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Newsletters

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Collective Action Cannot Proceed Where Representative Employee's Claim Rendered Moot

Nurses at a Philadelphia hospital claimed they were deprived of compensation when their employer automatically deducted 30 minutes of time worked per shift for meal breaks, even when the employees performed compensable work during those breaks. The representative employee, on behalf of all those similarly situated, claimed that the employer violated the Fair Labor Standards Act (FLSA) by engaging in such conduct. The employer served upon the employee an offer of judgment under Fed. R. Civ. P. 68, which was sufficient to fully satisfy her individual claim. The employee did not respond, and the offer was effectively deemed withdrawn. The employer moved to dismiss for lack of subject matter jurisdiction. The district court granted the motion, and the U.S. Court of Appeals for the Third Circuit reversed, finding that although no other potential plaintiff opted into the suit, and although the employer's offer fully satisfied the employee's claim, the collective action was not moot. This was

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because, according to the court, calculated attempts by employer-defendants to "pick off" representative employees with strategic Rule 68 offers *prior* to certification circumvented and frustrated the aims of the collective action process in the first place. The court held that the employee should be allowed to seek conditional certification of the action. The employer sought review by the U.S. Supreme Court. The high court agreed with the employer, finding that mootness principles controlled. Here, the employee's individual claim was rendered moot by virtue of the Rule 68 offer that provided complete satisfaction for her claim and left her with no personal interest or stake in the collective action. The Court also rejected the employee's attempt to rely upon Fed. R. Civ. P. 23 cases because Rule 23 class actions are fundamentally different from FLSA class actions and compel different results. Employers faced with class and collective actions should consult with counsel to determine whether the methods for resolution will bring about the intended result, and to ensure that such endeavors will pass muster under the applicable state and federal rules.

Genesis Healthcare Corp et al v. Symczyk, No. 11-1059 (U.S. Sup. Ct., Apr. 16, 2013)

For more information, please contact your regular Hinshaw attorney.

Employer Entitled to Lien on Employee's Recovery for Amounts Paid on Behalf of Employee

A group health plan established by a corporation paid $66,866 in medical expenses for injuries suffered by an employee participant as a result of a car accident with a third party. The employee's attorneys secured $110,000 in payments from the third party, with the employee receiving $66,000 after his attorneys were paid their contingency fee. Pursuant to a reimbursement provision in the group health plan, the corporation demanded that the employee reimburse the full $66,866 paid for his claims. The corporation sued under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) to enforce the plan's terms and obtain an equitable lien on $66,866 of the covered amount. The employee argued that enforcement would be unfair as absent any recovery on the employee's part, the corporation would not have a right to reimbursement absent over-recovery and that the corporation had to contribute its fair share of the cost incurred to get the recovery. The U.S. Court of Appeals for the Third Circuit reversed summary judgment in favor of the corporation, reasoning that the equitable principle of unjust enrichment overrode the health plan's reimbursement clause because it left the employee with less than full payment, and would give the plan a windfall. Upon consideration, the U.S. Supreme Court held that the plan constituted a contract between the employee and the corporation, which was enforceable through an equitable lien. However, the Court reasoned, the plan was silent on the allocation of attorneys' fees, so the common-fund doctrine should be used to fill the gap. The common-fund doctrine holds that someone who recovers money on behalf of another person can seek reimbursement from the amount recovered for their services. The Court remanded the case for a determination of how much the plan was entitled to recover in light of the employee's attorneys' fees. Based on the Supreme Court's holding, plan sponsors should ensure that reimbursement provisions in plans are carefully drafted and specifically address the terms of recovery.

US Airways v. McCutchen, No. 11-1285 (U.S. Sup. Ct., Apr. 16, 2013)

For more information, please contact your regular Hinshaw attorney.

