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A Year-End Look at Employment Law From a National Perspective

By Jeffrey Campolongo Contact All Articles

The Legal Intelligencer | December 28, 2012

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Jeffrey Campolongo

Employment law has seen some significant developments over the past year, and based upon the U.S. Supreme Court's current docket, we can anticipate some interesting decisions and developments in the upcoming year.

Of great note this year was the April 20 decision of the Equal Employment Opportunity Commission (EEOC), *Macy vs. Dept. of Justice (Bureau of Alcohol, Tobacco, Firearms and Explosives)*, Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 20, 2012). The EEOC held the term "sex" as used in Title VII encompasses both biological sex and gender. The prohibition against discrimination on the basis of sex, therefore, should be broadly interpreted to include discrimination on the basis of an individual's transgender identity. The lack of protection for transgender individuals has been a hot topic for a number of years, making the EEOC decision, though not binding upon the state or federal courts, extremely significant and likely foreshadowing the development of this interpretation by the courts. The EEOC is the federal government's method of oversight for its anti-discrimination laws, and its decisions, guidelines and positions are given great deference by legal practitioners and the courts.

Meanwhile, on May 4, the Republic of France moved in the opposite direction by decreasing its protections against sexual harassment. (See Decision No. 2012-240 of May 4, 2012 QPC, Constitutional Council of the French Republic.) The French Constitutional Council repealed a law that had made the act of sexual harassment a misdemeanor, citing the purported vagueness of the definition of "harassment." While the EEOC interpreted laws against "sex" discrimination and harassment to include the meaning of "sex" as both a gender and biological term, France declined to afford any meaning to its laws because they were not specific enough.

Back in the United States, Arizona was in the news quite often because of its controversial immigration law, "Support Our Law Enforcement and Safe Neighborhoods Act," more commonly referred to as SB 1070. The effects of the law as written had the potential for leaving individuals more prone to discrimination based upon race or national origin. While doing so for other reasons, the U.S. Supreme Court struck down a significant provision of SB 1070 that prevents some of the potential adverse effects. (See *Arizona v. United States*, 567 U.S. ___ (2012) (June 25, 2012).) SB 1070 made it a state crime for an unauthorized alien to apply for or perform work. The Supreme Court disallowed this, based on pre-emption by the federal immigration scheme. Notwithstanding the conflict between SB 1070 and federal immigration law, the potential for a criminal violation when certain persons are working or even applying to work, as well as the potential for national origin or race discrimination, were additional conflicts with the law.

Significant developments in the law often come from simply interpreting whether an employer has complied with the law, which can be difficult to ascertain without the ongoing interpretive assistance of the courts.

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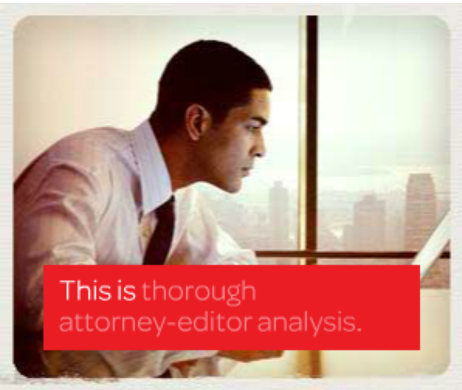

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This year, the U.S. District Court for the Eastern District of Pennsylvania, in *Thomas v. Bala Nursing & Retirement Center*, Civ. Action No. 11-5771, 2012 U.S. Dist. LEXIS 91920 (July 3, 2012), confirmed that there mere reporting to an employer of an employee's medical condition can be sufficient to require the employer to engage in the statutory interactive practice under the Americans with Disabilities Act to determine if the employee needs, and there is available, a reasonable accommodation.

In the coming year, additional interpretation of employment laws is expected in the Supreme Court's decision in *Vance v. Ball State University*, Docket No. 11-556. *Vance* poses the question of who is included as a "supervisor" for purposes of employer liability for adverse employment actions. The Supreme Court's decision can be expected to drastically affect the viability of future employment discrimination claims that arise out of interactions with or decisions by an employee's superior, particularly retaliation claims. How the court rules in the case can, and probably should, affect management training and human resources procedures to take into account what the employer's liability could be for the actions of its managerial staff.

And finally, we would be remiss if we overlooked this recent gem of a decision from the Iowa Supreme Court. The all-male court recently considered "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss views the employee as an irresistible attraction" in *Nelson v. James H. Knight DDS*, No. 11–1857(Iowa Supreme Court Dec. 21, 2012). According to the decision, Melissa Nelson worked as a dental assistant for more than 10 years. In the last six months of Nelson's employment, she and her boss, Dr. James Knight, exchanged a series of consensual text messages, some of which, according to the court's opinion, were "innocuous," and others of which contained sexually explicit advances by Knight.

