

NEWSSTAND

Legal Updates - Spring 2009

Spring 2009

Supreme Court Rules for Employer in Maternity Leave Case

In *AT&T Corp. v. Hulteen*, the United States Supreme Court was asked to determine whether employers violate Title VII of the Civil Rights Act by not fully restoring service credit for pregnancy leaves taken before the 1978 passage of the Pregnancy Discrimination Act (PDA) for employees who retire post-PDA. The Court recently ruled in favor of the employer and held that maternity leave taken prior to the passage of the 1978 Pregnancy Discrimination Act need not be considered in calculating employee pension benefits.

In 1968, Noreen Hulteen took maternity leave and then was hospitalized for a medical condition requiring post-partum surgery. She missed a total of 240 days of work due to her pregnancy and surgery, but her employer, Pacific Telephone and Telegraph (now AT&T), credited her with only 30 days of paid leave, since under the company's seniority-based system, her pregnancy leave was considered personal, not disability related. By contrast, had she had been out on disability leave unrelated to pregnancy she would have received credit for the entire absence. As a result, when Hulteen retired in 1994, she received credit for service as originally calculated in 1968, despite the enactment of the PDA in 1978.

In 2001, Hulteen and several other women sued AT&T, alleging that its decision to pay them smaller pensions because of their pregnancy disability leaves constituted an unlawful employment practice under the Pregnancy Discrimination Act, an amendment to Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of pregnancy and allows those on maternity leave the same coverage as other medical leave. AT&T argued that the law cannot be applied retroactively.

The U.S. District Court for the Northern District of California granted summary judgment on behalf of the women, based on a 1992 Ninth Circuit case, *Pallas v. Pacific Bell*. A three-judge panel of the Ninth Circuit reversed the district court's holding, contending in its 2-1 ruling that Pallas' holding gave retroactive effect to the PDA, and that this retroactivity was impermissible in light of the Supreme Court's 1994 decision in *Landgraf v. USI Film Prods*. In August, 2007, the Ninth Circuit heard the matter en banc and reinstated the grant of summary judgment in favor of Hulteen and the others.

The Supreme Court granted certiorari to resolve a split in the circuits, in part so that employees in a national pension plan would not receive conflicting decisions depending upon the geographic area in which they litigated the issue. In a 7-2 decision, the Court ruled in favor of AT&T, finding that (1) that the PDA is not retroactive and (2) that AT&T's benefit-calculation rule is exempt from Title VII of the Civil Rights Act because it is a "bona fide" seniority-based system that did not discriminate intentionally against pregnancy.

Justice Ruth Bader Ginsburg filed a strong dissenting opinion, joined by Justice Stephen Breyer, contending the company committed a current violation of the law by continuing to rely on a pre-1978 calculation of benefits. "It is at least reasonable to read the PDA to say, from and after the effective date of the Act, no woman's pension payments are to be diminished by the pretense that pregnancy-based discrimination displays no gender bias."

General Contractors May be Liable for OSHA Violations by Subcontractors

The U.S. Court of Appeals for the Eighth Circuit, in *Solis v. Summit Contractors, Inc.*, recently upheld OSHA's multi-employer worksite citation policy and found that the Occupational Safety and Health Review Commission (OSHRC) abused its discretion when it interpreted 29 C.F.R. § 1910.12(a) to be in conflict with the multi-employer worksite citation policy. Section 1910.12(a) states "[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work..." OSHRC held that this provision did not apply to a general contractor if the general contractor's own employees were not exposed to a found hazard, even if the general contractor was found to be a "controlling employer" under the multi-employer worksite policy.

The Eighth Circuit found OSHRC's reasoning to be at odds with the language of the regulation in that the general contractor was required to "protect the place of employment, including [subcontractors' employees], so long as [the general contractor] also has employees at the place of business."

Summit, the general contractor, had only four of its own employees at the construction site, and none were exposed to the violations found by OSHA. Summit's project superintendent had notified a subcontractor to remedy the violation at issue without success. In effect, the multi-employer citation policy makes the construction general contractor the guarantor of all construction work at a worksite when it has employees present, whether or not its employees are at fault or affected.

New Jersey Issues Regulations Regarding Family Leave Insurance Benefits

New Jersey Department of Labor and Workforce Development (NJ DOL) has issued regulations interpreting New Jersey's newly implemented paid family leave law, formally known as the "Family Leave Insurance Law."

