HINSHAW

Newsletters

# Employment Practices Newsletter - October 2014

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## Service Areas

Labor & Employment

### Exposure to Subjectively Unpleasant Weather Conditions and Deprivation of Office Amenities Are Not Adverse Employment Actions

Henry McCone worked for several years as a nondriving customer service associate for Pitney Bowes. He was required to open and date stamp incoming mail, and prepare outgoing mail. Later, Pitney Bowes transferred him to a position requiring him to drive and transport files between sites in the Orlando area. McCone was not satisfied with this arrangement, as he claimed he had to endure unfavorable weather conditions and lost regular access to office amenities, such as air conditioning, restrooms, a microwave oven and a refrigerator. McCone received a negative performance evaluation after complaining of the reassignment and sued Pitney Bowes for gender discrimination under Title VII of the Civil Rights Act of 1964 (as amended) because he claimed he was treated adversely from the female customer service associates. The district court dismissed his lawsuit with prejudice. The

U.S. Court of Appeals for the Eleventh Circuit affirmed. The court held, as a matter of law, that the changed conditions (e.g., weather and lack of office amenities) were not actionable adverse changes under Title VII because a reasonable person would consider them ordinary tribulations of the workplace. The court further noted that the alleged negative review did not save his claim because he could not establish that it led to any negative consequences. This decision confirms that employers retain flexibility in staffing decisions, but implies that a transfer to a less desirable position may lead to potential claims. Employers should carefully evaluate and document the circumstances of any such transfers.

*McCone v. Pitney Bowes, Inc.*, No. 14-11119 (11th Cir. Sept. 5, 2014)

Contact for more information: your Hinshaw attorney

**Corporate Franchisor May Be Liable for Harassment of Franchisee Even If Unnamed in EEOC Charge**

Plaintiffs Kimberly Kulig and Laura Baatz worked at a franchise location of Berryhill Baja Grill & Cantina in Houston, Texas. The franchise location was owned and operated by defendant Phillip Wattel. Plaintiffs filed charges with the U.S. Equal Employment Opportunity Commission (EEOC) complaining that Wattel sexually harassed them. Wattel admitted to groping, slapping and even biting the employees, citing that such conduct was acceptable in that work environment. The EEOC concluded that Wattel had engaged in harassment in violation of Title VII of the Civil Rights Act of 1964 (as amended) and sued the franchise. Kulig and Baatz joined the suit and added Wattel and Berryhill Corporate as defendants. Berryhill Corporate moved for summary judgment, arguing that Kulig and Baatz had failed to exhaust their administrative remedies because they did not name the corporate entity in their EEOC charges. The district court agreed, noting that the employees could not involve the judicially recognized exceptions to Title VII's named-party requirement because they were represented by counsel, and dismissed the suit against the corporate defendant. On appeal, the U.S. Court of Appeals for the Fifth Circuit noted that as a general rule, a party may not be sued under Title VII without first being named in a charge filed with the EEOC (i.e., the "named-party requirement"), but that the circuit courts have carved out exceptions to this rule in cases where the unnamed party has similar interests to the named party, or the unnamed party has actual notice of the EEOC proceedings. Here, the appellate court rejected the lower court's conclusion that represented parties cannot invoke the exceptions to the named-party requirement, noting that the point of the exception is to permit suits to go forward where, despite the plaintiff's failure to name the defendant in the charges, the purpose of the named-party requirement has been met. The presence of plaintiff's counsel, the court reasoned, is irrelevant to this inquiry. The case was accordingly remanded back for consideration of whether Berryhill Corporate received sufficient notice of the EEOC proceedings to satisfy the exceptions to the named-party requirement. Franchisors and parent companies must pay close attention to Title VII allegations even if not directly identified in the EEOC charge. The named-party requirement may not be a defense to liability if the company received sufficient notice of the allegations.

*Equal Employment Opportunity Commission v. Simbaki Limited et al.*, No. 13-20387 (5th Cir. Sept. 17, 2014)

