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Newsletters

Employment Practices Newsletter - June 2013

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Another Court Strikes Down NLRB Posting Rule

The National Labor Relations Board (NLRB) required employers who were subject to its jurisdiction to post a "Notification of Employee Rights under the National Labor Relations Act" on their properties and websites. The posting advised employees of their rights to: form, join or assist a union; bargain collectively through representatives of their choosing; discuss wages, benefits, and other terms and conditions of employment with fellow employees or a union; take action to improve working conditions; strike and picket; or choose not to do any of those things. If an employer failed to post this information, it would be subject to an unfair labor practice charge. If the employer was found to have violated this rule, the NLRB was permitted to suspend the running of the six-month limitations period for filing any unfair labor practice charge, and to consider whether the employer knowingly and willfully refused to comply with the law. Various organizations and trade associations sued, claiming that the rule violated the National Labor Relations Act (NLRA) and the First Amendment. The district court held that the NLRB had authority to promulgate the posting rule, and that it was reasonably related to the purposes of the NLRA, but that the NLRB had no authority to make a "blanket advance determination that a failure to post will always constitute an unfair labor practice. " The district court also found invalid the section of the rule that tolled the

Attorneys

V. Brette Bensinger

Tom H. Luetkemeyer

Service Areas

Employee Benefits

Labor & Employment

limitations period. Notwithstanding the fact that two of the three means of enforcing the rule were held invalid, the district court held that the NLRB would have wanted the posting requirement to stand. The U.S. Court of Appeals for the D.C. Circuit struck down the notice rule as invalid. The court found that Section 8(c) of the NLRA "precludes the Board from finding noncoercive employer speech to be an unfair labor practice or evidence of an unfair labor practice," but that here, the NLRB's rule did both. The court then found that the NLRB's tolling rule was contrary to Section 10(b) of the NLRA and could not stand. Because all three of the means for enforcing the NLRB's posting requirement were ultimately held invalid, the court vacated the posting rule. Employers subject to the jurisdiction of the NLRA are not required to post the subject notification at this time under the circumstances. However, employers are cautioned to consult with counsel to ensure compliance with requirements under the NLRA.

National Association of Manufacturers et al. v. National Labor Relations Board, No. 12-5068 (D.C. Cir. May 7, 2013)

Physician's State-Court Suit Challenging Denial of Privileges Precluded Subsequent Federal Discrimination Claim

A hospital denied a physician's reappointment following his two-year review, during which the physician acknowledged for the first time that he had been reprimanded by his former employer for creating a hostile work environment. The physician subsequently sued in Illinois state court, requesting judicial review of the hospital's decision under a writ of common law *certiorari* and, simultaneously but in a separate action before the U.S. Equal Employment Opportunity Commission (EEOC), lodged charges of racial and national origin discrimination. The Illinois court upheld the decision to deny the physician's privileges in the *certiorari* suit. Shortly after that state court proceeding concluded, however, the physician received an EEOC right-to-sue letter and filed a second lawsuit against the hospital in federal court. The hospital moved to dismiss the discrimination claims, arguing that the physician's earlier state court claim — in which he had not mentioned his discrimination argument — effectively barred his subsequent federal claim. The hospital's argument relied upon the *res judicata* (i.e., "claim preclusion") doctrine, which bars claims that could have been raised in an earlier lawsuit involving: (a) a final judgment; (b) the same parties; (c) sufficiently related causes of action; and (d) a "full and fair opportunity" to litigate the claim. The U.S. Court of Appeals for the Seventh Circuit concluded that the earlier Illinois *certiorari* suit involved a sufficiently related cause of action and provided a "full and fair opportunity" to litigate the federal discrimination issues. The panel found that the discrimination and judicial review claims were sufficiently related because they arose "from a single group of operative facts"; in other words, the doctrine "precludes the sequential pursuit not only of claims actually litigated, but of those that could have been litigated." Second, the panel held that "an action in Illinois circuit court seeking judicial review" of a decision by *certiorari* provides the "full and fair opportunity" necessary for claim preclusion to apply to a federal civil-rights claim. Thus, the physician could have joined with the state court *certiorari* proceeding his claims under Title VII of the Civil Rights Act of 1964, as amended. Because he did not, claim preclusion applied. Not all cases are won based on the facts. This case demonstrates that procedural challenges can prove to be useful tools in getting lawsuits dismissed.

