

HRAGC LEGAL UPDATE

NOVEMBER 17, 2022

FEDERAL

EEOC

The EEOC updated its “Know Your Rights” poster on October 20. This required poster adds information about equal pay discrimination for federal contractors, adds harassment as a prohibited form of discrimination, and clarifies that sex discrimination includes discrimination based on pregnancy and related conditions, sexual orientation, or gender identity. It also updates the formatting and provides a better link to the EEOC website. Employers should post the “Revised 10/20/22” poster and ensure that all employees, including those working remotely and those with disabilities, have easy access to the poster. Best practices include both posting in a conspicuous location in the workplace and digitally on the website (ensuring that visually impaired employees are able to read it), and providing an audio version.

NEW HAMPSHIRE

New Hampshire Supreme Court

On November 2, 2022, the New Hampshire Supreme Court reiterated that disagreement with a management decision is insufficient to satisfy the public policy component of a wrongful termination claim. In the case of *Donovan v. Southern New Hampshire University*, an employee of SNHU filed suit claiming she was constructively discharged for refusing to alter the mathematics grades for two college students. The Superior Court granted summary judgment for the University, finding the absence of public policy was clear as a matter of law. The Supreme Court affirmed on appeal.

Melissa Donovan, the Associate Dean of Faculty for Mathematics and a Senior Associate Dean initiated a review of a mathematics course due to concerns of the course’s design. The review discovered instructors were using different grading schemes, including one the University intended to phase out in the upcoming school year, and the differences were not communicated to students. Following the review Ms. Donovan was instructed to change the grade for one student from failing to passing and she refused. Ms. Donovan’s superiors made the change and made the same change for a second student. In meetings Ms. Donovan expressed her concern that changing the grades violated the University’s grading policy and were unethical. She referenced the Whistleblower Policy which encouraged employees to raise concerns about policy violations or unethical conduct. Ms. Donovan was then placed on a performance improvement plan (which did not reference the disagreement over the grade change requests) and she resigned the next month. She then filed suit for wrongful termination claiming that she was admonished for not changing the grades, she was retaliated against which created a hostile environment, and she was forced to resign.

In analyzing the claim, the Court began with the familiar standard (it has been in place for forty years) a plaintiff must meet to prevail on a wrongful termination claim: “(1) the employer terminated the employment out of bad faith, malice, or retaliation; and (2) the employer terminated the employment because the employee performed acts that public policy would encourage or she refused to perform acts that public policy would condemn.” Ordinarily the issue of whether a public policy exists is to be determined by the jury but if the presence or absence of a public policy is clear a court may rule on the issue as a matter of law (this has been the rule for thirty years). The Superior Court determined this was such a case. Ms. Donovan claimed that she reasonably believed the grade change requests were unethical and a violation of the University’s grading policy and that both public policy and the University’s Whistleblower Policy supported her reporting this conduct. But, as framed by the Supreme Court, this is merely a disagreement with a management decision and expressing disagreement with an employer’s decision is not an act that is protected by public policy.

Thus, the Supreme Court held “Public policy does not protect the plaintiff’s refusal to comply with her employer’s decision to allegedly depart from its own internal grading policy.”

Legislature

An update on the recent election results from PretiStrategies. House Republicans saw their near 30-vote advantage whittled down to just 6, pending the results of a dozen or so recounts of close races. A margin that small in a 400-member body means anything can happen on any given day. The current 14-10 Republican majority in the state Senate remains unchanged, though with a different makeup, as one-third of current senators decided not to run again, and one lost his reelection bid. The primary effect of the 2022 elections on legislative policy will likely be the increased uncertainty introduced by the slim majority in the House. In prior years, with the majority party usually having at least a 30-vote advantage, one could usually get a sense early on of how bills on partisan issues would fare in the House. That will not be the case with this session as the landscape could change from week to week. It will be more important than ever to have eyes and ears at the State House, gathering information and persuading legislators on measures that employers consider important.

There were a little over 200 Legislative Service Requests (LSRs) filed in the initial filing period. The employment related LSRs are listed below. Most will turn into bills. The description provides a sense of what the bill will address. Most of the LSRs are either retries of bills that failed last year or an attempt to undo what was done last year. The filing period for bills opened after the election for both House and Senate and runs until November 22 for the House and mid-December for the Senate. We will report next month on the bills.

| LSR # | Description |
|---------|--|
| LSR 6 | prohibiting collective bargaining agreements that require an employee to join a labor union. |
| LSR 7 | relative to the state minimum hourly rate. |
| LSR 9 | prohibiting payment of subminimum wages. |
| LSR 39 | relative to employee protections from COVID-19 in the workplace. |
| LSR 45 | relative to employment restrictions for registered sex offenders. |
| LSR 105 | prohibiting employers from engaging in certain anti-union activities. |
| LSR 121 | relative to employment protection for participants in the therapeutic cannabis program. |
| LSR 162 | relative to an employee’s unused earned time. |
| LSR 168 | relative to youth employment during the school year and at night. |
| LSR 195 | commemorating the first labor strike in the United States by women. |

Peter G. Callaghan, Esq.
Preti Flaherty PLLP
pcallaghan@preti.com
(603) 410-1500