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Newsletters

Employment Practices Newsletter - February 2014

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U.S. Supreme Court: Donning/Doffing on Your Own Time

Many employees who work in plants that manufacture steel products are required to wear protective clothing. At the beginning and end of each shift they must don and doff flame-retardant jackets, pants, hoods, snoods, work gloves, leggings and steel-toed boots, in addition to other safety gear such as glasses, earplugs and respirators. The union representing these employees negotiated a collective bargaining agreement provision that did not compensate the employees for donning and doffing the required clothing. Approximately 800 employees filed a collective action against their employer alleging violations of the Fair Labor Standards Act (FLSA). In a unanimous decision, the United States Supreme Court rejected those claims. Section 203(o) of the FLSA specifically provides that a union and an employer can agree in a collective bargaining agreement that clothes-changing time is not compensable. The issue decided by the Supreme Court is that "clothes" includes the above items from flame-retardant jackets to steel-toed boots. Although the other safety gear, glasses, earplugs and respirators were not considered "clothes," the time spent donning and doffing all items was on the employee's own time. Unionized employers should check their collective bargaining agreements for such a provision. Union-free employers must compensate their employees for time spent donning and doffing such clothes.

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Sandifer v. U.S. Steel Corp., No. 12-417 (U.S. Sup. Ct. January 27, 2014)

Employee's *Quid Pro Quo* Claim Survives Summary Judgment

The employee secured her position with the employer through the assistance of a friend's husband, and after she was hired, the man became her supervisor. She claimed that he put his arms around her shoulders and kissed the side of her face; put his arm around her shoulders on another occasion; and asked her to remove a hair from his chin with tweezers and kissed her. On each occasion, she claimed she was uncomfortable and tried to refuse, but he repeatedly told her not to complain and that he could get her fired. The employee complained to her supervisor's supervisor, who never followed up with the complaint, and instead, later recommended the employee's termination. The employer successfully sought summary judgment on the sexual harassment claim, and the employee appealed. The U.S. Court of Appeals for the Eighth Circuit agreed that the incidents were not severe or pervasive, even though the conduct was "inappropriate." On her *quid pro quo* claim, the employee claimed she was terminated for refusing to cooperate with her supervisor's attempts to engage her sexually, and the court found a jury could reasonably conclude that the supervisor was trying to bring the employee close to him in exchange for protecting her job. The court accordingly reversed the district court on the *quid pro quo* claim and remanded the case for further proceedings. Taking employees' claims of sexual harassment seriously and undertaking prompt and thorough investigations are of paramount importance and could make a significant difference in whether liability is imposed against an employer.

McMiller v. Metro, No. 12-3536 (8th Cir. December 26, 2013)

Employee's Failure to Include Discrimination Lawsuit Against Employer in Bankruptcy Schedules Results in Dismissal of Action

An employee of the United States Army alleged that certain adverse employment actions by the Secretary of the Army resulted from discrimination. She filed for Chapter 7 bankruptcy protection, but failed to list the discrimination action as an asset on her bankruptcy schedules. Only when the employer moved to dismiss the action on the ground of judicial estoppel did the employee amend her bankruptcy schedules to add this potential asset. The district court found that judicial estoppel barred her action and the case was dismissed. The employee appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed, finding that, in light of the timing of the employee's amendment of her bankruptcy schedules and her choice not to file a declaration explaining her initial error, no reasonable fact-finder could conclude that the omission was inadvertent or mistaken. This case serves as a reminder of the need to determine at the outset of every case whether the employee has filed for bankruptcy and, if so, to consider the potential for early dismissal if the employee failed to disclose the employment action in the bankruptcy case.

Dzakula v. John McHugh, No. 11-16404 (9th Cir. December 11, 2013)

Employer's Knowledge of Employee's Narcolepsy at Time of Termination Triggered Interactive Process Obligation

After an incident of falling asleep on the job, the employer held a disciplinary meeting at which the employee reported that her sleepiness was the result of a medication. After a second incident occurred, the employee was placed on suspension. She then reported to her manager for the first time that her conduct *might* be related to a medical condition. The manager therefore gave the employee paperwork to be completed by her physician but also recommended her termination. The employee returned the physician's paperwork, which confirmed that her excessive drowsiness was a qualifying disability under the Americans with Disabilities Act (ADA) and that additional medical tests were in progress. The employer, however, determined that the paperwork was insufficient and notified the employee of her termination. The employee was diagnosed with narcolepsy the following month, and she immediately filed suit against the employer alleging discrimination under the ADA. The district court granted summary judgment to the employer, finding that the termination effectively took place when the manager e-mailed his recommendation to his superior, which was *before* the employer had any definite knowledge of the employee's condition. The U.S. Court of Appeals for the Seventh Circuit reversed, finding that the termination did not occur until after the employee received "unequivocal" confirmation of the decision (i.e., in this case, *after* the report was received). The court found the employer "chose to turn a blind eye" to the employee's condition when it terminated her, and therefore failed to accommodate her in violation of the ADA. An employer creates significant risk by ignoring an employee's report of a disability and any action taken without engaging in an interactive dialogue will in all

likelihood result in liability.

