HINSHAW

Newsletters

Employment Practices Newsletter - September 2012

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Employee's ADA Association Claim Rejected

An employee with a disabled daughter worked as a secretary for a church. The employer decided to terminate the employee because she had poor performance and refused to work on weekends. The employee also arrived late for work the day before she was terminated. After being terminated, the employee brought an associational discrimination claim under the Americans with Disabilities Act (ADA) against the employer, alleging that she was fired for her inability to work weekends and for arriving late, both of which were due to her disabled daughter. The employee also asserted that her work performance was deficient because she was distracted by her daughter's disability. The U.S. Court of Appeals for the Seventh Circuit rejected the employee's claims. The court found that "[a]ssociational discrimination claims are unlike those otherwise falling under the ADA because employers are not required to provide reasonable accommodations to non-disabled workers." The court explained that while it is unlawful to terminate an employee based on "unfounded assumptions" regarding the employee's care for a disabled individual, it is not unlawful for an employer to terminate an employee for violating a neutral policy, even if the violation occurred because the employee was caring for her disabled family member. Therefore, in this instance, even if the employee's poor work performance, tardiness, and refusal to work on weekends was caused by her daughter's disability, the employer was not required to provide the employee with an accommodation to enable her to meet its legitimate expectations. As such, the employer did not violate the ADA by terminating the employee due to her inability to adequately perform her job. As this case demonstrates, employers are not obligated to provide reasonable accommodations to an employee who is associated with a disabled individual and may lawfully terminate such an employee for poor job performance. However, to avoid liability under the ADA, employers must ensure that they do not take adverse action against an employee who cares for a disabled individual based on a mere assumption that the employee will not meet job expectations.

Magnus v. St. Mark United Methodist Church, No. 11-3767 (7th Cir. Aug. 8, 2012)

NFL Player Denied Right to Workers' Compensation Benefits in California

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Workers' Compensation Defense

After retiring from the National Football League (NFL) after 19 years, a former Tennessee Titans player filed a workers' compensation claim in the state of California, seeking to recover benefits despite not having been injured in California. After the claim was filed, the Titans filed a grievance against the player arguing that the suit violated his employment contract, which specifically provided that any workers' compensation claim would be governed by Tennessee law. The dispute was arbitrated and the choice of law provision was deemed valid and controlling, thereby precluding the California claim. The player nevertheless sought to vacate the arbitrator's decision, but the district court refused, confirming the award. The player then appealed, arguing that the arbitrator's award and the subsequent court decision contravened California workers' compensation policy and federal labor policy. The U.S. Court of Appeals for the Ninth Circuit disagreed, finding that an employee who is otherwise eligible for California worker's compensation benefits cannot be deemed to have contractually waived such benefits. Further, it was questionable whether the player was eligible for benefits in California as he had no specific injury and sought no medical treatment in California and thus failed to allege sufficient contacts with California such that he would be entitled to state benefits. Both arbitration agreements and choice of law provisions can be very important in defending against various types of employment claims. Employers should review their handbooks and employee agreements to ensure the necessary provisions are included.

Matthews v. National Football League Management Council et al., No. 11-55186 (9th Cir. Aug. 6, 2012)

Employer's "Honest Suspicion" of Misuse of FMLA Leave Defeats FMLA Interference and Retaliation Claims

An employer set out to remedy an excessive employee absenteeism problem at one of its manufacturing plants. As part of its plan, the employer hired a private investigator to follow several employees who were suspected of abusing the company's leave policies. One of these employees was authorized to take intermittent leave under the Family and Medical Leave Act (FMLA), to care for his mother in a nursing home. Surveillance revealed, however, that on a day that the employee was allegedly caring for his mother, he did not even leave his house. The employer suspended the employee pending further investigation. The employee presented questionable documentation in support of his absence, but the employer terminated him for misusing FMLA leave. The employee sued, alleging interference with FMLA leave and retaliation. The district court concluded that although there were issues of fact as to whether the employee was actually using his FMLA leave for an approved purpose, it was undisputed that the employer had an "honest suspicion" that the employee was misusing his leave. This was enough to defeat the employee's substantive rights FMLA claim. The employee appealed. The U.S. Court of Appeals for the Seventh Circuit found that the employer's "honest suspicion" defense was sufficient to defeat the employee's claims. State and federal laws permit employees to take leaves for various reasons. It is important for the employer and employee to have regular and open communications to ensure that the leave is being used for approved purposes.

