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Newsletters

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Breaking News: Florida Court Declares 104-Week Limit of Temporary Benefits Unconstitutional, Reinstates 260-Week Cap

The Florida First District Court of Appeals was presented with a question of the constitutionality of the 104-week limitation on temporary indemnity benefits based on an injured worker who was not yet ready to return to work after the 104 weeks of temporary benefits, but who was not able to prove eventual permanent and total disability benefits, and therefore not entitled to indemnity benefits. The claimant's condition left him in the not-uncommon position of exhausting his statutory benefits prior to reaching the ability to return to substantial gainful employment. As amended in 1994, the Florida Statutes allowed only 104 weeks of temporary benefits. The court, in a scathing 25-page opinion, found that the claimant was denied access to the courts and to the constitutionally granted right to the administration of justice without denial or

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delay, in violation of the Florida Constitution. The court found unconstitutional the 1994 change to the law, which revised entitlement to temporary benefits from 260 weeks to 104 weeks. The court therefore remanded the case, with instructions to grant the claimant additional temporary total disability benefits not to exceed 260 weeks, as would have been provided under the previous relevant statutory provision prior to the 1994 amendment of Fla. Stat. § 440.15(2)(a). The court evaluated the workers' compensation statutes in all other states and found that more than 40 allow a minimum of 312 weeks, and only five jurisdictions limit disability to 104 weeks. The court concluded that the natural consequence of "such a system of legal redress is potential economic ruination of the injured worker, with all the terrible consequences that this portends for the worker and his or her family," and indicated that this system of redress for injury is "not merely unfair, but is fundamentally and manifestly unjust." The court, however, did not strike the entire 1994 or 2003 amendments to the statute, but only severed Section 440.15(2)(a), reviving the pre-1994 statute solely as it speaks to the time-limitation on temporary disability benefits. As this is a substantive change in the law and deals with an unconstitutional statute, the decision affects all cases, regardless of the date of accident. This case has a tremendous impact on the current cases nearing the 104-week mark, as well as those currently in litigation for permanent and total disability benefits.

Bradley Westphal v. City of St. Petersburg, Case No. 1D12-3562 (1st DCA Feb. 28, 2013)

School Principal Lacks Free Speech Claim as Work-Related Complaints Not Made as Private Citizen

A new middle school principal questioned her predecessor about certain expenditures made using the school credit card. The following year, the principal was placed on a performance-improvement plan. She was later advised that the school was contemplating terminating her contract. The principal filed a police report, claiming that the predecessor had misused school funds. She also sent letters regarding the same matter to the superintendent and other school officials. A hearing was held, and the district board voted to terminate the principal's contract. The principal sued, alleging breach of contract and violations of 42 U.S.C. § 1983, claiming that she was retaliated against for engaging in activities which were protected under the First Amendment. The district court granted summary judgment in favor of the district and the principal appealed. The U.S. Court of Appeals for the Seventh Circuit affirmed, finding that "in order for a public employee to raise a successful First Amendment claim for her employer's restriction of her speech, the speech must be in her capacity as a private citizen and not as an employee." Here, the principal was speaking as a public employee when she lodged complaints against her predecessor, and she was speaking about matters that were directly within her oversight as the principal. The court similarly rejected the principal's breach of contract claim because the employment contract language itself specifically stated that the district could terminate her for whatever reason after one year, as long as she was provided severance for the remaining year. The distinction between public and private speech can be a critical part of a public employer's defense against an employee's retaliation claim. This case also reminds employers of the importance of including specific language about at-will or for-cause termination in employment contracts.

McArdle v. Peoria School Dist. No. 150, No. 11-2437 (7th Cir. Jan. 31, 2013)

Employee Fails to Establish Race Discrimination Based on Having Biracial Children

An employee was terminated following an investigation that revealed that she was stealing hydrocodone pills from the employer's pharmacy. In conjunction with the investigation, the employer contacted the local police and supplied information leading to the employee's arrest. The employee sued, challenging the employer's role in her arrest, which she characterized as deliberately misleading and malicious. The employee also alleged that her termination was grounded in racial animus based on her having biracial children and that she was retaliated against for her complaints about unlawful race discrimination. The employee alleged that the employer's actions violated the state of Michigan's Elliot-Larsen Civil Rights Act and common law, and Title VII of the Civil Rights Act of 1964, as amended. The U.S. Court of Appeals for the Sixth Circuit found that the employee had failed to demonstrate race discrimination based on being the mother of biracial children because she could not show that she was treated differently from a similarly situated employee, and because she was unable to demonstrate that the employer's legitimate nondiscriminatory reason for her termination — that she was stealing from her employer — was a pretext for unlawful discrimination. The court also concluded that the district court properly granted summary judgment on the employee's retaliation claim because the employee failed to exhaust her administrative remedies and to show a causal connection between her activities and her termination. Properly documenting the legitimate, nondiscriminatory, nonretaliatory basis for an employee's termination is key to defending

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against claims such as these.