The new law became effective January 1, 2009, when employee contributions commenced. Eligible employees can take advantage of the law's leave benefits beginning July 1, 2009. The law provides eligible employees with up to six weeks of paid leave during any 12-month period to care for a sick family member or to bond with a newborn or a newly adopted child.

The new regulations address private plan approvals, employer notice requirements, claim filing and payment procedures, paid leave in lieu of FLI benefits, reduction of benefits under various circumstances and intermittent leave. Some of the more notable regulations are:

Private Plans

Employers with private plans must submit them to the NJ DOL for prior approval. The new private plan approval process mirrors the regulations governing private plan approval for Temporary Disability Insurance Benefits. (N.J.A.C. 12:21-2.1 through 2.28).

The regulations also address how to handle employee contributions to private plans. Specifically, employee contributions to a private plan cannot be commingled with an employer's assets and must be deposited in a trust fund account, which are to be used only for the administration and payment of FLI benefits. The trust fund accounts must be made available by employers for periodic inspection by the NJ DOL Division of Temporary Disability Insurance.

Notice Requirements

Employers are required to post in an accessible worksite area a printed notification of covered employees' rights pertaining to FLI benefits. Employers also must distribute a written copy to each employee - which may be in electronic form - within 30 days of adoption of the regulations (March 2, 2009), at the time of hiring, whenever the employee provides notice to the employer, or upon the first request of the employee of a need for FLI benefits. Employers can request both the written notification poster and the written copy of the notification from the NJ DOL.

New York Employers Must Take Steps to Secure Employees' Social Security Numbers

New York is the most recent jurisdiction to enact legislation intended to protect employees from identity theft. New York recently amended its Labor Law, adding section 203-d to prohibit all employers, regardless of size, from:

- publicly posting or displaying an employee's Social Security number;
- visibly printing an employee's Social Security number on any identification badge or card, including any time card;
- placing a Social Security number in files with unrestricted access; or
- communicating to the general public employees' personal identifying information including: Social Security numbers, home addresses or telephone numbers, personal electronic mail addresses, Internet identification names or passwords, parent's surname before marriage, or drivers' license numbers.

The law also prohibits employers from using a Social Security number as an identification number for purposes of any occupational licensing. Employers must take "reasonable measures" to ensure that the personal identifying information is not disseminated. Such measures include, informing employees of their rights under the new law, as well as implementing procedures and mechanisms to safeguard the information.

The law imposes a civil penalty of up to \$500 on any employer for a "knowing violation" of this statute. A violation is "knowing" if an employer has not implemented any policies or procedures to safeguard against such violation, including procedures to notify employees of the law.

Labor Law section 203-d is silent as to what constitutes a single "violation." Consequently, it remains unclear whether an employer's publication of a single list containing the personal identifying information of several employees would amount to single or multiple violations.

The Labor Law amendment also is silent as to whether there is a private right of action and whether employers are restricted from using the last four digits of an employee's Social Security number or any number derived from the full Social Security number for identification purposes, seniority lists or for any other reason. The Labor Law amendment does not define "Social Security number," unlike New York's Public Officers' Law and General Business Law which defines "Social Security Account Number" to include "the nine digit account number issued by the federal social security administration and any number derived therefrom."

The New York State Department of Labor, charged with interpreting and enforcing the Labor Law, has not issued any regulations that would provide guidance regarding these issues.

Employers Who Access Employees' Personal E-Mail May Be Liable for Punitive Damages and Attorneys' Fees

A recent case from the U.S. Court of Appeals for the Fourth Circuit, *Van Alstynes v. Electronic Scriptorium Ltd.*, held that an employer who accessed a former employee's personal e-mail account could be held liable for punitive damages and attorneys' fees under the federal Stored Communications Act (SCA), even without proof of actual damages.

After Electronic Scriptorium was sued by its former Vice President of Marketing, the company's president, Edward Leonard, gained access to her personal AOL e-mail account and over the course of a year, downloaded in excess of 250 e-mails. The former employee, Van Alstynes, learned of this access in response to discovery requests. She also discovered that Mr. Leonard had accessed the account at all hours of the day, and from home, work, and places as far away as London and Hong Kong. She sued the company and Mr. Leonard for violating the SCA. The SCA criminalizes unauthorized access to "electronic communications" in "electronic storage" at an "electronic communications service." The SCA authorizes a private cause of action for monetary damages, namely, actual damages, punitive damages, and attorneys' fees. The SCA states that "in no case shall a person be entitled to recover [actual damages] less than the sum of \$1,000."