Contact for more information: Your Hinshaw Attorney

**Security Guard Terminated After Incident With Psychiatric Patient Cannot Advance Discrimination Claims**

Anita Loyd, an African-American woman, began working for a hospital as a security guard in 1986. Loyd's tenure at the hospital was littered with various negative marks, and in 2011, when she was 52 years old, she was terminated after improperly handling an incident involving an agitated and combative psychiatric patient. Loyd conceded that the incident occurred, but disputed the details of precisely what had transpired. The hospital then hired a 39-year-old African-American woman to replace her. Loyd filed a charge with the U.S. Equal Employment Opportunity Commission for discrimination and obtained a right to sue letter. She then sued the hospital and five employees for age, race and gender discrimination. The hospital successfully moved for summary judgment and Loyd appealed, arguing that the trial court committed error in denying her motion to compel the production of a peer review that Loyd contended would shed additional light on the 2011 incident and in dismissing her claims at the summary judgment phase. The U.S. Court of Appeals for the Sixth Circuit affirmed, finding that the trial court was correct to not compel the production of the peer review. The court also agreed with the trial court's decision to dismiss the gender and race discrimination claims because Loyd's replacement was also an African-American woman. As for her age discrimination claims, the court said Loyd had not offered evidence to rebut the hospital's contention that it fired her out of its honestly held belief that she committed a "major infraction" during the June

2011 incident. Although the employer ultimately prevailed here, this case nevertheless demonstrates the importance of documenting disciplinary infractions and conducting thorough investigations into workplace incidents.

*Anita Loyd v. Saint Joseph Mercy Oakland et al., No. 13-2335 (6th Cir. Sept. 10, 2014)*

Contact for more information: Andrew M. Gordon

**Airlines Found to Be Joint Employers for the Purposes of an Employee's FMLA Eligibility**

Darren Cuff was the regional manager for Trans States Airlines, which provided regional air services under the United Express brand for United Airlines. A holding company owned both Trans States and GoJet Airlines. Cuff's job was to provide services to both Trans States and GoJet, and he worked with both on operational issues every day. His paychecks, however, were issued by Trans States. Cuff required leave and sought time off pursuant to the Family and Medical Leave Act (FMLA), which was denied. He took leave anyway and was terminated. He sued his former employer, and sought summary judgment on the issue of whether he was eligible for FMLA benefits. The court concluded that he was. The U.S. Court of Appeals for the Seventh Circuit affirmed, finding that the FMLA applies if an employer has at least 50 employees within 75 miles of a given worker's station. Here, Cuff worked at O'Hare Airport. Trans States had 33 employees in that area, and GoJet had 343. U.S. Department of Labor regulations provide that workers are covered by the FMLA when they are jointly employed by multiple companies that collectively have 50 or more workers. Here, the two companies could be treated as a single employer because there was an arrangement between employers to share the employee's services and one employer acted directly or indirectly in the interest of the other in relation to the employee. Cuff's business card bore the logos of all three companies, and the internal directories and communications directed persons to communicate with Cuff about Trans States or GoJet operations at O'Hare. Before denying FMLA leave based upon eligibility standards, employers must carefully consider factors such as joint employment so as to manage risk.

*Cuff v. Trans States Holdings, Inc.*, No. 13-1241 (7th Cir. Sept. 19, 2014)

Contact for more information: Your Hinshaw attorney.

**Appeal Premature Following Remand of ERISA Claim Denial**

Susan Mead suffered from degenerative cervical disc disease and sought long-term disability benefits through her employer's plan. The plan administrator reviewed and ultimately denied the employee's claim for benefits. Mead sued in district court pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), seeking a declaratory judgment that would award her benefits under the plan. The district court found that the denial was "arbitrary and capricious" and remanded the matter back to the claims administrator in order to determine the dollar amount of benefits that would be owed. Prior to making such a determination, the claims administrator appealed the district court's order, with Mead arguing that the appeal was premature. Thus, the issue was whether the district court's order remanding the claim to the claims administrator constituted a "final order" from which an appeal might be taken. The U.S. Court of Appeals for the Second Circuit dismissed the claims administrator's appeal, finding that remand decisions are not "immediately appealable." In doing so, the court cited authority from other circuits which held that because an ERISA remand order contemplates further proceedings before the plan administrator, it is not "final" and therefore may not be immediately appealed except when the familiar collateral order doctrine applies. The court noted that while other circuits may allow immediate appeals, in its view, remands to ERISA plan administrators are typically not "final" orders, although exceptions may apply. Plan sponsors and administrators should carefully follow the proper claims and appeals procedures in any claim for benefits under an ERISA plan.

*Mead v. Reliastar Life Insurance Company*, No. 11-192 (2d Cir. Sept. 16, 2014)

Contact for more information: Your Hinshaw attorney.

