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Newsletters

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Transferring Employee to Different Geographical Location for Better Access to Medical Care Found to Be Reasonable Accommodation

An employee sustained irreversible brain damage in a work-related incident and requested a hardship transfer to have better access to her ongoing medical treatment. The employer declined to accommodate her request. The employee sued, claiming that the employer discriminated against her in violation of the Rehabilitation Act by failing to accommodate her and by subjecting her to a hostile work environment. The employer moved for summary judgment, arguing that the employee's impairment did not substantially limit her activities so as to qualify as a disability under the Rehabilitation Act. The district court granted summary judgment in favor of the employer. The U.S. Court of Appeals for the Tenth Circuit reversed, finding that summary judgment was inappropriate as the employee provided ample evidence attesting to the manner in which her loss of vision limited her ability to see, and that this evidence was sufficient to permit the jury to determine whether the employee was "substantially limited" in her ability to see. With respect to the employer's argument that the Rehabilitation Act did not contemplate transfer accommodations for employees who require medical treatment despite being able to perform the essential functions of their jobs, the court rejected the suggestion that transfer accommodations are generally "not mandatory," as this court had previously held that "a reasonable accommodation may include reassignment to a vacant position if the employee is qualified for the job and it does not impose an undue burden on the employer." The court concluded that a transfer accommodation for medical care or treatment is not *per se* unreasonable, even if an employee is able to perform the essential functions of the job without it. Although employers are not required to provide accommodations where such accommodation poses an undue burden, here, the employer failed to argue that the requested transfer would have caused an undue burden. Being proactive and engaging in a good faith interactive process to determine whether and/or how a disabled employee may be accommodated are critical risk-management activities that should be undertaken by all employers.

Sanchez v. Vilsack, No. 11-2118 (10th Cir. Sept. 19, 2012)

For more information, please contact your regular Hinshaw attorney.

Attorneys

Anthony E. Antognoli

Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

Right-to-Sue Letter Directed to Attorney Constituted Notice to Employee for Purposes of Filing Timely Lawsuit

After she was denied sick leave, a doctor filed a complaint with the Puerto Rico Department of Labor and Human Resources, alleging unlawful discrimination and unwarranted refusal to make a reasonable accommodation for her disability. The matter was referred to the Equal Employment Opportunity Commission (EEOC), which ultimately issued a right-to-sue letter. The notice — which was sent to the doctor and her attorney, and to the employer — stated that the doctor had 90 days within which to file an action against her employer. Approximately 144 days after the right-to-sue letter was sent, the doctor sued her former employer for violations of the Americans with Disabilities Act. The doctor claimed she did not receive the right-to-sue letter until approximately four months after it was issued, that the filing period did not begin to run until after the notice was received, and that her lawsuit was timely because it was filed approximately 20 days after she allegedly received notice. The U.S. Court of Appeals for the First Circuit found that the doctor's attorney's receipt of the EEOC right-to-sue notice was sufficient to commence the running of the filing period. Because there was no dispute as to the fact that the attorney timely received the notice, the doctor was deemed to have constructive notice of the 90-day filing period. Because the doctor admittedly did not file the lawsuit within that 90 days, the employee's claims were time-barred. Failure to adhere to statutorily-prescribed timeframes can cause problems for both employees and employers alike.

Loubriel v. Fondo del Seguro del Estado, No. 11-1555 (1st Cir. Sept. 21, 2012)

For more information, please contact your regular Hinshaw attorney.

