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Newsletters

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Supreme Court Allows Employers to Obtain Review of EEOC's Conciliation Efforts

The U.S. Equal Employment Opportunity Commission (EEOC) sent a letter to an employer, advising of its investigation into sex discrimination charges, and invited it to engage in conciliation proceedings. The EEOC advised that it would contact the employee and employer later to commence that process. Thereafter, the EEOC sent a letter stating conciliation efforts failed and filed suit against the employer. The employer challenged the EEOC's ability to prosecute the action because it did not believe that the EEOC's letters constituted a good faith conciliation effort as required by statute. The EEOC claimed that by sending the letters, it fulfilled its statutory duty and that, regardless, its conciliation efforts were not subject to review. The district court disagreed and found that the courts could review the conciliation efforts, but granted the EEOC leave to immediately file an appeal. The U.S. Court of Appeals for the Seventh Circuit reversed, finding that the EEOC's conciliation efforts were not reviewable because "[n]othing said or done during" the conciliation process may be "used as evidence in a subsequent proceeding without written consent of the persons concerned." The U.S. Supreme Court, however, unanimously held that courts

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are in fact authorized to review such disputes to determine whether the EEOC has fulfilled its obligations to attempt conciliation before filing suit. Congress intended to allow judicial review of administrative actions such as those taken by the EEOC, reasoned the Court. This does not necessarily mean courts have unfettered ability to review the EEOC's conciliation activities. Instead, courts may conduct a limited review to determine whether the agency fulfilled its statutory obligations to give the employer notice and an opportunity to resolve the dispute before filing suit.

Employers should always be mindful of offers by the EEOC to conciliate, and understand that it is a critical prerequisite to any suit being filed. If the EEOC fails to fulfill its statutory duty, the employer may have a defense against any future action filed.

Mach Mining, LLC v. Equal Opportunity Commission, No.13-1019 (Sup. Ct. April 29, 2015)

Applying for Other Jobs Kills an Employee's Stress-related Reasonable Accommodation Claim

Funmilayo Adetimehin was a medical benefits administrator who suffered from an aneurysm in October 2011. She took four weeks of Family and Medical Leave Act (FMLA) leave for surgery and recovery. Approximately one year later, she received counseling and discipline on several occasions for poor performance, and was then hospitalized again. After she returned to work, she filed a written grievance complaining that her supervisor was bullying her. She asked for more FMLA leave due to stress from the bullying. Her leave request was granted. On the last day of her leave, the medical provider requested an extension and part-time leave as an accommodation for her stress. The employer advised that Adetimehin did not have that enough FMLA leave left. The employer also advised that if Adetimehin failed to return to work at the conclusion of her approved leave, she would be terminated. Adetimehin did not contact her employer or return to work; instead, she filed a complaint with the Equal Employment Opportunity Commission, alleging that her employer had failed to reasonably accommodate her disability by denying the four weeks of part-time work that she requested after her full-time absence under the FMLA. The employer moved for summary judgment, which the court granted. The U.S. District Court for the Southern District of Texas found that the employee's case had two chief deficiencies: 1) her doctor stated she was capable of working part-time, as the stress was related only to working with the employer and not working in general, and 2) the employee sought full-time work while on FMLA leave. The court found these two facts demonstrated that she was not substantially limited from working, and was thus not disabled under the Americans with Disabilities Act. The employee was capable of working, just not for that employer.
Understanding obligations with respect to reasonable accommodations and knowing how to respond to requests for leave is critical for any employer, as the area is laden with dangers.

