HINSHAW

Newsletters

Employment Practices Newsletter - April 2015

April 1, 2015

Supreme Court Draws New Lines for Pregnancy Discrimination Cases Asserting Discriminatory Denial of Accommodations

Peggy Young was a part-time driver for UPS who was placed under a lifting restriction by her physician due to a pregnancy. UPS required drivers such as Young to be able to lift up to 70 lbs and advised Young that she could not work while under a lifting restriction. Pursuant to the terms of a collective bargaining agreement, UPS agreed to provide temporary alternative (light-duty) work assignments to those who could not perform their normal duties due to an on the job injury or those who lost their certification or license, but such accommodations were not afforded to those disabled by pregnancy. Young filed suit claiming gender discrimination on the basis of pregnancy. The district court found in favor of the employer, as did the U.S. Court of Appeals for the Fourth Circuit. On review, the U.S. Supreme Court found that the Pregnancy Discrimination Act confirms that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy and that employers must treat "women affected by pregnancy... the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work." Thus, to state a claim for pregnancy discrimination, an employee must establish that she is a member of a protected class, that she sought an accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

Attorneys

Aimee E. Delaney

Peter J. Felsenfeld

Service Areas

Employee Benefits

Labor & Employment

Workers' Compensation Defense

Because Young presented a question of fact regarding whether the employer accommodated others similar in their ability or inability to work, the lower court's decision was vacated.

The Court's decision still leaves room for interpretation, but employers are nevertheless advised to consider all employees' requests for accommodation – regardless of whether they are injured on the job, have a non-work-related disability or condition, or are pregnant – similarly in determining whether and/or how such employees could possibly be accommodated.

Young v. United Parcel Service, --- S. Ct. ---- (2015)

Supreme Court Upholds Non-Exempt Classification for Mortgage Loan Officers

In 2006, the Mortgage Bankers Association (MBA) sought and received a federal Department of Labor (DOL) opinion letter finding that mortgage loan officers fell within the administrative exemption to the 2004 regulations pertaining to the Fair Labor Standards Act. Without notice or an opportunity to comment, in 2010 the DOL withdrew that letter and issued an Administrator's Interpretation concluding the opposite. The MBA brought suit claiming the reversal without opportunity for notice and comment violated the Administrative Procedures Act (APA). The district court granted summary judgment in favor of the DOL but the U.S. Court of Appeals for the District of Columbia reversed. Upon review, the U.S. Supreme Court reversed the circuit court and held the DOL did not violate the APA. According to the Supreme Court, the DOL's reversal constituted merely an "interpretive rule" (i.e., an agency's construction of a statute it administers) and not a "legislative rule" (i.e., an agency's own rule which has the force of law).

The immediate import of this decision is that financial institutions face greater risk of overtime and minimum wage lawsuits from mortgage loan officers, as courts give some deference to the DOL's exemption interpretations. More broadly, this decision reversed nearly a decade of contrary interpretation of an agency's notice and comment obligations with regard to interpretative rulemaking and gives federal agencies more leeway in upsetting established understandings of federal regulations, since now agencies need not engage in notice and comment rulemaking if they can classify the change as merely an interpretive rule.

Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015)

Car Dealership Service Advisors Not Exempt from Overtime Under FLSA

A car dealership employed "service advisors," who were hired to meet and greet car owners as they entered the service area of the facility, and evaluate and recommend service and repair needs. The employer classified the service advisors as exempt from overtime pay, and paid them on a commission basis. The service advisors filed suit against the employer, seeking unpaid overtime wages. The district court dismissed the claims on the grounds that the service advisors fell within the Fair Labor Standards Act's exemption for salesmen, partsmen, or mechanics. In considering this question of first impression, the U.S. Court of Appeals for the Ninth Circuit found that the service advisors did not fall within the exemption. Service advisors sell services for cars, and do not sell cars themselves, nor do they work on the cars. Despite the fact that this determination was contrary to similar results reached by the U.S. Court of Appeals for the Fourth and Fifth Circuits, the court reasoned that the Department of Labor created a narrow definition for the term "salesman" such that if it intended to include persons who sold services for cars, it would have included them in the definition.

When determining an employee's status, employers must take caution to ensure that the job description and the reasonable expectations of the employee and the employer are weighed against the federal and state exemptions to ensure proper classification.

