ROBINSON & COLE LLP
Labor, Employment & Benefits

Employer's Failure to Post EEOC Notices May Toll Complaint Filing Deadlines

Marcos Mercado and Suzanne Hebert-Jomp worked at the Ritz-Carlton San Juan Hotel, Spa and Casino. Mercado sued the Ritz-Carlton, alleging discrimination on the basis of national origin. Hebert also sued alleging sexual harassment, as well as gender and national origin discrimination. Both employees filed charges with the Equal Employment Opportunity Commission; however, the charges were filed late, outside of the 300-day deadline in Title VII. Without addressing the timeliness of the charges, the EEOC issued right-to-sue letters allowing the employees to bring their cases in court. The Ritz-Carlton asked the court to dismiss the claims based on their untimeliness at the EEOC. The employees countered that the Ritz-Carlton was barred from challenging the timeliness because the hotel failed to comply with EEOC regulations requiring employers to post notices that advise employees of their legal rights to file claims of employment discrimination. The employees asserted that the period for filing a claim did not begin to run until they received notice of their rights from their attorney. The trial court rejected the employees' arguments and dismissed the claims as untimely.

In Mercado v. The Ritz-Carlton San Juan Hotel (5/31/05), the U.S. Court of Appeals for the First Circuit disagreed and reinstated the claims. Although the appeals court noted that the time limitations in Title VII are important and courts should toll those time periods under very limited circumstances, the court determined that an employer's violation of the EEOC notice posting requirement may provide a basis for an extended filing period where the employee had no other actual or constructive knowledge of the EEOC's complaint procedures. The appeals court concluded that, because the employees had asserted that no informational notices were posted and that they had no knowledge of their legal rights until informed by their attorney, they were entitled to "factual development" to determine whether they possessed sufficient knowledge of the applicable filing deadlines to be held accountable for missing them.

FACT Act Regulation on Disposal of Consumer Information, including Some Personnel Records, Took Effect June 1

On June 1, 2005, the Federal Trade Commission's final rule regarding the disposal of consumer report information and records under the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act, went into effect. The rules apply to hard copies and electronic documents.

The rule requires that anyone who "maintains or otherwise possesses consumer information or any compilation of consumer information, derived from consumer reports for a business purpose properly disposed of any such information or compilation." "Consumer report" is defined to include a written, oral, or other communication of information about a person's credit, character, general reputation, personal characteristics, or a mode of living that was prepared or collected by a consumer reporting agency. In the employment context, a consumer report may include employee or applicant background checks, or other reports pertaining to workplace investigations, performed by third parties. Proper disposal, under the regulations, includes burning, pulverizing, or shredding papers so that the information cannot be read or reconstructed; destroying or erasing electronic files or media so that it cannot be read or reconstructed; or conducting due diligence and hiring a document disposal contractor to dispose of the information.

The FTC released guidelines to educate businesses about the new requirements at FTC Guidelines. The new regulation is available at Regulations.

Pregnant Employee Permitted to Pursue FMLA Claim Despite Being Ineligible for Leave

Lisa Beffert worked as a store room clerk at the Allentown State Hospital, operated by the Pennsylvania Department of Public Welfare. Several months into her employment, Beffert notified the hospital that she was pregnant and expected to deliver her baby sometime after her first service anniversary. Beffert claimed that immediately thereafter the hospital and her supervisor discriminated and retaliated against her by subjecting her to a pre-disciplinary conference, a written reprimand, a negative performance evaluation, and finally by terminating her only several weeks after receiving notice of her pregnancy. Beffert sued, asserting discrimination and retaliation in violation of the Family and Medical Leave Act. The hospital sought to dismiss the case based on the fact that Beffert had not been employed for 12 months, as required to be eligible for rights under the FMLA. Beffert countered that she would have been an eligible employee at the time of her anticipated delivery, but for the hospital's discriminatory conduct, and, thus, she should be protected.

In Beffert v. Pennsylvania Department of Public Welfare (4/18/05), the U.S. District Court for Pennsylvania allowed Beffert to proceed with her FMLA claim despite her ineligibility under the Act. Acknowledging that the issue was one of first impression, the court announced that "the statute necessarily must protect from retaliation those currently non-eligible employees who give such notice of leave to commence when they become eligible." To hold otherwise, the court reasoned, the advance notice requirement under the FMLA would become a trap for newer employees and would afford a significant exemption from liability for employers. Therefore, the court ruled that an employee is not barred from proceeding with a retaliation claim under the FMLA if he or she has been employed for less than 12 months, but requests leave to begin more than one year after employment has commenced.

