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Employment Practices NEWSLETTER

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Parent Company Not "Employer" Under the Fair Labor Standards Act

A former employee of a car rental company brought a collective class action under the Fair Labor Standards Act (FLSA), alleging that the parent company of his employer violated the act by failing to pay overtime wages. The parent company argued that it was not the employees' "employer" under the FLSA and therefore could not be liable for any FLSA violation. The U.S. Court of Appeals for the Third Circuit agreed. The court established factors for determining whether an entity is an "employer" under the FLSA. Those factors include whether the employer has: (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments and set conditions of employment, including compensation, benefits and hours; (3) day-to-day supervisory responsibility, including employee discipline; and (4) control of employee records, including payroll, insurance and taxes. Here, the parent company had no authority to hire or fire employees, to promulgate work rules, or to set compensation, benefits, schedules, rates or methods of payment. Moreover, the parent company was not involved in supervision or discipline of employees and did not maintain any control over employee records. Accordingly, the parent company was not the employees' "employer" under the FLSA and therefore was not liable for any unpaid overtime. Employers should be mindful of the potential for joint liability in circumstances such as this. Employers should further review their policies to ensure compliance with both the FLSA and applicable state wage laws concerning the payment of overtime compensation.

Hickton v. Enterprise Holdings Inc., Case No. 11-2883 (3rd Cir. June 28, 2012)

Contact for more information: Leigh C. Bonsall

Banana Peels and Confederate Flag Shirts May Create Hostile Work Environment

An African-American delivery truck driver found banana peels on his truck on four different occasions, was called an "Indian" by a co-worker, felt threatened by two white yardmen, and was confronted by white co-workers wearing confederate flag shirts. He sued his employer, claiming that he was subjected to a racially hostile work environment in violation of 42 U.S.C. § 1981 and of Title VII of the Civil Rights Act of 1964, as amended. Finding that the incidents were not racially motivated, or were not sufficiently severe or pervasive to change the terms and conditions of the driver's employment, the district court dismissed the claims. The U.S. Court of Appeals for the Eleventh Circuit reversed, finding that the banana peels could be evidence of racial harassment and could support an employment discrimination claim by an African-American employee. The court acknowledged that while the discarding of banana peels in and of itself may have nothing to do with race, because of historical racial slurs relying upon the associated imagery, such instances may give rise to a claim of racial harassment. Ultimately, a trier of fact would have to consider the totality of the circumstances, including the other instances, to determine whether such conduct rises to the requisite level. Employers must have clear anti-harassment and anti-discrimination policies and ensure that both employees and supervisors alike promptly report and respond to any such complaints that arise.

Jones v. UPS Ground Freight, No. 11-10416 (11th Cir. June 11, 2012)

Contact for more information: Mindy A. Ferrer

Hospital Employee Who Had Multiple Surgeries Failed to Show That She Was "Regarded As" Disabled

A hospital employee had eight surgeries over the course of her 10-year employment, resulting in many authorized absences from work. She was ultimately terminated for excessive unscheduled absences, per company policy. The employee sued the hospital under the Americans with Disabilities Act (ADA), claiming wrongful termination because she was "regarded as" disabled. She pointed to three specific comments made by her supervisor about her surgeries. The U.S. Court of Appeals for the Sixth Circuit looked to pre-ADA-Amendments-Act (ADAAA) case law and reasoned that the employee lacked a triable ADA "regarded as" disabled claim because to qualify as "regarded as," an employee must show that the employer perceived a physical or mental impairment and that the impairment was one with a duration of more than six months. The supervisor's comments, which were isolated and remote from the termination, reflected a concern about the employee's absenteeism, not a perceived disability. Under the subsequently enacted ADAAA however, an employee must only show the existence of an impairment, and comments such as the supervisor's in this case could be construed as related to impairment. Before disciplining or terminating an employee for absenteeism, employers should

consider the employee's history and evaluate whether any disability issues may be at issue. Engaging in proactive risk-management endeavors such as these will help employers make better employment decisions.

Gecewicz v. Henry Ford Macomb Hosp. Corp., No. 11-1065 (6th Cir. June 22, 2012)

Contact for more information: Olga L. Simanovsky

Employee Who Did Not Receive "Treatment" During Absence Lacks FMLA Interference Claim

A former employee suffered from anxiety and periodic leg and back pain, which required doctor visits every two to three months, medical testing two or three times annually, and prescription medication. The employee did not report to work one morning and instead made an unscheduled visit to his doctor's office where he picked up a prescription refill and confirmed that his referral paperwork had been transferred to the clinic where he would attend an afternoon appointment. The doctor did not examine the employee during this visit. The employee was subsequently terminated for failing to come to work, and he sued the employer for interference with his Family and Medical Leave Act (FMLA) rights. The U.S. Court of Appeals for the Seventh Circuit held that the employee had no viable FMLA-interference claim, reasoning that he was not "treated" by his doctor on the morning at issue, and merely checked on paperwork and picked up a prescription. This activity was not sufficient to justify an absence under the FMLA, and thus his termination on that basis could not give rise to an FMLA-interference claim. Employers may be surprised to learn about the various circumstances that can give rise to protected FMLA leave. It is important to stay abreast of the ever-changing federal and state leave laws to ensure that absences are treated properly.

