HINSHAW

Newsletters

Employment Practices Newsletter - August 2014

August 1, 2014

Employer's Honest Belief of Misuse and Untruthfulness Supports Termination of Employee After FMLA Leave

Bridget Dalpiaz was a benefits administrator for the county who was regularly charged with administering employment policies and procedures. After being involved in a vehicle accident, she obtained medical treatment that required additional time off and modifications to her duties upon return. Roughly seven weeks after the accident, the county asked her to submit a request for leave pursuant to the Family and Medical Leave Act (FMLA), given her need for time off. The employee did not respond, which prompted the county to advise her that her FMLA leave would commence on the date the forms had been mailed, but that final, official approval had not yet been given. The employee finally responded, and then returned to work within days with work restrictions. During

Attorneys

David Ian Dalby

Ambrose V. McCall

Service Areas

Employee Benefits

Labor & Employment

her absences, the supervisor heard that the employee was engaging in physical activities that were inconsistent with her claims of injury, and eight employees made statements to that effect. The supervisor requested that the employee submit to an independent medical examination to confirm she was, in fact, eligible for FMLA leave. The employee never set the examination, and was subsequently terminated for failure to timely complete the FMLA forms, failure to schedule the exam, evidence of untruthfulness regarding her ability to work, and abuse of sick leave. The employee filed suit, including violation of the FMLA. The district court granted summary judgment in favor of the county and the employee appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed, finding, at the outset, that the employee waived any claim of FMLA retaliation since she only plead an interference claim. With respect to the interference claim, the court concluded that the district court was correct in finding that it, too, failed as a matter of law because the county produced sufficient evidence to establish that the employee would have been terminated regardless of her request for FMLA leave. "What is important is not the absolute truth regarding Plaintiff's state of health, but rather whether the county terminated her because it sincerely, even if mistakenly, believed she had abused her sick leave and demonstrated significant evidence of untruthfulness." Dismissing an employee during a protected leave or immediately thereafter is always risky. Even though the employer prevailed under these circumstances, protracted litigation was required in order to achieve this favorable result. Employers should accordingly examine all of the circumstances prior to taking an adverse employment action to manage any potential risk and exposure.

Dalpiaz v. Carbon Cnty., No. 13-4062 (10th Cir. July 25, 2014)

Contact for more information: Your Hinshaw attorney.

Sixth Circuit Grants Employees Enhanced Pension Benefits Claim

A class of salaried employees who worked for an Anheuser-Busch subsidiary, Metal Container Corporation (MCC) participated in the ERISA-qualified Anheuser-Busch Pension Plan. The plan provided that in the event of a change in control, a plan participant with retirement benefits "whose employment with the Controlled Group is involuntarily terminated within three (3) years after the Change in Control" would be eligible for enhanced pension benefits. The employer was acquired by another company, and the parties agreed that this constituted a "change of control" for purposes of the pension plan. Shortly thereafter, the new company sold four of the former MCC plants in a sale to the Ball Corporation. It was agreed that the employees would become employees of Ball and cease to be participants in the Anheuser-Busch ERISA plan, though they would have similar pension benefits at Ball. The employees sought enhanced pension benefits from the Anheuser-Busch pension plan administrator because their employment with MCC ended "involuntarily" within three years of a change in control, regardless of the fact that Ball guaranteed the employees continued employment with substantially similar salary and benefits. The administrator denied the claims and the employees sued. The district court found in favor of the administrator and the employees appealed. The U.S. Court of Appeals for the Sixth Circuit looked at the meaning of the phrase "involuntarily terminated" and found that the employees' interpretation was the only plausible one. The court held that while the employees were now employed by Ball, they were still terminated by the Anheuser-Busch subsidiary, and that termination was not voluntary. The court reversed the judgment of the district court and remanded for entry of judgment in favor of the employees. In light of this decision, employers should review the language of their current employee benefit plans to ensure that the language of any provisions, or any ordinary interpretation of such provisions, does not exceed the intended scope.

Adams v. Anheuser-Busch Cos., No. 13-3149 (6th Cir. July 11, 2014)

Contact for more information: Your Hinshaw attorney.

