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PERSPECTIVES

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Inside this Issue…

Cheri Hass

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How do you describe someone who meant so much to so many? Cheri Hass was one-of-a-kind. Her genuine personality and sense of humor made a lasting impression on everyone she met. She was a loyal and honest friend, a respected colleague, trusted attorney, avid dog lover, and a treasured member of the Fishel Hass Kim Albrecht family.

She lived her life with an unapologetic honesty and seized every opportunity to make a difference in the lives of others. May we cherish the happy memories and sense of adventure Cheri brought to each of us.

There are no words to describe the immeasurable loss we feel, but we ask you to join us in remembering our beloved friend and partner, Cheri Hass.

Memorial contributions may be made in Cheri's memory to the Licking County Humane Society, 825 Thornwood Dr. SW, Heath, Ohio 43056, www.lchspets.org, or to Citizens for Human Action, 3765 Corporate Dr., Columbus, Ohio 43231, www.chaanimalshelter.org.

Employment Agreement Cannot Deprive Employee of FLSA Rights

Employers utilize employment contracts as a tool to protect themselves from liability. The Sixth Circuit U.S. Court of Appeals has approved some of these protections, including contracts which limit the time an employee can bring a discrimination claim against an employer. However, the Court recently changed its tune by refusing to recognize a contractual clause that limited an employee's right to file a wage and hour claim under the Fair Labor Standards Act (FLSA).

The clause in question read: "To the extent the law allows an employee to bring legal action against Federal Express Corporation, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first."

In *Boaz v. FedEx*, Boaz sued FedEx for violations of the FLSA and the Equal Pay Act, which Boaz alleged occurred for approximately 4 years prior to filing suit. FedEx moved to dismiss the lawsuit, contending that her claims were barred by the six month limitation in her employment agreement.

The Court determined that an employment agreement "cannot be utilized to deprive employees of their statutory [FLSA] rights." The Court went on to distinguish the FLSA claims from other claims in which they have recognized a limitation on statutory rights, such as under Title VII, by indicating that unlike claims brought under the FLSA, employees can waive claims under Title VII. Furthermore, an employer that violates wage and hour laws can gain a competitive advantage that would otherwise not exist by violating the FLSA.

If you have any questions, or if you would like a copy of the *Boaz* decision, please contact Anne McNab at amcnab@fishelhass.com

Court Provides Guidance On Who Is Responsible For Temps Under The FMLA

In *Cuellar v. Keppel Amfels, L.L.C.*, Cuellar worked as a temporary clerk for Keppel Amfels, a shipyard in Texas, through Perma-Temp Personnel Services, Inc. Cuellar became pregnant during her employment and notified both Perma-Temp and Keppel Amfels that she would require medical leave under the FMLA following the birth of her child. When Cuellar took maternity leave, Keppel Amfels filled her position with a replacement employee. Once released to return to work, Cuellar contacted Keppel Amfels' HR department, which told her that they would call her if there was another opening in her department. Cuellar then contacted Perma-Temp, which encouraged her to seek unemployment benefits. Perma-Temp did not refer Cuellar back to Keppel Amfels or ask Keppel Amfels to reinstate her to the clerk's position.

Cuellar filed suit against Keppel Amfels, asserting that it: (1) interfered with her FMLA rights by allegedly "convincing" Perma-Temp not to seek her reinstatement; and (2) retaliated against her based upon her exercise of FMLA rights. The District Court dismissed both claims because there was "no evidence in the record that [Keppel] Amfels acted with a discriminatory animus by terminating Cuellar's assignment." Cuellar appealed only the dismissal of her FMLA interference claim to the 5th Circuit, which affirmed the lower court's ruling.

Cuellar argued that, once Keppel Amfels replaced her, its actions "convinced" Perma-Temp that it was "fruitless" to refer Cuellar back for reinstatement. The Court, however, found that "the regulations permit, even expect, a secondary employer to rely on a primary employer to provide FMLA leave . . . a temporary employee's relationship with a secondary employer may end and never be restored without any violation of the FMLA."

As this case highlights, in dual employment situations where an employee is assigned to a secondary employer through a temporary agency, the temporary agency generally serves as the "primary" employer for FMLA purposes. This means that the temporary agency is responsible for full compliance with the FMLA, including job restoration. As the secondary employer, Keppel Amfels, only bore a conditional burden of job restoration and had no obligation to reinstate Cuellar absent a request from Perma-Temp. Since no request was ever made, no reinstatement was due.

