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FOS NEWS - *Our clients come first*

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Editor: Diane Slomowitz

DOES YOUR EMPLOYEE HANDBOOK CHANGE YOUR EMPLOYEES' AT-WILL STATUS?

By Lauren E. Maddente

Most Wisconsin employers rely on the law that, absent written employment contracts, employees are "at-will" employees, who can be terminated at any time, for any non-discriminatory reason.

Many employers also create employee policies or handbooks to provide additional guidance and instruction to employees and to ensure company rules are followed and applied equally.

In certain circumstances, however, those handbooks/ policies can create headaches for employers.

An at-will employee may argue, for example, that an employment handbook has changed their at-will status, or has created an entirely new employment agreement.

A recent Wisconsin Court of Appeals decision, *Buckstein v. Dean Health Systems, Inc.*, provides guidance on this issue.

In *Buckstein*, a physician employee's written employment contract with Dean Health made clear that the physician was an employee "at-will."

Dean Health, like many employers, also maintained a written management policy with suggested guidelines for addressing employment disputes.

That management policy included procedures for investigating allegations of employee misconduct that could result in discipline or termination.

Employees, however, were not required to sign this policy.

After Buckstein was terminated, he sued for breach of contract, claiming that the policy created a *new, non-at-will* employment contract, which allowed his termination only in accordance with the policy's provisions.

The Court of Appeals rejected this argument on the facts of this case.

It confirmed that an employment policy or handbook modifies an at-will employment relationship only when it can be reasonably inferred from its language that the parties intended to be bound by non-at-will terms.

What does this mean for employers?

Employers with written

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FOS—CELEBRATING 55 YEARS!

In 1962, new lawyer **William Fitzhugh Fox** opened a general practice business law firm in downtown Milwaukee.

55 years later, Fox, O'Neill & Shannon, S.C. continues as a 14-attorney, full service law firm representing businesses, corporations, families and estates in Wisconsin, across the United States, and internationally.

FOS's motto - "Our clients come first" - appears at the top of every firm newsletter for one simple reason.

It exemplifies the firm's purpose: to provide high quality legal services to individuals and entities at reasonable rates.

FOS stands proud and ready to serve you, our clients.

Here's to another 55 years!

KOUTNIK "UP AND COMING"

FOS congratulates associate Michael Koutnik for being named one of Wisconsin's 2017 Up and Coming Lawyers.

Mike's award was issued by the *Wisconsin Law Journal*.

Mike will be honored at a September 19, 2017 dinner at the Harley-Davidson Museum.

The Up and Coming Lawyers award honors the "rising stars of Wisconsin legal community," according to the *Wisconsin Law Journal.*

Mike's practice focuses on business, real estate and transactional matters.

NON-SOLICITATION AGREEMENTS IN LEGAL LIMBO

By Matthew W. O'Neill

A year ago, the Wisconsin Court of Appeals ruled that "non-solicitation" clauses in an employee's contract – clauses forbidding an employee from soliciting other company employees to leave the company – are subject to Wisconsin's statute requiring that non-compete clauses be reasonably limited in time and geographic scope.

The Court of Appeals, in *The Manitowoc Company v. Lanning*, concluded a company's non-solicitation clause was unreasonable and void under the statute, because it extended to all company employees, including janitors.

For now, under *Lanning*, any non-solicitation clause applying to all company employees is presumptively unenforceable.

"For now," because the Wisconsin Supreme Court has agreed to review *Lanning*.

Oral argument is scheduled for September, 2017, with a decision expected by next summer.

Those who see the current Wisconsin Supreme Court as pro-business may view a reversal as more likely than an affirmance.

Reversal could mean that broad non-solicitation clauses become enforceable again.

But what does a former employee, who wants to ask former co-workers to join her in a new venture, do now?

And what should a company, looking to enforce an existing non-solicitation agreement or considering rewriting its existing employment agreement, do now?

Surprisingly, the answer is not clear.

First, we must wait for the Supreme Court's decision. If the Court affirms, many existing agreements will be void and companies should update their contracts.

If the Court reverses, we will need to see if the Court directs the decision to apply prospectively only.

Wisconsin Supreme Court decisions normally apply retrospectively.

That would mean all non-solicitation clauses would be enforceable, and a former employee who, relying on the Court of Appeals decision, solicited a former co-worker, could face liability.

This is no small risk: the trial court awarded the *Lanning* company $97,000 in damages and over $1 million in legal fees.

There is, however, an exception.

If retroactive application would produce "substantial inequitable results," from "justifiable reliance" on "clear past precedent," the Court can declare its decision prospective only.

No one can predict what the *Lanning* court may do.

Former employees would favor prospective application: how can someone face liability for doing something approved by an

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Employee Policy Pitfalls

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employment policies or handbooks should state that such documents do not change the at-will employment relationship.

And written at-will agreements should state that they are at-will and that any policies or handbooks will not change the at-will status.

FOS can help you preserve your employees' at-will status and avoid unintended consequences.

RACE FOR A CURE!

On Sunday, September 24, 2017, FOS will participate in its sixth annual Milwaukee's Susan G. Komen Race for the Cure run/walk.

FOS's team, "The Karen Fox Trotters," honors the memory of our dear Karen Fox.