Fifth Circuit Finds Franchisor Not Employer Pursuant to Fair Labor Standards Act

Benjamin Orozco worked as a cook in a Craig O's Pizza and Pasteria franchise owned by Sandra and Arnold Entjer. Craig and Roxana Plackis owned Roxs Enterprises, Inc. ("Roxs"), the franchisor of Craig O's. Initially, the Entjers paid Orozco $1,200 bi-weekly; however, in 2007, his salary was reduced to $1,050, and in 2011, his salary was changed to $10 per hour. Thereafter, Orozco quit and filed suit against the Entjers, alleging overtime and minimum wage violations under the Fair Labor Standards Act (FLSA). Orozco eventually settled with the Entjers but added Craig Plackis, the franchisor, as a defendant. The jury rendered a verdict in favor of Orozco finding, in part, that Plackis was Orozco's employer. Plackis moved for judgment as a matter of law, which the court denied, and subsequently appealed to the United States Court of

Appeals for the Fifth Circuit. The court reversed, finding that Plackis was not Orozco's "employer" for purposes of the FLSA. To reach this conclusion, the court relied on the "economic realities test," analyzing whether Plackis (1) possessed the power to hire and fire employees; (2) supervised and controlled employees' work schedules or other conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. Orozco failed to present legally sufficient evidence to establish any of these four elements. Specifically, the court emphasized that Plackis providing advice and training to the Entjers and reviewing employees' schedules did not constitute "control" over Orozco's work schedule or other terms and conditions of employment. Similarly, the fact that Plackis was aware of Orozco's salary did not demonstrate that he decided Orozco's rate or method of pay. Based on this lack of evidence, the court held that Plackis could not be held liable as an employer under the FLSA. Although this decision provides defenses to liability for franchisors, the court specifically noted that its holding does not mean "franchisors can never qualify as the FLSA employer for franchisee's employees." Therefore, franchisors must be aware of and remain cautious regarding the Act's broad definition of what constitutes an employer.

Orozco v. Plackis, No. 13-50632 (5th Cir. July 3, 2014)

Contact for more information: Your Hinshaw attorney.

School Administrators Cannot be Sued by Teacher for Retaliation

Special Education teacher Bruno Mpoy worked for the Ludlow Taylor Elementary School (LTES) in Washington, D.C. Mpoy complained to LTES' Principal Donald Presswood about a number of things related to his working conditions including a lack of materials and unsanitary classrooms. Presswood allegedly failed to take any corrective actions and instead instructed Mpoy to falsely inflate special education students' assessments. After Mpoy refused, Presswood suspended him for allegedly failing to follow lesson plans and safety procedures among other things. Mpoy complained to LTES Chancellor Michelle Rhee about the suspension, which he deemed as retaliation for his complaints. Thereafter Mpoy was terminated. Mpoy filed suit in federal district court against the school district as well as Presswood and Rhee personally claiming First Amendment retaliation. The district court granted the defendants' motion for judgment on the pleadings, ruling that Mpoy's speech was not protected under the First Amendment because it was not made as a citizen on a matter of public concern but in his official capacity. The district court also found that Presswood and Rhee were entitled to qualified immunity even if the speech was protected. Mpoy appealed and the U.S. Court of Appeals for the District of Columbia Circuit affirmed on qualified immunity grounds. The court concluded that since Presswood and Rhee reasonably concluded that Mpoy's communications constituted complaints about "conduct that interfered with his job responsibilities" then it was proper for them to terminate him for such complaints. The court's opinion provides clarification about the circumstances under which individuals will be protected by qualified immunity from lawsuits by government employees and reminds government employers to carefully critique the nature of the complaint before terminating them for such speech.

Mpoy v. Rhee, No. 12-7129 (D.C. Cir. July 15, 2014)

Contact for more information: Your Hinshaw attorney.

