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Newsletters

Employment Practices Alert - January 2010

January 4, 2010

Religious Discrimination Claim Fails Due to Violation of Overtime Policy

An editorial writer at a large newspaper claimed that she was transferred to a less desirable position because she was a "traditional Christian," who believed homosexual conduct to be sinful. Specifically, after the writer's supervisor refused to publish an opinion column containing a graphic description of HIV risks associated with sodomy, the two engaged in an e-mail exchange regarding the relationship between objective truth and opinion. During this exchange, the writer asserted that she had been "knocked out by the Holy Spirit" and that if the supervisor's perspective was accurate, he should "call the nut farm" to haul her away. The supervisor responded by telling the writer not to proselytize at work. Independent of this exchange, the newspaper's management was counseling the writer regarding her continued violation of the newspaper's overtime policy. A month after the e-mail exchange took place, the writer was transferred to a less prestigious position as a copy-desk editor in an attempt to more closely monitor her overtime. The writer claimed that the transfer was instead made because of objections to her religious beliefs. On appeal, the U.S. Court of Appeals for the Seventh Circuit noted that a religious discrimination claim can be premised on the assertion that the decision makers, "though also Christian, did not like her brand of Christianity." Nevertheless, the court held that the writer's claim failed because of her undisputed repeated violation of the newspaper's overtime policy. That fact, the court noted, precluded the writer from establishing that she was meeting the newspaper's legitimate expectations, a fact that destroyed her claim. Employers should continue to remember the benefits that inure from properly documenting violations of workplace policies.

Patterson v. Indiana Newspapers, Inc., No. 08-2050 (7th Cir. Dec. 8, 2009)

For more information, please contact your regular Hinshaw attorney.

Mandatory Attendance of Sheriffs at Presentations by Christian Group Unconstitutional

A county sheriff invited a Christian support group for law enforcement officials to make a presentation at the sheriff's department leadership conference. Attendance was mandatory for all deputies who held the rank of sergeant or above. Just before the group's presentation, the sheriff announced that he would be making promotions to the rank of captain and distributed literature

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listing the qualities a leader should look for in his inner-circle, including "people of faith." During the presentation, the support group quoted bible verses, and asserted that government employees in authority were "ministers of God assigned to promote good and punish evil." After the conference, the group was invited to present at department roll calls, attendance at which was mandatory for all deputies. The group presented at 16 roll calls during a seven-day period. After complaining internally, two sheriff's deputies and their union sued the department. The U.S. Court of Appeals for the Seventh Circuit held that the sheriff's conduct created an impermissible appearance of endorsement of religion that violated the First Amendment's Establishment Clause. In so doing, the court made clear that it was not holding that religiously affiliated groups are always constitutionally barred from working with or speaking to government employees. However, a government official cannot invite a religious group to proselytize on numerous occasions at mandatory meetings of government employees. Governmental employers must carefully consider constitutional protections anytime non-secular topics are addressed at mandatory employee meetings or events.

Milwaukee Deputy Sheriff's Association v. Clarke, No 08-1515 (7th Cir. Dec. 4, 2009)

For more information, please contact Steven M. Puiszis or your regular Hinshaw attorney.