**Sixth Circuit Finds Direct Evidence of Age Discrimination Is Not Always Sufficient to Create a Genuine Issue of Material Fact**

Robert Scheick was hired as the principal of Tecumseh High School in July of 2004 when he was 51 years old. For the first three years of his employment, he was employed directly by Tecumseh Public Schools (TPS). Later, by agreement, Scheick formally retired from TPS and was hired by the staffing firm Professional Educational Services Group, LLC (PESG) to continue working as a principal through June 30, 2010. In early 2010, when Scheick was almost 57 years old, TPS decided not to renew its contract for Scheick's services. Scheick filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) and, subsequently, sued for age discrimination. The district court granted summary judgment in favor of TPS and PESG. The U.S. Court of Appeals for the Sixth Circuit reversed, finding that Scheick raised a genuine issue of fact as to whether age was the "but for" cause of TPS' decision not to renew his contract. Specifically, the court focused on certain statements by the school's superintendent who made the decision to not renew Scheick's contract and to whom Scheick reported, including "they just want somebody younger." The court found that these statements were unambiguous and, if believed, would not require an inference to conclude that age was the "but-for cause" of the adverse action. The court further held that notwithstanding evidence of a growing dissatisfaction with Scheick's performance, and the concurrent need to respond to the district's budget crisis, the evidence was sufficient to show a genuine issue of material fact. Although the court found in favor of Scheick, it emphasized that even where direct evidence of age discrimination has been offered, the question to be asked in deciding an employer's motion for summary judgment is whether the evidence, taken as a whole and in the light most favorable to the plaintiff, is sufficient to permit the trier of fact that age was the "but-for" cause of the challenged decision. This case clarifies the standard of proof for age discrimination cases and also the meaning and significance of direct evidence.

*Scheick v. Tecumseh Public Schools et al.*, No. 13-1558 (6th Cir. Sept. 2, 2014)

Contact for more information: Your Hinshaw attorney.

**Fifth Circuit Broadens Definition of "Adverse Employment Action" Under Title VII**

The city of Waco, Texas' police department suspended detective Allen Thompson, an African-American, and two Caucasian detectives on the basis that they had falsified time sheets, but it later reinstated all three officers. After the reinstatements, the department imposed written restrictions on Thompson that it did not impose on the two other detectives. Those restrictions allegedly barred Thompson from searching for evidence without supervision, logging evidence, and working in an undercover capacity. Thompson sued his employer, claiming race discrimination in violation of Title VII of the Civil Rights Act of 1964 (as amended) and 42 U.S.C. § 1981. In his complaint, Thompson alleged that he "no longer functions as a full-fledged detective; he is, effectively, an assistant to other detectives." The city moved to dismiss on the ground that Thompson failed to articulate an adverse employment action necessary to support a Title VII discrimination claim. The trial court granted the city's motion. The U.S. Court of Appeals for the Fifth Circuit reversed, finding that while the mere "loss of some job responsibilities" does not automatically constitute an adverse employment action, that does not mean that a change or loss of some responsibilities can never establish an actionable discrimination claim. Therefore, according to the court, based upon the specific facts set forth by Thompson as to the negative effects associated with his restricted responsibilities, Thompson could overcome the initial hurdle required by Title VII to set forth an "adverse employment action." Employers should note that if the terms and conditions of employment are changed to the extent that the basic nature of the job itself is impacted—even without a pay cut or a reduction in benefits—such action may be sufficiently "adverse" to support a discrimination claim under Title VII.

*Thompson v. City of Waco*, No. 13-50718 (5th Cir. Sept. 3, 2014)

Contact for more information: Andrew M. Gordon

**Property Owner Can Sue Union for Trespass and Nuisance for Disruption of Operations**

Retail Property Trust owns Brea Mall in Brea, California. One of the mall's tenants contracted with nonunion subcontractors to renovate its store. The union advised that it would pursue a labor dispute relative to this activity. The mall had rules regarding use of common areas for picketing or other protected activity and reserved the right to prohibit areas where safety was an issue. The trust claimed that the union members repeatedly violated their rules and were disruptive and interfered with business. Accordingly, it filed suit in state court against the international and local union, its secretary treasurer, and fictitious defendants, alleging state law claims for trespass and nuisance and seeking declaratory and

