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LABOR UPDATE — FOURTH QUARTER 2008

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

EMPLOYEE RETALIATION CLAIMS EXPANDED

A recent decision by the U.S. Supreme Court has made it easier for employees to sue their employers for retaliation. The Court ruled that certain retaliation claims can be brought under a Reconstruction-era civil rights law that prohibits race discrimination, even though that law does not mention, let alone expressly outlaw, retaliation claims.

Hedrick Humphries, a former assistant manager at Cracker Barrel, sued that restaurant chain alleging that it fired him because of his race and complaints of racial discrimination. Humphries brought his claims against Cracker Barrel under both Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866. Section 1981, enacted in conjunction with the abolition of slavery after the Civil War, prohibits racial discrimination in connection with the making of contracts, including both oral and written contracts of employment. As mentioned, however, it does not specifically cite retaliation as a cause of action.

In addition, because the enactment of Section 1981 significantly predated creation of the Equal Employment Opportunity Commission, that law does not require that a plaintiff file a charge with that agency, or sue within 90 days of receiving a “right to sue” letter from the EEOC. Because Humphries’ suit was untimely by this latter standard, a district court dismissed his claims for retaliation on that ground.

Humphries appealed this dismissal, and although the federal appeals court in Chicago affirmed the dismissal of Humphries’ Title VII claims, it reversed with respect to his retaliation claim under Section 1981. On review, the Supreme Court upheld this result, and allowed Humphries to proceed on both his discrimination and retaliation claims under Section 1981. The Court reasoned that its own precedent and subsequent enactments by Congress compelled that Section 1981 be interpreted broadly enough to prohibit retaliation.

This ruling is significant, because not only does Section 1981 allow employees a longer time in which to sue for retaliation compared to Title VII, it also contains no limits on damages. In addition, and as mentioned, employees can sue for retaliation under Section 1981 immediately, without first going to the EEOC. Consequently, this decision has added a potent weapon to an employee-claimant’s arsenal. *CBOCS West, Inc. v. Humphries*, 533 U.S. ___, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008).

“I DON’T DO COFFEE” WAS NOT THE RIGHT ANSWER

Tamara Klopfenstein worked as a receptionist at National Sales & Supply in Eastern Pennsylvania. Receptionists at that company were regularly asked by supervisors to bring them coffee, and the company claimed this was mentioned to Ms. Klopfenstein in her pre-hire interview.

At first, Klopfenstein would bring coffee to supervisors when asked, but later she refused. A terse e-mail from a supervisor reminded her of the company’s expectation concluding, “Don’t make an easy task a big deal.” Ms. Klopfenstein wrote back that she had no problem getting coffee or water for visitors, but that she hadn’t been told at the time of her hire that getting coffee for supervisors was a job duty, and that she wouldn’t have taken the job if she’d known that!

With the controversy now percolating, management replied that it was too bad Klopfenstein felt that way, said she should pack up her things, and told her she would receive her final check shortly. After Klopfenstein asked whether she would be permitted to work the remainder of the day, the company told her that she would be paid for the day regardless of whether she chose to leave immediately or at day’s end.

At *this* point, Ms. Klopfenstein first threatened to file a complaint, which management understood to mean an EEOC discrimination charge. Her supervisor reacted by telling Klopfenstein to just pack up and leave immediately, although she was paid through the end of the day.

Bringing her case to federal court in Pennsylvania, Klopfenstein argued that she was the victim of unlawful retaliation in that she was fired for threatening an EEOC charge. She also claimed unlawful harassment and gender discrimination.

The court found that being required to bring coffee to supervisors was not actionable harassment. While certainly questionable in 2008, it was not sufficiently offensive and humiliating to rise to the level of a hostile and abusive environment prohibited by law

In dismissing the gender discrimination charge, the court found there was no basis for that claim, since the only persons to work as receptionists at the company had been female, and thus there was no showing that males were treated differently. There also had been no showing that males had been barred from becoming receptionists.

Finally, the retaliation claim was rejected on the basis that Klopfenstein had not suffered a materially adverse action as a result of her threat to file an EEOC charge. The court observed that Klopfenstein had *already been fired* a few minutes *before* she threatened legal action. Therefore, the employer’s action of telling her to go right home after she made that statement would not have dissuaded her from pursuing a charge.

Perhaps if the company had provided Ms. Klopfenstein with a job description listing the various duties of receptionist—including fetching coffee—the expense and upheaval of this lawsuit could have been avoided. *Klopfenstein v. National Sales and Supply, LLC*, No. 07-4004, 103 Fair Empl. Prac. Cas. (BNA) 1081; 91 Empl. Prac. Dec. (CCH) P43,218 (E.D. Pa. June 5, 2008).

