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Newsletters

Employment Practices Newsletter - January 2015

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Employer Not Required to Compensate Employees for Time Spent in Security Screening Line

Employees of a retail warehouse filed a class action lawsuit alleging that they should be paid for the 20-25 minutes "postliminary" time they spent going through an anti-theft security checkpoint after their shift ended. The trial court dismissed their claim, and the U.S. Court of Appeals for the Ninth Circuit reversed, finding that the time spent in line was compensable. The U.S. Supreme Court reviewed the matter and reversed the Ninth Circuit. The Court found that, pursuant to the Portal to Portal Act's definition of compensable time under the Fair Labor Standards Act, the time spent in line was not an integral and indispensable activity for which the employees were hired. As a result, the time was not compensable. Employers should take into consideration the nature and extent of the duties being performed during the time frame at issue in order to determine whether the time is compensable.

Integrity Staffing Solutions, Inc. v. Busek et al. (9th Cir. December 9, 2014)

NLRB Holds Employees Have Right to Use Employers' Email for Union Organizing

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Service Areas

Labor & Employment

The employer prohibited employees from using the company email system for “sending uninvited emails of a personal nature.” Employees filed a grievance alleging that this rule restricted their Section 7 rights under the National Labor Relations Act. The National Labor Relations Board had previously held that employees had no right to use other equipment, such as company bulletin boards, phone systems, and public address systems, to organize. Here, however, the Board concluded that email is materially different than those older forms of communication, insofar as email is pervasive, flexible, and high-capacity – more like face-to-face discussions than a technology. Thus, the Board adopted a new “presumption that employees who have been given access to the employer’s email system” are entitled to use that system “to engage in statutorily protected discussions”*unless* the employer can prove “special circumstances that justify specific restrictions.” Since “email has become such a significant conduit for employees’ communications with one another, it is effectively a new “natural gathering place.” Employers should review their policies to ensure that their rules comply with this new NLRB position.

Purple Communications, Inc. No. 21-CA-095151 (NLRB December 11, 2014)

Supervisor's Bizarre Conduct Does Not Amount to Discrimination

Plaintiff Donald Rickard, a long-term sales employee, was assigned to a supervisor who allegedly repeatedly criticized his work and threatened to fire him. Rickard complained that his supervisor made disparaging remarks about his age and subjected him to sexual harassment by allegedly grabbing his nipple and rubbing a towel on his own crotch and handing it back to Rickard. The supervisor was reprimanded for his conduct. Thereafter, Rickard voluntarily retired due to health conditions that he claimed resulted from the stress of working with the supervisor. He filed suit, claiming hostile work environment based on age and sex. The district court granted the employer's motion for summary judgment, and Rickard appealed. The U.S. Court of Appeals for the Eighth Circuit affirmed, holding that Rickard provided "meager" evidence that the supervisor mistreated him due to his age or that the treatment was severe enough to affect the "terms, conditions and privileges" of employment, as simple teasing or offhand remarks cannot support a discrimination claim. As for the sex-based claims, the court found that Rickard failed to demonstrate that the supervisor's alleged conduct was based on sex. Although Rickard claimed that the supervisor's actions were motivated by sexual desire, he offered no evidence suggesting a sexual motive. Without more, the court held, a reasonable juror could not conclude that the actions amounted to sexual harassment. Though the court ultimately concluded that actionable harassment or discrimination did not occur, this case reminds employers of the importance of having anti-harassment/discrimination policies in effect, as well as the need for prompt and thorough investigations of complaints.

Rickard v. Swedish Match North America, Inc., No. 13-3729 (8th Cir. December 2, 2014)

No ADA Liability for Employer Not Involved in Decisionmaking

A corrections officer for Milwaukee County, Joyce Whitaker, injured her back at work and was transferred in order to accommodate her disability. Later, Whitaker began working for the state's Department of Health Services (DHS), but remained on the County payroll, with a County badge. Her supervisors were all employed by DHS, and could hire, transfer, suspend, promote and discharge County employees. Whitaker requested and took leave for her conditions, and failed to return to work thereafter, thereby prompting her termination. She filed suit against both the County and DHS, alleging failure to accommodate for and termination on the basis of her disability. DHS successfully moved for dismissal based on immunity pursuant to the Eleventh Amendment to the U.S. Constitution, and the County moved for summary judgment. The district court granted summary judgment for the County, finding that Whitaker's claims against it as a "joint employer" with DHS failed as a matter of law, and Whitaker appealed. The U.S. Court of Appeals for the Seventh Circuit affirmed. The court first examined whether the County and DHS were joint employers, and found that though the County paid Whitaker, control over personnel issues and the principal decisions at issue rested with DHS. More importantly, there was nothing in the record to suggest that the County participated in the alleged discriminatory conduct or failed to take corrective measures within its control. Therefore, as the only named party, the County did not have sufficient control over Whitaker to establish liability. This case demonstrates that the level of control and participation in decision-making are often critical indicators of whether liability may be imposed upon an employer.

