Newsletters

Employment Practices Newsletter - December 2011

December 1, 2011

Attorneys

Anthony E. Antognoli

Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

Plaintiff, an elementary school teacher, filed suit in Los Angeles Superior Court, Downtown Los Angeles, against her private school employer. The suit alleged age discrimination, wrongful termination and related claims. Plaintiff, a 37-year founding teacher, claimed her working hours and those of other older teachers were systematically reduced in a scheme to replace older teachers with younger ones. Plaintiff relied primarily on statistical evidence and testimony of other teachers. Defendant denied any plan or scheme, demonstrating that most of the teachers were in the protected age category and that this was consistent over time. Defendant further demonstrated that Plaintiff had workplace performance difficulties and that she was not a good fit for teaching younger grades. Plaintiff's total claimed damages were more than $3 million. The case was tried to a jury for over seven weeks. The jury returned a defense verdict for the school on all causes of action, providing the school with the right to recover its costs. Plaintiff recovered nothing. According to California's state enforcement agency, the Department of Fair Employment and Housing(DFEH), age discrimination charges make up roughly 19% of the charges filed, which is a substantial percentage. Some estimates for discrimination cases in Los Angeles Superior Court indicate Plaintiffs are successful at trial approximately 57% of the time with median verdicts in age cases approaching $1 million exclusive of attorneys' fees and costs. While long jury trials are rare for these types of claims, this case demonstrates that employers need not succumb to the demands of complainants.

NLRB Issues New Rules Affecting Elections

On November 30, 2011, the National Labor Relations Board (NLRB) decided, by a 2-1 vote, to revise several sections of its Rules & Regulations in an attempt to expedite the election process. The NLRB majority stated that their interest was to end what they referred to as unnecessary litigation. A summary of the changes are as follows: (1) hearing officers can limit the evidence introduced at pre-election hearings to the issue of whether an election should be held; (2) hearing officers can limit the filing of briefs; (3) appeals of a hearing officer’s decisions will be heard after the election is conducted; (4) elections will not be delayed pending an appeal; (5) requests for special permission to appeal will only be granted in extraordinary circumstances; and (6) the NLRB would have discretion on which appeals to hear. Although these rules are not as favorable to union organizing efforts as the Employee Free Choice Act or the initially proposed rule changes, non-union employers should be vigilant because unions have recently demonstrated increased organizing activities.

©2024 Hinshaw & Culbertson LLP

A security officer complained to his employer that he was being sexually harassed by the employee in charge of training him to use firearms. In response to the security officer's complaints, the employer staged an internal investigation and took action to prevent any further harassment. During the same period of time, the employer investigated the security officer's excessive use of sick leave and his failure to check in equipment. The employer also required the security officer to attend a meeting on his day off without first informing him that the subject of the meeting was his alleged sexual harassment. Additionally, the employer threatened the security officer with termination, singled him out at an employee meeting by "staring" at him, and switched the security officer from day to night shift after he requested the change. The officer resigned and then sued the employer, alleging that he was retaliated against in violation of Title VII of the Civil Rights Act of 1964, as amended. The U.S. Court of Appeals for the Second Circuit found that the officer was never subjected to "materially adverse" action that would "dissuad[e] a reasonable worker from making or supporting a charge of discrimination." Consequently, the court rejected the officer's retaliation claim. Specifically, the court found that the investigations into the officer's sick leave and misuse of equipment were warranted and were not disciplinary in nature. Additionally, requiring the officer to attend a meeting concerning his own sexual harassment complaints is not something that would dissuade a worker from making or supporting a charge. Finally, a shift change requested by the employee himself is not an adverse action, and without more, personality conflicts and verbal threats are "trivial harms" that also do not constitute materially adverse actions. While the employee's retaliation claim failed in this case, employers must continue to ensure that an employee never becomes the target of adverse action because he or she has filed complaints of discrimination or harassment.

Tepperwien v. Entergy Nuclear Operations, Inc., Case No. 10-1425 (2nd Cir. Oct. 31, 2011)

A union requested copies of the results of a pre-hire psychological aptitude test administered by the employer as part of an investigation relating to a bargaining unit dispute. The employer refused to provide the results without the applicants' consent, arguing that disclosing the aptitude test results would violate the applicants' reasonable expectations of privacy because the employer had told applicants that the results would generally be treated as private. The union filed an unfair labor practice charge, alleging that the National Labor Relations Act (NLRA) required disclosure of the records. The U.S. Court of Appeals for the First Circuit found that the applicants retained a legitimate expectation of privacy in the test results because the written notice that results could be disclosed in certain situations "could not eliminate all expectations of confidentiality in employee test results." Employers should be aware that an exception allowing disclosure of sensitive information to a union in compliance with the NLRA does not necessarily require disclosure of such information in all circumstances once a demand is made by the union. Employers should review their polices and practices to identify records containing private or sensitive employee information and assess on a request-by-request basis whether such information should be disclosed to unions.

