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Five-Year Gap in Employment Did Not Render Employee Ineligible for FMLA Leave

After five years working as a car salesman for Lee Auto Malls, Kenneth Rucker left his employment. Five years later, Rucker returned to work for Lee. Seven months into his second tenure with Lee, Rucker ruptured a disc in his back and was out of work for a total of 13 days over the next couple of months. Lee terminated Rucker's employment on account of his absences. Rucker sued Lee for violating the Family and Medical Leave Act. Rucker argued that he had worked for at least 1,250 hours in the seven months of his second tenure with Lee, thereby meeting one of the eligibility requirements of the FMLA. However, Lee argued that since Rucker had not worked for the auto dealer for at least 12 months in this second tenure, he was not eligible for FMLA. The trial court agreed with Lee and dismissed Rucker's claim. Rucker appealed.

In Rucker v. Lee Holding Company (12/18/06), the U.S. Court of Appeals for the First

Circuit reversed the dismissal and reinstated Rucker's FMLA claim. The appeals court determined that the FMLA statute was ambiguous because it did not define the minimum period of employment as "twelve consecutive months" or as "the previous twelve months." Given the ambiguity, the court looked at the legislative history which suggested, but was not conclusive, that the 12-month period of employment did not need to be consecutive. The court also noted that the FMLA regulations promulgated by the Department of Labor stated that the 12 months an employee must have been employed by the employer "need not be consecutive." After considering the statutory language, the legislative history, and the regulations, the court concluded that "the complete separation of an employee from his or her employer for a period of years, here five years, does not prevent the employee from counting earlier periods of employment toward satisfying the 12-month requirement." [back]

First Circuit Announces Burden of Proof in USERRA Claims: Employee Need Not Show Pretext

Carlos Velázquez Garcia was employed as a marine supervisor by Horizon Lines of Puerto Rico, a shipping and transportation company. Velázquez enlisted in the U.S. Marine Corps as a reservist and reported for six months' basic training. He returned to work after completing basic training but continued to report for monthly training exercises on weekends and took two weeks off for training each year. Although Velázquez often had to work weekends, Horizon adjusted his schedule to accommodate his military leaves. Velázquez alleged that some of his supervisors, including the Operations Manager, complained about having to change his weekend shifts and joked about his service, calling him "G.I. Joe," "Girl scout," and "little lead soldier." Horizon paid Velázquez his full wages during his periods of military service, recouping the difference between civilian and military pay after Velázquez returned to work by making deductions to his paycheck. Velázquez began operating a side business cashing checks for Horizon's stevedores for a fee. While Velázquez claimed that he ran the service only on his off-hours, he admitted to doing it once or twice while on duty. After Horizon had finished recouping the military pay (and about seven months after Velázquez started his check cashing business), the Operations Manager saw Velázquez cashing checks. Velázquez was told that his side business was in violation of Horizon's Code of Conduct and was terminated, despite an absence of prior discipline or warnings. Velázquez sued Horizon claiming his discharge was in violation of the Uniform Services Employment and Reemployment Rights Act.

In Velázquez-Garcia v. Horizon Lines of Puerto Rico (1/4/07), the U.S. Court of Appeals for the First Circuit announced a two-prong burden of proof to be applied in USERRA actions. Under the first prong, the employee must show that military status was at least a motivating or substantial factor in the adverse employment action. Once this showing is made, the burden shifts to the employer to show that it would have taken the same action despite the employee's military service. The appeals court distinguished this framework from the burden-shifting framework for analyzing discrimination cases under Title VII where the employee must show that the employer's stated reason is pretextual. USERRA, said the First Circuit, does not require proof of pretext. [back]

Court Rules that Six-Factor Glackamas Test should be Used to Determine if Shareholder-Directors of a Corporation are Employees for Purposes of Title VII and ADA

Lenda de Jesús worked in the accounting department of LTT Card Services, a corporation that sold cards for cell phones. De Jesús alleged that, after notifying her supervisors that she was pregnant, she was harassed

and subjected to a hostile work environment, forcing her to resign. De Jesús sued LTT alleging violations of Title VII and the Americans with Disabilities Act as well as other federal and state claims. LTT sought to dismiss the Title VII and ADA claims on the basis that it had fewer than the statutory minimum of 15 employees. LTT stated that two of its high level executives, Vice President Ibrahim Baker and President Jorge Pagán, were shareholder-directors and not employees. The trial court agreed and dismissed De Jesús's claim.

