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Employment Practices Alert - August 2010 Edition

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"Palpable Tension" Does Not Support Retaliation Claim

A human resources representative filed a charge of discrimination against her employer with the Equal Employment Opportunity Commission (EEOC) alleging that she did not receive a promotion because of her race. More than a year after her charge was filed, the employee received a written warning for violating a workplace rule. She eventually sued her employer alleging discrimination based on her failure to be promoted, and retaliation based on the written warning. The district court held that the failure to promote claim was untimely, and that the receipt of the written warning was insufficient to support a retaliation claim. On appeal, the employee acknowledged that the written warning alone was insufficient to support her retaliation claim, but argued that there was "a palpable tension" at the time she received the warning because of her pending EEOC charge, which heightened the impact of the written warning. The U.S. Court of Appeals for the Seventh Circuit rejected this argument, holding that an employee's subjective opinion regarding tension in the workplace cannot turn an otherwise benign event into an actionable claim for retaliation. While it is important to use caution when disciplining an employee who has raised a complaint of discrimination, written warnings and negative performance evaluations are generally insufficient to support a claim of discrimination or retaliation.

Jones v. Res-Care, Inc., No. 09-3076 (7th Cir. July 16, 2010)

Workers' Compensation Claim Does Not Insulate Employee From Discipline for Faking Illness

A baggage handler working for a major U.S. airline injured his finger while on duty. The employee reported his injury to the airline and its workers' compensation administrator. A doctor limited the employee to light duty work with medical restrictions. The following week, the employee called in sick for three consecutive days, initially indicating that he had the flu, but later claiming that his sick leave was a result of his injured finger. The airline discovered that the employee had not followed doctor's orders while on sick leave and fired him, claiming that he had violated the airline's sick leave policy by failing to follow medical restrictions and that he had provided conflicting reasons for his absence. The employee sued, alleging that he had been fired in retaliation for reporting his injury and invoking his workers' compensation rights under Illinois law. A trial court granted

summary judgment to the airline, and the U.S. Court of Appeals for the Seventh Circuit affirmed. The court held that no reasonable jury could find that the airline fired the employee because the airline's claims administrator had opened a file on the injury, rather than because it believed the employee had lied about being sick and disobeyed a doctor's orders. The Seventh Circuit also clarified that federal courts should use the stricter Illinois causation standard when faced with state retaliatory discharge claims, not the more plaintiff-friendly McDonnell Douglas burden-shifting analysis applied in retaliation cases implicating federal employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, as amended. Although employers must be careful not to retaliate against employees who take protected action, employees cannot insulate themselves from discipline merely by initiating a claim or complaint.

Gacek v. Am. Airlines Inc., No. 09-3131 (7th Cir. July 15, 2010)

New Hotel and Restaurant Opens Its Doors to Unfair Labor Practices

A Chicago hotel and restaurant entered a neutrality agreement with a local union before opening its doors for business in March 2008. On December 3, 2008, the union was recognized as the collective bargaining representative of the 208 full-time and part-time service employees at the hotel and restaurant. Contract negotiations began on January 26, 2009. On December 10, 2008, the employer posted an unsolicited notice to employees informing them of their right to file a decertification petition within 45 days of recognition. An administrative law judge found that the notice violated the National Labor Relations Act's prohibition against interference with employees' right to self-organization because it contained a misstatement of the law. The notice could have been construed to require a 45-day waiting period before the commencement of contract negotiations with a newly selected bargaining representative in contradiction to federal law, which dictates that an employer's voluntary recognition of a labor organization does not bar a decertification petitioner or a rival union petition that is filed within 45 days of the notice of recognition. While employers may communicate truthful statements of law and fact to employees during the recognition process, they must exercise extreme caution in doing so and should develop a plan of communication with the assistance of legal counsel.

