The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

CONTENTS

Kollman & Saucier P.A.
THe Business Law Building
1823 York Road
Timonium, MD 21093
P: 410-727-4300
F; 410-727-4391

To be added to our mailing list or if you have any questions or comments, please email us at lmaffei@kollmanlaw.com

AN EMPLOYER'S GUIDE TO THE GINA REGULATIONS

By Adam Simons

The Genetic Information Nondiscrimination Act (GINA) was enacted in 2008 to prevent discrimination on the basis of genetic information in employment and health insurance. Title I of the Act focuses on health insurance issues, and is administered by several federal Departments, while Title II prohibits employers from using genetic information in employment decision-making and is administered by the Equal Employment Opportunity Commission. On November 9, 2010, the EEOC issued the final regulations implementing Title II, and these regulations became effective January 10, 2011. The regulations explain GINA prohibitions, restrictions, and requirements for employers when dealing with an employee's genetic information, and also clarify several exceptions to the general prohibition against acquiring genetic information about employees and their family members.

Acquisition of Genetic Information

GINA strictly prohibits an employer from "requesting, requiring, or purchasing genetic information." According to the Act and the regulations, a request is any inquiry that "is likely to result" in an employer obtaining genetic information about an employee or an employee's family member. The regulations set forth examples of conducting an internet-based research on an individual, actively listening to third-party conversations, searching an individual's personal effects, and making requests about an individual's current health status.

Inadvertent Disclosure in Request for Medical Information

Despite the strict prohibitions, the regulations recognize that, in certain instances, an employer may inadvertently uncover genetic information about an employee, especially where the employer makes an otherwise lawful request for medical information.

(continued on page 5)

SUPREME COURT BROADENS SCOPE OF RETALIATION CLAIMS

By Randi Klein Hyatt

In Fiscal Year 2010, the Equal Employment Opportunity Commission (EEOC) received the highest number of charges ever, with nearly 100,000 such charges filed. The actual number of charges (99,922) was a seven percent increase from the prior year. Of those nearly 100,000 charges of discrimination, and for the first time ever, retaliation under all statutes was the most frequently filed charge, with 36,258 such charges filed, representing more than 36% of all charges filed. With its decision in *Thompson v. North American Stainless*, 562 U.S. __, No. 09-291 (Jan. 24, 2011), the Supreme Court paved the way for those numbers to continue increasing by endorsing associational retaliation claims under Title VII.

(continued on page 4)

ELEMENTARY SCHOOL HARASSMENT

By Kelly Hoelzer

Many in this country lament that we have become a litigious society. Indeed, the courts slog through backlogs of frivolous lawsuits brought by plaintiffs who perceive that they have been wronged or who simply misuse the judicial system as a forum to air their grievances with the world. Kevin Wilson is one such plaintiff.

Wilson filed what could be considered one of the most ludicrous – and disturbing – Title VII lawsuits in recent times. He is a self-styled "para-professional" who worked at an elementary school in Prince George's County, Maryland. After he was terminated for insubordination in December 2006, Wilson sued the school system in federal court, claiming that he was the victim of sexual harassment by a 10-year-old female student. *Wilson v. Prince George's County Bd. of Educ.*, Civil Action No.: 08-02359 (D. Md. Nov. 30, 2010).

In particular, Wilson alleged that during a six-week period in 2006, the student harassed him in the following ways: (i) she "bumped into" him three times without saying excuse me; (ii) her forearm touched his buttocks one time; and (iii) she asked another student to tell Wilson that she said "hello." According to Wilson, these contacts with the young girl created a hostile work environment for him.

After Wilson complained to his supervisors, the school met with him and the student's mother, and transferred the student to another class where she would have no interaction with Wilson. Though he admitted having no further contact with the student, her classroom reassignment was not enough for Wilson. He insisted that the student sign a written agreement consenting to a restraining order to prevent further contact and requested such from the school principal on three occasions. When the principal repeatedly refused to accede to Wilson's bizarre demand, Wilson contacted her mother directly. Apparently dissatisfied with the results of that discussion, Wilson became insubordinate and refused to perform various job duties (such as assisting an autistic student during the lunch hour). The well-founded decision to end Wilson's employment in an elementary school environment was made, and the school system fired him shortly thereafter.

