session – Prohibition on Using any Handheld Wireless Communication Device While Driving (effective May 13, 2014)**
  - **Cannot write, send or read a written communication**
  - **Dial a phone number**
  - **Access the Internet**
  - **View or record a video; or**
  - **Enter data into a device**

Mobile Phone / Driving Laws

- **Jeffery Lloyd Bascom – Sentenced in July to up to 5 years in prison.**

Vernal police say Thomas LaVelle Clark, 15, and a friend were walking on the shoulder of 500 West near 1300 South at about 9 p.m. on Sept. 2 when a Dodge pickup driven by Bascom drifted off the road and hit Clark. Police allege Bascom was texting at the time.

Clark was taken to a hospital and died the next day.

Meanwhile, the victim's family has filed a wrongful death suit against Bascom.

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Mobile Phone / Driving Laws

- **Respondeat Superior / Negligence Per Se**
  - **Liability can be extended to employers**
  - **When driving as part of duties, not to and from work**
- **Employer Policy Responses:**
  - **Safe driving policies**
  - **Prohibit violations of statutes**
    - **In Utah, compliance with new law**
- **Need compliance to policy at all levels**

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Unemployment Benefits

- ***Spencer Law Office, LLC v. Department of Workforce Services*, 2013 UT App 138, 302 P.3d 1257**

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Facts

- First-year associate attorney notified law firm that he was leaving his job (effective the next week) to practice as a solo practitioner and that a legal assistant from the law firm would be joining him
- Law firm confronted legal assistant
- Legal assistant hadn't yet made up his mind
- Law firm terminated associate and legal assistant

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Procedural History

- **Legal assistant filed for unemployment benefits with the Department of Workforce Services**
- **DWS denied the request**
- **Legal assistant appealed to Workforce Appeals Board**
- **Workforce Appeals Board held that law firm did not have just cause to discharge the legal assistant**
- **Law firm appeals to the Utah Court of Appeals**

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The Law

- **Benefits will be denied if the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which was deliberate, willful, or wanton, and adverse to the employer's rightful interest. However, not every legitimate cause for discharge justifies a denial of benefits. A just cause discharge must include some fault on the part of the claimant.**
  - **Utah Admin. Code R994-405-201**

The Law

Just Cause

- **3 elements**
  - **Culpability**
    - **If the conduct causing the discharge is so serious that continuing the employment relationship would jeopardize the employer's rightful interest. R994-405-202(1)**
  - **Knowledge**
    - **The claimant must have had knowledge of the conduct expected by the employer. R994-405-202(2)**
  - **Control**
    - **Conduct causing the discharge must have been within the claimant's control. R994-405-202(3)**

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Court of Appeals Decision

- **Was the legal assistant's consideration of the job offer so serious that continuing the employment relationship would jeopardize the law firm's rightful interest?**

- **Duty of loyalty**

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Court of Appeals Decision

- **Legal assistant did not compete with law firm while employed by the firm**
- **Legal assistant had no duty to disclose his plans to the law firm**
- **Legal assistant was entitled to take active steps to arrange his new employment in competition with the law firm while still employed there**

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Takeaway

- **Despite employee's at-will status and the fact that termination was lawful, there can be other consequences to terminating an employee without just cause**
- **Despite the potential for liability for unemployment benefits, it still might make business sense to terminate the employee**

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Wrongful Termination

***Stone v. M & M Welding & Construction, Inc.*, 2013 UT App 233, 312 P.3d 934**

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Facts

- **Employee injured during or after a party hosted by the employer**
- **Employee notified the employer that he wanted to file a workers' compensation claim**
- **Employer dissuaded employee from filing a claim and held his position open for him until he was able to return to work**
- **Upon return, employee's hours were reduced**

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Facts

- Employee informed employer at least two more times that he wished to file a workers' compensation claim
- Shortly thereafter, employee was working at customer's job site and reported a contaminated water spill
- Customer thought report was exaggerated and demanded that the employer fire the employee
- Employer terminated employee the next day
- Employee filed a workers' compensation claim approximately 8 months after termination