Seventh Circuit Saves Teacher's First Amendment Claim

A sixth-grade student threatened one student and beat up another in the hall, prompting the student's math teacher to meet with the student's parents. At the meeting, the parents threatened to sue the teacher. A few days later, the teacher called on the student to perform a "math karaoke" which involved reciting song lyrics about a topic learned about in class. The student used his math karaoke to threaten the teacher, stating: "I stabbed Gschwind," which was the teacher's last name. The teacher spoke to the school's police liaison, principal and assistant principal about filing a criminal complaint. While the liaison was supportive, he claimed that the principal and assistant principal tried to discourage him, arguing that the parents would then likely sue the school. Ultimately, the teacher filed a complaint, not just for his own safety reasons but because he wanted "to report the singing of the song as a crime that had been committed, to help ensure the smooth and safe operation of the school and everyone inside . . . to bring to the public light the fact that such an incident had occurred." The day after the teacher signed the complaint, he received an "unsatisfactory" evaluation and was subsequently "compelled to resign." The teacher sued the school, claiming that he was retaliated against for exercising his First Amendment right to free speech. The school argued that the teacher's complaint was not protected by the First Amendment because it was not speech involving a matter of public concern. Instead, it was private speech motivated by the teacher's purely personal reasons. The U.S. Court of Appeals for the Seventh Circuit found that "speech of public importance is only transformed into a matter of private concern when it is motivated *solely* by the speaker's personal interests." Here, the teacher stated that he had filed the complaint for reasons beyond his own personal interests, and he was ultimately allowed to pursue his claim. This case serves as a good reminder to public employers that employee speech that pertains to a matter of public concern may be protected by the First Amendment.

Gschwind v. Heiden, et al., No. 12-1755 (7th Cir. Aug. 31, 2012)

For more information, please contact your regular Hinshaw attorney.

Certain Severance Payments Deemed Exempt From FICA Tax

An employer operating a chain of retail stores closed a number of facilities while undergoing bankruptcy proceedings. As part of this reduction-in-force, the employer provided certain severance benefits to employees, and treated the severance benefits as income, reporting the wages on Forms W-2 with Federal Insurance Contributions Act (FICA) taxes withheld. Later, the employer sought a refund of more than $1 million in FICA taxes from the Internal Revenue Service (IRS), arguing that the severance payments were not properly treated as "wages" for FICA tax purposes. The bankruptcy court agreed, reasoning that the payments fell within a special exception for certain payments made by an employer and conditioned on eligibility for, and receipt of, state unemployment benefits (also known as "supplemental unemployment compensation benefits" or "SUB pay"). The IRS argued that SUB pay was exempt from FICA tax only under limited

circumstances, which were not present in this case. The district court disagreed, finding that severance benefits were properly treated as SUB pay and therefore excluded from wages for FICA purposes under the special statutory provision. The U.S. Court of Appeals for the Sixth Circuit affirmed. The circuit courts are split on this issue. Until there is further clarification from the U.S. Supreme Court or Congress, employers should consult with counsel to ensure proper withholdings associated with any severance payments.

United States v. Quality Stores, Inc., No. 10-1563 (6th Cir. Sept. 7, 2012)

For more information, please contact your regular Hinshaw attorney.

Employer Did Not Discriminate or Retaliate Against Disabled Employee Unable to Perform In-Person Supervision Tasks

A supervisor of released adult offenders suffered from a condition that limited her ability to walk and forced her to work from home. After surgery the employee made a full return to work, but approximately 18 months later she fell down stairs at work and the symptoms of her condition returned. The employee had a second surgery and took leave under the Family and Medical Leave Act (FMLA) to recover. She was terminated after her FMLA leave expired. The employee sued, alleging disability discrimination in violation of the Americans with Disabilities Act, and FMLA retaliation. The employer successfully defended against the FMLA claim by showing that the employee was terminated for a legitimate, nondiscriminatory reason because she never presented a "fitness-for-duty" certificate authorizing her return to work. The U.S. Court of Appeals for the Tenth Circuit found the employee's discrimination claim to be without merit because she admittedly could not perform work outside of her home, and accordingly, could not supervise offenders in-person, an essential function of the position. The only potential accommodation would have been a temporary reprieve from supervising offenders in-person. Absent an estimated date of return to full duty, the court held that the employer did not have enough information to determine whether temporary exemption from in-person supervision was reasonable. Employers should be mindful that the interactive process is a two-way street, and it is important to communicate in good faith concerning potential accommodations.

Robert v. Board of County Commissioner of Brown County, Kansas, No. 11-3092 (10th Cir. Aug. 29, 2012)

For more information, please contact your regular Hinshaw attorney.

Are Bonuses Part of "Earnings" for Purposes of Calculating Disability Benefits?

