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Employment Practices Newsletter - February 2012

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Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

NLRB Disallows Hospital's Ban on Safe Patient Care Ribbons

A nurses association in California conducted a union organizing drive where nurses were given ribbons to wear. The ribbons read, "Saint Johns' RNs for Safe Patient Care." The hospital's vice president prohibited nurses from wearing the ribbons in immediate patient care areas because of concerns that they were "detrimental and disruptive to patient care." Several nurses were also informed they would be written up for insubordination if they wore the ribbons. In the health care field, restrictions on wearing insignia in immediate patient care areas are presumptively valid. The National Labor Relations Board (NLRB), however, determined that the hospital could not claim the presumption's protections because the hospital's ban was selective and only applied to certain union insignia. Other nonunion insignia had been worn in immediate patient care areas, including an almost "identical" hospital-distributed ribbon, reading "Saint Johns' mission is patient safe care." The similarities between the union-distributed ribbon and the hospital-distributed ribbon weakened the hospital's argument that the ban was necessary to avoid disruption of health-care operations or disturbance of patients. Despite special circumstances present in hospitals that justify restrictions on solicitation, distribution and off-duty access, employers should draft and apply these policies without distinction between union and nonunion activity.

*Saint John's Health Ctr.,*31-CA-029005 (NLRB Dec. 30, 2011)

Supreme Court Recognizes Ministerial Exception in Employment Context

A teacher at a Lutheran school was diagnosed with narcolepsy and took a medical leave to treat the condition. Upon informing the school that she would be ready to return early in the second-half of the school term, the teacher was informed that the school had already contracted with another teacher to fill her position for the remainder of the year. Undeterred, the teacher appeared at the school on the first day she was medically cleared to return to work and refused to leave until she was provided with written confirmation from the school that she had reported to work. Shortly thereafter, the teacher was terminated for "insubordination and disruptive behavior." The school also asserted that the teacher's termination was in response to her threat to take legal action against the school. The teacher subsequently filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that her termination was discriminatory and retaliatory, in violation of the Americans with Disabilities Act. The trial court granted summary judgment to the school, holding that resolving the case would impinge upon both the Establishment Clause and the

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Free Exercise Clause of the First Amendment, a ruling based on what is commonly referred to as the "ministerial exception." The ministerial exception precludes application of certain employment discrimination laws to claims concerning the employment relationship between a religious institution and its employees tasked with religious duties. On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed, holding that while the ministerial exception exists, it was not applicable because the teacher spent the overwhelming majority of her time teaching secular subjects, and only 45 minutes of each work day performing religious duties. The U.S. Supreme Court, for the first time, held that the ministerial exception applies to claims of employment discrimination. Moreover, it reversed the Sixth Circuit, holding that the issue was "not one that can be resolved by a stopwatch." Rather, the Court carefully considered the nature of the teacher's religious duties and ultimately concluded that her position of employment fell within the exception. Critical to the Court's conclusion was the fact that the teacher was recognized as a "minister" by the congregation based on her completion of a mandatory course of religious study that took six years to complete. Moreover, the congregation retained the authority to recall its recognition of the teacher as a "minister." Additionally, the teacher taught religion to students, led them in prayer multiple times each day, took students to weekly chapel services, and twice each year led a religious service. Ultimately, the application of the ministerial exception will proceed on a case-by-case basis and hinge upon the specific facts of each case. The term "minister" is not dispositive, nor is it a requirement that the employee in question be ordained. Rather, the critical issue is whether the employee is tasked with teaching the faith. Employers affiliated with religious organizations must carefully analyze the applicability of the ministerial exception before taking any adverse employment action that might otherwise trigger a claim under a federal or state employment discrimination law. Also, covered employers should note that the Court recognized the ministerial exception as an affirmative defense rather than a jurisdictional bar to such claims, meaning that it must be affirmatively asserted and could potentially be waived.

*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,*No. 10-553 (S. Ct. Jan. 11, 2012)

ERISA Did Not Govern Claims Involving Legality of Retirement Plan

An employee was terminated without cause and her employer failed to pay her for unvested shares she had earned through the employer's long-term profit-sharing plan. The employee sued, alleging that the employer violated Maryland law by acting contrary to public policy. The employer argued that the employee's state law claims were preempted by the Employee Retirement Income Security Act (ERISA). The U.S. Court of Appeals for the Fourth Circuit held that ERISA did not preempt the state law claims. Because the employee's claims were directed at the legality of the long-term profit-sharing plan and not an interpretation of it, ERISA did not preempt the state law claims and thus ERISA's requirement that administrative remedies under the plan must be exhausted did not apply. However, the court held that denying the employee the unvested shares was not contrary to public policy because the profit-sharing plan contained a valid forfeiture clause for unvested shares. Employers should be aware that claims involving the legality of a benefit plan governed by ERISA will be governed by the applicable state law. Accordingly, benefit plans subject to ERISA should include a choice-of-law provision in the event an issue comes up that is not governed by ERISA.