COURT: DISCRIMINATORY TREATMENT FOR INFERTILITY TREATMENTS PROHIBITED

Cheryl Hall was a sales secretary for Nalco Company. During her employment, Hall requested and received a leave of absence to undergo in vitro fertilization (“IVF”) treatment for infertility. After returning to work from this leave, Hall told Nalco she intended to take a second leave of absence for additional treatments, as her first round of IVF treatment proved unsuccessful. Shortly thereafter, Hall lost her job as part of a company “reorganization.”

When informing Hall of her termination, Hall’s supervisor explained that the action “was in [Hall’s] best interest due to her health condition.” Prior to that conversation, Hall’s supervisor had discussed his concern about Hall’s infertility-related absences with the company’s employee-relations manager.

Hall sued Nalco for discrimination under the Pregnancy Discrimination Act (“PDA”), which makes discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions” a specific form of sex discrimination. However, the district court awarded judgment to Nalco on grounds that infertile women are not protected by the PDA. The district court reasoned that because infertility is a gender neutral condition that afflicts both men and women, alleged discrimination because of infertility is not unlawful discrimination “because of sex.”

Hall appealed, and the federal appeals court in Chicago reversed Nalco’s judgment and reinstated Hall’s claim. The appeals court ruled that it was error for the district court to have evaluated Hall’s status under the PDA based on her infertility condition alone. Given the nature of the IVF treatments that Hall needed time off to receive—treatments that, like pregnancy or childbirth itself, can be had only by women—the court reasoned that Hall was not terminated because of the gender-neutral condition of infertility, but rather for the gender-specific condition of her child-bearing capacity.

This decision is one of the first cases to consider the Pregnancy Discrimination Act in connection with infertility treatments. It should prompt employers to be cautious when considering discipline or other adverse action against female employees who are absent from work for infertility treatment. *Hall v. Nalco Co.*, 534 F. 3d 644 (7th Cir. 2008).

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COURT FINDS EMPLOYER JUSTIFIED IN FIRING EMPLOYEE FOR ABUSING FMLA

Diana Vail worked the night shift at Raybestos’ factory in Crawfordsville, Indiana. Ms. Vail suffered from migraines that caused her to occasionally miss work. Vail requested and Raybestos granted her intermittent medical leave under the Family Medical Leave Act (FMLA), so that Vail could receive medical treatment and recuperate when her headaches occurred.

Because Raybestos knew that Vail worked part-time for her husband’s lawn mowing business, the company became suspicious of the frequency and timing of some of her intermittent leave requests. The company engaged a local policeman to monitor Vail’s activities while she was off duty.

One day Vail’s doctor prescribed a new medication and instructed her not to work for twenty-four hours after taking it. Vail called in sick requesting an intermittent FMLA leave day, which was

granted. The next day, the policeman saw Vail leave her house and go to a cemetery where she mowed the lawn. That afternoon, Vail called in again, asking to take the day off because of a migraine.

Raybestos fired Vail, and she sued in federal court, alleging a violation of the FMLA and a breach of her union contract. The federal appeals court in Chicago brushed aside the union contract based claim because Vail had failed to file a grievance under that contract.

Focusing on the FMLA claim, the court ruled that Raybestos had not interfered with Vail's rights under that law. The court found that an employer can defeat an interference claim by showing that the employee did not take leave "for the intended purpose." The appeals court held that an employer does not violate the FMLA if it finds, based on "honest suspicion," that the employee was abusing her leave. *Vail v. Raybestos Products Company* 533 F.3d 904 (7th Cir. 2008).

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BITS & PIECES

An employer who had video tape evidence of an employee stealing a television from the company lost its case before the Illinois Department of Employment Security (IDES) and an Illinois appellate court agreed. The fatal flaw in the employer's case was that it failed to produce the video tape evidence at the hearing, and instead presented the testimony of a supervisor who *saw* the tape and described its contents. Given that the IDES hearing was a *telephonic* one, it would have been impossible to have played the tape for the witness to describe the scene, but nevertheless it was found that the employer failed to present the "best evidence" for the record and the employee ended up with both the television and unemployment pay. *Village Discount Outlet v. Illinois Department of Employment Security*, (Appellate Court of Illinois, First Dist., Fourth Div. No 1-07-1337, July 31, 2008).

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Whether to classify a worker as an employee or an independent contractor can be tricky, and cause an employer grief because various state and federal agencies regulating employment have different standards for such determination. A federal court in Connecticut is now being asked to determine whether three professional wrestlers who perform for World Wrestling Entertainment, Inc. are employees or independent contractors. The three plaintiffs claim that the WWE closely controls the manner and means of their activities, even extending to approval of their hairstyles! The court will now grapple with the facts and the law to determine whether "Raven," "Kanyon" and "Above Average" should be viewed as employees of the WWE.

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QUOTABLE

*'The horror of that moment,' the King went on, 'I shall never forget!'
'You will, though,' the Queen said, 'if you don't make a memorandum of it.'*

Lewis Carroll, from *Alice in Wonderland*