Handlon v. Rite Aid Servs., LLC, No. 12-1275 (6th Cir. Jan. 31, 2013)

Employees Cannot Give Constructive Notice of Need for FMLA Leave in the Eighth Circuit

An employee at a food production company missed a month of work due to depression. She lost her job for failing to comply with the company's call-in procedure, which treated three consecutive absences without calling in as a voluntary termination of employment. The termination was executed in spite of the fact that the employee occasionally had taken leave under the Family and Medical Leave Act (FMLA) and that a coworker notified the employee's supervisor when she was "sick." The employee filed FMLA entitlement (interference) and retaliation claims against the employer. The U.S. Court of Appeals for the Eighth Circuit held that the employee's behavior did not give the employer notice of the employee's need for FMLA leave. This decision rejects the principle of constructive notice, by which an employee's unusual behavior can act as notice that something has gone medically wrong, or excuse notice, requiring the employer to extend FMLA benefits in the absence of a stated need for leave. The court relied on a regulatory change that brings into doubt whether extraordinary circumstances may make notice infeasible. This decision creates a conflict with the U.S. Court of Appeals for the Seventh Circuit — which recognizes constructive notice in the FMLA context — and could require U.S. Supreme Court resolution. In the meantime, employers in the Eighth Circuit do not have to speculate as to an employee's need for FMLA leave before taking adverse employment action against an employee not complying with company policy.

Bosley v. Cargill Meat Solutions Corp., No. 12-1290 (8th Cir. Feb. 5, 2013)

Eleventh Circuit Orders Review of Stock Drop Litigation

Participants in an airline-employer's 401(k) and profit-sharing plan filed a class action lawsuit against the plan sponsor (the employer) for the investment by the plan in its own stock through an employee stock ownership plan (ESOP) during a period when the stock declined in value by 90 percent. The ESOP was used to fund a match to the employer's 401(k) and profit-sharing plan and served as an investment choice for plan participants. From 2001 to 2004, the employer's stock dropped 92 percent. At that point, the fiduciaries removed company stock from the investment choices. The participants sued, alleging that the ESOP fiduciaries breached their Employee Retirement Income Security Act (ERISA) fiduciary duty by failing to remove the employer's stock as an investment choice earlier. Two district courts dismissed the participants' complaint brought pursuant to Section 502(a)(2) of ERISA providing that fiduciaries only needed to diversify if they knew or should have known the company was facing "imminent collapse." The U.S. Court of Appeals for the Eleventh Circuit, however, found that the district courts had interpreted the plaintiffs' imprudent investment claims filed under Section 502(a)(2) as "failure to diversify claims," which are not permissibly brought under that section. Based on the U.S. Court of Appeals for the Eleventh Circuit's holding in a subsequent case, which held imprudent investment claims are permissibly brought under Section 502(a)(2), the court remanded the issue to the district court. Based on the court's holding, employers that permit employee investment in an ESOP should be aware that in stock-drop cases, a charge alleging a breach of fiduciary for imprudent investment may now be more likely to be considered on the merits. Consequently, employers should constantly review their retirement plan's investment in its own securities to ensure its prudence.

Smith v. Delta Airlines, Inc., No. 11-16145 (11th Cir. Feb. 21, 2013)

Seventh Circuit Decertifies Class Due to Individualized Damage Calculations

A group of satellite installers brought suit under federal and state law, claiming that they were required to work off the clock without pay and through unpaid lunch breaks, and were encouraged to under-report their hours, resulting in the employer's failure to pay them overtime. The employees were paid on a piece-rate basis, in that they received a set amount for a specific job, regardless of hours worked. More than 2,000 employees were alleged to have suffered damages, although the claimed unpaid hours varied and depended upon the individual's job performance. The court determined that there was no uniform or formulaic proof of damages applicable to the entire class. The employees thus needed to recommend a reasonable basis for trying the claims so that the district court did not end up trying more than 2,000 individual wage claims. The employees ultimately failed to provide this reasonable basis. While they suggested

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using a sampling of class members' claims as representative of the entire class, they failed to show how those claims could be representative of the entire group. The lack of uniformity in the claims, the difficulty in calculating damages for the class members, and the lack of evidence substantiating the alleged amount of extra hours worked per week without compensation led to the conclusion that not only was representative evidence inappropriate to calculate class-wide relief, it was further support that class certification was inappropriate. The U.S. Court of Appeals for the Seventh Circuit agreed, denouncing the tactic of certifying a class that would result in a "shapeless, free-wheeling trial." This case demonstrates that class and collective wage actions must have more than a company-wide policy of wage violations to carry them forward as there must also be class-wide relief that does not necessitate individual trials.

