HINSHAW

Newsletters

Employment Practices Newsletter - August 2011

August 1, 2011

No "Cat's Paw" Claim Where Supervisor Was Terminated for Violating Policy

A supervisor helped an injured employee obtain from the company nurse a work restriction that limited the number of hours the employee could work. However, the supervisor required the employee to work more hours than the restriction allowed. The supervisor alleged that at an intermediate-supervisor's direction he denied the employee the breaks that the employee was entitled to. The employer discovered that the supervisor had failed to honor the injured employee's restriction and terminated the supervisor. The supervisor in turn sued under the Iowa Civil Rights Act, claiming that he was retaliated against for seeking accommodation for the disabled subordinate employee. Using the "cat's paw" theory, the supervisor argued that the intermediate-supervisor, who lacked decision-making power, used a manager as a dupe in a deliberate scheme to get the manager to fire him. The U.S. Court of Appeals for the Eighth Circuit rejected the employee's claim because the intermediate-supervisor neither reported the supervisor's violation of the work restriction to the manager nor recommended that the supervisor be disciplined. Nor did the manager rely on anything from the intermediate-supervisor in deciding to fire the supervisor. Instead, the manager fired the supervisor because he had admitted violating company policy by forcing the employee to work in violation of his restriction. This case is significant because of the Court's recognition that the supervisor was required but failed to prove that the manager's decision was actually influenced by the intermediate-supervisor. Employers must ensure that decision-makers do not make employment decisions based on their own desire, or the desire of a subordinate, to retaliate against an employee for engaging in any kind of protected activity.

Diaz v. Tyson Fresh Meats, Inc., Case No. 10-1472 (8th Cir. Jun. 28, 2011)

For more information, please contact your regular Hinshaw attorney.

Waiver Language Sufficiently Clear to Satisfy Requirements of the OWBPA

Upon his termination, a 62-year-old photo editor was provided with a severance package including 20 weeks' salary and other benefits. In exchange for it, he signed a separation agreement, which contained a provision stating that he waived and released any and all claims against the employer including claims under the Age Discrimination in Employment Act (ADEA). The separation agreement further provided that nothing in it restricted the employee's right

Attorneys

Concepcion A. Montoya

Service Areas

Appellate

Employee Benefits

Labor & Employment

Workers' Compensation Defense

under the ADEA to challenge the agreement's validity. It also stated that the waiver and release do not apply to any ADEA claims that might arise after the date that the employee signed the separation agreement. Two years later, the employee sued the employer, alleging that his termination was a pretext for age discrimination in violation of the ADEA because his position remained extant and was filled by a younger employee. The employer argued that the employee's claim was precluded by the separation agreement's waiver provision. The employee countered that the waiver provision was not enforceable because it was unduly lengthy and confusing in violation of the requirements of the Older Workers Benefit Protection Act (OWBPA). The U.S. Court of Appeals for the Second Circuit held that the employer had satisfied the OWBPA's requirements because the waiver provision was written in a manner calculated to be understood by its relevant employees. To ensure that waiver provisions are enforceable under the OWBPA, they must be drafted so that employees can understand what the waiver's effect will be.

Rindinger v. Dow Jones & Co., Inc., Case No. 10-1771 (2nd Cir. July 11, 2011)

For more information, please contact Concepcion A. Montoya or your regular Hinshaw attorney.

