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EMPLOYMENT LAW ALERT

Winter 2014 Issue

JOB TRANSFER PREVIOUSLY SOUGHT BY EMPLOYEE MAY STILL BE BASIS FOR DISCRIMINATORY ACTION

The Sixth Circuit Court of Appeals recently held that an involuntary job transfer to a new position—even one which the claimant employee had previously requested—may constitute an adverse employment action. Reversing a summary judgment in the employer's favor, the Circuit Court in Deleon v. Kalamazoo County Road Commission, 2014 WL 114016 (6th Cir. 1/14/14), found sufficient evidence that the employee's new work environment was "objectively intolerable to a reasonable person" to proceed to trial.

The employee in Deleon worked for the county road commission as an Area Superintendent from 1995 to 2009 and generally received positive reviews. In 2008, he applied for a different position as Equipment and Facilities Superintendent, which he viewed as having better potential for career advancement. He was initially declined for this role and admitted his computer skills were insufficient for the job. After the first two selected candidates left or declined the job, Deleon was involuntarily transferred to this position in 2009 as part of a larger reorganization. He then raised numerous objections to the hazards posed by his new position, claimed he developed health problems due to exposure to fumes at his new workplace, and demanded a $10,000 salary increase, which was denied. Deleon's first evaluation in the new position indicated acceptable performance in most critical areas, but not sufficiently above minimum satisfactory level in all areas. The employee asked why he had been involuntarily moved from a position where he was performing well to one more hazardous in nature, and claimed that the transfer was a deliberate attempt to set him up to fail. After a disagreement with his supervisor and a work-related mental breakdown, Deleon was terminated due to exhausting all available leave before being cleared to return to work.

Deleon raised various discrimination claims, all of which required proof of an adverse employment action. The district court sided with the employer, relying on the proposition that reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions. However, the Sixth Circuit found a reassignment without salary or work hour changes—such as the transfer here—may be an adverse employment action if it constitutes a "constructive discharge," which requires working conditions "must be *objectively intolerable* to a reasonable person." Further still, the Sixth Circuit found a transfer not rising to a constructive discharge might still be actionable if employee can at least show a quantitative or qualitative change in the terms of the employment conditions. In Deleon, the Court found evidence of an objectively intolerable work environment: Deleon's daily exposure to toxic and hazardous diesel fumes, having to wipe soot from his office weekly, and contracting respiratory illness and symptoms.

Another question posed was whether a transfer action can be truly "adverse" if the employee previously requested it. Other circuits have held that a transfer request does not categorically preclude an adverse employment action. The Sixth Circuit focused on whether the conditions of the transfer would have been objectively intolerable to a reasonable person, not whether the transfer was requested or whether the employee must express dissatisfaction with the transfer. Here, the employee applied for the position with the intent to request a substantial raise, which was never provided, and asked supervisors why he was changed from a position in which he excelled and transferred to a more hazardous job. The majority found that these circumstances raised an issue of material fact making summary judgment improper.

PRACTICE POINTER: In evaluating an involuntary job transfer, you should review whether a reasonable person would objectively find the transfer and new position intolerable. The analysis may not end simply because the employee previously asked for a job transfer or sought the new position.

EMPLOYMENT LAW ALERT

THE EMPLOYEE POLYGRAPH PROTECTION ACT AND EMPLOYERS' LIABILITY

The Sixth Circuit Court of Appeals recently addressed standards for an employer's liability under the Employee Polygraph Protection Act ("EPPA") (29 U.S.C. § 2001 et seq.). The EPPA, which applies to most private employers with limited exceptions, generally prohibits employers from: requiring an employee or job applicant to take a polygraph test, using or inquiring about polygraph test results, disclosing information obtained during polygraph tests, or taking or threatening action against an employee or discriminating against an applicant over refusal of polygraph tests or test results. EPPA violations carry a civil penalty up to $10,000 plus employer liability for other legal or equitable relief, discretionary costs, and attorney fees.

In Bass v. Wendy's of Downtown, 2013 WL 2097359 (6th Cir. 5/16/13), Bass submitted to a polygraph test over a missing cash deposit at Wendy's. Although he failed the test, he continued working for Wendy's. Later Wendy's did not consider Bass for a manager's position. In its response to Bass' age discrimination and retaliation claim, Wendy's noted he was passed over in part because of his failed polygraph test. Bass filed suit on an EPPA violation because Wendy's disclosed the polygraph test results and discriminated against him based on the failed polygraph test. Wendy's contended that Bass was not promoted due to many other factors aside from the failed test.

The Sixth Circuit found the mixed motive framework of Price Waterhouse v. Hopkins to be the proper analysis for EPPA discrimination claims. Under this test, the claimant must initially establish a prima facie case with proof that the discriminatory factor (here, the polygraph test) was a motivating factor in the adverse employment action. The employer then must prove that it would have made the decision in the absence of the discriminatory motivation. The Bass Court affirmed summary judgment for Wendy's because the other factors supporting Wendy's decision were "overwhelming," including Bass' 22 corrective actions during his employment. The court concluded that no reasonable jury could find that Wendy's would have promoted Bass even if he had passed the polygraph test.

PRACTICE POINTER: Be careful when using information regarding employee's polygraph tests and test results, properly document other performance issues to support any disciplinary action, and respond carefully and cautiously to discrimination allegations.

UPCOMING EMPLOYMENT LAW SEMINARS

We are presenting a Spring Employment Law seminar in conjunction with the Volunteer SHRM chapter and Executive Impact on March 18, 2014, at the Lannom Center in Dyersburg, TN. Topics for the program include:

- The Affordable Care Act
- Social media issues
- Unemployment hearings and appeals
- Managing disability issues under the ADA

For online registration and information, go to http://volunteer.shrm.org/events/2013/04/april-legal-seminar. We hope to see you in Dyersburg on March 18!

Also, save the date of May 14, 2014, for our Spring Employment Law seminar in Jackson, TN, presented in partnership with the West Tennessee SHRM chapter. More details will be available soon.

We will soon be using only an e-mail system for our employment law alerts and newsletters. Please contact Brittany Key (bkey@raineykizer.com) and we will gladly add you to our e-mail list.