NLRB Finds Employer's Disciplinary Actions Unwarranted

Following a strike, the employer disciplined four unit employees for their misconduct during the strike by suspending or discharging them. The National Labor Relations Board (NLRB) determined that the two-day suspension of an employee who grabbed his crotch while looking at a non-unit employee, was unwarranted. The NLRB reasoned that although the gesture was unpleasant, it was not considered sexual harassment under Title VII of the Civil Rights Act of 1964, did not carry an implied threat of violence toward a non-unit employee, and likely did not discourage the non-unit employee from reporting to work during the strike. Similarly, the NLRB found that suspension was not warranted for an employee who made contact with a non-unit employees' vehicle as it left the company garage and yelled obscenities at him, because the conduct did not constitute workplace violence and the employee only briefly impeded the non-unit employee's progress in leaving the garage. Finally, the NLRB concluded that there was no evidence of misconduct for two discharged employees who were charged with harassing and intimidating non-unit employees while operating motor vehicles. The NLRB weighed the conflicting witness statements, lack of police reports, and the clean disciplinary records of the long-term employees in

reaching its decision that there was not enough evidence to warrant termination. In light of this decision, employers should consider and weigh the importance of a variety of factors before disciplining or discharging employees for mid-strike conduct.

Consolidated Communications d/b/a Illinois Consolidated Telephone Co. 360 NLRB No. 140 (July 3, 2014)

Contact for more information: your Hinshaw attorney

Audit Associates Found to be "Learned Professionals" and Exempt from Overtime

Entry-level accountants for KPMG filed a class action lawsuit against their employer claiming that they were misclassified as exempt, and had they been properly classified as non-exempt, they would have been entitled to overtime pay. Accordingly, they brought suit under the Fair Labor Standards Act (FLSA) seeking unpaid overtime wages. The employer moved for summary judgment on the basis that the accountants were learned professionals and thus exempt from the overtime provisions of the FLSA. The employees appealed, arguing that their work did not require specialized academic training nor did it require the consistent exercise of advanced knowledge or professional judgment, and therefore, they did not properly fall within the exemption. The U.S. Court of Appeals for the Second Circuit agreed with the district court, finding that the employees were employed in the field of science and learning, and that their knowledge and skills had been acquired through specialized instruction, and finally, that they exercised professional judgment in carrying out their work duties. The court further opined that just because the employees spent some of their time performing non-judgmental or clerical type tasks, and just because the employees had to defer ultimate judgment to higher authorities did not mean the exemption was defeated. Nationwide, more and more employees are filing costly misclassification suits and seeking overtime pay. Employers are cautioned to review the applicable exemptions with their human resources professionals or legal counsel to ensure that employees are properly designated.

Pippins v. KPMG LLP, No. 13-889 (2nd Cir. July 22, 2014)

Supervisor's Knowledge of Medical Condition Insufficient to Establish Discriminatory Animus for Termination

Ebersole was a sales representative for Novo Nordisk, Inc., who suffered from rheumatoid arthritis. Her supervisors were aware of her condition and some had conversations with her and asked her about rheumatoid arthritis. Ebersole took medical leave for arthritis treatment from January 30, 2009 to March 6, 2009. In July 2009, Ebersole was warned by her supervisor not to take additional vacation leave that year. The following month, Ebersole requested and was approved for three vacation days unrelated to her arthritis. The day before she was to leave for vacation, Ebersole and another employee were terminated for call falsification in violation of company policy. Novo had actually terminated a total of 20 employees for call falsification during 2009. Ebersole sued Novo and her supervisor, alleging retaliation under the Family and Medical Leave Act (FMLA) and for violations of the Americans with Disabilities Act. The district court granted defendants' motion for summary judgment on the FMLA claims finding Ebersole failed to establish direct evidence of retaliation. The employee appealed. The U.S. Court of Appeals for the Eighth Circuit affirmed, holding that no reasonable jury could find Ebersole's conversations with her supervisors about her condition established a discriminatory animus against her for taking FMLA leave. Additionally, the court held Ebersole could not establish Novo's stated reason for termination was pretext because she was not treated differently than comparable employees who falsified calls. Indeed, the evidence demonstrated that those individuals were also terminated. In order to defeat claims of pretext, employers should ensure the consistent application of company policies, particularly when taking adverse employment actions, so as to demonstrate the legitimate business basis for the decision.

Ebersole v. Novo Nordisk, Inc., No. 13-2160 (8th Cir. July 10, 2014)

Contact for more information: your Hinshaw attorney.