Jones v. C&D Techs. Inc., No. 11-3400 (7th Cir. June 28, 2012)

Contact for more information: Keith S. Howell

Tenth Circuit Finds Derogatory Racial Comments Over Three-Year Time Frame May Be Sufficiently Pervasive to Give Rise to Hostile Work Environment Claim

A hospital food-services worker claimed that she was subjected to racially motivated jokes and derogatory comments about Hispanic people by her supervisors. After a verbal altercation, she yelled at one of her supervisors, commenting "maybe I'm not white enough," and then called the matter to the attention of human resources. She was suspended for her comments back to her supervisors, and later asked to be transferred to a different department. Her request was denied, but she was offered (and accepted) leave under the Family and Medical Leave Act (FMLA). Toward the end of her leave, she was counseled for performance issues that had previously occurred but never been documented. She never returned to work after her leave expired, and was terminated. The employee sued for race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. The U.S. Court of Appeals for the Tenth Circuit found that while the district court had, in finding for the

employer, considered the comments as “a handful of racially insensitive jokes and comments over a period of more than three years,” there is no mathematical test for determining what constitutes “pervasive” conduct in a situation like this. The court concluded that a reasonable jury could find that the employee was subjected to intimidation, ridicule and insult that was sufficiently severe and pervasive enough to change the terms and conditions of her employment. Although offhand, trivial and sporadic comments rarely give rise to an actionable claim for hostile work environment, depending upon the circumstances, an employee may be able to make a viable claim. Employers must therefore ensure that employees are properly trained in anti-harassment and anti-discrimination policies, and that supervisors are trained as to how to investigate and correct any behavior called to their attention.

Hernandez v. Valley View Hospital Assn., No. 11-1244 (10th Cir. June 26, 2012)

For more information contact Mellissa A. Schafer

Court Remands NLRB Decision on Unilateral Change as Departure from Precedent

Union employees at their employer’s two plants were covered under a group health plan sponsored by the employer. The group health plan document provided that the employer had the right to change or discontinue the plan as long as the changes were announced at open enrollment. After the collective bargaining agreement (CBA) covering employees at both plants expired and successor agreements were being negotiated, the employer unilaterally made changes to the group health plan. The National Labor Relations Board (NLRB) found that the employer had engaged in unfair labor practices by making unilateral changes between the expiration of one and the negotiation of another CBA without having established a past practice to justify its unilateral changes during such a hiatus. The U.S. Court of Appeals for the District of Columbia declined to enforce the NLRB’s ruling, stating that the NLRB had departed, without reasonable justification, from precedent that allowed an employer to make limited unilateral changes during an interval between successive contracts when doing so was established practice. The court stated that the changes to the health plan were similar in scope to changes made in prior years and limited by the benefit plan, and were therefore consistent with NLRB precedent. As the changes to the health plan became a term and condition of employment, the employer could lawfully continue during the annual enrollment period irrespective of whether negotiations for successive contracts were ongoing. The court remanded the case to the NLRB with instructions to apply the precedent or explain its decision to depart from it. Employers may be able to exercise discretion to take unilateral action during times when negotiations for successive contracts are going on if consistent with previous actions taken.

E. I. du Pont de Nemours & Co. v. NLRB, No. 10-1300 (D.C. Cir. June 8, 2012)

Contact for more information: Elizabeth H. Earl

Deaf Employee Unable to Perform Essential Functions of Job Due to Inability to Verbally Communicate

A deaf individual who was hired to perform customer intake, sales, portrait photography and laboratory duties at a photography studio communicated through written notes, gesturing, pointing, miming and sign language. Because even the employee's written communications were poor, and she was unable to communicate with the subjects (who were often small children), she was placed on a performance improvement plan. After the busy holiday season, most employees had their hours reduced, including this employee. She was subsequently terminated due to lack of work. The U.S. Equal Employment Opportunity Commission (EEOC) filed suit on behalf of the employee, claiming that the employer had violated her rights by discriminating against her based on her disability in violation of the Americans with Disabilities Act (ADA). In determining whether the employee was a qualified individual, the U.S. Court of Appeals for the Tenth Circuit found that the employee was unable to perform three of the four essential duties of her position. The court reasoned that even with the suggested accommodation of an interpreter, the employee would still be unable to interact verbally with customers, which was an essential function of her position. The court ultimately determined that because she could not establish that she was qualified—with or without accommodation—to perform an essential function of her job, and because she could not provide evidence that the employer's legitimate, nondiscriminatory reasons for its employment decisions were pretextual, the employee could not prevail. Employers can establish essential functions of the position which are job-related, uniformly enforced, and consistent with business necessity.