Attorney's Insomnia Not Grounds for ADA, FMLA Claims

An attorney was diagnosed with fatigue, sleep deprivation and insomnia. After being cleared by her doctor to return to full-duty employment without restrictions, the attorney requested to limit her work days to five hours. Her supervisors denied the request on the grounds that she would not be able to fully perform her job. Months later, she was terminated for performance reasons. The attorney sued, claiming that she was discriminated against based on her disability. The district court granted summary judgment in favor of the employer, finding that the attorney was not an "individual with a disability" under the Americans with Disabilities Act (ADA) and that she did not present any evidence demonstrating that her employer's legitimate, nondiscriminatory reasons for firing her were a pretext. The U.S. Court of Appeals for the Fourth Circuit rejected the attorney's claims that her inability to sleep for more than four hours per night constituted an ADA-protected disability. The court noted that even if the attorney's insomnia qualified as a serious health condition, she failed to give her supervisors adequate notice of her need for leave. Although the attorney had requested a reduced work schedule, the court held that this was not tantamount to a request for leave pursuant to the Family and Medical Leave Act. This decision provides useful guidance for employers when considering whether an employee has a qualifying disability

and the ways in which the employee's disability can and should be accommodated.

Anderson v. Discovery Communication, LLC, No. 11-2195 (4th Cir. Apr. 5, 2013)

For more information, please contact your regular Hinshaw attorney.

Additional Reason for Failure to Promote Is Not Pretext for Discrimination

A member of the U.S. Air Force that was denied four promotions to Battalion Chief and Assistant Chief of Administration during a four-year period sued his employer fire department, alleging that these decisions violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). While there was sufficient evidence that the employee's military service was a motivating factor in the promotion decisions, the employee's claims were denied. As a rule, liability will not occur under USERRA if the employer would not have promoted a service member absent the individual's membership in the military. To this point, the fire department's decision-maker testified that the employee was untrustworthy and unable to make good decisions, exercise good judgment or work with others. The employee argued that this character assessment, first disclosed to him at litigation, was unbelievable because it was different than the reason originally given for the promotion decisions, he had less skills than the employees selected for promotion. The U.S. Court of Appeals for the Eleventh Circuit disagreed. Although this assessment of the employee's personal qualities was not expressly shared with the employee when the promotion decisions were made, it was consistent with the skill-based reason initially offered. The evidence showed that management believed these personal qualities were important aspects of the positions sought and considered them when it evaluated the candidates' skill sets for the positions. The differences in the reasons offered thus did not represent a shift in reasoning that would support a finding of pretext or lack of credence due to the employer. This is a favorable decision for employers. It establishes that the failure to inform an employee of a specific reason for an employment decision at the time it is made does not prevent the employer from using undisclosed, related reasons relied on to make the decision to refute claims of discrimination in a legal proceeding.

Landolfi v. Melbourne, No. 12-14295 (11th Cir. Apr. 5, 2013)

For more information, please contact your regular Hinshaw attorney.

Isolated Age Comment Insufficient to Overcome Employer's Legitimate Reason for Layoff

A technology company that manufactured components for large-scale computer networks and data storage systems employed a team of sales account managers. One particular account manager generated significant revenue for the company over the course of several years, but the downturn in the economy and industry changes led to a reduction in force. The account manager, however, felt that this rationale was a pretext for age discrimination and that he was selected for layoff because of his age. He pointed to comments made by the vice president of sales about needing to "re-energize" the team, which he considered disparaging remarks regarding the ages of the sales team. He filed a charge with the Massachusetts Commission Against Discrimination, and the complaint was dismissed for lack of probable cause. He then sued in state court, claiming, among other things, age discrimination under Massachusetts law. The employer removed the case to federal court based on diversity jurisdiction, and then successfully moved for summary judgment on all counts. The U.S. Court of Appeals for the First Circuit rejected the employee's argument that his employer's business decision was unsound. The employer had argued that the economy and industry changes led to a change in the data storage service which required them to downsize. The court stated "[a]n employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems objectively unwise." The court also observed that a review of the personnel decisions for similarly situated employees in the same sales unit did not reveal a pattern of discrimination, and that the company's new vice president of sales' "isolated" comment that the employee needed to "re-energize" his sales team was not a basis to conclude the termination was pretextual. Absent other evidentiary issues suggesting a discriminatory intent, courts will not second-guess a business judgment reduction-in-force termination corroborated by objective economic factors.