Implementation of BFOQ That Adversely Affected Male Employees Were Too Arbitrary

Male sheriff's deputies were denied the right to supervise female-only housing within the city and county of San Francisco correctional facility. The policy was initially implemented to provide for the health and safety of the female inmates, and was also designed to curtail allegations of sexual misconduct. A group of male sheriffs filed suit against the city and

county of San Francisco, claiming that this particular policy violated both Title VII of the Civil Rights Act of 1964 as well as California's Fair Employment and Housing Act in that it discriminated against male sheriffs based on their gender. The district court granted summary judgment in favor of the city and county, and the sheriffs appealed. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the city and county of San Francisco was ultimately unable to bear its burden of demonstrating that it was entitled to the BFOQ (bona fide occupational qualifications) defense. The court reasoned that when applying a BFOQ in a prison context, the employer must demonstrate 'a high correlation between sex and ability to perform job functions.' Although the court noted that it gave high deference to the correctional facilities administrator's decision, in this case the administrators did not undertake sufficient investigation before implementing and enforcing the policies. For instance, the court found that they performed no interviews with the sheriffs, failed to contact other facilities, and did not conduct any internal surveys before implementing and enforcing the policy. Employers who desire to avail themselves of a BFOQ defense must ensure that the process has been fully evaluated and that the evidence supports denying certain employees positions or job duties so as to avoid a later determination of arbitrariness.

Ambat v. City and County of San Francisco, No. 11-16746 (9th Cir. July 2, 2014)

Contact for more information: Thaddeus A. Harrell

Court Affirms Employer's Authority to Schedule Workweek Under FLSA

The Heckman Water Resources employees were classified as non-exempt employees. Their shift/work schedule consisted of 12 hour shifts worked for seven consecutive days that started every other Thursday. The employer permanently implemented a workweek that ran from Monday through Sunday to calculate overtime under the Fair Labor Standards Act (FLSA), and paid its employees on a bi-weekly basis. The employees filed suit claiming that their workweek actually started on Thursday and ended the following Wednesday, consistent with their schedules, which then should have entitled them to additional overtime. The trial court disagreed and entered summary judgment in favor of the employer. On appeal, the employees again urged that under the FLSA, their workweek should be formed in accord with their actual seven consecutive days of work, which would have entitled them to 44 hours each of overtime compensation per paycheck. The U.S. Court of Appeals for the Fifth Circuit, however, disagreed, stressing that the FLSA does not require the employer to set a workweek that maximizes overtime compensation for its employees. The court also looked to Department of Labor regulations and opinion letters that permit an employer to properly set a workweek that reduces the amount of overtime, and that do not require the employer to use the workweek proposed by the employees. Here, the court concluded, the employer complied with the FLSA even though the actual work/shift schedule of the employees spanned the two workweeks set by the employer and thereby decreased the overtime compensation the employees would have otherwise received. The ruling signals the need for every employer to evaluate the workweeks set for its non-exempt hourly employees under the FLSA and state laws that govern its employees, to see if opportunities for efficiencies exist that can be obtained through permanent changes to workweeks set for different employees or groups of employees.

Johnson v. Heckmann, No.13-40824 (5th Cir. July 14, 2014)

Contact for more information: Ambrose V. McCall

Employee's Failure to Apply for Position Proves Fatal to His Discrimination Claim

Audrain Health Care, Inc. posted two vacant nursing positions in the Critical Care Unit (CCU) and Post Anesthesia Care Unit (PACU). Employee David Lunceford attempted to transfer to the positions. The HR department was responsible for reviewing employees' Request to Transfer forms to determine if employees met the qualifications for the position, and if HR approved the transfer, it routed a personnel action form to the relevant department directors and a member of the executive administration for approval. Lunceford's Request to Transfer to the CCU position was approved but before he was scheduled to start in the CCU, he inquired about transferring to the Operating Room (OR) instead. He was not qualified for the OR position, and claimed he was informed that Audrain wanted to fill the OR position with a woman to have the right mix of patients' gender to staff gender. Audrain has a patient's right policy that provides that the patient is entitled to have a health care provider of the same gender in the room during treatment. Lunceford never filled out a Request for Transfer form for the OR position, which Audrain subsequently filled with the same experienced female OR