Dookeran v. County of Cook, No. 11-3197 (7th Cir. May 3, 2013)

Private Facebook Message Not Protected Concerted Activity Under the NLRA

An employer terminated a medical office worker based upon a private Facebook message she sent to several other then-current and former employees. The message contained derogatory comments about the employer but focused on one supervisor and another returning supervisor she disliked. In the message, the employee also expressed a desire to be terminated. None of the recipients responded directly to the message content at issue, but one of them gave the message to the employer. The employer terminated the medical office worker on the grounds that it was obvious she no longer wanted to work there and disliked the employer and, given these feelings, the employer was concerned about the employee's interactions with patients. The employee filed a charge claiming that her termination violated Section 8(a)(1) of the National Labor Relations Act, which protects concerted employee activity seeking to initiate, induce, or prepare for group action or where employees bring truly group complaints to management's attention. The National Labor Relations Board Division of Advice (Division) ultimately found that the Facebook message was not protected because it amounted to nothing more than individual griping. The Division explained that although the comments referenced the employee's situation at work, they expressed personal contempt for a former and returning supervisor and there was no evidence, such as a direct response to the message, that any other employee shared her concerns. The Division also specifically rejected application of the "inherently concerted" theory, which protects communications about inherently mutual subjects such as wages, because such personal gripes made to other employees do not amount to mutual workplace concerns and the employee did not discuss group action based upon her concerns. Although this outcome was favorable for employers, it demonstrates the importance of having the necessary facts and evidence to support a termination decision.

Tasker Healthcare Grp. d/b/a Skinsmart Dermatology, No. 04-CA-094222 (May 8, 2013)

Epileptic Employee Unable to Demonstrate Ability to Perform Essential Functions of Position

A mammography technician who had epilepsy unpredictably suffered numerous seizures at work. The seizures caused her to lose orientation and muscle control, which led to falls and injuries. The risk of injury to the technician and patients was so great that the employer placed her on paid administrative leave. The employer thereafter made various other accommodations in order to eliminate environmental triggers to her seizures. Although the technician returned to work, the seizures continued. The technician's continued seizures and failure to identify an accommodation led to the employer placing her on unpaid administrative leave. Once the technician began taking medicine to help control her seizures, the employer offered to reinstate her, but she refused. The employer ultimately terminated the technician, who consequently filed a charge with the Missouri Commission on Human Rights and the U.S. Equal Opportunity Employment Commission. The technician claimed violations of the Americans with Disabilities Act, the Age Discrimination in Employment Act, and state law. She alleged that the hiring of a younger technician to supplement the staff and the placing her on administrative leave were discriminatory acts. The U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment for the employer. The court found that the technician was not a qualified disabled person under federal or state law as she could not perform the essential functions of her position, even with accommodation, and her inability to do so caused a direct threat to herself and others. For the same reason, the technician could not meet her burden of establishing that age was the "but for cause" of the adverse employment action (here, termination) because she could not overcome the initial hurdle of establishing that she was qualified for the position. Although the law imposes obligations upon employers to accommodate disabled employees, under certain circumstances, there are simply no accommodations that will enable the employee to perform the essential functions of the position. Notwithstanding, prior to terminating a disabled employee for inability to accommodate, employers are cautioned to consult with counsel to ensure that all necessary steps have been taken to comply with state and federal law.

Olsen v. Capital Region Medical Center, No. 12-2113 (8th Cir. May 7, 2013)

Seventh Circuit Clarifies When a Financial Service Provider Is a Fiduciary Under ERISA

The trustee of a 401(k) pension plan sued a service provider that provided the plan's 383 investment options, alleging that the service provider's revenue-sharing practices constituted a breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA). Under the arrangement between the plan and the service provider, plan participants' investments were held in a separate account controlled by the service provider, which were then invested in the mutual funds selected by the participants. If the participants had directly invested in the mutual funds, the mutual funds would have been required to track the investments; however, because the service provider aggregated these investments, it was responsible for tracking the investments. Because the service provider undertook this duty, the mutual funds agreed to share with the service provider a portion of the revenue sharing fees they received. The trustee also retained the right to select and change the investment options offered under the plan and the service provider retained the right to substitute or delete from the trustee's choices. The district court granted summary judgment to the service provider, ruling that it had no fiduciary obligations with respect to its revenue sharing practices and therefore was not a functional fiduciary under ERISA. The U.S. Court of Appeals for the Seventh Circuit affirmed, holding that because the service provider was not specifically named a fiduciary it would only constitute a fiduciary to the extent it authorized discretionary authority or control over plan management. The court found that the assembly of a list of investment options was not a fiduciary act. Additionally, the court stated that that while it agreed that the service provider had authority or control over the plan assets based on the maintenance of separate accounts, the court did not find that the service provider was a functional fiduciary because there was no evidence that the service provider had mismanaged the funds. Finally, the court held that the service provider did not breach its fiduciary duty because it retained the right to delete or substitute the funds selected by the trustee and failed to substitute less expensive share classes because the omission to act was not sufficient to establish that an individual exercised authority or control over plan assets. Based on the court's ruling, employers should be aware that the mere authorization to choose plan investment options is not enough to make a plan service provider a fiduciary.

