To view this email as a web page, go here.

Labor, Employment & Benefits e-News

OCTOBER 30, 2006

In This Issue

New Supervisor's Higher Standards Are Not Evidence of FMLA Retaliation

Nancy Metzler worked as a database and systems analyst in the information technology department of the Federal Home Loan Bank of Topeka. The IT director informed Metzler of a department reorganization and that she would be transferred to a new group and placed under the supervision of Chris Miller. Metzler responded that she would rather be fired than work under Miller, a manager with whom she had developed "professional differences of opinion" about the manner in which Metzler performed her job. One day after the reorganization, Metzler began a medical leave due to work-related stress, depression, anxiety and related symptoms. Upon her return to work, Metzler began her new position under Miller's supervision. The day after her return, Metzler met with an outside consultant assisting in the transition and, according to Miller, Metzler was uncooperative during the meeting and refused to face him during the conversation. The meeting resulted in a counseling letter that created deadlines for Metzler to complete tasks. After failing to meet some of the deadlines established in the counseling letter, the bank issued another counseling letter and, contemporaneously, began drafting her termination letter. Metzler eventually was fired. She sued the bank in federal court alleging retaliation based on her invocation of rights under the Family and Medical Leave Act. The trial court granted summary judgment to the bank prior to trial and Metzler appealed.

In Metzler v. Federal Home Loan Bank of Topeka (9/26/06), the U.S. Court of Appeals for

the Tenth Circuit determined that Metzler had failed to show that her termination six weeks after returning to work was related to her use of leave time under FMLA. The appeals court explained that perceived hostility or harsh treatment by a new boss after returning from leave was not evidence of retaliation. The court reasoned that it was not proper to infer pretext where Metzler's pre-reorganization treatment was compared her post reorganization treatment by a different supervisor because any different treatment might be the result of the different supervisor's reactions. Because the main purpose of the reorganization was to improve productivity, the court concluded that it was reasonable for a new supervisor to impose stricter work standards. [back]

Wal-Mart to Pay $78.47 Million for Missed Breaks under PA Law

Employees working in Wal-Mart's Pennsylvania stores filed a class action lawsuit on behalf of current and former hourly employees alleging that Wal-Mart required them to work through their breaks and to work off-the-clock in violation of state law. Wal-Mart denied any wrongdoing and countered that employees skipped or cut short their breaks by their own choice, which it strongly discouraged. The company also noted that the majority of employee claims related to events that occurred up to eight years before the lawsuit and that it had since improved its practices to ensure that employees received their scheduled breaks.

In Braun v. Wal-Mart Stores Inc. (10/12/06), a state court jury in Philadelphia awarded $78.47 million to 170,000 former and current Wal-Mart employees. The damages awarded represented approximately $2.5 million for off-the-clock work and $76 million for lost rest breaks. In addition, the employees are expected to ask the court to approve an additional $62 million for willful violations of wage and hour laws. Wal-Mart intends to appeal the verdict. [ba
[back]

Pregnant Employees Are Not Entitled to Preferential Treatment under the PDA

Teresa Tysinger worked as a patrol officer for the City of Zanesville, Ohio. She learned that she was pregnant and met with her supervisor about her concerns that her job duties, such as "pushing vehicles and fighting with suspects" might endanger her unborn child. Although various alternative temporary assignments were discussed, such as assigning Tysinger to a desk job or to a detective bureau, no action was taken. The next month, Tysinger was involved in a physical altercation with a suspect and her doctor prescribed a work restriction that "Teresa is to be on light duty during her pregnancy." Tysinger presented the restriction to the police chief, who advised her that there was no light duty position available within the department and that she would have to take a leave of absence until she was able to return to full active duty. A short time later, Tysinger learned that a detective planned to leave the detective bureau, thereby creating an open position within her prescribed work restrictions. She expressed interest in the position to the police chief, but was not given the job because the detective bureau had been overstaffed and the position was not replaced. Tysinger sued the police department, alleging pregnancy discrimination based on the fact that the police department denied her light duty assignment despite having suitable positions available and despite having granted accommodations to other similarly situated non-pregnant workers in the past. The trial court found in favor of the police department prior to trial and Tysinger appealed.