EEOC v. The Picture People Inc., No. 11-1306 (10th Cir. July 10, 2012)

Contact for more information: Amanda Mattocks

Delivery Company Not Joint Employer for Purposes of FLSA Overtime Claim

A class of package-delivery drivers sued their employer, alleging that they were not paid overtime compensation pursuant to the Fair Labor Standards Act. The drivers were actually employed by an independent contractor who worked with the delivery company, but they sued the independent contractor and the delivery company under the theory that they were "joint employers." The relationship between the independent contractor and the delivery company was specified through a written contractual agreement, and on that basis, the delivery company sought to be dismissed from the lawsuit on the grounds that it was not the drivers' employer. The parties ultimately stipulated to the dismissal of the independent contractor, and the case proceeded against the delivery company. The delivery company then moved for summary judgment, seeking dismissal because it was not the employer of the drivers. The U.S. Court of Appeals for the Eleventh Circuit found that the delivery company had no financial or managerial responsibilities with respect to the drivers, and had no control over the hiring, firing, or paying of the drivers. The totality of the circumstances confirmed that the drivers were not employees of the delivery company. Joint-employment relationships can cause confusion as to a company's status as an employer. Therefore, before entering into any such relationship, it is important that the rights, obligations and duties of each entity are set forth in a written agreement, and that employees are made aware of which entity is their actual employer.

Layton v. DHL Express (USA), Inc., No. 11-12532 (11th Cir. July 9, 2012)

Contact for more information: Heidi Eckert

Police Officer Trainee Not Limited to Title VII for Discrimination Claim

A former police-officer trainee claimed that while in the police academy for training to become a police officer, she was repeatedly subjected to sexually harassing comments, discriminatory actions, and physical assault by her male trainers. The trainers subsequently issued a memorandum indicating that she would not graduate from the academy, which meant that she would not be able to join the police force. The trainee sued the city board of police commissioners and various individual officers, claiming that she had been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, and for violations of the Fourth and Fourteenth Amendments to the U.S. Constitution. The U.S. Court of Appeals for the Eighth Circuit reasoned that although Title VII provides the exclusive remedy for violations of its own terms and an employee seeking relief under this provision must comply with the act's procedural requirements, and while an employee may not invoke a purely remedial statute (such as 42 U.S.C. § 1983) to redress a right conferred only by Title VII, where an employer's conduct violates Title VII and rights conferred by an independent source, "Title VII supplements, rather than supplants, existing remedies for employment discrimination." Thus, the court found that although Title VII provided the exclusive remedy for the trainee's discrimination claims, its exclusivity ceased when the employer's conduct also amounted to a violation of a constitutional right. Here, then, where the employee asserted a violation of a constitutional right, she could sue under Section 1983 alone without having to plead a Title VII violation and comply with the act's procedural requirements. There exists a host of federal and state law providing bases for employees to make claims of discrimination. For that reason, it is important for employers to be aware of the employment and civil rights laws in their jurisdiction to ensure compliance with all applicable law.

Hensley v. Sgt. Bill Brown et al., No. 11-2561, (8th Cir. July 25, 2012)

Contact for more information: Amy K. Jensen

"Ambush Election Rule" Remains Invalidated, Despite NLRB Challenge

The U.S. Chamber of Commerce (Chamber) sued the National Labor Relations Board (NLRB), seeking to invalidate the "ambush election rule." The Chamber claimed that the rule would make responding to union campaigns more difficult for employers. The Chamber further argued that the rule imposes drastic changes to the procedures for conducting workplace elections, which in turn deprives employers of a fair opportunity to explain the consequences of unionizing to its employees. The Chamber asked the court to strike the rule on the grounds that it was issued without the statutorily mandated quorum in that only two of the board members made the decision. Under *New Process Steel v. NLRB*, No. 08–1457 (S.Ct. June 17, 2010), the NLRB must have a quorum of three members to issue new rules. The U.S. District Court for the District of Columbia struck down the rule. Thereafter, the NLRB sought to amend the judgment based upon further argument and evidence. The court declined to amend the judgment, reasoning that the arguments made had already been presented to and ruled upon by the court, and that despite proffering new evidence, there was no explanation as to why the NLRB failed to

present the evidence previously. Nor did the NLRB demonstrate that the court's finding was "clear error." Thus, the "ambush election rule" remains invalidated for the time being. Employers should nevertheless ensure familiarity with election rules and understand employee and employer rights and responsibilities during the process.

Chamber of Commerce of the United States of America v. National Labor Relations Board, No, 11-2262 (July 27, 2012)

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