HINSHAW

Newsletters

Employment Practices Newsletter - December 2013

December 2, 2013

No ADA or FMLA Violation for Requiring Alcoholic Employee to Agree to Not Drink

A freight company driver sales representative admitted himself into an alcohol abuse treatment program after relapsing into alcoholism. The employee had previously received leave under the Family and Medical Act (FMLA) for his alcoholism and, as a condition of his returning to work, was required to sign a return to work agreement (RWA) promising not to drink alcohol. The employer thereafter terminated the employee for breaching the RWA. The employee sued under the FMLA, the Americans with Disabilities Act, and a parallel state statute. The trial court found that the employer based its termination on a nondiscriminatory reason — the violation of the RWA — and the employee had no evidence to the contrary, and granted the employer summary judgment. On appeal, the employee argued the RWA violation could not be a valid termination reason because the RWA itself violated the ADA's prohibition against "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability." The employee argued similarly that the RWA violated the FMLA because it discouraged him from exercising his FMLA rights. The U.S. Court of Appeals for the Third Circuit rejected both arguments, holding that the RWA did not violate the ADA because it did not restrict the ability of someone with his alleged disability to work, it merely forbade employees who signed the agreement to consume alcohol. The

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court also found that the RWA did not violate the FMLA because the employer requested he sign the agreement pursuant to its Department of Transportation obligation to maintain strict alcohol policies for covered employees. While the RWA withstood a challenge in this case, the validity of such agreements can vary depending on the jurisdiction and specific laws involved and an employer should consult an attorney before taking any action in reliance on one.

Ostrowski v. Con-Way Freight, Inc., No. 12-3800 (3d Cir. October 30, 2013)

Contact for more information: your Hinshaw attorney

"Special Needs" Doctrine Permits Breathalyzer Testing of Police Officers Involved in Shootings

The police department had a policy of administering a breathalyzer test to any officer who discharged a firearm which resulted in death or personal injury. The union representing the officers challenged the policy, arguing that it was unconstitutional under the Fourth Amendment to the U.S. Constitution as an unreasonable search. The district court found the policy to be constitutionally reasonable under the "special needs" doctrine, and granted the department's motion for summary judgment. The union appealed, arguing that any "special needs" were sufficiently outweighed by the officers' privacy interests, and that the policy did not serve a primary purpose distinct from normal law enforcement. The U.S. Court of Appeals for the Second Circuit affirmed, finding that the breath test policy served "special needs" distinct from the normal criminal law enforcement activities, in that the policy helped maintain the public's confidence in the department and served to ensure the officers were in compliance with the sobriety guidelines when they discharged their firearm. Thus, the policy fit within the exception to the probable cause requirement of the Fourth Amendment. Employers who conduct similar "searches" of employees should be mindful of the potential challenges to such testing and should take caution when implementing such policies to ensure that they are constitutional.

Lynch v. City of New York, No. 12-3089 (2nd Cir. November 15, 2013)

Contact for more information: your regular Hinshaw attorney.

References to Employee's "Shelf-Life" Not Evidence of Age Discrimination

The employee claims he was terminated due to his age, and his contention was largely based upon an instant messaging conversation between members of human resources wherein one inquired about this particular employee's "shelf life." The messages centered upon a discussion about whether to eliminate the employee's position, as well as an evaluation about his performance. Though the employee was initially retained, he was later terminated. The employee sued, claiming age discrimination. The employer moved for summary judgment, which the district court granted, finding that the reference to "shelf life" had nothing to do with the employee's age and instead, referred to his workload. The U.S. Court of Appeals for the Tenth Circuit affirmed. The appellate court agreed with its brethren, finding that the comment did not constitute direct evidence of age discrimination. The court also rejected the employee's allegations that the term "Project Blue" was discriminatory in terms of age because of the alleged allusion to blue rinses sometimes used by older people. The court ultimately concluded that the employee had no direct evidence of discrimination, and the circumstantial evidence amassed was insufficient to suggest that he was terminated based on his age. When making termination decisions, it is important to ensure that the requisite documentation has been completed and accurately reflects the legitimate, non-discriminatory basis for the termination.

