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Newsletters

# Employment Practices Newsletter - January 2014

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## Northern District of Illinois Holds that Job-Related Evaluation Consistent with Business Necessity Does Not Violate the Americans with Disabilities Act

In a case where the defendant construction company was represented by Hinshaw & Culbertson LLP, the U.S. District Court for the Northern District of Illinois ruled that the company did not violate the Americans with Disabilities Act (ADA) when it rescinded a conditional job offer to an employee who failed its job-related evaluation. The Court based its decision on the ADA regulations, which provide that an employer can defend against a discrimination claim by showing that standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability are job-related and consistent with business necessity. In the alternative, the ADA permits an employer to conduct post-offer examinations as long as it does so for all individuals entering the same job category. In this case, the company implemented a policy requiring that all persons applying for field positions in Illinois successfully complete a functional capacity employment test. In June 2010, the company extended a conditional offer of employment to the plaintiff carpenter whom it previously laid off for economic reasons. The offer, however, was contingent upon successful completion of the evaluation, which ultimately

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revealed that the plaintiff was unable to meet the company's minimum lifting requirements. The company then rescinded his conditional offer because he could not perform the essential functions of the job. The Court ruled that the post-job offer exception to the ADA's medical test prohibition applied. Even if the evaluation was not required for each employee, it properly analyzed tasks that were representative of those performed by the carpenters and contributed to the company's efforts to maintain a safe workplace. This decision serves as a reminder to employers that post-offer examinations must be applied to all individuals entering the same position or must be job-related and consistent with business necessity.

*Chi. Reg'l Council of Carpenters v. Berglund Constr. Co.*, No. 12 C 3604 (N.D. Ill. Dec. 19, 2013)

Contact for more information: your regular Hinshaw attorney.

**Police Officer's Complaints Regarding Safety Matters Not Protected Speech**

A police officer was removed from his position on the K-9 team after it was determined that he, as well as other officers on the team, had serious performance issues that posed a significant risk to team safety. The officer brought suit against his employer and various other officers alleging that that he was deprived of his constitutional rights in that he was retaliated against for exercising his free speech rights under the First Amendment. Essentially, the officer claimed that he was terminated because he voiced various concerns about the K-9 team's ongoing safety problems and the accidental discharge of weapons. The matter was tried to a jury, who found unanimously that the officer was retaliated against. The employer moved for a judgment as a matter of law, which was denied. The employer appealed. The U.S. Court of Appeals for the Ninth Circuit found that the evidence presented to the jury did not reasonably permit the conclusion that the employee established a retaliation claim pursuant to the First Amendment. The court found that where a public employee reports safety concerns to his supervisor pursuant to a duty to do so, that employee does not speak as a private citizen, and is thus not entitled to First Amendment protection. In reaching this conclusion, the court reversed the judgment and held that the employer was entitled to judgment as a matter of law. Not all speech is protected and not all adverse actions are retaliatory, as this case demonstrates. However, employers must nevertheless take caution when taking adverse employment action against an employee who has recently articulated complaints so as to avoid inference of retaliation, and, in the public sector, to avoid potential First Amendment challenges.

*Hagen v. City of Eugene*, No. 12-35492 (9th Cir. December 3, 2013)

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**Parent Company Has Liability For Subsidiary's WARN Violations**

An employee was laid off by a company's subsidiary and filed a class action suit alleging the subsidiary and its parent company and other related ownership entities violated the Worker Adjustment Retraining and Notification Act (WARN), which requires employers with 100 or more employees to provide 60 calendar days' notice of plant closings or mass layoffs to give transition time to workers and their families to adjust to the prospective loss of employment, seek alternative jobs, and/or enter skill training or retraining to successfully compete in the job market. The employee contended that the parent company was liable for the subsidiary's WARN violations because the parent company disregarded the subsidiary's corporate form and exercised de facto control of the subsidiary. The parent company was the sole member and manager of the subsidiary, and the parent company board operated as the subsidiary's board. The U.S. Court of Appeals for the Second Circuit reversed summary judgment in favor of the parent company, finding that a triable issue of fact existed that would allow a jury to conclude that the subsidiary was so controlled by the parent company that the subsidiary lacked the ability to make any decisions independently and that the parent company's resolution authorizing the subsidiary to lay off this employee and the class of similar employees was a function of being an employer and created liability. Adopting Department of Labor Regulations to determine if separate entities are a single employer, the court considered whether there was (1) common ownership; (2) common directors and/or officers; (3) de facto exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations. The court observed that the inquiry is a fact-specific balancing test, no one factor controls, and all factors need to be present for liability to attach to the related entity. Significantly, this case serves as a reminder to employers that a separate legal existence will not insulate a parent company from liability for a subsidiary's WARN violations if the parent is the decision-maker responsible for the employment practice giving rise to the litigation.