Whitaker v. Milwaukee County, Wisconsin, No. 13-3735 (7th Cir. November 25, 2014)

Employee's Recent Complaints Do Not Prevent Legitimate Termination

An employee of the City of North Las Vegas filed a charge with the U.S. Equal Employment Opportunity Commission, alleging that the City denied his request for an accommodation relating to a hearing impairment and retaliated against him for having filed a prior charge of discrimination. He then got into an altercation with a coworker, and it was noted that he had a history of making insensitive remarks, engaging in verbal altercations, and threatening co-workers. The City investigated, and found the employee had repeatedly threatened several of his coworkers and their families with violence. The City ordered him to undergo a fitness for duty evaluation to determine if he was a danger to himself or others. Though the doctor found the employee fit for duty, the City terminated his employment for nonperformance of duties due to excessive personal phone calls, intimidation of coworkers by threats of violence, conducting and soliciting personal business on work time, and making disparaging remarks about his supervisors and the City. He then filed suit against the City claiming he was wrongfully terminated, retaliated against, and discriminated against based on his disability. The district court granted summary judgment in favor of the employer. The U.S. Court of Appeals for the Ninth Circuit agreed, finding that the City presented legitimate reasons for the termination and the employee could not show that the stated reasons were pretextual. The court noted that although very close temporal proximity between a protected activity and an adverse employment action can be sufficient to establish a causal link between the two to support a prima facie showing of retaliation, timing alone cannot refute a company's stated legitimate reasons for a termination. Here, the new information revealed by the City's investigation defeated any causal inference that might follow from the temporal proximity between the protected activity and termination. Where the facts warrant, and where the conduct is well-documented, adverse employment action can still be taken against an employee, even one who has engaged in recent protected activity.

Curley v. City of North Las Vegas, No. 12–16228, (9th Cir. December 2, 2014)

Employer's Pre-Election Gifts to Employees Interfered with Results of Election

SBM Management Services, Inc. provides custodial services for certain commercial facilities and held employee meetings on Fridays. At a meeting a few days before a union election, SBM provided pizza, and certain employees were given bonus checks or gift cards, which was out of the ordinary. Only eight employees subsequently voted in favor of the union. The union filed objections, claiming the employer's conduct interfered with the results of the election. The National Labor Relations Board (NLRB) heard the matter to determine whether the employer did, in fact, violate Section 8(a)(1) of the National Labor Relations Act. The Board noted that there is an inference that benefits granted during the critical period are coercive and thus violate Section 8, but it allows the employer to rebut the inference with an explanation for the timing of the benefits (e.g., the employer must show that it had an "established past practice" of giving bonuses for extra or superior work). Here, the Board found that this was not an established past practice and was actually a significant departure from prior practices. Since the bonuses were significant compared to employees' weekly wages and were given to 11 of the approximately 35 eligible voters six days before the election in front of nearly the entire bargaining unit, the Board determined this was "far from de minimis" misconduct and concluded that SBM violated section 8(1)(1). The Board recommended that the election be set aside. Employers – especially those with union activity – should take this decision into consideration when planning to distribute gifts to employees.

SBM Mgmt. Servs., No. 5-CA-129128 (NLRB December 8, 2014)

Custodian Failed to Show Wife's Comments Led to His Reassignment

A school custodian's hours and work assignments were changed six days after his wife spoke about eliminating the superintendent's position at a school board meeting about budgetary issues. The custodian's reassignment followed the district's elimination of two part-time custodial positions that previously handled the work. The custodian resigned, claiming his working conditions were "uniquely intolerable," because his new assignment required outdoor work and he was severely allergic to bee stings, although his doctor never recommended that he not perform outdoor duties. The custodian filed suit against the employer and others alleging he was constructively discharged because of his association with his wife. The district court granted summary judgment to the employer because the custodian failed to establish that his association with his wife was a substantial or motivating factor in his alleged constructive discharge or that the employer's proffered reason for his reassignment (that it eliminated the positions which previously performed the work) was pretext. The U.S. Court of Appeals for the Eighth Circuit affirmed, stating that the employer "reassigned him to a position for which

he was well qualified as part of a plan to address ongoing financial difficulties." Employers should take care in changing working conditions or taking other potentially adverse actions shortly after the employee has engaged in arguably protected activity and always ensure that the reasons for such action are carefully documented.

