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Human Resource and Workplace Law Developments

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1. Too Much Experience - Age Discrimination:

A claim for "unintentional age bias" was held to exist by the U.S. Court of Appeals in a situation where an applicant was rejected because he had too much experience. The effect of a facially neutral employment policy can result

in an Age Discrimination in Employment violation. There is now a split among Circuit Court of Appeals on the question of unintentional age discrimination. Eventually, the U.S. Supreme Court will, in all probability, address this issue.

2. Working While on Leave Not a Violation of FMLA:

An employer that allowed an employee who was on an FMLA leave to service sales accounts and earn a commission or to take unpaid leave did not interfere with the employee's FMLA right. As long as the employee had the option to work, there was no FMLA interference, according to the U.S. Court of Appeals (8th Cir.).

3. Volunteers at Non-Profit Employers:

The U.S. Appeals Court (6th Cir.) reversed a U.S. District Court ruling made in response to a U.S. Department of Labor complaint that "volunteers" were employees subject to the FLSA. The volunteers at issue worked in a restaurant that was operated by a church.

The U.S. Appeals Court decision relied on whether the volunteers for a non-profit organization expect to be compensated, as being the test of whether an individual is an employee or a non-employee volunteer.

4. U.S. Court of Appeals Rules Working a Rotating Shift an "Essential Function":

The Americans with Disabilities Act ("ADA") protects disabled persons who can perform the essential functions of a job with or without reasonable accommodation.

A fast food manager having PTSD asked to work one specific time period each week, rather than the rotating of shifts at different times of the day and days each week required of managers. He claimed that the refusal to allow him to work a fixed schedule was a failure to provide a reasonable accommodation.

The Court ruled that working a rotating schedule was an essential function because the employer had documented that requirement and the reason for it; and the ADA and its regulations require crediting an employer's documented judgment. Secondly, the Court relied on the essential function requirement that consisted not only of the disabled employee being able to perform the employee's functions, but being able to do so without unduly burdening co-workers.

SH&Q OBSERVATION: *Employers desiring to avoid employee accommodation lawsuits should note the teaching moment in this Court Opinion. Job descriptions shouldn't be routinely drafted or copied from a*

generic reference source. Thoughtful, deliberate, documented function requirements need to be included in a job description if it is to be persuasive in an accommodation lawsuit. This Decision was issued by the First Circuit, which has jurisdiction for most of New England.

5. Massachusetts Jury Finds No Discrimination but Awards \$28 Million for Retaliation:

A long-service, 70-year-old hospital nurse supported a co-worker whom she felt had been verbally abused by supervision. The nurse was then investigated for poor patient care. A poor nursing evaluation had not been asserted before the co-worker issue. The nurse's claim for racial discrimination was dismissed by the jury; but the jury found for her on her claim of retaliation, awarding \$463,000 in lost wages, \$2.75 million in emotional distress and \$25 million in punitive damages.

SH&Q OBSERVATION: *Employers need to learn from this case's teaching moments. Continuing performance evaluations need to be made, documented and followed up on. Unsatisfactory performance shouldn't be ignored or accepted. Supervisory failures in leadership and employee communications also should not be tolerated. Plus, should a complaint of mistreatment be made, management must take it seriously and investigate.*

6. Disability Burden of Proof:

In a claim that an employer refused to provide an ADA reasonable accommodation, the plaintiff-employee has the burden of showing the existence of a reasonable accommodation, which would enable the person to perform the essential functions, according to a U.S. Court of Appeals (9th Cir.) decision.

SH&Q OBSERVATION: *When faced with an accommodation request, it is critical that the employer engage with the employee in the interactive process to identify suggested accommodations and their reasonableness or lack of reasonableness.*

7. NLRB Judge Declares Moonlighting Prohibition Illegal:

An NLRB Administrative Law Judge ruled illegal an employer's prohibition of employee moonlighting work that is inconsistent with company interests and which could affect the company image. According to the Judge, the otherwise lawful purpose expressed by the employer could have been better expressed. But the Judge ruled that, as written, it could adversely impact employees' protected National Labor Relations Act rights to engage in union activity.

8. Court Rules Union Resignation Procedure Illegal:

An IBEW rule requiring members who wanted to resign from the Union to personally appear at the Union's hall to do so violated the National Labor Relations Act, according to a decision issued by the U.S. Court of Appeals (D.C. Cir.).

9. NLRB "Blocking-Charge" Rule May Be Revisited:

Pending election petitions at the NLRB have been put on hold when a party files an unfair labor practice charge. Unions have filed charges in situations where unionized employees sought a decertification election. The result has been that the employees' decertification election has been, in some cases, postponed for years. Now it is reported that the National Labor Relations Board intends to revisit this rule.

10. New Jersey Enacts Paid Sick Leave:

New Jersey employers will have to provide paid sick leave accrued at the rate of one hour for every 30 worked, up to a maximum of 40 sick leave hours per year. It was reported that ten states now have paid sick leave.

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