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Newsletters

Employment Practices Newsletter - March 2015

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Ministerial Exception Bars Employee's Claims of Gender Discrimination

A spiritual director who provided religious counsel and prayer services at a religious organization notified her supervisors, per company policy, that she was contemplating divorce. She was placed on leave in order to attempt to work things out with her husband and was terminated for failing to reconcile her marriage. She then filed for divorce. She filed charges with the U.S. Equal Employment Opportunity Commission and the Michigan Department of Civil Rights and later filed suit claiming violations of Title VII of the Civil Rights Act of 1964 and corresponding state statutes for gender discrimination. She claimed that similarly situated male employees had gotten divorces during their employment and were not terminated. The employer filed a motion to dismiss, asserting the ministerial exception allows it to make these types of decisions in that the First Amendment and the freedom of religious organization precludes the application of Title VII and related laws to claims relating to the employment relationship between religious organizations and their ministers. The district court granted the motion and the spiritual director appealed. The U.S. Court of Appeals for the Sixth Circuit affirmed, holding that the ministerial exception bars all of the spiritual director's claims. The Court found that while the employer is not a church, it is a religious affiliated entity whose "mission is marked by clear or obvious religious characteristics." Further, the Court found that the ministerial

exception protects against the claim at issue. Though the spiritual director was not a "minister," she worked as a spiritual director, which conveys a religious (as opposed to secular) meaning. Her job duties entailed assisting others to cultivate "intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines," which the Court found to be a ministerial function.

Though religious organizations have more options in terms of terminating employees, particularly where the ministerial exception comes in to play, taking adverse employment action and terminating employees always carries risk, and employers should consider those risks carefully in order to attempt to proactively manage risk and prevent future litigation.

Conlon v. InterVarsity Christian Fellowship, No. 14-1549 (6th Cir. February 5, 2015)

Contact for more information contact your regular Hinshaw attorney.

Worker's Blood Pressure Not FMLA-Qualifying Condition

Employee Kendrick Johnson left work for medical treatment for a bad headache. He was prescribed blood pressure medicine and taken off work for three days. The doctor's note had a blank space for "name" which Johnson filled in himself, and which led to the employer being suspicious. Johnson provided a second note, but this was signed by a paramedic. His employer terminated him six days later. Johnson sued for retaliation and interference under the Family and Medical Leave Act (FMLA). The district court granted summary judgment in favor of the employer, and the employee appealed. The U.S. Court of Appeals for the Eighth Circuit affirmed. The court looked at whether Johnson had a serious medical condition under the FMLA. He had a period of incapacity and had visited *once* with a health care provider, but did he also either (i) see a health care provider for a second time within 30 days or (ii) receive a supervised treatment regimen? On the first issue, the court noted that Johnson *eventually* saw his regular physician about his blood pressure, but reasoned that this was not good enough; he could not provide the exact date of his second visit, and "[v]ague assertions about a follow-up appointment without specificity as to its timing are not sufficiently probative." The second issue turned on whether the medication prescribed for Johnson on the day that he left work was a "supervised treatment regimen." The court found that there was nothing supervised or directed about the prescribed medication at all; instead, the clinic "simply prescribed Johnson medication and sent him on his way." Thus, the court concluded, Johnson did not have a serious medical condition and, whatever the rightness or wrongness of his termination, was not protected by the FMLA.

Employers take note: just because an employee is ill and visits the doctor does not mean that he or she is entitled to FMLA coverage. Employers may inquire further into an employee's medical condition before approving FMLA coverage to ensure that these requirements are met.

Johnson v. Wheeling Machine Products, No. 13-3786 (8th Cir. February 20, 2015)

Contact for more information contact your regular Hinshaw attorney.

EEOC's Expert Report Found to be Unreliable Under Federal Rules of Evidence

As part of an employer's business in providing integrated services for high level events, it undertook background checks of all prospective employees, including credit checks for positions dealing with "credit sensitive" information. An employee who was denied a position based on the employee's credit filed suit with the U.S. Equal Employment Opportunity Commission (EEOC), and the EEOC later issued a letter of determination that the employer's background and credit checks violated Title VII of the Civil Rights Act of 1964 (as amended). The claim was later amended to state the background and credit checks also had a disparate impact on black applicants. To establish its claims, the EEOC utilized an analytical expert, but the employer sought to have the expert's testimony dismissed, claiming it was "rife with analytical errors" and "completely unreliable." The district court granted the employer's motion, stating the EEOC's expert testimony did not satisfy Federal Rule of Evidence 702, which sets forth the requirements for expert testimony in a lawsuit. The EEOC appealed, and the U.S. Court of Appeals for the Fourth Circuit affirmed, noting that the district court had identified an alarming number of errors and analytical fallacies in the expert's reports, making it impossible to rely on any of his conclusions. Further, the court found that the sheer number of mistakes and omissions in the expert's analysis rendered it "outside the range where experts might reasonably differ." The Court of Appeals therefore found that the district court had not abused its discretion in finding the EEOC's expert testimony unreliable.

