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Employment Practices NEWSLETTER

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Supreme Court: State's Immunity Remains in FMLA's "Self-Care" Case

A state employee sued his employer for violating the "self-care provision" of the Family and Medical Leave Act (FMLA) after being informed that he would be terminated if he did not resign following his request for leave. The FMLA entitles an employee to take up to 12 work weeks of unpaid leave per year for: (A) the care of a newborn son or daughter; (B) the adoption or foster-care placement of a child; (C) the care of a spouse, son, daughter or parent with a serious medical condition; and (D) the employee's own serious health condition when the condition interferes with the employee's ability to perform at work. The courts refer to provisions (A), (B) and (C) as the "family-care provisions" and to provision (D) as the "self-care provision." While the FMLA creates a private right of action for equitable relief and damages against an employer, the issue raised by the state employee's lawsuit was whether Congress intended to abolish a state's sovereign immunity pursuant to authority under Section 5 of the 14th Amendment as it relates to subparagraph (D) of the FMLA. Generally states are immune from damage suits, unless they waive that defense. In fact, the District Court dismissed the state employee's suit based on sovereign immunity. The Fourth Circuit then affirmed holding that the self-care provision was not like the family care provision considered in *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003), which held that Congress could subject states to lawsuits for violations of subparagraph (C) based on evidence that states administered family-leave policies, even neutral family-leave policies, in ways that discriminated on the basis of sex. In this case, the Supreme Court, in a 5 to 4 ruling, affirmed the judgment against the state employee and found his three key arguments unpersuasive. Specifically, the state employee argued that the "self-care provision": (1) addresses sex discrimination and sex stereotyping; (2) is a necessary adjunct to the family-care provision in Hibbs; and (3) helps single

parents keep their jobs when they get ill. The Supreme Court held that Congress failed to identity a pattern of constitutional violations and tailor a remedy designed to address documented violations before subjecting states to suits for damages for violation of the FMLA's self-care provision. State employees need to be aware that while they can no longer bring lawsuits for money damages related to denial of the "self-care provision" of the FMLA for their own serious health conditions, they still have a cause of action for violations of the "family-care provision" when an employee's FMLA rights are violated in the care of a spouse, child or parent with a serious medical condition.

Coleman v. Ct. of App. of MD, No. 10-1016 (U.S., Mar. 20, 2012)

Contact for more information: Geri Lynn Arrindell

Pay Disparity Revives Female Manager's Bias Claims

A female sales manager who performed the same duties and responsibilities as her male peers, and, who the employer conceded was one of its most successful business managers, received a salary that was substantially lower than her male peers. The salaries were strikingly disproportional, with the highest paid male sales managers earning two to three times more than female sales managers. While the employer had argued that the pay disparity was due to differences in education and experience, the District Court did not require the employer to actually prove that this was the case. The Seventh Circuit reversed and held that an employer claiming that a pay disparity is the result of a "factor other than sex" must prove this as an affirmative defense. As such, the employer must not only articulate a non-discriminatory reason for the pay difference but also carry the burden of persuasion on it. The Seventh Circuit further rejected the application of the burden-shifting method in equal pay cases. Employers setting employee compensation or granting pay raises must examine differences in pay and ensure that differences, if there are any, are due to valid reasons.

King v. Acosta Sales & Mktg. Inc., No. 11-3617 (7th Cir., Mar. 13, 2012)

Contact for more information: Linda K. Horras

Employer May Not Interfere With Handbillers

A union distributed hand bills criticizing the employer, a grocery store chain, for hiring nonunion remodeling contractors that did not pay area standard wages. After the grocery store chain caused the handbillers to be removed from more than two, the union filed an unfair labor practice charge, and the National Labor Relations Board ("NLRB") general counsel issued a complaint alleging that the employer's action violated Section 8(a)(1) of the National Labor Relations Act. The Seventh Circuit found that the employer failed to meet the threshold burden of showing that it had a valid property interest that entitled it to exclude nonemployees, because the employer did not own the stores in dispute, but rather leased the properties from various shopping center owners and only enjoyed nonexclusive easements (i.e., the right to use the real property of another for a specific purpose) over the parking lots and sidewalks where the union peacefully handbilled. The court rejected the employer's argument that its obligations to maintain the property established a right to exclude. Furthermore, the court observed that none of the leases provided the employer with explicit authority to eject trespassers or other unwanted parties from the common areas. Employers are cautioned not to exclude peaceful,

non disruptive protesters engaged in protected Section 7 activity if they do not have a state-law property interest to do so.