Chicago Hotel Master Lessee LLC, No. 13-CA 45089, (NLRB ALJ June 29, 2010)

Fired Human Resources Director Loses ERISA Battle But May Yet Win the War

A human resources director complained to others in management that her company was engaging in numerous Employee Retirement Income Security Act (ERISA) violations, such as allegedly administering the group health plan on a discriminatory basis, misrepresenting to some employees the cost of group health coverage in an effort to dissuade them from opting into benefits, and enrolling noncitizens in its ERISA plans by providing false social security numbers and other fraudulent information to insurance carriers. The human resources director was terminated weeks later. She sued the company, claiming that she was terminated in violation of the anti-retaliation provision of Section 510 of ERISA. The U.S. Court of Appeals for the Third Circuit rejected her claim, holding that the anti-retaliation provision only applies when the complaining employee complains in the context

of an "inquiry or proceeding," and that the phrase "inquiry or proceeding" is limited to formal actions, not unsolicited communications to management made in the course of one's employment. As a result, the employee was not entitled to reinstatement or other relief under ERISA. This decision reflects a split in the federal courts of appeal on whether the anti-retaliation provision of Section 510 of ERISA encompasses unsolicited internal complaints. The Third Circuit's opinion is in agreement with opinions from the Second and Fourth Circuits. In contrast, the Fifth and Ninth Circuits have held that unsolicited complaints to management about the violations of ERISA are protected by ERISA. Of course, complaints about ERISA violations, whether solicited or unsolicited, should be carefully reviewed and referred to legal counsel where appropriate. Significantly, although in the Second, Third and Fourth Circuits there is no remedy under federal law, plaintiffs in those circuits are free to pursue state law claims for wrongful discharge, under which a plaintiff may be able to recover front pay and back pay in a state court cause of action.

Edwards v. A.H. Cornell & Son, Inc., No. 09-3198 (3d Cir. June 24, 2010)

Timing Alone Sufficient to Keep Retaliation Claim Alive

A chief financial officer (CFO) made a decision to fire the employer's controller based on her job performance. The employer had fired its two previous controllers for failing to meet his standards. The CFO actively sought a replacement controller before firing the employee. When the employee discovered the employer's plan to replace her, she wrote a letter to the company stating that she believed that she was being fired based on her national origin. The employer fired the employee immediately after it received the letter. The employee sued the employer for discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, but a district court granted summary judgment for the employer on both claims. The U.S. Court of Appeals for the Eleventh Circuit affirmed summary judgment on the discrimination claim, stating that while the CFO's standards may have been unobtainable, "she was free to set unreasonable or even impossible standards, as long as she did not apply them in a discriminatory manner." However, the court found that the employer was not entitled to summary judgment on the retaliation claim. While acknowledging that the letter was not the reason the employer was planning on firing the employee, the court stated that the letter was the reason for the timing of the firing, and that the employer's argument that it feared retaliation from the employee was not sufficiently supported for a finding of summary judgment. The court found that while a legitimate fear of retaliation from an employee could entitle an employer to take "preemptive action," they found the facts in this case were not sufficient to warrant summary judgment. The court also provided employers with advice, stating that if the employer would have fired the employee as soon as the decision to let her go was made, the employer would have easily won. While employers may decide to find a replacement before firing an employee in order minimize interruptions, the decision to retain an employee who the employer has decided to fire can be potentially harmful if that employee makes a claim of retaliation.

Alvarez v. Royal Atlantic Developers, Inc., No. 08-15358 (11th Cir. July 2, 2010)

Search of Physicians' Lockers Deemed Not a Violation of Due Process

Shortly after terminating a contract with a physician and his group, a Wyoming medical center noticed that instruments were missing from its surgical center. Calls to the physician's group were unreturned. The medical center's security personnel subsequently opened and searched a locker space belonging to the physician's group, but no instruments were found. The physicians then resigned their privileges at the medical center and sued the medical center, claiming that they were denied their property interest without due process of law, and that they were constructively discharged. The U.S. Court of Appeals for the Tenth Circuit affirmed a grant of summary judgment to the medical center, holding that the search of the lockers was reasonable under the circumstances, and not a violation of plaintiffs' due process rights. The fact that inventory was missing, and that the medical center had video surveillance tape showing the physician and his group leaving the medical center with certain unspecified equipment, gave the medical center reasonable grounds to perform a search, especially given the poor relationship between the parties. The Tenth Circuit further held that the work environment was not intolerable to the employees, but rather mutually intolerable due to the actions of both parties, and that the physician had options other than resignation, including continuing to work at the medical center. Although employers generally have the right to search their premises, litigation may ensue where such searches are viewed as retaliatory or intended to intimidate an employee.