Woodward v. Emulex Corporation, No. 12-1612 (1st Cir. Apr. 18, 2013)

For more information, please contact David I. Dalby or your regular Hinshaw attorney.

Eleventh Circuit Affirms Denial of Temporary Reinstatement Sought by NLRB

The National Labor Relations Board (NLRB) filed an administrative complaint against the employer, claiming that it unlawfully discharged employees who were involved in a union organizing campaign. The NLRB filed a petition seeking to reinstate six of the terminated employees. The district court reasoned that injunctive relief of this type should only be granted where there is reasonable cause to believe that the unfair labor practices occurred and the requested injunctive relief is just and proper. In this case, the NLRB contended that the employer interfered, restrained or coerced employees in the exercise of their collective bargaining rights, and discriminated against certain employees by discouraging union membership, both violations of the Sections 158(a)(1), (3) of the National Labor Relations Act (NLRA) when it discharged the six employees. The NLRB satisfied the first prong for the requested injunctive relief, but could not meet the second because the evidence showed that the union organization campaign had "grown cold" more than a week before the contested discharges. Further, the terminations had little, if any, impact on the ability of the union to successfully proceed with its organization campaign. The U.S. Court of Appeals for the Eleventh Circuit found that the discharges were not proven to have inflicted any "chilling" effect on the union campaign. For example, the attendance at the union meetings stayed the same, or improved slightly, after the terminations at issue occurred. Moreover, the record showed that none of the discharged employees' departmental co-workers sought to rescind their authorization cards. As a result, the court rejected the NLRB's efforts to challenge the trial court's fact-finding and affirmed the trial court's decision denying temporary relief. This case reminds employers to monitor and review the factual impact of any discharges that occur during the course of a union organizing campaign, as well as other employee activities protected by the NLRA.

NLRB v. Hartman & Tyner, Inc., No. 12-14508 (11th Cir. Apr. 16, 2013)

For more information, please contact Ambrose V. McCall or your regular Hinshaw attorney.

Supervisor Who Told Employee She Was "Too Old" Not Responsible for Firing

A 61-year-old employee's supervisor made age-related comments over a four-month period. Later, while informing the employee that she was being fired, the supervisor suggested that the employee was "too old" for the job. The employee sued the employer for age discrimination in violation of the Age Discrimination in Employment Act (ADEA) and the state's civil rights act. The U.S. Court of Appeals for the Sixth Circuit upheld a dismissal of the case, finding that the supervisor had merely relayed a decision made by higher level management. "[A]lleged statements of individuals with no authority to fire" cannot demonstrate that the employer's reason for termination was discriminatory. The employer argued, and the employee agreed, that the employee's performance fell well below minimum requirements on performance reviews and that she violated company policy at least twice prior to her termination. The reports of inadequate performance were generated by a third-party company that anonymously evaluated the employee's skills. The court found that the supervisor's comments were not direct evidence of discrimination and did not establish that the employer's stated reason for termination was false as required in order to prove discrimination under the ADEA. The court also found that written discovery responses identifying the supervisor as one of the individuals who recommended the employee's "discipline, demotion, and/or discharge" did not indicate that the supervisor had any decision-making power. According to the court, the discovery responses were consistent with the employer's assertion that the supervisor was merely conveying the results of independent evaluation and the decision to terminate made by those in higher authority. This demonstrates how input from a neutral third party, and independent decisions made by upper management, can help an employer overcome an inference of discrimination. Documentation and neutrality are key.

Marsh v. Associated Estates Realty Corp., No. 12-1594 (6th Cir. Apr. 5, 2013)

For more information, please contact your regular Hinshaw attorney.

