

Employment Law Update

DECEMBER 2025

BY BOB GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

LEGISLATIVE & ADMINISTRATIVE ACTIONS

End of Same-Day Postmarks Guarantee. The US Postal Service (USPS) will no longer guarantee that mail deposited in drop boxes or in the mail slot inside a post office will receive a postmark on that same date. It does not state how long a delay there may be between the deposit date and the postmark date. To guarantee the date marked, one must take the item to a post office counter and have its date marked there while you watch (not just tossed into a bin to be marked later), or you can rent a postage meter from USPS and do it in-house. *Why is this important for employment issues?* Many employment processes, as well as legal statutes of limitation, depend on exact dates. “Must be postmarked by” is a standard notice. One day can make all the difference in FMLA coverage, inclusion or exclusion in a hiring process, contracts, or whether the court will accept or reject your answer and defense in an employment case. The postmark date is often an issue in litigation. Dropping the letter in the slot before midnight no longer guarantees you have met the deadline postmark date. So, one must now be more diligent and avoid being last-minute regarding mailings. Also, expect to see more “Must be *received* by” notices and electronic filings, intended to avoid later arguments about postmark dates.

LITIGATION

National Labor Relations Act

Employee Secretly Records Meeting with Manager; Discussion of Wages with Other Workers is Protected Activity. In *NLRB v. North Mountain Foothills Apartments, LLC* (9th Cir. 2025), the court upheld the National Labor Relations Board’s finding of an Unfair Labor Practice and award of damages to a Maintenance Technician who was fired after disclosing his compensation package to other workers. Key evidence in

the case was the recording the worker secretly made of his meeting with the company's two top managers. The day prior, one of the managers told the Maintenance Technician she was upset because other workers knew they were getting lower compensation than he was. He was called into a meeting the next day. He recorded the two managers' statements of displeasure about his having talked with coworkers and how it had "become a red-hot issue," making our "life really tough." They went on to say his wage revelation had created "a hornet's nest to deal with" requiring "damage control." The managers said the Tech's action had ruined the working relationship with them, "trusted confidentiality had been chiseled away" and then instructed him that his work conditions and wages were "Nobody's business but his; except now everyone is aware of them" and this had caused management to lose confidence in him. The next day, the Maintenance Tech received a discharge notice. Both the NLRB and the Court of Appeals found substantial evidence to support a Section 8(a)(1) Unfair Labor Practice for firing due to engaging in protected activities. Employees have a general right to reveal their compensation to each other and discuss their concerns and opinions about wages, hours, terms and conditions of their employment. *There are two key lessons from this case.* First, do not vent your anger at employees until you at least first check to be sure it is not protected activity at issue. Second, be aware that any conversation you have may be recorded. Technology increasingly makes it easier to secretly record and even live-broadcast to the internet, and employees are increasingly doing so in their interactions with supervisors. This, as in the present case, comes back as evidence in later litigation. [The company also challenged the NLRB's authority to issue a decision, arguing that both investigating the issue and making the final determination violated constitutional separation of powers and due process. The Court rejected this, finding that the NLRB's investigating and hearing processes were completely separate and insulated from each other. The Hearing was not a rubber stamp of the investigation results.]

Courts Trim Damages Awarded by NLRB. Different employment laws provide different sorts of remedies; some allow awards of only back compensation, others can add on large amounts for punitive damages, emotional distress, fees, fines, penalties, and more. This is why cases often allege claims under two or more laws. The scope of awardable damages is often a matter of contention. Recently, two courts have limited the damages that could be awarded under the National Labor Relations Act in Unfair Labor Practices cases. *NLRB v. Starbucks Corp.* (6th Cir. 2025) involved a coffee shop employee who was fired due to her union organizing efforts. *Hiran v. NLRB* (5th Cir. 2025) involved a karaoke bar and restaurant that promptly fired eight employees who voiced complaints about pay and then went out on strike. In both cases, the NLRB found unlawful discharge and awarded reinstatement, back pay/benefits, and also issued an order for payment of "any direct or foreseeable

pecuniary harms resulting” from the discharge. Both courts ruled that this additional “direct and foreseeable harms” order was too broad in scope and was beyond the NLRB’s statutory authority. The damages were trimmed to back pay/benefits and reinstatement.

Discrimination

Standards of Proof

Harassment Standard Remains Severe & Pervasive. There are different sorts of proof for different types of discrimination under Title VII. In *Muldrow v. City of St. Louis* (2024), the U.S. Supreme Court lowered the standard for what constitutes actionable discrimination for “discrete acts,” one-time decisions such as termination, hiring, promotion, transfers, etc. Another type of discrimination is “hostile work environment/harassment,” requiring being subjected to “sufficiently severe or pervasive” unwelcome behaviors. The courts have ruled that some lesser degrees of unwelcome attention are not “severe or pervasive” enough to meet the standard to maintain a case. *Russel v. Daniel Driscoll, Secretary of the Army* (10th Cir. 2025) was filed by a civilian manager at an Army base hospital. He complained that his supervisor, a female Army Major, had engaged in several incidents that constituted gender discrimination and favoritism toward female staff. An internal investigation found some instances that seemed to be gender favoritism. Mr. Russel believed he should receive compensation for the harassment, even though he had not suffered a tangible change in position or pay (a discrete act). He filed a Title VII harassment case. The Army argued that even though the Major’s acts may have been gender discrimination, they were not sufficiently *severe or pervasive* to meet the standard for actionable harassment. Russel argued that the *Muldrow* decision had altered the standard, lowering the level of behavior needed to less than “*severe or pervasive*,” so significantly lesser levels of gender related behavior should now be enough to make a case. The court disagreed. It held that “discrete acts” and “harassment” have two separate definitions and two separate standards. ***Muldrow*** addressed a discrete act, a transfer to a less desirable position. It did not address or mention harassment. Thus, it made no change in that area of Title VII. A plaintiff must still show sufficient severity and pervasiveness of unwelcome behavior to maintain a harassment case.