Espenscheid v. DirectSat USA, LLC, No. 12-1943 (7th Cir. Feb. 4, 2013)

Less-Qualified Employee Lacks Race, Retaliation Claims

An employee applied for a program manager position, which was advertised as both an "administrative" series position and/or a "professional" series position. The employee applied under the administrative series and was deemed qualified. She did not meet the qualifications for the professional series as she did not have the requisite educational degrees or relevant professional experience. The employer re-advertised the position, and the job went to a male counterpart. A few years later the job was again open, but was solely a professional series position, for which the employee was not qualified. The employee sued the employer, alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended. The U.S. Court of Appeals for the Tenth Circuit found that the employee had established a *prima facie* case of discrimination, but that she could not prove that she did not get the position due to discrimination because the evidence demonstrated that the position required skills that she did not have, but that the male employee did have. She further failed to demonstrate that the stated basis for denying her the position was pretextual. The court also rejected the employee's retaliation claim because the alleged protected activity occurred two years prior to the alleged adverse employment action, thereby destroying any causal connection. Employment decisions — adverse or not — must be based upon legitimate, nondiscriminatory nonretaliatory bases, and employers must ensure that the action taken is well-documented so as to avoid a claim of pretext.

Conroy v. Thomas Vilsak, No. 11-4091 (10th Cir. Feb. 11, 2013)

Eighth Circuit Denies Class Certification of Pizza Delivery Drivers Claiming Delivery Charges Were Gratuity

A pizza delivery company implemented a delivery charge on food deliveries in Minnesota. The disclosure of the charge was given when online and phone orders were made, and pizza boxes identified the existence of a delivery charge. Credit card receipts identified the delivery fee and left a separate line for customers to leave a tip. A group of drivers sued the company, alleging that the delivery charge was a gratuity that was wrongfully withheld by the company. The district court certified a Fed. R. Civ. P. 23(b)(3) class of approximately 1,600 Minnesota delivery drivers. The U.S. Court of Appeals for the Eighth Circuit granted the company's request for interlocutory appeal and ultimately reversed the class certification. The court determined that because customers' specific circumstances determined whether the delivery charge might reasonably be construed as a payment for personal services, the proposed class lacked commonality. It further found that some customers asked about the charge and some did not and that some employees volunteered that it was not a gratuity and some did not. These circumstances determined the objective reasonableness of construing the charge as a payment for personal services. Therefore, the lack of commonality barred class certification. Policies regarding service fees and gratuities should be clearly delineated so as to manage the expectations of the employees as to which, if either, constitute any portion of their wages.

Luiken v. Domino's Pizza LLC, No. 12-1216 (8th Cir. Feb. 4, 2013)

Employer's Failure to Return Employee to Work Prior to Conclusion of FMLA Leave Does Not Amount to Interference

A maintenance employee who had worked at a hotel for more than 20 years had vision problems. From the beginning of his employment, the hotel accommodated these problems by ensuring that the employee's schedule and assignments

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were copied in large print. The employee suffered an injury, which required him to take leave. The hotel provided him with required information under the Family and Medical Leave Act (FMLA) and approved 12 weeks of leave. Over the next six months, the employee submitted conflicting doctors' notes from two different doctors. Some stated that the employee was completely debilitated, and others suggested that he could return to light-duty work. The employer attempted to get additional information from the employee's primary physician and to obtain additional information from the employee, only to be ignored. Ultimately, the employee returned to his previous position, and the same shift and level of seniority. Nonetheless, he claimed violations of the FMLA and the Americans with Disabilities Act (ADA), arguing that the hotel's failure to return him to work earlier amounted to FMLA interference, FMLA retaliation, and an ADA failure to accommodate. Affirming summary judgment for the employer, the U.S. Court of Appeals for the Seventh Circuit noted that the FMLA does not require job restoration to a position different than the one the employee held when he or she started leave. Here, there was no clear statement from the employee's physicians that he could return to his prior position, something that would have triggered the duty to reinstate. He thus could not sustain an FMLA interference claim. The retaliation claim also failed because the employee could not establish that the failure to reinstate to a lesser position was a materially adverse action. Finally, the employee's ADA claim lacked merit as the conflicting medical information did not create a material disputed fact as to his ability to return to work. Even if it had, the accommodation that he wanted — the re-assignment of his primary job duties away from him — was not reasonable. From all appearances, the hotel's human resources personnel knew the law, had proper FMLA processes in place, and had reached out to engage in the employee in the process of returning him to work. Having done so, the employer was properly protected from trial on these FMLA and ADA claims. This case serves as a reminder of the importance of having clear policies regarding leave and ensuring that management and human resources staff are adequately trained regarding the handling of such claims and the communications required with the employees and medical professionals to ensure compliance with the law.

