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Newsletters

Employment Practices Alert - May 2010

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Arbitration Panel Exceeded Authority by Requiring Class Arbitration of Claims

A supplier sued a group of shipping companies alleging antitrust violations, and sought to maintain the case as a class action. Later, other companies filed similar actions and the cases were consolidated. After the supplier demanded that the dispute be resolved by way of class arbitration, the parties agreed that an arbitrator must decide whether the arbitration agreement contained in the contract between them permitted arbitration of class issues on a class-wide basis. The arbitration panel found that class arbitration was permissible. The shipping companies sought to vacate that ruling, which led to the claims being filed in both district and appellate court as to whether the arbitration panel was authorized to determine that arbitration of class claims was proper in absence of express consent of the parties. The matter made its way to the United States Supreme Court, which held that imposing class arbitration upon individuals who did not agree to class arbitration would be inconsistent with the Federal Arbitration Act, and that accordingly, the arbitrators exceeded their authority by requiring that the class arbitrate the claims even though the entire class had not agreed to do so, and even though there was no federal or state law compelling that result. This decision may have far-reaching implications for employers, who often require employees to arbitrate employment disputes.

Employer Not Required to Create New Position to Accommodate Employee

A female employee was originally hired as an electronic court reporter specialist in the control room of an Illinois county courthouse. A 2006 policy change eliminated the “court reporter specialist” position and consolidated all court reporters as “official court reporters,” who were to rotate through the courtrooms. The employee, who suffered from incontinence, was unable to remain at her post in open court for long stretches of time. The county proposed a number of possible accommodations for the reporter, but she insisted that she remain in her former position. The county ultimately terminated the reporter, and she sued under the Americans with Disabilities Act (ADA). The United States Court of Appeals for the Seventh Circuit found that the employer had fulfilled its obligation to offer a reasonable accommodation and that the employee’s refusal to consider any accommodation that required that she do in-court reporting strongly suggested that she believed that she was incapable of performing this function. Therefore, the court concluded that the employee was not a “qualified” individual under the ADA because she could not perform the

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essential functions of court reporter. Although an employer must be sure to offer employees with disabilities reasonable accommodations, it is not required to retain an employee whose disability makes it impossible for him or her to perform the essential functions of his or her job.

Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th, and 22nd Judicial Circuits, No. 08-3134 (7th Cir. Apr. 7, 2010)

Arbitrator May Award Pension Benefits Paid by Employer for Breach of CBA

Employees at an Oklahoma employer's manufacturing facility were represented by a union. The union negotiated for benefits to employees who were laid off when, or after, they turned 50, and had at least 10 years of service, to receive an employer pension and lifetime health insurance paid by the employer. The employer sold the facility and deemed the employees' "terminated as a result of divestiture." The employer's classification of the employees as "terminated" rather than "laid-off" resulted in the employees losing rights to the employer's pension and health benefits. The union filed a grievance claiming that the employer's refusal to treat the employees as laid off violated the collective bargaining agreement. An arbitrator ruled in favor of the union and directed the employees to apply for benefits from the plan administrator. If the plan administrator denied the claims, the employer was required to assume the plan's obligations and pay the benefits to the employees. The employer appealed, arguing that the arbitrator violated the Employee Retirement Income Security Act of 1974 (ERISA) by requiring the employer to pay benefits without the employees first filing an ERISA lawsuit. The United States Court of Appeals for the Seventh Circuit disagreed, finding the employer's argument that ERISA forbade the arbitrator to order such relief "frivolous." The court further reasoned that the arbitrator awarded what amounted to damages for beach of contract measured by the benefits of which the breach deprived the workers, who were third-party beneficiaries of the collective bargaining contract. This case highlights the difficulties that employers with union employees contracted to receive pension plans and lifetime health benefits may encounter in trying to divest themselves of these obligations.