injunctive relief. After removing the action to federal court, the unions moved to dismiss state law claims. The district court granted the motion, holding that Section 303 of the Labor Management Relations Act (LMRA) completely preempted the state law claims related to secondary boycott activity described in the LMRA and provided an exclusive remedy for the redress of allegedly illegal activity. Section 303 prohibits secondary boycott activities that are directed at parties who are not involved in the labor dispute, as opposed to primary boycott activities in which a union pressures an employer to change its behavior. The U.S. Court of Appeals for the Ninth Circuit affirmed in part, reversed in part and remanded the case to the district court to decide whether to exercise supplemental jurisdiction over the state claims or to send them back to the state court. Significantly, the court ruled that federal preemption relating to the union activity does not sweep away state-court jurisdiction over conduct traditionally subject to state regulation where the trust's claims for trespass and nuisance fall within the longstanding exception for conduct that touches interests so deeply rooted in local feeling and responsibility that preemption could not be inferred in the absence of clear evidence of congressional intent and concern only the application of time, place and manner restrictions to raucous and threatening picket activity. Importantly for nonunion employers, federal preemption did not bar the trust's claims from going forward because the conduct at issue was, at most, a merely peripheral concern of federal labor law. Employers and property owners must take caution when seeking to quash potentially protected speech.

*The Retail Property Trust v. United Brotherhood of Carpenters and Joiners of America*, No. 12-56427 (9th Cir. Sept. 24, 2014)

Contact for more information: David I. Dalby

**Seventh Circuit Upholds Indiana's Right to Work Act**

In 2012, Indiana enacted the Right to Work Act (Act), which prohibits, among other practices, making the payment of union dues a condition of getting or keeping a job. The Act also prohibits requiring an individual to join a union as a condition of employment. Three weeks after its enactment, the International Union of Operating Engineers, Local 150, AFL-CIO (Union) sued Indiana's governor, attorney general, and commissioner of the Indiana Department of Labor, alleging that the National Labor Relations Act (NLRA) preempted the Act, and that the Act violated the U.S. Constitution and the Indiana Constitution. Defendants successfully moved to dismiss the preemption and constitutional violation claims, and the Union appealed. The U.S. Court of Appeals for the Seventh Circuit addressed both the preemption claim and constitutional violation claims. The Union claimed that the Act was preempted by NLRA Section 8(a)(3), which expressly permits bargaining parties to require union membership as a condition of employment. The court looked beyond this provision, however, and found that NLRA Section 14(b), which expressly recognizes the right of states to prohibit union "membership" as a condition of employment, applied here. The court reasoned that under Section 14(b), states can ban parties from negotiating provisions requiring the payment of any fees to the union. The court also rejected the Union's arguments that the Act violated the Contracts and the *Ex Post Facto* clauses of the U.S. Constitution, finding that the Act expressly provided that it would only apply prospectively as existing collective bargaining agreements expired. Any violation under these clauses would require some retroactive application, such as impairment of an already existing contract or punishment for past conduct. The court found no retroactive application here. The contentious ruling may lead this case to be reviewed *en banc*, and may potentially lead to U.S. Supreme Court review. Twenty-four states have enacted laws similar in nature to the Indiana Right to Work law. Employers should be mindful as to whether they are located in a state with a right to work law or other similar law and should determine how this may affect current labor practices.

*Sweeney v. Pence*, No. 13-1264 (7th Cir. Sept. 2, 2014)

Contact for more information: Your Hinshaw attorney.

**EEOC Files First Suits to Protect Transgender Workers Under Title VII**

The U.S. Equal Employment Opportunity Commission (EEOC) has filed its first two lawsuits on behalf of transgender individuals stating that they were discriminated against by their employers. The cases were filed in the Middle District of Florida (Lakeland) and the Eastern District of Michigan. In the Lakeland case, the EEOC alleges that the Lakeland Eye Clinic engaged in discrimination based on sex by firing an employee because she is transgender, because she was in transition from male to female, and/or because she did not conform to the employer's gender-based expectations,

preferences or stereotypes. According to the EEOC, the employee performed her duties satisfactorily throughout her employment, but after she began to present as a woman and informed the clinic she was transgender, the Lakeland Eye Clinic fired her. The second lawsuit encompasses similar claims in that the EEOC claims that Detroit-based R.G. & G.R. Harris Funeral Homes, Inc. engaged in discrimination when it discharged a funeral director because she informed the company that, as part of her gender transition from male to female, she intended to return to work presenting consistent with her gender identity as a woman. The lawsuits are part of the EEOC's ongoing efforts to implement its Strategic Enforcement Plan (SEP), as adopted in December 2012, which includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply." While in the early stages of litigation, the potential decisions could pave the way for large steps in equal treatment for all gender forms. Employers should revisit their policies, procedures and practices to ensure that no employee is denied employment opportunities because he or she does not conform to the preferred or expected gender norms or roles of the employer or co-workers.