Spurling v. C&M Fine Pack, Inc., No. 13-1708 (7th Cir. January 13, 2014)

"Savings Clause" Does Not Save Government Employee's Untimely Claim

A legislative analyst and probationary employee filed a whistleblower retaliation complaint with a government agency, and days later, communicated with an equal employment opportunity counselor. After the first claim was dismissed, he was told he would have to file a discrimination complaint within 15 days but failed to do so. Instead, he filed a whistleblower retaliation and discrimination claim with another agency, which also dismissed his claim. He then sought to file a formal equal employment opportunity charge, despite the deadline having passed, and the charge was dismissed as untimely. The employee filed suit in the district court alleging violation of Title VII of the Civil Rights Act of 1964, as amended. The district court also dismissed the claim as untimely, and the U.S. Court of Appeals for the D.C. Circuit agreed. Though the employee sought to avail himself of the "savings clause," which permits employees some latitude in terms of timeliness when employees file with the wrong agency, the Court declined. Had the employee erroneously filed his formal complaint with a different agency within the timelines prescribed by the statute, his complaint would have been deemed timely. Here, however, he did not file it with the correct agency *or* within the requisite timeframe. Statutory timeframes can mean the difference between a viable claim and a dismissal. It is important to review each claim for timeliness.

Schlottman v. Perez, No. 12-5132 (D.C. Cir. January 3, 2014)

NLRB Drops Requirement to Display Workplace Rights Poster

The National Labor Relations Board (NLRB) has decided to let stand a pair of federal Court of Appeals decisions invalidating the posting rule requiring private sector employers to display a poster outlining employees' rights to unionize. In 2011, the NLRB mandated that employers covered by the National Labor Relations Act must post an 11"x17" poster specifying certain employees' rights. The U.S. Courts of Appeals for the D.C. Circuit and the Fourth Circuit struck down the requirement, finding that the NLRB did not have the authority for such a mandate. It was believed the NLRB would appeal to the United States Supreme Court but the Board declined to do so. The NLRB's decision means the employers cannot be forced to display the Board's "Notice of Employee Rights" but may do so voluntarily. Employers beware: the NLRB's decision should not be taken as a weakening of its position that employees still have the right to discuss work conditions among themselves, form or join a union, or bargain collectively.

View the NLRB announcement here.

Engaged Employee Has First Amendment Right to Intimate Association

The Caucasian employee claimed he was assaulted, harassed and ultimately terminated from his employment because of a romantic relationship he had with an African-American woman, who also worked for the same employer. The couple was engaged at the time of the alleged harassment and termination, and eventually married. The employee filed suit, claiming racial discrimination and wrongful termination in violation of state law as well as violations of the First and Fourteenth Amendments. A jury returned a verdict in favor of the employee on all claims. The employer appealed and the U.S. Court of Appeals for the Second Circuit mostly affirmed, finding that the treatment of the employee at the hands of the employer and its personnel was motivated, at least in part, by his relationship with his now-wife. The court found that the employee's engagement fit within the First Amendment right to intimate association, and that he was not limited by the fact that they were not yet married. The relationship of betrothal and engagement constitutes an expression of one's choice to a marital partner and shares the quality of marriage; thus, according to the court, the engagement should be protected as a form of intimate association. Employers should take notice of this decision, as it expands upon the nature of the relationships that may be protected in the workplace.

Matusick v. Erie County Water Authority, No. 11-1234 (2d Cir. January 6, 2014)

Employee's Temporary Condition May Constitute a Disability

A senior analyst for a government contractor was working on site at his employer's client base. Several months after he was hired, he was involved in an accident that fractured both of his legs and left him incapacitated. His physician ordered that he not put any weight on his left leg for several weeks and estimated that he would not be able to walk normally for at least seven months. While hospitalized, the employee contacted his employer about obtaining short-term disability and working from home while he recovered. He also sought suggestions about how to return to work and return to full-time employment. The employer never responded and subsequently terminated his employment. In turn, he filed a complaint against his employer alleging discrimination on the basis of disability in violation of the Americans with Disabilities Act (ADA). The district court held that he was not a "qualified person with a disability" because, although he was physically impaired, a temporary condition did fall within the purview of the ADA. The U.S. Court of Appeals for the Fourth Circuit reversed, referring to the ADA Amendments Act of 2008 (ADAAA) in which Congress broadened the definition of "disability," suggesting that a temporary impairment could qualify as a disability. Ultimately, the court held that, pursuant to the ADAAA and its corresponding regulations, a sufficiently severe temporary impairment may constitute a disability. Although a condition may seem temporary, an employer may be obligated to engage in the interactive process and provide reasonable accommodations. Employers are cautioned against categorically excluding an employee from this process.

