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Newsletters

Employment Practices Newsletter - March 2011

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U.S. Supreme Court Reinstates Army Reservist's "Cat's Paw" Bias Claim Under USERRA

A U.S. Army reservist was employed as a hospital technician. Both the employee's immediate supervisor and her superior were hostile to his military obligations and its impact on his employment. The employee's supervisor issued the employee a "corrective action," which included a directive requiring the employee to report to his supervisor or the supervisor's superior when each of the employee's cases at the hospital were completed. Subsequently, the supervisor's superior reported to the hospital's vice president of human resources (vice president) that the employee had violated the corrective action. After reviewing the employee's personnel file, the vice president decided to fire the employee. The employee filed a grievance, claiming that the allegations against him were fabricated out of hostility toward his military obligations. But the vice president adhered to her decision. The employee sued the employer under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), alleging that his supervisor and his supervisor's superior were motivated by hostility to his military obligations and that their actions improperly influenced the vice president. The U.S. Supreme Court held that an employer may be held liable if a biased supervisor's discriminatory intent was the proximate cause of the employee's termination, even if an unbiased employer representative made the ultimate decision to terminate the employee. Thus, the Supreme Court extended the "cat's paw" theory typically found in discrimination cases brought under Title VII of the Civil Rights Act of 1964, as amended, to claims brought under USERRA. The "cat's paw" theory applies where the employer's decision maker executes a lawful employment action, but the lawful action was influenced by another's illegal bias. Employers should ensure that lawful grounds exist for any employment action they decide to take and to avoid "cat's paw" liability. It is essential that actions taken by decision makers are isolated from the unlawful bias other employees may possess.

Staub v. Proctor Hospital, No. 09-400 (U.S. Sup. Ct. March 1, 2011)

For more information, please contact your regular Hinshaw attorney.

Prompt Investigation and Reasonable Response Prevent Employer's Liability for Repeat Harasser

A male employee who had been disciplined for "leering at" a female co-worker was later accused of sexually assaulting a different female employee. The

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employer interviewed the allegedly assaulted co-worker, the witnesses and the male employee (who denied the allegations), but was unable to substantiate the new claims. The employer's response was therefore to reprimand the male employee and put the parties at different workstations. During a subsequent criminal investigation, the male employee admitted to the sexual assault. This led the female co-worker to sue under Title VII of the Civil Rights Act of 1964, as amended, alleging that the employer created a hostile work environment by failing to terminate the male employee in light of his prior incident and by forcing her to continue working near him. Title VII makes an employer liable for creating a "hostile work environment" when the employer fails to take reasonable steps to prevent or correct severe or pervasive sexual harassment in the workplace. The U.S. Court of Appeals for the Seventh Circuit held that the employer was not liable for the male employee's actions, despite the fact that the employer had previously disciplined him for inappropriate sexual behavior. The court found that the prior "leering" incident was not severe enough to provide the employer with notice that the employee was likely to commit sexual harassment and that the employer's response met the court's standard of being "reasonably likely to end harassment." Employers should remember that even where an employee has a history of minor infractions, a prompt and thorough investigation, coupled with a response that is reasonable under the circumstances, will likely prevent liability for the employee's conduct.

Sutherland v. Wal-Mart Stores Inc., Case No. 10-2214 (7th Cir. Jan. 21, 2011)

For more information, please contact your regular Hinshaw attorney.

Eighth Circuit Affirms Summary Judgment for Employer Where Termination Caused by Immigration Status, Not National Origin

An employee working as an associate scientist at the employer's research facility was a citizen of China legally residing in the United States on a temporary work visa secured by his employer. When the employee's visa was set to expire after two years, the employer hired an immigration law firm and began pursuing permanent residency for the employee. The law firm completed all necessary steps to file the application, but the employee refused to sign the document. The employee acknowledged that the law firm had strongly advised him to sign the form and he understood that the application could not be filed without his signature. Subsequently, the employer decided to consolidate its research department and move to a new location. As part of the consolidation, the company notified 10 employees, including the employee from China, that their positions would be eliminated. The employer offered nine employees, four of whom were Asian, positions in the new location. But it informed the employee from China that he was not offered a job at the new facility because he would not be able to work much beyond the date the consolidation and location transfer were occurring. The employee sued his employer, alleging violation of Title VII of the Civil Rights Act of 1964, as amended, and the Iowa Civil Rights Act. The employee argued that his employer discriminated against him because of his national origin by refusing to assist him further in renewing his work visa. The U.S. Court of Appeals for the Eighth Circuit reasoned that the employee was terminated because of his immigration status, not his Chinese ancestry. Moreover, there was no evidence that the employer's decision not to provide further help to the employee regarding his immigration status was because of his Chinese ancestry. Employers should be aware that any business decision involving assistance or non-assistance with immigration status cannot be made on the basis of national origin.