*Guippone v. BH S&B Holdings, LLC et al.*, No. 12-183 (2nd Cir. December 10, 2013)

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**Sixth Circuit Holds That General Contractor Can Be Joint Employer of Subcontractor's Employees**

While working at a construction site, a group of African American construction lift operators claimed they were subjected to frequent and onerous racial discrimination, including name calling and even being doused with porta-potty liquid. The employees claimed that the conduct continued, despite numerous complaints to the subcontractor that hired them and the general contractor. The U.S. Equal Employment Opportunity Commission then filed suit against both the subcontractor and the general contractor, claiming race discrimination in violation of Title VII of the Civil Rights Act of 1964 (as amended). The district court granted the general contractor's summary judgment motion, holding that the general contractor was not the employer. On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the lower court and held that the general contractor had sufficient control over the employees at the construction site to be considered a joint employer. The court reached this conclusion based on the fact that the general contractor supervised and controlled the employees' day-to-day activities, set the work hours, collected timesheets, required safety training, handled complaints, and could remove employees from the site. Employers should be aware that, despite not being the actual "employer" of the complaining employees, certain conduct on behalf of a company can ultimately result in the company being deemed a "joint employer" for liability purposes.

*Equal Employment Opportunity Commission v. Skanska USA Building, Inc.*, No. 12-5967 (6th Cir. December 10, 2013)

Contact for more information: your regular Hinshaw attorney

**Employee's Facebook Complaints of Harassment Fail to Support Employee's Retaliation Claim**

A hospital nuclear-medicine technician posted complaints on Facebook alleging that her supervising physician inappropriately touched her and paid her and other employees for time they did not work. The accused physician brought these posts to the hospital's attention and the hospital subsequently asked the employee if she authored the posts. The employee denied authoring them three times. The hospital began an investigation, during which the employee told other employees the physician destroyed evidence of the overpayments. The employee later admitted to authoring the posts and was terminated for dishonesty and causing a workplace disruption. The employee subsequently sued the hospital claiming, among other things, that she was terminated in retaliation for complaining of sexual harassment in the form of the Facebook posts. The U.S. Court of Appeals for the Tenth Circuit affirmed summary judgment in favor of the employer, finding there was no evidence the hospital engaged in retaliation. First, the hospital had a flexible harassment reporting system the employee did not use and the hospital found out about the posts only because the accused supervisor reported the posts. Second, it was undisputed that the employee lied and initially disclaimed authoring the posts and falsely accused the supervisor of destroying evidence, and that these acts — dishonesty and disruptive behavior — were valid grounds for termination. In this case, the employer was ultimately able to rely upon its policies in support of the termination, as well as the employee's failure to comply with those policies. This case serves as a reminder of the importance of the existence, implementation, and enforcement of such policies.

*Debord v. Mercy Health System of Kansas, Inc.*, No. 12-3072 (10th Cir. November 26, 2013)

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**Court Finds Union Illegally Sued Two Construction Companies After NLRB Awarded Disputed Roofing Work to Rival Union**

A township in New Jersey authorized a construction project subject to a Project Labor Agreement (PLA). The PLA superseded any other agreements the PLA's signatories may have signed. A roofing subcontractor signed the PLA and assigned the job to the local carpenters union (the Carpenters) with which it had an existing collective bargaining relationship, even though the Carpenters did not sign the PLA. The local sheet metal workers union (the Sheet Metal Workers), which was a party to the PLA, argued that it was entitled to the work. The subcontractor, which was contractually obligated to both the Carpenters and the Sheet Metal Workers, refused to reassign the job. The National Labor Relations Board (the Board), exercising its authority to resolve jurisdictional disputes between unions, awarded the

work to the Carpenters. The Sheet Metal Workers filed a lawsuit in New Jersey federal court against the subcontractor and the Carpenters seeking damages under Section 301 of the Labor Management Relations Act. In response, the subcontractor filed an unfair labor practice charge against the Sheet Metal Workers, arguing that its lawsuit directly conflicted with the Board's award. The U.S. Court of Appeals for the Third Circuit held that when an employer binds itself to conflicting collective bargaining agreements, there is no determinative dispute resolution system, and the Board can resolve the dispute. Thus, the court found that the Board acted within its discretion in finding that the Sheet Metal Workers violated the National Labor Relations Act by maintaining its lawsuit against the subcontractor.