Boeing Co. v. United Automobile Workers, No. 09-3542, (7th Cir. Mar. 18, 2010)

Employee Who Developed and Executed Marketing Plan Has No FLSA Overtime Claim

A waste management company employee's primary job duties were marketing, developing and then selling the company's services to commercial customers. She spent over half of her workday, and sometimes significantly more, outside of the office making sales and business development calls. She worked with the company's owner to target new business and attended weekly chambers of commerce meetings to represent the company's interests. While she had some customer service duties, such as responding to customer complaints, she also had the discretion to offer credits or set-offs to customers as a method of dealing with the problem. A disagreement arose between the employee and the company. The employee sued alleging that the company had improperly refused her overtime pay under the Fair Labor Standards Act (FLSA). The United States Court of Appeals for the Seventh Circuit disagreed, ruling in favor of the employer. The court found that the outside sales exemption applied to the employee, given her heavy emphasis on sales and the fact that these duties were generally performed outside of the office. The administrative duties that she performed, such as marketing and promotional duties, related directly to her outside sales work and therefore fell within the scope of this exemption. In the alternative, the court agreed that even if these marketing and promotional duties fell outside the outside sales exemption, they fell within the administrative exemption. When viewing these categories of job duties together, the employee was also covered by the combination exemption of the outside sales and administrative exemption. Although a number of exemptions to the FLSA exist, employers must take care in classifying employees as exempt from overtime to avoid litigation and potentially large wage claim liability.

Schmidt v. Eagle Waste & Recycling, Inc., 599 F.3d 626 (7th Cir. Mar. 22, 2010)

No Tolling of FMLA's Hour Requirement for Time Spent on Leave

An employee was terminated after she received eight "points" under her employer's "no-fault attendance policy." The employee sued under the Family and Medical Leave Act (FMLA), asserting that some of her points were accrued while she was on a protected leave under the FMLA. The employer responded by arguing that the employee's absences were

not protected because she had not worked the minimum 1,250 hours during the previous 12-month period, which is required in order to qualify for protection under the FMLA. The employee argued that a previous FMLA leave of 56 days should not be counted as part of the 12-month period; rather, she asserted that the period of consideration should have been extended over the 56 days preceding that first leave. If that was done, the employee would have been considered to have worked the requisite number of hours. The United States Court of Appeals for the Seventh Circuit rejected the employee's position, and held that the hours worked requirement must be satisfied during the preceding 12-month period, and would not extend it for time spent on a prior protected leave. Effective administration of FMLA leave hinges on an employer's ability to accurately manage the specific requirements for leave qualification, as this case demonstrates.

Bailey v. Pregis Innovative Packaging, Inc., No. 09-3539 (7th Cir. Apr. 2, 2010)

Officers' Donning and Doffing of Their Uniforms and Gear Not Covered by the FLSA

Police officers employed by an Arizona city contended that the employer violated the Fair Labor Standards Act (FLSA) by failing to compensate them for the time they spent donning and doffing their police uniforms and related gear (which usually included trousers, a shirt, a nametag, a clip-on or velcro tie, specified footwear, a badge, a duty belt, a service weapon, a holster, handcuffs, chemical spray, a baton, a portable radio and the optional body armor). A district court determined that because the police officers had the option of donning and doffing their uniforms and gear at home, these activities were, therefore, not compensable pursuant to the FLSA, as amended by the Portal-to-Portal Act. The police officers challenged the district court's entry of summary judgment in favor of the city. The United States Court of Appeals for the Ninth Circuit affirmed, agreeing that these activities were not compensable pursuant to the FLSA. The court concluded that donning and doffing at the employer's premises was not required by law, employer rule, or the nature of the work. Although the Ninth Circuit had previously stated that "under the FLSA employers must pay employees for all hours worked," it nevertheless concluded in this case that nothing compelled the conclusion that the donning and doffing of police uniforms and accompanying gear were compensable work activities. While employers may be required to compensate employees for the donning and doffing of certain protective gear necessary for the employees' job, there is a growing number of cases which have refused to require employers to pay employees for dressing in uniform, even where the employees change into their uniforms at the employers' place of business.

Bamonte v. City of Mesa, No. 08-16206 (9th Cir. Mar. 25, 2010)