Navarro v. Encino Motorcars, LLC, No. 13-55323 (9th Cir. March 24, 2015)

Supervisor's Single Offensive Comment Insufficient to Create Hostile Work Environment

Employee Harry Singh allegedly used the phrase "Heil Hitler" in a meeting attended by employee Courtney Satterwhite, who was offended by the comment and reported it to human resources. Singh later discovered that Satterwhite had reported the incident, and after a promotion, Singh was reassigned to oversee Satterwhite. Thereafter, Singh disciplined Satterwhite on several occasions and recommended Satterwhite be demoted, and subsequently Satterwhite was demoted

with a reduction in pay. Satterwhite filed suit under Title VII of the Civil Rights Act of 1964 and corresponding state statutes claiming he was retaliated against after reporting Singh's comments. The district court granted summary judgment in favor of the employer, and the employee appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed. The Court found that though Satterwhite claimed that he engaged in two protected activities – (1) reporting the "Heil Hitler" comment and (2) responding to inquiries regarding investigations of the comment – for his activities to be protected, he would have to reasonably believe that Singh's comments created a hostile work environment under Title VII. The court stated that "[i]solated incidents (unless extremely serious) do not amount to actionable conduct under Title VII." Even though the it was determined that the comment violated an executive order, the comment in isolation did not satisfy the definition of an "unlawful employment practice."

Single comments are rarely sufficient to support claims of harassment, discrimination, or retaliation in the workplace, but that still does not mean that employers are safe from such claims. This is but one example where a single instance did not rise to the requisite level to be actionable.

Satterwhite v. City of Houston, No. 14-20240 (5th Cir. March 3, 2015)

Court Shoots Down Disability Discrimination Claim Based on Embarrassment

A City's Senior Services Manager had a disabled daughter, and there was an incident in which law enforcement was called to her home to resolve a dispute between the employee and her daughter. The employee was ultimately terminated for failing to follow bidding protocols in protection with a project and for steering a job to a friend without the required approval. The employee, however, filed suit, claiming that she was terminated because of her association with her disabled daughter and because the City was embarrassed by her daughter's disability and the resulting issues. Under the Americans with Disabilities Act, an employer can be held liable for an adverse employment action taken because of its knowledge of the affected employee's relationship with a disabled person. To establish association discrimination, an employee must demonstrate that the adverse employment action "occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision." Here, however, the U.S. District Court for the District of Colorado found that the employee failed to raise such an inference, and that "embarrassment" was not sufficient to support an association claim. The court further found that the incident which arose at the employee's home was only tangentially related to the daughter's disability, if at all. Accordingly, the court granted the employer's motion for summary judgment and dismissed the case.

Association claims are somewhat nebulous, because they often involve people and conduct which exist outside of the workplace. As with any other termination, employers must be mindful to ensure that the basis for the termination is a legitimate, non-discriminatory business reason, and is not retaliatory or based upon some other improper reason.

Lester v. City of Lafayette, No. 13-1997 (D.Colo. February 27, 2015)

Employer's Fraud Claim against Disabled Employee Fails

Darrell Scott worked as a lube tech, performing oil changes for customers' vehicles, and included checking air filters, transmission fluid, oil levels, and brake fluid. Scott had a history of back problems, and after being involved in a car accident, these problems became worse. He claimed he was terminated after his employer received information from his doctor which indicated that he should not engage in activities which required him to bend, sweep, and lean forward. He claimed that he should not have been terminated because he could still perform the essential functions of his position. Scott filed suit, alleging violations of the Americans with Disabilities Act. In response, the employer filed a claim against Scott for fraud and abuse of process, alleging Scott fraudulently misrepresented that he could perform the essential functions of his job when he applied for the job, as this representation was contradicted by Scott's more recent filing of applications for unemployment and disability benefits wherein he claimed he was disabled and unable to work. Scott then filed a motion to dismiss the employer's counterclaim. The U.S. District Court for the Southern District of Indiana granted Scott's motion. The court found that while the employer claimed that Scott lied when he said he could perform his job, nowhere did the employer allege Scott was not able to perform those tasks during the six years he worked there before the car accident. At best, the court held, the allegations demonstrated that Scott made a misrepresentation regarding future facts, or the fact that he would be able to perform the essential functions of his job going forward, and under the law, this was insufficient to support a claim of fraud. Further, that Scott may have had a disability at the time he applied for

work did not mean that his statement about his ability to perform the essential functions of his position was false.

In preparing a defense to an employee's claim, employers should always compare employees' allegations and sworn statements in the context of litigation with doctors' notes and other documents filed with state and government agencies relating to benefits to determine whether there is a basis on which to challenge the claim. While the employer attempted to use the employee's alleged fraud as an offensive tactic in a counterclaim, it is not precluded from pursuing its defense on this basis.

Scott v. Rama, Inc., No. 13-01750 (S.D. Ind. March 16, 2015)

Providing Arbitration Agreements to Nude Dancers for Signature Unconscionable

Exotic dancers in California filed a lawsuit alleging various wage and hour claims under federal and state wage and hour law. The employer moved to enforce the arbitration clause in the dancers' employment agreements. The U.S. District Court for the Northern District of California found sufficient procedural and substantive unconscionability to find the agreements unenforceable. First, the court found the agreements to be based on "unequal bargaining power," and that the dancers had no "real" chance to negotiate nor did they have a "meaningful choice" but to sign, since they were given the agreements while "mostly naked" and were rushed to sign in that they could not read the agreement or take it home before signing. The court also found the agreements to contain one-way provisions which were favorable to the employer without reasonable justification, including the cost-shifting provisions. Because of the numerous issues with the agreement, the court refused to simply strike the defects and instead found the entire agreement to be unenforceable.

