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Newsletters

Employment Practices Newsletter - February 2015

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Cop's Facebook Posts About Police Chief's Decisions and Leadership Not Protected Speech

Susan Graziosi was a sergeant with the Greenville Police Department (GPD) for 25 years. After learning that no member of the GPD attended the funeral of a police officer killed in the line of duty in a nearby city, Graziosi posted statements on her Facebook page and left comments on other Facebook pages criticizing the decisions and leadership of the GPD police chief. Following an investigation, Graziosi's employment was terminated for insubordination and other violations of GPD's policies and procedures. She appealed her termination to the city council, which upheld her termination. Graziosi then filed suit against the city alleging she was terminated in retaliation for exercising her First Amendment right to engage in free speech. The district court granted the city's summary judgment motion. The U.S. Court of Appeals for the Fifth Circuit affirmed and found that while she may have made the comments while speaking as a citizen (and not a public employee), the comments were not of public concern, and were instead a private, personal issue. The court noted that the posts at issue here amounted to a rant in the context of a private, internal grievance, and therefore, the speech was not entitled to First Amendment protection. The Court also found the city's substantial interest in maintaining discipline and close working relationships and preventing insubordination within

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the department outweighed Graziosi's minimal interest in speaking on matters of public concern.

More and more public employers are being faced with free speech retaliation claims. Taking an adverse employment action against any employee who has recently made complaints can prove costly if not handled appropriately.

Graziosi v. City of Greenville Mississippi, No. 13-60900 (5th Cir. January. 9, 2015)

Contact for more information: your Hinshaw attorney.

Employer's Identification of Employee in SEC Filing May Have Been Retaliatory

Celia Greengrass worked as an account executive for International Monetary Systems, Ltd. (IMS). Two months after making an internal complaint about alleged harassment by a manager, she quit her job, and later filed a charge with the U.S. Equal Employment Opportunity Commission claiming national origin discrimination, sex discrimination, and retaliation. During this process, the IMS made disclosures as part of its annual SEC filings, and included Greengrass's claim in the pending litigation section of the report, and identified her by name. The employment dispute was ultimately resolved by the parties, but Greengrass claimed she was unemployable due to the company's disclosure of her name in the filings. She reasoned that prospective employers could conduct a Google search of her name and find that she sued an employer. She therefore filed another charge, and subsequently, a lawsuit, claiming retaliation through the company's use of her name. The district court granted summary judgment in favor of the employer and Greengrass appealed. The U.S. Court of Appeals for the Seventh Circuit found sufficient evidence to reverse the lower court and send the case to a jury. The Court reasoned that the employer had not previously or subsequently identified other individuals who made claims against the company, and that the timing here was suspicious. There was also evidence of email correspondence reflecting disagreement with the EEOC process and animus toward Greengrass which supported the inference of retaliation.

This case illustrates the need for employers to practice consistency when publicly disclosing pending litigation or administrative charges. Employers should balance their reporting obligations with the privacy protections afforded to current and former employees.

Greengrass v. International Monetary Systems, Ltd., No. 13-2901 (7th Cir. January 12, 2015)

Contact for more information: Your Hinshaw Attorney.

Employer's Knowledge of Employee's Underreporting of Work Hours Bars Defense

Santonias Bailey underreported his hours worked, but claimed that his supervisor instructed him to do so. In fact, he claimed that his supervisor would routinely revise his time records to show that he worked even less hours. The failure to report all hours worked was a violation of the employer's policies, as was the failure to report that the supervisor was instructing him to violate the policy. Bailey ultimately quit and filed suit against his employer seeking unpaid wages and overtime under the Fair Labor Standards Act (FLSA). The employer raised the equitable defenses of "unclean hands" and in pari delicto based upon these policy violations. Broadly speaking, these defenses relieve a defendant from liability where the defendant can show that the plaintiff bears equal responsibility for his damages. Based on these equitable defenses, the court dismissed the claims. The U.S. Court of Appeals for the Eleventh Circuit reversed, finding that if an employer knows or has reason to know that its employee underreported his hours, the employer cannot then invoke an equitable defense based on that underreporting to bar the employee’s FLSA claim.

The court reserved judgment as to whether equitable defenses based upon employee misconduct could ever bar an FLSA claim -- and distinguished cases in which the employer did not know of underreporting -- but the tone of the opinion suggests any such defense would face a high hurdle given the deterrent purposes underlying the FLSA.