Captain's "Shy Bladder" Does Not Insulate Him From Drug Test Failure

A sludge boat captain was required to maintain his United States Coast Guard issued pilot's license in order to perform the essential functions of his job with a New York City environmental protection agency. In December 2001, after approximately nine years on the job, the captain was deemed to have "refused" a random drug test after he failed to produce urine during a three-hour testing period. The captain denied that he "refused," but instead claimed to have a condition known as "shy bladder syndrome." The city suspended the captain, but gave him five days to get medical evidence confirming his condition. The captain returned with a doctor's note confirming the condition, as well as two drug tests, one hair test and one blood test, showing that he tested negative for illegal substances. The city reinstated the captain, but restricted his duty to land-based activities pending the outcome of his Coast Guard disciplinary proceeding. The Coast Guard ultimately ruled against the captain, and his license was suspended for a year. After his appeal was rejected, the city terminated him on the basis that he did not have the pilot license necessary to do his job. The captain sued, alleging that his "shy bladder syndrome" was a disability, and that the city had failed to accommodate his disability under the Americans with Disability Act (ADA). The U.S. Court of Appeals for the Second Circuit rejected the claim, holding that even if the captain's condition qualified as a disability, the city had accommodated the captain by allowing him the opportunity to get a doctor's note after the failed drug test. That note, the court found, did not comply with federal regulations regarding medical exemptions from the drug testing requirement. Thus, the captain had failed to take advantage of the accommodation offered. The Second Circuit also recognized that the Coast Guard's suspension of the captain's license resulted in the captain no longer being qualified for his position. While employers may use random drug testing in many instances to ensure the health and safety of their employees, employers should consider allowing reasonable testing accommodations to people with medical conditions that may make testing difficult.

Kinneary v. New York, No. 08-1130 (2d Cir. Mar. 19, 2010)

No Reverse-Discrimination Claim Where Emails Were Not Frequent or Severe

Alleging reverse discrimination based on her race, a Caucasian woman sued her former employer, a dog-racing track, under Title VII of the Civil Rights Act of 1964, as amended. The employee claimed that her supervisor had subjected her to a hostile work environment, eventually leading to her resignation. The supervisor had sent the employee demeaning or condescending e-mails about once a week for a two-month period of time. The e-mails criticized what the employee considered "petty" aspects of her work and suggested that she was incompetent. The supervisor also denied the employee a promotion and refused to grant her request for day shifts. Additionally, the employee believed that the supervisor sought to implicate her in a theft of $500 from a cash register. The employee admitted that she was never physically threatened, that her job was never threatened, and that she was never written-up or disciplined. The United States Court of Appeals for the Eighth Circuit found that the e-mails were neither frequent nor severe, the refusal of day shifts was not actionable conduct, and the promotion denial did not indicate discrimination because the position was given to a more qualified woman, who was also Caucasian. Based on its finding that there was no hostile work environment, the Eighth Circuit also found that the employee was not constructively discharged. Finally, the employee's retaliation claim was rejected because no adverse action was ever taken against her. While conduct must be severe or pervasive for an employee to succeed on a hostile work environment claim, employers should ensure that their employees are never treated offensively based on their race, color, religion, sex or national origin.

Helton v. Southland Racing Corp., No. 09-1674 (8th Cir. Apr. 5, 2010)

Withdrawal of Union Recognition by Majority Cannot Be Tainted

A manufacturer utilized by the United States Armed Services had a long-term relationship with the New England Joint Board and its bargaining unit. The company's assets were purchased and a new company was created. When the new company opened, a "Guiding Coalition" was established to effectively facilitate communications and decision making between management and the employees. Shortly thereafter, the union asserted that it was the majority representative of the production and maintenance employees, and asked for recognition and bargaining. The employees executed a petition stating that they declined union representation. The union filed an unfair labor practice charge, alleging that the "Guiding Coalition" interfered with the employee's organizing rights, and that the company was failing to bargain as required by the National Labor Relations Act (NLRA). The National Labor Relations Board (NLRB) in New York determined that because the new company was a successor company (due to its continuity of operations and the fact that a majority of its employees had previously been employed by the predecessor) it had an obligation to recognize and bargain with the union, but was not required to adopt or assume the collective bargaining agreement that the union had with the predecessor. The NLRB also determined that the new company could withdraw recognition if there was objective evidence that a majority of the employees in the bargaining unit no longer desired union representation. The NLRB further determined that the Guiding Coalition was a dominated labor organization and that the employees' petition was tainted by the maintenance of an illegally dominated labor organization, and that the refusal to bargain with the union violated Sections 8(a)(1) and (5) of the NLRA. Employers must be careful not to establish procedures or committees that interfere with employees' statutorily protected right to unionize and collectively bargain.

Bradford Printing & Finishing LLC, NLRB ALJ, No. 1-CA-45575 (April 14, 2010)