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Newsletters

Employment Practices Newsletter - January 2011

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Employee Fails to Demonstrate That Age Was "But For" Cause of His Termination

A 57-year old employee was terminated in a reduction-in-force (RIF) by his employer. The employee sued, alleging discrimination under the Age Discrimination in Employment Act (ADEA) because 14 of the 15 employees terminated from his department in the RIF were age 40 or older. The employee also alleged direct evidence of age bias based on statements made by his manager who recommended the employee for the RIF wherein the manager asked the employee and a co-worker if they were "just trying to make it to retirement," suggested that the co-worker "could always get a job at Wal-Mart as a greeter" and sent employees unsolicited AARP mailings. The U.S. Court of Appeals for the Eighth Circuit held that the employee could not establish disparate impact age discrimination under the ADEA because the relevant pool of employees for comparison purposes was not merely the employee's department, but the company as a whole. Based on the court's examination of the broader pool, the statistics did not support a disparate impact finding. As to the employee's disparate treatment claim, the court acknowledged that age-related comments by decision makers generally require close scrutiny. However, it noted that isolated remarks regarding retirement and age are generally insufficient to prove age discrimination. Thus, the court concluded that the employee failed to demonstrate that his age was the "but for" cause of his termination, and affirmed summary judgment in favor of the employer. Employers conducting reductions-in-force should be able to identify the specific decisional unit considered for reductions and identify the criteria used for selections, while being mindful of the overall impact of the reductions on individuals within protected classifications.

Clark v. Matthews Int'l Corp., Case No. 10-1037 (8th Cir. Dec. 27, 2010)

Training Cost Repayment Agreements Do Not Violate FLSA

A former city police officer sued her former employer alleging violations of the Fair Labor Standards Act (FLSA) based on the city's demand that she repay expenses incurred for training her. The city maintained a policy that police officers who resigned less than five years after joining the police department were to repay the department's costs for their police academy training. Recovery of the expenses was tied to the length of service. The former police officer resigned from the department less than two years after being hired and the city notified her that she was liable for 80 percent of her training costs. The former officer argued that the city's policy violated the FLSA's regulations which

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provide that employee wages are not considered paid unless they have been paid unconditionally. The U.S. Court of Appeals for the Ninth Circuit held that the city's policy did not violate the FLSA and that the reimbursement scheme was essentially a loan to the employee, with repayment forgiven for a period of years. Employers that have reimbursement agreements in place with employees for items such as training and tuition should make certain that written employee reimbursement agreements are in place and that such agreements state that the employer is providing the employee a financial loan that shall be repaid under specific conditions should the employee separate from his or her employment within specified periods of time.

Gordon v. City of Oakland, Case No. 16167 (9th Cir. Nov. 19, 2010)

EEOC Concludes Pension Checks Not New Acts of Discrimination Under Ledbetter Fair Pay Act

A retired employee of the U.S. Environmental Protection Agency (EPA) filed a charge of discrimination under Title VII of the Civil Rights Act, as amended, and the Equal Pay Act, alleging discrimination in pay and her resulting retirement benefits. The retired employee alleged that during her employment in 1996 and at the time she retired in 1997, she was classified at a lower pay grade than similarly situated male employees. Although the retired employee did not file her charge of discrimination until May 2009, she argued that each of her pension checks constituted a new act of discrimination. In its final agency decision, the EPA found that the retired employee's paycheck and pension check claims were untimely. On review, the U.S. Equal Employment Opportunity Commission (EEOC) found that the legislative history of the Lilly Ledbetter Fair Pay Act (Act) suggested that Congress did not intend to alter the time limits for claims relating to pension benefits. Thus, the EEOC determined that the Act's provision allowing the time limit for filing pay discrimination claims to start running with each discriminatory paycheck does not apply to pension checks. Employers should remain mindful that the Act applies to paychecks issued during an employee's period of employment and take immediate action to correct instances of unequal treatment with respect to pay.

