SEBRIS BUSTO JAMES Employment Law Note October 2013

The Horror! A Spooktacular Employment Law Update

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Autumn is upon us. In Washington, that means we are busy savoring our pumpkin spice lattes and enjoying the last few days of sunshine. This is also the time of year when some of us carve pumpkins and tell scary stories as the Halloween holiday approaches. To celebrate the season, we bring you this light-hearted update on cases sure to strike fear in the heart of unions and employers. Read on if you dare!

Organized Labor "Fright Night"

Soon, the Supreme Court will hear two cases, both brought with the assistance of the National Right to Work Legal Defense Foundation, that could become a nightmare for organized labor. In *Harris v. Quinn*, No. 11-681, Illinois home care workers seek to limit the power of public-sector unions to collect dues in exchange for the unions representing their interests before state agencies. The home care workers are considered state employees because they provide services to Medicaid recipients and their payments are administered by the State. State law requires the workers to acknowledge and support an exclusive representative to petition the State over Medicaid reimbursement rates. Pursuant to this law, the courts below held that unions could collect dues from the workers. The petitioners challenge this forced-unionization scheme on grounds that it violates their freedom of association. They further assert that it violates their First Amendment rights to petition the State as individual private citizens.

In a second case, *Unite Here Local 355 v. Mulhall*, No. 12-99, the court will consider whether agreements between unions and employers that set ground rules for union organizing violate the Labor Management Relations Act (LMRA). In *Unite Here Local 355*, the union entered into an agreement with a casino company under which the casino agreed that it would not interfere with union organizing and the union agreed not to strike during the organizing period. Such agreements are fairly standard nationwide to establish organizing "ground rules." However, the petitioner challenges the agreement on grounds that it violates the anti-corruption provision of the LMRA, which is intended to keep employers from bribing unions by specifically prohibiting companies from giving union officials "any money or other thing of value." The petitioner in *Unite Here Local 355* takes a non-traditional view of bribery, essentially asserting that such ground rules are "things of value" and therefore constitute bribery.

Harris and *Unite Here Local 355* are more than just a bump in the night for organized labor. Should both of these cases be decided against the labor organizations, a union's ability to efficiently unionize a workplace would be directly effected. Under *Harris*, Unions could lose a portion of their dues, i.e., their compensation for representing workers, and find it harder to organize public employees. Under *Unite Here Local 355*, a private sector union and employer could be prohibited from agreeing that the employer: will not to fight organization; will provide the union with access to its facility; or will provide the union with the contact information of the eligible employees, for example. The loss of such agreements could result in difficult, prolonged and contentious organizing campaigns and fewer organized workers.

The Undead Wrongful Termination Claim

Generally, when administrative remedies are available to a plaintiff by statute, the plaintiff cannot obtain relief for his or her claim under common law. However, the Washington Supreme Court recently held that a public employee protected by a collective bargaining agreement may bring a common law claim for wrongful termination notwithstanding the administrative remedies available through the Public Employment Relations Commission (PERC). In *Piel v. City of Federal Way*, 177 Wn.2d 604 (June 27, 2013), a public employee was involved in organizing a police union. Post-organizing, he received less favorable performance evaluations and was eventually terminated.

The employee sued his employer, alleging that his termination constituted wrongful termination in violation of public policy. The trial court held that the existence of statutory remedies available under RCW 41.56, the Public Employees' Collective Bargaining statute, prevented him from establishing his public policy claim, but the Washington Supreme Court disagreed. The high court found that the limited remedies available under the statute were inadequate and did not foreclose more complete tort remedies for wrongful termination. Therefore, notwithstanding the administrative remedies available, a Washington employee terminated for asserting collective bargaining rights may bring a common law wrongful termination claim.

Haunted by the Halloween Party

Halloween celebrations in the office can be motivational and fun for employees. However, such celebrations can also offer more tricks than treats for employers. Inappropriate Halloween costumes, comments, and conduct can haunt employers long after the holiday passes. For example, in *Devane v. Sears Home Improvement Products Inc.*, 2003 Minn. App. LEXIS 1514 (Minn. Dec. 23, 2003), an employee obtained a judgment on her claims for sexual harassment and hostile work environment based in part upon a Halloween costume confrontation. The employee, who dressed in a doctor costume, was approached by her manager, who allegedly unbuckled his pants, pointed to his groin and told the employee that "[i]t hurts here." In one pro-employer case, *Dahms v. Cognex Corp.*, 914 N.E.2d 872 (Mass. 2009), an employer embroiled in a sexual harassment case was allowed to introduce evidence of the plaintiff's Halloween costume, described as "a see-through Empire State Building," to show that the plaintiff was not subjectively offended by her work environment. Halloween costumes have even lead to workers' compensation disputes. In *Travis v. Robbins-Sykes Hardwood Flooring*, 1993 Ark. App. LEXIS 617 (November 17, 1993), an employer was successfully sued for workers' compensation benefits by an injured employee who fell off a stool after being scared by a costumed co-worker.

Finally, if your organization sponsors a Halloween gathering, it is important to be respectful of those who do not wish to participate. Otherwise, you may find yourself in the middle of a religious discrimination horror story. For example, in *EEOC v. Community Transport Services, LLC*, 5:09-cv-02391 (D.S.C. 2009), an employer terminated an employee, who was a Jehovah's Witness, for allegedly refusing to participate in a Halloween carnival. The EEOC won its religious discrimination suit on the employee's behalf, alleging that the employer was aware that the employee's religious beliefs prohibited her from participating in the carnival. Scary indeed.