Leimkuehler v. American United Life Insurance Co., Nos. 12-1081, 12-1213 & 12-2536 (7th Cir. Apr. 16, 2013)

Court Finds Attendance to Be Essential Function of Job

A dispatcher for a ground transportation service for a railroad had various attendance problems. The employer's attendance policy provided that after an employee's fifth absence in a year, he or she could be subject to a verbal warning, and after further absences, a written warning, suspension, and/or termination might be administered. The policy did not differentiate between absences for medical reasons and other absences. The employee was absent for several days due to various symptoms that led to her being diagnosed with multiple sclerosis. She was then absent several more days with additional symptoms. The employee provided doctors' notes following her absences, but was written up anyway. After further absences, she was suspended. The employee then requested a 30-day leave of absence, which was denied. The employee sued, alleging that the employer had violated the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act. The district court granted summary judgment for the employer, finding that the employee failed to present evidence sufficient to establish a *prima facie* right to the protection of either statute. On appeal, the U.S. Court of Appeals for the Seventh Circuit similarly found that the employee could not prevail on her ADA claim because she could not show that she was qualified to perform the essential functions of her job, even with reasonable accommodation. An individual whose disability prevents her from coming to work regularly cannot perform the essential functions of her position. The court considered that there was no anticipated date by which the employee would have been expected to attend work regularly, even if she had been granted leave. The court also looked to the fact that after the employee was terminated, she worked for another employer for a very short time, and was absent for many days there, too, due to her illness. Considering all of the evidence at hand, the court could not conclude that a jury could potentially find that the combination of leave and medication would have enabled her to return to work. The employee's FMLA claim further failed because she was not eligible for leave at the time of her request due to her length of service, and thus, she was not entitled to the benefits or the protections of the statute. Employers must take caution to properly consider and address employees' requests for leave for medical reasons so as to ensure compliance with federal and state laws, and to minimize potential risk for future litigation.

Basden v. Professional Transportation, Inc., No. 11-2880 (7th Cir. May 8, 2013)

EEOC May Be Liable Under Equal Access to Justice Act for Fees and Costs in Age Discrimination Case

The U.S. Equal Employment Opportunity Commission (EEOC) sued a nonprofit community health center in Tennessee on behalf of an employee of the health center who was laid off as part of a corporate downsizing. The employee challenged her layoff by filing internal grievances and a charge with EEOC, which were denied. While still receiving severance, the employer hired the employee for a lower-paying position. The employee was then interviewed for a higher paying position, but a younger applicant was hired instead. The employee filed another charge with EEOC, which found that it lacked reasonable cause to believe she had been laid off because of her age. However, the EEOC found that reasonable cause existed to believe that the employer's failure to *rehire* her for the higher paying position was based on her age. The EEOC then sued the employer for violation of the Age Discrimination in Employment Act (ADEA) by failing to rehire the employee based on her age and in retaliation for her protected activity in filing internal grievances challenging her layoff. The district court granted the employer's motion for summary judgment on both claims, and the employer received an award of 50 percent of its attorneys' fees and costs under the Equal Access to Justice Act (EAJA). Reversing in part and remanding, the U.S. Court of Appeals for the Sixth Circuit found that the district court applied the incorrect standard in assessing whether EEOC's case was substantially justified. As for the broader question of the fee-shifting provisions the court found that the EAJA applies to claims by the EEOC against private parties under the ADEA. The court found that the EAJA expressly waives sovereign immunity and allows private parties to recover legal fees and costs from the federal government to eliminate the financial disincentives for such parties to challenge and deter unreasonable exercises of governmental authority. However, the ADEA, which expressly provides for prevailing plaintiff attorneys' fees and costs, is silent concerning whether prevailing defendants may recover fees and costs. The court noted that the EAJA "fills the void" created by that silence, and requires an award of fees and costs to a prevailing private party, except as otherwise explicitly provided by law and unless the government's position in the case was "substantially justified." The court noted that unlike Title VII of the Civil Rights Act of 1964, as amended, the ADEA does not provide a basis for defendants to recover fees, thus triggering application of the EAJA when the plaintiff is the federal government and the defendant is a private party. Because the EEOC is a federal agency and the employer is a private party, the employer may be entitled to recover attorneys' fees and costs from EEOC under the EAJA. Despite this ruling, it is doubtful that EEOC will be unduly deterred in its mandate to enforce anti-discrimination laws because of the possibility of incurring liability for prevailing defendants' attorneys' fees.

