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Newsletters

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Supreme Court Reinstates Firefighters' Case Alleging Discriminatory Eligibility Testing

A city fire department announced the results of a firefighter entry exam and the cutoff scores for qualified applicants in January 1996. Under the city's announcement, candidates with test scores of 89 or higher were deemed "well qualified," while applicants who scored between 65 and 88 were deemed "qualified," but should not expect to be selected for hire. The city used this list of qualified applicants to hire firefighters on 11 occasions between 1996 and 2002. After the city's second round of hiring, in March 1997, a "qualified" African American candidate filed a race discrimination charge with the Equal Employment Opportunity Commission (EEOC). A group of African American candidates later filed a class action lawsuit against the city, claiming that the city's test results were biased and that its hiring practices relying on the results were discriminatory. The U.S. Court of Appeals for the Seventh Circuit ruled that the candidates' claims had to be dismissed because none of the candidates had filed an EEOC claim within 300 days of the city's announcement of its test results and use of the test scores for hiring, which the Seventh Circuit believed to be the only adverse employment decision at issue. The U.S. Supreme Court unanimously reversed, holding that the later use of the test scores, and what the Court called an arbitrary cutoff score, for hiring purposes caused a disparate impact to African American candidates. The Court held that the candidates had filed EEOC complaints within 300 days of each new discriminatory practice when the city hired from its eligibility list. Further, the Court noted that plaintiffs in disparate impact cases need not show discriminatory intent within the limitations period, only an adverse and discriminatory impact on a protected class. This case is another in a string of recent Supreme Court decisions rejecting technical and/or timing defenses in favor of greater employee protection against discriminatory practices of employers.

Lewis v. City of Chicago, No. 08-974 (U.S. May 24, 2010)

Supreme Court Clarifies Awarding of Attorneys' Fees in ERISA Cases

An employee participated in her employer's long-term disability plan. After leaving her job due to carpal tunnel syndrome injuries, the employee made a claim for benefits under the plan. The insurance company which served as the claims administrator for purposes of the plan approved the claim on a "temporary" basis, meaning that plan benefits under the plan would expire after

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24 months. Over that 24-month period, the employee's injuries worsened, and she was determined to be disabled by the Social Security Administration (SSA). The employee then sought a redetermination by the long-term disability plan that her injuries were permanent, citing the SSA determination and other new evidence. The insurance company reviewed her renewed application for benefits and denied the claim. The employee sued, alleging that the insurance company did not complete a full review of her revised claim. Both parties moved for summary judgment, and both motions were denied. The district court, however, noted that it was "inclined" to rule in the employee's favor, and instructed the insurance company to "adequately consider" all of the employee's evidence within 30 days. The insurance company did so, and approved her claim in full. On the basis of the district court's order, the employee moved for attorneys' fees and costs under section 502 (g) of the Employee Retirement Income Security Act of 1974 (ERISA). The district court awarded fees, but the U.S. Court of Appeals for the Fourth Circuit vacated the order, finding that the employee was not a "prevailing party" at the lower court level. The U.S. Supreme Court reversed, noting that the plain language of the statute allows a court to award reasonable attorneys' fees and costs in its discretion to either party. Therefore, in order to recover attorneys' fees under this section of ERISA, a party must only show "some degree of success on the merits," and is not required to be a prevailing party.

Hardt v. Reliance Standard Life Insurance Company, No. 09-448 (U.S. May 24, 2010)

One Strike and You're Not Out: Honest Mistake in Interpreting Employee Benefit Plan Does Not Gut Plan Administrator's Interpretive Authority

A federal court of appeals held that the administrator of an employer's pension plan unreasonably interpreted the provisions calculating participants' lump sum distributions under a pension plan. This was so even though the plan document expressly gave the administrator the discretionary authority to determine the amount of benefits and to construe and decide the meaning of all of the plan's terms. When the plan administrator undertook to interpret the same provision in the plan in a different but reasonable manner, the federal district court and court of appeals both applied a "one-strike-and-you're-out" approach. The lower courts found that the prior honest mistake in interpretation meant that no deference at all would be afforded to the plan administrator's new decision. The U.S. Supreme Court reversed, explicitly rejecting the lower courts' approach as an improper *ad hoc* exception to providing deference ordinarily given to a plan administrator's decision making. The high court reasoned that the approach taken by the lower court had no basis in either the plan provisions or the applicable law and that the Court's prior precedent, as well as the federal employee benefit plan statute, was designed to keep plan administrative costs down so as to encourage employers to keep and administer their plans with a predictable set of liabilities and uniform standards of conduct. Employers should review the written instruments for all of their plan documents to ensure that the provisions governing how the plans are to be interpreted vest full discretionary authority in the plan administrators to decide claims and interpret the plan terms.