For additional information or questions regarding FMLA, please contact our office at info@fishelhass.com

Telling Elderly Employee to "Hang Up Superman Cape" May Reveal Age Discrimination

This summer, the Eight Circuit U.S. Court of Appeals decided a case of whether age-related comments by a non-decision maker evidence unlawful age discrimination. In *Johnson v. Securitas Sec. Servs., USA, Inc.*, a 76-year-old security guard sued his former employer, a security services company, under the Age Discrimination in Employment Act, after he was discharged for being involved in a work-related

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vehicle accident and not immediately reporting it and for leaving his post before the end of his shift.

The Court found that the employee, who alleged that his supervisor told him that he "needed to hang up his Superman cape" and retire, may proceed with his age discrimination claim. In addition to the Superman comment, the employee also alleged that his supervisor made various comments related to his age, including comparing him to his elderly father, telling him that he was "too old to work," and encouraging him to retire.

The Court found that these comments were not simply "stray remarks" wholly unrelated to the discharge decision. Although the claimant's supervisor was not the ultimate decision maker, the Court found that a factual question existed as to whether he played any role in the discharge decision. Additionally, the Court found that the employee presented evidence that similarly situated, younger security guards, who also had work-related vehicle accidents, were treated differently following their accidents. If true, the court said, this disparate treatment strengthened the employee's evidence that age was a factor in his discharge.

Further, factual issues existed as to whether the employer's reason for the discharge was discriminatory. The court noted that the employer based its decision that the employee failed to meet its job expectations solely on the car accident and the incidents that followed it. However, the employee presented facts that he performed his job duties satisfactorily by showing that he had never been disciplined for performance issues or received any complaints in five years of employment with the company prior to the accident.

According to the Court, other factual disputes existed in the case that made summary judgment inappropriate, including whether the claimant left his shift early, whether the ultimate decision maker knew the claimant's age when she discharged him, whether the supervisor's age-based animus influenced the decision maker, and whether the claimant's younger coworkers were treated more favorably in similar circumstances.

While this case is not binding in Ohio, it is a good reminder for employers of the consequences of allowing supervisors to use age-based language and of not ensuring that all similarly situated employees are treated the same for policy infractions. Finally, this case serves as a reminder that the Employer will need to provide sufficient evidence of who was involved in a disciplinary decision along with what they used to make such a determination.

How Does the U.S. Supreme Court's Invalidation of DOMA Impact My Employees?

Many questions have been swirling since June when the U.S. Supreme Court invalidated the Defense of Marriage Act in *U.S. v. Windsor*: What does this mean for my employees? Are same-sex couples covered by the FMLA? How will the IRS handle this? So what are the answers? The truth is, it will probably take some time to sort out the answers to all of the questions, but here is what we know so far:

FMLA: The FMLA has not been amended to change the definition of "spouse" to include same-sex spouses; however, the Department of Labor has amended its Wage and Hour Fact Sheet #28F: Qualifying Reasons for Leave under the FMLA to read:

Spouse: Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including "common law" marriage ***and same-sex marriage.***

The DOL Fact Sheet is not law, but provides some indication of the direction the DOL plans to take the FMLA. It is important to also remember, that the FMLA is a floor, not a ceiling, for employee rights. Consequently, employers are free to extend such leave of absence rights as they see fit.

IRS: On August 29, 2013, the IRS issued Revenue Ruling 2013-17, implementing the federal tax aspects of *U.S. v. Windsor*. Under the Revenue Ruling, same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes. The ruling applies regardless of whether the couple lives in a state that recognizes same-sex marriage. Consequently, employers in states that do not recognize same-sex marriage will have to provide favorable federal tax treatment to employees' same-sex spouses validly married in jurisdiction where it is legal.

ERISA Benefits: The Department of Labor also issued new guidance extending benefits under the Employee Retirement Income Security Act (ERISA), which governs most private pension and health plans, include to same-sex couples. The effect of this place-of-celebration rule is that couples who were married in a state that recognizes same-sex marriage (ex. California) but

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reside in a state that does not recognize same-sex marriage (ex: Ohio), will be able to have these ERISA benefits extended to them.