Brakeall v. EPA, EEOC No. 0120093805 (Nov. 30, 2010)

The NLRB Uses Its Rule Making Authority to Require Notice Posting

The National Labor Relations Board (NLRB) has proposed a rule requiring all employers under its jurisdiction to post a notice informing employees of their rights under the National Labor Relations Act (NLRA). The notice must be posted on an 11 x 17 inch poster and be distributed electronically if the employer customarily communicates with employees in such a manner. The NLRB believes that employers' awareness that employees are informed of their rights will dissuade employers from engaging in unfair labor practices. As a further deterrent of unfair labor practices committed by employers, the proposed rule threatens noncompliant employers with sanctions. Failure to post a notice will be treated as an unfair labor practice and may serve as cause for tolling the six-month statute of limitations period under the NLRA. Also, knowing noncompliance with the posting requirement may be used as evidence of motive in cases in which unlawful motive is an element of one or more alleged violations. The NLRB majority cited Section 6 of the NLRA, which gives the agency the power to adopt "such rules and regulations as may be necessary to carry out the provisions of this Act," as its authority for this rule. The rule was proposed and published over the dissent of NLRB member Brian E. Hayes, who questioned the statutory authority for the rule because, unlike other federal labor laws, the NLRA does not expressly require a notice of rights. Employers should consider using the public comment period, which expires on February 22, 2011, to present concerns about the notice requirement and consult legal counsel to ensure their future compliance with the final rule.

75 FR 80410 (Dec. 22, 2010)

No Violation of Bankruptcy Code for Refusing to Hire Applicant Due to Bankruptcy Filing

An applicant for a project manager position with an information technology employer was interviewed and offered the position, pending a background check. The background check revealed that the applicant had filed for bankruptcy in 2002, and the applicant was not hired because of that filing. The applicant sued, alleging that the employer had violated the U.S. Bankruptcy Code's anti-discrimination provision when it decided not to hire him based on his debt history. The U.S. Court of Appeals for the Third Circuit rejected the applicant's claim, finding that the Bankruptcy Code does not prevent a private employer from considering a bankruptcy filing in the hiring process. While the Bankruptcy Code states that a public employer may not "deny employment to" an individual based on a bankruptcy filing, it does not extend that prohibition to

private employers. Rather, the Bankruptcy Code only creates liability for private employers who "terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor . . ." While this case indicates that private employers may consider an applicant's debt history when making hiring decisions, employers must be aware of state laws that do not allow such considerations. For example, Illinois employers must now abide by the Employee Credit Privacy Act, which prohibits employers from discriminating against applicants based on their credit history.

Dean Rea v. Federated Investors, Case No. 10-1440 (3rd Cir. Dec. 15, 2010)

No FMLA Interference Where Employee Was Terminated for Violating Employer's Call-in Policy

A telecommunications company had a policy requiring its employees, when absent, to call in to supervisors daily. An employee who qualified for leave under the Family Medical Leave Act (FMLA) violated the policy when she failed to call in to the employer each day during her absence. Upon her return to work, the employer gave the employee a verbal warning citing her violation of the call-in policy. Subsequently, the employee applied for and received FMLA leave again. She continued to miss days of work without calling-in. After receiving an additional written warning, the employee was terminated for having violated the call-in policy a total of seven times over the course of one year. The employee sued, claiming that the employer had interfered with her right to take medical leave under the FMLA. The U.S. Court of Appeals for the Eighth Circuit found that the employer had not interfered with the employee's FMLA rights. The court explained that the employee's termination for violating the employer's call-in policy was "unrelated to her FMLA leave" and that call-in policies are permissible under the FMLA. The employee could not claim that she was never notified of the policy because she received it in her employee handbook and was given verbal and written warnings citing the policy when she violated it. While employers may create and enforce attendance policies, they must be sure that employees are notified of such policies and that the policies do not discourage employees from exercising their rights under the FMLA.

Thompson v. CenturyTel of Cent. Ark. LLC, Case No. 09-3602, unpublished opinion (8th Cir. Dec. 3, 2010)

Driver Terminated After Seizure on Job Lacks ADA Claim

A county highway worker's commercial driver's license (CDL) was temporarily suspended after he suffered a seizure while driving a county dump truck. The employee was granted leave under the Family Medical Leave Act (FMLA), but was later terminated after his treating physician indicated that he could return to work without restrictions within six months if no further seizures occurred. The county based the termination on the grounds that the employee had a physical disability that prevented him from carrying out his duties of employment, and there was no reasonable prospect of recovery that would enable him to resume his duties. The employee sued, alleging that when the employer terminated him, it violated the Americans with Disabilities Act (ADA). Analyzing the claim under the pre-January 1, 2009, version of the ADA, the U.S. Court of Appeals for the Eighth Circuit found that the employer did not violate the ADA when it terminated the employee because there was no guarantee that the employee could reacquire a CDL license, which was an essential qualification of the job. While employers may terminate employees who cannot perform the essential functions of the job, they must remember their duty to engage in the interactive process and provide reasonable accommodations to disabled employees. This is especially true in light of the ADA Amendments Act of 2008, which allows more employees to qualify for the ADA's protections.