James v. Hyatt Regency Chicago, 12-1511 (7th Cir. Feb. 13, 2013)

Employee's Poor Performance and Insubordination Prove Fatal to Discrimination Claim

An employee was placed on short-term disability leave for medical problems. She later returned to work on a full-time basis, and the employer allowed her to rest as needed on the job and to take time off for medical appointments. The employee's work performance, conduct and attendance later became an issue, and the employer warned her that if her performance did not improve, she would be terminated. The employee was subsequently terminated due to failure to meet performance expectations and for being insubordinate. She sued the employer, claiming disability discrimination in violation of American with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA). The U.S. Court of Appeals for the Eighth Circuit found that the employer had terminated the employee for performance and insubordination. Although the court questioned whether the employee had a qualifying disability to begin with, for the sake of argument it assumed she was disabled, but noted that she had no proof of intentional discrimination. The only evidentiary support for the employee's claim was her own subjective belief, which the court deemed insufficient. Further, the court found that the employee's disability had been accommodated for years, so there was no viable failure-to-accommodate claim. Finally, in terms of ADA retaliation, the court agreed with the district court that there was no causal connection between any protected activity and the ultimate termination. Anti-discrimination laws do not insulate an employee from discipline for violating workplace policies.

Lenzen v. Workers Comp. Reinsurance Ass'n., No. 12-1211 (8th Cir. Feb. 11, 2013)

Summary Judgment Ruling For Employer In Male Same-Sex Harassment Case Vacated

A male employee filed a sex-discrimination lawsuit, alleging that one of his male supervisors sexually harassed him by touching his genitals and by creating a hostile work environment. The district court granted summary judgment in favor of the employer on the ground that there was no evidence that the employee suffered discrimination because of his sex (i.e., because he was male). The U.S. Court of Appeals for the Second Circuit vacated the summary judgment ruling, and remanded the case to the district court for further proceedings. The court noted that "the critical issue" for same-sex harassment claims is "whether members of one sex are exposed to disadvantageous terms or conditions of employment (e.g., a hostile work environment), to which members of the other sex are not." The evidence showed that the alleged harasser's conduct was gender-based, and that the alleged harassment was motivated by the victim's sex, in that: (1) the

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alleged harasser treated women better than men; (2) the alleged harasser directed vulgar comments toward many male coworkers; (3) the alleged harasser struck the genitals of numerous male employees; (4) men were the primary targets of the alleged harasser's conduct; (5) the alleged harasser's vulgar comments were sex-specific; and (6) the alleged harasser frequently touched male-specific (and sex-related) body parts. Furthermore, the evidence showed that the alleged harasser's conduct was sufficiently severe or pervasive to constitute a hostile work environment, in his touching of the male employees' intimate body parts. In order for the male employee to show that he suffered "discrimination because of sex," the court outlined three examples of evidence: "(1) the alleged harasser was homosexual (and, therefore, presumably motivated by sexual desire); (2) the male employee victim was harassed in such sex-specific and derogatory terms by [someone of the same gender] as to make it clear that the harasser is motivated by general hostility to the presence of [someone of the same gender] in the workplace; or (3) there is 'direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'" It is not clear whether these three categories are meant to establish an exclusive list or merely provide a representative sample. Nevertheless, employers must remember that discrimination policies should be equally applicable to discrimination by and against both males and females.

Barrows v. Seneca Foods Corporation, No. 12-970 (2nd Cir. Feb. 25, 2013)

New Data Shows that DOL Is Actively Enforcing FLSA's New Breastfeeding Break Requirement

Statistics released by the U.S. Department of Labor (DOL) show that the department is taking seriously the Affordable Care Act's (ACA's) requirement that employers provide employees with an opportunity for expression of breast milk. The breastfeeding-break requirement became law with the passage of the ACA in 2010. The ACA requires employers to provide "a reasonable break time" in a shielded and secure place, other than a bathroom, for employees to express breast milk during their child's first year. Small employers with less than 50 employees need not comply if the accommodation would "impose an undue hardship by causing the employer significant difficulty or expense." The DOL investigated 54 employers for suspected violations of this requirement between March 23, 2010, and June 11, 2012. Sixty-six percent of those investigations resulted in findings of at least one violation, with the DOL finding failure to provide space and failure to provide break time. This new data released by the DOL demonstrates that employers must act now to comply with these requirements or risk facing an investigation and, potentially, substantial penalties and fines. Employers should confirm compliance by reviewing policies and practices at all locations.

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