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he office, learned of the elson because she had become a "detriment" to his family and that for the sakes of both their families, they should no longer work together, the decision read.

The Iowa court then went through various machinations and ruminations about sex-based discrimination by reviewing cases regarding interoffice consensual relationships. In concluding that firing a female employee at the insistence of the boss' wife was not unlawful discrimination, the court said the decision to fire Nelson was "not gender-based, nor is it based on factors that might be a proxy for gender."

This would normally be the space in this column reserved for analysis, opinion, commentary or all of the above. As it concerns the Iowa Supreme Court, and its handling of sex-based discrimination, for once, this writer is rendered speechless.

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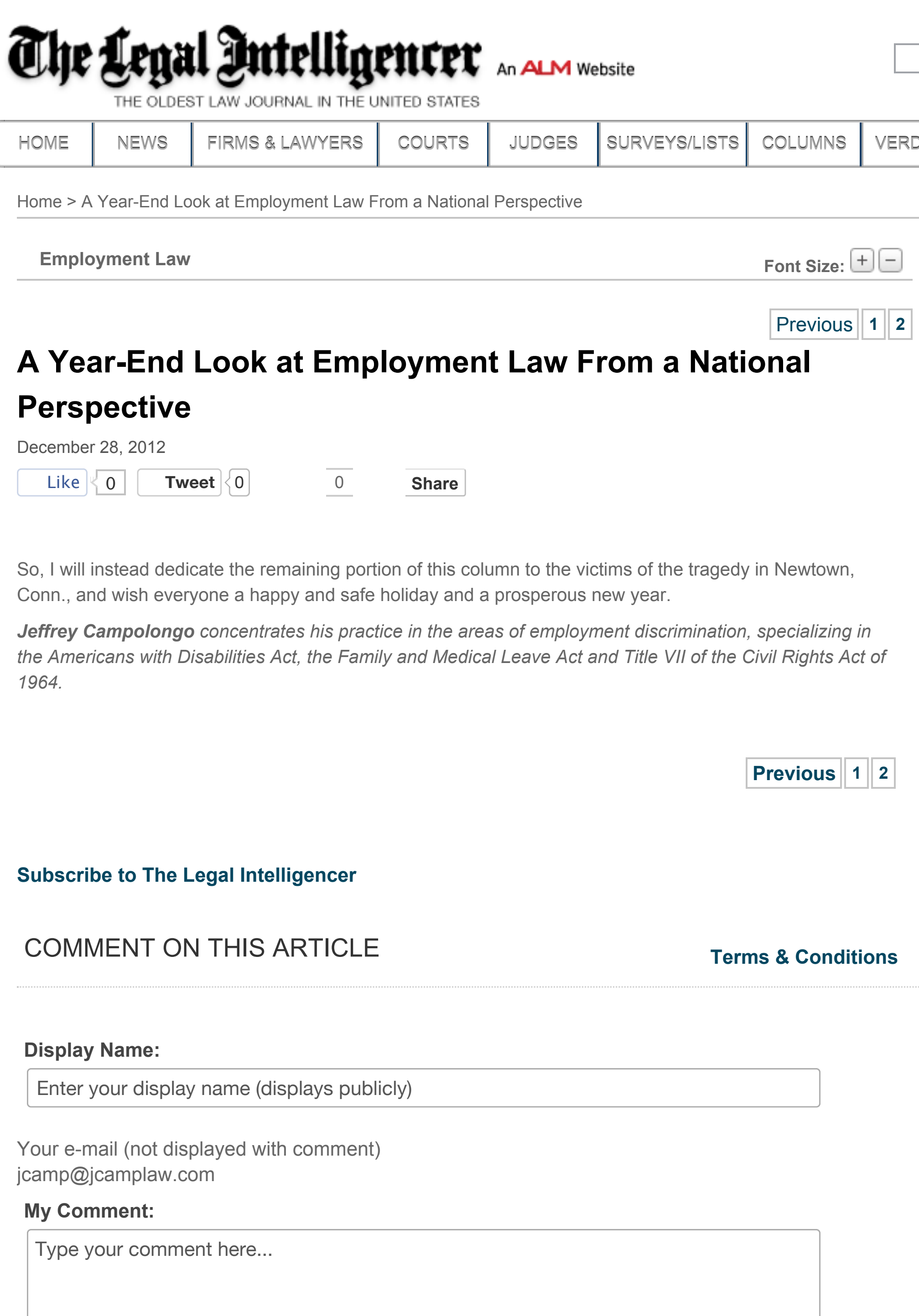

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Previous 1 2

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December 28, 2012

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So, I will instead dedicate the remaining portion of this column to the victims of the tragedy in Newtown, Conn., and wish everyone a happy and safe holiday and a prosperous new year.

Jeffrey Campolongo *concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.*

Previous 1 2

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