Scruggs v. Carrier Corporation, No. 10-3420 (7th Cir. Aug. 3, 2012)

An Empty Head Can't Retaliate

A for-profit educational service maintained a campus in California. The director for that campus believed that a number of irregularities were allegedly occurring at the campus. He reported these perceived irregularities — including allegations that entrance exam scores and grades were being altered — to the service's directors of recruitment and compliance. During the same general time period, the director's performance was under scrutiny by the service's chief executive offer (CEO). The campus had performed below expectations, receiving a negative evaluation during an operational review and a low score in an internal audit. Ultimately, the CEO terminated the director for poor performance. The director sued under the False Claims Act (FCA), alleging that his termination was in retaliation for reporting irregularities in how the service managed federally subsidized student loans. The U.S. Court of Appeals for the Seventh Circuit assumed that the director's actions qualified as protected activity under the FCA, but held that the director could not establish that he was terminated "because of" that activity, an essential aspect to a retaliation claim. The director argued that knowledge of his complaints should be imputed beyond those to whom he actually reported the issues, including to the CEO who decided to terminate the director. The Seventh Circuit rejected this argument, recognizing that proving retaliatory intent requires actual, rather than constructive, knowledge of the protected activity. This case highlights the benefit of directing protected activity to an individual who does not also bear authority to terminate or discipline employees.

Halasa v. ITT Educational Services, Inc., No. 11-2205 (7th Cir. Aug. 14, 2012)

Wellness Program Penalty in Group Health Plan Survives ADA Challenge

An employer offered its employees coverage under a group health plan and also sponsored a wellness program which consisted of a biometric screening and an online health-risk assessment questionnaire through which the health insurer identified employees who suffered from one of five diseases and confidentially gave them the opportunity to participate in a disease-management program. While participation in the wellness program was not mandatory, the employer imposed a $20 penalty on employees who enrolled in group health plan coverage but did not undergo the wellness screening. An employee covered under the group health plan who incurred the penalty sued the employer alleging that the wellness screening violated the Americans with Disabilities Act of 1990 (ADA) because it constituted a required "medical examination." The federal district court found that the wellness screening fell within the ADA's safe harbor provision for a "bona fide benefit plan" based on underwriting, classifying, or administering risks. The U.S. Court of Appeals for the Eleventh Circuit affirmed, ruling that the testimony of the employer's benefit manager that the wellness program was not a "term" in the employer's benefit plan did not create a factual dispute. The court reasoned that there was no requirement that a wellness program be explicitly identified in a benefit plan's written document to qualify as a "term" of the benefit plan for purposes of the ADA. The court focused on determining whether the wellness program was part of "a bona fide benefit plan" and not on the group health plan penalty for failure to undergo the wellness screening. In designing and reviewing wellness programs, employers should carefully consider how a wellness program with a monetary or other penalty is connected to an existing group health plan.

Seff v. Broward County Florida, No. 11–12217 (11th Cir. Aug. 20, 2012)

Seventh Circuit Upholds Arbitrator's Reduction of Withdrawal Liability

In 2005, an employer withdrew from a multiemployer pension plan. Because the plan was substantially underfunded, the employer was assessed a withdrawal liability of more than $3.4 million. In arbitration, the employer contested the amount of liability, arguing that the assumptions and interest rates used by the plan's trustees were unreasonable, causing an unwarranted increase in the amount assessed upon the withdrawal. The arbitrator found in favor of the employer and ruled that the plan had overassessed the amount of the withdrawal liability by more than $1 million. The U.S. District Court for the Northern District of Illinois upheld the decision. The U.S. Court of Appeals for the Seventh Circuit found that the interest rates used by the plan's trustees to determine the employer's withdrawal liability were different from the interest rates that were the "best estimate" of the plan's actuaries. As a result, the amount of the assessment was overstated. The Seventh Circuit rejected the plan's argument that the interest rates it used were protected by a statutory safe harbor, and affirmed the district court's ruling. Employers that are subject to withdrawal liability after exiting a multiemployer pension plan should be careful to examine the assumptions underlying the assessment, keeping in mind strict statutory deadlines for challenging the amount assessed.

Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc., No. 11-3034 (7th Cir. Aug. 20, 2012)

Mine Operator Not Required to Provide Temporary Reinstatement for Miner Pending Outcome of Individual Action

After being terminated, a miner filed a discrimination complaint with the Federal Mine Safety and Health Administration pursuant to Section 105(c) of the Federal Mine Safety and Health Act (FMSHA) of 1977, alleging he was terminated for making safety-related complaints. The U.S. Secretary of Labor filed an application for temporary reinstatement of the miner, and the parties agreed to economic reinstatement in lieu of returning to work. Thereafter, the Secretary of Labor advised that the discrimination complaint would not be pursued, prompting the administrative law judge (ALJ) to issue an order dissolving the miner's temporary reinstatement. The miner filed a discrimination action on his own, and the mine operator challenged the claim, given the prior history. The Federal Mine Safety and Health Review Commission reversed the ALJ's order and held that temporary reinstatement was required until the miner's discrimination action was resolved. The U.S. Court of Appeals for the Sixth Circuit, in examining the FMSHA's express language, determined that the act did not require such continued temporary reinstatement. The court held that the statutory language, legislative history, and other relevant factors demonstrated Congress' judgment that, once the Secretary determines that no violation of the act has occurred, the public interest in mandating continued reinstatement is substantially lessened. Therefore, upon such

determination, a miner is no longer entitled to temporary reinstatement. Mine operators must be prepared to properly handle and document work refusals by miners. It is expected that Section 105(c) cases will continue to have a high priority. The temporary reinstatement hearing is a strategic point in any defense of a Section 105(c) case.

North Fork Coal Corporation v. Federal Mine Safety and Health Review Commission, Nos. 11-3398/3684 (6th Cir. Aug. 14, 2012)

What Constitutes a "Medical Examination" Under the ADA?

An employer became concerned that an emergency medical technician's (EMT's) personal relationship with a co-worker was impacting her ability to perform her job safely. The employer told the EMT to see a psychologist for counseling in order to keep her job. The EMT refused, did not return to work, and subsequently sued the employer, alleging that the direction to undergo counseling was a violation of the Americans with Disabilities Act (ADA). The U.S. Court of Appeals for the Sixth Circuit considered what constituted a "medical examination" under the ADA. It reasoned that 42 U.S.C. § 12112 (d)(4)(A), prohibits employers from requiring a "medical examination" or making inquiries of an employee as to whether such employee is an individual with a disability unless the examination or inquiry is shown to be job-related and consistent with business necessity. In contrast to many other ADA provisions, all individuals — disabled or not — may bring suit under this section. The court reviewed the guidance directives provided by the Equal Employment Opportunity Commission, observing that an employer's intent is not dispositive as to whether something qualifies as a "medical examination" under the ADA. The employer's purpose must be considered within the larger factual context of a particular assessment's typical uses and purposes. With respect to counseling by a psychologist, the question is whether the procedure is likely to reveal evidence of a mental disorder or impairment providing the basis for discriminatory treatment. This case is significant, not only because it represents a matter of first impression in the Sixth Circuit, but because it reminds employers to take caution when requesting that an employee undergo a procedure that might reveal evidence of a disability that could be the basis for disability discrimination. Any such inquiry must be strictly confined by the "job-relatedness" and "business necessity" requirements.

Kroll v. White Lake Ambulance Authority, No. 10-2348 (6th Cir. Aug. 22, 2012)

Appellate Court Allows Employees of the State to Recover Damages for Age Discrimination Claims

A 61-year-old male attorney was one of a group of attorneys terminated from the state of Illinois in 2006. The attorney claimed that he was replaced by a female in her 30s. Although the male attorney's yearly evaluations indicated that he met or exceeded expectations, the state claimed that the attorney's low productivity, inferior litigation skills, excessive socializing and poor judgment formed the basis for his termination. The attorney sued under the Age Discrimination in Employment Act (ADEA) and pursued his age discrimination claim sued under the Equal Protection Clause of the Constitution. The ADEA prevents state employees from recovering any damages (including money or reinstatement) from the state for claims under the ADEA. To recover monetary damages, the employee must pursue his claim outside of the ADEA through, for example, the Equal Protection Clause of the Constitution. The state argued that Congress created the ADEA to handle claims of age discrimination and asserted that the attorney should not be able to evade the express limitations of the statute by using the Equal Protection Clause. The U.S. Court of Appeals for the Seventh Circuit allowed the Equal Protection claim to move forward because there is no express language in the ADEA statute indicating that Congress intended for the ADEA to be the sole vehicle to address claims of age discrimination. As a result, employees of the state now have a clear avenue to sue the state for damages based on an age discrimination claim. The Seventh Circuit (covering Illinois, Indiana and Wisconsin) is the first circuit to determine that state employees may recover damages against the state for age discrimination claims.