Liu v. BASF Corp., Case No. 09-1850 (8th Cir. Feb. 14, 2011)

For more information, please contact your regular Hinshaw attorney.

No FMLA Interference Claim for Worker Who Ignored Supervisor's Phone Calls

An employee sent an e-mail to his supervisor asking to take "the next couple of days off" to make arrangements for his mother, who had fallen into a coma. The employee's supervisor repeatedly tried to contact the employee to determine the timing and duration of the employee's leave by making more than 12 phone calls to the employee over the next several days. The employee ignored his supervisor's calls until the supervisor placed his 14th call a week later. At a meeting with the employee the following day, the supervisor fired the employee for violating the employer's leave policy that called for the termination of employees who accrued more than two consecutive days of unapproved absences. The employee sued, alleging that the employer had interfered with his rights under the Family and Medical Leave Act (FMLA). The U.S. Court of

Appeals for the Seventh Circuit affirmed the dismissal of the employee's interference claim based on the employee's failure to provide his employer with sufficient notice of his intent to take FMLA leave or to notify his employer of the anticipated duration of his leave beyond the ambiguous "next couple of days" reference. Moreover, the court observed that employers may enforce compliance with their regular notice and procedural requirements for employees taking leave. Thus, the court held that the employer was justified in its termination of employment based on the employee's violation of the employer's attendance policy. Employers should remember that the federal regulations for FMLA leave require employees to inform their employers of the anticipated timing and duration of their leave. Also, where the leave is unforeseeable, employees must at least communicate this fact to their employer and provide an estimated duration of the leave.

Righi v. SMC Corp. of America, Case No. 09-1775 (7th Cir. Feb. 14, 2011)

For more information, please contact your regular Hinshaw attorney.

No ERISA Violation Where Price of Employer's Stock Fell After Employees Invested as Part of 401(k) Plan

A group of employees who participated in their employer's 401(k) plan invested a portion of their account in their employer's stock. They sued their employer under the Employee Retirement Income and Security Act (ERISA) when the price of their employer's stock dropped. The employees alleged that their employer had failed to disclose sufficient information about a bad business transaction that the employer had entered into and to monitor the conduct of the plan fiduciaries. Initially, the U.S. Court of Appeals for the Seventh Circuit dismissed a claim of an employee bringing suit who had previously signed a severance agreement with the employer waiving all claims against the employer, including those under ERISA. The employee argued that he could still pursue his claim against under the plan because ERISA prohibited plan fiduciaries from being released from their fiduciary responsibilities. The court held that nothing in ERISA prohibits a fiduciary from obtaining a release for potential claims that had already accrued. It went on to find that the fiduciaries did not violate ERISA in initially selecting their own stock as an investment option under the plan because: (1) the fund was one of many among which the participants could choose; (2) the plan repeatedly warned against the risk of not diversifying their investment choices; and (3) the employer's stock had never performed badly enough to make it an imprudent investment choice. Additionally, the court held the employer and plan fiduciaries were protected under the "safe harbor" provision of Section 404(c) of ERISA against the employee's claims that the employer had failed to disclose information about certain business decisions and to monitor plan fiduciaries. The Section 404(c) safe harbor provision provides protection for plan fiduciaries in certain instances where participants direct the investment of their accounts in a 401(k) plan. The purpose of the Section 404(c) safe harbor provision is to relieve the fiduciary of responsibility for choices made by someone beyond its control. The court held that the plan fiduciaries had no duty to provide plan participants with real time updates on business decisions or to review all business decisions of the company. Based on the court's findings in these cases, employers should ensure they are in compliance with Section 404(c) of ERISA, as it provides protection to 401(k) plan sponsors if their fiduciary decisions are questioned. However, they should be aware that Section 404(c) does not provide protection for the initial fund selection. Additionally, employers should ensure that all severance agreements are well-drafted.

Howell v. Motorola, Inc., Case No. 07-3837 (7th Cir. Jan. 21, 2011)
Lingis v. Dorazil, Case No. 09-2796 (7th Cir. Jan. 21, 2011)

For more information, please contact your regular Hinshaw attorney.