Adetimehin v. Healix Infusion Therapy, Inc., 2015 WL 1537280 (S.D.Tx. April 6, 2015)

Sixth Circuit Holds Complaint of Sexual Harassment to Be Protected Activity

Three female former employees at a supply chain logistics company alleged that a male supervisor made sexually explicit comments to them. All three allegedly complained to the supervisor about his conduct, and all three were fired soon afterwards. The evidence showed that the supervisor had a role in the firings. The employer, however, maintained that the employees were fired because of poor work performance and issues relating to tardiness. A jury returned a verdict in favor of the employees, and the employer appealed on the grounds that the employees did not engage in any protected activity and thus, the verdict as to retaliation should be overturned. The U.S. Court of Appeals for the Sixth Circuit affirmed. The employer looked to the "opposition" and "participation" clauses of Title VII of the Civil Rights Act of 1964 in terms of retaliation. Though the employer claimed that mere complaints to a supervisor do not rise to the level of "protected activity" that would trigger the opposition or participation clauses, the Court disagreed, stating that "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice – i.e., resists or confronts the supervisor's unlawful harassment – the opposition clause's broad language confers protection to this conduct. Importantly, the language of the opposition clause does not specify to whom protected activity must be directed."

Although the Sixth Circuit's ruling appears to reflect the majority approach, it is not the unanimous law of the land. The Fifth Circuit, for example, has held that communications directed solely to supervisor do not constitute protected activity. In order to manage risk and potentially avoid future litigation, employers should always take caution when taking adverse employment action against an employee who has recently made a complaint - whether officially or unofficially.

Equal Employment Opportunity Commission v. New Breed Logistics, No. 13-6250 (6th Cir. April 22, 2015)

Plan Administrator Properly Denied Severance Benefits to Voluntary Retiree

A former employee who was a participant in his former employer's executive severance plan alleged that the plan had improperly denied him severance benefits after determining that the employee had retired voluntarily from his position. The severance plan at issue provided that benefits were available only to executives who were involuntarily terminated or for those who left for "good reason." The employee argued that he was forced out when he declined to temporarily relocate, and thus resigned for good reason, but the benefits committee responsible for administering the plan denied the claim for severance benefits after determining that he left voluntarily. The employee objected to this decision and sued for severance benefits, health insurance premiums, and back pay, along with a claim of benefits interference under Section 510 of the Employee Retirement Income Security Act (ERISA), arguing that the administrator acted with specific intent to deprive him of benefits. The district court determined that the plan administrator's decision to deny the claim for benefits was supported by substantial evidence and was procedurally proper. The court further found that the plan had given the administrator discretion to review benefit claims, and that the administrator's decision was entitled to judicial deference. The U.S. Court of Appeals for the First Circuit affirmed the lower court's decision upholding the administrator's denial of the employee's claim. The Court examined the standard of review applicable to "top-hat" plans that provide benefits for highly paid executives. It afforded substantial deference to the administrator where the plan grants the administrator discretion to interpret the plan. The Court also vacated the district court's ruling as to the interference claim, on other grounds.

Given the importance of the plan's terms in applying a standard of review, sponsors of employee benefit plans should ensure that the plan provides broad discretion to the administrator when deciding claims for benefits.

Niebauer v. Crane & Co., No. 14-2059 (1st Cir. April 21, 2015)

Court Dismisses ADA Claim by Employee with Cancer

Lisa Spears was hired to work in the medical unit of a jail in Wakulla County, Florida and was eventually promoted to a lieutenant position responsible for supervising several officers. Her job was later eliminated when a private health-care provider took over inmate medical care. Spears did not meet the minimum education requirements to apply for a position with that private company, and requested a transfer to the jail's corrections department. No lieutenant positions were available, but a "shift detention deputy" position was. Then, for the first time, Spears advised that she had cancer and was undergoing treatment. She then asked for intermittent leave and a position allowing her to work the "8-5 shift," which was denied. She took leave under the Family and Medical Leave Act and upon exhaustion of that leave, her doctor advised that she could not perform deputy tasks and was better suited for a supervisory position. She was terminated for being unable to perform the essential functions of the deputy position. Spears filed suit, and the district court granted summary judgment in favor of the employer. On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed, finding that Spears' request to transfer to a light-duty or part-time lieutenant position until she was able to return to work full time was not reasonable. Her lieutenant position in the medical unit was eliminated when that department was outsourced, the court said, and there were no vacant supervisory positions available in another department at the time she requested a transfer. Furthermore, the ability to work shift hours and a consistent schedule were essential functions of the detention deputy position. The Americans with Disabilities Act "does not require an employer to reallocate job duties in order to change the essential functions of a job." Thus, the court held, it would not have been reasonable to expect the employer to accommodate Spears by altering a detention deputy job to make the position both light duty and part time.

