Employment Practices Alert - December 2010

December 1, 2010

Extension of Performance Improvement Plan While Employee Deployed Is Evidence of USERRA Violation

An employee who was a member of the Army Reserve informed his supervisor that he was going to return to active duty in the future, with a high probability that he would be mobilized. Soon thereafter, his job performance evaluation declined from “solid performer” — which it had been for the previous three years — to “needs improvement.” As a result, the employee was placed on a performance improvement plan (PIP) that required him to meet certain objectives within 90 days. Despite meeting the objectives, the employee was told that his PIP would be extended for “other reasons” until he returned from any upcoming military leave. Prior to being deployed, the employee sued his employer, alleging various violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The employer argued that the complained of conduct took place before the employee’s deployment, and, therefore, that the employee was not protected by USERRA. The U.S. Court of Appeals for the First Circuit disagreed. The court found that when the employee notified his supervisor of his planned return to active duty, the protections of USERRA were triggered. The court went on to find that the employer may have violated USERRA when it extended the employee’s PIP because the employee had already completed the PIP prior to deployment. Furthermore, a supervisor had commented that the PIP was extended because the employee had not performed well when engaged in military service. Employers should be aware that formal military orders are not required to invoke USERRA protections. Accordingly, employers must always ensure that employment decisions are not influenced by an employee’s military affiliation, status or intent to serve.

Vega-Colon v. Wyeth Pharmaceuticals, Case No. 09-1861 (1st Cir. Oct. 28, 2010)

Nondisabled Employees Cannot Sue for Discrimination Under ADA

A manufacturer attempted to improve work performance and safety in its factory by prohibiting employees from taking certain medications. To enforce the prohibition, the employer implemented a drug testing policy. When a group of employees tested positive for the prohibited drugs, they produced physicians’ letters stating that their work performance would not be affected by their medications. The manufacturer refused to consider the letters and terminated the employees. The employees sued, alleging that the anti-medication policy violated the Americans with Disabilities Act (ADA). Specifically, the employees cited the ADA provision that prohibits employers from “using qualification

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standards, employment tests, or other selection criteria" that "screen out or tend to screen out" persons with disabilities. The manufacturer argued that the employees who sued were not "qualified individuals with a disability," and, therefore, could not bring a claim under the ADA. The U.S. Court of Appeals for the Sixth Circuit agreed with the manufacturer. The court found that a straightforward reading of the "qualifying standards" section of the ADA led to the conclusion that Congress only intended to protect "individuals with a disability." When using employment tests, qualification standards, or other selection criteria that are not job-related or consistent with business necessity, employers must ensure that their tests or standards do not operate to screen out individuals with qualifying disabilities.

Bates v. Dura Automotive Systems, Inc., Case No. 09-6351 (6th Cir. Nov. 3, 2010)

NLRB Awards Daily Compounded Interest on Back Pay Award

The National Labor Relations Board (NLRB) concluded that a hospital violated the National Labor Relations Act by placing a hospital employee on indefinite investigatory suspension. In fashioning a remedy to make the employee whole, the NLRB was confronted with the challenge of determining whether interest on any loss of earnings or other benefits suffered as a result of the hospital's unfair labor practices should be compounded, and if so, whether the compounded interest should be calculated on a daily, quarterly or annual basis. Ultimately, the NLRB decided to depart from its previous practice of awarding straight interest on back pay awards, in favor of daily compounded interest. This departure reflected the NLRB's hope to measure the time value of money lost by an employee more fairly and accurately. The NLRB reasoned that daily compounded interest is the norm in connection with private lending practices. For instance, interest on credit card debt is calculated using compounded interest. Additionally, the Internal Revenue Service, which the NLRB has historically looked to for guidance on calculating interest on awards, calculates interest on tax underpayments using daily compounded interest. When developing risk management procedures for labor practices and evaluating the value of unfair labor practice cases, employers should be aware of the NLRB's new practice for calculating interest on back pay awards.

Jackson Hospital Corp. d/b/a Ky. River Med. Ctr., 356 NLRB NO. 8 (Oct. 25, 2010)

Electronic Remedial Action Notifications Required for Some Employers

The National Labor Relations Board (NLRB) recently held that employers found to have violated the National Labor Relations Act (NLRA) now must post remedial notices electronically, in addition to the traditional posting of a paper notice on a company bulletin board. As a matter of general policy, the notice must be electronically posted on an employer's intranet or internet site, or distributed by e-mail if the employer customarily uses such methods to communicate with employees. In the NLRB's view, an electronic remedial notice requirement adequately effectuates the purposes of the remedial notice to: (1) notify employees of their rights and the NLRB's role in protecting those rights; (2) notify employees of the corrective action that their employer must follow to remedy violations of the NLRA; and (3) deter future violations. It should be noted that this decision only applies to employers that customarily communicate with employees through electronic means.