nurse who had left the position. The Equal Employment Opportunity Commission (EEOC) brought an action alleging that Audrain violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 by refusing to consider transferring Lunceford to a vacant OR position on the basis of his gender. The district court granted Audrain's motion for summary judgment, holding that the EEOC failed to demonstrate an adverse employment action by Audrain because Lunceford never completed a Request for Transfer form, so Audrain never made a decision to deny him the OR position. The district court rejected the EEOC's argument that victims of gross and pervasive employment discrimination such as Lunceford were not required to formally apply for the OR position if he could prove Audrain's discriminatory practice of a gender mix deterred him from applying for the OR position. The district held that the EEOC had not shown that Audrain's policy evidenced gross and pervasive discrimination and in any event, Lunceford could not prevail on the discrimination claim because, having not formally applied for the OR position, Lunceford was required to make every reasonable attempt to convey his interest in the OR position to Audrain, which Lunceford had not done. The U.S. Court of Appeals for the Eighth Circuit affirmed. Employers must carefully document employees' expressions of interest in transfers to other positions by adopting very specific transfer procedures to avoid discrimination claims based on casual inquiries.

*EEOC v. Audrain Health Care, Inc.,*No. 13-1720 (8th Cir. June 30, 2014)

Contact for more information: David I. Dalby

Sixth Circuit Rules Outside Sales Exemption May Not Apply to Grocery Distributor Sales Representatives

A Midwestern grocery food distributor discharged 69 sales representatives in a restructuring effort. Some of these employees signed severance agreements waiving all claims against the employer, including the right to join a collective action. The sales representatives later sued for unpaid overtime, arguing the employer had erroneously classified them as exempt under from the outside sales exemption. To qualify for this exemption, an employee must be regularly engaged away from the employer’s workplace and have the primary duty of making sales. Such employees may perform promotional work and still be exempt so long as it is incidental to sales. The employees were stationed at the employer’s client’s stores and, while the employees did enter orders for goods and could solicit orders from clients, the employees spent a substantial amount of time promoting products in stores and typically just entered orders given to them by account managers and for restocking purposes. The district court ruled that employees who signed a waiver could not join the collective action and then granted summary judgment against the class on the outside sales exemption. The U.S. Court of Appeals for the Sixth Circuit reversed as to the exemption. The court held the mere placing of orders created by account managers or for restocking purposes did not, as a matter of law, constitute the making of sales and was instead a question for the jury, as was the determination of whether this was a primary duty or whether the employees really did promotion work in furtherance of account managers’ sales. The court further found the waivers to be invalid because the provisions did not provide for arbitration of employee claims, thus potentially defeating the aims of the Fair Labor Standards Act (FLSA) by allowing an employer to restrict employee rights to obtain an unfair competitive advantage. This case is a cautionary tale reminding employers to ensure substance controls over form in classifying employees, and, at least in Michigan, Ohio, Tennessee, and Kentucky, that an FLSA waiver still permits individual claim arbitration.

Killion v. KeHE Distribs., LLC, No. 13-3357/4340 (6th Cir. July 30, 2014)

Contact for more information: your Hinshaw attorney

Court, Not Arbitrator, to Determine Arbitrability of Class Claims

Various Robert Half International employees filed suit against their employer claiming they were wrongfully classified as exempt employees and thus deprived of required overtime pay. They sought relief under the Fair Labor Standards Act. The named plaintiff employees previously executed employment agreements with the employer, which required employees to submit any dispute or claim arising out of or relating to their employment to arbitration. The agreement was silent as to classwide arbitration. The employer moved to compel arbitration on an individual basis, and though the court agreed in part, it concluded that the propriety of individual versus classwide arbitration was for the arbitrator to decide. The parties proceeded to arbitration, where the arbitrator held that the employment agreements permitted classwide arbitration. The employer then moved the court to vacate the arbitrator's award, which the court denied. The employer appealed. The U.S. Court of Appeals for the Third Circuit considered whether a district court or an arbitrator should decide if an agreement to