Experts' reports often help to bolster parties' respective positions. Notwithstanding, such testimony must meet the requirements of the federal rules, and if it fails to do so, it can result in severe consequences for the party seeking to rely upon such evidence.

Equal Employment Opportunity Commission v. Freeman, No. 13-2365 (4th Cir. February 20, 2015)

Contact for more information: Thaddeus A. Harrell.

Driver Loses Harassment Claim Based on Failure to Follow Complaint Procedure

A black pizza delivery driver claimed that his general manager, who was a Hispanic female, subjected him to harassment based on his gender and race. He complained to the area manager and company president, but claims that he was subjected to retaliation in that his hours were then cut. He filed suit against his employer under 42 U.S.C. §1981 and corresponding state law claiming harassment and retaliation. The employer claimed that it actually reduced his hours once it learned that he had unpaid tickets which led to his driver's license being suspended. The case proceeded to a jury, who found in favor of the employer on its defenses, and in favor of the driver with respect to his claims against the individual manager. The driver filed a motion for judgment as a matter of law and for a new trial, which the lower court denied. The U.S. Court of Appeals for the Fifth Circuit affirmed. Though the court recognized that the driver was subjected to harassment by the manager, the evidence showed that the employer had anti-discrimination policies in place, and that the driver only alerted low-level supervisors about the harassment, even though the policy required that he complain to the manager's supervisor. Once he did actually complain to someone with authority, an investigation was undertaken and the manager was terminated. Had the driver followed the policy and complained to the correct individuals, the employer could have taken steps to prevent and correct the alleged harassment.

This case serves as a reminder to employers that it is critical to have anti-harassment, discrimination, and retaliation policies in place, and to ensure that employees and managers alike are trained accordingly.

Blanton v. Newton Associates, Inc., No. 14-50087 (5th Cir. February 10, 2015)

Contact for more information contact your regular Hinshaw attorney.

Class Certification Does Not Require Damages Capable of Measurement on Classwide Basis

A group of former restaurant employees filed suit against their employer claiming that they were owed wages under the Fair Labor Standards Act and corresponding provisions of New York Labor Law. Specifically, the employees claimed they did not receive the extra hour of pay they were due when working a ten hour work day, and that managers made unlawful deductions for rest breaks. The district court denied class certification on the grounds that the potential damages would have to be ascertained on an individual basis, which would require examining the amount of unpaid wages owed to each individual employee. On appeal, the U.S. Court of Appeals for the Second Circuit reversed, finding that the commonality requirement under Rule 23(b)(3) does not require that damages be capable of measurement on a classwide basis. Rather, individual damages are simply one of the many factors to be considered when evaluating whether a class is susceptible to certification. Often times, the fact that all members of the class were subject to the same policy and therefore share the same theory of liability is sufficient. Employers often rely upon the individualized nature of claims or the individual damage calculations in attempting to defend against claims of class certification.

This case reinforces the notion that the courts consider a multitude of factors, and that this single issue – should it be present in a particular case – is not, in and of itself, determinative, and that a class could potentially be certified even if individual employees have different damages.

Roach v. T.L. Cannon Corp., No. 13-3070 (2d Cir. February 10, 2015)

Contact for more information: your regular Hinshaw attorney.

