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Newsletters

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Employee Not Entitled to Reinstatement to an Equivalent Position Under the FMLA When the Employee Exceeds His FMLA leave

Scott Bellone was a fourth grade teacher for the Woodland Elementary School in Southwick, Massachusetts. In March 2010, Bellone requested leave pursuant to the Family and Medical Leave Act (FMLA) based on two notes from his doctors. After asking for clarification of Bellone's condition, the School finally provided Bellone with an FMLA designation notice in July 2010, which stated that Bellone's FMLA leave was approved and that he had exhausted his leave three weeks prior to the end of the semester. A day before the new school year began, Bellone submitted a note from another doctor stating he was fit to return to work. Thereafter, the School placed Bellone on a paid administrative leave with compensation and benefits identical to his previous position. It then reassigned Bellone to a new position in which he worked as a co-teacher for half of the school day and taught smaller groups of students for the second half of the day. Bellone filed suit against the School claiming interference with his FMLA rights. The district court granted summary judgment in favor of the School, and Bellone appealed. The U.S. Court of Appeals for the First Circuit affirmed, finding that the School's failure to notify Bellone of his eligibility to take

FMLA leave within five business days, pursuant to the applicable regulations, did not, in and of itself, constitute interference with Bellone's FMLA rights where Bellone did not offer any evidence showing he could have returned to work during the period at issue. The court further found that because Bellone's leave exceeded the time allowed by the FMLA, he was not entitled to reinstatement to an equivalent position under the FMLA. Employers must take caution to follow the rules in terms of timely notifying employees of the nature and extent of the leave being afforded to ensure all parties have the same expectations going forward.

Bellone v. Southwick-Tolland Reg'l Sch. Dist., No. 13-1341 (1st Cir. May 2, 2014)

Court Upholds Arbitration Agreement Despite Challenge Under Dodd-Frank

Accenture account executive Armand Santoro was terminated as part of the company's cost cutting measures. In response, Santoro sued alleging claims under the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA) and the Employee Retirement Income Security Act (ERISA). Accenture moved to compel arbitration under the parties employment contract and Santoro opposed Accenture's motion contending that the clause was void under three whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). The district court granted Accenture's motion ruling that Dodd-Frank only applied to whistleblower claims and Santoro did not bring a Dodd-Frank whistleblower claim. The U.S. Court of Appeals for the Fourth Circuit agreed and held that Dodd-Frank's scope clearly prohibits arbitration only where plaintiffs are bringing whistleblower claims. The court rejected Santoro's argument that Dodd-Frank invalidates "in toto" all arbitration agreements by publicly traded companies that lack a carve-out for Dodd-Frank whistleblower claims even if the plaintiff is not a whistleblower. Employers should seek to enforce properly drafted arbitration provisions and be aware that these clauses will not be prohibited by Dodd-Frank unless an employee brings a whistleblower claim.

Santoro v. Accenture Federal Services, LLC, No 12-2561 (4th Cir. May 5, 2014)

Liquidated Damages Available to Employee Based Upon FMLA Retaliation Claim

Jackson was a welder/machinist for the City of Hot Springs. He underwent surgery for complications with his gallbladder and pancreas and used his accrued paid sick leave for his time off. Thereafter, he was granted leave under the Family Medical Leave Act (FMLA), which was then extended by a month. When he was unable to return to work after that, he was terminated. He was then released to return to work and re-applied. He was interviewed and rated highest of all interviewees, but the city manager felt rehiring Jackson would be a mistake and did not select him for the position. Jackson sued alleging violations of FMLA, the Americans with Disabilities Act (ADA), and related state law. The district court granted the City's motion of judgment in part, and a jury found in favor of Jackson on the remaining claims and awarded lost wages and emotional distress damages. The trial court vacated the emotional distress damages. The City appealed, arguing that Jackson failed to present evidence that he could perform the essential functions of the job and that there was causal link between the failure to rehire and his FMLA leave. Jackson appealed as well. The U.S. Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. The court agreed that Jackson presented sufficient evidence to show he could perform the essential functions of the job and that there was causal connection between his FMLA leave and the failure to rehire, but the court also agreed that Jackson failed to establish that the City had knowledge of his disability at the time of the failure to rehire. The court further held that emotional distress damages were not available under FMLA, and reversed the lower court's determination concerning liquidated damages, finding that Jackson could recover such damages if the employer failed to show that it acted in good faith. While the majority of discrimination and retaliation claims come from employees, employers should not forget about the potential for liability associated with the hiring process. Employers should work with counsel to manage risk during this process.