An employee sustained a spinal cord injury that left him a quadriplegic a few months after starting his new position with the employer. The employee earned a salary, but was also guaranteed a substantial bonus after his first 12 months of employment. He was also eligible for long-term disability benefits. After his accident, the employee sought benefits under the long-term disability plan. The insurance company determined that he would receive benefits based upon his annual salary. The employee appealed the benefits determination, arguing that his benefits should have been based on the base salary plus the guaranteed bonus. The insurance company disagreed. The employee sued. The U.S. Court of Appeals for the Ninth Circuit found that there existed a conflict of interest given that the insurance company was charged with both evaluating benefits claims and paying them, but found that the district court failed to determine what weight the conflict should be given. In order to determine whether the insurance company was correct in its benefits determination, and whether the employee was entitled to receive benefits based upon the substantial bonus, the court recognized the need to rectify various administrative issues. The court accordingly remanded the matter back to the district court to ultimately determine whether the insurance company abused its discretion in failing to include the bonus in the benefits calculations. In this case, the employer's wording about salary and benefits in the offer letter played a key role in the determination of what the employee was ultimately entitled to. Employers should ensure that the terms and conditions of employment that are included in offer letters have been fully vetted to ensure that they are appropriate.

Stephan v. Unum Life Insurance Co. of America, No. 10-16840 (9th Cir. Sept. 12, 2012)

For more information, please contact your regular Hinshaw Attorney.

Seventh Circuit Reverses Previous Precedent Regarding Reassignment of Disabled Employees

An employer adopted reasonable accommodation guidelines, which provided that while a transfer to an equivalent or lower-level vacant position may be a reasonable accommodation, employees needing accommodation must participate in a competitive process for the position. The employer's policy also provided that disabled employees needing an accommodation would receive some preferential treatment for other positions by receiving an interview and preference over a similarly qualified applicant seeking the position. Ultimately, however, a best-qualified candidate would be selected over the disabled employee. The district court upheld this policy on the ground that the Americans with Disabilities Act (ADA) does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it is the employer's consistent and honest policy to hire the best applicant for the particular job in question. The U.S. Court of Appeals for the Seventh Circuit reversed, and articulated that the test to determine whether a disabled employee should be reassigned to a position over a more qualified applicant is whether such assignment is unreasonable. First, the court must consider if mandatory reassignment is ordinarily a reasonable accommodation, and it must then determine if there are fact-specific considerations particular to the employment system that would create an undue hardship and render mandatory reassignment unreasonable. The court also distinguished the use of a best-qualified selection policy from a seniority system. While employers may prefer to hire the best-qualified applicant, the violation of a best-qualified selection policy does not involve the property rights and administrative concerns presented by the violation of a seniority policy. As such, although a seniority system presents a narrow, fact-specific exception to accommodation by reassignment, a best-qualified selection process does not. Based on this ruling, employers must now abide by a stricter test that considers the individual circumstances to determine if reassignment is unreasonable.

Equal Employment Opportunity Commission v. United Airlines, Inc., No. 1101774 (7th Cir. Sept. 7, 2012)

For more information, please contact Eileen M. Caver or your regular Hinshaw attorney.

NLRB: Employer's Overbroad Social Media Policy Violates Employees' Rights

An employer's handbook contained a section entitled "Electronic Communications and Technology Policy," which provided that: "Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the [Handbook], may be subject to discipline up to and including termination of employment." The National Labor Relations Board's (NLRB's) general counsel took issue with the prohibitions, arguing that the policy could reasonably be viewed as prohibiting "protected activities" under the National Labor Relations Act, such as online communications critical of the employer's treatment of employees. An administrative law judge rejected the argument, finding that the policy was lawful and intended to promote "a civil and decent workplace," and that no reasonable employee would construe it to prohibit protected communications. The NLRB reversed and found the employer's social media policy to be unlawful. The NLRB held that the policy "clearly" included "concerted communications protesting respondent's treatment of its employees" and that there was "nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule." The NLRB further found that the rule did "not present accompanying language that would tend to restrict its application" and therefore "allow[ed] employees to reasonably assume that it" pertained to "certain protected concerted activities." The NLRB ordered the employer to remove or modify its rule to ensure that it did not prohibit protected activities. Employers should ensure that their social media policies are narrowly and precisely written to simultaneously prevent unwanted employee communications (*e.g.*, malicious, abusive, confidential, unlawful or slanderous speech) while also permitting protected activity — even that which damages the company's reputation.