Narotzky v. Natrona County Mem'l Hosp. Bd. of Trs., No. 09-8053 (10th Cir. June 23, 2010)

Reassignment Is Not a "Reasonable Accommodation" When Position Is Not Vacant

An African American female employee who was ultimately terminated from her position as legal secretary after a permanent disability rendered her unable to perform the essential tasks required for the job, sued her employer. She alleged that her termination violated Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act (ADA), Section 1981, and the District of Columbia Human Rights Act. The crux of the employee's case was that her employer failed to assign her to another position that she was able to perform, which the firm was holding open for a Caucasian employee who was on medical leave. The employee alleged that the firm wrongfully did not give her the position because the Caucasian employee had no legal right to the position and therefore the stated reason given by her employer was mere pretext. The district court granted summary judgment to the employer on all claims. The U.S. Court of Appeals for the District of Columbia Circuit affirmed summary judgment because (1) the firm gave a legitimate, nondiscriminatory reason for both the refusal to assign the new position (the position was occupied) and the termination (the employee could no longer perform her job because of a permanent medical condition), that the employee could not dispute as pretext; and (2) reassignment is not a "reasonable accommodation" when the position is not vacant. Employers should be aware that they have the right to terminate an employee if he or she is no longer able to perform the job because of a permanent medical condition, and do not have to offer to reassign a disabled employee who is no longer able to perform her job to a position that is not available.

McFadden v. Ballard Spahr Andrews & Ingersoll, No. 08-7140 (D.C. Cir. June 29, 2010)

The Business Judgment Rule Cannot Be Used to Escape Contractual Obligations

An airplane engine manufacturer announced plans to close two facilities and move the work performed there outside the state. It was prevented from doing so, however, after a district court ruled that the company had not used "every reasonable effort" to preserve bargaining unit work, as required by the operating collective bargaining agreement. The U.S. Court of Appeals for the Second Circuit affirmed because the company was unwilling to consider alternative plans that would generate recurring long-term savings, insisted on measuring savings under only one metric for doing so, and did not assign "extra value" to alternative plans that would keep the facilities in operation. The company had also suspended negotiations with state officials who had offered it $100 million in tax credits, training assistance and other benefits to help save jobs. The company argued that these decisions were products of its business judgment and that the court should refrain from interfering with corporate affairs. The court held that the company had exercised its business judgment to limit its discretionary business authority to the terms of the collective bargaining agreement, which were violated. Employers must carefully evaluate collective bargaining agreement provisions that may limit their ability to make business decisions before engaging in conduct that will impact mandatory subjects of bargaining.

Int'l Ass'n. of Machinists v. United Techs. Corp., No. 10-0702-cv, (2d Cir. July 8, 2010)

DOL Backs Pay for Changing Protective Gear

The U.S. Department of Labor Wage and Hour Division (WHD) recently issued a new interpretation of the provisions in the Fair Labor Standards Act (FLSA) that address time spent changing clothes at the beginning or end of the workday. The FLSA permits an employer to exclude from compensable hours an employee's time spent changing clothes or washing at the beginning or end of a workday if the time is excluded by "the express terms of or by custom or practice under a bona fide collective-bargaining agreement." The WHD's new interpretation provides that this provision of the FLSA does not extend to protective equipment worn by employees, thus reversing prior interpretations issued during the President George W. Bush administration to the contrary. The WHD also found that "clothes changing" covered by the FLSA provision may be a principal activity marking the start of a workday, triggering the obligation of an employer to pay an employee for subsequent activities, including walking and waiting time.

Disadvantaged Business Rules Apply to Entities Receiving Illinois State Funds

On July 16, 2010, Illinois Governor Pat Quinn signed legislation that will require entities receiving state support for capital construction projects to comply with Illinois' equal employment and business enterprise rules applicable to minorities, women and persons with disabilities. Under the legislation, public or private entities receiving state grants or loans of more than $250,000 will have to certify that they are in compliance with the Business Enterprise for Minorities, Females, and Persons with Disabilities Act, also known as the Business Enterprise Program (BEP), and the equal employment practices requirements of the Illinois Human Rights Act. The legislation requires that recipients of state funds provide written certification and a BEP plan prior to executing a state loan or grant. The BEP plan is to detail which diverse businesses the grant or loan recipient plans to utilize with the state funds. The

diverse businesses must be at least 51 percent owned and controlled by minorities, women or persons with disabilities and must be approved before any grant or loan funds are made available to the recipient.

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