Levin v. Madigan, No. 11-2820 (7th Cir. Aug. 17, 2012)

Complaints Made to Human Resources Constitute Protected Activity Under Title VII

The former director of global finance for an automotive industry manufacturing company, "light-heartedly" confronted the company's vice president (VP) after the VP referred to Mexican plant employees in racially derogatory terms. The VP thereafter communicated an apology. After the VP later made additional disparaging remarks about a Latin American employee, the former director spoke to the company's human resources department about "inappropriate or derogatory

things about other races" made by the VP. The former director was fired a week later, and sued the company, alleging that he was terminated in retaliation for lodging complaints regarding the racially oriented comments. The U.S. Court of Appeals for the Sixth Circuit held that the former director did not engage in protected activity with respect to the comment he made directly to the company's VP. The court noted, "[n]othing in [the former director's] responses can reasonably be construed as 'opposition' to the alleged racial character of the statement." The court did, however, hold that as to the former director's comments to the human resources department, those were protected under Title VII of the Civil Rights Act of 1964, as amended. The court stated, "We have repeatedly held that complaints to human resources personnel regarding potential violations of Title VII constitute protected activity for purposes of establishing a *prima facie* case of retaliation." The court held that the former director's comment to the human resources department could be deemed a complaint about a hostile work environment. This case serves as a reminder that while not every response to a biased or potentially discriminatory remark qualifies for Title VII's anti-retaliation protections, human resources professionals should be properly trained in how to accept, investigate and respond to both informal and formal complaints.

Trujillo v. Henniges Auto. Sealing Sys. N. Amer. Inc., No. 11-1148 (6th Cir. Aug. 20, 2012)

Loss of Consortium Claim Barred by Workers' Compensation Exclusivity Rule

An employee sued his employer for industrial injuries sustained while using a power press in the course and scope of employment. He was able to bring a civil action rather than proceeding in the workers' compensation arena per the Cal. Lab. Code § 4558 "power press" exception, which authorizes an injured worker to bring a civil action for tort damages against his or her employer where the injuries were "proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press," where the "manufacturer [had] designed, installed, required or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer." The employee's spouse also sued the employer for damages for loss of consortium. The California Supreme Court unanimously ruled that the spouse's claim was barred by the workers' compensation exclusivity rule. The Court reasoned that the "power press" exception applies to the injured employee only, unless the injuries are fatal. It provides for a civil remedy to augment an employee's workers' compensation benefits but does not take the case outside of the workers' compensation system. Under workers' compensation, derivative claims such as loss of consortium remain barred and not an available benefit resulting from an industrial injury.

LeFiell Manufacturing Company v. Superior Court (Watrous), No. S192759 (Ca. Sup. Ct. Aug. 20, 2012)

Sensitivity to Perfume Gives Rise to ADA Claim

An employee who suffered from asthma and had a severe chemical sensitivity to certain perfumes and other scented products requested that the employer implement a fragrance-free workplace policy. When this request was denied, the employee asked to be allowed to work from home as an accommodation, which the employer rejected via correspondence from its attorney. The employee consequently sued. The employer contended that it would be impossible to accommodate the employee's alleged disability because it would be impossible to completely limit the employee's exposure to perfumes in the workplace given that members of the public were present in the workplace. The U.S. District Court for the Southern District of Ohio found that the purpose of the proposed accommodation was to minimize and limit employee's potential exposure to perfumes that triggered her severe asthma and not completely eliminate any possibility that perfume would be worn into the workplace by members of the public. The court found that the employee's request for a fragrance-free workplace was reasonable. The court noted that the U.S. Court of Appeals for the Sixth Circuit has agreed with the general proposition that an employer is not required to allow disabled workers to work at home. However, it recognized the possibility of exceptions to the general rule in the unusual case where an employee can effectively perform all work-related duties at home. The court further held that due to advances in communication technology, it would not take a very extraordinary case for the employee to create a triable issue of the employer's failure to allow the employee to work at home. Nevertheless, the court noted that the ultimate determination of reasonableness is a fact-specific inquiry and a question for the fact finder. The court concluded that the employee sufficiently plead a plausible claim for relief. This case highlights the importance of engaging in the interactive process to determine whether and/or how to accommodate employees, and the potential exposure and liability for failure to do so.

