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Newsletters

Employment Practices Alert - March 2010

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Supreme Court Adopts “Nerve Center” Approach for Multistate Employers

Two California employees sued a national rental car company operating in California under state wage and hour laws. The two employees brought their claim in California state court and sought damages on behalf of a class of other California employees who had allegedly suffered similar wage and hour damages. The company, which is headquartered in New Jersey, attempted to remove the case from state to federal court. Removal is allowed in limited circumstances, including where there is “diversity of citizenship,” which means that all of the plaintiffs and all of the defendants are from different states. The employees sought to have the case sent back to state court, and argued that the rental car company did such significant business in California that it was rendered a California resident. Both the trial court and the Ninth Circuit agreed. However, the United States Supreme Court took up the case and reversed, holding that the company could maintain the case in federal court. In so doing, the Supreme Court adopted a “nerve center” approach to “diversity” cases, rejecting the old “principal place of business” analysis. Under the Supreme Court’s analysis, a company’s “nerve center” is the “place where a corporation’s officers direct, control and coordinate the corporation’s activities.” This is a significant victory for corporations that transact substantial business in multiple states. Many states have employment laws which are more favorable than federal law counterparts, especially with respect to wage and hour issues. Plaintiffs often forego claims under the federal Fair Labor Standards Act and instead utilize state law to seek individual and, more frequently, class relief. This decision ensures that corporations operating in multiple states will continue to have access to federal courts with respect to state law claims, rather than being forced into state courts, where plaintiff-employees may be treated more favorably.

Hertz Corp. v. Friend, No. 08-1107 (S. Ct. Feb. 23, 2010)

Employer’s Lack of Knowledge About Pregnancy Bars Employee’s Discrimination Claim

A field clerk for a company that produced crushed stone for road construction projects was transferred to a new office. Although the transfer was accompanied by a raise and increased job responsibilities, the clerk considered it a demotion. Specifically, she felt that the job ultimately limited her ability for advancement within the company, and, more importantly, that the transfer was made because she was pregnant. The trial court dismissed the case. On

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appeal, the United States Court of Appeals for the Seventh Circuit acknowledged that whether the transfer qualified as an adverse employment action was a close call. Ultimately, however, it did not need to decide that issue because the clerk could not establish that her boss knew that she was pregnant at the time the transfer decision was made. The clerk could only assert that her boss became aware of her pregnancy "shortly after" she became pregnant. The transfer decision was documented in writing only 10 days after the clerk became pregnant, and her boss testified that he was unaware of the clerk's pregnancy at the time he made the decision. As a result, the clerk could not establish that the decision was related to her pregnancy. This case demonstrates just how crucial timing can be, and that employers should take care to adequately document all significant personnel decisions and the bases for them.

LaFary v. Rogers Group, Inc., No. 09-1139 (7th Cir. Jan. 12, 2010)

Inappropriate Contact After End of Consensual Relationship Still Harassment

A male waiter had a nine-month sexual relationship with his female boss. The waiter explained that after he broke off the relationship, his boss would grab his genitals, ask for kisses, and touch his buttocks while he was at work. During the same time period, and as a result of the skin condition psoriasis, the waiter claimed that it was uncomfortable for him to wear underwear. After several incidents in which fellow employees observed the waiter naked while he changed in an employee break room, the employer asked him to change in the men's restroom instead. The waiter asked for the reasonable accommodation of allowing him to change in a different restroom in the basement that was not used by employees, but the employer refused. The employee filed a lawsuit alleging discrimination because of a disability and sexual harassment. The United States Court of Appeals for the Seventh Circuit explained that while the claims of disability were not appropriate, there was sufficient evidence to support the claims of sexual harassment. As to the disability claims, the court noted that psoriasis is not a covered disability because the waiter could not show that he was significantly restricted in a major life activity. However, the court explained that the boss' unwanted touching and kiss requests were sufficient to potentially show a hostile work environment sufficient to prove sexual discrimination. Employers should be aware that unwanted touching can give rise to a claim for sexual harassment.