Aggrieved by his termination, Wilson sought justice from the federal court. Wilson's sexual harassment and retaliation claims, however, were summarily dismissed. Because Wilson alleged that a student harassed him, the court viewed his claim as one for hostile work environment. To recover for hostile work environment harassment, Wilson had to prove that (i) he was harassed because of his "sex;" (ii) the harassment was unwelcome; (iii) the harassment was so severe and pervasive that it created an abusive working environment; and (iv) some basis existed to impute liability to his employer. *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 772 (4th Cir. 1997). Wilson failed to meet this burden.

The court found that there was nothing to even suggest that the student's actions were remotely sexual in nature or connected to Wilson's gender. As common sense suggests, "bumping or a touching on the buttocks of a grown male by a ten-year-old girl is far more likely the attention-getting action of a young child than a sexual overture." Even if that behavior occurred between adults, the court noted it would be considered "childish antics"– not actionable harassment.

(continued on page 3)

WHAT DOES "TO CARE FOR" MEAN UNDER THE FMLA?

By Darrell Van Deusen

The FMLA provides that an employee may take leave to care for a parent, spouse, son or daughter who has a serious health condition. 29 U.S.C. §2612(a)(1)(c). An employee can take leave to care for a parent or spouse of any age who, because of a serious mental or physical condition, is in a hospital or other health care facility, or who is at home but unable to care for his or her own basic hygienic or nutritional needs or safety. So, no question, an employee gets protected leave to take care of a parent or spouse whose daily living activities are impaired by such conditions as Alzheimer's disease, stroke, or clinical depression, or who is recovering from major surgery or who is in the final stages of a terminal illness.

Only infrequently have courts considered where and how the leave needs to be taken. Some cases are pretty clear. Courts have found that "caring for" a family member includes an employee who is directly involved in providing psychological support for a spouse or parent. *See, e.g., Scamihorn v. General Truck Drivers,* 282 F.3d 1078, 1087 (9th Cir. 2002) (plaintiff drove his father to counseling sessions, spoke with his father about his father's grief, and may have been necessary to help his father meet basic needs). There does have to be some one-on-one time involved.

In *Tellis v. Alaska Airlines, Inc.*, 414 F. 3d 1045, 1047 (9th Cir. 2005), the Ninth Circuit held that an employee who made regular telephone calls to his pregnant wife while he made a solo three-day driving trip to bring back for her a more reliable car was not "caring for" her under the FMLA.

(continued on page 4)

SOCIAL SECURITY DISABILITY BENEFITS BAR ADA CLAIM

By Mike Severino

In a case arising under the Americans with Disabilities Act (ADA), the federal district court in Maryland granted summary judgment in favor of Greater Baltimore Medical Center (GBMC) and against the Equal Employment Opportunity Commission (EEOC) because the employee on whose behalf the EEOC had sued had applied for and was receiving SSDI benefits. *Equal Employment Opportunity Commission v. Greater Baltimore Medical Center, Inc.*, 09-CV-02418 RDB (D. Md. Jan. 21, 2011). The Court ruled that the claimant's statement in his SSDI application that he was disabled, coupled with his continuing receipt of SSDI benefits, barred his later claim that he was a qualified individual under the ADA.

Michael Turner worked for GBMC as a unit secretary responsible for, among other things, assisting patients, families, vendors and visitors. In January 2005, Turner was hospitalized for over five months. He was discharged in July 2005 and permitted to return to work on November 15, 2005. On November 17, 2005, however, Turner suffered a stroke and was hospitalized until December 2005.

After his discharge, Turner's mother applied for SSDI benefits on his behalf. In the SSDI application, Turner (through his mother) stated that he had become unable to work in January 2005 and that he was still disabled as of December 2005. Turner was awarded benefits retroactive to January 2005 and continued to receive those benefits through the filing of his EEOC claim. The SSDI application requires Turner to notify the Social Security Administration (SSA) if his medical condition improves such that he is able to return to work.

Shortly after his discharge from the hospital in December 2005, Turner advised GBMC that he wanted to return to work as a unit secretary. GBMC determined that Turner was unfit for his previous position, but did approve Turner for other positions on a part-time basis. While Turner eventually was cleared to return to work full-time, he was not approved to return to his job as a unit secretary. After Turner unsuccessfully applied for other positions, GBMC terminated him when his general leave expired.

