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Newsletters

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Referral System Used to Prevent Salting Violates NLRA

A nonunion trade association operated an employee referral system for its members, who were nonunion electrical contractors. The association would receive applications from electricians and sort them based on each applicant's level of experience. Applicants were not allowed to learn which members had reviewed their applications, nor were they permitted to review their own applications once submitted. The association also offered a "shared man" program, through which members could borrow employees from other members for up to 60 days. During the same time period, the electricians' union began a campaign directed toward the association's members designed to instill union organizers in the contractors' workforces. This is commonly referred to as "salting." Shortly after the salting campaign began, the association instituted a $50 fee for each subsequent application received by an applicant within a 30-day period. The only exception was for individuals who had been terminated from a member contractor within the last 30 days. In its monthly publications to members, the association repeatedly asserted that its referral system helped its members avoid the risk of salting posed by the union's campaign. The union filed a charge against the association with the National Labor Relations Board (Board), alleging that the referral system violated union members' rights under the National Labor Relations Act (NLRA) by making it less likely that they would be hired as compared to nonunion applicants. The Board agreed. In support of its ruling, the Board focused on the association's own assertions within its newsletter that the referral system protected members from salting. Additionally, the Board asserted that the "shared man" program and $50 application fee increased the ability of members to utilize employees known to be nonunion. Further, it asserted that the inability of applicants to learn which employers were reviewing their applications decreased the likelihood that salts would be hired because they could not determine whether they had been considered and rejected. Recognizing that salting constitutes protected activity under the NLRA, the Board ruled that the referral system interfered with the rights of union applicants by decreasing the overall likelihood of hire for such individuals. Employers must take care to avoid efforts which reference or affect directly the hiring of union organizers and, instead, focus on acceptable methods of maintaining a union-free workplace.

KenMor Elec. Co., Inc., 355 NLRB No. 173 (Aug. 27, 2010)

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Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

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Partial Blindness and Hepatitis C Not Qualifying Disabilities Under ADA

An administrator for a railway's employee assistance program suddenly became legally blind in his left eye. He also suffered from Hepatitis C. The employee sought accommodations including a larger computer monitor, shorter work weeks, and permission to work from home. The employee's supervisor approved only the larger monitor. When the employee's computer was later stolen from work, he expressed his anger regarding the accommodations he had received, asserting that the theft would not have occurred had he been able to work from home. Around that same time, the employee's supervisor got approval to have his position outsourced in order to cut costs, leading to the employee's termination. The employee sued, alleging that the employer had discriminated against him because of his vision and his Hepatitis C and that he was terminated in retaliation for his request for accommodation. The U.S. Court of Appeals for the Eighth Circuit rejected the employee's claims, finding that his vision impairment did not constitute a qualifying disability under the Americans with Disabilities Act (ADA) because the employee "failed to show that any restrictions resulting from his monocular vision substantially limited his major life activities." The court explained that monocular vision did not make the employee disabled per se and that he did not provide evidence showing "the degree to which he *personally* is limited by his conditions." The same conclusion was reached regarding the employee's Hepatitis C, which his physician described as "definitely not disabling in any way." Finally, the court rejected the employee's claim that he was terminated in retaliation for seeking accommodation. The court first noted that the employee's claim did not square with the ADA's retaliation provision, which protects employees who oppose "any act or practice made unlawful" by the ADA, not necessarily those who have sought accommodation. Even if requests for accommodation were proper grounds for ADA retaliation claims, the court found that "no reasonable jury could find [that the employee's complaint about his stolen computer] amounted to a request for reasonable accommodation." While not all impairments are qualifying disabilities under the ADA, employers must not discriminate against employees with disabilities, and where a disabled employee requests accommodations, employers should engage in the interactive process called for by the ADA.