Turner v. The Saloon Ltd., No. 07-2449 (7th Cir. Feb. 8, 2010)

First Amendment Does Not Protect Complaints About Lead at State Police Firing Range

A state police officer was assigned to manage a firing range where state police officers received firearms training and took firearms qualifications tests. Shortly after being assigned to the range, the officer began experiencing severe headaches, aching hips, and numbness and tingling in his extremities. A blood test revealed that the officer had elevated levels of lead in his blood. The officer filed a grievance with the state police union, alleging that his elevated levels of lead were a result of the range, and that the conditions at the range violated the collective bargaining agreement's safe working conditions provisions. The range was tested, and after results showed high levels of lead, it was closed for eight months for professional cleaning. The story received local media attention. After the officer was cleared to return to work, he sought a second medical opinion, which resulted in extended disability. When the officer did return, he worked only one week and again experienced symptoms that he claimed were related to lead exposure. The state police department had the officer examined by another physician, who found the officer's neurological test results to be normal and concluded that the officer could work, so long as he was not exposed to lead. The police department terminated the officer's disability benefits and ordered him to return to work. It required the officer to use personal days rather than sick time for additional leave, and paid him only for hours actually worked once his personal time was exhausted. The officer then sued under Section 1983 of the Civil Rights Act of 1871, alleging that the department had retaliated against him in violation of his First Amendment rights because his grievance forced the range to close and publicly embarrassed the department. The alleged retaliation included docking the officer's pay, refusals of requests to use sick leave, and misrepresenting to his coworkers that he was faking his illness. The trial court granted summary judgment to the department. The United States Court of Appeals for the Seventh Circuit affirmed, holding that although the officer's grievance constituted speech on an issue about which the public might have been interested, his purpose was strictly personal and internal to the department, and therefore not protected. A public employee who speaks publicly about a matter of public concern may have First Amendment rights against retaliation by his public employer. In this case, however, because the officer had filed an internal grievance addressing only the effects of lead contamination on himself and his work environment, the grievance

did not constitute public speech addressing a matter of public concern. Public employers must be careful not to retaliate against employees who speak publicly about political, safety, or other similar matters which impact the public generally.

Bivens v. Trent, No. 08-2256 (7th Cir. Jan. 6, 2010).

Employee Returning From Military Leave Only Entitled to Job With Pre-Leave Employer

A subcontractor providing rehabilitation services at a retirement home refused to hire a physical therapist returning from active military duty. The physical therapist's previous employer had a contract with the retirement home. During the physical therapist's leave, the former employer terminated its contract with the retirement home, and the retirement home entered into a contract with a new company. The new company in turn contracted with a rehabilitation services subcontractor. The subcontractor offered to consider the physical therapist for employment, and sent her a job application, but did not believe that it was obligated to hire her. The physical therapist sued the subcontractor pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA), which grants war veterans certain re-employment rights, alleging that the subcontractor: (1) discriminated against her based on her military status; and (2) was a successor-in-interest to the physical therapist's former employer. The district court granted summary judgment in favor of the subcontractor on both claims. The United States Court of Appeals for the Eighth Circuit affirmed, holding that: (1) the subcontractor was neither the physical therapist's employer nor a legally bound successor-in-interest to her former employer because the two were distinct and unrelated companies with no contractual or business relationship between them; and (2) there was no evidence that the subcontractor discriminated against the physical therapist based upon her military status. A company which has no relation or contractual ties to an employee's former employer is not obligated to reinstate the employee after his or her return from military leave. However, employers should offer to treat the employee as any other job applicant to avoid liability for discrimination pursuant to military status.

Reynolds v. RehabCare Group East, Inc., No. 09-1144 (8th Cir. January 14, 2010)

Salesperson Who Engaged in Strategic Planning Exempt Under the FLSA

A salesperson marketed a prescription drug made by her employer to physicians located in a specific geographic territory. The salesperson routinely worked over 40 hours per week performing these duties and preparing relating reports, although she did not receive overtime pay. Believing that she was improperly classified as exempt from the Fair Labor Standards Act (FLSA), the salesperson sued. The employer argued that the salesperson was properly classified as either an outside salesperson or under the administrative exemption to the FLSA. The United States Court of Appeals for the Third Circuit agreed, noting that the salesperson's job was to develop a strategic plan for marketing a prescription medication to physicians, and to then make inroads into their offices to make presentations about the drug. While the employer prepared the materials she used in her presentation and provided her with a list of physicians to target, the salesperson developed methods for introducing herself to physicians and their staff and for cultivating those relationships once she got her foot in the door. Moreover, all but five percent of her duties were performed without any supervision. The Third Circuit found that the employer had properly classified the salesperson as an administrative employee ineligible for overtime. While employers must be careful to properly classify employees under the FLSA, employees who exercise sufficient discretion, judgment and self-supervision may qualify for certain exemptions to the overtime requirements that otherwise apply.