*EEOC v. Lakeland Eye Clinic*, No. 14-2421 (M.D. Fla., Sept. 25, 2014)

*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710 (E.D. Mich., Sept. 25, 2014)

Contact for more information: Thaddeus A. Harrell

**Northern Indiana District Court Rules Fired Parochial Teacher Can Pursue Claim of Sex Discrimination**

After suffering a medical condition that would not allow Emily Herx, a teacher, to bear children, Herx and her husband began undergoing in-vitro fertilization. As part of the condition of her employment by the diocese, Herx was required to sign a "moral clause" in which she was to refrain from "improprieties related to the church teachings or law." After discovering that Herx was receiving in-vitro fertilization, the diocese chose not to renew her teaching position, stating that the in-vitro
fertilization process violated the diocese's "moral clause." Herx sued, alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964 (as amended), the Pregnancy Discrimination Act and the American with Disabilities Act. The diocese moved for summary judgment, and the district court denied this request, holding that Title VII, by its terms, does not give religious organizations freedom to make discriminatory decision on the basis of race, sex or national origin. The court reasoned that while a jury could find that a gender-neutral rule against in-vitro fertilization led to the termination, it could also feasibly find that a male teacher's contract would have been renewed under the same circumstances. Here, Herx produced direct evidence of sex discrimination, as only a woman can undergo in-vitro fertilization and the diocese never had fired a male teacher for any infertility treatment. Further, the court also found that the diocese could not satisfy the "ministerial exception" defense that Herx was not a member of the clergy and had no ministerial role. Thus, in denying summary judgment, the court allowed Herx to proceed with her Title VII claim. The court did not go as far as to agree with the teacher that the Pregnancy Discrimination Act prohibits religious institutions from defining what is "immoral," but rather stated that the triable issue is whether or not the fired teacher's contract was not renewed based on sex. Because religious standards often come into play in making decisions about religious-based institutions' employees, such employers are advised to consult with counsel before taking adverse employment actions against employees on religious bases.

*Herx v. Diocese of Fort Wayne-South Bend Inc. et al.*, No. 12-122 (N.D. Ind. Sept. 3, 2014)

Contact for more information: Thaddeus A. Harrell

**House Bill 4157 Extends Illinois Human Rights Act's Sexual Harassment Protections to Unpaid Interns**

On August 25, 2014, Illinois Governor Pat Quinn signed into law House Bill 4157, amending the Illinois Human Rights Act (Act) to extend the Act's sexual harassment protections to unpaid interns. Starting January 1, 2015, the definition of "employee" will be expanded to include unpaid interns who meet certain criteria. An "unpaid intern," pursuant to the Act, is a person who performs work for an employer in circumstances under which the employer is not committed to hiring the individual at the conclusion of the individual's tenure and the parties agree that the person is not entitled to wages. In addition, the work performed: must supplement training that is given in an educational environment that may enhance the intern's employability; must provide experience for the benefit of the person performing the work; cannot not displace

regular employees; must be performed under close supervision; and must provide no immediate advantage to the employer. Illinois is the third state to enact legislation that protects interns. Oregon and New York have similar legislation, as do Washington D.C. and New York City. Employers in Illinois should consider updating their training programs and policies to include the new state law protections for unpaid interns. In addition, employers must remember that even if a person does not satisfy the definition of an "unpaid intern," he or she may be considered an "employee" who is otherwise entitled to the Act's protections.

HB 4157

Contact for more information: Your Hinshaw attorney.

**California Employers Must Provide Paid Sick Leave in 2015**

California Governor Jerry Brown recently signed into law a statute requiring California employers that do not already do so to provide employees with paid sick leave. Assembly Bill 1522, also known as The Healthy Workplaces, Healthy Families Act of 2014, requires employers to provide paid sick leave to employees who, on or after July 1, 2015, work 30 days or more in California within a year of commencement of employment. Employees will accrue paid vacation time at a rate of not less than one hour for every 30 hours worked. Employers are permitted to limit an employee's use of the paid sick days to 24 hours or three days for each year of employment and may cap the total accrual at 48 hours or 6 days. Additionally, employers are not required to provide compensation for accrued, unused paid sick time upon separation of employment. The new law also requires employers to provide written notice of the amount of sick leave available on either the employee's itemized wages statement or in a separate writing provided on the designated pay date with the employee's wage payment. The Healthy Workplaces, Healthy Families Act of 2014 does not apply to employers that already have a company policy that provides for paid sick leave that already meets the requirements set out above. Employers with California employees should revise their already existing sick leave policies to comply with the new law.

AB 1522

Contact for more information: Your Hinshaw Attorney

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