Roberts v. International Business Machines Corporation, No. 12-5169 (10th Cir. November 5, 2013)

Contact for more information: your regular Hinshaw attorney.

Religious Business Owners Obtain Injunction Barring Enforcement of Contraceptive Mandate under ACA

Two Catholic families and their for-profit closely-held construction and manufacturing entities operated in accordance with their religious beliefs. The companies filed a request for an injunction in court, seeking to bar the enforcement of the regulations promulgated under the Affordable Care Act (ACA) that relate to the "contraception mandate." The trial court denied the companies' request for a preliminary injunction. On appeal, the issue was whether business owners and their closely held corporations could assert a religious objection to this mandate, and whether forcing them to provide this coverage substantially burdens their right to exercise their religious rights. The U.S. Court of Appeals for the Seventh

Circuit found that the owners and their companies could challenge the mandate. It further found the requested injunction appropriate based on the likely success of the companies' claims under the Religious Freedom Restoration Act (RFRA). The critical provisions of the RFRA bar the federal government from imposing substantial burdens on "a person's exercise of religion" unless the federal government can show that the imposed regulatory burdens qualify as the "least restrictive means of furthering...[a] compelling government interest." Here, the appellate court found that the federal government had failed to satisfy its burden under the RFRA pursuant to an applied strict scrutiny standard given the owners' and operators' of the companies claimed exercise of religious rights. Though this matter is likely to be reviewed by the U.S. Supreme Court, business owners are cautioned to comply with the mandate unless and until further legislation or guidance is provided.

Korte v. Sebelius, No. 12-3841 (7th Cir. November 8, 2013)

Contact for more information: Ambrose V. McCall

Court Finds Wage Difference Between Male and Female Counterparts to be Justified

The employee started working with the auto parts manufacturer when she was a student. After she graduated, she was hired as a test engineer with the same starting salary as the male engineering graduates. The employee was later promoted to be an applications engineer, and then claimed she was promoted to an account manager position, though the employer disputed this. She complained about her salary on several occasions and generally received raises in response. She later filed suit, claiming wage discrimination under the Equal Pay Act and Michigan state law. The district court granted summary judgment in favor of the employer on the grounds that the employee failed to produce specific evidence of her job duties and those of her male counterparts to show she performed the same job. The U.S. Court of Appeals for the Sixth Circuit affirmed, finding that the wage differential was because the employee lacked the skill, experience, and qualifications of her male counterparts, and because, in some cases, the male counterparts had greater job responsibilities, such as major accounts and management. Though the employee argued that the differences in pay were legitimate only up to a point and that the employer should have borne the burden of justifying any excess, the court declined to accept this, finding that in this case, the differences in skill, experience, and education between the employee and the male co-workers was significant. As a result, no reasonable juror could conclude that the pay differential was based on the employee's gender. While pay differences between employees is a reality for most businesses, it is important to ensure that there is a legitimate, gender-neutral reason for differentials between counterparts who perform the same or similar jobs.

Foco v. Freudenberg-Nok General Partnership, No. 12-2174 (6th Cir. November 25, 2013)

Contact for more information: your regular Hinshaw attorney.

Employer Entitled to Recover Prevailing Party Costs from Employees, Despite its "Enormous Wealth"

Console supervisors at a refinery sued their employer claiming that the employer misclassified them as exempt in violation of the Fair Labor Standards Act (FLSA). Some of the employees were dismissed from the lawsuit because their responses to the employer's discovery requests were deficient, and later, after other employees violated discovery orders, the court dismissed their claims as well. After all of the employees' claims were ultimately dismissed, the employer, as prevailing party, sought to recover over $50,000 in litigation costs, but the court declined, citing the employer's "enormous wealth" and the employees' "limited resources." Both parties appealed, and the U.S. Court of Appeals for the Fifth Circuit, though agreeing with the district court's dismissals of the employees, found that the district court should not have reduced the employer's cost award. The court found that the comparative wealth of the parties was not a sufficient basis to reduce a prevailing party's cost award, and that here, the employer spent a couple of thousand dollars per employee on carefully documented costs, such as depositions, and that the award was justified. With employment class actions on the rise nationwide, cases like this demonstrate the rare opportunity for a prevailing employer to recoup some of its litigation costs.