This case provides employers with an example of the limits that can be applied to employers' duties to make reasonable accommodations to employees under the ADA.

Spears v. Charlie Creel, No. 14-12261 (11th Cir. April 15, 2015)

EEOC Not Required to Identify Aggrieved Individual in Race Discrimination Claim

After unsuccessful attempts at a pre-litigation settlement, the U.S. Equal Employment Opportunity Commission (EEOC) filed a complaint against Rosebud Restaurants, alleging that from November of 2009 to the present, it failed or refused to hire African-Americans in violation of Title VII of the Civil Rights Act of 1964 as amended. Rosebud filed a motion to dismiss, arguing the EEOC was required to identify an individual job applicant who was rejected because of his or her race and that no such individual had been named. The U.S District Court for the Northern District of Illinois disagreed, finding Rosebud's argument was not supported by the language of the statute. The EEOC is authorized to bring a civil action in its own name, and Title VII does not contain a provision which limits any such actions to those brought on behalf of named individuals, the court said. Instead, the EEOC is authorized to prevent any person from engaging in an unlawful employment practice, which includes the widespread failure to hire an individual based on race. Accordingly, the court denied Rosebud's motion to dismiss, allowing the EEOC's allegations of intentional discrimination to move forward even in the absence of the identification of an aggrieved individual.

The EEOC continues to focus on fulfilling its 2012 Strategic Enforcement Plan, which prioritizes combating systemic discrimination in hiring and recruitment on the basis of race. This case is just one example of its ongoing and continuing efforts.

EEOC v. Rosebud Restaurants, Inc., No. 13-06656 (N.D. Ill. April 7, 2015)

Employers Have Little Guidance on Work Authorization Procedures

Former employees allegedly engaged in protected concerted activity but were discharged for that activity. The National Labor Relations Board ordered the employer to "make [the employees] whole" and ordered the payment of back pay and reinstatement. The employer challenged this, claiming that a 2002 U.S. Supreme Court decision precluded both back pay and reinstatement because the employees were not legally authorized to work in the United States. Ultimately, the Board ruled that the employer was required to make a “conditional reinstatement” guarantee—if the undocumented employees were able to provide evidence of their work authorization within a “reasonable period of time” after the Board issued its order, the employer had to rehire in their former positions. The Board determined that conditional reinstatement was the only way the Board could provide relief to the individual employees while seeking to deter future unfair practices.

Though this decision focuses more on the termination of the employees, the takeaway from this case is a reminder that employers must always use discretion and judgment when evaluating purported work authorization documents to ensure compliance with the law.

Mezonos Maven Bakery, Inc . No. 29-CA-025476 (N.L.R.B. March 27, 2015)

EEOC Finds Employee Wellness Programs OK

Until recently, businesses looking to make sure that their employee wellness programs comply with the Americans with Disabilities Act (ADA) were without much help from the U.S. Equal Employment Opportunity Commission (EEOC). However, recently, the EEOC took an initial step towards clarity when it issued proposed ADA rules regarding these cost-saving measures—weight loss programs, smoking cessation efforts, health risk assessments, and so on. The EEOC has indicated that any wellness program that provides for an incentive of more than 30% of the total cost of employee-only coverage will not be considered “voluntary.” This new 30% rule—up from the 20% cap that had been suggested in prior opinion letters—corresponds with the similar 30% cap imposed by the Affordable Care Act (ACA) and HIPAA. The EEOC will also require any employer who creates an employee wellness program to issue a detailed notice to employees intended to ensure that participation “is truly voluntary.” The notice must explain what medical information will be obtained, who will receive the information, how the information will be used, what restrictions exist on disclosure, and what security methods will be used. Additionally, the EEOC will only permit employers to receive employee health information gathered through a wellness program in the aggregate—no individual employee's information or identity can be discernible from the information provided to the employer. Further, in order to be a permissible wellness program under the ADA, the employer must actually do something with information gathered; this can be either in the form of aggregate assessment (e.g., using evidence that a significant number of employees have diabetes to design a specific health program) or through individual feedback (through a physician, of course).

