AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

October Meeting

Wednesday, October 8th

Decatur Country Club

$15.00

11:45 am —1:00 pm

Networking will begin at 11:15 a.m. and the program will start at 11:45 am.

If you **RSVP** that you are coming and then you don't attend, you will still be charged for the meal.

If you are unsure about attending and paying for a lunch, you can always save-a spot for the salad bar.

For reservations, contact Patti Fowler at pfowler@alliancehrservices.com

TVC~SHRM
TENNESSEE VALLEY CHAPTER OF SHRM - ALABAMA

October Newsletter

October 8, 2014

Our Speaker:

William (Ivey) MacKenzie

HR CERTIFICATION INSTITUTE 2014 APPROVED FOR CREDIT

Topic:

"Getting HR Smart"

Ivey MacKenzie is an Assistant Professor of Management at the University of Alabama in Huntsville where he teaches undergraduate and graduate courses on Competitive Strategy, Human Resources and Labor Relations Management, Employee Staffing & Development, and Strategic Human Resource Management in a Technological Environment. He received his Ph.D. from the University of South Carolina's Moore School of Business. His research and consulting work focuses on how organizations identify and develop human capital resources to gain a competitive advantage. His work in this area has been published in outlets such as the Academy of Management Journal, Human Performance, Journal of Labor Research, and Journal of Small Business Strategy. He is active in a number of professional organizations including the Academy of Management, Society of Industrial and Organizational Psychology, American Psychological Association, and the Society for Human Resource Management.

A firm's ability to achieve a competitive advantage is dependent on the resources it acquires and deploys in order to pursue its strategy. Human resources are simultaneously one of the most important and most challenging resources to manage within most organizations. The purpose of this session is to help human resource professionals understand the importance of strategy and how to adopt a more strategic approach to human resources. We will discuss topics including competitive advantage, ways in which HR can become more strategic, common HR misconceptions and making the case to management for human resources to become a strategic business partner.

AGD INSURANCE LLC

Thank you to AGD Insurance LLC and Trinity Performance Solutions for sponsoring our October meeting!

The Importance of Investigation Before—Rather than After—the Employment Decision

Courtesy of Lehr Middlebrooks & Vreeland, P.C.

Have you ever been shopping and found something—a pair of jeans, a watch, a bottle of wine—that you just loved, and when you bring it to the register, you learn that it's 50% off? You were willing to pay full price based simply on preference, but you feel doubly-smart when you see the discounted price on the register screen.

We welcome these small confirmations that, yes, we made the right choice. But, they're just that: confirmations. They didn't actually influence our decision, they just made us feel better about it. In the case of Kroll v. White Lake Ambulance Auth. (6th Cir., August 19, 2014), a supervisor took action based on a couple of complaints and the supervisor's own beliefs about the employee's morality. As he learned throughout the course of the lawsuit, the supervisor made the right decision: the employee's personal problems had infected her job performance, and she was a danger to herself and others. However, because the supervisor hadn't discovered all that confirmation evidence until after he took the employment action, it couldn't be used to the employer's benefit.

Employee Kroll was an emergency medical technician whose job required her to provide care for patients when called out on an emergency basis. Kroll had a "tumultuous" affair with a co-worker (not a supervisor). After the affair, co-workers reported two significant work- related incidents involving Kroll to their supervisor. In one case, Kroll violated a company policy by talking on her cell phone while driving the ambulance. In the other, Kroll refused to respond when a co-worker asked Kroll to provide oxygen to a patient in the ambulance. Right before she ignored that co-worker, she and that co- worker had been involved in a heated argument because Kroll had accused the co-worker of sleeping with her paramour.

The employer did not terminate Kroll, but rather required that she receive psychological counseling. Now, an employer can require psychological counseling (a medical exam) of a current employee if it is job-related and consistent in business necessity. In this case, in our view, the employer clearly had job-related bases to demand that the employee participate in counseling. Talking on the cell phone while driving an ambulance is a safety risk to all involved and not responding to provide oxygen to a patient is an obvious safety risk to that patient. However, our motivations were not the supervisor's motivations, and the supervisor's motivations controlled the outcome in this case. The supervisor testified that he compelled Kroll to attend counseling because of his concerns about her personal and sex life (and not just the portion of it occurring with co-workers) and his belief she would benefit from counseling.

Given that the supervisor's motivations largely stemmed from Kroll's outside-of-work behavior, the employer faced—and lost—a tough battle to prove that the demand to seek psychological counseling was job-related.