Veterans Benefits: U.S. Attorney General Eric Holder announced earlier this month that he will be taking steps to extend veterans benefits to same-sex married couples. The new policy will no longer enforce statutory language governing the Department of Veterans Affairs and the Department of Defense that restricts the award of spousal benefits to opposite-sex marriages only.

If you have any questions regarding DOMA in the workplace, please contact Anne McNab at amcnab@fishelhass.com

EEOC Files First Lawsuits Under GINA

In May of 2013, the Equal Employment Opportunity Commission (EEOC) filed its first two lawsuits under the Genetic Information Non-Discrimination Act (GINA). GINA prohibits employers who have more than 15 employees from using genetic information to discriminate in employment. GINA's definition of "genetic information" includes an individual's family medical history, the results of an individual's or family members' genetic tests, and the fact that an individual or an individual's family member sought or received genetic services. GINA further prohibits employers from obtaining genetic information from employees during post-offer and fitness-for-duty medical examinations. Instead, the EEOC regulations expressly require employers to inform physicians not to collect genetic information during these examinations.

In the first lawsuit, the EEOC claimed the employer violated GINA by asking for an applicant's family medical history during its post-offer medical examination. Specifically, the medical examiner's questionnaire asked about the existence of certain disorders in the applicant's family medical history, such as heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis and mental disorders. The employer in this case chose to pay $50,000 and enter into a consent decree with the EEOC upon filing of this lawsuit.

The second lawsuit is a class action against a nursing and rehabilitation center under GINA, the ADA and Title VII. The EEOC is asserting that this employer also conducted post-offer, pre-employment medical examinations of applicants, which were repeated annually if the person was hired, and asked for family medical history as part of the examinations.

Based on the above cases, employers should review their policies and practices with regard to medical examinations of employees or candidates. Employers must make sure to warn the examining physician, preferably in writing, not to obtain genetic information and not to provide it to the employer when reporting the results of the examination. The regulations state that if an employer provides these warnings but nevertheless receives genetic information, the receipt of the genetic information will be considered inadvertent and will not be a violation of GINA.

If you have any questions about GINA, its regulations or would like to obtain model GINA language that can be used when seeking medical examinations, please contact Brad Bennett at bbennett@fishelhass.com

Legislative Update

The Ohio General Assembly has been busy these last few months enacting legislation affecting employers around the State. Some of the more notable new laws include the following:

H.B. 2: Requires an unemployment compensation claimant to register with OhioMeansJobs and receive a weekly report of available job listings in order to be eligible for unemployment compensation benefits and to require a claimant to contact a local one-stop office beginning with the eighth week after filing an application for unemployment compensation benefits. (Effective October 11, 2013) (R.C. § 4141.29)

H.B. 37: Creates the SharedWork Ohio Program which allows a participating employer to reduce the number of hours worked by its employees in lieu of layoffs. Employees of employers participating in the Program whose work is reduced between 10% to 50% and employees affected by temporary business closures would be eligible for shared work compensation from the Unemployment Compensation Fund. (Effective July 11, 2013) (R.C. § 4141.50)

H.B. 59: State Budget Bill (Effective June 30, 2013 or September 29, 2013)

Clarifies that it is not an unlawful discriminatory practice for a person or an appointing authority administering a civil service examination to obtain information about an applicant's military status for the purpose of determining if the applicant is eligible for additional credit. (R.C. § 4112.02)

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Adds a religious employer exemption to the unlawful discriminatory practices provision of the Ohio Civil Rights Law (R.C. § 4112.02)

Adds an exception to the Ohio Open Meetings Act to permit public bodies to go into executive session to consider certain confidential information directly related to an application for economic development assistance. Under this exception, the quorum of the public body must be unanimous in its vote to go into executive session for this purpose. A majority vote of the public body is not sufficient. (R.C. § 121.22 (G))

A political subdivision that buries the body or cremated remains that are unclaimed or that are claimed by an indigent person (now defined as a person whose income does not exceed 150% of the federal poverty line) may now provide a metal grave marker instead of a stone or concrete marker. (R.C. § 9.15)

Permits county DD boards to fill a board vacancy in extenuating circumstances by allowing a term-limited board member to serve an additional four-year term by permission of the Director of the Ohio Department of Developmental Disabilities. (R.C. § 5126.026)

Pushing the Limits: Requiring Physical Fitness Tests For Promotion

Many counties are curious about the legal parameters of requiring law enforcement officers to pass a fitness test as part of the qualifications for promotion. Please be aware that requiring certain types of strength and endurance tests could lead to violations of several federal and state laws, including the Americans with Disabilities Act (ADA) and Title VII.