"Cat's Paw" Theory Supports Caucasian Woman's Race Claim

A Caucasian woman working for a city's summer camp program "heard the sound of flesh being struck and a child screaming" when an African American child was picked up by his aunt following his suspension from the camp. The employee then found the aunt holding a belt loop in her hand and the child crying, with a welt on his arm. The employee reported the incident to her immediate supervisor. The supervisor, who was an African American woman, told the employee that what she was reporting was "a cultural thing" and that it was "the way we discipline children in our culture." The employee then reported what she saw to the authorities. After doing so, she was called into the supervisor's office and admonished for sending the police to the aunt's house. The supervisor angrily reiterated her view that the employee's

actions reflected her lack of understanding of African American culture. Immediately after berating the employee, the supervisor drafted a memo to her superiors detailing performance deficiencies the employee exhibited, leading to the employee's termination. The employee sued, alleging that she was terminated because of the supervisor's racial bias, amounting to race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. Unlike the supervisor, the supervisor's superiors who had terminated the employee never displayed any racial bias towards the employee. Accordingly, the employee utilized the "cat's paw" theory to support her claim. The "cat's paw" theory confers liability upon an employer where an "unwitting manager or supervisor . . . is persuaded to act based on another's illegal bias." The U.S. Court of Appeals for the Seventh Circuit found that the supervisor had sufficiently influenced her superiors' decision to terminate the employee to support the employee's race discrimination claim. The court justified its holding based on the fact that the decision to terminate the employee had been a joint one between the supervisor and her superiors. Furthermore, an "independent investigation" was never conducted before the employee was terminated. Rather, the supervisor's superiors relied upon information given to them by the supervisor when terminating the employee. To avoid liability under the "cat's paw" theory, employers should conduct independent investigations before executing employment decisions that are otherwise based on input from employees. The independent investigation will negate any link between the ultimate employment decision and the unlawful bias an employee may have been acting upon when providing input.

Schandelmeier-Bartels v. Chicago Park Dist., Case No. 09-3286 (7th Cir. Feb. 8, 2011)

For more information, please contact your regular Hinshaw attorney.

NLRB Permits Union Bannering at Secondary Employer

During a strike against two construction employers in Utah, carpenters unions sent letters to secondary employers to apprise them of the strike and request that they terminate business relationships with the two construction employers; displayed banners at 19 different sites associated with secondary employers, two of which ignored an established reserved gate system; and distributed handbills providing a detailed explanation of the labor dispute. The general counsel for the National Labor Relations Board (NLRB) argued that these displays constituted unlawful signal picketing and unlawful picketing at a common location with a reserve gate system, and thus violated Section 8(b)(4)(i)(B) and Section 8 (b)(4)(ii)(B) of the National Labor Relations Act. The NLRB disagreed, and ruled that in Section 8(b)(4)(i)(B) cases, the evidence must prove that the alleged conduct "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer." Here, the unions' activity was not designed to target secondary employees as they arrived and departed work, there was no conversation with secondary employees, there was no evidence that secondary employees ceased work, and the signs could be observed by members of the public as well as by secondary employees. These facts also supported a conclusion that the unions' appeal to consumers to cease doing business with the primary employers of the primary construction employer did not constitute a form of restraint or coercion of a neutral employer prohibited by Section 8(b)(4)(ii)(B). Employers should note that it may be difficult to prevail on an unfair labor practice charge against a union for unlawful bannering absent evidence that a display induced a work stoppage.

Southwest Reg'l Council of Carpenters (New Star Gen. Contractors Inc.), 356 NLRB No. 88 (Feb. 4, 2011)

For more information, please contact your regular Hinshaw attorney.

Seventh Circuit Rules Holds That Classes of Employees Can Maintain Wage Claims Under Both Federal and State Law

The Seventh Circuit Court of Appeals recently ruled that a class of employees can maintain a state law class action wage claim (such as class claims under the Illinois Minimum Wage Act) with a federal collective action wage claim under the Fair Labor Standards Act (FLSA). The court noted that the FLSA specifically states that it does not displace state law on topics such as the minimum wage and overtime pay. In other words, there is nothing in the language of the FLSA that prohibits the simultaneous litigation of a state law wage claim (even a state law class action wage claim) with an FLSA collective action. Accordingly, employers must find alternative arguments when challenging state law class claims made in the same lawsuit in which an FLSA collective action is maintained. For instance, where the state law class members vastly

outnumber the FLSA collective action members, an argument that the state law claims will predominate remains a valid one for denying class certification under the federal rules. This opinion will impact employers in the Seventh Circuit that seek to limit the size of a class of plaintiffs seeking recovery under both the FLSA and state law wage laws at the same time.