Duello v. Buchanan County Bd. of Super., Case No. 10-2061, (8th Cir. Dec. 20, 2010)

Medical Resident's Poor Bedside Manner Could Not Be Accommodated

As a result of suffering from Asperger's Disorder, a family practice medical resident demonstrated significant performance deficiencies during his residency program. Most critically, physicians who evaluated the resident noted that he was severely deficient with respect to patient communication. He was unable to speak with patients, discern their ailments, and describe treatments to them. As a result, the resident was informed that he would be terminated from the residency program. The resident responded by informing the hospital that he had recently been diagnosed with Asperger's Disorder, and requested that his disability be accommodated through "knowledge and understanding." Hospital representatives met with the resident to discuss his proposed accommodation, but ultimately concluded that it did not have the resources to support his request. However, the hospital did offer to assist the resident in finding a pathology residency, which would

require significantly less direct patient communication. The resident sued under the Americans with Disabilities Act (ADA), asserting that the hospital failed to accommodate his disability. On appeal, the U.S. Court of Appeals for the Sixth Circuit upheld summary judgment in favor of the hospital, holding that the resident's proposed accommodation of "knowledge and understanding" offered no solution to his deficient patient communication skills, and was therefore inadequate. Additionally, the court held that the hospital had satisfied its obligation to engage in the interactive process by meeting with the resident and offering to assist him in finding an alternate residency that better fit his skills. Critical to the hospital's success in this case was the hospital's ability to clearly document the resident's performance deficiencies and explain why his proposed accommodation would not cure those deficiencies. This case demonstrates how, under the amended ADA, it is critical for employers to carefully evaluate accommodation requests and to be prepared to explain why any rejected request was insufficient.

Jakubowski v. The Christ Hospital, Inc., Case No. 09-4097 (6th Cir. Dec. 8, 2010)

Timing Alone Insufficient to Support Retaliation Claim

A hotel employee of Egyptian descent complained to his supervisor that a co-worker had referred to him as a "Terrorist Muslim Taliban." Roughly three weeks later the employee was terminated for failing to disclose certain aspects of his prior employment history. The employee did not dispute the omission, but argued that the real reason for his termination was the complaint he had filed with his supervisor. In upholding summary judgment in favor of the hotel, the U.S. Court of Appeals for the Second Circuit held that suspicious timing alone is insufficient to support a claim of retaliation. The court acknowledged that the short period of time between the employee's complaint and his termination may have raised an inference of retaliation. However, the employee's inability to establish that the reason offered by the hotel for his termination was untrue doomed his claim. Ultimately, plaintiffs in discrimination claims must establish that the employer's proffered reason for the employment decision at issue was untrue. The inability to do so defeats such a claim. This case serves as a reminder that employers must strive to ensure that employment decisions are based on objectively reasonable and verifiable bases, as these will serve as the bedrock of the employer's defense to any claim of discrimination.

El Sayed v. Hilton Hotels Corporation, Case No. 10-453-cv (2d Cir. Dec. 17, 2010)

Ninth Circuit Examines Nonunion Employer Exposure to Withdrawal Liability Under "Alter Ego" Theory

An employer with nonunion employees established a new entity to handle union work. There was common ownership between the unionized and nonunion employers, and the two entities shared administrative staff and operated out of the same building. The union employer in this "double-breasted" operation contributed to a multiemployer union pension fund. After several years as a participating employer in this fund, a bargaining dispute between the employer and the union resulted in an impasse and a strike, and eventually led to the union employer withdrawing from the pension fund and incurring $2.4 million in withdrawal liability. The union employer made quarterly withdrawal liability payments for more than three years, until it shut down operations and went out of business. The pension fund then sued the nonunion employer, arguing that the two entities were "alter ego" employers and that the nonunion employer was responsible for the remaining withdrawal liability payments. The U.S. Court of Appeals for the Ninth Circuit emphasized that there are two requirements for two entities to be alter-ego employers: (1) that the two firms have "common ownership, management, operations, and labor relations"; and (2) that the nonunion firm is used "in a sham effort to avoid collective bargaining obligations." Ultimately, the Ninth Circuit sent the case back to the lower court due to the trial court's initial failure to consider both prongs of the test. The appellate court explained that while the lower court had considered the commonalities between the two entities, it had not analyzed whether the nonunion employer was in fact used in a sham effort to avoid collective bargaining obligations. Employers that maintain "double-breasted" operations should review the relationship between their union and nonunion workforce so that, to the extent possible, the nonunion employer is insulated from the union employer's obligations.

Resilient Floor Covering Pension Fund v. M&M Installation, Inc., 9th Circuit, Case No. 09-17047 (Dec. 22, 2010)