These are merely proposed rules, and the EEOC's final position will not be known for several more months. At the same time, employers with their fingers on the pulse will know that similar wellness program requirements were imposed by the ACA, and those rules certainly need to be considered as well. For now, employers should keep the EEOC's proposed rules in mind, especially if designing a wellness program at the current time. Hinshaw attorneys are prepared to assist, and will continue to track developments on this issue.

Please see the proposed rules here.

SEC Files Enforcement Action Against Employer Based on Confidentiality Policy

The U.S. Securities and Exchange Commission (SEC) recently filed an enforcement action against an employer on the grounds that the company's confidentiality agreement contained improperly restrictive language. The Houston-based technology firm required employees who were witnesses participating in internal investigations, including those addressing allegations of possible securities law violations, to sign confidentiality agreements. These agreements contained language that warned the witnesses that if they were to discuss those matters with outside parties without obtaining the prior approval of the company's legal department, they could face discipline or termination. The SEC found the terms of the confidentiality agreements at issue to be unlawful in that they violated Rule 21F-17 because the blanket prohibitions in the agreements could have potentially discouraged whistleblowers from reporting any such violations to the SEC. The matter was resolved without formal proceedings, and the employer amended its confidentiality statement, which was found acceptable to the SEC, and paid a civil penalty of $130,000.

Confidentiality provisions are critical to most employers' business, and are typically recommended by counsel and HR professionals alike. It is necessary to review the language contained in those provisions, however, to ensure that the agreements comport with the existing and ever-changing state and federal laws.

In re KBR, Inc., No. 3-16466 (SEC, April 1, 2015)

Employer's "No Re-Hire" Provision May Violate California's Non-Compete Laws

Daniel Golden was an emergency room doctor who was formerly affiliated with California Emergency Physicians Medical Group (CEP) and sued CEP in 2008 stating various state and federal claims. The parties settled the case prior to trial. In the settlement agreement, Dr. Golden waived his right to future employment with CEP and/or any facility with which CEP might contract. Not only did the agreement contain this future employment ban, but it also stated that if CEP took over a facility at which Dr. Golden was working, CEP could terminate Dr. Golden without liability. Dr. Golden refused to sign the settlement agreement, which resulted in litigation. The district court held that the settlement agreement was enforceable, finding that the provision in the settlement agreement prohibiting Dr. Golden's right to seek employment with CEP did not violate Cal. Bus. & Prof. Code § 16600, because it was not an unenforceable covenant not to compete. The U. S. Court of Appeals for the Ninth Circuit reversed, reasoning that the lower court abused its discretion in limiting its analysis under Section 16600 only to whether the agreement constituted a covenant not to compete. Though the Court agreed that the settlement agreement in no way sought to prohibit Dr. Golden from surrendering any right to work for any of CEP's competitors or give up his profession generally, the court found that Section 16600, which states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void," does not limit itself to covenants not to compete or employment contracts. Rather, **Section 16600's prohibition is much broader, and covers all contracts that seek to restrain someone from engaging in a lawful profession.** The court refrained from holding that the settlement agreement did indeed violate Section 16600, but rather remanded the case with instructions that in examining the validity of the settlement agreement, the court must examine not if the settlement agreement restricts Dr. Golden's right to compete, but rather whether it presents "a restraint of a substantial character, no matter its form or scope."

The Court's decision limits employers' ability to include no-rehire provisions as part of their employment, separation, or settlement agreements. Employers should re-evaluate the value of a settlement agreement under which a troublesome employee may well be able to reappear on the employer's doorstep in the future.