Roundy's Inc. v. NLRB, No. 10-3921 (7th Cir., Mar. 9, 2012)

Contact for more information: Jennifer M. Ballard

Employer May Implement After Reaching a Bargaining Impasse

An employer and its union held more than twenty bargaining sessions during more than ten months, including several months after the collective bargaining agreement expired. One of the main issues was the employer's desire to reduce insurance costs by changing coverage to the same level as its other employees. The employer declared impasse and informed the union that it would implement its final offer in three weeks. The delay was necessary for the employer to make arrangements so that the new insurance coverage could start soon thereafter. The union filed unfair labor practice charges claiming that an impasse did not exist because the employer and union continued to negotiate after the impasse was declared. The NLRB determined that the parties were at impasse initially, but were not at impasse at the time of implementation. The DC Circuit Court disagreed and held that the time to examine the impasse is when the impasse is declared. The fact that the employer made some "reasonably comprehended" changes to its insurance plan upon implementation did not alter the fact that an impasse had occurred in the negotiations. Employers negotiating with the union must make certain that an impasse exists before unilaterally implementing a final offer.

Coman, Inc. vs. NLRB, D.C. Circ., No. 10-1406, 3/2/12

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Sexual Harassment Claim is Appropriate for a Jury

A production line worker at a cardboard manufacturer was approached by her lead production manager about "taking care of him." She refused initially, but she eventually conceded to the sexual advances. The production manager and other workers then started making sexually explicit statements about her. She reported the conduct to a supervisor, who allegedly reminded her that she was "replaceable" and laughed at her. Feeling ostracized, she notified a human resources representative that she was looking for a new job. The human resources representative offered her a severance agreement. When she refused to sign the agreement she was escorted off the premises by the supervisor. Days later she was given a letter stating she had not been fired and was welcome to return to work. Instead of returning to work, she sued for gender discrimination and sexual harassment. The Seventh Circuit reviewed the *Faraghr-Ellerth* doctrine which provides employer an affirmative defense to a charge of supervisory harassment if: (1) the employee exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Here, the fact that the aggrieved employee was given a letter stating that her position remained open needed to be weighed against evidence that the employee was asked to sign the severance agreement or risk being fired and being escorted off the premises when she refused to sign. Viewing these facts in a light most favorable to the employee, the Seventh Circuit determined that a jury could conclude that she was fired, and therefore the defense was unavailable. Although it is important for employers to take

reasonable care to prevent and promptly correct any sexually harassing behavior in the workplace, these measures cannot support a *Faragher-Ellerth* defense to sexual harassment if the aggrieved employee has suffered a tangible employment action.

Dulaney v. Packaging Corp. of Am., No. 10-2316 (4th. Cir. Mar. 12, 2012)

Contact for more information: Alex Breland

Doctor Was Retaliated Against But Not Constructively Discharged

A Middle-Eastern doctor was a member of the faculty at a university. While employed, the doctor was allegedly the target of racial harassment and heard his supervisor comment that "Middle-Easterners are lazy." To avoid his supervisor's harassment, the doctor sought and was offered a position as a clinician with a medical center affiliated with the university. The doctor then resigned from his faculty position by submitting a letter stating that the primary reason for his resignation was his supervisor's "religious, racial and cultural bias against Arabs and Muslims that...resulted in a hostile work environment." After the doctor submitted his resignation letter, the university opposed his employment with the medical center, and the medical center ultimately withdrew his offer. The doctor filed a lawsuit asserting that he was constructively discharged and retaliated against by the university. The Fifth Circuit rejected the doctor's constructive discharge claim because "his proof was no more than the minimum required to prove a hostile work environment." While proof of a hostile work environment can support a harassment claim, a constructive discharge is "more extreme" than harassment and requires proof that "working conditions were so intolerable that a reasonable employee would feel compelled to resign." The doctor did, however, prove that the university retaliated against him by blocking his employment with its medical center after he complained of harassment. The court held that a retaliation claim "is less demanding than constructive discharge" and the doctor's testimony that his resignation letter was the reason he was not hired was sufficient proof to support his claim. Employers must ensure that if an employee complains of harassment or discrimination, employers must not take adverse action against the employee because of the complaint.