NLRB Sets Aside Decertification Vote Where Union Promised to Waive Unpaid Dues

An employer was required under its union contract to deduct monthly union dues from employees' paychecks. The employer failed to deduct the dues for several consecutive months. Realizing the mistake, the union sent an e-mail to the employer, and the employer immediately resumed the deductions without collecting the back dues. The union neither attempted to collect the delinquent dues nor notified members about the error. Six months later, a new employer took over the union contract and filed a petition to decertify the union. During the decertification campaign, the union distributed a flyer notifying employees about the delinquent dues and promising that the dues would never be collected if the employees voted to retain the union. The employees subsequently voted in favor of the union. The employer objected to the outcome, arguing that the union's promise to waive dues violated the National Labor Relations Act (NLRA). Under the NLRA, neither a union nor an employer may make or promise to make a "gift of tangible economic value" as an inducement to win support during a decertification campaign. The National Labor Relations Board reasoned that employees reasonably would infer under the circumstances that the purpose of the union's promise was to induce them to support the union, and that the promise therefore "constituted an objectionable grant of a tangible financial benefit." As a result, the Board ordered that the election should be set aside and a second election held. Employers should keep a close watch during decertification campaigns to ensure that unions do not promise any financial benefit to union members, but must also remain aware that employers themselves are subject to the same requirement.

Go Ahead North America, LLC, 357 NLRB No. 18

For more information, please contact your regular Hinshaw attorney.

Employer Precluded From Making Unilateral Change to Retirees' Benefits

An employer entered into a collective bargaining agreement (CBA) with a group of unionized employees. The CBA provided for retiree health coverage for retired union employees for the CBA's duration. It also required the employer to create a voluntary employee benefit association (VEBA) trust, and provided that upon the exhaustion of the funds in the VEBA, the employer could charge the retirees the cost of their retiree health coverage. Upon the CBA's expiration, the employer unilaterally changed the retiree health coverage previously regulated under the expired CBA. The union, on behalf of a class of several hundred retirees, sued under Section 502(a) of the Employee Retirement Income Security Act (ERISA) and Section 301 of the Labor Management Relations Act (LMRA), seeking a permanent injunction preventing the employer from making any unilateral changes to retiree health coverage and an award for benefits that would have been received without the employer's changes. The U.S. Court of Appeals for the Fourth Circuit found that it was the joint intent of the employer and the union that retiree health insurance benefits could not be unilaterally changed by the employer after the governing CBA's expiration. The Fourth Circuit interpreted the CBA as a whole to find that the inclusion of both the VEBA provision and a provision governing the exhaustion of the funds in the VEBA (which was not projected to occur until six years after the expiration of the three-year CBA) demonstrated the parties' joint intent to continue to impose the obligation to provide retiree health benefits. The lack of durational limit of coverage was also noted. Employers entering

into CBAs covering retiree health benefits should ensure that the language governing the duration of coverage of retiree health is clear and concise when read in conjunction with the entire CBA.

Quesenberry v. Volvo Trucks North America Retiree Healthcare Benefit Plan, Case No. 10-1491 (4th Cir. Jul. 11, 2011)

For more information, please contact your regular Hinshaw attorney.

NLRB May Delegate Power to Its General Counsel to Seek Injunctive Relief From District Courts
In 2002, a union local began to organize employees at a hotel. Following failed bargaining between the union and the hotel, the union filed numerous unfair labor practice charges with the regional director of the National Labor Relations Board (NLRB). The regional director investigated the claims and issued an unfair labor practices complaint. After a 13-day hearing, an administrative law judge determined that the hotel had violated numerous sections of the National Labor Relations Act (NLRA) and recommended that the NLRB order the hotel to cease and desist from the unfair labor practices and take other remedial actions. The hotel filed extensive objections to the ruling. As the case remained pending before the Board, the regional director filed a petition with the district court for injunctive relief under Section 10(j) of the NLRA. The hotel opposed the petition, claiming that the district court lacked subject-matter jurisdiction because the regional director had failed to obtain the Board's approval to file the Section 10(j) petition. The U.S. Court of Appeals for the Ninth Circuit held that although the Board may reserve the ultimate decision of whether to petition for Section 10(j) relief in individual cases for itself, it may also exercise its power to petition for such relief by authorizing the general counsel to decide in which case to seek relief on the NLRB's behalf. The Ninth Circuit determined that as far as delegation to subordinates is concerned, express statutory authority for delegation was not required. As such, the general counsel is the NLRB's subordinate insofar as Section 3(d) of the NLRA requires the general counsel to perform "such other duties as the Board may prescribe."

*Frankl v. HTH Corp.,*Case No. 10-15984 (9th Cir. July 13, 2011)

For more information, please contact your regular Hinshaw attorney.