Changing Clothes and Showering After a Shift Not Compensable Activities

Employees working at a paper plant faced certain job hazards, including the potential to come into contact with caustic chemicals, such as lime dust. Their employer had a policy requiring employees who believed that their skin contacted such chemicals to report the exposure and to immediately shower and change clothes. Such employees were paid for all time spent on these activities. Many employees routinely changed clothes and showered at work to reduce the likelihood of carrying chemicals on their clothes into their cars and subsequently into their homes. These activities were done off the clock and hence without pay. The employees challenged this no-pay policy and sued under the Fair Labor Standards Act, arguing that these post-work activities were required by the nature of their job and hence compensable. The U.S. Court of Appeals for the Seventh Circuit disagreed, holding instead that many preliminary or postliminary activities, such as showering, which occur at the beginning or end of one's shift, when principal work activities have not begun or have ceased, are generally not compensable "work." Rather, such tasks are often performed for the convenience and preference of the employee. However, an employee must be compensated for such activities if they are "'integral' and 'indispensable' to that employee's employment." In this case, there was no showing that the chemical exposure was so significant that employees had to change and shower before leaving work. In fact, the employer had a policy which compensated employees who were knowingly exposed and there was no evidence that this policy would not apply if the chemical exposure occurred at the end of one's shift as opposed as during it (thus applying to the very situation about which plaintiffs were complaining). With this policy in place, there was no reason to require compensation for changing and showering done at the employees' desire. Moreover, there was evidence that some employees preferred to go home to shower, thus indicating that the chemical exposure risk was not as significant as plaintiffs imagined. In sum, these postliminary activities were not indispensable to the employees' jobs and not compensable. Employers must be careful when categorizing donning and doffing activities to avoid wage claims.

Musch v. Domtar Industries, Inc., No. 08-cv-4305 (7th Cir. Nov. 25, 2009)

For more information, please contact Linda K. Horras or your regular Hinshaw attorney.

Apparent Success Will Not Bar Termination of Underperforming Employee

At the age of 58, a high-ranking sales manager was fired by his employer for persistent tardiness, customer complaints and refusal to be a team player. The sales manager contended that his age was the real reason for the termination and sued the employer under the Age Discrimination in Employment Act (ADEA). The U.S. Court of Appeals for the Seventh Circuit rejected the pretext argument and stated that even if the manager had showed that the company's stated reasons for terminating him were false, he could not overcome the "virtual avalanche of documentation" showing that his performance consistently fell short of the company's expectations. The court noted that the manager's top earning status one year, as well as his high rank, were predicated entirely on two major deals for which the credit he received overstated his actual contribution. Although caution is required when terminating a high-ranking employee who has had apparent success, the employee must produce sufficient evidence to rebut an employer's proof of the employee's overall

underperformance and consistent deficiencies.

Senske v. Sybase, No. 09-1610 (7th Cir. December 3, 2009)

For more information, please contact your regular Hinshaw attorney.

No Retaliation Against Employee Fired During Restructuring

A company purchased a similar business and restructured to eliminate redundancy. In the restructuring, a female employee's position was eliminated. The employee filed a sex bias charge with the U.S. Equal Employment Opportunity Commission (EEOC) after the restructuring, claiming that her termination was discriminatorily based on her gender. The employee later applied for another position after the restructuring, but the employer hired a different employee. When she was rejected for the new position, the employee filed another charge with the EEOC, this time alleging that she was rejected in retaliation for having filed the prior charge. She then sued her employer under Title VII of the Civil Rights Act of 1964, as amended, alleging retaliation and sex discrimination. The U.S. Court of Appeals for the Seventh Circuit examined the employer's proffered reasons both for eliminating her position and not hiring her for the open spot, and ultimately upheld judgment in favor of the employer. As to the original discrimination claim, the court explained that the employer made its decision to eliminate the employee's position prior to the employee filing her first charge with the EEOC, and that the restructuring was a legitimate nondiscriminatory reason for the employee's termination. As to the latter charge, the employer explained that it had hired a more qualified candidate, which the court held was a legitimate explanation, noting that "it is logical that the company would select the person with [more] experience" for the open position. Employers should be careful when restructuring and eliminating positions not to select an employee for termination based on his or her race, gender, national origin, age or disability.

Scruggs v. Garst Seed Co., No. 07-2266 (7th Cir. Nov. 20, 2009)

For more information, please contact Justin M. Penn or your regular Hinshaw attorney.

