HINSHAW

Newsletters

Employment Practices Newsletter - July 2014

July 1, 2014

Attorneys

Andrew M. Gordon

Service Areas

Labor & Employment

Supreme Court: ACA Contraception Mandate May Not Be Applied to Objecting Closely Held, For-Profit Corporations

The Affordable Care Act (ACA) mandates that employers must provide no-cost contraceptive methods to employees as part of their health insurance plan, including IUDs and "morning after" pills (i.e., types of contraception that operate after the fertilization of an egg). An exemption was created for churches and other religious organizations, and the Department of Health and Human Services (HHS) also extended that exemption to religious-based, not-for-profit corporations. The plaintiffs in this case were three large, closely held family businesses. The owners of each company espoused Christian beliefs and expressly incorporated those beliefs into the management and mission of their businesses. Despite the religious beliefs of their owners, however, these were for-profit businesses not falling within the statutory exemptions, and therefore they were required to comply with the ACA's contraception mandate, including by providing IUDs and "morning after" pills (i.e., which, according to the religious beliefs of the owners, ended the life of a fetus). The businesses, facing

the choice of either providing the objectionable forms of contraception or paying significant fines, instead filed suit in federal court, seeking an injunction under the federal Religious Freedom Restoration Act (RFRA). After the federal Courts of Appeals for the Third and Tenth Circuits split on the issue, the cases made their way to the U.S. Supreme Court, which observed that the RFRA prohibits any government practice that burdens the "exercise of religion" unless that burden (a) is in furtherance of a "compelling government interest" and (b) is the least restrictive means of achieving the goal. First, the Court found that closely held corporations are protected by RFRA, because RFRA protects all "persons" (including *corporate* persons) and because "protecting the free-exercise rights of corporations" such as Hobby Lobby "protects the religious liberty of the humans who own and control those companies." Second, the contraceptive mandate burdened the exercise of religion because the individual owners of the plaintiff companies were forced to either "engage in conduct that seriously violates their religious beliefs" or pay millions of dollars in penalties. Third, the mandate was found to not be the least restrictive means of furthering the government's interest in no-cost access to the contraceptive methods at issue. The Court reasoned that if the government truly desired, it could provide the contraception methods themselves, or extend the existing exemption for non-profit corporations to close-held profit corporations. Both of those options, the Court held, would achieve the ends sought without burdening an individual's religious beliefs. Therefore, the mandate is unlawful as applied to closely held corporations that are owned by individuals with sincere religious objections to contraception, regardless of the for-profit nature of the company. Notably, the majority opinion concluded with a series of caveats clearly intended to limit the scope of the decision — the decision "is concerned solely with the contraceptive mandate" and should not be understood to broadly apply to such things as vaccinations or blood transfusions, nor does the decision "provide a shield for employers who might cloak illegal discrimination as a religious practice." The impact of the Court's opinion will depend on the response from the Obama Administration. We expect that the U.S. Department of Health and Human Services will now provide some "less intrusive" method for the employees of the objecting employers to receive the mandated coverage, either through the existing accommodation for religiously affiliated employers or through a new regulatory requirement. Employers should monitor further guidance from the Administration to determine how it will seek to enforce the mandate as to objecting employers.

Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. Sup. Ct. June 30, 2014)

Partial-Public Employees Cannot Be Forced to Pay Dues to a Union They Do Not Wish to Join

Home health care workers were part of the Illinois Rehabilitation Program (Program), which was designed to prevent unnecessary institutionalization of individuals who can sufficiently be cared for at home at a lesser cost to the state. The Program allows participants to hire a "personal assistant," typically a family member, who provides homecare services tailored to the individual's needs. Illinois state law establishes an employer-employee relationship between the caregiver and disabled customer, and the assistant is paid by the state of Illinois, with subsidies from Medicaid. In 2003, the Governor of Illinois issued an Executive Order, calling for state recognition of a union as the personal assistants' exclusive bargaining representative. The Illinois Public Labor Relations Act (PLRA) was amended, and the Service Employees International Union (SEIU) was designated as the personal assistants' exclusive bargaining representative. SEIU and Illinois entered into a collective bargaining agreement that required all personal assistants who were not union members to pay a "fair share" of the union dues. Eight personal assistants under the program filed a class action seeking an injunction against enforcement of the fair-share provision and a declaration that the PLRA violates the First Amendment. The district court dismissed their claims, and the U.S. Court of Appeals for the Seventh Circuit affirmed, holding that state employees who choose not to join a public-sector union may nevertheless be compelled to pay a fee to support union work that is related to the collective bargaining process. The U.S. Supreme Court reversed, finding that the Court failed to take into consideration the difference between core union speech involuntarily subsidized by dissenting public-sector employees and core union speech involuntarily funded by their counterparts in the private sector. The Court reasoned that personal assistants are public employees for only one purpose: collective bargaining, and for all other purposes, the State regards them as private-sector employees whose duties are specified in their individualized Service Plan and who are supervised and evaluated by their specific customers. The workers are accordingly partial- or quasi-public employees and cannot be compelled to pay dues to a union they do not wish to join. This case demonstrates the Court's disapproval of state laws requiring public-sector workers to pay union dues.