Kirkeberg v. Canadian Pac. Ry., No. 09-1422 (8th Cir. Aug. 27, 2010)

Employers Using Materials That Have Moved Interstate May Be Covered by FLSA

Employees working as landscapers, security-system technicians and construction workers sued their respective employers alleging violations of the Fair Labor Standards Act (FLSA). The employers were all located in Florida and provided services for local Florida residents. The employees claimed that their employers failed to pay them the minimum wage, overtime or both, in violation of the FLSA. The district courts found that by purchasing their goods and materials in Florida, and by only doing business within Florida, the employers did not engage in interstate commerce to trigger FLSA coverage. The U.S. Court of Appeals for the Eleventh Circuit reversed, finding that the district courts had misapplied the "handling clause" of the FLSA, which allows FLSA coverage over an employer who has employees "handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." The court explained that "the inquiry for [FLSA coverage] is whether the 'goods' or 'materials' were in the past produced in or moved interstate, not whether they were most recently purchased intrastate." The court did recognize an exception to the "handling clause," under which FLSA coverage does not extend to an employer who is the "ultimate consumer" of interstate goods its employees are handling. However, the court emphasized that the "ultimate consumer" exception does not apply to "materials," such as tools used by an employer. Therefore, even if an employer bought tools locally for its own use, if the tools were previously moved in interstate commerce, their use would subject the employer to FLSA coverage. Accordingly, the court concluded that the Florida employers would be covered by the FLSA based on their employees using lawn mowers, trucks, pencils, gasoline, key pads and wires that were produced for interstate commerce, so long as those items could be categorized as either "goods" (where the employer was not the ultimate consumer) or "materials." To ensure that employees are being lawfully compensated and avoid liability, employers must be proactive when determining whether they are covered by any of the FLSA's provisions.

Polycarpe v. E & S Landscaping Serv., No. 08-15154 (11th Cir. Aug. 31, 2010)

ERISA Collective Action Defeated by Termination Defense

A subcontractor and a laborers' union entered a collective bargaining agreement (CBA) that bound the employer to

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subsequent agreements reached by the union and a multi-employer bargaining unit, unless the employer notified the union to the contrary at least 60 days prior to contract expiration. Sixty-four days prior to contract expiration, the subcontractor sent a letter to the union stating its intent to terminate the CBA if changes to the agreement were not negotiated to its satisfaction. The union refused to individually negotiate with the subcontractor prior to the expiration of the CBA. Consequently, when the new CBA was entered into by the union and multi-employer bargaining unit, the subcontractor refused to submit to an audit to determine the amount of money it owed to a fringe benefit trust fund (Fund). The union sued for violation of the CBA and the Fund brought an ERISA action to collect unpaid fringe-benefit contributions. The subcontractor argued that its letter terminated its obligations to the Fund under any subsequent CBA. The U.S. Court of Appeals for the Sixth Circuit agreed, ruling that a termination defense is effective against an ERISA collective action where the intent to terminate is "unequivocally communicated." Although the subcontractor's letter made termination conditional, it satisfied this requirement because "conditionality does not automatically equal ambiguity, at least where the condition is entirely straightforward and its satisfaction (or not) is evident to all parties." Therefore, when the union refused to bargain individually with the subcontractor, the condition for termination was met, supplying the subcontractor with a valid termination defense. When seeking to terminate a collective bargaining agreement, employers must express their intent to the union in a clear and unequivocal manner.

Laborers Pension Trust Fund-Detroit & Vicinity v. Interior Exterior Specialists Constr. Group Inc., No. 08-2526 (6th Cir. Sept. 8, 2010)

Ninth Circuit Reverses Summary Judgment for Employer in Female-on-Male Sexual Harassment Case

A male passenger service assistant made complaints about a female co-worker who repeatedly asked him out on dates, gave him sexually-related notes and pictures, and persistently pursued a sexual relationship with him, all of which he refused. The assistant complained to at least four different members of management, none of whom actively took any steps toward preventing further incidents from occurring. As a result of the harassment and unresolved complaints of harassment, the assistant suffered from emotional distress, which impacted his work performance. He was demoted and subsequently terminated. He then sued the employer claiming that he was subjected to a hostile work environment based on his sex in violation of Title VII of the Civil Rights Act of 1964, as amended. The employer argued that the conduct that the employee had complained of was not sufficiently severe or pervasive to constitute a hostile work environment, further noting that the assistant admitted that most men in his position would have welcomed the attention and that he was only embarrassed because of his Christian background. The employer further noted that the assistant never made a written complaint of harassment, and that management had, in fact, informed the female co-worker that her behavior was not appropriate. On these grounds, the district court ruled in favor of the employer. The U.S. Court of Appeals for the Ninth Circuit reversed, finding that the co-worker's continued advances were unwelcome and created an environment that the assistant reasonably perceived as hostile and abusive, particularly because he repeatedly and clearly rejected her overtures. This case serves as a reminder that it is not enough to simply have a sexual harassment policy, but rather an employer must also adhere to and enforce the policies set forth. To appropriately manage risk, employers must undertake a prompt and thorough investigation of any sexual harassment complaints, and remember that different standards do not exist based upon the victim's gender.