Core v. Champaign County Board of County Commissioners, No. 3:11-cv-166 (S.D. Ohio, July 30, 2012)

Pregnancy Discrimination Not Prohibited by Florida Civil Rights Act

An employee sued her former employer, alleging pregnancy discrimination in violation of the Florida Civil Rights Act of 1992 (FCRA). The employee claimed that after notifying her supervisor of her pregnancy, she was treated unfairly and differently, and deprived of various conditions of employment. The employee further argued that upon being released to return to work after maternity leave, she was never returned to the schedule. The Florida Third District Court of Appeal found that the employee was unable to state a claim for relief. The court looked to two prior state court opinions as well as U.S. Supreme Court authority to reach its conclusion, and ultimately determined that discrimination on the basis of pregnancy was not sex discrimination under Title VII of the Civil Rights Act of 1964, as amended. Though later, Title VII was amended to include the Pregnancy Discrimination Act, Florida never amended its state law to include a prohibition against such discrimination. Because the state legislature did not intend to include this prohibition, the court concluded that the employee could not make a claim for pregnancy discrimination under the FCRA. Although the Florida statute has not been updated to include these protections, federal law (and many other state laws) prohibit discrimination on the basis of pregnancy.

Delva v. The Continental Group, Inc., No. 11-2964 (Fla. July 25, 2012)

Rotational Employee Unsuccessful on FMLA Interference Claim Based Upon Leave Calculations

An employee who suffered from a serious medical condition requested and was granted 12 weeks of Family and Medical Leave Act (FMLA) leave. His position required that he work a rotational schedule of seven 12-hour days for one week, followed by seven days (or one week) off thereafter. The employee took an initial leave from September 20, 2010, to October 4, 2010, and a second leave starting on October 25, 2010. The employer calculated that the total 12-week leave would end on December 26, 2010, and when the employee was not cleared to return to work, terminated him. The employee contended that as of December 26, 2010, given his unique schedule, he would have only used 6 weeks of leave and thus had additional time off available to him. The employee sued, alleging interference with his rights under the FMLA and argued that his leave should have been calculated under statutory and regulatory rules on intermittent leave, which bases leave on the actual hours the employee was scheduled to work, not limiting it to workweeks, regardless of the employee's schedule. As this was not an intermittent leave case, the employee was limited to a total of 12 workweeks of leave during any 12-month period as provided by law. The court therefore determined that the employer properly calculated the leave and there was no interference with the employee's FMLA rights. Given the dearth of case law on this issue, employers calculating FMLA leave for rotational employees should exercise caution in ensuring that leave is accurately calculated and provided to employees.

Murphy v. John Christner Trucking LLC, No.11-CV-444-GKF-TLW (Okla. Aug. 15, 2012)

Illinois Prohibits Employers From Seeking Facebook Passwords

On August 1, 2012, Illinois Governor Pat Quinn signed into law a provision that amends the Illinois Right to Privacy in the Workplace Act. This amendment serves to make it unlawful for an employer to ask an applicant or employee for a password or other account information related to social networking accounts. The law also prohibits employers from demanding access to such accounts in any other manner. Despite these prohibitions on requesting protected information, employers may still be able to free obtain information about an employee or applicant that is in the public domain. The new law also does not restrict employers from having policies regulating the use of the employer's electronic equipment, or monitoring the usage of an employer's electronic equipment or e-mail. Notwithstanding the foregoing, employers are cautioned to be mindful of existing state and federal laws pertaining to background checks on applicants and employees, and to ensure that those extracting information from the public domain on applicants or employees are doing so consistently and pursuant to an established policy.

Illinois Right to Privacy in the Workplace Act

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Hinshaw's Annual Labor & Employment Seminar to be held on Wednesday, October 3, 2012

Save the date! Hinshaw's Annual Labor & Employment Seminar will be held on Wednesday, October 3, 2012 at the Stonegate Conference Centre in Hoffman Estates, Illinois.

Join in-house legal counsel, business leaders, and human resource professionals for an informative seminar that examines and analyzes current issues affecting employers and offers practical strategies for minimizing your company's exposure to claims. As in previous years, attendees will be able to earn CLE and HRCI continuing education credit for this full-day seminar.

Look for an email with registration details soon!