Team registration is open until the race. To sign up or contribute to the Milwaukee event, please go to komenwisconsin.org. Search for our team in the "Race for the Cure" area of the website. For more information, call team captain Lauren Maddente at 414-273-3939.

FOOD FROM THE BAR

FOS once again participated this summer in the "Food From the Bar" campaign.

"Food From the Bar" is a friendly competition among local law firms and legal departments benefiting Feeding America Eastern Wisconsin.

Last year, total donations to Food From the Bar provided nearly 52,000 meals.

For every $1 raised, Feeding America can purchase enough food for three meals, creating a significant, positive community-wide impact.

YOUR HOME IS STILL YOUR CASTLE WHEN THE ASSESSOR COMES KNOCKING

By Jacob A. Manian

We know that the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable governmental searches, protects against a SWAT Team blasting into your home without a warrant or other legal justification.

But what about a property appraiser, working as a municipal government agent, who wants to enter and inspect your home to assess its value?

Wisconsin law generally requires that an assessment be based on the best information that the assessor can practically obtain.

Does that present a homeowner with a Hobson's choice: either don't challenge a property assessment or let the local inspector enter and inspect the house?

The Wisconsin Supreme Court recently ruled in favor of homeowners.

The Court decided that a couple who turned away a property appraiser could still challenge an unfavorable assessment before the Town of Dover Review Board.

In *Milewski v. Town of Dover* (Decision July 7, 2017), a couple refused to allow a property appraiser, working on behalf of the town, entry into their home to appraise the property.

The appraiser then smacked the couple with a 12% increase in value.

The appraiser did this, even though most of the parcels surrounding the couple's home had actually decreased in value.

When the couple tried to challenge this assessment increase, the town ruled against them.

The town relied on a Wisconsin law providing that a homeowner gives up the ability to challenge an assessment if the homeowner denies a reasonable request to view the property.

The Wisconsin Supreme Court decided that this law unconstitutionally violated the homeowners' right to privacy from unreasonable searches as guaranteed by the Fourth Amendment.

After *Milewski*, if an owner refuses access, the municipality will have to rely on other sources for its property valuation.

These include making an outside view of the property, speaking with the homeowner as to improvements or other changes in the home, and obtaining and reviewing public records, including those showing what, if any, permits were requested or obtained.

The Court's decision means that, when a homeowner challenges a property assessment, the owner's right to deny a municipality entry overrides the locality's desire to inspect the inside of the home to do a property appraisal.

The Court's decision is consistent with long-standing legal precedent that a homeowner has the right to deny access to anyone who wishes to enter his or her home, absent a warrant or other legal justification.

Non-Solicitation Agreements

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appellate court?

Former employers would label prospective application unfair: why should its agreements, if upheld, still be unenforceable because an intermediate court erred?

The best advice, for now, is to proceed with caution.

Your FOS attorney can help guide you through this complicated period in employment covenant law.

KOUTNIK MEETS WITH FUTURE LAWYERS

FOS Attorney Mike Koutnik met with an impressive group of future lawyers from St. Marcus Lutheran School at Fox, O'Neill & Shannon's offices on July 18, 2017. The students were participating in Marquette University Law School's Summer Youth Institute.

FOX O'NEILL SHANNON S.C.

622 N. Water Street
Suite 500
Milwaukee, WI 53202

Phone: 414-273-3939
Fax: 414-273-3947
www.foslaw.com

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IN THIS ISSUE

7TH CIRCUIT EXPANDS FEDERAL DISCRIMINATION PROTECTION FOR EMPLOYEES

By Michael G. Koutnik

Employers know that it is illegal to base an employment decision (hiring, firing, promoting, etc.) on race, color, religion, sex, or national origin.

Recently the 7th Circuit Court of Appeals expanded employee protections, and so increased potential employer liability.

It held that federal law prohibits employment discrimination based on sexual orientation.

The 7th Circuit, which sits directly below the U.S. Supreme Court and covers Wisconsin, Illinois, and Indiana, is the highest level federal court to make such a ruling.

The case, *Hively v. Ivy Tech Community College*, involved a teacher who claimed that a community college terminated her part-time employment and rejected her for full-time positions because she was homosexual.

The 7th Circuit concluded that sexual orientation discrimination is just another form of sex discrimination, comparing it to "women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing."

While Wisconsin's Fair Employment Act has long prohibited discrimination based on sexual orientation, the 7th Circuit's decision allows employees claiming sexual orientation discrimination to also seek damages available under federal employment law.

These damages include punitive and future compensatory damages, which can be substantial and are not available to plaintiffs under the Wisconsin Fair Employment Act.

Despite the 7th Circuit's holding, the Justice Department is now arguing that Title VII does not protect against employment discrimination based on sexual orientation.

This issue, then, will continue to be fought in the federal courts, perhaps up to the U.S. Supreme Court, or in Congress.

For the time being, Wisconsin employers should abide by the 7th Circuit decision.

Existing manuals and handbooks should be reviewed and updated, if necessary, to specifically include sexual orientation as one the classes of potential employment discrimination, upon which an employment decision cannot be based.

Employee training should also include the 7th Circuit's decision.

If you have questions, contact your FOS attorney.