On appeal, in De Jesús v. LTT Card Services, Inc. (1/19/07), the U.S. Court of Appeals for the First Circuit decided that the six-factor test, announced by the U.S. Supreme Court in Glackamas Gastronenterology Assocs. v. Wells to determine whether shareholder-directors of a professional corporation are employees, should be applied to shareholder-directors of a close corporation. According to the court, these six factors include: (1) whether the corporation can hire or fire the individual; (2) the extent to which the corporation supervises the individual's work; (3) whether the individual reports to someone higher in the corporation; (4) the extent the individual can influence the corporation; (5) whether the parties intended the individual to be an employee as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses or liabilities of the corporation. After determining that the six-factor test applied to De Jesús's Title VII and the ADA claims, the appeals court vacated the summary judgment and remanded the case to the trial court to hear evidence on these six factors. [back]

Even if Employee Had Expectation of Privacy for his Office Computer, Employer Retained the Ability to Consent to a Search

Frontline Processing processes on-line payments for Internet merchants. Its internet service provider contacted the FBI to report that a Frontline employee allegedly was accessing child pornography. That same day, the FBI contacted Frontline's Internet Technology administrator John Softich. Softich confirmed that through monitoring it had identified the offending employee as the company's Director of Operations, Jeffrey Ziegler. Softich informed the FBI that Frontline had placed a monitor on Ziegler's computer to track his Internet traffic. After meeting with the FBI, Softich approached Frontline's CFO about entering Ziegler's office to copy the hard drive. The CFO provided a key to access Ziegler's office. Late at night, Softich unlocked and entered Ziegler's office. Once inside, they opened the computer's casing and made two copies of the hard drive. Subsequently, Frontline's counsel notified the FBI that it was willing to fully cooperate in any investigation and would voluntarily turn over Ziegler's computer to the FBI. The hard drive contained many images of child pornography. Ziegler was eventually indicted on several federal counts including receipt and possession of child pornography and obscene material.

During his criminal trial, Ziegler sought to suppress the evidence found on the hard disk claiming that it was obtained as the result of an improper search under the Fourth Amendment to the U.S. Constitution. In U.S. v. Ziegler (1/30/07), the U.S. Court of Appeals for the Ninth Circuit rejected Ziegler's claim. The court ruled that Ziegler did not have a reasonable expectation of privacy on his workplace computer and the evidence obtained could properly be admitted. The court explained that, even if Ziegler had an expectation of privacy in his office and in the computer kept in his office, Frontline could consent to a search. Frontline had complete administrative access to any employee's computer, it had installed a firewall to monitor Internet traffic, and it routinely monitored the firewall log. The court also noted that Frontline employees were told that the company monitored their Internet traffic and that they were expected to use the equipment for business, not for

personal use. The court reasoned that, given the control exercised by Frontline over the computer it provided to Ziegler, Frontline retained the ability to consent to its search. Ziegler's motion to suppress the evidence obtained was denied. [back]

Citing "Pervasive Discrimination," Court of Appeals Reverses Dismissal of Hostile Work Environment Claim

After being passed over for promotion and believing his days with the company were numbered, Lewis Herrera quit his job with Lufkin Industries. Herrera had worked for Lufkin for four years, initially as a sales representative and later as a field supervisor. He was directly supervised by service center manager Bruce Cunningham and indirectly by general manager of service operations Bruce Moore. Cunningham had told Herrera that, when he retired, Herrera would become service center manager. That did not happen. Instead, on Cunningham's retirement Moore assigned another employee to manage the service center. Herrera later quit his job and sued Lufkin claiming that he had been subjected to harassment by his supervisors in violation of Title VII because he was Mexican; that Lufkin had breached its contract by constructively discharging him; and that Lufkin was responsible for the intentional infliction of emotional distress caused by his supervisors. The trial court dismissed Herrera's claims and he appealed.