Smith v. Johnson and Johnson, 2010 WL 347911 (3rd Cir. Feb. 2, 2010)

Ice Cream Shop Assistant Manager Has No ADA Claim After Injury to Shoulder

An assistant manager of a restaurant chain performed both managerial and manual tasks as part of her job. Although the assistant manager supervised employees, she also unloaded supplies, scooped ice cream, and operated the grill and deep fryer. After approximately six years of work at the restaurant, the assistant manager was diagnosed with "shoulder impingement syndrome." Her doctor recommended that she stop working on the grill and restricted her from lifting more than 10 pounds. After the assistant manager underwent shoulder surgery and took medical leave for approximately 12 weeks, her doctor released her to return to work. The manager maintained restrictions that she not perform repetitive

tasks with her injured arm, and that she not lift more than five pounds. The restaurant's district manager, however, communicated with the employer's human resources department that he did not wish the manager to return to work. The company's human resources manager communicated to the assistant manager that she was terminated because she had exhausted her Family and Medical Leave Act (FMLA) leave, was disabled, and was unable to perform the duties required of her position. The assistant manager sued, claiming discrimination in violation of the Americans with Disabilities Act (ADA) and the Maine Human Rights Act. The employer argued that the assistant manager was not protected under the ADA because she was unable to perform the essential functions of her job. Specifically, the employer argued that the assistant manager position required her to occasionally fill in for subordinates, and that her shoulder condition prevented her from performing all of the manual tasks of restaurant staff. The United States Court of Appeals for the First Circuit found that because the assistant manager could not show that she could perform her essential job functions with or without reasonable accommodation, she was unable to prove that she was a "qualified individual" within the meaning of the ADA. Additionally, because repetitive tasks and lifting more than five pounds were required of all jobs at the restaurant, no reasonable accommodation was available. Employers should be aware that their duty to reasonably accommodate an employee's disability does not require them to employ individuals who cannot perform the basic duties of the job.

Richardson v. Friendly Ice Cream Corp., No. 08-2423 (1st Cir. Feb. 5, 2010)

Ninth Circuit Upholds First Amendment Protections Over Employees' Rights

A dispute over news content between a newspaper publisher and its reporters and editors led to the resignation of several employees. Remaining reporters commenced efforts to organize. Shortly thereafter, a union filed a representative petition and won the election. An administrative law judge found that the newspaper had violated the NLRA, and recommended that the National Labor Relations Board (NLRB) order the paper to reinstate the employees who had initially resigned over the dispute. The NLRB ultimately authorized a Section 10(j) of the National Labor Relations Act petition, which was denied by the district court on the ground that the relief sought would infringe upon the paper's First Amendment rights by preventing it from disciplining employees who seek to limit editorial discretion. The United States Court of Appeals for the Ninth Circuit Court of Appeals affirmed, echoing the district court's sentiment concerning the risk of compromising the newspaper's First Amendment rights. It further cautioned that the employees' rights to organize and collectively bargain do not supersede the First Amendment. The injunction was therefore denied. This decision demonstrates that even where important employee rights are at issue, the First Amendment's protections are paramount and may compel a more employer-friendly result.

McDermott v. Ampersand Publ'g LLC, d/b/a Santa Barbara News-Press, No. 08-56202 (9th Cir. Jan. 26, 2010)

New DOL Guidance Provides Safe Harbor to Small Employers for Depositing Employee Plan Contributions

On January 14, 2010, the United States Department of Labor issued final regulations to enhance the clarity and certainty for small employers as to when participant contributions will be treated as contributed in a timely manner to employee benefit plans. In general, amounts paid to or withheld by an employer become plan assets on the earliest date on which they can reasonably be segregated from the employer's general assets, but, in the case of contributions to retirement plans, in no event later than the 15th business day of the month following the month in which participant contributions are received by the employer. Thus, under this general rule, the date on which contributions become "plan assets" is uncertain and depends on the specific facts and circumstances of each employer. The new guidance provides a "safe harbor" for small employers. In the case of a plan with fewer than 100 participants, any amount deposited with the plan not later than the seventh business day following the day on which such amount is received by the employer, or the seventh business day following the day on which such amount would otherwise have been payable to the participant in cash, will be deemed to satisfy the requirement that contributions be turned over to the plan on the earliest date that they can be reasonably segregated. For employers which maintain plans with 100 or more participants, the new "seven-day rule" cannot be relied upon. So, if the employee contributions can be segregated from the larger employer's assets within, for example, three days, then such contributions will be considered plan assets three days after the employer receives them. Although the new guidance provides some assurance to small employers with respect to their fiduciary duties in making plan contributions, all employers should review their policies to confirm that they are depositing employer contributions as soon as reasonably possible.