EEOC v. Prospect Airport Servs. Inc., No. 07-17221 (9th Cir. Sept. 3, 2010)

Employer's Failure to Keep Complainant Informed of Remedial Measures or to Follow Through on Discipline May Constitute Insufficient Response to Harassment

A female employee worked as a physical therapist at the same health clinic as a male chiropractor. For two years, the male chiropractor subjected the employee to unwanted touching, culminating in the chiropractor kissing the employee's forehead. The employee then complained twice to the health clinic's practice manager, and later to the clinic's owner and president about the chiropractor's conduct throughout the course of her employment. Three female patients also complained about the same chiropractor. The employer took no immediate action regarding the chiropractor's behavior, forcing the employee to complain once again. Finally, the employer confronted the chiropractor. However, the chiropractor refused to sign a statement acknowledging the complaints or to attend counseling. After the chiropractor was confronted by the employer, he began to act in "intimidating" ways toward the employee. The employer promised the employee that

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the chiropractor would be terminated within 45 days. However, no such action was taken. Several months later, the employee resigned and sued the employer, claiming that she had been constructively discharged due to the hostile work environment she had been subjected to, in violation of Title VII of the Civil Rights Act of 1964, as amended. After a jury awarded the employee $100,000 in damages, the U.S. Court of Appeals for the Eighth Circuit affirmed. The court noted that the employer took no action after the employee's first complaint, waited seven weeks to confront the alleged harasser after her second complaint, failed throughout to keep the employee informed, and never identified who was responsible for the investigation. Moreover, the employer never enforced its remedial demands to the alleged harasser while the alleged harasser continued to intimidate the employee. Upon receiving complaints of sexual harassment, employers should designate a person responsible for investigation, keep the complainant apprised of the employer's response, and follow through on remedial measures imposed upon the alleged harasser.

Sheriff v. Midwest Health Partners P.C., No. 09-3367 (8th Cir. Aug. 30, 2010)

"Negative Certification" Does Not Preclude FMLA Claim

A receptionist missed several consecutive days of work, claiming that her absences were related to a serious health condition. In order to determine if the employee's absence was permissible leave under the Family Medical Leave Act (FMLA), the receptionist's supervisor made an oral request that she provide a medical certification confirming her inability to work. When the employee returned a certification from her physician, it indicated that she did not suffer from a FMLA-qualifying condition and that she could in fact return to work. The employer argued that the "negative certification" served as a legitimate basis on which to terminate the employee for excessive absenteeism. The U.S. Court of Appeals for the Sixth Circuit held, however, that the employer could not rely upon the employee's failure to provide a medical certification as a basis for terminating her employment because her supervisor had failed to make a written request for certification, as required under the FMLA. This case makes clear that whenever an employee seeks FMLA leave for his or her own serious health condition or to care for a family member with a serious health condition, the employer's request for a medical certification must be made in writing, and the employee must be notified of the possible consequences of failing to provide a certification.