Terminated Employee Denied Accommodations Has Triable ADA Claims

An employee was on a flexible work schedule for a number of years to accommodate her disability, chronic fatigue syndrome (CFS). After being assigned to a new supervisor, the employee was served with written reprimands for attendance and deprived of other accommodations that eased her symptoms, including a flexible work schedule. The employee took medical leave from her job because of the stress caused by her supervisor's actions and was subsequently terminated. The employee claimed that her employer had violated the American with Disabilities Act (ADA) when it failed to provide her with reasonable accommodations for her disabilities and that it retaliated against her by terminating her employment. The U.S. Court of Appeals for the First Circuit held that although attendance is an essential function of any job, whether a reasonable accommodation, such as a flexible work schedule, will allow an employee to maintain good attendance must be considered by the employer. With the recent implementation of new regulations addressing the ADA, employers must carefully consider whether reasonable accommodations are available that will aid employees in performing the essential functions of their job, including accommodations that will adequately address employee attendance.

Valle-Arce v. Puerto Rico Ports Authority, Case No. 10-1102 (1st Cir. July 8, 2011)

For more information, please contact your regular Hinshaw attorney.

Title VII Caps Damage Awards Per Plaintiff, Not Per Claim
A female employee sued her employer under Title VII of the 1964 Civil Rights Act (Title VII) after being fired, asserting three separate claims: (1) sex discrimination in setting of sales quotas, (2) retaliation for making complaints about discriminatory treatment on the basis of her sex, and (3) discriminatory termination. The jury found in favor of the employee on all three claims and awarded $200,000 in compensatory damages on each claim, $150,000 in back pay for both her retaliation and termination claims, and $2.4 million in punitive damages, for a total of $3.45 million in damages.

The district court applied the U.S. Supreme Court's prohibition on double recovery in back pay to her termination and retaliation claims and reduced the back pay award from $600,000 to $150,000. The district court then applied Title VII's damages cap, which limited the amount for compensatory and punitive damages and reduced the employee's award from $2.4 million to $200,000. On appeal the employee sought $200,000 in damages on each of her successful Title VII claims because they were "separate, distinct, and independent causes of action," which could have been filed separately. The U.S. Court of Appeals for the Fifth Circuit upheld the trial court's reduction of the damages award based on the Civil Rights Act of 1991, which amended Title VII to allow jury trials and compensatory and punitive damages. The statutory language provides that a "complaining party" may recover compensatory and punitive damages under Title VII, and the amount awarded "shall not exceed, for each complaining party" a designated amount based upon the size of the employer. The compensatory and punitive damages cap on the employer here was $200,000. In light of this case, when assessing whether to settle or litigate discrimination complaints, employers need to be mindful that Title VII caps damages per plaintiff, not per claim. Additionally, employers need to be cognizant of the fact that its number of employees determines the amount of the Title VII damages cap.

Black v. Pan Am. Labs., LLC, Case No. 09-51092, (5th Cir. July 11, 2011)

For more information, please contact your regular Hinshaw attorney.

EEOC Warns Against Keeping Personal and Occupational Health Information in Single Electronic File

Maintaining an employee's personal health information and occupational health information in a single electronic medical record could violate the requirements of Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA), according to an informal discussion letter recently released by the Equal Employment Opportunity Commission (EEOC). An employer's right to access occupational health information from individuals providing health services unrelated to employment is strictly limited under both the ADA and GINA. Although neither the ADA nor GINA specifically addresses whether encryption, password authentication, or other security safeguards are necessary for electronic records maintained by employers, the EEOC stated that it does not interpret either statute's confidentiality provisions to apply only to paper records. Therefore, maintaining personal health information and occupational health information in a single electronic medical record, particularly one that allows someone with access to the electronic medical record, presents a real possibility that the ADA and GINA, or both, will be violated.

EEOC informal discussion letter on ADA and GINA: Confidentiality Requirements

For more information, please contact your regular Hinshaw attorney.