Supervisor Who Failed DOT Exam Not "Qualified Individual" Under ADAAA

David Hawkins was a supervisor at a frozen food product sales and distribution center who was responsible for supervising truck operations and driving trucks to service appointments. His job required physical activity and being able to lift and pull up to fifty pounds. The center closed for some time, but Hawkins stayed on board and loaded and drove trucks between facilities. He then began to suffer from various medical conditions which led to him suffering a minor stroke and having a pacemaker implanted. He failed a routine DOT medical evaluation and was placed on unpaid leave until he could obtain his certification or find a non-DOT position. He did not apply for any other jobs and subsequently signed a termination form voluntarily resigning, but he hand wrote in that he was forced to quit for medical reasons. Hawkins filed suit alleging violations of the Americans with Disabilities Act and the Oklahoma Anti-Discrimination Act. The district court granted the employer's motion for summary judgment, and Hawkins appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed, agreeing with the district court that Hawkins was not a qualified individual with a disability, because he could not perform the essential functions of his position, which included securing a DOT certification in order to drive the company's trucks. Even though he did not have to drive a truck every day, or for a certain period of time, all facility supervisors were required to be DOT qualified, his job description required that he be DOT qualified, and he was only one of two people at one of the facilities authorized to drive a company truck. Failing to have the DOT certification would seriously disrupt the company's business. The Court concluded that having the DOT certification was therefore an essential function of the position. The Court also considered Hawkins' claim that the district court confused the issue of what amounts to job qualifications versus the essential functions of a position, and rejected this argument, finding that the specifications here were job-related, uniformly-enforced, and consistent with business necessity.

Employers should review job descriptions and consider the job qualifications and essential functions, as such documentation and information is often the guiding instrument in determining whether and/or how to accommodate a qualified disabled individual.

Hawkins v. Schwan's Home Service, Inc., No. 13-6149 (10th Cir. February 19, 2015)

Contact for more information contact your regular Hinshaw attorney.

Employee's Failure to Sue Proper Employer Defendant Results in Dismissal

A cocktail waitress at Scores West Side filed suit, claiming that she was harassed by her manager and other employees based upon her sex and race, and that she was subjected to retaliation when she complained. She asserted claims pursuant to Title VII of the Civil Rights Act of 1964 (as amended) and corresponding state statutes. She filed the suit against Scores Holding, who then sought dismissal on the grounds that it was not her employer for purposes of Title VII claims. The district court agreed and dismissed the waitress's claims. On appeal, the U.S. Court of Appeals for the Second Circuit affirmed. The court found that the waitress had failed to demonstrate that either the single employer doctrine or the joint employer doctrine required a finding that Scores Holding was her employer for the purposes of Title VII. Though there was some evidence of common ownership between companies, that is but a single factor in determining whether there exists an employment relationship. The court also pointed out that there was no evidence that the holding company actually controlled labor relations, even though the waitress submitted as evidence a printout from Scores Holding's website regarding attracting and training personnel and a handbook which included the address and phone number for Scores Holding.

Employers should always consider, as a first-step defense, whether the employee has asserted claims against the proper legal entity which was the "employer." Just because an entity has some business or legal relationship with the employer does not always mean that it is or can be held responsible for its alleged violations of employment law.

Shiflett v. Scores Holding Company, Inc., No. 14-1594-cv (2d Cir. February 19, 2015)

Contact for more information: your regular Hinshaw attorney.

Employer Backtracks on Initial Assertion of Right to Terminate Trans Employee

A department store employee who was born a male and identifies as a female filed suit against her employer claiming she was subjected to a pattern and practice of discrimination from management and co-workers. She claimed that she was denied access to the women's bathroom and was told to dress and act like a man, as well as being told to "separate her home life and her work life." The employer argued that transgender status was not protected under Title VII of the Civil

Rights Act of 1964 (as amended) and initially sought to dismiss the complaint. This motion was withdrawn, however, as the employer now maintains that the employee was terminated after she was rude to customers. The employer issued a statement articulating its position against discrimination, including discrimination of transgender individuals.

No determination has been made in this case, however, retailers and other businesses alike should take note of this issue and review anti-discrimination policies to ensure that the needs of the transgender employees are met. Managers should be trained on how to address difficult questions from transgender employees and their colleagues concerning bathroom use, dress and behavior.

Jamal v. Saks & Company, No. 14-02782 (S.D. Texas January 26, 2015)