Ervin v. OS Restaurant Services, Inc., 09-3029 (7th Cir. Jan. 18, 2011)

For more information, please contact Linda K. Horras or your regular Hinshaw attorney.

NLRB Settles Facebook Termination Case

The National Labor Relations Board (NLRB) filed a complaint against an ambulance company, alleging that the employer had engaged in unfair labor practices by firing an emergency medical technician after she posted negative comments about her supervisor and the company on her private Facebook page. The NLRB contended that the employer's social media policy was overly broad and that the employer's prohibitions on disparaging the company or individual supervisors, and on depicting the company on the internet in any way without permission, violated Section 7 of the National Labor Relations Act. On the eve of trial, the case settled. Under the settlement, the employer agreed to revise it's "overly broad rules" to ensure that they do not improperly restrict employees from discussing wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions. The exact details of the required policy revisions have not yet been released, but employers should note this settlement as it provides some guidance regarding how social media policies must be drafted to withstand NLRB scrutiny.

In Re American Medical Response of Connecticut, Inc., Case No. 34-CA-12576 (Oct. 27, 2010)

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

Sick Leave Buy-Back Must Be Included in Calculation of "Regular Rate" for Overtime

A city allowed employees who had accumulated a minimum amount of unused sick leave to sell it back to the city. The city did not, however, include buy-back payments when determining the regular rate of pay for purposes of calculating overtime pay. Under the Fair Labor Standards Act (FLSA), overtime hours must be compensated at a rate not less than 1.5 times the "regular rate" at which an employee is paid. The term "regular rate" includes "all remuneration paid" to an employee, with a few exceptions. The U.S. Courts of Appeals for the Sixth and Eighth Circuits are split on whether a sick leave buy-back payment must be included within an employee's regular rate for overtime purposes. Noting the split, the U.S. Court of Appeals for the Tenth Circuit agreed with the Eighth Circuit and the U.S. Department of Labor in holding that such a payment must be included within the regular rate calculation. In so doing, the court stated that sick leave buy-backs represent compensation for additional service or value received by the employer and are analogous to attendance bonuses. Consequently, such payments must be included within the regular rate calculation. Interestingly, in the same opinion, the court held that vacation buy-backs do not need to be included within the regular rate calculation. Ultimately, this case demonstrates the complexities inherent in complying with wage and hour laws and that employers must carefully consider how the payment of bonuses and other forms of additional compensation impact the calculation of overtime payments to employees.

Chavez v. City of Albuquerque, No. 09-2274 (10th Cir. Jan.12, 2011)

For more information, please contact your regular Hinshaw attorney.

Employee's Leave in Order to Go on "Faith Healing" Trip Not Protected Under FMLA

An employer approved intermittent Family and Medical Leave Act (FMLA) leave for an employee to take care of her husband, who suffered from serious medical conditions. After three years of taking intermittent leave, the employee submitted a request to take a seven-week leave to travel with her husband on a faith-healing pilgrimage to the Philippines. The employer denied the leave based on an FMLA certification from the husband's doctor stating that he was "presently . . . not incapacitated," despite also receiving a doctor's note indicating that the employee's leave was needed so that she

could physically assist her husband on the pilgrimage. When the employee failed to respond to the employer's requests for her to return to work, the employer terminated her. The employee sued, asserting that the faith-healing pilgrimage constituted medical care under the FMLA, and that the employer's actions constituted interference with her right to leave and retaliation in violation of the FMLA. The U.S. Court of Appeals for the First Circuit rejected the employee's claims because: (1) no conventional medical treatment was provided to the employee's husband during the trip; (2) the employee's husband saw no doctors on the trip; and (3) during the trip, the employee and her husband prayed, went to Mass, spoke with others on the pilgrimage, and visited other churches and family. The court concluded that FMLA leave to care for an immediate family member does not extend to vacations during which no medical care is provided. The fact that the employee provided physical and psychological care to her husband was incidental to the vacation. This case serves as reminder that FMLA leave is meant for employees with serious health conditions or who care for a family member with a serious health condition. Accordingly, employers need not grant FMLA leave requests where the leave sought is actually a vacation.

Tayag v. Lahey Clinic Hosp. Inc., No. 10-2012 (1st Cir. Jan. 26, 2011)

For more information, please contact your regular Hinshaw attorney.

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