Newsletters

Employment Practices Newsletter - February 2011

February 7, 2011

U.S. Supreme Court Allows Third-Party Retaliation Claim

An employee and his fiancée were working for the same employer when the fiancée filed a charge of sex discrimination against the employer. Three weeks after the employer received notice of the fiancée's charge, it terminated the employee. The employee sued, alleging that the employer terminated him to retaliate against his fiancée in violation of Title VII of the Civil Rights Act of 1964, as amended. The U.S. Court of Appeals for the Sixth Circuit rejected the employee's claim, concluding that Title VII "does not permit third party retaliation claims." In a unanimous decision, the U.S. Supreme Court reversed, finding that if the employer did in fact terminate the employee in order to retaliate against his fiancée, the employer violated Title VII. The Court noted that Title VII's anti-retaliation provision prohibits any action that might dissuade a reasonable worker from making or supporting a charge of discrimination, and "a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiance would be fired." Additionally, the Court found that the employee was not precluded from bringing a retaliation claim by Title VII's limitation that only "a person claiming to be aggrieved" may file suit under its provisions. The Court declared that claims may be brought by any individual who falls within the "zone of interests" sought to be protected by Title VII. Because Title VII protects employees from their employer's unlawful actions, and the employee was allegedly subjected to an unlawful retaliatory termination, the employee fell within the statute's "zone of interests." The Court did not rigidly declare how far third-party retaliation claims can extend, i.e. how closely related employees must be in order for action against one to constitute retaliation against the other. However, employers must be aware of the Court's holding, which indicated that retaliation claims can arise based on adverse action taken against someone "closely related" to an employee who engaged in protective activity.

Thompson v. North American Stainless, LP, No. 09-291 (U.S. Jan. 24, 2011)

No ERISA Claim for Employees Where Price of Employer's Common Stock Rose

A group of employees who invested in their employer's common stock sued their employer under the Employee Retirement Income and Security Act (ERISA) alleging that they were financially victimized by their employer's mismanagement and imprudent investment decisions that resulted in the common stock price falling by more than 11 percent. The employees alleged that the employer inflated the value of their stock though misrepresentations and omissions by corporate leadership. Specifically, the employer allegedly

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misrepresented the success of one of its products and then failed to take corrective action for eight months upon learning the product was defective. The U.S. Court of Appeals for the Eighth Circuit held that the employees did not actually suffer an injury as a result of their employer's actions, as they were able to sell their stock at a price greater than they could have without the employer's alleged deception. Accordingly, the employees failed to show how an ERISA fiduciary's breach could be redressed considering that the breach actually conferred a financial benefit on plan participants. In reaching this position, the Eighth Circuit rejected the employees' assertion that they suffered an injury simply because the stock lost value while the employees were invested in it. Employers that provide their employees with the opportunity to invest in their stock should be aware that a drop in the price of the stock could trigger an ERISA claim by the employees invested in the stock. However, this case illustrates that the drop in the price of stock alone is not enough to impose liability on the employer.

Brown et al. v. Medtronic Inc. et al., No. 09-2524, (8th Cir. Dec. 13, 2010)

Medical Testimony Is Not Necessary to Establish a Disability Under the ADA

An employee's back injury caused painful swelling whenever he lifted an item or rotated his torso. After years of being forced by his employer to complete tasks that aggravated his injury, the employee was terminated. The employee subsequently sued, alleging that the employer violated the Americans with Disabilities Act (ADA) by failing to accommodate his disability. The ADA defines a "disability" as any physical or mental impairment that "substantially limits" a major life activity. Applying the ADA standards that existed before the enactment of the Americans with Disabilities Act Amendments Act of 2008, the district court granted summary judgment to the employer, finding that the employee had not established that he was "substantially limited" in any major life activity. On appeal, the employer argued that the employee's failure to offer medical evidence substantiating his alleged limitations precluded a finding that he was disabled under the ADA. The U.S. Court of Appeals for the Seventh Circuit disagreed, finding that neither the ADA's language nor the relevant case law require employees to produce medical evidence. Quoting the U.S. Supreme Court, the Seventh Circuit concluded that the ADA requires employees "to prove a disability by offering evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial," and that the employee's testimony in this case did just that. Employers should be aware that an employee need not offer medical evidence in order to successfully bring a discrimination claim under the ADA.

