ROBINSON & COLE LLP
Labor, Employment & Benefits

Public Employers Not Immune from Monetary Damage Awards for FMLA Violation

In Nevada Department of Human Resources v. Hibbs (5/27/03), the U.S. Supreme Court ruled that the states are not immune from monetary claims brought under the Family and Medical Leave Act. William Hibbs, an employee of the Nevada Department of Human Resources, received a full 12-week leave under the FMLA to care for his ailing wife. Three months after the expiration of the 12-week leave Hibbs had not returned to work. He was then terminated. Hibbs sued the state agency for violation of the anti-retaliation provision of the FMLA, seeking monetary damages. The Supreme Court found that the language of the FMLA, specifically providing for damages "against any employer (including a public agency)," was a valid abrogation of the sovereign immunity of the states. In reaching its decision, the Supreme Court examined past laws restricting women's access to the workplace and the disparity of gender-based leave policies granted by the states. The Court noted that, in providing gender-neutral leave policies, the FMLA targeted gender discrimination by challenging the stereotype that only women are responsible for family care-giving. The creation of an "across-the-board routine employment benefit for all eligible employees" ensures that family leave is not seen as a cost of having female employees.

It is important to note that the Supreme Court did not decide whether Hibbs was retaliated against by the Nevada Department of Human Resources. The Court only decided that his lawsuit, seeking monetary damages from the State of Nevada, should be allowed to proceed.

ERISA Does Not Require Plan Administrators to Give Special Deference to Treating Physicians

Kenneth Nord, an employee of Black & Decker, was diagnosed with mild degenerative disc disease and his physician recommended that he temporarily stop working. Nord applied for disability benefits under the Black & Decker Disability Plan. The preliminary recommendation on benefit claims had been delegated to Metropolitan Life Insurance Company, which denied Nord's initial claim. As part of the review process, Nord was seen by a neurologist engaged by the Plan. The neurologist agreed with the diagnosis but concluded that, with the help of pain medication, Nord did not need to stop working. After his claim was again rejected, Nord filed an action in U.S. District Court seeking the benefits. The trial court dismissed the lawsuit. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the dismissal and ordered the award of benefits to Nord. Citing the "treating physician rule," which affords great deference to the opinion of the claimant's own doctor, the Ninth Circuit found that, in rejecting the opinion of Nord's own physician, MetLife was required to come forward with specific reasons for its decision. The Plan then appealed.

In Black & Decker Disability Plan v. Nord (5/27/03) the U.S. Supreme Court reversed the decision of the Ninth Circuit, rejecting the applicability of the "treating physician rule" to ERISA plans. The rule, originally developed by appellate courts to review disability determinations under the Social Security Act, was later incorporated into regulations applicable to social security disability claims. Distinguishing the mandatory, nationwide Social Security disability program from the voluntary, employee benefit plans with their flexible criteria, the Supreme Court rejected importing a rule from the Social Security system into ERISA. The Court also noted that the Secretary of Labor had not endorsed the "treating physician rule" into the regulatory framework governing ERISA employee benefit plans. The Court cautioned that plan administrators could not arbitrarily refuse to credit a claimant's evidence, including that furnished by the treating physician. Courts also could not require plan administrators to give greater weight to the opinion of the claimant's own physician, nor impose a "burden of explanation" when a conflicting opinion is credited.

Failure to Mitigate Damages Reduces Award in Willful Age Discrimination Claim

Thomas West was 60 years old when he was discharged by Nabors Drilling USA and replaced by a 38-year old employee. He filed an age discrimination claim under the Age Discrimination in Employment Act. After a trial, a jury found that Nabors had willfully discriminated against West on account of his age and ordered an award of $115,000 in back pay, $115,000 in liquidated damages for a willful violation, over $67,000 in attorney's fees, more than $5,000 in costs, plus interest. Nabors appealed, claiming there was insufficient evidence to support the jury's finding of a willful violation since the conduct was not egregious. Nabors also claimed that West was not entitled to back pay or liquidated damages because he had not sought a comparable job at a comparable rate of pay.

In West v. Nabors Drilling USA, Inc. (5/20/03), the U.S. Court of Appeals for the Fifth Circuit upheld the finding of willful age discrimination, but reversed the award of back pay and liquidated damages based on West's failure to mitigate his damages. The Circuit Court noted that there was sufficient evidence of willful discrimination, which included the failure to follow the progressive disciplinary measures and the false testimony of West's direct supervisor about the reason and timing of the discharge as well as the timing of the selection of the younger replacement. A finding of willfulness under ADEA only requires that the conduct be intentional, not outrageous. But, to recover back pay, ADEA requires a plaintiff to use diligent efforts to find equivalent employment and "a plaintiff may not simply abandon his job search and continue to recover back pay." Because West stopped looking for a comparable job after getting a low-paying truck driver's job, he was not entitled to recover back pay. Upon a finding of willfulness, ADEA mandates liquidated damages in an amount equal to the back pay award. There being no back pay, the liquidated damage award was also reversed.