Employers must carefully consider using fitness tests, especially in positions that are more supervisory and less physically-active. In the past, these tests have been found to unlawfully screen out individuals who are otherwise qualified to perform a supervisory job. For example, one case held that a test where 93% of male applicants passed physical agility test for fire fighter positions, compared to less than 13% of female applicants, stated a claim under Title VII of the Civil Rights Act for discrimination, despite no allegation of intentional discrimination toward a particular applicant. Fitness tests must be related to the specific job they are for, which they are administered. Furthermore, fitness tests must be validated to show the tests actually and appropriately measure the requirements necessary to perform the job duties associated with the specific position. Employers must look at every aspect of an examination process to see if it unfairly discriminates against specific protected classes. To require a candidate to pass a fitness test for promotion, the test must be job-related and consistent with business necessity. "Job related" measures how an individual can perform both the essential and marginal job functions they are to do for the specific job in question. "Business necessity" refers to the essential functions of that particular job. In other words, a fitness test may be job-related in that a sergeant may patrol, but because the sergeant's position is a supervisory one, requiring a candidate to pass a physical fitness test may not be justified by business necessity because it does not concern an essential function of a job.

Best practices advice for requiring fitness tests:

Get outside assistance. Have a qualified outside agency analyze the specific position and determine what specific tasks the job requires.

Choose the assessment carefully. This should not be an arbitrary process. Tasks should be chosen after understanding what is effective and what limits are appropriate for the specific job in question.

Validate the test. Even after the test is validated, the employer still has the responsibility to make sure that it stays valid.

Test the minimums. A fitness test should only examine the minimum qualifications necessary to perform the job successfully. This test should not be harder than what the candidate would do in the actual job.

Find an alternative solution. If there are two ways to test an individual's ability to do a job and one way is far less discriminatory against certain protected groups than the other, that is the one that should be used.

The time and effort to establish good practices now will save a lot of stress and spending in fighting off a lawsuit in the future. For additional questions regarding this topic, feel free to contact us at info@fishelhass.com

U.S. Supreme Court Clarifies Who is a "Supervisor" Under Title VII

In *Vance v. Ball State University* (6-23-2013), the U.S. Supreme Court clarified who qualifies as a supervisor for purposes of unlawful harassment. This is important because Employers are held strictly liable for the harassment of a supervisor whenever tangible employment action (e.g. termination, demotion, loss of pay) results to an employee as a

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result of the harassment. If strict liability attaches, the Employer cannot assert the implementation of a harassment policy and/or the employee's failure to file a complaint pursuant to said policy as a defense.

The employee in *Vance* worked as a catering assistant. She claimed that a fellow employee, a catering specialist, harassed her due to her race. The employee asserted that the fellow employee was a supervisor under Title VII since catering assistants work under the direction of the catering specialists. Therefore, the employee argued that the Employer should be held strictly liable. The Employer argued that the fellow employee was merely a co-worker because the catering specialists have no say in hiring decisions and have no power to institute discipline. Therefore, the Employer argues that plaintiff should have complied with the Employer's harassment reporting policy.

The Court resolved the conflict by holding that, for Title VII purposes, a "supervisor" is one who has the power to take a tangible employment action against an employee and must be able to "effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment…or a decision causing significant change in benefits." Because the fellow employee in question was unable to take any of the above actions against the plaintiff, the Court found that the employee did not qualify as a supervisor.