Nassar v. University of Texas Southwestern Medical Center, Case No. 11-10338 (5th Cir., Mar. 8, 2012)

Contact for more information: Leigh Bonsall

Religious Discrimination Claim Fails Based on Saturday Work Shift

After working for six years in a retail sales position for a mobile phone company, a retail sales employee became a Seventh Day Adventist. The religion practices of the Seventh Day Adventist required its members to refrain from work on Saturdays in observance of the Sabbath. This religious requirement conflicted with the sales employee's work schedule, as all retail sales employees were expected to work Saturday shifts on a rotating basis. The employee contacted human resources on a number of occasions in an effort to be excused from Saturday shifts for religious reasons and submitted a letter from his church confirming that he could not work Saturdays. In response, the employer explained that it would help facilitate voluntary shift swapping with other employees, but refused to excuse the employee from Saturday shift responsibilities. The employer also offered the employee two other positions which did not require weekend shifts. Those alternative positions, however, did not

provide the significant commission earnings that the employee's retail sales position offered. The employee declined the alternative positions and could not find co-workers who were willing to cover his Saturday shift. Thereafter, the employer began to discipline the employee for missing his Saturday shifts and not providing coverage. Eventually, the employee resigned and filed a lawsuit for religious discrimination in violation of Title VII, among other claims. The First Circuit determined that the employer had provided a "reasonable accommodation" to the employee's religion. In its decision, the Court explained that cases involving "reasonable accommodations" turn heavily upon their facts and the "appraisal of the reasonableness of the parties' behavior." Employers are cautioned to act thoughtfully and deliberately when an employee requests an accommodation based on religion.

Miguel Sanchez Rodriguez v. AT&T Mobility Puerto Rico, Inc., No. 10-2177 (1st Cir., Mar. 8, 2012)

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Two-Month Gap Between FMLA Leave and Separation Insufficient for Proving Retaliation

An employee sued her former employer for retaliation under the Family and Medical Leave Act (FMLA) alleging she was discriminated against for exercising her FMLA rights. On the employee's third day back from FMLA leave, the employer expressed concerns about her health and indicated that colleagues felt she was physically unable to perform her job. While there was no mention of FMLA leave during the meeting, the parties disagree on whether the employee was terminated. To establish retaliation the employee has to prove the adverse employment action (e.g. the alleged termination) was causally linked to the protected conduct (e.g., taking FMLA leave). The employee argued that the timing of her alleged termination in connection with her use of FMLA leave was evidence of the employer's retaliation. The Eighth Circuit determined the date that the employer knew of the employee's use (or planned use) of FMLA leave, not the date that the leave ended, was the proper time to evaluate alleged retaliation. In this case, more than two months was deemed too long to support a finding of retaliation without additional evidence, but that length of time may not be sufficient in all situations.

Sisk v. Picture People, Inc., No. 10-3398 (8th Cir., Feb. 28, 2012)

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Employee Fired for Attendance Violation After Being Warned Lacks FMLA Claim

A supervisor with a history of excessive absenteeism filed a claim against her employer under the Family and Medical Leave Act (FMLA) after she was fired for violating the employer's two-day no-call-no-show policy. Three months prior to being terminated, the supervisor received an attendance-related corrective action notice for excessive absenteeism (more than 103 hours of unscheduled paid time off) which inadvertently included 18 hours of FMLA-protected time despite a notation which stated the "corrective action notice does not include any days that you reported as FMLA." The supervisor argued that the inclusion of 18 hours of FMLA protected time in the disciplinary notice constituted a "negative factor" in her termination. The Eighth Circuit found the "negative factor" argument was contrary to FMLA's prohibition on interference with rights because the Act is not a strict liability statute. The court

held that an employer is not liable for interference if its adverse decision was unrelated to the employee's use of FMLA leave. In order to prevent an FMLA claim, employers must ensure that their actions are not motivated by the use of FMLA.

Lovland v. Employers Mut. Cas. Co., No. 11-2076 (8th Cir., Mar. 16, 2012)

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