DOL Extends FMLA Rights to Married Same-Sex Couples

Effective March 27, 2015, the term "spouse" under the Family and Medical Leave Act will now include most same-sex married couples. The U.S. Department of Labor (DOL) recently announced its Final Rule changing the definition of "spouse, " a change that stems from the 2014Supreme Court decision in *United States v. Windsor*. In *Windsor*, the Supreme Court struck Section 3 of the Defense of Marriage Act (defining "marriage" for purposes of federal law as being between one man and one woman). Immediately thereafter, the DOL clarified the decision's effect on the FMLA's then-current definition of "spouse": same-sex couples were "spouses" under the FMLA, but only if they resided in a state that recognized same-sex marriage. On February 23, 2015, however, the DOL announced that it was going one step further by issuing a Final Rule providing for uniform treatment of same-sex spouses based upon their place of celebration instead of the state of residence. In other words, if a same-sex couple was validly married in a state that recognizes same-sex marriage, then they are "spouses" for FMLA purposes regardless of where they live in the future. (Same-sex couples who were married outside the United States will be considered "spouses" under the FMLA as long as the marriage was valid in the country of celebration and would be considered valid in at least one U.S. state.) As a result, after the effective date of March 27, 2015, most same-sex married couples will achieve "spousal" status under the FMLA, which will allow employees to take leave for their same-sex partners' serious health conditions, for spousal military "qualifying exigency" leave, or for spousal military caregiver leave. It also means that employees will be able to take leave for the serious health condition of the children of their same-sex partners, even if the employee is not acting *in loco parentis* with respect to the child.

All employers should be aware of this simple but significant change in the law.

Contact for more information: Andrew M. Gordon.

https://www.federalregister.gov/articles/2015/02/25/2015-03569/definition-of-spouse-under-the-family-and-medical-leave-act

Contract Language Did Not Support Retirees' Demand for Benefits for Life

In 2000, M&G Polymers purchased the Point Pleasant Polyester Plant in Apple Grove, WV. At that time, M&G entered into a collective-bargaining agreement and a related Pension, Insurance, and Service Award Agreement (P & I Agreement) with the union. The P & I Agreement provided for medical coverage with a full employer contribution to be provided for the duration of the agreement, subject to future negotiations. When those agreements expired, M&G announced that it would require retirees to contribute to the cost of their health care benefits. Several retirees sued M&G, alleging that the P & I Agreement created a vested right to a lifetime contribution of free healthcare benefits. The district court dismissed the case, concluding that the P & I Agreements had no language creating a vested right to such benefits that would continue beyond the expiration of the original agreements. The U.S. Court of Appeals for the Sixth Circuit found in favor of the retirees, looking to precedent to conclude that there was a presumption in favor of vesting retiree medical benefits, and that the vesting rights from the retiree's original contract would have been considered illusory if they could be taken away. The court therefore found that the retirees' medical benefits vested for life. The U.S. Supreme Court unanimously rejected the Sixth Court's decision, as **ordinary contract principles do not support an inference that the parties intended benefits to vest for life.** The Court explained that collective bargaining agreements, including those establishing retirement plans, are interpreted according to the general principles of contract law. When the appeals court inferred vesting rights that were not included in the original P & I Agreement, the Court found that this "distorted" the agreement's

texts.

Vesting rights, according to the Court, are not inferred lightly, and the intent to vest must be found in the plan documents and must be stated in clear and express language. Employers currently drafting or negotiating collective bargaining agreements must be explicit about whether they intend to create vesting rights for employee benefits.

M&G Polymers USA, LLC v. Tackett, No. 13-1010 (Sup. Ct. January 26, 2015)

Contact for more information contact your regular Hinshaw attorney.

NLRB Should Have Considered Company's Request for Information from Union

An auto-parts distributor filed objections with the National Labor Relations Board (NLRB) challenging an election on the grounds that certain employees harassed and threatened other employees to influence their votes. The NLRB regional director ordered a hearing on those objections. Before the hearing, the employer served subpoenas on the union seeking certain information and documents related to the union's communications with employees whom the employer believed to be acting as agents for the union. At the hearing, the hearing officer granted the union's request to quash the subpoenas on the basis that the requested documents violated the employees' confidentiality interests and Section 7 rights. The hearing officer also questioned whether the subpoenaed information was relevant. The hearing officer did not, however, conduct an inspection of the documents prior to her ruling. The employer filed exceptions to the hearing officer's report, but the NLRB denied the exceptions and certified the election results. The employer refused to bargain with the newly certified union. On appeal, the U.S. Court of Appeals for the D.C. Circuit found that the hearing officer should have first conducted an in camera review of documents. The court concluded that the hearing officer failed to adequately balance the employees' confidentiality interests against the company's need for the requested information. Accordingly, the NLRB's order was vacated, and the employer's petition for review was granted. The case was remanded to the NLRB to revisit the employer's election objections.

Parties to NLRB proceedings should expect more in camera review of subpoenas materials at the start of hearings.

Ozark Auto. Distribs., Inc. v. NLRB, No. 11-1320 (D.C. Cir. February 10, 2015)

Contact for more information: your regular Hinshaw attorney.