Importantly, the Court strongly suggested that had the supervisor more thoroughly investigated Kroll's behavior, he could have located several other incidents where Kroll used her cell phone while driving the ambulance, which could have led him to conclude that Kroll's emotional problems were leading her to operate the ambulance (an essential job function) improperly, thus possibly making the demand that the employee seek counseling job- related.

Also, we note that Kroll's supervisor could have disciplined her for the behavior as reported to him, without turning the meeting into a Dr. Phil moment. Had he investigated prior to issuing discipline (and thus discovered the several incidents of cell phone use while driving), he likely would have been justified in immediately terminating her. Indeed, the Justices roundly condemned the supervisor's moralistic tone, including the allegation that he told Kroll that she would end up getting raped if she kept picking up random men at the bar.

Again, it was the supervisor's focus on Kroll's out of work behavior that prevented the employer from showing that counseling was job-related.

The employer had one last hope: the direct threat defense, which puts a high burden on employers to prove that the employee poses a direct threat to themselves or others. Among other things, a direct threat must be more probable than possible and must pose a risk of significant harm. Employers who work in the public safety field normally get a presumption that the potential for harm is significant. Even with this presumption, the Court held that the supervisor did not have enough facts to conclude that a pattern of dangerous behavior existed to make the threat to the public probable. Again, the Court left open the possibility that had he investigated, the supervisor could have located sufficient evidence to conclude Kroll did pose a direct threat. The employer just simply wasn't permitted to use all the evidence confirming that it had made the right decision because the supervisor had not been aware of the evidence when he made his decision.

Retaliation and Timing: How Long Does the Connection Remain?

Courtesy of Lehr Middlebrooks & Vreeland, P.C.

The key "first impression" in any retaliation claim is the timing of the adverse action in relation to when the employee engaged in the protected activity. The ideal situation for an employer is when the adverse action is a continuation of progressive discipline which began prior to the protected activity. Thus, in September, the employee is suspended for unsatisfactory performance, the employee misses the month of October due to FMLA and, when the employee returns in November, the unsatisfactory performance continues and the employee is terminated, resulting in a retaliation claim. The employer is in a strong position, because of the connection between the pre- and post-protected activity actions.

Three recent cases explored the issue of timing in retaliation claims. In the case of Malin v. Hospira, Inc. (7th Cir., August 7, 2014), the appellate court upheld a retaliation claim which arose three years after the employee's alleged protected activity. The employee alleged that she was sexually harassed by her indirect supervisor. Her direct supervisor discouraged her from bringing the harassment claim. Three years later, she was demoted during a company reorganization. The lower court had granted summary judgment for the employer based upon the remoteness of the protected activity compared to the adverse action. In reversing the lower court, the Seventh Circuit stated that, "a long time interval between protected activity and adverse employment action may weaken but does not conclusively bar an inference of retaliation." The Court also noted that the plaintiff was denied promotions during that same three-year period, when the decision-maker about promotions was the same supervisor who discouraged her from bringing a sexual harassment claim.

In the case of Langenbach v. Wal-Mart Stores, Inc. (7th Cir., August 4, 2014), the Court ruled that the five months timing between the employee's FMLA absence and termination was not connected, because the employee had been on a performance improvement plan (PIP) prior to the leave and failed to improve after the leave.

In Munoz v. Nutrisystem, Inc. (E.D. Pa., July 30, 2014), an individual brought an ADA claim after she was terminated for excessive absenteeism. Although the Court ruled that the employer failed to engage in a reasonable accommodation discussion with the employee, "there is no suggestion that the company treated Munoz differently than other employees or counted her disability-related absences more heavily." Further, Munoz claimed retaliation because she was terminated two months after she requested a reasonable accommodation for her absences. The Court stated that the two-month gap was not close enough to her protected action to "suggest retaliation." Furthermore, the Court stated that the employer was not hostile in response to her request for accommodation.