Harris v. Quinn, No. 11-681 (U.S. Sup. Ct. June 30, 2014)

Supreme Court Finds NLRB Recess Appointments Were Invalid

On January 4, 2012, when Congress was out of session for a three-day period, President Obama appointed three members to the National Labor Relations Board (NLRB) pursuant to the Recess Appointments Clause of the Constitution. Thereafter, the NLRB, including the newly appointed members, issued a ruling finding that Pepsi-Cola distributor, Noel Canning, unlawfully refused to execute a collective-bargaining agreement with a labor union. Noel Canning challenged the ruling on the grounds that the three members appointed by President Obama were invalidly appointed and that the NLRB did not have authority to act when it issued its order. The U.S. Supreme Court agreed with Noel Canning and held that the three-day recess period was not long enough to trigger the President's recess-appointment power. The Court relied heavily on the history of recess appointments and also found that a recess of more than three days but less than ten days is presumptively too short to fall within the Recess Appointment Clause. As such, the Court found that the appointment of the members was not within the President's authority under the Constitution. As a result of this ruling, hundreds of NLRB cases decided by the improper appointees may now be invalid. This decision could also have effects on appointments beyond the NLRB. Accordingly, employers should evaluate whether any decisions issued during this time period pertain to them directly or affect any of their current practices, and should contact their legal counsel to further discuss the potential implications of this far-reaching decision.

National Labor Relations Board v. Noel Canning, No. 12-1281 (U.S. Sup. Ct. June 26, 2014)

Supreme Court Finds Public Employee's Speech Entitled to First Amendment Protection

The President of the Central Alabama Community College terminated Director Edward Lane after the College experienced significant budget shortfalls. Lane had previously reported to the President that he discovered a State Representative on the College's payroll was not reporting to her office. Though the President warned Lane that terminating the State Representative could have negative repercussions for him and the College, Lane terminated her anyway. The termination resulted in an investigation being conducted by the Federal Bureau of Investigation, and Lane's testimony assisted in securing a conviction against the State Representative. Lane then filed suit claiming a violation of 42 U.S.C. §1983 on the grounds that he was terminated in retaliation for testifying against the State Representative. The President successfully sought summary judgment on the grounds that Lane's claims against him individually were barred by qualified immunity, and the official capacity claims were barred by the Eleventh Amendment. Lane appealed, and the U.S. Court of Appeals for the Eleventh Circuit affirmed, finding that Lane's speech was not protected because he spoke (when testifying) as a public employee and not as a private citizen. The U.S. Supreme Court reviewed the matter, and affirmed in part and reversed in part. The Court ultimately concluded that Lane's sworn testimony was outside the scope of his ordinary job duties and was thus entitled to First Amendment protection. Further, Lane's testimony was found to have been made as a citizen on a matter of public concern, and this type of speech is separate and distinct from any obligations a testifying public employee may have to his employer. The Court clarified that the question is whether the speech at issue is itself ordinarily within the scope of the employee's duties, and not whether the speech merely concerns those duties. Public employers must be mindful of the First Amendment protections associated with public employees' speech and consider any such issues prior to terminating an employee who has exercised such a right.

Lane v. Franks, No. 13-483 (U.S. Sup. Ct. June 19, 2014)

Trucking Company Did Not Violate ADA or FMLA When it Fired an Alcoholic Driver

The employee worked for the trucking company for several years before he was diagnosed with alcoholism in 2010 and sought leave to obtain treatment. After being out of work for approximately one month, the employee sought to return to work, but the employer decided that he was no longer qualified to be a commercial motor vehicle driver pursuant to applicable regulations and company policy, and terminated his employment. The employee sued, asserting claims under the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA) arguing that the employer discriminated against him due to his disability — alcoholism — and that it further interfered with his FMLA rights and retaliated against him for exercising his FMLA rights. The district court disagreed and granted summary judgment in favor of the employer. The U.S. Court of Appeals for the Eleventh Circuit affirmed. The court held that the employee was not a "qualified individual" under the ADA because he was not physically qualified to drive under DOT regulations. The court observed that it is the employer's burden to ensure that a driver meets all DOT physical qualification standards. Because the DOT does not permit anyone with a "current clinical diagnosis of alcoholism" to drive, the employee was not physically