Bicycle Accident Not Enough to Entitle Employee to FMLA Leave

A part-time employee was struck by a car while riding a bicycle off duty. The employee subsequently left a message with his employer that he had been hit by a car, but did not provide any other information. When the employee did not respond to his employer's letter threatening termination for failure to provide medical documentation substantiating his absence, he was fired. The U.S. Court of Appeals for the Sixth Circuit held that the employee had given adequate initial notice of his condition. But it ultimately rejected the argument that the employee's firing violated the Family and Medical Leave Act (FMLA), concluding that the employee had not shown that he had a "serious health condition." Medical records showed the employee had "suffered only contusions and mild to moderate back pain" and that the return to work forms simply stated that he could not work "for medical reasons." This, the court held, fell "far short" of demonstrating that he had a serious health condition under the FMLA. Employers should continue to thoughtfully and carefully address employees' possible FMLA qualifying leave.

Stimpson v. United Parcel Serv., No. 08-2263 (6th Cir. Nov. 3, 2009)

For more information, please contact your regular Hinshaw attorney.

Ninth Circuit Permits Independent Contractor to Maintain Discrimination Claim Under Rehabilitation Act

An anesthesiologist who suffered from sickle cell anemia applied to work at a medical center on a modified schedule. After it learned about his condition, the medical center informed the doctor that it would be unable to accommodate his scheduling requirements. The doctor accordingly declined to accept a full-time schedule as a condition of employment, and the contract between the parties was cancelled. The doctor sued the medical center alleging breach of contract and discrimination in violation of the Rehabilitation Act. The medical center prevailed on a motion for summary judgment because the doctor was deemed to be an independent contractor, who was not protected under the Rehabilitation Act. In deciding the issue of first impression, the U.S. Court of Appeals for the Ninth Circuit considered whether the Rehabilitation

Act permits an independent contractor to maintain a claim for discrimination. After reviewing Title I of the Americans with Disabilities Act (ADA) in conjunction with the Rehabilitation Act, as well as the split of authorities from the U.S. Courts of Appeals for the Sixth, Eighth and Tenth Circuits, the Ninth Circuit ultimately held that since the Rehabilitation Act incorporates the standards of Title I of the ADA for proving when discrimination in the workplace is actionable, an independent contractor such as the doctor could maintain a private cause of action for disability discrimination under the Act. The court held that the Rehabilitation Act's scope is broader than the ADA's, that the legislature did not use language of incorporation when it referred to the ADA in this provision of the Rehabilitation Act, and that it did not believe that the Rehabilitation Act had such a narrowed scope as to exclude these types of claims, all of which compelled the ultimate result. The laws governing independent contractor-employer relationships can be complex and different from those applicable to a typical employee-employer relationship. This case highlights how courts are expanding the rights of the independent contractor in the employment context.

Fleming v. Yuma Reg. Med. Ctr., No. 07-16427 (9th Cir. Nov. 19, 2009)

For more information, please contact your regular Hinshaw attorney.

Second Circuit Confirms Broad Reach of EEOC's Subpoena Power

A prospective employee applied for a position as a seasonal holiday driver, and was told that he would have to shave his beard in order to comply with the company's appearance guidelines. After advising that he could not shave his beard due to religious reasons, the company advised the applicant that there were other non-public positions in which he could work that would not require the shaving of his beard. Thereafter, when completing the new hire paperwork, the applicant was again told that he would have to shave his beard. He refused, and ultimately was not hired. Though the employer contended that it did not hire the applicant due to a false Social Security number, the applicant maintained that he was discriminated against on the basis of his religion. Another employee had the same issue with respect to his own beard and similarly filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) alleging religious discrimination. The EEOC elected to investigate the matter and issued subpoenas to the employer requesting information concerning its appearance policy and the granting of religious exemptions from it for employees who had contact with the public. The employer was unable to comply with the subpoena, and the EEOC subsequently filed a petition in the district court seeking to compel the employer to respond. The district court held that the subpoena was overly broad and sought information not relevant to the individuals' charges. The U.S. Court of Appeals for the Second Circuit reversed and held that the EEOC was entitled to national information from the employer regarding the particular policies at issue. This decision was based upon several factors, including: (1) the appearance guidelines applied to all facilities nationwide; (2) neither of the employees were told that they could apply for a religious accommodation from the policy; and (3) one of the charges expressly alleged a pattern and practice of discrimination. The court of appeals determined that the lower court had applied too restrictive a standard of relevance in determining that information about how religious exemptions to the appearance guidelines are or are not granted nationwide was not relevant to the charges being investigated. There have been numerous decisions of late which uphold and confirm the broad scope of the EEOC's subpoena power when investigating charges. Employers must be mindful that the lower standard applicable to the EEOC often entitles the agency to obtain information on a much broader scale.