Kunda v. C.R. Bard, Inc., Case No. 09-1809 (4th Cir. Dec. 23, 2011)

For more information, please contact your regular Hinshaw attorney.

Employer's Anti-Harassment Policies Not Enough to Protect Employer From Sexual Harassment Liability

The U.S. Equal Employment Opportunity Commission (EEOC) filed suit on behalf of two teenage employees of a Wisconsin pancake house, alleging that the employees were sexually harassed by a night manager with whom their shifts overlapped. The employer had an updated harassment policy for managers and employees that prohibited all forms of harassment. Employees were required to sign acknowledgement forms confirming that they had received the policy. The policy directed employees to report harassment to a manager or company representative. New hires also received training that included videos on sexual harassment. Additionally, a poster was placed in the restaurant providing company contact information in the event of emergencies, which included discrimination. The employees both had reported the night manager's conduct to the general manager, who took no action and failed to investigate the claims. It was not until a private investigator began approaching employees that the matter came to the attention of a corporate executive, who then conducted an investigation which resulted in the termination of the general manager for failing to investigate the employee complaints. After the EEOC filed its lawsuit, the U.S. Court of Appeals for the Seventh Circuit held that the employer could not avoid liability under the *Faragher-Ellerth* defense, which shields employers from liability for sexual

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harassment where an employer can demonstrate that it exercised reasonable care to prevent and correct harassing behavior and that the employees unreasonably failed to take advantage of any preventative opportunities provided by the employer. Typically, employers relying on this defense point to the harassment policies in place and training or other preventative measures taken to demonstrate that the employer takes harassment seriously and has mechanisms in place to prevent it from occurring. Here, despite the policy and training efforts undertaken by the employer, the evidence showed that the policy was not reasonably effective in practice, as no manager investigated or otherwise followed up on the employees' complaints. Simply having the policy or training mechanisms in place are not sufficient to shield an employer from liability for sexual harassment. Employers need to ensure that managers and other staff identified as individuals to whom complaints can be made take appropriate action to investigate the complaints made.

EEOC v. Mgmt. Hospitality of Racine Inc., Case No. 10-3247 (7th Cir. Jan. 9, 2012)

Employer Avoided Liability for Supervisor's Sexual Harassment With Effective Anti-Harassment Policy

A supervisor engaged in an ongoing pattern of severe sexual harassment against four employees. None of the employees reported the conduct to the employer, despite the employer's comprehensive "zero tolerance" anti-harassment policy and practices, because of a purported fear of retaliation and a desire to build up evidence against the supervisor. After eight months, the employees filed charges against the employer alleging vicarious liability for the supervisor's sexual harassment under Title VII of the Civil Rights Act of 1964, as amended. Only then did they make the employer aware of the supervisor's conduct, leading the employer to immediately initiate an investigation, suspend the supervisor, and, two weeks later, terminate him. The U.S. Court of Appeals for the Eighth Circuit granted summary judgment to the employer based upon the *Faragher-Ellerth* defense, which protects an employer from vicarious liability for a harassing supervisor's conduct if: (a) the employer takes care to prevent and correct any harassing behavior in the workplace; and (b) the employee unreasonably failed to take advantage of the corrective opportunities offered by the employer. The court found that the employer had designed and followed a comprehensive anti-harassment policy, and that it had made an effective response to this and all other documented reports of harassment. It then determined that the employees' fear of retaliation was irrational in light of the employer's anti-harassment practices and that a desire to build up evidence is not a valid reason to refrain from reporting. This case is yet another reminder to employers that a well-designed anti-harassment policy, coupled with proper responses to all instances of alleged harassment, can protect against even the most severe forms of unreported harassment.