Disability

Night Blindness Can Be a Disability. A county Health Department employee adequately performed all job duties. Then she was assigned to a position that required some nighttime driving. This was very difficult for her due to her night blindness condition. When she requested accommodation, instead, her nighttime work was increased. She filed an ADA case claiming failure to accommodate and

retaliation for having requested an accommodation. A jury found in the employee's favor on both counts. The county appealed, claiming that night blindness was not a "disability" under the ADA because she could do all job duties once she arrived at the job site. The court rejected this argument and ruled that night blindness could be a covered disability given the ADA's requirement to do an individualized assessment of the degree to which a condition impacts the employee's ability. Having to drive to work locations is integral to performing the job. *Edwards v. Shelby County TN* (6th Cir. 2025)

Fair Labor Standards Act

Retaliation by a Future Employer. The employment laws have increasingly empowered people, especially women, who were long seen as being on the margins of employment and subject to a variety of mistreatments in wages, terms and conditions. One such group is exotic dancers/strip club workers who have traditionally been hired as "Independent Contractors" with no employment rights or protections at all. Recently, these workers have filed a growing number of cases regarding benefits, wages, sexual harassment, abusive treatment and more. Strip club workers have even started union organizing efforts to give more power and support to often isolated and vulnerable workers. In *Hollis v. R&R Restaurants, Inc.* (9th Cir. 2025), a dancer at Sassy's Club challenged being classified as an independent contractor and demanded proper wages under the Fair Labor Standards Act. After she filed the FLSA case, one of the club's owners, who also owned a separate club, Dante's, cancelled her upcoming contract to dance there. The dancer then added a retaliation claim against the owners of Dante's to her case. The lower court dismissed the claim, holding that the retaliation was not done by the club "employing" her; she had not yet started her work at Dante's, and needed to have actually worked there at the time of the retaliation. On appeal, however, the 9th Circuit overruled and found the FLSA's anti-retaliation provisions are much broader. They "do not require the retaliator to be the plaintiff's current employer...instead the status covers retaliation by any person acting directly or indirectly in the interest of an employer." Since the person cancelling the future engagement was also the co-owner of the original club being sued, this certainly met the criteria.

Employment Contracts

It's Not Over When It's Over. Employers Must Remember to Live Up to Terms of Settlement Agreements – For Years. Settlement Agreements and Severance Agreements are contracts between employees and employers. Each party has an obligation to live up to its side of the agreement, always. The employee agrees to release all claims and never file suit against the employer, ever. The employer

usually pays a severance *and* often makes other promises, such as a specific future reference to be given, always. The problem is that “always” is a long time. A few years later, the manager forgets the Agreement’s terms, or a new manager or HR person comes in, and there is no adequate record or reminder of the reference provision in the file. So, a different and harmful reference is given, causing the former employee to not be hired somewhere else. This is a breach of the contract. The former employer may now be liable for all foreseeable damages – such as all the pay the person would have received in the new job if the erroneous reference had not been given. This is a far too common occurrence.

In *Reyes v. Merit Systems Protection Board/Veterans Administration* (Fed. Cir. 2025), a Security Officer for the Veterans Administration contested removal from his position. In 2012, the Officer and VA signed a Settlement Agreement. Part of the Agreement provided that the VA “will provide a letter of reference stating only dates of employment, job title, and that it is the policy of the agency to give only this information, and that Mr. Reyes’ employment ended due to “*resignation*.” This Agreement was part of Mr. Reyes’ Personnel Record. However, six years later, the VA received a reference request from Homeland Security. A Human Resources Specialist, who was not involved in the original Settlement Agreement, responded and instead of sticking to the agreed script stated, “*Per binding legal agreement [she] was only allowed to release Mr. Reyes’ dates of employment.*” This was a pretty clear message that Mr. Reyes had left the VA under contentious circumstances rather than a simple voluntary resignation. So, Homeland Security withdrew the conditional job offer it had made to Mr. Reyes. He then sued for breach of the Agreement. The Federal Circuit Court of Appeals ruled that regardless of the lapse of time, the VA had an obligation to honor the terms of the Agreement. Any reference except the exact language guaranteed in the Agreement, or any message that qualified or clouded that language, could be viewed as a breach. Mr. Reyes could maintain his suit for resulting damages. *A lesson* from this case is that it is very important to keep track of Agreement terms for a longer time than you may actually retain general personnel records. Just like many other sorts of business contracts with lengthy obligations. These Agreements should be kept in the same manner you are required to retain some other “forever” employment records, such as certain OSHA, ERISA, or privacy information, with some sort of “flags” to alert new managers or HR personnel before they give information which might violate the Agreements.

Author

Bob Gregg

(608) 283-1751