As this case points out, it is crucial that Employers conduct an audit of their workplace to ensure that no "unofficial" line of authority is unknowingly being developed. Further, Employers should ensure that they have accurate job descriptions and an updated Organizational Chart showing the level of authority and leadership within the organization in order to clearly identify who is, and who is not, a supervisor. Should you have any questions about *Vance*, harassment, or conducting an audit of your workplace, please contact Brad Bennett at bbennett@fishelhass.com

Facebook, the Stored Communications Act & Unfriendly Friends

A New Jersey Federal district court has held that the Stored Communications Act ("SCA") protects non-public Facebook wall posts of employees. In *Ehling v. Monmouth-Ocean Hosp. Service Corp*., Deborah Ehling was a registered nurse, paramedic and local union president employed by a hospital. She maintained a Facebook account with privacy settings so only her Facebook "friends" could access her wall posts. She had approximately 300 hundred friends. Several of Ms. Ehling's "friends" were coworkers, but she was not "friends" with any management individual or agent of the Hospital. A friended coworker independently came-up with the idea to give a manager a copy of Ms. Ehling's non-public postings.

The manger did not directly supervise Ms. Ehling, never asked for information regarding her, never sought or possessed her Facebook password, and did not request to be apprised of Ms. Ehling's Facebook activities. Nonetheless, the coworker gave the manager a copy of Ms. Ehling's non-public post advocating that paramedics should have withheld care to an "88 yr old sociopath white supremacist." The hospital determined that the posting demonstrated a deliberate disregard for patient safety and suspended Ms. Ehling. In turn, Ms. Ehling brought a lawsuit claiming Hospital violated the SCA by improperly accessing her non-public postings.

The SCA covers: (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public. The Court found Facebook wall posts that are configured to be private meet all four criteria of the SCA. Just because the SCA covers such postings an employer is not prohibited from using non-public Facebook postings as a basis for discipline. Rather, an exception to the SCA must allow for such posts to be utilized.

An "authorized user" exception applies where (1) access to the communication was "authorized," (2) "by a user of that service," (3) "with respect to a communication ... intended for that user .". Access is not authorized if the purported "authorization" was coerced or provided under pressure. The Court found all three elements of the authorized user exception are present as Ms. Ehling's act of "friending" the coworker authorized him to access the posts and, as such, the posts were intended for coworker. Further, the hospital took no action to coerce Ms. Ehling or the coworker in an attempt to access the non-public postings.

Employers are wise to tread lightly when faced with non-public Facebook postings or, in a broader sense, an employee's private social media activity. It may be unlawful to solicit or coerce access to private postings, whether through the employee, a co-worker or others. Employers may, however, discipline an employee based on his or her private postings where the unsolicited private postings relate to the employee's employment and there is a legitimate non-discriminatory reason to discipline. Certainly, the employer's access to and use of social media content by employees remains an emerging employment law issue.

For a copy of this case or for more information regarding the impact of social media in the workplace contact Frank Hatfield at fhatfield@fishelhass.com

Welcome Daniel Downey to FHKA

As many of you heard back in August, Fishel Hass announced the addition of Daniel T. Downey as a Partner to our firm. Dan will enhance the litigation and law enforcement liability sections of the firm. Dan focuses his practice on civil rights litigation with an emphasis on governmental liability and immunities. He also represents Counties in day to day employment matters including labor relations and collective bargaining.

Prior to joining Fishel Hass, Dan was a Partner with the law firm of Weston Hurd. Dan received his B.A. in 1991 from Youngstown State University and his J.D. in 1994 from The Ohio State University. He gained his Ohio Bar admission in 1994 and has admission in the United States District Court for the Northern and Southern Districts of Ohio and the United States Court of Appeals, Sixth District. Dan was also named to the Ohio Super Lawyer list for Civil Litigation Defense (2013), and Law & Media Politics.

Dan can be contacted by email at ddowney@fishelhass.com or by telephone at (614) 221-1216.

Congrats to David Riepenhoff

David Riepenhoff was awarded the Community Engagement Award from Otterbein University's Young Alumni Awards on September 20, 2013. David was recognized for his volunteer efforts on the Development Board of Nationwide Children's Hospital. The Young Alumni Awards are given in recognition to those ages 40 and younger and whose contributions exemplify one of Otterbein's Five Cardinal Experiences: Community Engagement, Global and Intercultural Engagement, Professional Achievement, Leadership and Citizenship, and Research or Creative Achievement.

You Don't Want to Miss Our Next Free Fridays!

Do you have a legal question you've been itching to ask? Our next "Free Friday" Daniel Downey will be on standby to answer your calls – on the house. You can submit your questions to Daniel on Friday, November 1, 2013 from 9 am- 4 pm by calling (614) 221-1216. Please no emails as we will only be accepting and responding to phone calls.

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