J & R Flooring Inc., d/b/a J. Picini Flooring, 356 NLRB No. 9 (Oct. 22, 2010)

No Breach of Fiduciary Duty Where Plan Participant's Wife Detrimentally Relied on Fiduciary's Misrepresentations

A participant in a pension plan governed by the Employee Retirement Income Security Act (ERISA) received multiple letters which misstated the calculation or amount of his pension benefits. As a result of the information in the letters, the participant's wife retired from her job. After the wife retired, the participant received a letter correcting downward the pension calculations in prior letters. The participant and his wife sued the participant's former employer for breach of fiduciary duty owed to them as a participant and beneficiary under the pension plan, and for promissory estoppel as a result of the participant receiving the misleading letters, and the wife's subsequent retirement. The U.S. Court of Appeals for the Third Circuit held that there was no detrimental reliance, and thus no breach of fiduciary duty, where a decision by a plan participant affected a nonemployee's benefits or retirement that were completely separate from the plan. Specifically the court found that although the participant and his wife may have taken action based on the letters to determine whether the wife should retire, that action did not implicate the participant or his wife's benefits under the plan at issue. The court also found that the wife's retirement was not foreseeable by a fiduciary, and therefore was insufficient to establish detrimental reliance. Employers nevertheless should be aware that a spouse of a retirement plan participant may bring a suit for breach of fiduciary duty where the participant's foreseeable reliance on misrepresentations affect the nonparticipant spouse adversely.

Shook v. Avaya Inc., Case No. 09-4043 (3rd Cir. Nov. 2, 2010)

Complaint Must Be Made About an Unlawful Activity to Receive Retaliation Protection Under Title VII

An employee working as a public safety auditor for a city was terminated after publishing a report criticizing the city's police department. The report asserted that the department made unfair traffic stops and that it should "improve its relationship with the communities of color." Soon after publishing the report, the employee was terminated for insubordination. The employee sued, alleging that she was retaliated against for opposing discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended. The employee also claimed that her right to free speech under the First and Fourteenth Amendments was violated. The U.S. Court of Appeals for the Eighth Circuit denied the employee's retaliation claim, finding that her report did not oppose any act made unlawful by Title VII. While the employee's report criticized discriminatory policing practices within the community, it did not criticize employment discrimination within the police force. Additionally, the court denied the employee's First Amendment claim because her report was published while she was acting in her official capacity, and not as a private citizen. Therefore, she was not immunized from employer discipline for the comments she had made. When disciplining an employee for insubordinate comments, employers must consider whether the comments were made to oppose an unlawful employment practice or an employment practice that the employee had a good-faith belief was unlawful, such that discipline would constitute retaliation in violation of Title VII.

Bonn v. Omaha, Case No. 09-3332 (8th Cir. Oct. 19, 2010)

Employer Not Liable for Retaliation Where Both the Complaining Employee and Accused Co-Worker Engaged in Prohibited Behavior

An employee complained to her supervisor that a co-worker had made sexual comments to her on a regular basis. After 10 days and another complaint, an investigation was performed. The investigation indicated that both the employee and the co-worker had made inappropriate jokes to one another and that both employees had engaged in behavior strictly prohibited by the employer's policy. Consequently, the employer suspended both employees without pay for five days and afterwards transferred the accused co-worker to another department. When the employee returned to work, she experienced, but did not report, problems with different co-workers. Instead, the employee resigned from her position. She then filed several claims, including retaliation under both Title VII of the Civil Rights Act of 1964, as amended, and the Iowa Civil Rights Act of 1965. The U.S. Court of Appeals for the Eighth Circuit denied the employee's claims. The court found that the employee failed to present sufficient evidence to support a conclusion that the employer's proffered reason for suspending her — namely, a violation of policy — was a pretext for a retaliatory motive. The court also determined that the employer could not be liable for retaliation based on constructive discharge when it was never made aware of problems that the employee experienced after returning to work from her suspension. Employers should undertake prompt and thorough investigations of sexual harassment complaints in the workplace and respond in good faith after evaluating the information gathered.