qualified to drive a commercial motor vehicle, and neither the district court nor the Eleventh Circuit found fault with that conclusion. The Court of Appeals also upheld the dismissal of the FMLA interference and retaliation claims because the employee would have been discharged regardless of whether he took FMLA leave. The retaliation claim failed because he could not show that his termination was related to his FMLA leave. Employers must always take caution when terminating an employee due to a medical condition or disability, however, under certain circumstances, a termination may be lawful and upheld, particularly when the employer makes the determination based upon well-settled industry-specific rules.

Jarvela v. Crete Carrier Corporation, No. 13-11601 (11th Cir. June 18, 2014)

No Violation of Rehabilitation Act for Refusing to Allow Employee Six-Month Leave

An assistant professor at Kansas State University signed a written one-year contract to teach classes over three academic terms, but shortly before she commenced teaching, learned that she had cancer. At the advice of her doctor she requested a six-month paid leave of absence, which the University granted. Prior to the second academic term, the professor's doctor advised that she needed additional time off, but the University refused on the grounds that it allowed no more than six months' sick leave. The professor filed suit claiming that the University violated the Rehabilitation Act by denying her request for leave. The district court dismissed her lawsuit, and the professor appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal. In order for a disabled individual to establish a violation of the Rehabilitation Act, three prongs must be present: (1) the individual must show she is qualified for her job; (2) the individual must show she can perform the job's essential function with a reasonable accommodation; and (3) that the employer failed to provide a reasonable accommodation despite a request for one. Here, the court found that there was no question that the professor was qualified and disabled, however, the professor admitted she could not perform the essential functions of her job even with a reasonable accommodation. The employee could not work at any time during her leave of absence and the Rehabilitation Act is in place to enable "employees to work, not to not work." The Court further reasoned that despite the professor's unfortunate predicament, "[t]he Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work — not to turn employers into safety net providers for those who cannot work." This decision clarifies that employers are not required to eliminate an essential function of the job in order to accommodate a disabled worker.

Hwang v. Kan. State Univ., 10th Cir., No. 13-3070 (10th Cir., May 29, 2014)

Employer's Interim Grievance Procedure Need Not Provide Opportunity for Arbitration

In March 2012, employees of an EMS ambulance service certified a new union to replace their existing representative. At the outset of the negotiations on a new collective bargaining agreement (CBA), the parties agreed that until a new CBA was signed, they would utilize two of the three grievance steps identified in the prior union's CBA. Specifically, they agreed that the third and final step, arbitration, would not be available until a new contract was signed. Subsequently, the employer terminated various employees for misconduct and poor performance and refused to arbitrate. The union filed an unfair labor practice charge, and the employer responded that the union should be bound by its agreement to an interim grievance process that expressly excluded arbitration. The union sought to nullify the agreement, pointing to NLRB precedent which, the union argued, provided that an interim grievance process must be fully negotiated by the parties (not just verbally agreed to) and must contain the opportunity for arbitration. The administrative law judge rejected the union's argument, agreeing with the employer that the union was bound by its agreement not to pursue arbitration during the interim period. The judge specifically found that the union's verbal agreement constituted sufficient "bargaining" regarding the interim grievance process, and that NLRB precedent does not strictly require that an interim process must include arbitration. This decision provides crucial guidance for employers during the transition from one union to another. Securing agreement on a favorable interim grievance process can facilitate effective discipline during the transition process and provide leverage vis-a-vis the union during the critical initial bargaining period.

Medic Ambulance Serv., No. 20-CA-109532 (NLRB ALJ, June 10, 2014)