Jackson v. City of Hot Springs, No. 13-1772 (8th Cir. May 12, 2014)

Sarbanes-Oxley Does Not Foreclose Fee Award to Prevailing Employer Under State Law

Leslie Smith worked as a mental health counselor for a subsidiary of Psychiatric Solutions, Inc. Smith alleged she discovered child abuse and fraud but was discharged after she reported it to management. Smith subsequently sued Psychiatric Solutions for retaliatory discharge under the Florida Whistleblower Act (FWA) and the Sarbanes-Oxley Act (SOX). The district court granted summary judgment against Smith on all claims and proceeded to award Psychiatric

Solutions attorneys fees and costs, including under the FWA. The FWA authorizes an award of attorneys fees to a prevailing employer but SOX does not. Smith appealed the fees award and argued the FWA's fees provision was preempted by SOX because SOX did not authorize prevailing employer fee awards. The U.S. Court of Appeals for the Eleventh Circuit affirmed the fees award. The court held SOX did not preempt the FWA as to fees because the FWA's fees provision did not prevent compliance with SOX. The court also noted that, while SOX does not authorize a fees award to an employer, it also does not prohibit it and it would be error to construe SOX's silence as an explicit prohibition. Finally, the court found that permitting an employer to recover fees in a case such as this did not interfere with SOX's regulatory scheme because an employee could avoid the risk by bringing a whistleblower claim only under SOX and, since fees are discretionary under the FWA, courts could decline to award an employer fees where inappropriate. This decision of first impression provides an employer a powerful tool to fight back against frivolous whistleblower claims and prevents an employee from seeking refuge in state court where state whistleblower law permits prevailing employer fee awards.

Smith v. Psychiatric Solutions, Inc., No. 13-12785 (11th Cir. May 6, 2014)

Employee Terminated After Single Unsolicited Complaint is Not Protected by ERISA Anti-Retaliation Provisions

Brian Sexton, general manager for a Panel Processing Inc., also served as the trustee for the company's employee retirement plan. Sexton campaigned on behalf of two other employees who were running for the company's board of directors. Those employees won the election, but the board refused to seat them due to a conflict with the company's bylaws. At the same time, the board removed Sexton as trustee of the retirement plan. In response, Sexton complained that the board's actions were in violation of the Employee Retirement Income Security Act (ERISA) and other laws. There was no response, and Sexton took no further action. Sexton's employment was terminated approximately six months later, and he filed suit, alleging, among other claims, unlawful retaliation under ERISA's anti-retaliation provision. The district court held in favor of the employer, and Sexton appealed. On appeal, the U.S. Court of Appeals for the Sixth Circuit held that Sexton was not covered by ERISA's anti-retaliation protections because his complaint was not made in connection with either a formal investigation or any other "inquiry or proceeding relating to" ERISA. The court further concluded that a single, unsolicited complaint of a potential ERISA violation does not constitute "giving information," in the context of an inquiry, which would be protected under the law. The email sent by Sexton, the court found, was not sent in the context of a "proceeding" and it did not amount to "testimony." This decision clarifies for employers the distinction between terminating an employee who has made an unsolicited complaint under ERISA as opposed to a termination that could be considered unlawful under the ERISA anti-retaliation provision.

Sexton v. Panel Processing, Inc., No. 13-1604 (6th Cir., May 9, 2014)