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Procedural History

- **Employee sued employer alleging his termination was in retaliation for his announced intent to seek workers' compensation benefits**
- **Employer moved for summary judgment on the basis that because the employee filed his workers' compensation claim after he was fired, the termination could not have been in retaliation for filing the claim**

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The Law

- **At-will employment-**
  - **Employer's decision to terminate an at-will employee is presumed to be valid**
- **3 ways to overcome the presumption:**
  - **Implied or express agreement**
  - **Statute or regulation restricting the rights of the employer to terminate an employee under certain conditions**
  - **Where termination constitutes a violation of a clear and substantial public policy**

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The Law

- **Elements for cause of action for wrongful discharge in violation of public policy**
  - **Employer terminated employee**
  - **Clear and substantial public policy existed**
  - **Employee's conduct brought the public policy into play**
  - **Discharge and the conduct bringing the policy into play are causally connected**

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The Law

- ***Touchard v. La-Z-Boy, Inc.*, 2006 UT 71, 148 P.3d 945**
  - **"retaliatory discharge for filing a workers' compensation claim violates the public policy of this state; thus, an employee who has been fired or constructively discharged in retaliation for claiming workers' compensation benefits has a wrongful discharge cause of action."**

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Court of Appeals Decision

- **Was the public policy of the Workers' Compensation Act "brought into play" by the employee's conduct**
- **Public policy may be "brought into play" by conduct short of actually filing a claim**
- **Examples**
  - **Preparing a claim**
  - **Notifying the employer of an intent to file a claim**
  - **Discussing a claim with a coworker**

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Takeaway

- **Can't terminate an employee for considering or preparing to file a Workers' Compensation claim**
  - **Would likely have the same result if it were a discrimination or harassment claim**
- **Does not apply to employees who oppose employer's treatment of employees who are entitled to claim workers' compensation benefits**

Religious Discrimination

***Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013)**

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Facts

- **Muslim woman, who wore a headscarf for religious reasons, applied for job at Abercrombie and Fitch**
- **A&F "Look Policy"- no black clothing and no caps**
- **Applicant asked friend who worked at A&F if her headscarf would be a problem. Assistant manager said it would not**

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Facts

- Applicant wore black headscarf during interview
- Interviewer assumed applicant was Muslim
- Interviewer assumed that applicant wore headscarf for religious reasons
- Applicant never mentioned her religion in her interview
- Interviewer described dress requirements, but did not mention Look Policy

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Facts

- **Interviewer gave applicant a score that amounted to recommendation to hire the applicant**
- **Interviewer was unsure if the headscarf would be a problem and consulted with district manager**
- **District manager said that applicant "should not be hired because she wore a headscarf—a clothing item that was inconsistent with the Look Policy."**
- **Applicant was not hired because she wore a headscarf**

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The Law

Title VII

- **Under Title VII it is an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's religion**
- **Employer has an obligation to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates the accommodation would result in undue hardship on the conduct of the business**

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The Law

McDonnell Douglas Burden Shifting

- **Employee must prove prima facie case**
  - **Employee had a bona fide religious belief that conflicts with an employment requirement**
  - **Employee informed employer of this belief**
  - **Employee was fired (or not hired) for failure to comply with the conflicting employment requirement**
- **Burden shifts to employer to:**
  - **Conclusively rebut one or more elements of the prima facie case**
  - **Show that it offered a reasonable accommodation**
  - **Show that it was unable to reasonably accommodate the employee's needs without undue hardship**

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District Court

Applicant presented sufficient evidence for a prima facie case:

- **Applicant had a bona fide, sincerely held religious belief**
- **The practices related to this belief conflicted with the Look Policy**
- **A&F had notice that applicant wore headscarf because of her religious belief**

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District Court

Notice Element

- **"faced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice [that] an accommodation is needed[,] the Tenth Circuit would likely opt for the latter choice."**

