Zinsergram a/k/a Legal Update

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MACHINISTS UNION ABANDONS UNIT IN OMAHA

Omaha World-Herald has long had a bargaining unit represented by the Machinists' union. In June of 2016, 75% of the unit employees signed cards stating unequivocally that they no longer wanted to be represented by IAM Lodge 31.

The employee who solicited the signatures presented them to Management. Under existing caselaw, the Employer had certain, actual knowledge that the union had lost the majority. Under that same caselaw, the Employer was privileged to withdraw recognition.

However, the current NLRB General Counsel Richard Griffin is a very activist, pro-union General Counsel. On May 9, 2016 General Counsel Griffin issued a Memorandum directing NLRB Regional Directors to issue complaints against companies withdrawing recognition, in an attempt to create a test case mandating that an Employer could withdraw recognition only *after* an NLRB election.

Choosing not to present the opportunity for a test case, *Omaha World-Herald* instead filed an RM Petition with the Board. The union, the NLRB, and the *Omaha World-Herald* then entered into a Stipulated Election Agreement, with an election scheduled for July 26, 2016.

Shortly thereafter, on July 20, 2016, the union disclaimed any further interest in representing the employees, rather than face certain defeat. The election was cancelled, and on July 25, 2016, the NLRB revoked the bargaining rights of IAM Lodge 31.

In previous negotiations, the union had agreed to a pay cut, after very little communication with the unit employees. The employees decided to represent themselves. This is a testament to the Operations team at *Omaha World-Herald*, which created the atmosphere of trust that made this Management success possible.

Editor's Note: *Omaha World-Herald* is represented by The Zinser Law Firm, P.C.

LEGISLATION PROPOSED TO LIMIT OVERTIME RULE

The Overtime Reform and Enhancement Act, introduced as H.R. 5813, has been proposed to limit the Department of Labor's Final Rule on overtime. Under this piece of legislation, on December 1, 2016, the salary one must earn in order to be overtime-exempt on rises to $692.00 per week, much lower than the $913.00 per week under the DOL's Final Rule.

Under this bill, the salary threshold increases to $760.00 per week on December 1, 2017; $839.00 per week on December 1, 2018; and $913.00 per week on December 1, 2019. The legislation eliminates the automatic three-year increase to the salary threshold that has been established under the DOL's new Rule.

This bill was proposed by four Democratic Members of Congress. The National Newspaper Association has endorsed this bill.

TITLE VII DOES NOT COVER SEXUAL ORIENTATION

The U.S. Court of Appeals for the 7th Circuit reiterated that Title VII does not protect against discrimination "on the basis of sexual orientation." At issue was Hively, a professor who was denied an interview for all six full-time positions for which she applied during a five-year span, and who did not have her employment contract renewed.

Hively made a claim for discrimination based on sexual orientation with the EEOC, which did not issue a "Right to Sue" letter. Nevertheless, Hively filed a *pro se* lawsuit, alleging discrimination based on sexual orientation.

Judge Rovner, writing for the Court, made it clear that the legislative history of Title VII, as well as precedent in the Seventh and every other Circuit, recognized discrimination based on sex only – and not on sexual orientation. The Court recognized:

> Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.

The Court concluded its opinion by stating that Title VII does not protect against sexual orientation discrimination, noting, "Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our own precedent."

The 7th Circuit precedent is true to the plain meaning of the word "sex" and the legislative history of its addition to Title VII:

> Homosexuals and transvestites do not enjoy Title VII protection … [W]e came to this conclusion by considering the ordinary meaning of the word "sex" …. Congress had a narrow view of sex in mind when it passed the Civil Rights Act … discrimination on the basis of sexual orientation and transsexualism, for example, did not fall within the purview of Title VII.

EIGHTH CIRCUIT REVERSES NLRB ON WAGE ISSUE

On June 27, 2016, the U.S. Court of Appeals for the Eighth Circuit reversed the National Labor Relations Board. The Court ruled that the Employer did not violate the National Labor Relations Act when, after a Collective Bargaining Agreement's expiration, it did not continue to give wage increases on the employees' anniversary dates.

The CBA provided, "For the duration of this Agreement, the hospital will adjust the pay of nurses on his/her anniversary date… such pay increases … during the term of this Agreement will be 3%." The parties were still in negotiations for a new CBA when the contract expired. After the expiration, the Company discontinued the 3% wage increases. The NLRB ruled that Employer violated the Act because a status quo of giving 3% raises had been established.

Embracing the argument of dissenting NLRB Member Harry Johnson, the Court quickly reversed the Board. The Court looked at the plain language of the contract and ruled, "The language sets forth a straightforward, singular pay increase on a particular day during the one-year contract." One cannot separate the one-year term limit from the pay raise obligation. The Court expressly rejected the notion that a one-time act by an Employer creates a new status quo.