Section 1981 Does Not Provide Private Right of Action Against State Actors

David Campbell, a former laborer at the Cermak Family Aquatic Center in Lyons, Illinois was terminated after he was caught on the Center's security camera having sex with a coworker. Nearly two and a half years later, Campbell filed suit, alleging he was denied progressive discipline and terminated because of his race in violation of 42 U.S.C. §1983 and 42 U.S.C. §1981. The employer initially moved for summary judgment, arguing that both claims were governed by Illinois' two-year statute of limitations for personal-injury torts, which applies to § 1983 claims. After permitting Campbell to amend his complaint to remove the §1983 claim, the district court granted the employer's motion to dismiss, finding that §1983 provides the exclusive remedy for violations of §1981 committed by state actors; therefore, Campbell's §1981 claim was also time-barred by the two-year limitations period governing §1983. Joining six other circuits, the U.S. Court of Appeals for the Seventh Circuit affirmed, holding that Campbell failed to state a claim upon which relief could be granted because §1981 does not create a private right of action against state actors. The court relied on the United States Supreme Court's decision in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), finding that §1981 claims against state actors must arise under §1983. Therefore, Illinois' two-year statute of limitations for personal injury claims, as opposed to the four-year statute of limitations for §1981 claims, applied. This was a case of first impression in the Seventh Circuit and provides state employers an additional ground for dismissal.

Campbell v. Forest Preserve Dist. of Cook Cnty., No. 13-3147 (7th Cir. May 15, 2014)

Eleventh Circuit Finds Employee Fired for Inadequate Skills, Not Race

Bernard Toomer was an engineer hired by defense and intelligence contractor CACI, Inc. to work on a two-phase project with the Defense Information Systems Agency (the "Agency"). Early on, the Agency began expressing its concerns regarding Toomer's abilities and ultimately demanded Toomer be removed from the project, noting he lacked the skills necessary to continue on with phase two of the project. CACI then terminated Toomer. He then filed suit claiming he was terminated in violation of Title VII of the Civil Rights Act of 1964 (as amended) due to his race, African American. The district court dismissed the case, finding Toomer had not plead a *prima facie* case of discrimination because he was not qualified for the job, and alternatively, had not shown the reason for the firing was a pretext. The U.S. Court of Appeals for the Eleventh Circuit affirmed, finding the employer was forced, pursuant to its contract, to remove Toomer from the project because the Agency required it. Further, the court noted that CACI had offered to move Toomer to another project but he declined, knowing that he would therefore be terminated. Employers should pay close attention to contractual provisions providing for a client's unilateral ability to set certain skill standards and require termination of employees who fail to meet such standards. As a result of this case, employers should abide by such contractual provisions with a bit more assurance that their actions are legally defensible.

Toomer v. CACI, Inc., No. 14-10176 (11th Cir. May 21, 2014)

Employer's Overreaching "Off-Duty Rule" Violates NLRA

Union Representative Donna Mapp posted a notice of a union meeting in the employee break room to discuss various issues, including a rival union. The company's executive director told Mapp that she could not have a union meeting in the break room and created a sign stating, "NO UNION MEETING HERE. The Union is not permitted to hold meetings in the break room." Mapp stayed behind and talked to employees anyway. Mapp was also told that off-duty employees were not allowed to attend the meeting. The union challenged this prohibition as unlawful. The National Labor Relations Board (NLRB) held that the company violated Section 8(a)(1) of the National Labor Relations Act by prohibiting union meetings in the break room. This stated prohibition did not acknowledge the union's right to have access to the company's premises for certain purposes as stated in the parties' expired collective-bargaining agreement. The sign was therefore overbroad in violation of Section 8(a)(1). The NLRB also held the company violated Section 8(a)(1) by maintaining a policy prohibiting employees from remaining on its premises after their shift "unless previously authorized by" their supervisor. A rule restricting off-duty employee access is valid only if it (1) limits access solely with respect to the interior of the facility and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Although generally prohibiting off-duty access, the company's policy contained an exception, indefinite in scope, under which off-duty access is permitted with supervisory authorization. The company accordingly had "broad — indeed, unlimited — discretion 'to decide when and why employees may access the facility.'" Employers with union employees should review their off-duty policies to ensure that they are not overly restrictive.