Time Spent Going Through Security Checks at Work May Be Compensable

A staffing company that provided warehouse space and staffing to various businesses employed hourly employees to fulfill internet orders in the warehouse. The employees sued their employer, claiming that they were denied compensation for the time they had to spend going from a security search (which took roughly 25 minutes) as well as the time that was

taken away from their meal breaks due to having to go through security and embark on the lengthy walk to the cafeteria. The employees claimed violations of Fair Labor Standards Act (FLSA) and various Nevada state labor laws. The district court granted the employer's motion to dismiss for failure to state a claim. The U.S. Court of Appeals for the Ninth Circuit agreed in part. The court first considered the time spent by the employees going through security checks and found that the time could be deemed compensable because it was integral and necessary, was designed to prevent theft, and was done for the employer's benefit. With respect to the shortened meal periods, however, the court found that walking back and forth to the lunch room was not a work function and was not necessary to the employees' principal work. Because the court held that security checks could be compensable, employers who require such undertakings should review their time and attendance and payroll policies to determine whether under the circumstances, the employees must be paid.

Busk v. Integrity Staffing Systems, No. 11-16892 (9th Cir. Apr. 13, 2013)

For more information, please contact Mellissa A. Schafer or your regular Hinshaw attorney.

Essential Functions May Trump ADAAA

A commercial truck driver/manager suffered an eye injury, which disqualified him from driving a commercial truck under the U.S. Department of Transportation (DOT) requirements. After the employee's treating doctors refused to certify him as meeting DOT standards, his employer terminated him. The employee sued the employer under the Americans with Disabilities Act. Upholding summary judgment, the U.S. Court of Appeals for the Eighth Circuit started its analysis by reviewing the essential functions of the job — including that the employee must drive a truck from time to time — and found that "no genuine issue of material fact exists that being DOT qualified to drive a delivery truck is an essential function of [the employee's] position." The court rejected the employee's assertion that it should start its analysis by addressing whether he was disabled under the Americans with Disabilities Act Amendments Act (ADAAA). The employee also claimed that that employer did not engage in an interactive process and failed to offer reasonable accommodations when it refused to allow him to continue in his same position despite having no DOT qualification. The court found that "eliminating the essential job function of being DOT qualified [from the position requirements] would be an unreasonable accommodation" and further rejected the claim that the employer did not engage in a good faith interactive process. This case provides a useful summary of how medical-related essential job functions should be analyzed under the ADAAA. Where the essential job functions include physical requirements, as is the case for many regulated jobs in transportation industries, employers should focus first on the essential job functions notwithstanding that the physical impairment may also qualify as an ADAAA disability.

Knutson v. Schwan's Home Service, Inc., No. 12-2240 (8th Cir. Apr. 3, 2013)

For more information, please contact your regular Hinshaw attorney.

Newly Created Company's Failure to Bargain With and Hire Existing Union Employees Constitutes NLRA Violation

A company entered into an agreement with a county to acquire a state-owned rehabilitation facility where union employees were employed. The company then formed a new company to manage and operate the facility, and hired most of the existing county (union) employees to work at the facility. But it did not hire several union officers who participated in demonstrations opposing the sale. The company refused to bargain with the union, and the union filed unfair labor practice charges with the National Labor Relations Board (NLRB). After a six-day hearing, an administrative law judge issued a decision finding that the company and its new subsidiary were a single employer subject to the National Labor Relations Act, and were thus jointly and severally liable for remedying unfair labor practices committed by either. The NLRB affirmed the findings. On appeal, the company argued that it did not have a duty to bargain with the union under the successorship doctrine and that there was insufficient evidence to support the finding that it violated the Act when it did not hire the referenced employees. The U.S. Court of Appeals for the Eleventh Circuit found the company and the newly created company were a single employer, and thus jointly and severally liable for violations of the NLRA committed by either. It also found that, pursuant to the successorship doctrine, the company had a duty to bargain with the local union. Finally, the NLRB's ruling that the company violated the National Labor Relations Act by refusing to hire the former employees was supported by substantial evidence. Companies that form subsidiaries and/or enter into purchase agreements must be

mindful of any existing bargaining and organizational issues, and must evaluate whether the existing circumstances will be equally applicable to the new company.