In Tysinger v. Police Department of the City of Zanesville (9/25/06), the U.S. Court of Appeals for the Sixth Circuit agreed with the trial court. The court concluded that Tysinger

was not discriminated against based on her pregnancy because the Pregnancy Discrimination Act requires only that pregnant employees be treated the same as similarly situated non-pregnant employees. The court explained that Tysinger failed to meet the requirements of the PDA because she was unable to show a causal nexus between her pregnancy and the denial of her requested accommodation. The court rejected Tysinger's attempt to rely on evidence of similarly situated non-pregnant male employees who were granted more favorable treatment, based on its conclusion that those employees "presented themselves to their employer as willing and able to continue working in their ordinary capacities." Tysinger, on the other hand, requested temporary alteration in her job duties. According to testimony from the chief of police, if Tysinger had been willing to perform full duty work, she would not have been removed from the active duty roster. In this respect, the court found that Tysinger sought not the same or equal treatment, but more favorable treatment. [back]

Worker Fired after Complaining about Failure to Pay Overtime Proceeds to Trial

Paul Predzik worked as a maintenance supervisor at Shelter Corporation, which operated an apartment complex in Egan, Michigan. Predzik complained to his manager that he was not being paid for overtime work. His manager stated that the company considered him an exempt employee and, therefore, he was not entitled to overtime pay. Predzik responded that he would speak to the Department of Labor about the issue. Two weeks later, Shelter issued Predzik a warning for several employment related issues. The next week, Predzik received a negative performance evaluation, and shortly thereafter received a "final warning," repeating many of the same concerns. According to another employee, Predzik's manager commented that management needed to put "paper" on Predzik.

Predzik contacted the Department of Labor and informed Shelter that he was doing so. Within four days, Shelter advertised for a replacement to fill Predzik's job. The Department of Labor investigated the complaint and concluded that the company had misclassified Predzik and others as exempt employees, awarding damages to the misclassified employees. Three weeks following the conclusion of the Department of Labor investigation, Shelter fired Predzik. Predzik sued Shelter, alleging retaliation for making complaints under the Fair Labor Standards Act and the Minnesota Whistleblower Act. Shelter sought judgment prior to trial based on its argument that there was no connection between Predzik's termination and his complaints regarding overtime pay, as well as evidence acquired after Predzik's termination that he falsified his employment application and, therefore, would have been terminated anyway.

In Predzik v. Shelter Corp. (9/27/06), the U.S. District Court for Minnesota denied Shelter's motion for judgment before trial. The court concluded that Predzik had presented sufficient evidence of a nexus between his complaints and his termination, based on the timing of his disciplinary action and evidence that his manager intended to "paper" Predzik's file. With respect to the misrepresentation on Predzik's employment application, Shelter requested that any damages awarded to Predzik be limited to the pay he would have received from the date of his actual termination until the time of the company's discovery of his misstatements, when, it argued, Predzik would have been fired. The court denied Shelter's request based on

the fact that Predzik signed an employment application warning that falsifications "may result in rejection of my application or discharge at any time during my employment." The court concluded that the use of the word "may" and its warning was "equivocating language" and that Shelter would have to establish at trial that it would have, in fact, terminated Predzik. [back]

"Conspicuously Intense" Negative Evaluations and Paper Trail of Lack of Objective Review Factors May Be Evidence of Discrimination under Title VII

Theresa Metty worked as corporate vice president for Motorola Inc. For several years, Metty performed acceptably and received bonuses, raises and a promotion. When her supervisor left and a new CEO began a company-wide restructuring, Metty was subjected to four months of "conspicuously intense" negative interaction. During a staff review meeting, the new CEO stated that he wanted Metty terminated "legally" and asked "how do we explain this to a jury?" As a result of that meeting, Motorola introduced a new 9-point rating system to evaluate executive staff performance. Based on the 9-point system, Metty was ranked at the bottom of the group. The 9-point rating system was never again used as an evaluation tool. Metty was terminated shortly thereafter and sued Motorola alleging sex discrimination in violation of Title VII. Motorola sought judgment prior to trial.

