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HRAGC LEGAL UPDATE

APRIL 15, 2021

FEDERAL

United States Supreme Court

The Supreme Court turned aside in early April an appeal by an employee whose suit for religious discrimination against his employer was dismissed. The suit was dismissed because the employer showed it would be an undue hardship to accommodate the employee's request to have certain days off for religious observance and fulfilling commitments. The Supreme Court declined to accept the appeal, without a written decision, but Justices Gorsuch and Alito expressed a willingness to overturn the long-standing precedent defining a key term in the statute. Employers must provide religious accommodations unless doing so would present an undue hardship, under Title VII of the Civil Rights Act of 1964. In a 1977 opinion (*Trans World Airlines v. Hardison*) the Court explained that "undue hardship" means something more than a de minimis or trivial burden on the employer. Justices Gorsuch and Alito would overrule that case as they believe the definition improperly applies a lower standard for the employer to deny an accommodation request than other applications of the undue hardship standard. They believe that religious freedom is being given less protection than other rights. The case is *Small v. Memphis Light, Gas & Water*, No. 19-1388.

While the traditional standard for evaluating an employee's request for a religious accommodation remains in place, the Supreme Court may decide a case that changes the standard and imposes a higher burden on employers who believe it would be an undue hardship to grant the request. Employers should consider whether it is more protective to self-impose a higher standard to determine whether an undue hardship exists.

United States District Court for the District of New Hampshire

The District of New Hampshire denied summary judgment for Hannaford in a case involving allegations of hostile work environment on the basis of sex and sexual orientation, setting the case on a path to trial. Plaintiff is a gay male who worked for Hannaford for nearly ten years. A new supervisor (an outside hire on the job for a few months) began to harass him, it was reported to management, the supervisor admitted the misconduct (claiming he was joking) and he apologized. But Hannaford did not document the matter or the verbal counseling in the supervisor's personnel file in violation of its policy. The harassment continued, some of it was not reported, little was done to discipline the supervisor and the employee eventually left. The Court found that a jury could conclude the harassment was severe and pervasive: plaintiff was subjected to multiple instances of harassment in front of co-workers, including physical contact, name-calling, offensive gestures and degrading comments. And the jury could conclude Hannaford did not do enough to prevent the harassment: it relied on verbal warnings without documentation for conduct the supervisor admitted, it disciplined plaintiff more severely for a single incident (that he denied), and it failed to issue formal discipline after three incidents of misconduct by the supervisor. The case is *Record v. Hannaford*, 19-CV-034.

This case is a reminder of the importance of following policies, taking formal disciplinary measures if warranted and documenting the measures taken, and imposing discipline evenly and consistently. Employers should be cautious when handling new employees who engage in serious misconduct in the first few months of employment, as it is a warning of what may come if prompt and appropriate action is not taken. And look ahead to whether the decision to impose lesser forms of discipline will hold up to scrutiny if the misconduct continues. Failure to attend to these issues will deprive the employer of important defenses, increase the likelihood of trial, and make it tougher to resolve claims.

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NEW HAMPSHIRE

New Hampshire Legislature

Bills continue to work through committees. Bills that may be of interest to private employers include the following:

- SB 69. This bill requires employers to provide a sufficient space and break time for nursing mothers to express milk. The bill passed 24-0. It remains pending in the House Consumer Affairs Committee.
- SB 61. This bill, named the Right to Work bill, prohibits a collective bargaining agreement from requiring an employee join or contribute to a labor union. The bill passed 13-11. It remains pending in the House Industrial and Rehabilitative Services Committee.
- SB 67. This bill requires the accrual of paid sick leave and regulates its use with a cap on how many hours may be used in a year. It was deemed inexpedient to legislate by the Senate Commerce Committee.
- HB 517. This bill requires payment for earned but unused vacation and personal time at the end of employment. It was retained in the House Industrial and Rehabilitative Services Committee.
- HB 258. This bill permits wage and hour records to be approved and retained electronically. It passed the House and has also passed the Senate Commerce Committee.
- HB 165. This bill makes unenforceable non-compete agreements for certain mental health professionals. It was laid on the table in the House Commerce and Consumer Affairs Committee.
- HB 408. This bill prohibits employers from hiring registered sex offenders if the job will involve contact with a minor. It was retained in the House Criminal Justice and Public Safety Committee.
- HB 303. This bill exempts ski and snowboard instructors at ski resorts from the required minimum pay law. It passed the House and also passed the Senate Commerce Committee.
- HB 544. This bill prohibits the dissemination of "divisive concepts" related to race and gender in state contracts, grants and training programs. It was laid on the table in a House committee.

Updated Pandemic Best Practices for Businesses

New Hampshire's Universal Guidelines were amended April 1, 2021. Welcome | Safer at Home (nh.gov). Employers must continue to adhere to the universal and industry specific guidelines. Key aspects include:

- Employees must stay home if they experience new or unexplained symptoms, have been diagnosed with COVID-19, have been exposed to someone with COVID-19 or have international or cruise ship travel risk exposure. Depending on the circumstances, there are requirements for testing, isolation and quarantine.
- Those who are 14 days beyond full vaccination or within 90 days of a COVID-19 diagnosis are not subjected to the same restrictions for quarantine, isolation or testing. And there are exceptions for critical infrastructure.
- A screening process must remain in place for all employees and visitors. Employers may request medical documentation for symptoms where it may be related to a chronic condition.
- Continue to follow the CDC guidance on cleaning and disinfecting. Those standards have recently been modified.
- Modify work processes, including staggering schedules, altering workstations, and permitting remote work.
- Face coverings must continue to be worn and physical distancing practices must be followed.
- Follow the FFCRA if opting in as of April 1, 2021.

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