Golden v. California Emergency Physicians Medical Group, No. 12-16514 (9th Cir. April 8, 2015)

Ford Did Not Violate the ADA By Rejecting Employee's Unreasonable Telecommuting Request

Jane Harris worked for six years at Ford as resale buyer. A resale buyer serves as an intermediary between Ford's steel and its parts suppliers. Much of a resale buyer's work consists of in-person meetings. Harris, however, suffered from extreme irritable bowel syndrome, and her condition sometimes made it impossible for her to make the drive to work without an accident. Her performance suffered as she was absent more than present and her colleagues had to assume some of her duties. Harris asked to telecommute up to four days per week, compared to at most one day for other resale buyers. But Harris admitted the result would be she could not perform four of ten main job responsibilities, including meetings with suppliers, making price quotes to suppliers, and attending required internal meetings. Ford rejected this proposed accommodation as unreasonable and Harris rejected lesser proposals. Harris instead filed an EEOC charge of discrimination under the Americans with Disabilities Act (ADA) shortly before Ford terminated her employment for performance issues. The EEOC sued Ford claiming it failed to reasonably accommodate her disability and discharged her in retaliation for filing her charge. The district court granted Ford summary judgment, concluding four days per week telecommuting would prevent her from performing essential job functions and the evidence did not cast doubt on Ford's stated performance termination rationale. The EEOC appealed and a panel of the appellate court reversed. The full appellate court then granted en banc review, vacated the panel decision, and affirmed summary judgment. To be qualified under the ADA, an individual must be able to perform the essential job functions with or without reasonable accommodation, the appeals court noted, but an accommodation is per se unreasonable if it removes an essential job function. Given the nature of Harris' job, the appellate court held Ford was entitled to insist regular attendance was an essential job function and therefore Harris was not qualified. As to the second claim, the appellate court noted Ford gave a valid reason for termination, poor performance, and supported this rationale with performance reviews, evidence Harris lacked vital interpersonal skills, and evidence Harris' absences lead to mistakes. The appellate court held no reasonable jury could conclude a for profit corporation would have otherwise continued to pay an employee who failed to do her job in the past and, who by her own admission, could not perform all essential job functions in the future.

This case informs employers they may offer some telecommuting benefits while but insisting on actual attendance if the employer deems it necessary. It is also important because it establishes, implicit to the EEOC's position, that employers—and not employees—are still entitled to establish what constitutes an essential job function and to determine whether an employee can meet it absent real, contrary evidence.

Florida Legislature Passes Bill to Outlaw Pregnancy Discrimination

The Florida Legislature recently passed a bill banning discrimination against pregnant women at work and in public places. While passing unanimously in the Florida Senate and receiving near-unanimous passage in the Florida House of Representatives, Governor Rick Scott must approve and sign the bill before it becomes Florida law. The law would become effective July 1, 2015. The bill amends the Florida Civil Rights Act (FCRA) to include pregnancy as a protected class- joining the existing protected classes of race, sex, and physical disability. The bill codifies the April 2014 decision of the Florida Supreme Court, *Delva v. Continental Group, Inc.*, holding by a vote of 6-1 that the FCRA applies to pregnancy discrimination in addition to sex discrimination. The female employee alleged employment discrimination based on pregnancy but the lower courts dismissed her complaint for failure to state a cause of action. The Court ultimately reasoned that the FCRA's prohibition of sex discrimination includes pregnancy as pregnancy is a "natural condition and primary characteristic unique only to the female sex." If the bill is signed, a Florida employee now has the option of bringing a pregnancy discrimination claim in state court under the FCRA instead of only having the option of bringing a pregnancy discrimination claim in federal court under Title VII.

Since pregnancy discrimination violates most state laws and Title VII, employers both in Florida and elsewhere should review their policies and revisit their training materials to ensure that employees are educated about this potential basis for discrimination.