Moore v. Citgo Ref. & Chems. Co., LP, No. 12-41175 (5th Cir. November 12, 2013)

Contact for more information: Olga Simanovsky

ADA Amendments Act Does Not Absolve a Party Alleging Disability Discrimination From Having to Prove the Disability

A control-room operator who had a series of verbal altercations with his supervisors was suspended and then terminated, and was subsequently diagnosed with major depressive disorder and generalized anxiety disorder severe without psychosis. He filed suit against his employer, claiming violations of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act. The district court dismissed the FMLA claim, and the former employee voluntarily dropped his Title VII retaliation claim before trial. The remaining claims were tried to a jury, which concluded that the operator was not a qualified individual with a disability. The operator appealed, and the U.S. Court of Appeals for the Fifth Circuit affirmed. On appeal, the operator claimed that the district court erred in allowing the jury to determine if he was a qualified individual with a disability, as he claimed this was not a predicate to a finding of discrimination under the ADA. He further claimed that the ADA Amendments Act of 2008 (ADAAA) expanded the coverage of the ADA by simplifying the analysis of "disability" and focusing on whether there was discrimination, and not whether there was a disability. The court rejected this notion, reasoning that the changes in the ADAAA were an attempt to harmonize the language and terminology of the statute with Title VII, not to underscore the importance of a "disability." While the ADAAA may have made it easier for employees to prove that they have a disability, this case demonstrates that the Amendments do not absolve an employee from proving that he has a disability.

Neely v. PSEG Tex., LP, No.12-51074 (5th Cir. November 6, 2013)

Contact for more information: your regular Hinshaw attorney.

Employee Witness Entitled to Same Protections against Retaliation as Complaining Employee

A Caucasian maintenance worker cooperated with his employer's investigation into other employees' complaints about a supervisor's racist language. The worker informed the investigator that he heard the supervisor use offensive language about African American employees, had asked the supervisor to stop, but the supervisor refused. The investigator concluded that there was a pattern of inappropriate language and use of derogatory racial comments. The worker was laid off within a few months of participating in the investigation. He then filed suit alleging retaliatory discharge in violation of 42 U.S.C. §1981, Title VII of the Civil Rights Act of 1964, and related state statutes, claiming he was terminated because he participated in the investigation. The employer moved for summary judgment, which the district court granted in part. The case went to trial on the §1981 claim and the jury awarded the worker compensatory damages and back pay. Both parties appealed. The U.S. Court of Appeals for the Eighth Circuit affirmed, finding that an employee who substantiated complaints of such violations has demonstrated opposition to that violation and acted to vindicate the rights of others, and thus should receive the same protection against retaliation as the person who complained. To hold otherwise would impede internal efforts to address discrimination. Taking adverse employment action against employees who have recently complained or participated in an investigation can be risky. Employers should be mindful of this when making such decisions, and ensure that legitimate, non-discriminatory, non-retaliatory reasons support the action taken.

Sayger v. Riceland Foods, Inc., No. 12-3301 (8th Cir. November 18, 2013)

Contact for more information: Mellissa A. Schafer

Attention Central Illinois Employers - There's Still Time To Register!

Hinshaw partners Ambrose V. McCall and Timothy J. Newlin will give a presentation titled "Illinois Employers and the Two-Year Itch: Workers' Compensation and Retaliation Claims Challenges and How To Address Them" at Hinshaw's Peoria office. The program will help business leaders, HR managers, and other managers in dealing with common pitfalls related to difficult workers' comp and related retaliation claims. The program will take place on Wednesday, December 4, 2013

from 8:00 a.m. to 9:30 a.m. Central. CLE and continuing education credit for HR professionals is available. For more information and to RSVP, please click here or contact Hannah Lopas at hlopas@hinshawlaw.com.