EEOC v. Memphis Health Center Inc., Docket No. 11-6426 (6th Cir. unpublished opinion May 17, 2013)

Employer's Mental Fitness-for-Duty Examination Did Not Violate ADA

During a routine one-on-one meeting with his supervisor, a customer service representative complained for the first time about alleged discrimination and mistreatment by various managers and co-workers. He became agitated, banged his hands on the table, and said someone was "going to pay for this." The manager reported the conduct, and human resources felt the comment constituted a threat against employees. The employee met with an independent consulting psychologist to discuss the workplace issues, and the psychologist expressed concern about the employee's level of emotional distress and his ability to perceive events accurately. The doctor accordingly recommended a fitness-for-duty evaluation. The employer informed the employee that as a condition of his continued employment, he must complete an evaluation to identify whether there were any issues that could represent a risk to the safety of others in the workplace. The employee completed the evaluation and was cleared to return to work. He subsequently sued, claiming that the requirement that he undergo the fitness-for-duty evaluation violated the Americans with Disabilities Act (ADA). The U.S. Court of Appeals for the Eleventh Circuit noted that Section 12112(d)(4)(A) of the ADA protects employees who are not disabled because it does not refer to a "qualified individual," but instead references an "employee." The court then found that the employer had a reasonable, objective concern about the employee's mental state that affected job performance and potentially threatened the safety of its employees so as to warrant the examination. Because an employee's ability to handle reasonably necessary stress and work reasonably well with others were essential functions of any position, the fitness-for-duty test was job-related and consistent with business necessity. Fitness-for-duty examinations can be required under various different circumstances. The findings and results of such examinations, though private and confidential, may affect the ability of the employment relationship to continue. Employers should proceed cautiously, and ensure that any such policies are equally and consistently applied to all employees.

Owusu-Ansah v. Coca-Cola Co., No. 11-13663 (11th Cir. May 8, 2013)

Sixth Circuit Upholds Michigan's Public Act 53 Regulating Public School Union Dues

Michigan's Public Act 53 (Act) prohibits public-school employers from providing payroll deductions to collect union membership dues from public-school employees. A group of unions and union members challenged the Act facially, alleging that it violated their federal constitutional rights. The district court entered a preliminary injunction barring enforcement of the Act. In evaluating the injunction on appeal, the U.S. Court of Appeals for the Sixth Circuit noted that when a party seeks a preliminary injunction on the basis of a potential constitutional violation, the determinative factor is often whether there is a likelihood of success on the merits. Ultimately, the court reversed the preliminary injunction, holding that the challengers' First Amendment and Equal Protection claims were without merit, and thus, there was not a likelihood of success on the merits. On the First Amendment claim, the court held that the Act neither restricts speech nor discriminates based upon viewpoint. The court also held that the Equal Protection claim failed because there is a conceivable legitimate governmental interest in support of the classification barring public-school employers from using their resources to collect union dues. This case serves as a reminder for employers to be mindful when allowing or rejecting payroll deductions, as state and federal labor and employment laws provide very specific rules as to what is and what is not allowed.

Bailey v. Callaghan, No. 12-1803 (6th Cir. May 9, 2013)

Improper Recess Appointments Render NLRB Order Invalid

The National Labor Relations Board (NLRB) issued a bargaining order to a nursing facility, but the facility claimed that it was invalid because the NLRB lacked quorum to issue the order. Specifically, the facility argued that President Obama's recess appointment of Craig Becker as a member of the Board in 2010 was invalid, and thus, any orders issued at that time lacked sufficient quorum. The U.S. Court of Appeals for the Third Circuit agreed with the facility. In reaching its decision, the court looked to the Recess Appointments Clause of the U.S. Constitution, which provides that the President may fill vacancies which occur during the Senate recess. The question in this case, however, was what "the recess of the senate" meant. There were three alternative definitions proposed: (1) breaks between sessions of the Senate; (2) intersession breaks as well as breaks within a session that last for non-negligible time; or (3) any break in the Senate business that renders the body unavailable to provide advice and consent on the President's nominations. The court concluded that the "recess of the senate" language could only mean intersession breaks. As a result, the court found that the NLRB lacked the requisite number of members to exercise its authority because the one panel member (Becker) was invalidly appointed during the intrasession break. Although this decision has significant ramifications in terms of the determinations rendered by the NLRB during this timeframe, it does not give employers carte blanche to disregard any orders issued by the NLRB during its lack of quorum. Employers should consult with counsel to ensure compliance.

NLRB v. New Vista Nursing and Rehabilitation, No. 11-3440 (3rd Cir. May 16, 2013)

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