The defendants attempted to dismiss the claim on the basis that Mr. Leonard's actions had not caused any damages. The district court rejected this argument, and the jury returned a verdict against the company for \$25,000 in compensatory damages and \$25,000 in punitive damages, and \$150,000 in compensatory damages and \$75,000 in punitive damages against Mr. Leonard. The compensatory damages represented statutory damages of \$1,000 each for each SCA violation. The court also awarded over \$135,000 in attorneys' fees and court costs against the defendants, for a total award of over \$400,000. The defendants appealed to the Fourth Circuit.

The Fourth Circuit upheld the decision but disagreed with the damages calculations. Interestingly, unlike the three federal district courts that previously considered the issue, the Fourth Circuit held that statutory damages of \$1,000 per violation are not available in the absence of actual damages. The appellate court did find that punitive damages and attorneys' fees can be awarded in the absence of actual damages, but vacated the awards for those and remanded this case to the district court.

Employers Strictly Liable for Sexual Harassment Committed by Any Supervisor

In a recent decision, *Sangamon County Sheriff's Department v. Illinois Human Rights Commission*, the Illinois Supreme Court held that an employer is strictly liable for sexual harassment committed by any supervisory or management employee, even though the harasser had no supervisory authority over the complainant and did not have authority to affect the terms and conditions of the complainant's employment.

The complainant, Donna Feleccia, was a records clerk with the Sangamon County Sheriff's Department. Ron Yanor was a sergeant in the patrol division of the Sheriff's Department. Although he was a supervisor, he and Feliccia worked different shifts in different divisions of the Sheriff's Department, and Yanor had no supervisory authority over Feleccia. There was a three hour overlap in their shifts.

Feleccia had been working for the Sherriff's Department for six years when the alleged sexual harassment by Yanor began. These events included: an invitation by Yanor to take her to a bar that he told her would be attended by others in the Department but was not; a forced kiss when he drove her home from that bar; an unexpected appearance at her home to give her a Christmas cup filled with candies; and an encounter where Yanor asked Feleccia if she would like to go to a hotel with him for the night. All of these events allegedly occurred in a two-month time period in November and December of 1998. Feleccia did not report any of these events to the Sherriff's Department's other management.

On February 5, 1999, Feleccia received a phony letter on Illinois Department of Public Health letterhead informing her that she had been exposed to a sexually transmitted disease. The letter was determined to be a hoax and was eventually traced to Yanor, who confessed, claiming that he did it as a practical joke. Shortly thereafter, the Sherriff's Department gave Yanor a four-day suspension and a letter of reprimand.

Feleccia did not believe the sanction was severe enough and told higher-level officials in the Sherriff's Department about the prior incidents of sexual harassment by Yanor. She eventually filed a charge of sexual harassment and retaliation with the Illinois Human Rights Commission (IHRC) against the Sherriff's Department and Yanor. The IHRC found that Feleccia had established sexual harassment based on a hostile work environment. The IHRC found as a matter of law that the Sheriff's Department was strictly liable for Yanor's harassment of Feleccia because he was a supervisory employee, even though he was not Feleccia's supervisor. The Illinois Court of Appeals reversed, finding that Yanor was merely a co-employee of Feleccia since he had no supervisory authority over her. Accordingly, the appellate court found that the Sheriff's Department was not liable because it took reasonable corrective measures upon learning of the harassment when it suspended Yanor for four days without pay and issued a letter of reprimand.

The Illinois Supreme Court based its decision on the language of the sexual harassment provision in the Illinois Human Rights Act. The first clause of that statute in section 2-102(D) prohibits sexual harassment broadly. The second clause then limits the first clause by stating that "an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures."

The Court held that: “[w]here the offending employee is either a ‘nonemployee’ or ‘nonmanagerial or nonsupervisory employee,’ an employer is responsible for the harassment only if it was aware of the conduct and failed to take corrective measures.” The court found that the statutory language was unambiguous and that the facts of the case did not fall within the limitation of the second clause of the statute because Yanor was “neither a ‘nonemployee’ nor a ‘nonmanagerial or nonsupervisory employee.’” Therefore, the Sheriff’s Department was liable for Yanor’s sexual harassment regardless of whether it knew about it, and regardless of whether it took reasonable steps once it found out.

D.C. Circuit Addresses Independent Contractor Status in a Recent NLRB Petition for Enforcement In a significant labor law decision, the U.S.