Crawford, et al. v. BNSF Ry. Co., Case No. 11-1953 (8th Cir. Jan. 11, 2012)

D.C. Circuit Demonstrates the Danger of Poor Documentation

An African-American, male federal employee passed over for a promotion felt that he was far more qualified than the Caucasian female employee selected for the position. He sued his employer under Title VII of the Civil Rights Act of 1964, as amended, calling its assertion that the selected employee had been more qualified a pretext, and alleging that the other employee had actually been selected over him based upon his race and gender. The district court granted summary judgment to the employer, finding that the disparity in the employees' qualifications was "not significant enough to warrant an inference of discrimination." On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed. The employee's "superior qualifications taken together with other flaws in the employer's explanation," the D.C. Circuit found, "create[d] a genuine issue of material fact that only a jury [could] resolve." Specifically, the record contained "no contemporaneous documentation of the [employer's] proffered explanation." In other words, there had been no notes from the job interviews, no complete documentation of the job requirements, and essentially no written evidence of the interviewers' observations or conclusions. The court concluded that "[t]o sum up, . . . we believe that, when taken together, the evidence of a significant disparity in the candidates' qualifications, the highly subjective nature of the [employer's] proffered nondiscriminatory explanation, and the absence of any contemporaneous documentation supporting that explanation could lead a reasonable jury" to find for the employee. This case is a good reminder for all employers that the failure to document can turn what would be an easy case into a disastrous one.

Hamilton v. Geithner, Case No. 10-5419 (D.C. Cir. Jan. 17, 2012)

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Sixth Circuit Holds That *McDonnell-Douglas* Test Applies to FMLA Interference Claims

A fast-food restaurant employer suspected that an employee was stealing money by charging customers the full price for their meals, then entering a discounted price in the register and pocketing the difference. While the employer investigated the employee's alleged misconduct, the employee, who suffered from health problems and had taken leave under the Family Medical Leave Act (FMLA) in the past, underwent surgery and notified her supervisor that she would need to once again miss work. Upon the employee's return to work, she was terminated. The employee sued, alleging that the employer had unlawfully interfered with her right to take FMLA leave. The employee's claim required the U.S. Court of Appeals for the Sixth Circuit to determine whether the burden-shifting *McDonnell-Douglas* test applies to FMLA interference claims. It is well-established that the *McDonnell-Douglas* test applies to discrimination and retaliation claims under the FMLA and other equal employment laws. However, courts have distinguished FMLA interference claims because such claims are based on an employee being denied a substantive right, e.g., the right to take leave for a health condition. As one court opined, "[a]pplying rules designed for anti-discrimination laws to statutes creating substantive entitlements is apt to confuse . . ." Significantly, the Sixth Circuit rejected that argument, and held that the *McDonnell-Douglas* test does apply to FMLA interference claims. Under the *McDonnell-Douglas* test, an employee must establish a *prima facie* case of FMLA interference, which the employer can respond to by asserting the lawful reason it terminated the employee. The employee must then demonstrate that the employer's stated reason for terminating him or her is "pretextual" in order to prevail. In this instance, the employee could not prove that the employer's legitimate reason for terminating her—her theft of money—was "pretextual." Accordingly, the employee's claim failed. This case is significant because of its holding that the *McDonnell-Douglas*test applies to FMLA interference claims. It also serves as a good reminder that adverse action should never be taken against an employee on the basis that that employee intends to exercise rights under the FMLA.

*Donald v. Sybra Inc. d/b/a Arby's,*Case No. 10-2153 (6th Cir. Jan. 17, 2012)

Insurance Investigators Exempt as "Administrative" Employees

A group of current and former special investigators filed a complaint against their employer, an insurance company, seeking overtime compensation under the Fair Labor Standards Act (FLSA). The U.S. District Court for the Southern District of Ohio held that the investigators were exempt employees under the FLSA's administrative exemption, and therefore not entitled to overtime compensation. In order for employees to qualify for the administrative exemption, their "primary duty" must "include the exercise of discretion and independent judgment regarding matters of significance." Here, the investigators were required to conduct investigations into suspicious claims and analyze indicators of fraud. That duty, the court held, called on investigators to use their experience and knowledge of fraud to distinguish the relevant from the irrelevant and fact from untruth, and to resolve competing versions of events, thus influencing the insurance company's decision to pay or deny insurance claims. Accordingly, the investigators' primary duty did require the exercise of discretion and judgment on matters of significance and the investigators were exempt from FLSA coverage, barring their overtime compensation claims. The insurance industry has a long history of misclassification claims involving investigators and adjusters, therefore employers should be mindful of the criteria set forth by the FLSA for classifying employees.

Foster v. Nationwide Mut. Ins. Co., Case No. 08-00020 (S.D. Ohio, Jan. 5, 2012)

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