In Metty v. Motorola, Inc. (10/10/06), the U.S. District Court for Illinois ruled that Metty had provided sufficient evidence regarding Motorola's motives for firing her to allow her claim to proceed to trial. The court concluded that the staff meeting notes and the CEO's deposition testimony that "Metty broke the record" for scoring badly on the 9-point rating system could reasonably demonstrate pretext, particularly, as the court noted, given the fact that the system "had, of course, no records to break after having been implemented for the first time that day." Although the court noted that Motorola's primary complaints about Metty's performance, which were related to interpersonal conflicts and poor relationships with senior management, could be valid, they had "little to do with her success in meeting her position's more formal demands." The court relied on evidence that Metty performed well for four years in her position. The subjective evaluations of her interpersonal skills, the court found, "while valid, are nonetheless subject to closer scrutiny." The court reasoned that the "relatively abrupt shift" in Metty's performance may reflect Motorola's "explicit desire to be rid of her," as opposed to proof of her performance deficiencies. The court also rejected Motorola's argument that Metty could not identify similarly-situated males who were treated more fairly, noting that Metty presented evidence related to males with substantially similar reporting requirements. The court did grant Motorola summary judgment on Metty's retaliation claim based on her failure to mark the "retaliation" box in her Equal Employment Opportunity Commission charge. [back]

Claim of Retaliation for Supporting Harassment Complaint Survives

Michael Cross was a Museum Specialist with the Smithsonian National Air and Space Museum. William Reese was Cross's immediate supervisor. At the beginning of his employment, Cross received favorable evaluations and pay increases. A year later, however, Colonel Tom Alison, who managed the facility where Cross worked and who was Reese's supervisor, discharged Cross prior to completion of his one-year probation, based on poor attendance and misconduct. Cross challenged his termination, arguing that it was the result of his repeated complaints alleging

sexual harassment of Heather Hutton, a co-worker, and deteriorating morale among the staff allegedly caused by Reese.

Hutton had a consensual romantic relationship with John Curry, a non-supervisory co-worker. When Hutton ended the relationship, Curry and Reese apparently told the staff that her interactions with her male co-workers were inappropriate and disruptive to morale. Hutton filed a complaint with the Smithsonian and Cross supported her complaint. Several months before his termination, Cross sent a memo to the Smithsonian ombudsman listing nine examples of alleged mismanagement and bias. In another memo to the ombudsman, Cross indicated that Reese had learned of the first memo and was questioning staff members to determine which "conspirators" were "behind the mutiny." Shortly thereafter, Cross e-mailed Smithsonian management alleging that up to 18 employees, especially women, were intimidated by Reese and feared physical violence. Cross said rotating shifts of workers were staying near Hutton "after hours for protection."

Following the e-mail, Alison held a meeting at the facility where 12 to 15 staff members registered their concerns about management. The Smithsonian conducted an internal investigation in which management allegedly identified Cross as a "troublemaker." At the conclusion of the investigation, Reese was relieved of his supervisory duties and instructed to apologize to employees and Cross was terminated for poor attendance and misconduct. Cross sued the Smithsonian and its Secretary Lawrence Small under Title VII, alleging retaliatory harassment, discharge, and negative references based on his efforts to stop Reese's alleged harassment of Hutton. The Smithsonian sought judgment in its favor prior to trial.

In Cross v. Small (9/29/06), the U.S. District Court for the District of Columbia concluded that Cross could pursue his retaliatory discharge claim, but had no viable claim for retaliatory harassment or retaliatory negative references. The court found that Cross had engaged in protected activity by repeatedly complaining about alleged discrimination and that the Smithsonian's decision to fire him as a "troublemaker" may have been caused by his complaints. The court concluded that a jury must resolve whether the Smithsonian's asserted reasons for the termination - an alleged pattern of poor performance, poor attendance and misconduct - were believable. The court also noted that the Smithsonian retreated from its original, primary reason for terminating Cross, which was his poor attendance. In addition, evidence indicated that Cross had not exhausted all of his available leave prior to his termination. The court, however, found insufficient evidence to support Cross's unlawful harassment claim because he relied on isolated incidents that were not sufficiently severe to implicate Title VII protections. [back]

For more information, please contact Stephen Aronson or Alice DeTora or phone either of them at 800-826-3579.