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“Employee Briefs”
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Strike = U. C.

We usually do not comment on decisions of state courts, but this one is exceptional and, from an employer's point of view, alarming. The New Jersey Supreme Court in Lourdes Medical Center v Board of Review held that 240 nurses who struck a hospital were nonetheless entitled to unemployment compensation for the entire duration of the strike. The court held that there was no “stoppage of work” because the hospital continued to operate during the strike. New Jersey law defines “stoppage of work” as happening when an employer produces not more than 80% of its normal goods and services. Because this hospital continued to operate during a strike at greater than 80% capacity in order to serve patients in its community of Burlington County, those very same tax payers who were served during the strike wound up paying the striking nurses unemployment benefits for striking.

Settlements and Awards

The EEOC settled a sexual harassment and retaliation lawsuit against Hospitality USA Inv. Group, Inc. for \$115,000. The six plaintiffs alleged that they were subjected to physical abuse and sexual harassment.

A jury in Tobin v Liberty Mutual Insurance Co awarded \$500,000 for emotional distress based on the employer's refusal to accommodate an employee's request for an accommodation for her bipolar disorder. The First Circuit upheld the award based on their conclusion that the request to accommodate was denied not because (a) the employee, a salesman, was unable to perform the job he requested to be transferred to; (b) the job was not available; (c) the transfer would have done harm to the employer; or (d) the employee was not competent to do the requested job, but because the employer thought the employee was “undeserving.”

A jury awarded twenty-three Akron, Ohio firefighters \$1.9 million based on their conclusion that the test required by the department to qualify for promotion was biased against (a) whites for the job of captain, (b) blacks for the job of lieutenant and (c) applicants who were over the age of 40.

Merrill Lynch & Co., Inc. agreed to pay \$1.5 million to settle an EEOC lawsuit charging that an Iranian Muslim employee was fired because of his religion and national origin. The EEOC charged that the employee was subjected to animus to his national origin and religion. The employer refused to promote the employee and then terminated him. His supervisor told the employee “You are from a country that has a high risk factor and is a threat.”

In a case of “turnabout is fair play,” the EEOC was ordered by the Fifth Circuit to pay \$225,000 in attorney's fees paid by the defendant company because the court concluded that the EEOC knew after the complainant's deposition that its action had no merit.

COBRA

The American Recovery and Reinvestment Act of 2009 (ARRA) provides for premium reductions and additional election opportunities for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA. The stimulus law requires that an employer subsidize premiums for involuntarily terminated employees who are “assistance eligible.” The assistance

eligible employee will be required to pay 35% of the COBRA premium. The remaining 65% of the COBRA premium will be reimbursed to the employer in the form of a payroll tax credit in the case of a self funded plan or to a multiemployer plan if the employee is covered by that type of plan. An "assistance eligible individual" is an employee who is eligible for COBRA benefits between September 1, 2008 and December 1, 2009. The full subsidy is available for an individual with a modified gross income of up to \$125,000 per year (\$250,000 for joint filers) and on a reduced amount for a modified gross income of between \$125,000 and \$145,000 (\$250,000 and \$290,000 for joint filers). The subsidy lasts for a maximum period of nine months, but not beyond the end of the maximum COBRA benefit period. Employers will need to notify all individuals who had a COBRA qualifying event on or after September 1, 2008 of the change in the law. The notice will advise the employee that (s)he has a 60 day special election period within which to elect coverage under the reduced rates. This election can be chosen by eligible employees currently receiving COBRA coverage as well as employees who previously declined COBRA coverage or discontinued it.

FMLA

The Second Circuit held in Roberts v The Health Association that an employee who takes FMLA leave and who is unable to return to work at the end of the maximum 12 week FMLA period within 12 months is not entitled to be restored to the job (s)he held at the commencement of the leave. In this case, an employee took FMLA leave and after ten weeks the employee provided to the employer a note from his doctor opining that the employee could not medically return to work until a date well beyond the end of the 12 week period. Upon receipt of the doctor's note, the employer terminated the employee and paid the employee two weeks pay, thereby paying the employee for 12 weeks of FMLA leave. The employee sued the employer claiming that the employer violated the ADA and was guilty of retaliation. The court rejected both claims. The court held that the employee could not show a connection between the decision to terminate and the FMLA request and could therefore not prove retaliation. The court also concluded that to show that the employer violated the ADA the employee would have to show that the employer believed the employee was suffering from a condition that prevented him from working in a broad range of jobs, not just the job he previously held.

The Federal District Court in the Northern District of Illinois in Reynolds v Inter-Indus. Conference on Auto Repairs held that although the FMLA statute defines an eligible employee as one who has been employed for at least 12 months and has worked 1,250 hours, an employee was an eligible employee even though he had not been employed for 12 months who after being employed for 10 months requested FMLA leave to start after he had completed his 12 months of employment. The employee was terminated just after he completed 12 months of employment, but before FMLA leave commenced. This decision means, if other courts follow suit, that an employer cannot terminate an "ineligible" employee for requesting future FMLA leave for which that employee will be entitled at the time his FMLA leave would begin.

WARN

The Tenth Circuit held in Gross v Hale-Helsell Co that an employer did not have to pay 200 employees for a sixty day period after the closing of a plant because of the exception to the sixty day notice requirement in the WARN Act referred to as "unforeseeable business circumstances." This provision specifies that if the mass layoff or plant closing is caused by business circumstances that were not reasonably foreseeable at the time, no notice need be given. In this case, a wholesale grocery warehouse had a thirty year relationship with a major customer which comprised forty percent of the orders processed by the warehouse. When the warehouse received a notice from that customer advising that it would not continue to be a customer, the warehouse laid off 200 employees with essentially no notice. A number of states have their own plant closure and/or mass layoff laws that are more restrictive from the point of view of the employers in those states. Employers should check on their state and city layoff notice laws, if any, as well as the WARN statute prior to laying off a number of employees.

Perceived Disability

The Eighth Circuit in Kozisek v County of Seward Nebraska upheld judgment in favor of an employer who terminated an employee because the employee refused to enter an in-patient alcohol rehabilitation treatment program recommended by a psychologist. The employee filed suit against the employer contending that the ADA provides that since he was “regarded” as disabled by the employer the termination was in violation of the ADA. The court disagreed and found that because the mandatory in-patient treatment was based on the recommendation of a qualified medical provider without expressing an opinion about the ability or inability of the employee to perform his job at the end of the treatment, it did not establish the perception of disability required by the ADA.

Class Action

The Ninth Circuit will review a Federal District Court’s certification of a class of 1.5 million current and former female employees of Wal-Mart who allege that they were under paid and/or denied promotions on the basis of their gender. If the Ninth Circuit agrees with the decision of the District Court, this class will be the largest number of employees in a sexual discrimination lawsuit ever and could result in damages in the billions of dollars. Wal-Mart unsuccessfully argued at the District Court level that the class should not be certified because of (a) due process difficulties in managing a trial with such a large number of plaintiffs, (b) the differences in the amount sought by each class member, (c) the differences in the type of relief sought, and (d) the hundreds of geographic locations.

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