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Newsletters

Employment Practices Newsletter - June 2011

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Seventh Circuit Condones Broad EEOC Subpoena Power

After an African-American sales employee was fired, he filed a charge with the Equal U.S. Employment Opportunity Commission (EEOC) alleging that the employer discriminated against him based on his race and ultimately terminated him because he had filed an internal complaint of race discrimination. When the EEOC investigated the employee's charge, it requested and received information from the employer. The information revealed that few African-Americans worked for the employer and that the employer maintained two separate sales teams that were racially divided. Based on those facts, the EEOC surmised that the employer may have engaged in discriminatory hiring. This led the EEOC to issue a subpoena to the employer seeking information about its hiring practices. The employer refused to comply, arguing that the materials were irrelevant to the employee's race discrimination charge, in which he did not specifically allege discriminatory hiring. The U.S. Court of Appeals for the Seventh Circuit rejected the employer's argument and held that there is "a generous standard of relevance for purposes of EEOC subpoenas" and that the agency may obtain "virtually any material that might cast light on the allegations against the employer." In this instance, information pertaining to the employer's discriminatory hiring practices could "cast light" on the employee's discrimination complaint. Accordingly, the court enforced the EEOC's subpoena. This case underscores the EEOC's far-reaching subpoena power and serves as an alert that employers must be prepared to respond when the EEOC requests information.

Equal Employment Opportunity Commission v. Konica Minolta Business Solutions U.S.A., Inc., Case No. 10-1239 (7th Cir. Apr. 29, 2011)

For more information, please contact your regular Hinshaw attorney.

Tenth Circuit Finds No Pretext in the Termination of an Employee Who Was the Subject of 23 Reported Complaints

An African-American male worked as a technician for 10 years. During that time, he was the subject of 23 reported complaints from co-workers and supervisors, including five complaints of sexual harassment. The employer performed an investigation based on the complaints, which resulted in the employee's termination. The investigation revealed that the employee had received many final warnings and should have been terminated much earlier. After being fired, the employee sued, alleging that the employer discriminated against him based on his race and retaliated against him for complaining about

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the lack of African-Americans in management. The employee argued that his long disciplinary history was proof that his inappropriate behavior could not have been the motivation for his termination and must have been pretext for discriminatory and retaliatory motives. The U.S. Court of Appeals for the Tenth Circuit rejected the employee's claims and held that the employer's discipline of the employee, including his termination, was coherent, consistent and lawful. Employers should be sure to have a coherent, progressive disciplinary policy that is applied consistently to all employees. Such a policy will serve as a valuable defense should claims of discrimination or retaliation arise after an employee has been disciplined.

Crowe v. ADT Security, Case No. 10-1298 (10th Cir. Apr. 25, 2011)

For more information, please contact Sean N. Pon or your regular Hinshaw attorney.

Former Employee Must Arbitrate Discrimination Claim Because the Employment Agreement Constituted a Valid Contract

An employee signed an employment agreement four years after she began her employment with the employer. The agreement contained an arbitration clause that set out a three-step process for resolving employment disputes, including discrimination claims. The employee sought to have the agreement invalidated based on lack of consideration and lack of notice as to the arbitration provision. The U.S. Court of Appeals for the First Circuit held that the employee's agreement to the alternative dispute resolution process in exchange for the employer's promise to waive certain defenses satisfied the consideration requirement for contract formation. The court also held that the plain text of the agreement provided the employee with adequate notice that employment discrimination claims would be subject to arbitration. Accordingly, the court ruled that the employee was required to arbitrate her claims. In light of this case, employers should consider utilizing a carefully drafted arbitration clause in their employment agreements as a viable alternative to being forced to litigate discrimination claims.

Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, Case No. 10-1638 (1st Cir. May 4, 2011)

For more information, please contact your regular Hinshaw attorney.

Voluntary Disclosure of Medical Information Does Not Create Employer Liability Under the ADA

A truck driver voluntarily informed his company's human resources manager that he was HIV-positive. Several months later, the driver decided to become a driver-trainer for the company. The company's human resources manager expressed concerns regarding the driver's ability to work as a trainer because of his HIV-positive status. The company and the driver discussed the matter and ultimately decided that the driver's HIV status would be disclosed to those he trained via an acknowledgement form informing trainees that the driver suffered from HIV. Ultimately, the relationship between the driver and the company deteriorated significantly, and the driver's contract was terminated. The U.S. Employment Opportunity Commission (EEOC) sued the company on the driver's behalf, raising a number of claims. Included among these was a violation of Section 102(d) of the Americans with Disabilities Act (ADA), which governs medical examinations and inquiries. Ultimately, the U.S. Court of Appeals for the Tenth Circuit held that Section 102(d) only prohibits the disclosure of confidential information obtained through an authorized medical examination. It does not, the court held, protect information that is voluntarily disclosed by an employee outside of an authorized employment-related medical exam or inquiry. This opinion recognizes an important limitation on Section 102(d), which could otherwise rapidly devolve into a strict-liability provision that creates liability for any disclosure. Such a result would negatively impact the ability of employers and employees to develop creative solutions to difficult situations, like the one presented here. Nevertheless, employers must tread with extreme caution whenever disclosing confidential employee information, as doing so could lead to litigation not only under the ADA, but under state tort laws as well.