Turner filed a charge of disability discrimination against GBMC for failing to reinstate him into his position as a unit secretary. In his intake questionnaire for the EEOC, Turner stated that his disability did not affect his ability to work as a secretary and that he never requested a reasonable accommodation because one was not needed. The EEOC found reasonable cause to believe that GBMC violated the ADA and filed suit against GBMC.

GBMC argued that Turner was judicially estopped from claiming that he was a qualified individual under the ADA based on his statements in his SSDI application that he was disabled and his continuing receipt of SSDI benefits. The Court noted the potential contradiction between a recipient of SSDI benefits (one who cannot engage in any type of gainful work) and a qualified individual with a disability under the ADA (one who, with or without a reasonable accommodation, can perform the essential functions of his or her job).

Relying on Supreme Court precedent, the trial court found that the EEOC did not adequately explain Turner's contradictory positions. The Court relied on several salient facts. First, the SSDI application, in which he claimed he was disabled, required Turner to notify SSA if he were able to return to work. Turner never notified SSA. Second, Turner continued to receive SSDI benefits while attempting to obtain a position at GBMC. Finally, Turner stated a number of times that he never needed a reasonable accommodation to perform the positions for which he applied. Accordingly, the Court ruled that the EEOC could not establish that Turner was a qualified individual under the ADA and entered judgment for GBMC.

The Court's ruling demonstrates that an employee will not be permitted to take inconsistent positions. Any employer faced with an ADA claim should carefully examine whether the claimant has sought or been awarded any benefit based on the claimant's physical condition. If so, the employee may very well be bound by his or her prior claim.

ELEMENTARY SCHOOL HARASSMENT

(continued from previous page)

Nor was there any basis to impute liability to the school system. Once Wilson reported the perceived misconduct, the principal transferred the student to another class. Even if the alleged harasser had been an adult, the school took appropriate action to eliminate any inappropriate conduct. Wilson had no further contact with the student, and the school, therefore, was not liable for any hostile work environment.

Wilson's claim that he was fired in retaliation for complaining of harassment was likewise dismissed. The court noted that Wilson's complaint about the "childish behavior of a young student toward an adult which in no way approaches sexual conduct" was not protected activity under Title VII. Moreover, Wilson admitted that he

(continued on next page)

FMLA CLARIFIED

(continued from page 2)

Tellis argued that he "cared for" his wife within the meaning of the FMLA "because his trip [from Seattle] to Atlanta and back to retrieve the family car provided psychological reassurance to her that she would soon have reliable transportation, and his phone calls to her while he drove back to Seattle provided moral support and psychological comfort." The Ninth Circuit disagreed, holding that, as a matter of law, "providing care to a family member under the FMLA requires some actual care which did not occur here." The court distinguished those cases where a question of fact was raised about the level of actual care given by finding that at least some face-to-face care was given in each of those cases.

What about the employee who travels with her spouse who has a serious health condition? There had better be medical evidence that the trip was necessary for medical treatment for the serious health condition and that most of the time spent on the trip was for that purpose. In *Tayag v. Lahey Clinic Hosp.*, Inc., 2011 U.S. App. LEXIS 1697 (1st Cir. 2011), the Third Circuit affirmed summary judgment to an employer who terminated an employee who had accompanied her seriously ill husband to the Philippines, where he sought faith-healing. There was no violation of the FMLA, because nearly half of the trip was spent visiting friends and family. The court was skeptical of the whole "faith healing" component. Indeed, at no point during the entire trip did Mr. Tayag receive medical treatment or visit a health care professional. *See also*, *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999) (where the court held that a mother's claim that she needed to "care for" her son by moving him from California to the Philippines in order to remove him from a physically dangerous environment was not FMLA protected, because the son did not see a doctor after moving to the Philippines, and merely taking the son to a foreign country did not amount to "caring for" within the meaning of the FMLA).