Branham v. Gannett Satellite Information Network, No. 09-6149 (6th Cir. Sept. 2, 2010)

No FLSA Claim Where Workers Were Paid Commission

Call center employees who sold weight loss programs were paid the greater of either their hourly pay or a flat-rate payment per each sale they made in a given pay period. Under this system, most of the employees were compensated using the flat-rate per sale calculation, and they did not receive any overtime pay. This led to the employees bringing a collective action alleging they were denied overtime pay in violation of the Fair Labor Standards Act (FLSA). The U.S. Court of Appeals for the Third Circuit denied the employees' claims, finding that the employer's compensation system fell within an exception to FLSA coverage because the employees' "earnings result[ed] from the application of a bona fide commission rate." The court rejected the U.S. Department of Labor's (DOL) contention that the employees' pay was not commission because it was not based on a "strict percentage relationship" whereby pay to the employee increases as cost to the consumer goes up. Rather, the court determined that the flat rate paid to the employees was a commission because it was based on the employees' sales, and was "proportionally related to the charges passed on to the consumer." The court also noted that the method of compensation provided an incentive to sales associates to make more sales calls and compensated for actual time worked. Employers should be cognizant of whether their method for calculating employee compensation excludes them from FLSA coverage.

Parker v. NutriSystem Inc., No. 09-3545 (3rd Cir. Sept. 7, 2010)

Cancer in Remission Qualifies As Disability Under ADAAA

More than a year after a service technician had surgery for renal cancer, his employer informed him that in order to meet customer demand, all service technicians would need to work 65 to 70 hours per week rather than the 40 hours per week they had been working. The service technician objected and provided the employer with a doctor's note stating that he was limited to his existing 40-hour schedule. Initially, the employer informed the service technician that it could not accommodate the 40-hour schedule, but later proposed that the service technician work a 40-hour week from the

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company's corporate office. The service technician rejected this proposal because it would require a daily two- to three-hour commute for which he would not be compensated. This left the parties at an impasse, and the company ultimately terminated the service technician. The service technician sued, alleging that the employer had failed to accommodate his disability and fired him because he was disabled or regarded as disabled under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act (ADAAA). The employer moved for summary judgment, arguing that the service technician did not have a qualified disability because his cancer was in remission at the time of the events in question. After reviewing the ADAAA's express language, the stated purpose of the Act, and the interpretive regulations of the U.S. Equal Employment Opportunity Commission, the U.S. District Court for the Northern District of Indiana held that an employee who has cancer is considered disabled under the Act regardless of whether his or her cancer is in remission at the time of the adverse employment action. The ADAAA, which became effective January 1, 2009, significantly broadened the application of the ADA by clearly providing that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Thus, the service technician did not need to demonstrate that his cancer substantially limited him in a major life activity at the time of the adverse employment action to recover on his claims. This case is one of the first published opinions to address the new ADAAA standards for identifying disabilities, and the court's ruling is indicative of how other courts will apply the new standards. Employers should be mindful of the broader definition of disability being applied by the courts under the ADAAA when confronted by employees seeking accommodations for a disability.

Hoffman v. Carefirst of Fort Wayne, Inc., d/b/a Advanced Healthcare, No. 1: 09-cv-00251 (N.D. Ind. Aug. 31, 2010)

Employee Owed Benefits Under Severance Plan Due to the Totality of the Circumstances

An employee of a subsidiary company participated in a severance benefits plan offered by the parent corporation. The plan provided for benefits where employment was terminated due to a business reason not related to individual performance. No benefits were to be paid, however, where a participant's employment was terminated due to the sale of a subsidiary to a successor employer that would provide comparable employment after the sale closed. The subsidiary was later sold to an unrelated purchaser, and the employee’s employment was terminated the following day. The employee made a claim for benefits under the severance plan, which was denied by the parent corporation based on the "sale of business" exception to providing benefits. The employee sued, alleging that the plan administrator abused its discretion in denying benefits under the severance plan. The parent corporation argued that it was entitled to use a "snap shot" approach where the employee’s momentary employment for a few hours after the sale closed was sufficient to rely on the "sale of business" exception. The district court granted summary judgment to the employee. The U.S. Court of Appeals for the Third Circuit affirmed, finding that the "sale of business" exception did not apply when employment after the sale was *de minimis*. The court noted that the denial of benefits in such circumstances would be flatly inconsistent with the stated purpose of the plan. Employers that offer benefits based on a specified event (termination of employment, change of control, etc.) should examine the totality of the circumstances surrounding that event, rather than relying on a "snap shot" approach, in determining claims for benefits.

Howley v. Mellon Fin. Corp., No. 08-1748 (3d Cir. Aug. 31, 2010)

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