EEOC v. C.R. England, Inc., Case Nos. 09-4207, 09-4217 (10th Cir. May 3, 2011)

For more information, please contact your regular Hinshaw attorney.

Vocational Students Are Not Employees Under the FLSA's Child Labor Provisions

A boarding school provided its students with "spiritual, academic and vocational training" by placing them in a nursing home where they worked in the kitchen and housekeeping departments and were able to participate in a certified nurse's aide program. The students typically spent four hours per day in classroom training, and four hours learning practical skills. The students did not receive payment for the duties they performed. The U.S. Secretary of Labor sued the school alleging that the work performed by the students was compensable under the Fair Labor Standards Act (FLSA). The U.S. Court of Appeals for the Sixth Circuit held that the students were the primary beneficiaries of the work they performed because they received valuable vocational training. The court found that the students profited from their work experience, which taught them about responsibility, leadership and practical work skills. The court further found that the students did not displace compensated workers. Rather, compensated instructors were required to devote their own time to student supervision. Accordingly, the work performed by the students did not violate the FLSA's child labor provisions. This case illustrates that where students are performing work that is primarily for their own benefit, and the students do not displace compensated workers, they may be considered trainees under the FLSA. However, if a student-worker is performing work that is primarily for the benefit of the employer, he or she must be compensated for all hours worked.

Solis v. Laurelbrook Sanitarium & Sch. Inc., Case No. 09-6128 (6th Cir. Apr. 28, 2011)

For more information, please contact your regular Hinshaw attorney.

Ninth Circuit Allows Employees to Be Prosecuted Under Computer Fraud and Abuse Act for Breach of Employer's Network Policy

After leaving the company, a former executive search firm employee persuaded former co-workers to provide him with certain information from the company's databases as it pertained to various candidates and employers, in order to help him set up a competing company. The employer had a computer-use policy that placed clear and conspicuous restrictions on the employees' access to the system and to the information contained in the system. Specifically, the company had taken considerable steps to protect and ensure the privacy of its confidential data, including assigning unique login credentials to employees, controlling access to the computer systems, and requiring employees to execute confidentiality agreements pertaining to these databases and information. The government indicted the former employee and the two current employees for violations of the Computer Fraud and Abuse Act (CFAA) for knowingly accessing a protected computer without authorization or exceeding authorized access with the intent to defraud. The former employee and current employees argued that they had been authorized to access and use the database and the information, and thus did not violate the CFAA. The U.S. Court of Appeals for the Ninth Circuit held that the employees had violated the criminal statute by accessing the database, obtaining information from that database, and using it in a way that violated the employer's restrictions. The court found that the employer took considerable measures to protect its information and that the employees knew (by virtue of these written protective measures) that they were not authorized to access the database and information in order to defraud the employer. This ruling demonstrates the importance of having computer-use and electronic-communications policies. Such rules are critical so that employers can protect their trade secrets and confidential information by making employees aware of what access is "authorized" versus "unauthorized."

United States v. Nosal, Case No. 10-10038 (9th Cir. Apr. 28, 2011)

For more information, please contact your regular Hinshaw attorney.

Employee's Administrative Tasks Performed at Home Outside the Coverage of the FLSA

An employee commuting from his home base to various worksites also completed work tasks at home in the mornings and evenings. The company compensated the employee for his home-to-work travel in excess of one hour. Although the company's policy was for employees to record time spent on at-home tasks, the company expected employees to finish all their work tasks in a 40-hour week. The employee falsified his timesheets, failing to record his overtime work. When the employee was terminated, he sued alleging that the company failed to pay him for his commuting time and overtime work that he failed to report, in violation of the Fair Labor Standards Act (FLSA) and New York Labor Law. A federal trial court found no basis for employer liability and granted summary judgment to the employer. The U.S. Court of Appeals for the Second Circuit rejected the employee's first argument, finding that his at-home work did not extend his workday under the