Retaliation is the fastest growing employment claim in the country, appearing in approximately 40% of all discrimination charges. OSHA is responsible for enforcing retaliation claims covering 22 different federal statutes. There are multiple state and local laws which prohibit retaliation. The following are some principles for employers to consider when evaluating a decision in conjunction with a potential for a retaliation claim:

1. What was the timing of the decision in relation to the protected activity? The closer in time (such as a few months) to the protected activity, the greater the clarity the employer must show that the decision would have been made regardless of the protected activity.
2. Is there a possibility of connecting the reason for the adverse action to counseling or discipline which occurred prior to the protected activity? The "before and after" approach is one of the strongest an employer can raise to avoid or defend retaliation claims.
3. Was the protected activity (typically a complaint that some law or standard was violated) handled professionally? Did the employee receive assurances that the complaint would be taken seriously and that there would be no retaliation? Did the employer take precautions to shield the employee from retaliation?
4. Were there positive employment actions which occurred subsequent to the protected activity? For example, if an employee received a raise two months after returning from leave and is terminated two months thereafter, the argument is why would an employer retaliate when the employer gave the employee a raise?
5. Was the employer's actions toward the employee consistent with how the employer handled analogous situations?

Wellness Alabama
Fire Up the GRILL!!

Courtesy of Kimberly Rider and Elisabeth A. Doehring

With cooler weather coming and outside activities everywhere from the soccer field to high school/college/ university tailgating, now is the ideal time to get outside and grill up your favorite meats, vegetables--and even fruits! This healthy way of preparing foods is not without its share of safety woes. Here are some tips to help keep you and your friends and family safe during fall cookouts!

Thawing and Marinating

1. Always thaw and marinate food in the refrigerator, never on the counter or in the sink. Food needs to remain at a certain temperature to keep bacteria from growing. The counter or sink of water is a perfect place for bacteria to feast on your food.
2. Remember to use a different plate to remove the cooked items from the grill that you initially used for the raw food. Plates containing raw food need to be washed with soap and hot water before being re-used.
3. Never re-use marinades! Once they touch raw food, throw them out. Do not put them back on the food after it has been cooked.

Grilling Times and Temps

1. Meat should be checked with a food thermometer before being taken off the grill.
    - Beef: 155°
    - Poultry: 165°
    - Fish: 145°
2. Food should be refrigerated one hour after cooking if in direct sun-light and two hours after cooking if inside or after dark.

Foods to Grill

1. Most meats are great for the grill as long as chicken and burgers are thin enough or cooked slowly enough to make sure the inside is getting cooked as well as the outside.
2. Fish and Vegetables are great with just some olive oil and garlic and placed on the grill in either a grilling basket or in foil packets to keep them from falling through the grates.
3. Try lightly grilling some sturdy fruits such as peaches and pears for a new twist on a Sundae!

Are You Prepared for Election Day 2014? SHRM Can Help!

As we rapidly approach Election Day on November 4, SHRM is encouraging you to be motivated to cast an educated and informed vote this year. From the smallest local election to races for federal office, it is critical for HR professionals to become familiar with where their respective candidates stand on key workplace issues and how they can best be involved. SHRM does not endorse candidates for office, nor does it contribute financially to candidate campaigns. However, SHRM does offer its members with access to a robust online platform which provides details on all state and federal elections for 2014, candidate information and voter registration deadlines and specifics. Be sure to visit www.advocacy.shrm.org to find all the Election Day resources you will need to cast your vote. Note that after the Election Day results are in, SHRM will be briefing its members on the 2014 race outcomes, the new political landscape, and what all this could mean for HR professionals in 2015. In the meantime, for more information on how you can become actively involved in the federal, state and local election process during the upcoming midterm election season, please contact Meredith Nethercutt, SHRM's Senior Associate for Member Advocacy, at Meredith.Nethercutt@shrm.org.

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Get Connected (Clickable Icons)

Save the Date! Upcoming Events

- **Wednesday, October 22, 2014**
  The North Alabama Committee on the Employment of People with Disabilities Awards Luncheon at the Turner-Surles Community Center
- **Thursday, November 6, 2014**
  Navigating the International Landscape of People Management at the Embassy Suites Hotel in Huntsville
- **Wednesday, November 12, 2014**
  Annual Legislative Meeting at the Decatur Country Club
- **Thursday, December 4, 2014**
  Christmas Party at Vittone's (more details coming soon)
- **Every 1st Wednesday**
  Workforce Coalition meeting at The Chamber of Commerce
  (Contact Taylor Simmons- taylor@dcc.org *for more info)*

Please contact Tiffany Weaver at tweave@ascendmaterials.com if you have an upcoming event that you would like to add.

Our November meeting will be held on Wednesday, November 12, 2014 at the Decatur Country Club.

Hope to see everyone there!

Tennessee Valley Chapter SHRM
PO Box 1271
Decatur, AL 35602
www.tvcshrm.org