Faith healing is addressed in section 825.118 of the DOL regulations, identifying others "capable of providing health care services," to "Christian Science practitioners." 29 C.F.R. §825.118. Christian Scientists reject ordinary medical care as defined by the statute and so, as to a Christian Scientist patient, there is no duplication either for government insurance programs or for employers providing FMLA leave. Tayag did not claim that her husband's religion forbid ordinary medical care, and she had already taken FMLA leave a number of times to assist him in connection with receiving such care.

ELEMENTARY SCHOOL HARASSMENT

(continued from previous page)

refused to execute his job duties, which logically resulted in his termination. Because there was no evidence of any retaliatory motive, Wilson's retaliation claim was dismissed.

Wilson has appealed his case to the United States Court of Appeals for the Fourth Circuit, where his chance of prevailing is as unlikely as it was in the trial court. Perhaps Wilson is a particularly sensitive person, but his vindictive focus on the alleged conduct of a ten-year-old girl almost five years ago is a senseless waste of the courts' time and resources.

SUPREME COURT

(continued from first page)

In 2003, Miriam Regalado and her then fiancé (now husband), Eric Thompson, both worked for North American Stainless (NAS). Ms. Regalado had filed a charge of discrimination with the EEOC, alleging that her supervisors discriminated against her because of her sex. Three weeks after the company received notice of Ms. Regalado's charge, the company fired Mr. Thompson. Mr. Thompson then filed his own EEOC charge alleging that his termination was in retaliation for his fiancé's charge of discrimination, and not for any legitimate reason. The company argued his termination was performance driven. The EEOC ultimately issued a probable cause finding and Mr. Thompson took his claim to the federal court system and all the way to the Supreme Court.

At the trial court level, NAS won the case on summary judgment. The court found that there was no recognized basis for Thompson's retaliation claim based upon his association with his fiancé and her EEOC claim filing (*i.e.*, no third-party retaliation claims). Before his termination, Thompson had not engaged in protected activity personally and he could not rely upon his fiancé's protected activity to support his retaliation claim. Thompson appealed the decision to the Sixth Circuit. A panel of the Sixth Circuit reversed the trial court, but then the full Sixth Circuit considered the appeal, affirmed the trial court's decision, and joined the Third, Fifth and Eighth Circuits in holding there can be no third-party retaliation claims under Title VII.

The Supreme Court, which presumed that NAS fired Thompson in order to retaliate against Regalado for filing a charge of discrimination, considered whether NAS's firing of Thompson was unlawful retaliation; and if so, whether Title VII provided Thompson with the right to sue. The Court had "little difficulty" concluding that NAS's firing of Thompson violated Title VII. Returning to its 2006 Title VII retaliation decision in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court reiterated that Title VII's anti-retaliation provision must be

(continued on page 6)

GINA REGULATIONS

(continued from first page)

The regulations state that, if genetic information is acquired in response to a lawful request for medical information, the acquisition will be considered inadvertent if the employer specifically directs the disclosing entity not to provide genetic information. The regulations provide language to be used in requests for medical information that will deem any disclosure inadvertent:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

Failing to use this or similar language will not necessarily prevent an employer from later asserting that the disclosure was inadvertent, such as where an overly broad disclosure was provided in response to a tailored request. Using this language is highly recommended, however, because of the automatic result that any disclosure is inadvertent. Therefore, this language should be used in conjunction with employer requests for documentation to support a request for a reasonable accommodation, requests for leave under the FMLA, or other instances in which medical information is being sought legitimately for employment purposes.

Other Inadvertent Disclosure Situations

The regulations expand upon certain scenarios in which inadvertent disclosures may occur. These scenarios include, but are not limited to, when a manager inadvertently overhears a conversation; a manager receives information directly from the employee during casual conversation or following a general health inquiry (*i.e.*, "How are you?" or "Did they catch it early?" asked of an employee who was just diagnosed with cancer); or a manager learns of the genetic information without having solicited the information. A final example includes disclosure from a social media platform (*e.g.* Facebook) where the manager was given permission to access the individual's profile.