Applicant Must Prove Disability to Maintain ADA Information Misuse Claim

John Wetherbee applied for a systems engineer position with the Southern Nuclear Operating Company and received a job offer contingent upon a satisfactory medical evaluation. Wetherbee disclosed to Southern Nuclear that he suffered from bipolar disorder during the examination. Southern Nuclear's medical team determined the company could only hire Wetherbee if Wetherbee met several conditions, including that Wetherbee was restricted from working on "safety sensitive systems and equipment for one year." Because the systems engineer position specifically required such work, Southern Nuclear rescinded the offer. Wetherbee sued for discrimination based on the misuse of information acquired during a required medical evaluation in violation of the Americans with Disabilities Act (ADA). The district court granted summary judgment in Southern Nuclear's favor on the basis the rescission was job-related and based upon a business necessity. Wetherbee appealed. On appeal, the U.S. Court of Appeals for the Eleventh Circuit ruled that because Wetherbee admitted he could not prove he was disabled, the threshold question was whether a plaintiff suing for misuse of information must prove he was disabled. Joining the Seventh and Tenth Circuits, and deciding a matter of first impression in the Eleventh Circuit, the Court held that proof of an actual disability is required in order to prevail. The court distinguished the misuse provisions against provisions that prohibit medical examinations or inquiries into whether a job applicant has a disability, on the ground that these other provisions do not require such proof. In other words, those provisions are violated merely by an exam occurring whereas a misuse violation occurs when information gained during a permissible examination is misused. This ruling effectively raises the burden of proof on ADA misuse claims within the circuit and restricts information misuse claims only to those applicants or employees who can prove that they suffer from a qualifying disability.

Wetherbee v. The Southern Co., No. 13-10305 (11th Cir. June 11, 2014)

Police Department's Policy Manual Created a Property Right in Employment

Decherd Police Chief Terry Freeze and Patrolman Earnest Colvin were terminated by the City immediately after a board meeting in 2009 where Freeze's possible demotion was to be discussed and where Colvin accused one of the aldermen of lying about a harassment charge Colvin had filed against him. At the time of the discharge, no grounds were given for their terminations, other than for the "betterment" of the city. Neither Freeze nor Colvin was made aware with written notice that their terminations would be considered at the 2009 board meeting. Freeze and Colvin filed suit alleging, among other things, that their termination was in violation of their due process rights because it was done without notice, explanation, or an opportunity to respond. The City claimed the termination was proper because under a 1999 Resolution, City employees had no property right in their employment and could be terminated at will. The district court found that the officers did not possess a property interest in their continued employment, and the officers appealed. The U.S. Court of Appeals for the Sixth Circuit reversed, finding that though the 1999 Resolution provided for "at will" employment, the subsequently enacted police policies and procedures manual stated that discipline would be for cause and follow the basic concepts of due process. This manual, the court found, changed their status from at-will employees to employees with a property right in continued employment, which included the right to termination only for good cause. The court acknowledged the high bar for showing that an employee handbook creates a contract and property right, but found that this burden was met through the language used. In light of this decision, employers should review their employee handbooks and take special consideration as to whether the language could be construed as a contract or as giving property rights in employment.

Freeze v. City of Decherd, No. 12-6160 (6th Cir. June 4, 2014)

Executive's Retaliation Claim Restored by Court of Appeals

Executive employee Thomas Kmak sued his former employer, American Century Investments, for allegedly retaliating against him after he provided testimony for JPMorgan at an arbitration stemming from the companies' joint venture. Kmak alleged that American Century Investments improperly exercised its call rights to repurchase his shares only after he provided the unfavorable arbitration testimony at a time when he would lose out on a substantial dividend for that year. The district court dismissed Kmak's complaint for breach of the implied covenant of good faith and fair dealing, holding that American Century Investments was within its rights to call the stock for repurchase when it did after Kmak's departure from the company. The U.S. Court of Appeals for the Eighth Circuit reversed the district court's decision and reinstated Kmak's complaint. The court stated that American Century Investments failed to act in good faith when it called Kmak's

shares since it improperly waited until the arbitration award was final, only exercised it repurchase rights for Kmak's shares, and it did so one day prior to dividends being issued. This is a cautionary tale for employers to be keenly aware of the timing of actions regarding compensation that may seem to be justifiable on their face but may be retaliatory when all of the circumstances are considered.

Kmak v. Am. Century Cos., Inc., No. 13-1530 (8th Cir. June 5, 2014)