NLRB v. USPS, Case No. 11-1225 (1st Cir. Oct. 27, 2011)

A company purchasing a hospital required the seller to reject a collective bargaining agreement with a nurse's union as a condition to the purchase. After the purchase, the company refused to recognize and bargain with the union despite having received a letter from the union indicating that the new owner was a successor employer. The National Labor Relations Board's (NLRB's) Regional Director petitioned the district court for and was granted injunctive relief under the National Labor Relations Act (NLRA), resulting in an order for the company to cease and desist from refusing and failing to bargain in good faith. The U.S. Court of Appeals for the Ninth Circuit upheld the injunction, noting that the district court did not abuse its discretion. First, there was a likelihood of success on the merits of the underlying interference and failure-to-bargain allegations. The consistency in the staff before and after the sale created a continuity of operation that established that the successor employer had a duty to bargain. At the time that the new owner declared the hospital "fully staffed," a majority of the nurses on staff were union incumbents. Second, absent injunctive relief, it was likely that the union would suffer irreparable harm because a delay in bargaining following such a transition in ownership threatens industrial peace and discredits the union in the eyes of employees. Third, these harms outweighed the financial and administrative costs the company would accrue if compelled to engage in good faith bargaining. Finally, the strong showing of likelihood of success on the merits and irreparable harm demonstrated that preliminary relief was in the public

©2024 Hinshaw & Culbertson LLP

interest. Successor employers should carefully consider the number of employees necessary to conduct business operations in normal or substantially normal fashion upon acquiring a new business. This number, which should not be based on uncertain staff expansion contingent upon business growth, is critical to determining whether a union enjoys incumbent status following a change in ownership.

Small v. Avanti Health Systems LLC, No. 11-55563 (9th Cir. Oct. 31, 2011)

Continuing a long string of rulings in employer "stock drop" litigation, the U.S. Court of Appeals for the Second Circuit found that a fiduciary in an Employee Retirement Income Security Act (ERISA) retirement plan was entitled to a "presumption of reasonableness" in continuing to offer plan participants the option to invest in employer stock. Plaintiffs were a putative class of participants in a 401(k) plan sponsored by a large bank. The employer (which was also the plan sponsor for the 401(k) plan) maintained an administrative committee to operate the plan and an investment committee to choose which investments would be available to plan participants. One of the investment options offered to participants was a fund designed to invest in the common stock of the employer/plan sponsor. During the financial crisis of 2007-2009, the stock price of the employer dropped significantly. Plaintiffs sued, alleging that the plan sponsor and the committees administering the plan had breached their respective fiduciary duties by continuing to allow the stock fund to be an investment option. The Second Circuit, adopting the standard used in *Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995), held that the plan's fiduciaries were entitled to a presumption that offering the employer's stock fund as an investment option under the plan was reasonable. The *Moench* standard presumes that a plan fiduciary's investment decisions are prudent, a presumption that may be rebutted by showing that the fiduciary had abused its discretion. Absent evidence of such an abuse of discretion, a plaintiff's claim of a fiduciary breach cannot survive a motion to dismiss. A companion case issued the same date reached a similar conclusion. Plan fiduciaries should regularly document their actions to protect against claims that they have acted imprudently.

In re Citigroup ERISA Litigation (Gray v. Citigroup Inc.), No. 09-3804 (2nd Cir. Oct. 19, 2011);

Gearren v. McGraw-Hill Cos., No. 10-792 (2nd Cir. Oct. 19, 2011)

After suffering multiple work-related injuries to his shoulder, a package-car driver was released to work with restrictions by the company doctor. A company labor manager said the work restrictions meant that the employee could no longer work as a package driver. A specialist gave the employee the same diagnosis, but made the work restrictions permanent. The employee's own doctor said the employee could return to work without any restrictions. The employee was then re-examined by the company doctor and cleared to work. After a conversation with the company's occupational health manager, however, the company doctor changed his opinion to match that of the specialist. As a result, the employee was barred from returning to work. The employee filed a grievance under the subject collective bargaining agreement, and a fourth doctor was asked to examine the employee. That doctor requested to run a functional capacity exam to test the strength of the employee's shoulder but was told that the company would not pay for any testing. Thus, the fourth doctor made his evaluation based on the employee's medical records alone and concluded that the employee could not perform the essential functions of his job. Ultimately, the employee was fired and he sued the employer for retaliation. A jury awarded the employee $630,307 in compensatory damages and $2 million in punitive damages. The U.S. Court of Appeals for the Tenth Circuit found that the evidence presented supported a reasonable inference in support of the employee's retaliation claim. The court ultimately concluded, however, that the jury's $2 million punitive damage award was excessive and violated the employer's federal due process rights. Employers must ensure that adverse action is never based on an employee exercising his or her right to file a claim based on a work-related injury.

Jones v. United Parcel Serv. Inc., No. 09-3275 (10th Cir. Oct. 24, 2011)

©2024 Hinshaw & Culbertson LLP

As a result of the economic downturn, an employer sought to lay off various staff. A supervisor indicated that it would be "an obvious choice" to eliminate an employee in the communications department because the employee's duties had changed significantly and the employer had stopped work on one of his core campaigns. After the employee was selected for layoff, a communications director notified the employer of his need for time off for knee replacement surgery. The employer then made a last-minute decision to lay off the communications director in lieu of the previously selected employee. The communications director sued, claiming that the employer had violated the Family and Medical Leave Act (FMLA). The U.S. Court of Appeals for the Seventh Circuit found that the record contained sufficient evidence to create triable issues where: (1) the employer had originally identified a co-worker for termination, but then selected the communications director shortly after he announced intention to take FMLA leave; (2) management backdated a memo to make it appear that the termination decision was not influenced by the leave request; and (3) the employer gave an inconsistent explanation regarding the termination. When an employer decides to terminate an employee not originally slated for layoff, it should make sure that the employment action is accurately and timely documented and that the employer's thought process is consistent, precise and well-reasoned.

Shaffer v. American Medical Association, No. 10-2117 (7th Cir. Oct. 18, 2011)

©2024 Hinshaw & Culbertson LLP