Conkright v. Frommert, No. 08-810 (U.S. Apr. 21, 2010)

Insubordination Dooms Age and Gender Discrimination Claim

A data manager for a trucking company shared an office with another employee whom she did not like. The other employee engaged in long, personal phone calls during working hours, and this led to conflict between the data manager and her. Eventually, the company's two owners attempted to mediate a resolution. The meeting did not go well. The following day, the data manager ignored a morning greeting from one of the owners and acknowledged a greeting from the other in an "exaggerated manner." Exhausted by the data manager's theatrics, the owners terminated her for insubordination. The data manager sued, alleging that male employees and younger employees were not similarly discharged for insubordination. Ultimately, however, the data manager could not establish that any other employees acted similarly to her, and she acknowledged that the owners truly believed that she had been insubordinate. As a result, she could not sustain a discrimination claim because the law does not look at whether the discipline imposed was appropriate, but rather to whether the reason given for why it was imposed was honestly believed. Employers should properly document misconduct if it will serve as the basis for discipline.

Everroad v. Scott Truck Systems, Inc., No 08-3311, (7th Cir. May 10, 2010)

Construction Company Bound to Signed, but Unread, Collective Bargaining Agreement

A non-union construction company, subcontracting on a university housing project, signed a collective bargaining agreement (CBA) between a construction employer association and a laborer's union without reading it, under the mistaken belief that the CBA expired at the conclusion of the project. In fact, the CBA applied to all concrete work the company would perform in the state during the next five years. The company admittedly violated the CBA when it began work on a new project with a non-union general contractor and did not pay union wages or make benefit fund contributions in accordance with the CBA. More than six months later, the union filed a complaint against the company for repudiating the CBA. The National Labor Relations Board (NLRB) found that the company's repudiation of the CBA interfered with the employees right to bargain collectively through representatives of their choosing and thus violated §§ 8(a)(1) and (a)(5) of the National Labor Relations Act (NLRA). The U.S. Court of Appeals for the Seventh Circuit affirmed the decision and rejected the company's three defenses. The Seventh Circuit held that the company had waived its affirmative defense under § 10(b) of the NLRA that the union untimely filed its unfair labor practice charge because it did not raise the issues in its answer or at the hearing before the administrative law judge. The company also waived its common law waiver argument because it presented conflicting evidence as to whether the contractor had earlier knowledge of the repudiation that would have caused the limitations period to run. The company's jurisdictional argument that the NLRB should have deferred the matter in favor of arbitration was held unavailing because the company did not raise the issue before the NLRB. Employers must thoroughly examine the provisions of any collective bargaining agreement before entering into such contracts with unions and/or employees.

Sheehy Enterprizes, Inc. v. NLRB, 09-1383 & 09-1656 (7th Cir. May 10, 2010)

References to Prior Leave Sufficient to Send FMLA Claims to Trial

A county administrative assistant was terminated two weeks before she was scheduled to begin two months of leave under the Family Medical Leave Act (FMLA). The employee sued alleging that her employer had interfered with her right to reinstatement, and terminated her in retaliation for taking FMLA leave. The employer argued that the employee was terminated because she lacked a certain job skill set. The U.S. Court of Appeals for the Seventh Circuit held that while a jury could believe that the employee was terminated because the employer wanted a more qualified individual in her job, comments suggesting her supervisor's dissatisfaction with her prior use of FMLA leave, her positive performance reviews, and the timing of her termination, could allow a jury to find that the decision to terminate the employee was due to her protected FMLA activity. Employers must be careful when taking actions with respect to an individual's employment status that may be interpreted as retaliation against the employee for use of statutorily protected leave.

Goelzer v. Sheboygan Cty., No. 09-2283 (7th Cir. May 12, 2010)

Firefighter With Protectable Interest Raises Triable Issue Regarding Removal

Prior to resigning in lieu of termination, a firefighter received performance evaluations from his supervisor that noted numerous areas of concern and warned that his "administrative functions" and "personal and business issues" were distracting him from his job duties. The firefighter sued alleging that his employer violated his due process and First Amendment rights by terminating him for engaging in pro-union speech. The U.S. Court of Appeals for the Seventh Circuit first had to determine whether the firefighter, who was terminated 16 months after his date of hire, but who spent approximately four of those months on medical leave, possessed a protectable interest in continued employment under the Illinois Fire Protection Act (Act), which protects a firefighter from termination without cause if he "held that position for one year." The Seventh Circuit held that the Act's protection extends to a firefighter who has held his position "one year after the firefighter has been appointed to the job and begins to perform services for which [s]he will be remunerated." The Seventh Circuit rejected the alternative interpretation that would limit the Act's coverage to firefighters who perform the duties of the position for one year. On the First Amendment question, the court held that a trier of fact could conclude that the firefighter's speech, comprised of general statements of ideological support for unions, was the "but for" cause of his resignation in lieu of termination. The Seventh Circuit held that the supervisor's performance evaluations and comments to the fire department's board of trustees that the firefighter "caused unrest for co-workers," that he presented a "constant challenge of authority," and that "imperative nonsense . . . brings the organization down," could be understood as anti-union

animus that unconstitutionally influenced the recommendation to dismiss the firefighter. Although employers can require that employees devote their full working attention to their job responsibilities while on duty, they must be careful not to interfere with employees' right to organize and collectively bargain.