Costco Wholesale Corp., 3558 NLRB No. 106 (Sept. 7, 2012)

For more information, please contact your regular Hinshaw Attorney.

Employee Failed to State Valid First Amendment Claim Because She Spoke Pursuant to Her Official Duties

A former school payroll clerk reported fiscal irregularities to the superintendent and, later, to an outside consultant. The employee was subsequently suspended when it was discovered that she had falsified her employment application. In response, the employee wrote a personal letter to individual board members expressing frustration with how the

superintendent responded to fiscal concerns, and claimed that her suspension was in retaliation for reporting fiscal malfeasance. The termination was later made official following a disciplinary hearing. The employee filed a First Amendment retaliation claim, and the district court held the former payroll clerk, a public employee, could proceed to trial on the claim that the superintendent violated her right to freedom of speech. The superintendent appealed, arguing that he was entitled to qualified immunity, which shields government officials performing "discretionary functions" from liability insofar as their conduct did not violate a clearly established right. The U.S. Court of Appeals for the Second Circuit assessed the employee's official duties and the nature of her speech to determine whether she was speaking as a private citizen. Finding that the employee's complaints, specifically directed to the superintendent, consultant and board members, were made pursuant to her job duties, the court held that she therefore was not protected by the First Amendment because she never communicated her complaints to the public. This case demonstrates the scope of First Amendment protection in the context of public employment.

Ross v. Lichtenfeld, No. 10-5275 (2nd Cir. Sept. 10, 2012)

For more information, please contact your regular Hinshaw attorney.

Compensation System Found to Be Race-Neutral and Not in Violation of Title VII

A group of brokers sued their employer, claiming race discrimination under Title VII of the Civil Rights Act of 1964, as amended, and under 42 U.S.C. § 1981, on the grounds that the firm's "teaming" and account-distribution policies prevented black brokers from obtaining lucrative assignments and earning more money. The employer was later acquired by a bank, and the companies implemented a "retention-incentive program," which was designed to compensate brokers based upon their previous levels of production. A second lawsuit was filed against both the bank and the firm, alleging that the new program was similarly violative of Title VII because the new plan incorporated policies which were derivative of the prior firm's discriminatory practices. The U.S. Court of Appeals for the Seventh Circuit found that the retention program provided for bonuses to brokers based on race-neutral assessment of levels of production. To the extent there were any past discriminatory effects of the underlying firm's employment practices, those matters would be addressed in the prior litigation, and were not to be considered here. The only allegations here regarding the discriminatory effects were found to be purely conclusory, and confirmed that dismissal was proper. Employers are probably most familiar with claims of intentional discrimination, but this case serves as a reminder that policies, practices and processes, even if seemingly neutral, can come under fire if their effects adversely affect a group on account of race, disability, gender or other protected classes.

McReynolds v. Merrill Lynch & Co., Inc., No. 11-1957 (7th Cir. Sept. 11, 2012)

For more information, please contact your regular Hinshaw attorney.

Sixth Circuit Permits Changes to Retiree Health Benefits in Two Cases

An employer agreed to provide vested retiree health benefits to its unionized workforce in a series of collective bargaining agreements that were negotiated over a period of 30 years. Among the negotiated benefits was free lifetime health care for retirees and their surviving spouses. Beginning in 2004, the employer began negotiations for a new collective bargaining agreement, and negotiated with the union a requirement that certain retirees contribute toward the cost of their retiree health benefits. A class of retirees who had retired after 1994 sued, arguing that the prior collective bargaining agreements under which they had retired had vested in them the free lifetime benefits promised by those agreements. In a 2007 ruling, the district court agreed with the retirees. A 2009 opinion from the U.S. Court of Appeals for the Sixth Circuit affirmed that ruling, and further noted that while the employer was required to provide free lifetime health care benefits, it was not required to offer benefits at the same level as was offered under the prior collective bargaining agreements. On remand, the district court concluded that the employer was only permitted to change the level of benefits through collective bargaining. The Sixth Circuit reversed that holding, finding that the employer's commitment to offer free retiree health benefits did not mean that the employer could make no changes to the health benefits that were provided. Rather, the employer could make reasonable changes to the offered benefits, as long as the benefits provided were "roughly consistent" with those offered under the prior plan and with those offered to current employees. An employer's agreement to provide vested benefits is not necessarily static. Reasonable modifications that take into account the evolving nature of

those benefits may be permitted without having to renegotiate.