Employees May Not Demand Specific Accommodation for Disabilities

In September of 2010, Khoury Enterprises, a firm operating Dairy Queen franchises in Indianapolis, hired Joshua Bunn, who is legally blind. Hourly employees at Khoury's stores were typically required to rotate between various stations, including preparing food, working the cash register and maintaining the dining area. Bunn, however, was unable to perform certain duties because he could not read the ingredient labels or monitors displaying orders. Accordingly, the store's manager scheduled Bunn exclusively in the "Expo" department, where he was responsible for delivering food to dine-in customers and keeping the store and dining area clean. During the winter months, the store was forced to close on several occasions due to holidays and inclement weather, which resulted in Bunn working fewer hours. Eventually, he resigned, believing he could work more hours elsewhere. He then filed a charge of disability discrimination with the Equal Employment Opportunity Commission and subsequently filed suit, alleging violations of the Americans with Disabilities Act (ADA). The district court granted summary judgment in Khoury's favor on Bunn's failure-to-accommodate and disparate treatment claims. On appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed, finding that Khoury reasonably accommodated Bunn's disability by working with him to determine which job functions he could perform. Khoury's willingness to change the way things were customarily done was "exactly the kind of accommodation envisioned by the regulations applicable to the ADA." The court also emphasized there is no separate cause of action for a failure to engage in the interactive process, and Bunn's dissatisfaction with the way in which Khoury decided on his accommodation or its failure to provide the exact accommodation he preferred was irrelevant. With respect to his disparate treatment claim, the court held that Bunn could not establish a *prima facie* case of discrimination because he was not meeting Khoury's legitimate expectations when he was placed on a disciplinary suspension for shoving a trashcan at his night manager. In addition, he failed to identify a similarly-situated, non-disabled employee who was treated more favorably. This decision offers guidance to employers deciding how to accommodate an employee's specific disability and confirms that an employee may not require a specific accommodation so long as the accommodation afforded is reasonable and effective.

Joshua Bunn v. Khoury Enters., No. 13-2292 (7th Cir. May 28, 2014)

California Court Finds Public Teacher Tenure Unconstitutional

A Silicon Valley-based student advocacy group brought a lawsuit on behalf of nine students against the State of California and various other state agencies and officials and local public school districts, claiming that California's teacher tenure and dismissal laws made it almost impossible to terminate the employment of low-performing teachers. Because a disproportionate share of underperforming teachers are placed in schools having a majority of low-income or minority students, the group argued that the inability to dismiss teachers violates the equal protection clause of the California constitution, because by preventing schools from being able to terminate underperforming teachers, minority and low-income students are being denied equal access to education. The state and teachers' groups opposed the lawsuit, arguing that the tenure rules are necessary to preserve academic freedom and attract talented individuals to a teaching profession that is generally low-paying. The matter proceeded to trial before the Los Angeles County Superior Court, and the court found that California's public school teacher tenure and dismissal laws violate the equal protection clause of the California constitution. The court reasoned that students have a fundamental right to equality in the educational experience under the state and federal constitutions, and the evidence established that ineffective teachers have a significant impact on the quality of students' education and that there are a significant number of grossly ineffective teachers currently active in California classrooms. The challenged statutes "impose a real and appreciable impact on student's fundamental right to equality of education and [ ] impose a disproportionate burden on poor and minority students," and are therefore unconstitutional. The decision, if it withstands appeal, could have wide-ranging impact on the way California hires and fires teachers. Because teachers could be fired much more easily, with less cost and less need to justify the termination, it is likely that teachers will be terminated on a much more frequent basis. This in turn will no doubt lead to more lawsuits by individual teachers challenging their specific terminations.

Vergara v. State of California, No. BC484642 (Cal. Super. Ct., June 10, 2014)

California Supreme Court Allows Class Waivers in Arbitration Agreements, but Not PAGA Waivers

Iskanian, a chauffeur for CLS Transportation, signed an agreement to resolve all employment-related disputes in individual arbitration, with no possibility of a class or representative action. After his employment ended, Iskanian filed a class action and representative suit under California's Private Attorney General Act (PAGA) alleging various wage and hour claims against his former employer. CLS moved to compel arbitration pursuant to the agreement, and the trial court granted its request. Shortly thereafter, the California Supreme Court issued a ruling invalidating class action waivers under certain circumstances. Accordingly, the California Court of Appeals issued a writ of mandate directing the trial court to reconsider its motion to compel arbitration ruling. On remand, CLS withdrew its motion to compel arbitration. Around that time, the United States Supreme Court issued an opinion invalidating prior California authorities which restricted consumer class action waivers in arbitration agreements. This prompted CLS to renew its motion to compel arbitration, which was then granted. Iskanian appealed. The California Supreme Court determined that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy. In addition, we conclude that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." In the end, then, the Court found that while class action waivers are valid and enforceable parts of arbitration agreements, employers cannot require employees to waive their right to bring PAGA claims. Since PAGA and class action claims are treated very similarly procedurally, this decision has far-reaching ramifications in that it may leave employers defending parts of a case in arbitration and other parts in civil court. Employers should review their arbitration agreements to ensure that they are compliant with the ever-changing law on the permissible scope of arbitration in California.

Iskanian v. CLS Transportation Los Angeles LLC, No.S204032 (Ca. Sup.Ct., June 23, 2014)