Court of Appeals for the District of Columbia Circuit held that Massachusetts drivers who voted for representation by the International Brotherhood of Teamsters were independent contractors who were not covered by the National Labor Relations Act (*FedEx Home Delivery v. NLRB*, D.C. Cir., No. 07-1391, 4/21/09). In a 2-1 decision, Judges Janice Rogers Brown and Stephen F. Williams set aside a National Labor Relations Board decision that the company unlawfully failed to bargain with Teamsters Local 25 after the union was certified as the bargaining agent for drivers at two FedEx Home terminals, finding that the board improperly classified the drivers as employees under the NLRA.

FedEx acquired Roadway Package Systems in 1998 and changed its name to FedEx Ground Package System Inc. The present company consists of a ground division that delivers packages primarily to and from businesses, and the home division, known as FedEx Home, that delivers packages primarily serving residential customers. FedEx Home entered into independent contractor agreements with about 4,000 drivers who are responsible for more than 5,000 delivery routes across the United States.

In July 2006, Local 25 filed representation petitions with NLRB, requesting elections at two small terminals in Wilmington, MA. An NLRB regional director determined that the drivers at both facilities were employees under the NLRA and directed that elections be held on the issue of union representation. The NLRB declined to review the director’s decision, and the union won both elections. FedEx filed objections and refused to bargain with the union on the basis that the drivers were independent contractors rather than employees. The NLRB found that the company had violated Sections 8(a)(1) and 8(a)(5) of the NLRA. FedEx petitioned for review of the board order in the D.C. Circuit, and the NLRB filed a cross-petition for enforcement.

The majority of the D.C. Circuit vacated the Board’s decision and refused to enforce the bargaining order. Writing for the majority, Judge Brown said the Board and the courts apply the traditional common law agency test in resolving independent contractor issues, but the test is not amenable to a “bright-line rule.” She called uncertainty about independent contractor status “particularly problematic” under the NLRA, because the Act gives NLRB jurisdiction over statutory employees but “no authority whatsoever over independent contractors.” Stating that the court is responsible for ensuring that the Board only exercises the power granted by the Act, the D.C. Circuit said it would not defer to NLRB decisions on independent contractor status. Instead, it said, the court would uphold the Board’s decision if it reflected that the agency made a choice between “two fairly conflicting views.”

The appeals court said the FedEx Home drivers appeared to share many “characteristics of entrepreneurial potential.” The NLRB regional director found that the Massachusetts drivers sought by Local 25 had signed operating agreements that specified they were not employees of the company for any purposes, and that the contractor retained control over the “manner and means of reaching mutual business objectives.” They provided their own vehicles, and bore the costs of operating and maintaining them. The court noted that NLRB also heard evidence that the drivers under contract with FedEx Home were free to use their trucks for any personal or commercial purpose, as long as they removed or covered company logos and markings when the equipment was not in service for FedEx Home. Contractors were free to serve multiple routes for FedEx Home, and had complete authority to hire and fire their own drivers. According to the decision, “contractors do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there.”

The court noted that the NLRB regional director, in a decision upheld by the Board, found that the FedEx Home drivers were employees in part because the company required the contractors to wear uniforms, conform to grooming standards, complete a driving course, and be audited or observed twice a year. The director noted that the company also controlled the display of its logo on trucks, required contractors to have drivers available Tuesday through Saturday, and could reconfigure route assignments if a contractor's service was not adequate. The court found that "those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship."

The company requires drivers to wear uniforms to give customers a sense of security, not to control the drivers, it observed. "FedEx has an interest in making sure her conduct reflects favorably on that logo [once a driver is wearing it], for instance by her being a safe and insured driver—which is required by [Department of Transportation] regulations in any event," the court added.

The court observed that in finding the drivers to be employees under the NLRA, the Board's regional director emphasized that the drivers were performing a function that is a regular and essential part of the company's operations and that few took advantage of the entrepreneurial opportunity to hire other drivers. But the court was not persuaded by the analysis. "While the essential nature of a worker's role is a legitimate consideration, it is not determinative in the face of more compelling countervailing factors," the court said, adding that whether drivers took advantage of particular opportunities "is beside the point." Citing a prior decision, it said a worker's retention of the right to engage in entrepreneurial activity is more important than the regular exercise of that right.

"Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent," the court said, granting the company's petition for review, vacating the board's order and denying enforcement of the order that FedEx Home bargain with Local 25.