Reese v. CNH America LLC, No. 11-1359 (6th Cir. Sept. 13, 2012)

In a second retiree health care benefits case out of the Sixth Circuit, the court found that where an employer had expressly reserved the right to modify or terminate benefits, the retirees were not entitled to lifetime, unchangeable health care benefits. Although the collective bargaining agreement had promised "continuous health insurance . . . during the life of the retiree," the collective bargaining agreement also had a provision in which the employer reserved the right to amend or terminate the plan. Such "reservation of rights" language is of critical importance to employers that wish to have the flexibility to modify future benefits.

Witmer v. Acument Global Technologies, No. 11-1793 (6th Cir. Sept. 17, 2012)

For more information, please contact Anthony E. Antognoli or your regular Hinshaw attorney.

Employee's Failure to Cooperate with Interactive Process Leads to Dismissal of Claim

A university professor who was diagnosed with "an adjustment disorder and depression" sued the university, alleging that it failed to provide her with an office change as a reasonable accommodation in violation of the Americans with Disabilities Act (ADA). The university demonstrated that it requested, but did not receive, guidance from the professor's doctor on a suitable office location and other "stressors" the professor needed to avoid in order to make the accommodation work. The U.S. Court of Appeals for the Seventh Circuit concluded that the professor and her doctor had refused to respond to the university's request for more information. The court pointed out that the university did agree to change the location of the professor's office so that she was no longer near the department head who was allegedly causing the professor more stress, but that the professor's doctor failed to respond to the university's further questions on other aspects of the requested office transfer and other "stressors" that needed to be avoided so that she could effectively perform her job in the future. Under these circumstances, the court held that no rationale trier of fact could find that the university failed to offer the professor a reasonable accommodation and summary judgment was therefore appropriate. Employers must engage in a good-faith interactive process with disabled employees to determine whether and/or how the employer can accommodate an employee's disability. Such communications are critical to ensure compliance with state and federal law.

Hoppe v. Lewis University, No. 11-3358 (7th Cir. Aug. 31, 2012)

For more information, please contact your regular Hinshaw attorney.

NLRB Properly Certifies Union's Representation Despite Claims of Blocking Charge

A union filed a petition to represent employees, and the employer and union entered into an agreement for an election. Immediately prior to the election, a local newspaper published an anti-union article specifically relating to the election at this particular company, and cautioning that if the employees unionized, the company might ultimately close. The employer immediately responded, directed employees to disregard the rumors, and stated that it was not closing the plant, regardless of the outcome of the election. The union filed an unfair labor practice charge against the employer, and the regional director elected to postpone the election. Later, the union asked the National Labor Relations Board (NLRB) to proceed with the processing of the election petition, which was subsequently approved. The employees voted in favor of unionizing. The employer filed an objection, claiming that the union's unfair labor practice charge was without merit, and led to an unfair delay that adversely affected the outcome of the election. The NLRB overruled the objections and certified the union as the bargaining agent of the employees. The employer nevertheless refused to bargain with the union, which ultimately led to the NLRB finding that it had violated the National Labor Relations Act. The U.S. Court of Appeals for the Eighth Circuit rejected the employer's arguments concerning the union's allegedly baseless charge and the subsequent delay of the election. The court noted that it was not unreasonable for the union to file the charge against the employer given that it was widely believed that the company caused the newspaper article to run, even if there was no direct proof. Further, the court found that the NLRB had substantial evidence to support its decision to postpone the election. Ultimately, it was within the NLRB's authority to certify the union as the bargaining agent of the employees. Employers must be mindful of engaging in any activities that may be construed as potential interference with an upcoming election.

Warren Unilube, Inc. v. NLRB, No. 11-2664 (8th Cir. Aug. 28, 2012)

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