Kodish v. Oakbrook Terrace fire Protection Dist., 08-1976 (7th Cir. May 10, 2010)

Employee Who Resigned After Acquittal of Criminal Charges Did Not Prove Adverse Employment Action

A former correctional officer who was acquitted of criminal charges of custodial misconduct resigned after his acquittal. The correctional officer then sued the sheriff's department, alleging: gender and race discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended; gender and race discrimination under Section 1983; First Amendment retaliation; malicious prosecution; and intentional infliction of emotional distress. The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment in favor of the sheriff's department on the officer's discrimination claims, holding that the officer failed to show that he experienced an adverse action. The officer argued that he was constructively discharged but did not claim intolerable working conditions other than being suspended after an investigation and being on paid leave pending a hearing. The court affirmed the district court's finding that the officer did not show gender bias where the sheriff's department offered legitimate, nondiscriminatory reasons for its removal of male officers from the women's division. The court further held that the officer had not established a *prima facie* case of First Amendment retaliation because the alleged speech was "too far removed to support an inference of retaliatory motive" and that no rational juror could find that the department's reasons for taking action against the officer were pretextual where there was substantial evidence that the officer had violated general orders and even criminal law by engaging in sexual relations with a female detainee. The court also affirmed the district court's dismissal of the officer's retaliation claim under Title VII because his charge did not include an allegation of retaliation. The court found that the officer's claim of malicious prosecution failed because the evidence presented did not negate the existence of probable cause at the relevant time, and that the intentional infliction of emotional distress claim failed because the officer was unable to meet the applicable "extreme and outrageous" standard. Employers must be careful to document their legitimate reasons for terminating, demoting or even transferring employees to avoid liability for retaliation or discrimination.

Swearnigen-El v. Cook County Sheriff's Dep't, No. 09-2709 (7th Cir. April 22, 2010)

Physical Ability Test May Lead to Sex Discrimination Liability

A female truck driver who was injured on the job was terminated after being given a physical ability test (PAT) not required of her male colleagues. The employee sued her employer under Title VII of the Civil Rights Act of 1964, as amended, alleging sex discrimination. According to the employer, the PAT demonstrated that she was unable to perform the physical requirements of her job. The U.S. Court of Appeals for the Fourth Circuit determined that the evidence showed that few if any males had been required to take the PAT when they sought to return to work. The employer's inability to produce any written policy showing when the test was required combined with other evidence suggesting sex-based animus led the court to conclude that a reasonable jury could find that the PAT was a pretext for gender discrimination. While physical ability tests are not unlawful in and of themselves, use of them in discriminatory ways may give rise to employer liability.

Merritt v. Old Dominion Freight Line Inc., No. 09-1498 (4th Cir. Apr. 9, 2010)

Judicial Forum Provision Struck Down for Insufficient Information Regarding Company Grievance Process

A husband and wife worked for the same employer. The husband was terminated, and he sued the employer, after completion of its four-step grievance process, alleging that he was retaliated against and wrongfully discharged because he was a member of Michigan's Army National Guard, and that he was retaliated against for filing a complaint with the Michigan Occupational Safety and Health Administration. The wife, although she was not terminated and did not utilize the employer's grievance process, joined in the lawsuit, claiming that: (1) she was subjected to a hostile environment and disparate treatment based on her sex; (2) she was retaliated against for filing an Equal Employment Opportunity Commission complaint; (3) the employer violated the Family Medical Leave Act (FMLA) by demoting her, threatening to replace her, not reinstating her to her prior position, and retaliating against her for taking pregnancy related FMLA leave.

The district court granted summary judgment for the employer, holding that the husband and wife knowingly and intelligently waived their right to a judicial forum under the employer's policy. The U.S. Court of Appeals for the Sixth Circuit reversed, striking down the provisions in the employment application that required applicants to waive their rights to a judicial forum for employment-related claims, and shortening the statute of limitations for employment disputes to six months. The Sixth Circuit held that the husband and wife could not have knowingly and voluntarily waived their right to a judicial forum because at the time they signed the waiver, they were not given information on the employer's grievance process, and they did not receive that information until they received an employee handbook at their orientation, nearly a month after they were hired. Employers should be aware that employees generally must know and understand the effect of a waiver of the right to a judicial forum before it will become effective and enforceable.

Alonso v. Huron Valley Ambulance, Inc., No. 09-1812 (6th Cir. Apr. 26, 2010)