EEOC v. AutoZone Inc., No. 10-1353 (7th Cir. Dec. 30, 2010)

No Claim for Retaliation Under FLSA Where Employee Did Not Make a Complaint

An employee working for a newspaper was given assignments that supplemented her usual workload. When the additional assignments caused the employee to work over 40 hours per week, her supervisor instructed her not to report any overtime. Despite the supervisor's instruction, the employee recorded her overtime work on the employer's records, prompting the supervisor to again request that the employee discontinue such recording. When the employee disobeyed and recorded additional overtime work, she was terminated. She sued, alleging that her termination was based on "her insistence on recording overtime," in violation of the anti-retaliation provision of the Fair Labor Standards Act (FLSA). The employee asserted that when she continued to report her time, she put the supervisor on notice that his request was violating the FLSA, such that her termination was retaliatory. The U.S. Court of Appeals for the Eighth Circuit disagreed, finding that the employee never made a formal, or even informal, complaint to the employer. Therefore, she never engaged in protected activity under the FLSA such that her termination could constitute retaliation. The court did not view the employee's conduct of continuing to report her overtime as an "affirmative complaint" but rather described it as "mere insubordination." Importantly, the court was clear that it did not decide whether or not an actual informal complaint to a manager or employer would constitute statutorily protected activity. When dealing with a complaining employee, employers must be mindful of whether the employee is actually asserting FLSA rights, such that any adverse action taken in response to such complaints could be construed as retaliation. Moreover, 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 an employee.

Ritchie v. St. Louis Jewish Light, No. 10-1356 (8th Cir. Jan. 4, 2011)

State Prosecutors Cannot Sue for Age Discrimination Under ADEA

Three former assistant prosecutors in the Office of the Cook County (Illinois) State's Attorney were terminated when the office needed to make personnel cuts. They subsequently sued under the Age Discrimination in Employment Act (ADEA). The state's attorney's office argued that it was immune from suit under the ADEA because the employees were "appointees on the policymaking level." The U.S. Court of Appeals for the Seventh Circuit categorizes employees as "appointees" if the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision making on issues where there is principled disagreement on goals or their implementation. Applying that definition, the court held that prosecutors are, by definition, policymakers, and therefore not within coverage of the ADEA. It is important to note that this opinion creates a split with other federal appellate courts that have rejected the Seventh Circuit's definition of "policymaker" under the ADEA. Despite the narrow exception to ADEA coverage recognized by this case, employers must remember that in most instances, the ADEA will confer liability upon employers that consider an employee's age when making employment decisions.

Opp v. Office of State's Attorney of Cook Cnty., No. 09-3714, (7th Cir. Dec. 29, 2010)

Ninth Circuit Revives Oregon Employee's Claims of Same-Sex Harassment and Retaliation

A temporary line production employee complained to his supervisor that his male coworkers were making derogatory comments about his sexual orientation. The employee was terminated two days later. He sued the employer under both Title VII of the Civil Rights Act of 1964, as amended, and the corresponding Oregon state statutes. The employee alleged that he was discharged in retaliation for his complaint and that he was subjected to a hostile work environment based on both his sex and his sexual orientation. The U.S. Court of Appeals for the Ninth Circuit found the temporal proximity between the employee's complaint and his subsequent termination evidence that his termination was retaliatory. Regarding the employee's hostile work environment claims, the court found only the state law sexual orientation claim to have merit. The comments that the employee endured were related to his sexual orientation, not his failure to conform to a male gender stereotype. Therefore, the comments were evidence of discrimination based on sexual orientation, but not discrimination based on sex. This case serves as a reminder that employers must establish and enforce good anti-harassment/discrimination policies that include a complaint-reporting mechanism that prompts thorough investigations into all employee complaints.

Dawson v. Entek International, No. 09-35844 (9th Cir. Jan. 10, 2011)

Employees Accepting Voluntary Severance Packages Do Not Count Toward Determining WARN Act Notice Requirements

In November 2008, a package delivery service announced that it would cease domestic shipping operations resulting in the closure of five of the service's six parcel facilities in the Chicagoland area. The employees' unions responded by negotiating severance agreements on behalf of their represented drivers and office workers. Although the parties' collective bargaining agreements did not provide for severance payments, the parties agreed to several different severance packages offering severance payments and benefits. Ultimately, 506 workers accepted severance packages. Workers declining the severance package offer retained their seniority rights, recall rights, and the right to bring legal claims against the company. Two drivers who declined the severance option sued the company, alleging that it breached the 33 percent threshold for triggering the notice requirements under the Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act exempts employers from its notification requirements if the job losses do not affect at least 33 percent of full-time employees. Consistent with U.S. Department of Labor regulations, the U.S. Court of Appeals for the Seventh Circuit held that employees accepting "voluntary departure" through severance agreements are generally not counted toward the employment loss threshold. The employees argued on appeal that the group of 506 employees who accepted the severance packages essentially were coerced and should be included in calculating the 33 percent threshold. However, the Seventh Circuit found that although the employees had been placed in an unenviable position to decide whether to accept the severance packages, nothing in the record demonstrated that they had acted involuntarily. Employers engaging in mass employee layoffs should be mindful of the WARN Act's notification requirements and that employees accepting voluntary severance packages should not be counted in calculating the 33 percent threshold for notification of WARN Act rights.