Bailey v. TitleMax of Ga., No. 14-11747 (11th Cir. January 15, 2015)

Contact for more information: your Hinshaw attorney

Whistleblowing Air Marshall Allowed to Pursue Claim

Robert MacLean, a former air marshal who flew undercover and armed, expressed concern about the Transportation Security Administration's (TSA) decision to reduce overnight flights for air marshals. He believed his claims were ignored and therefore informed MSNBC, which led to the TSA reversing course and halting the cutbacks. After his identity was revealed three years later, MacLean was terminated for disclosing "sensitive security information," which violated TSA regulations. He challenged the dismissal under the Whistleblower Protection Act which protects federal workers from retaliation if they disclose "a substantial and specific danger to public health or safety." However, an exception exists under the Act for disclosures "specifically prohibited by law." The Merit Systems Protection Board found he did not qualify for protection, but, relying on that exception, the U.S. Court of Appeals for the Federal Circuit held that the disclosure did not violate a federal law, only a TSA regulation, and therefore, his whistleblowing was protected. The government asked the U.S. Supreme Court to overturn the lower court's decision, but it declined. The Supreme Court considered whether an agency regulation prohibiting the disclosure of "specific details of aviation security measures" was the sort of exception that Congress was referring to in the Act, and ultimately rejected the argument that the word "law" as used in the Act encompassed the regulation violated by MacLean. The Court further disagreed that some regulations should nonetheless count as law because they were "promulgated pursuant to an express congressional directive." The Court was ultimately unable to support the government's interpretation of the language.

Dept. of Homeland Security v. MacLean, No. 13-894 (Sup. Ct. January 21, 2015)

Contact for more information: Andrew M. Gordon.

Nurse's Pretext Claims Fail in the Face of Her Poor Work History

A dialysis clinic nurse was suspended, demoted and ultimately terminated months after reporting the improper packaging of blood samples and a purported cover-up by her employer. The nurse filed suit against the employer alleging that she was terminated, and otherwise adversely treated, because of her report about the blood samples in violation of the Minnesota Whistleblower Act (MWA), Minnesota Statute § 181.932. The district court granted summary judgment to the employer holding that the nurse failed to establish a prima facie case under the MWA because (1) the purported “direct evidence” of discrimination (that management had asked the nurse’s supervisor if there was a way to “get rid of” the nurse several months before her termination) was not linked to the employer’s adverse actions; and (2) the nurse’s actions were not protected activity under the MWA since management was already aware of the blood sample incident when the nurse made her complaints. The U.S. Court of Appeals for the Eighth Circuit affirmed, but reasoned that even if the nurse could make out a *prima facie* case, she failed to provide sufficient evidence that the employer’s reasons for its adverse actions (including that the nurse slapped a patient’s arm, impersonated a clinic manager, inappropriately documented a patient’s treatment and failed to obtain a proper doctor’s order for the treatment of a patient) were mere pretext.

Employers should be aware that a wide-range of “reports” to management and others may be considered protected activity under the law, and take care in taking potentially adverse actions shortly after such reports.

Pedersen v. Bio-Medical Application of Minn., No. 14-1284 (8th Cir. January 6, 2015)

Contact for more information: Your Hinshaw Attorney.

Employer's Unclear Handbook Language Held to Confer Additional Rights to Employees

Employed since 1993, the employee began experiencing performance issues in 2010. As part of his performance improvement plan, the employee was required to submit three reports to his immediate supervisor. Before the employee was able to submit his third report, the employee suffered heart-related complications and requested leave under the Family and Medical Leave Act (FMLA). The employee was fired shortly thereafter, and filed suit, claiming, among other things, retaliation based on the taking of FMLA leave. The district court granted summary judgment in favor of the employer, but the U.S. Court of Appeals for the Sixth Circuit reversed. The court looked to the employee handbook which

provided FMLA benefits for "all employees who work full time, at least 1,250 hours in the past twelve months." Although the employer argued the employee was not eligible for FMLA benefits due to the fact there were not more than 50 employees within a 75 mile radius, the court rejected the argument based on the theory of equitable estoppel. The Court held that if the employer wanted to disqualify the employee from benefits, they had to include the language of 50 employees within a 75 mile radius in the handbook. Since the employer failed to do so, the Court held the employee reasonably relied on the information and was entitled to FMLA.

Employers should carefully review employee handbooks to make sure benefits are accurately explained to employees so as to avoid a mistake like this.

Tilley v. Kalamazoo Cnty. Road Comm'n, No. 14-1679 (6th Cir. January 26, 2015)

Contact for more information: Thaddeus A. Harrell.

Being On-Call During Meal Periods Does Not Automatically Make Time Compensable

Security guards at a casino were required to work five, eight-hour shifts each week, and received a 30-minute meal period, during which they were permitted to eat, drink, socialize, etc., but could not leave casino property. Additionally, they were required to monitor their security radios during meal periods. A group of current and former guards filed suit against the employer, claiming that they were deprived of overtime wages because their meal periods constituted working time, and were thus compensable. The casino successfully sought summary judgment, and the employees appealed. The U.S. Court of Appeals for the Sixth Circuit affirmed, finding that there was no evidence that the time spent during meal periods was "predominantly for the employer's benefit," and considering the totality of the circumstances (e.g., that the employees could and did have uninterrupted meal periods), concluded that the time was not compensable. The Court further reiterated that simply being required to carry a radio during breaks, or de minimis interruptions in the break period, did not convert a meal period to compensable time.