Voluntary Wellness Programs

Voluntary wellness programs are an exception from the general prohibition on obtaining genetic information. A voluntary wellness program means that the employer cannot require individuals to provide genetic information nor penalize those who choose not to provide it. While an employer may not offer a financial incentive for individuals to provide genetic information, an employer may offer financial inducements for completing health risk assessments that include questions about family medical history or other genetic information, so long as the employer confirms that the financial inducement is not contingent on the disclosure of genetic information. The regulations provide the following example:

"A covered entity offers $150 to employees who complete a health risk assessment with 100 questions, the last 20 of them concerning family medical history and other genetic information. The instructions for completing the health risk assessment make clear that the inducement will be provided to all employees who respond to the first 80 questions, whether or not the remaining 20 questions concerning family medical history and other genetic information are answered. This health risk assessment does not violate Title II of GINA."

Employers may also offer financial incentives to encourage employees who have voluntarily provided genetic information to participate in disease management programs or programs to promote a healthy lifestyle. For example, an employee who voluntarily disclosed a genetic predisposition to diabetes may be offered $150 to participate in a weight-loss program or employers may provide additional inducements to individuals who achieve certain health outcomes, such as meeting weight-loss goals.

It is important to note that, while the regulations permit the disclosure of the genetic information, the disclosures can be made only to licensed health care professionals or board certified genetic counselors involved in providing such services. The information must not be accessible to managers, supervisors, or others who make employment decisions.

Compliance with FMLA or State and Local Medical Leave Laws

The prohibition against obtaining genetic information does not apply where an employer requests family medical history to comply with FMLA (or similar statutory) certification provisions, or pursuant to a policy that permits the use of leave to care for a sick family member and that requires all employees to provide information about the health condition to substantiate the need for leave.

(continued on next page)

GINA REGULATIONS

(continued from previous page)

Commercially and Publicly Available Information

GINA is not violated where an employer acquires genetic information from documents that are commercially and publicly available for review or purchase, including newspapers, magazines, periodicals, or books, or through electronic media, such as information communicated through television, movies, or the Internet. Notably, this exception does not apply to medical databases, court records, scientific research databases, social networking and media sites with limited access, or where the employer accesses a commercially or publically available database with the intent to obtain information.

Biological Monitoring

The regulations also permit an employer to acquire genetic information for use in monitoring the biological effects of toxic substances. The employer must provide written notice of the monitoring to the individual and inform the individual of monitoring results. The monitoring must be required by federal or state law or conducted with the individual's voluntary consent. It must be conducted in compliance with state and federal law, and, where the results are reported to the employer, it must not disclose the identity of specific individuals.

DNA Testing

Employers that conduct DNA analysis for law enforcement purposes as a forensics lab or to identify human remains are permitted to obtain genetic information. These employers may request genetic information from their employees, but only to be used as markers for quality control and to detect sample contamination.

Important Note on Maintenance of Genetic Information

Aside from the exceptions to the requests, the regulations contain certain record keeping requirements for genetic information. Any genetic information in the employer's possession must be stored in a confidential medical file separate from the employee's human resources or personnel file.

Best Practices for Employers

To ensure compliance with the Act, it is recommended that employers take the following steps:

- Update policies and procedures manuals to include clauses prohibiting discrimination on genetic information.
- Conduct supervisor and employee training regarding compliance with the Act.
- Include the recommended disclaimer language on all forms requesting medical information.
- Ensure that any documents that may contain genetic information are stored separately from an employee's personnel file.
- Review wellness programs to ensure GINA compliance.
- When in doubt, consult knowledgeable counsel.

SUPREME COURT

(continued from page 4)

construed to cover a broad range of employer conduct, and that it prohibits any employer action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Supreme Court concluded it "obvious" that a reasonable worker (Regalado) might be dissuaded from engaging in protected activity if she knew that her fiancé (Thompson) would be fired.

In answering NAS's challenge of "where do you draw the line" concerning the types of relationships entitled to protection (fiancé, girlfriend, sibling, trusted colleague, etc.), the Supreme Court categorically refused to identify a fixed class of relationships for which third-party reprisals are unlawful. While it posited that firing a close family member will almost always meet the test, and a milder reprisal on a mere acquaintance will almost never, the Court refused to pen a specific list of protected associations in this context. The Supreme Court did reiterate that the standard for judging retaliatory harm is objective and not dependent upon a plaintiff's subjective feelings.