Ellis v. DHL Express, Inc., No. 09-3596 (7th Cir. Jan. 11, 2011)

Court Affirms Termination of Employee Struggling Without Alcohol Use

After five years on the job, a freight crew employee at a hardware store disclosed her alcohol problem to her manager. She was placed on paid administrative leave and enrolled in an employee assistance program, which subjected her to reasonable suspicion drug and/or alcohol tests and promised immediate termination for positive test results. While on the plan the employee showed up to work smelling of alcohol. She also slurred her words and was less responsive to conversation than normal. The employer required the employee to take an alcohol test and terminated her when lab reports were returned positive. The employee sued, claiming violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). The U.S. Court of Appeals for the Seventh Circuit acknowledged that substance abuse may qualify as a serious health condition, but reminded the employee that entitlement to FMLA leave requires a showing that the condition involved "inpatient care" or "continuing treatment" by a health provider. The employee had sought inpatient care but only well after she had violated the hardware store's legitimate drug and alcohol policy. Any claim that the employee's condition required "continuing treatment" was undermined by her own deposition testimony that her alcohol use neither incapacitated her, nor affected her work performance. This same testimony also contravened the employee's arguments that her alcohol abuse substantially limited a major life activity, a required element to show the existence of a disability under the ADA. This decision reaffirms an employer's right to hold employees suffering from alcohol abuse to the same employment qualification standards or job performance as other employees.

Ames v. Home Depot U.S.A. Inc., No. 09-4151 (7th Cir. Jan. 6, 2011)

Replacing Promotion List Not Discriminatory

A city promoted paramedics within its fire department by using a promotion list. The list ranked promotional candidates by combining their scores on a promotional exam with their seniority. An African American employee was ranked 32nd on the list, which was compiled in 2000. Promotions were made from the list once a year, and in 2007 the candidates ranked 29th and 31st were promoted, leaving the employee next in line for promotion. Prior to these promotions, however, the city decided to administer a new exam in 2007. Following the administration of the 2007 exam, which occurred shortly after the candidates ranked 29th and 31st were promoted, the employee was slotted at 48th on the new list. The employee sued the city, alleging that its failure to promote him was based on race. The trial court ruled in favor of the city, holding that the employee could not establish that he was similarly situated to any of the individuals who were promoted ahead of him because they were legitimately ranked higher on the promotional list. On appeal, the U.S. Court of Appeals for the Seventh Circuit held that the lower court's interpretation of the "similarly situated" showing was too narrow, as the candidate's argument was really that it was discriminatory for the city to stop using the promotional list just after promoting two Caucasian employees and just before reaching the candidate, an African American. Nevertheless, the court upheld the lower court's ruling in favor of the city because there was nothing inherently invidious about updating a promotion list—otherwise new employees would never have an opportunity for promotion. Moreover, there was no evidence that anything other than chance led to the old list being discarded when an African American employee stood next in line for promotion. This conclusion was bolstered by the fact that the individual who decided to stop promoting from the 2000 list was not informed who was on the list, and therefore had no knowledge that the next candidate in line was African American. This case reflects the importance of employers being able to explain the legitimate basis underlying facially race-neutral decisions, as such decisions could serve as the basis for a discrimination claim.

Stinnett v. City of Chicago, No. 09-3626 (7th Cir. Jan. 4, 2011)

OFCCP Issues Directive Indicating When Health Care Providers and Insurers Must Have an Affirmative Action Plan

The Office of Federal Contract Compliance Programs (OFCCP), an office within the U.S. Department of Labor, recently issued a directive that seeks to clarify when health care providers and insurers are required to have an affirmative action plan (AAP). Initially, in order to be subjected to the OFCCP's AAP requirement, the employer must have a covered federal contract or subcontract. This means that the employer must contract with a federal government agency or federal health care program such as Medicare; Medicaid; TRICARE (the health care program serving Uniformed Service members, retirees and their families worldwide); or the Federal Employees Health Benefits Program (FEHBP) to provide specific services or supplies. The OFCCP construes the term “contract” liberally, and if an employer is found to be a covered contractor or subcontractor, then all of its facilities must comply with the agency’s requirements, no matter where the contract is actually being performed. An example of an instance where there is no “covered contracts” is when reimbursements are made pursuant to Medicare Parts A and B or from Medicaid. These reimbursements are considered federal financial assistance rather than “covered contracts.” Additionally, federal health care program grants are not in and of themselves “covered contacts” such that an AAP is required by the OFCCP. This directive replaces prior directives issued in 1993 and 2003. Accordingly, employers who are health care providers or insurers should review the new directive to ascertain whether they are required to have an AAP pursuant to the requirements and regulations of the OFCCP.