Employers should ensure that meal and rest breaks are free from duty; however, they should work with counsel to ensure meal and rest break policies are compliant both with federal and applicable state law.

Ruffin v. MotorCity Casino, No. 14-1444 (6th Cir., January 7, 2015)

Contact for more information: Your Hinshaw Attorney

Six-Year SOL Period Does Not Apply to Federal Workers' Title VII Suit

Two federal workers filed an administrative class complaint in 1995 alleging race discrimination against the Department. For several years, there were many dismissals and appeals of the claims, and there were numerous changes in terms of the naming and substituting of different claimants. Settlement efforts were unsuccessful, prompting the employees to move to file an amended complaint seeking to add hostile work environment, disparate impact, and retaliation claims. The district court dismissed the case on the grounds that the six-year statute of limitations for non-tort suits against the United States barred the suit. The court held that the individual claims accrued back in the 1990s when the employees could have filed suit 180 days after filing the initial charges. The employees appealed. On a matter of first impression, the U.S. Court of Appeals for the District of Columbia Circuit held that the six-year statute of limitations for suits against the United States under 28 U.S.C. § 2401(a) does not apply to claims filed by federal employees pursuant to Title VII of the Civil Rights Act of 1964 (as amended). The court found that Congress enacted an "exclusive" judicial scheme giving preference to administrative resolution of federal employee's Title VII claims, and to apply a different limitation period would "irreconcilably conflict" with Congress's comprehensive scheme, which the court is obliged to uphold.

Public employers should take note of this interesting decision, given that it extends an otherwise lengthy statute of limitations, and may give rise to additional claims.

Howard v. Pritzker, No. 12-5370 (D.C. Cir. January 6, 2015)

Contact for more information: Esperanza Segarra

California Court Again Clarifies Going and Coming Rule

Craig Schultz worked for a civilian company on a large U.S. Air Force base. He drove his personal vehicle onto the base, and was permitted to travel around the base and use military vehicles. While driving to work one morning, and while on base, he suffered symptoms of his diabetes which led to his flipping his car and sustaining severe injuries. He filed a workers' compensation claim seeking benefits on the grounds that his injury occurred on his employer's premises. He argued that the going and coming rule did not preclude liability because he was required to use his personal vehicle as a condition of employment, or alternatively, as an accommodation to the employer. The employer argued the accident occurred before work started, and while it was at a location within the base, it was still seven miles away from the building at which Schultz worked. The judge ruled in favor of the employee, but the Workers Compensation Appeals Board denied benefits based on the going and coming rule. The employee petitioned the California Court of Appeals for review. On appeal, the court first looked at going and coming rule– a rule which precludes compensation for injuries suffered during the course of a local commute to a fixed place of business at fixed hours in the absence of exceptional circumstances. Here, although Schultz was assigned to a particular building on the base, he often worked at other locations around the controlled and secured base. The court found that Schultz was on the premises of his employer once he entered the base and his injury therefore occurred during the course of that employment for purposes of workers' compensation law, and the employee was entitled to benefits.

Employers with employees who work at controlled access locations or on large properties should be mindful of this decision. California employers could, under similar circumstances, incur liability for workers who are injured on such property, even if they are in the act of going or coming to work.

Schultz v. Workers' Compensation Appeals Board, No. B255678 (Ca. Ct. of Appeal, January 6, 2015)

Contact for more information: Jeremiah Snowden.

Court Considers Whether Reductions in Number of Participants Over Multiple Years Constitutes a Single Partial Termination

The plaintiff, Howard Matz, was an employee of a subsidiary company until the company was sold. He argued that the parent company that was the sponsor of the plan had adopted a restructuring plan that included the elimination of some of its subsidiaries and layoffs of other workers in retained subsidiaries which resulted in a partial termination of the plan, thereby requiring full vesting of plan benefits. The district court was asked to decide whether the series of reductions in the number of plan participants constituted a single partial termination. The court dismissed the case on the grounds that no single partial termination occurred. The U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the district court. The court noted that nothing requires a significant corporate event to occur within a single plan year. Nevertheless, the court agreed with the district court's finding that the parent company's sales of multiple subsidiaries and layoffs of other workers over multiple years were not part of a single restructuring plan, but rather were made sequentially, on the basis of economic conditions in the particular market in which each subsidiary operated, and that these conditions had varied from market to market. Therefore, the court upheld the district court’s holding that a partial termination did not occur.

This decision reaffirms the Seventh Circuit’s prior holding that a series of reductions in the number of participants in a plan over multiple plan years may result in a partial termination of a plan. The determination of whether a series of reductions over multiple plan years are related is highly factual in nature and should be considered for purposes of determining whether a partial termination has occurred.

Matz v. Household Int’l Tax Reduction Inv. Plan, No. 14-01683 (7th Cir. December 24, 2014).

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