American Baptist Homes of the West, No. 32-CA-078124 (N.L.R.B. May 1, 2014)

Court Upholds Summary Judgment Finding Employee Cannot Demonstrate Termination Based on Hostile Work Environment or Retaliation

Reya Boyer-Liberto and her fellow co-worker were involved in a dispute related to a bartending incident when on two separate occasions, within two days, the co-worker allegedly called Boyer-Liberto a racial slur. After the second occasion, Boyer-Liberto reported the racial slur to her manager. She was terminated shortly thereafter. She then brought claims of hostile work environment and retaliation against her employer, claiming she was terminated for complaining about the racial slur. The district court granted summary judgment in favor of the employer. The U.S. Court of Appeals for the Fourth Circuit affirmed, finding that the slur, while racially derogatory and highly offensive, and used twice in a period of two days related to a single incident, was not so severe and pervasive as to change the terms and conditions of Boyer-Liberto's employment. Further, the court concluded she failed to show she had an objectively reasonable belief that the two incidents reported to management created a racially hostile work environment to support a retaliation claim. Though the company prevailed under these circumstances, employers should review their policies and training procedures to ensure that supervisors and non-supervisors alike are aware of what conduct is deemed inappropriate, how complaints should be

made, and that employees who call such matters to their employers' attention will not be subjected to retaliation as a result.

Boyer-Liberto v. Fountainbleau Corporation, No. 13-1473 (4th Cir. May 13, 2014)

California Court Reverses Misclassification Verdict After Trial Court Improperly Extrapolates Liability and Damages

A group of U.S. Bank employees who worked as business banking officers (BBOs) were responsible for selling bank products to small business customers and cultivating new business. BBOs were expected to manage account relationships, using creativity and independence. The bank classified the BBOs as exempt from overtime based upon California's outside salesperson exemption. The employees filed suit, claiming they were misclassified and were therefore entitled to unpaid overtime. The class of 260 employees was certified, and the trial court devised a plan to determine liability by extrapolating data from a random sample. The matter proceeded to trial, where the court heard testimony from 21 employees. The bank was not permitted to introduce any further evidence or information. Based on this sampling, the court concluded that the entire class was misclassified, and based on expert statistical evidence, the court extrapolated the damages to the class as a whole, which resulted in over $57,000 per class member. The employer appealed, and the California Court of Appeals reversed, agreeing that the trial court's flawed implementation of sampling ultimately prevented the employer from establishing its defense in that the bank was not able to show that some employees were entitled to no recovery, and the bank was not able to impeach the statistical model utilized by the employees and the court. The Court of Appeals held that even in class actions, the trial court must allow for the presentation and litigation of affirmative defenses, even where there are individual issues. More courts are refusing to certify classes or affirm judgments where shortcuts have been taken and results are not or cannot be substantiated. Though employers will inevitably continue to face class action lawsuits, this case demonstrates that the courts will not require employers to shortcut the presentation of their defense.

Duran v. U.S. Bank N.A., No. S200926 (Cal. May 29, 2014)

Hinshaw's Trial Victory in Age Discrimination Case Affirmed by Court of Appeals

The Jewish day school teacher had been employed with the school for over 25 years. Over the course of several years, the teacher's hours were reduced, as the school experienced a downturn in enrollment. The teacher was compensated for the loss of the hours pursuant to the terms of her year-to-year agreement with the school. Ultimately, the school was able to give the teacher 10 teaching hours per week, but the teacher refused and quit, claiming that she was being forced out due to her age. She sued under California's Fair Employment and Housing Act, among others, claiming age discrimination, constructive discharge, and emotional distress. In short, she claimed that other, younger teachers were treated more favorably than she. On the eve of trial, the teacher sought to assert a claim for age discrimination based upon disparate impact theory as opposed to the previously asserted disparate treatment theory. The trial court rejected this attempt and did not allow the teacher to present any such evidence at trial. The jury returned a verdict in favor of the school on all counts, and the teacher appealed. The California Court of Appeals affirmed. The court concluded that the trial court did not abuse its discretion when it denied the teacher the ability to present a new theory of liability at trial when that theory of liability had been essentially abandoned before the teacher even filed suit. In this published opinion, the appellate court stressed that disparate impact and disparate treatment are different theories of discrimination and that pleadings alleging only one theory of disparate treatment based upon intentional discrimination are insufficient to put a defendant on notice of disparate impact. The court also stressed that the doctrine of avoidable consequences enables an employer like the school to show that reasonable use of its internal procedures would have prevented at least some of the harm the employee suffered. The court further rejected the teacher's other bases for appeal, finding that the failure to give a certain jury instruction was harmless error, and the jury's hearing off-hand comments about the teacher's wealth did not affect the verdict. Congratulations to Filomena E. Meyer of Hinshaw's Los Angeles office, who successfully represented the client at the trial and appellate levels, respectively.

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