In Herrera v. Lufkin Industries, Inc. (1/4/07), the U.S. Court of Appeals for the Tenth Circuit ruled that Herrera's hostile work environment claim could proceed to trial. In reaching its decision, the appeals court concluded that Herrera had presented evidence that his work environment was "pervasively discriminatory." In support, the court noted the following incidents: when Herrera was first hired, Moore refused to shake his hand; Moore later sent Herrera some candy labeled as "Mexican peanut brittle;" Herrera was sent to talk to or serve customers because they were also Mexican; Moore addressed or referred to Herrera as a "Spanish lover," "f----ing Mexican," or "the Mexican;" Moore told Cunningham to tell Herrera not to "Mexicanize" his truck – meaning do not add "lots of chrome with dice hanging off the mirror." Herrera also presented evidence that, although not directly addressed to him, Dickerson used racially derogatory terms such as "wetback" and "spic" when referring to Latinos. There was also evidence that Dickerson enforced company rules more harshly with respect to Herrera than with non-Latino employees. The appeals court rejected the breach of contract claim on the grounds that the handbook did not constitute a contract. The intentional infliction claim also was rejected as it would be duplicative of the emotional distress claim in the hostile work environment action.[back]

Massachusetts Amends Child Labor Laws

Effective January 3, 2007, "An Act Relative to Child Labor," significantly amended the Massachusetts child labor laws.

This new law provides that, after 8:00 p.m., all minors must be under the direct supervision of an adult who is in the immediate area and reasonably accessible to the minor, unless the child works in a kiosk, cart or stand in the common areas of a shopping mall that has security from 8:00 p.m. until closing time.

The law also provides that hours of work for 14 and 15 year olds have not changed: they cannot work during school hours, but they may work between 7:00 a.m. and 7:00 p.m. during the school year and between 7:00 a.m. and 9:00 p.m. during the summer. During the school year, children aged 14 and 15 cannot work more than 18 hours per week, or 6 days per week, or 3 hours per school day, or 8 hours on weekends and holidays. During the summer, the maximum hours are: 40 hours per week, 8 hours per day, and 6 days per week. The law also provides that 16 and 17 year olds may work between 6:00 a.m. and 10:00 p.m.

(on nights preceding school day) and between 6:00 a.m. and 11:30 p.m. (on nights not preceding a school day), except that, if the teen works in a restaurant or race track, he or she can work until 12:00 midnight on nights not preceding a school day. If a 16 or 17 year old works in an establishment that stops serving the public at 10:00 p.m., the minor may work until 10:15 p.m. The maximum hours of work for minors (during school year and summer) are: 48 hours per week, 9 hours per day, and 6 days per week. The revised Employment Permit Application contains detailed instructions about obtaining a permit for the employment of minors and the applicable restrictions.

The statute is enforced by the Attorney General. Penalties now range from $250 for the first violation to $2,500 for the third and subsequent violations. Payment must be made within 21 days. If the citation is not timely paid, enforcement includes the ability to place a lien on the real or personal property of the violator. The statute provides for imposition of interest at the rate of 18% on the unpaid amount. Criminal proceedings may be instituted for failure to pay. [back]

DOL Issues Bulletin Clarifying FLSA Computer Employee Exemptions

In mid-December 2006, the U.S. Wage and Hour Division issued a Field Assistance Bulletin clarifying the exemption from overtime pay applicable to computer employees under the Fair Labor Standards Act. In addition to earning at least $455 weekly salary or $27.63 hourly, the employee must meet the duties test codified in the statute. The bulletin emphasizes that the exemption "does not include employees engaged in manufacture or repair of computer hardware or related equipment." It goes on to state that "employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs…but *who are not primarily engaged* in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test" are not exempt. [back]

REMINDER: Massachusetts Minimum Wage is Now $7.50 per Hour

The minimum wage in Massachusetts as of January 1, 2007 is $7.50 per hour. Effective January 1, 2008, the minimum wage will be $8.00 per hour. Massachusetts has issued a minimum wage notice explaining the increase. [back]

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