Disability Claim Fails when Applicant Cannot Rebut Requirement that Lifting 100 Pounds Is Job-Related

Joseph Fuzy applied for a job as a pipe fitter with S & B Constructors. He received an offer of employment, contingent on a satisfactory physical examination. Although Fuzy had a history of knee problems, he had never been placed on work-restriction. One of the tests within the medical examination required Fuzy to lift 100 pounds unassisted. This prerequisite was consistent with the requirements for a pipe fitter as listed in the U.S. Department of Labor's Dictionary of Occupational Titles. Unable to lift more than 92 pounds, Fuzy was not hired. He sued S & B, claiming that denial of his application due to his failure to meet the lifting requirement violated the Americans with Disabilities Act. The U.S. District Court dismissed the claim. In Fuzy v. S & B Engineers & Constructors, Ltd. (5/23/03) the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal. The appeals court ruled that, where Fuzy did not meet the lifting requirement, and where the requirement related to an essential function of the job, the ADA claim could not go forward unless Fuzy established that the requirement was not job-related. Since Fuzy presented no evidence to rebut the job-relatedness of the requirement, his claim was properly dismissed.

Circuit City's Arbitration Agreement Ruled Unenforceable ... Again

When applying for a job with Circuit City Stores, Catherine Ingle was required to sign an arbitration agreement. The agreement provided that all employment-related claims would be resolved through arbitration. A few years into her employment, Ingle filed a lawsuit in federal court charging Circuit City with sex and disability discrimination, sexual harassment and retaliation under both federal and state law. Pointing to the arbitration agreement, Circuit City demanded that Ingle be ordered to arbitrate her claims. Finding the arbitration agreement unconscionable under California contract law, the court denied Circuit City's request. On appeal, in Ingle v. Circuit City Stores, Inc. (5/13/03), the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the trial court. The appeals court found that Circuit City's arbitration agreement was oppressive in that the unequal bargaining power between the parties precluded the employee from negotiating the terms of the agreement. The arbitration agreement was also one-sided, requiring only the employee (not the company) to arbitrate the claims. In addition, provisions such as a shorter statute of limitations, unavailability of class-action claims, the payment of fees and cost-splitting by the employee, and the limitation of available remedies served to render the arbitration agreement unconscionable under California contract law.

Arbitration Agreement in Offer Letter and SEC Registration Form is Enforceable under California Law, but Employee is Exempt from Cost-Splitting Provisions

As a prerequisite to his job as director of investment bank CIBC World Markets, Michael McManus was required to sign two arbitration agreements. The first was contained in the offer letter, and the second was included in the Securities and Exchange Commission Form U-4, Uniform Application for Securities Industry Registration. About a year into his employment, McManus was discharged for off-duty conduct: he became intoxicated at a CIBC-arranged beach party and later got into a fight. After his termination, McManus sued CIBC. Given the two arbitration agreements executed by McManus, CIBC requested the court to order that the claims be arbitrated. McManus opposed arbitration, claiming the agreements were unenforceable as contracts of adhesion since they were presented on a "take it or leave it" basis. InMcManus v. CIBC World Markets Corporation (5/23/03) the California Court of Appeals ruled that the Federal Arbitration Act applied to the agreements between McManus and CIBC. Under the framework of the FAA, arbitration clauses in securities-broker employment agreements are not automatically unconscionable. The CIBC agreement was not one-sided (it provided that CIBC also submit any claims to arbitration), the agreement afforded McManus a choice in the selection of the arbitrator, gave him discovery procedures similar to those available in court, and provided for a written decision. The only factor deemed unlawful in the arbitration agreement was the requirement that McManus pay for the cost of the arbitration. That provision was deemed unenforceable, but severable, allowing for the remaining provisions to be enforced and the claim to proceed to arbitration.

NY Court Upholds Employees' Right to Tape Record Supervisors to Support Discrimination Claims

In Mena v. Key Food Stores Cooperative, Inc. a New York trial court ruled that employees may secretly tape record statements made by their supervisors and enter those recordings into evidence to prove sex and race discrimination claims. The employees contacted a lawyer who hired a private investigator to equip the employees and instruct them on how to tape record the statements. Key Foods and its supervisors requested that the court exclude the tapes from evidence. Noting that New York follows the rule that admissibility of evidence is not affected by the means through which it is obtained, the court found nothing improper about the recording and explained that the public's interest in eradicating discrimination outweighed Key Food's interest in excluding the recordings.

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