In assessing whether Thompson could actually maintain a Title VII retaliation claim against NAS (*i.e.*, was he a "person claiming to be aggrieved"), the Court did not interpret the phrase to include only those persons "claiming to have been discriminated against," but that it more appropriately included those persons within the "zone of interests" sought to be protected by Title VII. The Court next held that Thompson fell within the zone of interests protected by Title VII because he was a NAS employee and the purpose of Title VII is to protect an employee from an employer's unlawful actions. Hurting Thompson was the unlawful act by which NAS punished Regalado, which rendered Thompson non-collateral damage.

We saw fairly quickly after the Supreme Court's *Burlington* decision the number of retaliation claims skyrocket. Now that the potential universe of retaliation plaintiffs has been given another boost of opportunity, those numbers will undoubtedly continue to rise. Employers must be careful to consider whether an employee who will be suffering a materially adverse action, and personally has not engaged in protected activity, has an association with another individual who has, such that a third party retaliation claim may lie.

MARYLAND'S PENDING EMPLOYMENT LEGISLATION

By Cliff Geiger

Maryland's General Assembly began its 428th session on January 12, 2011. Every year a handful of bills are proposed that, if signed into law, will affect employment relationships. This year is no different. Below is a summary of some of the employment issues our lawmakers are pondering.

Workplace Bullying

Though the issue of bullying has garnered a great deal of attention in recent years, no state currently has an anti-bullying law that applies to the employment relationship. This may soon end. According to the Healthy Workplace Campaign, as of February 17, 2011, Maryland became the eighth state with an active bill on employer bullying.

Workplace bullying (or harassment) is not illegal unless the antics are based on the victim's membership in a legally protected classification. For example, Title VII prohibits harassment based on race, color, religion, sex or national origin. Some states, such as Maryland, have laws that expand the list of protected categories (for example, to include sexual orientation). Nonetheless, under these laws it is harassment because of the employee's membership in a legally protected group that triggers employer liability. In response to employee complaints about rude, unprofessional, and inappropriate conduct that is not based on membership in a protected class, courts often write that anti-discrimination laws are not meant to be general codes of workplace civility. Advocates of anti-bullying legislation want that to change.

SB 600 would protect employees from abusive conduct in the workplace. Abusive conduct is "acts of an employer or an employee targeted at an individual employee that a reasonable individual would experience as creating a hostile work environment, based on the severity, nature, and frequency of the employer's or employee's conduct." The bill would impose liability for "abusive conduct so severe that it causes an actual material impairment of mental health or physical health."

It is difficult to imagine how this legislation could be implemented without creating a slew of frivolous claims. From an employee's perspective, many things are considered harassment. For example, constructive criticism, personality conflicts with co-workers, disagreements over work or performance issues, high expectations, and sometimes just ordinary supervision currently often result in harassment complaints. Indeed, employees often claim that these ordinary trials and tribulations of the workplace adversely affect their health, citing stress, anxiety or depression that is supported by medical documentation. If this bill gains support, it will be very difficult to define actionable bullying.

Maryland's Minimum Wage

SB 716/HB 988 would increase Maryland's minimum wage from $7.25 per hour to $9.75 per hour by July 2013. After that, the bill would require the minimum wage to be adjusted annually for inflation according to increases in the Consumer Price Index. The bill would also change the wage employers are required to pay employees who receive tips, such as restaurant servers and bartenders. Employers currently may take a tip credit of 50% of the minimum wage. This means that these employees must be paid, in addition to the tips they keep, at least 50% of the minimum wage. The pending legislation would change the amount of the available tip credit to 25%, so that employers would have to pay at least 75% of the minimum wage.

Employer Use of Applicant or Employee Credit History

Maryland joined the growing tide of states with proposed legislation that would limit an employer's ability to consider credit history when making job decisions. The Job Applicant Fairness Act (HB 87 & SB 132) seeks to correct these perceived injustices by prohibiting employers from using an applicant's or employee's credit history or credit report in determining whether to deny employment to an applicant or discharge an employee. There are blanket exceptions for certain financial institutions and employers who are required under federal or state law to consider an applicant's or an employee's credit report or credit history for employment purposes.