Skalsky v. Indep. Sch. Dist. No. 743, No. 13-3605 (8th Cir. November 28, 2014)

Employee's Failure to Engage in Good Faith Interactive Process Leads to Dismissal of Case

Pamela Manning worked a fairly predictable schedule as a sales associate at Kohl's, but then the employer restructured its staffing system which led to her scheduled hours becoming more unpredictable. Manning informed her supervisor that she could not work erratic shifts because it aggravated her diabetes, and subsequently brought in a doctor's note to that effect, requesting a predictable day shift. The employer advised her that while they could not give her a consistently steady, nine-to-five schedule, it could work with her in terms of scheduling and breaks. Manning became upset and said she had to quit or else she would become gravely ill. She slammed the door and left. A supervisor followed her to calm her down and to ask her to reconsider her resignation to discuss other accommodations, but Manning refused. She then contacted the U.S. Equal Employment Opportunity Commission (EEOC) about filing a charge. A few days later, the supervisor again contacted her and asked her to reconsider alternative accommodations, but ultimately, Manning's departure was treated as a voluntary resignation. The EEOC filed suit on her behalf, alleging discrimination and constructive discharge in violation of the Americans with Disabilities Act (ADA). The district court granted the employer's motion for summary judgment and the employee appealed. The U.S. Court of Appeals for the First Circuit affirmed. First, the Court found that Kohl's acted in good faith by trying to engage in a continued interactive process with Manning about her work schedule, and that the failure of Kohl's to provide her with her exact requested work schedule did not amount to bad faith. Manning's refusal to participate in further discussions regarding accommodations was, however, in bad faith. On the constructive discharge claim, the Court found that Manning's decision to resign was "grossly premature" as it was based on nothing more than "her own worst-case-scenario assumption." A reasonable person in similar circumstances would not feel compelled to resign where the employer was offering to discuss work arrangements with her. This case shows that the importance of the interactive process when dealing with employees with disabilities. The good faith (or lack thereof) of the parties can ultimately change the outcome of the case.

Equal Employment Opportunity Commission v. Kohl's Department Stores, Inc., No. 14-1268 (1st Cir. December 19, 2014)

"Super Policy" Requires Employer to Provide Greater Protections to Employees

A Costco employee who suffered from Tourette's syndrome made complaints to management about the way his supervisors and others were treating him. He later filed suit, claiming that he was subjected to a hostile work environment and retaliation in violation of the Americans with Disabilities Act and corresponding state statutes, as well as breach of contract and promissory estoppel. Thereafter, the employee was terminated once his employer found him secretly tape recording interactions with co-workers and customers. The employer filed a motion for summary judgment. On the breach of contract claim, the court found that there was a written employment contract between the parties, but that there was a genuine issue of fact as to whether the employer violated the anti-harassment provisions of that agreement. The agreement contained statements like "the Agreement is our pledge that you can feel secure in your job and that you will be treated fairly," which the court found could create contractual obligations on the part of the employer. The court stated that the agreement's definitions and provisions regarding harassment could be "quite reasonably read to confer protections for employees from harassment beyond what protections may exist by law." The agreement also stated in more than one place that Costco will take appropriate corrective action against an employee who has violated the anti-harassment policy, even if the inappropriate conduct does not violate any law. The court found that these provisions actually exceeded the protections afforded by the Americans with Disabilities Act, which may have obligated the employer to act accordingly. Thus, there was an issue of fact as to whether Costco breached its obligations to the employee to protect him from harassment. Employers should consider whether their policies promise protections which exceed those afforded by applicable state and federal laws.

Marini v. Costco Wholesale Corp., No. 11-00331 (Dist. Conn. December 1, 2014)

Department of Justice Extends Title VII Protection to Transgender Government Employees

The United States Department of Justice (DOJ) will now interpret Title VII of the Civil Rights Act of 1964 (Title VII) as extending to protect individuals from discrimination based on gender identity, including transgender status. Previously, the DOJ interpreted Title VII as not being applicable to persons who do not present as the gender associated with the sex with which they were born. However, Attorney General Holder noted that several courts, including the First, Sixth and Eleventh Circuit Courts of Appeals, have interpreted Title VII's prohibition of sex discrimination as barring discrimination based on a perceived failure to conform to socially constructed characteristics of males and females. Although Congress may not have had such claims in mind when it enacted Title VII, based on the text of statute, the relevant case law interpreting the statute, and the developing jurisprudence in the area, Attorney General Holder determined that the best reading of Title VII's prohibition against sex discrimination is that it encompasses discrimination based on gender identity. This announcement signifies the continuing effort to expand the law's protection of lesbian, gay, bisexual, transgender and other workers. At present, these protections are only extended to employees of state and local governments and affiliated agencies. Private employees and employers are not affected by this new interpretation. Notwithstanding, employers should consult with counsel to ensure that their policies are compliant with the applicable state and federal laws concerning protected classes.