U.S. Department of Labor's "continuous workday" rule. Therefore, the court held that the fact that the employee chose to perform his at-home activities immediately before and after his commutes did not mean that the employer was required to pay him for the first hour of those drives, which was "time that was not part of his continuous weekday and that was, in the end, 'ordinary home to work travel' outside the coverage of the FLSA." The U.S. Court of Appeals disagreed with the district court's finding that the employer was entitled to summary judgment for unpaid overtime work that the employee admittedly failed to report, holding that a jury could reasonably find in the employee's favor that the employer had actual or constructive knowledge of his off-the-clock work. The court was clear that, "where the employee's falsifications were carried out at the instruction of the employer or the employer's agents, the employer cannot be exonerated by the fact that the employee physically entered the erroneous hours into the timesheets." When dealing with employees who commute, employers must be mindful that tasks deemed "integral and indispensable" to an employee's principal activities, but which the employee has flexibility in choosing when to perform, do not extend the employee's workday under the "continuous workday" rule and thus are not compensable. Employers should also be aware that it is unlawful to direct an employee not to record overtime to avoid payment for hours actually worked by him or her.

Kuebel v. Black & Decker Inc., Case No. 10-2273 (2nd Cir. May 5, 2011)

For more information, please contact your regular Hinshaw attorney.

Title VII Provides Retaliation Claim to Son Based Upon Father's Protected Activity

Two employees, a father and son, sued their employer under Title VII of the Civil Rights Act of 1965, as amended (Title VII), which makes it unlawful for an employer to retaliate against an employee for engaging in protected Title VII activity. Both the father and the son alleged that they had been subjected to adverse employment actions because of the father's prior complaints of discrimination. The district court granted summary judgment to the employer on the son's claim, relying on earlier federal decision that had interpreted Title VII as requiring a plaintiff to allege retaliation "because of his own protected activity." The U.S. Court of Appeals for the Fifth Circuit reversed, recognizing that the U.S. Supreme Court had rejected that interpretation of Title VII just months later in the case of *Thompson v. North American Stainless, LP,* 131 S. Ct. 863 (2011), where the high court found that a husband was entitled to bring a Title VII claim based on retaliation that he suffered because of protected Title VII activity by his wife. Relying on the Supreme Court's holding in *Thompson* that Title VII permits an employee to bring a claim based on retaliation suffered because of protected activity by a "close family member" who is also a co-worker, the Fifth Circuit remanded the son's claim for reconsideration. Employers should remember that in light of *Thompson*, any adverse actions taken against an employee who has complained of discrimination or against any of that employee's family members could be grounds for a Title VII retaliation claim.

Zamora v. Houston, Case No. 10-20625 (5th Cir. May 12, 2011)

For more information, please contact your regular Hinshaw attorney.

Drug Abuser Lacks ADA Protection Despite Completion of Rehabilitation Program

In 2004, an employee sales representative voluntarily entered an outpatient drug rehabilitation program with his employer's knowledge. In June 2005, the employee was asked to submit to a drug test, which he failed. As a result, the employer terminated the sales representative's employment, but informed the employee that he could return if he "got himself clean." In July 2005, the employee entered an inpatient drug rehabilitation program. During the intake process for the program, the employee tested positive for cocaine and marijuana. The employee completed the program on August 4, 2005, at which time his rehabilitation counselor described his recovery prognosis as "guarded." The next day, the employee contacted his former employer about returning to work. The employer informed him that he could return, but only to a position in which he would receive less compensation than his former sales job and that the employee could not service the same accounts he had prior to his discharge. The employee refused the conditions placed on his reinstatement and sued the employer contending that the refusal to reinstate him to his former position constitutes disability discrimination based on his drug addiction in violation of the Americans with Disabilities Act (ADA). The U.S. Court of Appeals for the Tenth Circuit ruled that "an individual is currently engaging in the illegal use of drugs if the 'drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem.'" The court declined to adopt a bright-line rule that 30 days of being drug-free is *per se* insufficient for a former drug abuser to qualify for ADA protection. But it found that the employer reasonably considered the employee a current user based on

his recent history of drug use and his guarded prognosis for recovery. Consequently, the court held that the employee was not protected under the ADA's safe harbor provision for recovering drug addicts who are no longer abusing drugs. Employers should be mindful that although participating in or completing a drug treatment program may bring an individual within the safe harbor provisions, and therefore, the protection of the ADA, an individual must also be no longer engaging in drug use for a sufficient period of time to demonstrate to the employer that the drug use is no longer an ongoing problem.

Mauerhan v. Wagner Corp., Case No. 09-4179 (10th Cir. Apr. 19, 2011)

For more information, please contact your regular Hinshaw attorney.

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