Alvarez v. Des Moines Bolt Supply, Inc., Case No. 09-1465 (8th Cir. Nov. 17, 2010)

Court Finds "Me Too" Evidence Properly Excluded Where Not Tied to the Employment Actions Disputed in Case at Hand

A managerial employee was terminated as part of a company-wide reduction-in-force. She sued under the Age Discrimination in Employment Act (ADEA), alleging that her department managers had implemented the reduction-in-force in a discriminatory manner. In support of her claim at trial, the employee sought to introduce testimony from several other employees outside her department who similarly believed that they had been discriminated against due to their age. The trial court disallowed the testimony of the other employees, finding that only employees who were terminated by the same decision maker as the employee, around the same time, could provide relevant testimony. The trial court's decision to disallow the "me too" evidence of the employees was reversed by the U.S. Court of Appeals for the Tenth Circuit. The case then went to the Supreme Court of the United States, which remanded it to the district court, allowing the trial court to reaffirm its initial holding. When the trial court's decision to exclude "me too" evidence was again appealed, the U.S. Court of Appeals for the Tenth Circuit affirmed. The Supreme Court noted that "whether evidence of discrimination by other supervisors is relevant . . . is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances. . . ." The Court reasoned that "anecdotal evidence of discrimination should only be admitted if the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand." This case provides a useful tool for employers due to its ultimate holding that where an employee is seeking to prove discrimination, a trial court may exclude witnesses who are not similarly situated to the employee due to their inability to provide relevant evidence.

Mendelsohn v. Sprint/United Mgmt. Co., Case No. 08-3334, unpublished opinion (10th Cir. Nov. 12, 2010)

Pension Plan Dispute Procedure Trumps CBA Arbitration Clause

A longtime employee of a beverage company left his employment to serve as an elected official for his union. Under the terms of the collective bargaining agreement (CBA) between the employer and the union, an employee taking a position with the union could return to his job with the company without suffering any interruption in seniority. The CBA also included a broad arbitration provision that encompassed all grievances regarding its interpretation. After completing his elected position with the union, the employee returned to the employer for one day and then resigned. The employee's subsequent claim for pension benefits was denied, and his union filed a grievance under the CBA, arguing that because the employee was entitled to uninterrupted seniority, his pension benefits should not have been denied. The employer refused to arbitrate the matter, asserting that the CBA expressly excluded claims pertaining to pension benefits. The union then filed a complaint in federal court seeking to compel arbitration and arguing that interpretation of the seniority provision was necessary to resolve the pension dispute. The U.S. Court of Appeals for the Sixth Circuit refused to compel arbitration, holding that disputes regarding pension benefits were excluded from the CBA's dispute resolution procedures. The court's ruling hinged on the fact that the CBA expressly incorporated the pension plan, which provided an alternate procedural framework for resolving pension disputes. That, the court held, operated as an express exclusion of pension disputes from the scope of the CBA, even if a provision of the CBA might be relevant to the resolution of the pension dispute. Put differently, the pension plan's dispute procedures trumped those of the CBA on the issue. Two facts were critical to the employer's success in this matter: (1) the CBA expressly incorporated the pension plan, and (2) the plan had its own procedure for resolving disputes. There is a strong federal policy favoring arbitration, and disputes pertaining to almost any issue can be subject to arbitration unless expressly excluded from the arbitration provision. However, employers must make sure to carefully tailor arbitration provisions.

Teamsters Local Union No. 783 v. Anheuser-Busch, Inc., No. 09-6065 (6th Cir. Nov. 1, 2010)

Genetic Information Nondiscrimination Act Implemented by the EEOC

The U.S. Equal Employment Opportunity Commission (EEOC) has issued the final regulations implementing the Genetic Information Nondiscrimination Act (GINA), which will become effective January 10, 2011. GINA protects job applicants, former and current employees, labor union members, apprentices and trainees from discrimination based on their genetic information. Accordingly, GINA prohibits employers from obtaining, disclosing or basing employment decisions upon the genetic information of applicants, employees or former employees. "Genetic information" includes "an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services" and the genetic information of fetuses or embryos held by an individual or family member. An employer will not be liable for genetic information "inadvertently acquired" through a request for medical certification or documentation required by the Family Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA), so long as the employer notifies the employee and health care provider that they should not provide genetic information when providing the FMLA or ADA documents. Such notice must also be given to a health care provider performing an employment-related medical examination at the employer's request. Employers will also not be liable under GINA where genetic information is disclosed in a casual "water-cooler" conversation or for the purposes of a voluntary wellness program. Where an employer does acquire genetic information, it must be kept in a confidential file separate from the employee's personnel file. To protect themselves from liability under GINA, employers should implement a practice of notifying employees and medical providers that genetic information must not be provided when they supply FMLA or ADA medical documentation. Furthermore, if employers do receive genetic information, employment decisions should not be based upon it, and the information should be kept confidential.

For the full text of regulations, please see: http://edocket.access.gpo.gov/2010/pdf/2010-28011.pdf