EEOC v. United Parcel Service, No. 08-cv-5348 (2d Cir. Nov. 19, 2009)

For more information, please contact your regular Hinshaw attorney.

Illinois Levies Largest Civil Penalty Under Employee Classification Law

On November 18, 2009, the Illinois Department of Labor (IDOL) issued a final determination and notice of violation under the Employee Classification Act (ECA) against a construction contractor for failing to classify 18 individuals as employees and to maintain proper records as required under the ECA. The ECA became effective on January 1, 2008 and places a traditional employee designation on all construction workers unless it has shown that: the individual performing services for a contractor is free from control or direction; the services provided by the individual are outside the usual course of services provided by the contractor; the individual is engaged in an independently established trade, occupation or profession; and/or the individual is deemed a legitimate sole proprietor or partnership. The ECA was enacted to

discourage the misuse of the independent contractor designation by construction contractors in order to avoid tax, payroll and safety obligations. The IDOL found that the construction contractor had violated the ECA by improperly designating employees as independent contractors and by engineering improper schemes in which workers incorporated as separate business entities to evade the ECA. As a result of the violation, the IDOL assessed civil penalties of $1,500 per day for 218 total days of misclassification and an additional penalty of $1,500 for failure to maintain proper records under the Act, for a total civil penalty of $328,500. Construction contractors in the state of Illinois must make sure that individuals performing work under their direction and control are properly classified under the ECA. The IDOL has stated that it is actively enforcing the provisions of the ECA against construction contractors and that it is routinely enlisting the assistance of unions to identify contractors which may not be in compliance.

For more information, please contact your regular Hinshaw attorney.

COBRA Subsidy Extended

On December 21, 2009, President Obama signed the U.S. Department of Defense appropriations bill. This legislation includes provisions that extend a COBRA subsidy for certain employees who have been or will be involuntarily terminated during the period of September 1, 2008, through February 28, 2010. This subsidy applies to employers subject to COBRA and to employers subject to state continuation of health insurance coverage laws. Certain high income individuals are not eligible for this subsidy. The subsidy (65 percent of the COBRA premium which is paid by the federal government through payroll tax credits) must be offered to employees who are involuntarily terminated and eligible for COBRA before February 28, 2010. The length of time that an individual can receive the COBRA subsidy has been increased from the prior limit of nine months to a new limit of 15 months, is retroactive to all individuals currently receiving the subsidy, and will apply to certain individuals whose nine-month subsidy period had expired. The extension is also retroactive to those individuals who lost COBRA coverage because they stopped paying premiums after their nine-month subsidy expired. Such persons may be able to re-enroll in COBRA and receive the additional subsidy without any gaps in coverage. Plan administrators must issue written notice of these changes as soon as possible to individuals who are currently receiving the subsidy and to individuals who previously received the subsidy and began paying the entire COBRA premium after the nine-month period expired in order to allow these individuals to receive credit during the extended benefit period. Plan administrators must also issue written notice to individuals who allowed their COBRA coverage to lapse after the expiration of the nine-month subsidy period. These individuals will then have until February 17, 2010 or 30 days after they receive this new notice, whichever date is later, to pay the 35 percent of their COBRA premium to reinstate their coverage.

For more information, please contact your regular Hinshaw attorney.

Hinshaw Spotlight

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