Arbitration agreements are subject to continued and repeated scrutiny by the courts, and employers are cautioned to regularly review such agreements with counsel to ensure compliance with state and federal authorities so that when the time comes to enforce the agreement, it will hold up.

Roe v. SFBSC Management, LLC, No. 14-03616 (N.D. Cal. March 2, 2015)

Cosmetology Students Must Be Paid Minimum Wage in School Salons

The students were attendees at cosmetology schools, seeking to obtain their state licenses, and as a part of their curriculum, were required to participate in clinics and perform personal cosmetology services on consumers. The consumers paid the school a fee for their services, the school retained those fees, and the students received academic credit for their services, but no money. The students claimed that in addition to performing cosmetology services, they were required to sell products to the consumers, perform janitorial and clerical functions, and provide services in a different area of cosmetology than they were practicing. The students filed suit claiming violations of the Fair Labor Standards Act (FLSA) and corresponding state provisions seeking unpaid wages and overtime wages. The schools sought to dismiss the claims, but the U.S. District Court for the Western District of New York denied their request. To determine whether an entity is an "employer" for the purposes of the FLSA, the court looked at the individuals' activities to determine whether an employment relationship exists. The economic realities of the situation, the court found, **weighed in favor of a finding of an employment relationship.** The schools were not salons, so the students had no expectation of employment upon graduation, and the students did not displace regular employees. The factor given the most weight, however, is whether the student or the school derives the most benefit from the students' work. Here, there was no question that while the students received credit for their work, the salon received a substantial profit and competitive advantage over other salons (with employees who must be paid minimum wage), and thus, the primary benefit likely ran to the schools. At a minimum, the court found that the allegations in the complaint were sufficient to show that the schools were employers subject to the FLSA, and thus allowed the students to proceed with their claims against the presumptive employers.

Schools or businesses with students or interns should be mindful of the growing trend of the courts to conclude that such individuals qualify for minimum wage under federal and state employment laws.

Winfield v. Babylon Beauty School of Smithtown, Inc., No. 13-cv-6289 (E.D.N.Y. March 7, 2015)

Family Permitted to Pursue Discrimination on Behalf of Deceased Employee

An employee worked as an engineer for over twenty years with an employer based in Puerto Rico. The employee suffered a stroke, which affected his speech and mobility, but he continued to perform his job duties and actually exceeded his prior years' performance. On the day of his performance evaluation, he was terminated as he arrived at work on the grounds that there was a significant decline in the market. Thereafter, his physical and mental health deteriorated and he began to receive social security benefits. About a year later, the employer offered to rehire him but he declined due to his disability. The employee filed suit claiming he was terminated in violation of the Americans with Disabilities Act (ADA) and corresponding state provisions. The employee died one month after filing suit. The family of the employee later moved to substitute itself in place of the employee. The District Court of Puerto Rico denied the family's request on the grounds that the claims asserted were not inheritable claims, and the family appealed. The U.S. Court of Appeals for the First Circuit reversed, finding that the claims survived the employee's death. Though both statutes were silent on whether claims survive the death of the employee, the court concluded that the family was not seeking to assert their own personal rights, but instead were seeking to stand in the place of the deceased employee and assert his rights. As a result, the claims were inheritable and the employee's discrimination action could continue through his surviving family members. Though it is unclear whether the employee's family will be successful in proving discrimination, the court's decision has paved the way for it to attempt to do so.

Although this is an isolated case, employers should be mindful of the potential of the inheritability of certain claims.

Vaello-Carmona v. Siemens Medical Solutions, USA, Inc., No. 13-1405 (1st Cir. March 17, 2015)

NLRB Report Provides Guidance on Lawful Employee Handbook Provisions

The National Labor Relations Board (NLRB) General Counsel recently issued a report to offer guidance regarding handbooks, given the increase in the number of charges alleging unlawful handbook rules received by the office. The General Counsel issued the report "with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful." This is coupled with the reminder that if a handbook rule has a chilling effect on employees' Section 7 activity, it will be found to be unlawful. The report consists of two different parts: 1) identifying rules that the NLRB has found to be unlawful and why, and 2) rules specific to a recently settled unfair labor practice charge involving workplace rules. At the outset, the report addresses confidentiality and reminds employers that employees have the right to discuss wages, hours, and other terms and conditions of employment with employees and non-employees alike. The report gives several examples of seemingly typical confidentiality provisions which have been found to violate Section 7. The report further identifies the provisions an employer may include to govern conduct between employees, employees and supervisors, and employees and third parties. Likely in response to many employers adding social media and electronic communications provisions to their handbooks, the report addresses appropriate rules for protecting employer logos, copyrights and trademarks. Employers should take note of these specific examples of what the NLRB deems to be "lawful" and "unlawful" policies. Even those employers with non-union workplaces can benefit from the guidance set forth therein.