Grane Health Care LLC v. National Labor Relations Board, No. 11-4345, (3rd Cir. Apr. 15, 2013)

For more information, please contact Amanda L. Mattocks or your regular Hinshaw attorney.

Employee's Termination for Dishonesty About Drug Addiction on a Post-Offer Medical Questionnaire Upheld

A hospital-employer hired the employee as a security guard. On his post-offer medical questionnaire, the employee affirmatively stated that he had never suffered from drug or alcohol addiction or participated in a drug and alcohol treatment program. Thereafter, the employee suffered an injury at work and reported to the hospital's emergency department. When discussing his treatment with the physician, the employee indicated that he was a recovering drug addict. The employee's medical information was then transferred to the hospital's employee services division. Upon learning that the employee had suffered from past drug addiction, the hospital terminated the employee for dishonesty on his post-offer medical questionnaire. The employee sued the employer under the Americans with Disabilities Act (ADA), alleging that he was improperly terminated for his history of drug addiction. The U.S. Court of Appeals for the Third Circuit affirmed summary judgment in favor of the employer, finding that the employee failed to show that the reason for his termination was due to his past drug addiction and not his dishonesty on his medical questionnaire. The court noted that the fact that the employee did not believe his court-ordered drug and alcohol program was addiction treatment did not mean that the employer could not have reasonably viewed his negative response to the question regarding treatment as dishonesty. The court further held that the employee failed to present any evidence that the employer's reason for the termination was pretextual. This case serves as a reminder to employers to clearly document the reasons for terminating an employee and that an employee's failure to answer post-offer medical questions in a forthright manner could serve as grounds for termination.

Reilly v. Lehigh Valley Hospital, No. 12-2078 (3d Cir. Mar. 29, 2013)

For more information, please contact Eileen M. Caver or your regular Hinshaw attorney.

Employee Fails to Establish Injury Relative to Employer's Alleged Violation of Computer Fraud Abuse Act

An employee claimed that his employer defendants unlawfully withheld his wages, had him incarcerated, and took actions that barred him from accessing his personal email account. The employee reportedly merged his personal email account with the email accounts of his employer. After obtaining a temporary restraining order to regain access to his personal emails, the employee found that his personal correspondence, spanning several years, was all gone. The employee sued the employer and pled a number of state and federal law claims, including a claim that relied on the Computer Fraud Abuse Act (CFAA) 18 U.S.C. § 1030. The trial court dismissed the employee's claim based on his failure to plead the occurrence of an injury of at least $5,000, as required by the CFAA. The employee amended his claim, and later, the employer defendants moved for summary judgment. While faulting the employee's summary judgment response, the U.S. Court of Appeals for the Seventh Circuit provided some guidance to all parties on how to satisfy the injury element of the CFAA. One possibility the court identified, and that the employee had not pursued, was the filing of affidavits from potential business partners who were unable to reach him while he was locked out of his email account. The court also raised the possibility of the employee providing receipts that could have detailed fees he paid to obtain duplicates of lost records on his finances and bills. The court additionally commented that the employee could have submitted an admittedly self-serving, but admissible, affidavit wherein he could have testified about the number of hours he spent to obtain his emails. The employee's failure to pursue any of the potential paths outlined by the court, combined with his decision to rely on his pleadings, led to his defeat on summary judgment, an outcome affirmed on appeal. This opinion serves as a reminder to employers to have electronic communications policies in place which identify the permissible use of the company's computers and internet, and clearly delineate the allowed personal use, if any, of the systems.

Modrowski v. Pigatto, No. 11-1327 (7th Cir. Apr. 8, 2013)

For more information, please contact Ambrose V. McCall or your regular Hinshaw attorney.