Summers v. Altarum Institute, Corp., No. 13-1645 (4th Cir. January 23, 2014)

Supervisor Physically Preventing Employee From Leaving Office Does Not Amount to Sex Discrimination or Harassment

The employee, a female graphic designer, was working with her male supervisor when the two got into an argument. The supervisor began screaming and cursing at her, and when the employee attempted to leave, her supervisor put his hand on her multiple times and physically prevented her from leaving for some time before finally letting her go. Days later, the employee reported the incident to her supervisor's boss and to a human resources representative, but no disciplinary action was taken. Thereafter, the employee filed claims against her employer and supervisor alleging sex discrimination, sexual harassment, constructive discharge, and retaliation. The district court granted summary judgment in favor of the employer on all counts. The employee appealed. The U.S .Court of Appeals for the Eighth Circuit upheld the district court's holding in favor of the employer. In rejecting the employee's sex discrimination and retaliation claims, the court found that the employee suffered no "adverse action" as she was not terminated, she did not lose benefits, and her job duties did not change. In addition, the court found that the supervisor's behavior during the incident did not constitute severe or pervasive sexual harassment, nor could it constitute "intolerable working conditions" for the employee's constructive discharge claim to stand. While the court ultimately found in favor of the employer, this case serves as a reminder that employers must undertake prompt and thorough investigations of complaints of harassment and discrimination.

Rester v. Stephens Media, LLC, 12-3934, (8th Cir. January 13, 2014)

ERISA Wrongful Termination and Conspiracy Claims Dismissed by Seventh Circuit After Change in Union Representation Led to Layoffs

The company owned a rail yard in Chicago and used an independent contractor to operate it. Employees of that contractor were represented in bargaining by the union. In 2010, the company decided to terminate the contract of its contractor and directly take over operations of the railroad. In doing so, it entered into a labor agreement with a different union. The contractor was then forced to lay off its union workers at the rail yard. In response, the union filed a proposed class action claim against both the company and its contractor, alleging violations of Employee Retirement Income Security Act (ERISA). The union alleged that the purpose of the change in operating the rail yard was to interfere with the attainment of retirement benefits under the union's pension plan. The U.S. Court of Appeals for the Seventh Circuit dismissed the claim against the company that owned the rail yard, finding that it was not in an employment relationship with the members of the union. It also found that the contractor discharged the employees not to interfere with their attainment of a pension benefit, but because it had lost its contract to perform the work at the rail yard. While a good result for the employer, the court did clarify that although the company was dismissed in this case, liability under Section 510 of ERISA is not limited to only employers *per se*. A non-employer could be liable where it discriminates against plan participants and beneficiaries in a way that violates Section 510. Thus, any action that could impact the attainment of an ERISA-protected benefit should be considered in light of a possible claim of discrimination.

Teamsters Local Union No. 705, et al. v. Burlington Northern Santa Fe, LLC, et al., No. 11-3705 (7th Cir. January 24, 2014)

Race Discrimination Claim Fails Because Bankruptcy Trustee Not "Employer" Under State Law

An African-American woman was employed as the office manager for the office of the Chapter 13 standing trustee for the Western District of Louisiana. When the new trustee came on board in 2008, she and he frequently got into disagreements. Ultimately, it was recommended that the employee be terminated. She was replaced by a Caucasian woman. The employee filed suit against the trustee claiming that she was terminated due to her race in violation of the Louisiana Employment Discrimination Law. The district court granted summary judgment in favor of the trustee, finding that he was not an "employer" under state law. The employee appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal, finding that to qualify as an "employer" under the state statutes, the trustee would have to employ twenty or more employees for twenty or more weeks. The court rejected the employee's assertion that the trustee was part of the larger association of the Chapter 13 system (which employed over 125 employees in the state of Louisiana) because the employee provided no authority or evidence for this position. While state and federal laws offer multiple protections to employees, a case can often rise or fall based upon the determination of employment status. Organizations should consider this potential defense at the outset of any claim.

Bell v. Thornburg, No. 13-30155 (5th Cir. December 30, 2013)