arbitrate disputes between the parties also authorizes classwide arbitration. The court concluded that the availability of classwide arbitration is a substantive "question of arbitrability." Because of the fundamental differences between classwide and individual arbitration, and due to the consequences of proceeding with one over the other, the court concluded that the issue must be determined by the court, unless there is a clear agreement providing otherwise. The laws pertaining to the arbitrability of employment claims are constantly changing and vary by jurisdiction. Indeed, the week prior to this decision, a California Court of Appeals held that whether parties to an arbitration agreement agreed to class arbitration must be determined by the arbitrator, not the court. (*Sandquist v. Lebo Automotive, Inc.*, No. B244412 (Cal.Ct.App. July 22, 2014). Employers should accordingly review their arbitration agreements to ensure compliance with both state and federal laws, and be mindful of the fact that a one-size-fits-all approach may not suffice.

Opalinski v. Robert Half International Inc., No. 12-4444 (3d Cir. July 30, 2014)

Contact for more information: Your Hinshaw attorney.

EEOC Issues New Guidance On Pregnancy, Outlines Broader Accommodation Requirements for Pregnant Employees

On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued new guidance on pregnancy discrimination in the workplace. The document, titled *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, is the first official update of the Commission's position on pregnancy since 1983. In practical terms, the most significant development for employers involves accommodation of pregnant employees in the workplace. The Commission's Guidance provides that, to comply with the PDA's requirement that "pregnant employees be treated the same as non-pregnant employees," the accommodations provided to pregnant workers must be equal to accommodations provided to disabled non-pregnant employees, *regardless of whether the pregnant workers are disabled under the ADA*. In other words, under the PDA, pregnant employees who do not have a disability under the ADA are entitled to reasonable accommodations if they merely have job restrictions that are similar to an individual with a disability. If an employer offers light duty work to employees who are unable to perform their normal duties due to ADA disabilities, the employer must provide similar light duty work to a pregnant employee (for example, due to a lifting restriction or discomfort standing) without even inquiring into whether the pregnant employee is disabled. This is a drastic change from PDA law as establish by the federal courts. As such, employers should be aware that this change could be short-lived: a dispute over this very issue will be heard by the U.S. Supreme Court next year in ***Young v. UPS***, where the Court will be asked to decide whether disabled workers are appropriate "comparators" to pregnant workers when determining whether discrimination occurred under the PDA. The Guidance is extensive, and addresses a number of matters and issues not addressed here. Employers therefore are encouraged to review the **Guidance** or the **shorter "Q&A" document** issued by the EEOC, and to immediately assess all current policies and practices to ensure compliance.

Contact for more information: Your Hinshaw attorney.

New Illinois Law Limits an Employer's Ability to Conduct Criminal Background Checks of Job Applicants

On July 19, 2014, Illinois Governor Pat Quinn signed the Job Opportunities for Qualified Applicants Act, 30 ILCS 105/5.855, into law. Employers should take note of the Act (which goes into effect on January 1, 2015) because it significantly limits the ability to request or review criminal background information of applicants as part of the hiring process. Under the Act, an employer may not inquire into or consider the criminal record or criminal history of a job applicant until the employer determines that the applicant is qualified for the position and either (1) selects the applicant for an interview or (2) if there is not an interview, makes a conditional offer of employment to the applicant. However, the Act specifically does not apply in situations where: (1) federal or state law requires the exclusion of applicants with certain criminal convictions; (2) a standard fidelity bond or equivalent is required and an applicant's conviction would disqualify the applicant from obtaining such a bond; or (3) the employer employs individuals licensed under the Emergency Medical Services (EMS) Systems Act. The Act permits employers to notify applicants in writing of the specific offenses that would disqualify an applicant from employment in a particular position, however, employers should still take caution because such statements have the potential to invite scrutiny by the Equal Employment Opportunity Commission or the Illinois Department of Human Rights under anti-discrimination laws. Employers that do not comply with the new Act will be subject to monetary penalties from the Illinois Department of Labor. Interestingly, however, there is no private right of action under the Act. All Illinois employers who conduct criminal background checks of applicants should review their

hiring practices and consult with counsel to ensure that the proper background check processes and procedures are in place to comply with the new law.

A copy of the new law is available at *http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-0774*

Contact for more information: Eileen M. Caver

This newsletter has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.