EEOC Disclosure of Employer Trade Secrets during Litigation May Harm Employers, Says Court

The Venetian Casino Resort in Las Vegas, Nevada, conducted a mass hiring process and hired over 4,000 employees. Thereafter, several rejected applicants filed employment discrimination complaints with the EEOC alleging that Venetian discriminated based on the applicants' age, race, and color in violation of various federal antidiscrimination laws. In response, Venetian provided the EEOC with relevant information, which it deemed confidential and proprietary, in defense of the claim. The EEOC subpoenaed additional documents and Venetian petitioned to revoke or modify the subpoena based on confidentiality concerns. The EEOC refused to modify its subpoena and Venetian sued because, it argued, the EEOC disclosed trade secrets and other confidential information to the charging parties without first notifying the party who submitted the information, in violation of the Trade Secrets Act, the Administrative Procedure Act, and the Freedom of Information Act.

At trial, the EEOC provided inconsistent descriptions of its policy regarding the disclosure of confidential information, first providing an outdated version and then conceding that its practice was substantially different. The trial court ultimately rejected Venetian's request to restrict the disclosure, concluding that the issuance of an administrative subpoena did not constitute a "final agency action" as required for judicial review and, therefore, Venetian's request was premature. The court also concluded that Venetian failed to prove that it would be sufficiently and irreparably harmed by the disclosure to warrant injunctive relief. Venetian appealed.

In Venetian Casino Resort v. EEOC (5/27/05), the U.S. Court of Appeals for the District of Columbia Circuit concluded that the EEOC's inconsistent description of its own policy required further examination by a trial court. The appeals court noted that at trial the EEOC's attorney acknowledged that EEOC investigators could, as they saw fit, disclose documents designated as confidential to a third party in the course of an investigation, without providing notice to the submitting party. Noting that counsel's description of the policy was precisely the practice that Venetian opposed, the appeals court concluded that a trial court would need to determine exactly what the EEOC's policy was with respect to the disclosure of privileged information and whether the Venetian Casino Resort's trade secrets were compromised during its litigation.

Employee Must Show Irreparable Harm to Obtain USERRA, False Claims Act Injunction

Dr. Carlos Bedrossian worked at Northwestern University as a Medical School Professor and Director of the Hospital's cytopathology service. Bedrossian also served as a Colonel in the U.S. Airforce Reserve Medical Corps, spending about two weeks each year lecturing and one weekend per month providing medical services. The University provided him three to four weeks of paid military leave each year for his service. Bedrossian alleged that other physicians began harassing him about his military service. In addition, Bedrossian filed a claim against the hospital under the False Claims Act alleging fraudulent billing practices. Thereafter, Bedrossian received notice that his contract would be renewed for an additional year, but that no further renewal would ensue. Bedrossian sued over the non-renewal, alleging that the University was terminating him in violation of the Uniformed Services Employment and Reemployment Rights Act and the False Claims Act and seeking an injunction to prevent his termination. The trial court denied his request for an injunction, concluding that Bedrossian failed to demonstrate that he would be irreparably harmed without it. Bedrossian appealed, contending that neither USERRA nor the FCA require a showing of irreparable harm.

In Bedrossian v. Northwestern Memorial Hospital (5/31/05), the U.S. Court of Appeals for the Seventh Circuit agreed with the trial court, concluding that both USERRA and the FCA require an employee to show irreparable harm to obtain an injunction against his or her employer. The appeals court explained that the test for whether a court can issue an injunction without the traditional showing of irreparable harm required that a statute's language give rise to a "necessary and inescapable inference" that Congress intended for plaintiffs under that statute to obtain preliminary injunctive relief without such a showing. Reviewing the language of USERRA and the FCA, the appeals court concluded that neither law contained any inference that irreparable harm need not be shown. The appeals court also noted that lost income and damaged reputation were not sufficient to demonstrate irreparable harm, and, thus, Bedrossian was not entitled to an injunction barring his job termination.