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Tenth Circuit

Notice element of the prima facie case

- **Plaintiff must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs accommodation for that practice due to a conflict between the practice and the employer's neutral work rule**

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Tenth Circuit

- **Because applicant did not notify A&F of her religious beliefs, A&F did not have *actual knowledge* that applicant needed an accommodation**
- **A&F's decision not to hire applicant because of her headscarf was thus proper**

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Takeaways

- **Caution!**
- **Should seek to accommodate an employee's religious needs**
- **But wait for the employee to raise the need for accommodation**
- **Do not assume that an employee holds a particular belief, engages in particular practices, or is inflexible with regard to those practices**

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SOX Whistleblower Liability

***Lawson v. FMR, LLC*, 571 U.S. __ (2014)**

- **Petitioners were employees of privately held company that provided advisory and management services to a publicly-traded mutual fund.**
- **Raised concerns about accounting methodologies and inaccuracies in a registration statement relating to the mutual fund.**

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SOX Whistleblower Liability

***Lawson v. FMR, LLC*, 571 U.S. __ (2014)**

- **Adverse employment actions taken against petitioners.**
- **Employer moved to dismiss SOX Whistleblower liability on the grounds that it was not a public company.**

SOX Whistleblower Liability

***Lawson v. FMR, LLC*, 571 U.S. __ (2014)**

- **Supreme Court (Ginsberg): SOX "whistleblower protection extends to employees of contractors and subcontractors" – even if privately held – if the protected activity pertains to public companies.**

SOX Whistleblower Liability

***Lawson v. FMR, LLC*, 571 U.S. __ (2014)**

- **Dissent: "a babysitter [could] bring a federal case against his employer – a parent who happens to work at the local Walmart (public company) – if the parent stops employing the babysitter after he expressed concern that the parent's teenage son may have participated in an Internet purchase fraud."**
- **It also highlights the possibility of a suit "against a small business that contracts to clean the local Starbucks (public company) if an employee is demoted after reporting that another nonpublic company client has mailed the cleaning company a fraudulent invoice."**

SOX Whistleblower Liability

***Lockheed Martin Corp v. Administrative Review Board (Andrea Brown),* 717 F.3d 1121 (10th Cir. 2013).**

- **Lockheed's Vice President of Communications, Wendy Owen, was running a "pen pals program" for the company whereby Lockheed employees would correspond with members of the U.S. military deployed in Iraq.**

SOX Whistleblower Liability

***Lockheed Martin Corp v. Administrative Review Board (Andrea Brown),* 717 F.3d 1121 (10th Cir. 2013).**

- **Andrea Brown, who reported to Owen, was told that Owen had developed sexual relationships with several soldiers, and had concerns that Owen may have used Lockheed funds to purchase a laptop for one of the soldiers, traveled to "welcome-home ceremonies" to entertain soldiers in expensive hotels and limousines, and sent inappropriate emails and sex toys to soldiers.**
- **Brown reported her concerns to Lockheed's Vice President of Human Resources and an investigation ensued.**

SOX Whistleblower Liability

***Lockheed Martin Corp v. Administrative Review Board (Andrea Brown),* 717 F.3d 1121 (10th Cir. 2013).**

- **Brown was demoted, and lost her office and responsibilities, among other things. "Brown then had an emotional breakdown, fell into a deep depression, and took medical leave." Eventually provided a notice of forced termination and alleged a constructive discharge.**
- **ARB found that Brown's new supervisors who knew nothing of the complaints about Owen "both were poisoned against Brown by Owen's biased reports regarding Brown's professional competence."**

SOX Whistleblower Liability

***Lockheed Martin Corp v. Administrative Review Board (Andrea Brown)*, 717 F.3d 1121 (10th Cir. 2013).**

- **Cat's Paw liability -- only needs to be a contributing factor.**
- **10th Circuit upheld the ARB's decision that Lockheed had constructively discharged Brown after she had engaged in protected activity.**

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