The other set of exceptions is sure to generate debate. The first permits an employer to consider an applicant's credit history after it has made an offer of employment, but only if the credit information is used for a purpose other than denying employment to the applicant or setting the terms and conditions of employment. The second permits an employer to use an applicant's or employee's credit history if the employer has a bona fide purpose that is substantially job-related. Another bill (HB 934) contains the same type of "bona fide" purpose catch-all, but attempts to define some situations in which employers may rely on an applicant's or an employee's credit history for job-related reasons. These situations include employees with: (1) unsupervised access to certain amounts of cash or marketable assets; (2) signatory power over business assets; (3) certain managerial responsibilities; and (4) access to personal, confidential, or financial information.

ON WISCONSIN

By Frank Kollman

Let me see if I understand how government works. Government employee unions pour millions of dollars into the campaign chests of political candidates, those candidates (now office holders) force unions on all government workers, and then those office holders give government employees wages and benefits the citizens cannot afford. The unions, in return, pour more money into reelection campaigns.

Governments, however, unlike private businesses, do not make money by creating products that they can sell for a profit. Governments make money by raising taxes. My taxes then are paying the salaries of the government officials, the wages and benefits of the government workers, the money being paid in dues to the government worker unions, and the money being put in the campaign coffers of those government officials whose salary I am paying.

I have seen first-hand the power of government unions to make politicians dance like puppets. It takes months, if not years, to get most bills through the state legislature. Nevertheless, many years ago one of Maryland's counties abolished collective bargaining because the union was behaving badly. Within weeks, the Maryland General Assembly passed emergency legislation forcing the county to reinstate collective bargaining, and the governor signed it. It was ugly, and it was a form of legalized corruption. It is one thing for a politician to take money from a lobby for an industry she supports, but it is another thing for a politician to take money from a union she is going to deal with directly in a position of trust for the citizens of his state, county, or city. How can someone beholden to a union deal with that union on behalf of the citizens she represents? How can a politician give our money, directly or indirectly, to a union that in turn gives the money back to her?

What is going on in Wisconsin is clearly a reaction to this corruption. The Democrats who left the state are merely making sure the money they receive from the government employee unions does not stop. The Republicans may be overreacting by trying to abolish collective bargaining, but they are only reacting to the excesses of the prior practices. Unions thrive in the public sector only because government can pass the labor costs on to the taxpayers, not because they do anything special for government workers. Indeed, government workers already have constitutional protections not available to private employees, who continue to reject unionization in large numbers. Government workers want unions because they want the unholy marriage between politicians and union contributors to continue. If it continues, however, only disaster can follow. Governor Christie of New Jersey told unionized government workers recently that their bloated benefits and pensions will be in jeopardy if the insanity does not stop. This writer doubts they will heed his warning.

I am pro-management, and that makes many of my principles different from those of pro-union people. Unions want to protect the worst worker; I want him fired. Unions want to squeeze employers for higher wages and benefits without taking any of the risks involved in generating profit; I think employers should be rewarded for their risk. Government unions want my taxes raised so a government clerk can retire at age 55; I want my taxes to pay for bridges and roads. I believe employees should be treated fairly, and I think managers should be treated fairly. Maintaining the level of corruption between government and government employee unions is not something I want to see continued.

NLRB REVISITS BARGAINING UNIT RULES

By Eric Paltell

For. decades, the National Labor Relations Board has applied a "community of interest" standard to determine what is an appropriate bargaining unit. Under this standard, the Board evaluates a variety of factors to see if the group of employees a union is seeking to represent have sufficient common interests to constitute an appropriate bargaining unit.

On December 22, 2010, the NLRB signaled that it will revisit the community of interest standard and may replace it with a "single job" standard. In *Specialty Healthcare*, 15-RC-8773, the NLRB has sought briefs on the issue of whether a bargaining unit consisting of certified nursing assistants (CNAs) at a nursing home was appropriate, or whether, as the company contends, the unit should incorporate all nonprofessional service and maintenance staff.

In a dissent from the invitation to file briefs, Board member Brian Hayes said the notice and invitation to file briefs "is a stunning initiative by my colleagues to consider replacing decades of Board law applying the community-of-interest standard with a test that will likely find that any group of employees who perform the same job in the same facility is an appropriate bargaining unit, without regard for whether the interest of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."

The Board's action appears to be yet one more example of its activist pro-labor agenda, since it is generally much easier for unions to organize small groups of employees in a single job classification than to organize a group comprised of employees working in a variety of classifications.