*Sheet Metal Workers Local 27 v. E.P.Donnelly, Inc.*, No. 10-2201 (3rd Cir. December 13, 2013)

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**Failure to Clearly Identify "Essential Functions" of Position Leads to Employer's Loss**

An excavator operator lost one of his legs in a motorcycle accident. As a result of his injury, he could no longer drive the manual-transmission semi-truck that was used to move his excavator between work sites, which he often had been tasked with prior to his injury. Driving the manual-transmission truck was not listed in his job description, however, and in fact was specifically listed in the job description for a different position. Regardless, when the employee sought to return to work following his recovery, the employer refused and terminated him, claiming that driving the manual-transmission truck was an "essential function" of his position. The Americans with Disabilities Act (ADA) permits employers to refuse a position to an employee who cannot perform one of the position's "essential functions" even after accommodation. The employee filed suit, alleging that the manual-transmission truck was not one of his "essential functions" and that the employer therefore had violated the ADA when it terminated him. The district court granted summary judgment to the employer, agreeing with the employer's testimony that driving the semi-truck was an "essential function" of the excavator operator position. The employee appealed to the U.S. Court of Appeals for the Sixth Circuit and a panel of judges reversed and remanded the case. The panel specifically found that the district court had relied too heavily upon the employer's testimonial opinion and had not assigned adequate weight to the written job description for the position. The court particularly rejected the employer's argument that, because the job description included the catch-all "[o]ther duties assigned" as one of its duties, the excavator operator could be assigned duties from any job category. The court concluded that "not every other duty under every other job category is an essential function of the excavator operator position," noting that "[t]o reach that conclusion would make the various job descriptions meaningless." This case is yet another reminder of the critical importance of accurate and complete job descriptions — in this case, the employer is facing a costly trial as a direct result of its failure to maintain appropriate job descriptions that reflect employees' actual work.

*Henschel v. Clare Cnty. Rd. Comm'n.*, No. 13-1528 (6th Cir. December 13, 2013)

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**Court Allows Attorneys' Fees Award Far Exceeding Employee's Damages in Age Discrimination Claim**

An employee working as executive housekeeper who was fired by her hotel employer filed suit against the employer claiming that Massachusetts state and federal discrimination laws were violated, including the Age Discrimination in Employment Act (ADEA). The employee's multiple-count lawsuit was dismissed except for two discrimination claims that went to trial. The jury found in the employee's favor and awarded her $7,650 in damages plus attorneys' fees and costs. The employee claimed that all of her attorneys' fees and costs should be paid for by the employer even though only two claims were successful and despite the fact that the fees and costs far exceeded her awarded damages. The district court agreed that some reduction should be made to the total attorneys' fees and costs for the dismissed claims but flatly rejected the employer's argument that an award of more than $104,000 should be reduced further since it was "disproportionate" to the damages awarded to the employee. The U.S. Court of Appeals for the First Circuit agreed and explained that, "the rules surrounding fee-shifting in civil rights cases are designed to encourage attorneys to take these types of cases and are based on full compensation for the work performed." The court's ruling underscores the employer's need to address and resolve claims of discrimination early if possible to avoid paying a prevailing employee's attorneys' fees and costs that oftentimes far exceed the amount of damages recoverable by an employee.

*Diaz v. Jiten Hotel Mgmt., Inc.*, No. 13-1444 (1st Cir. December 18, 2013)

Contact for more information: your regular Hinshaw attorney.

**Supreme Court Enforces Contractual Agreement Shortening Limitations Period for ERISA Claim**

An employee filed a claim for long term disability benefits with her employer's disability plan, which was administered by the insurance company. The insurance company issued its final letter denying her claim in November 2007. Three years later, the employee filed suit against the insurance company challenging the denial of her benefits under the Employee Retirement Income Security Act (ERISA). The insurance company moved to dismiss the lawsuit, arguing that the employee's claim was barred by the plan's limitations period requiring legal actions to be brought within three years from the time that proof of loss was due under the plan. The employee disagreed, asserting that the limitations period began running before she could exhaust her administrative remedies as required under the plan. The district court and the U.S. Court of Appeals for the Second Circuit agreed with the insurance company, and the employee sought review by the U.S. Supreme Court. Agreeing with the lower courts, the Supreme Court held that "the principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan." The court also held that absent a controlling statute to the contrary, parties may agree to a particular limitations period as long as the period is reasonable. Here, the court found the three-year limitations period to be reasonable in the circumstances, given that administrative procedures ordinarily would be completed within one year. Limitations periods are often critical in terms of whether a claim may be maintained. Employers defending against litigated disputes should always look at employment-related contract provisions for any such periods which may assist in bringing about early resolution of claims.

*Heimeshoff v. Hartford Life & Accident Ins. Co.*, No. 12-729 (U.S. Sup.Ct., December 16, 2013)

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