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FISHEL HASS KIM ALBRECHT LLP™
Attorneys at Law

PERSPECTIVES

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TELECOMMUTING MIGHT BE REASONABLE ACCOMMODATION

Employers may be required to allow disabled employees to telecommute, even if their job requires sight visits and customer contact. The Americans with Disabilities Act requires employers to provide "reasonable accommodations" to qualified employees with a disability. Recently, the U.S. Sixth Circuit Court of Appeals found an employer may be required to allow an employee to telecommute four days a week as a reasonable accommodation to her disability. *EEOC v. Ford Motor Company*, Co.

Jane Harris was a resale steel buyer at Ford from 2003 until termination of her employment September, 2009. The essence of her job was group problem-solving, which requires being available to interact with employees, suppliers and others in the supply chain. Ms. Harris suffered from irritable bowel syndrome ("IBS"). Throughout her employment Ms. Harris frequently worked from home on an "informal basis" to keep up with her work. In February 2009, Ms. Harris formally requested to telecommute up to four days per week to accommodate her IBS.

Ford utilized a telecommuting policy, but denied Ms. Harris' request claiming that resale steel buyers can only telecommute one day per week due to site visits and team meetings. Ford offered to move Ms. Harris' cubicle closer to the restroom among other accommodations. Ms. Harris rejected these options. In April 2009, Ms. Harris alleged disability discrimination and retaliation. In July, she was placed on a performance improvement plan due to being a "lower achiever." Ford terminated Ms. Harris' employment for failing to achieve identified objectives in September 2009. The case proceeded to court.

The trial court found that Ms. Harris was not "qualified" for the position of resale steel buyer due to excessive absenteeism; therefore, the employer could not be liable. The Court of Appeals, reversed because Ms. Harris' position does not require face-to-face interaction and the vast majority of her interactions were conducted by conference call. Telecommuting 80% of the time might constitute a reasonable accommodation under the ADA. In the Court's own words "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life."

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Contrast this case with the 2012 case of *Core v. Champaign Bd. Comm*. In *Core*, a social worker requested to work from home due to alleged chemical sensitivities. The social worker's request was denied because her duties included, among others, inspection of day care facilities, face-to-face meetings with clients, performing trainings, and accessing confidential files located only at the Champaign DJFS. In *Core*, the Court found face-to-face client contact was essential to physically interact with people and be present at the employer's premises.

Employers are well advised to consider telecommuting requests on a case-by-case basis. Make sure that "physical presence" in an essential job function when denying requests. If physical presence is an essential function of the job, it should be documented in job descriptions or other materials describing the position.

Please contact feel free to contact us for a copy of these cases or if you have questions about the application of the ADA.

RECENT CHANGES TO OHIO WORKERS' COMP

On June 16, 2014, the Ohio Governor signed House Bill 493, which changes Ohio's workers' compensation laws and employer requirements. Beginning in 2015, most employers will be required to pay their premiums prospectively as opposed to paying on or near the end of coverage. The Bill establishes a transition period for public employers, who will need to fully transition to prospective payments by 2017. Most employers will also be required to pay on an annual basis rather than a semiannual basis. The Bill also increases the penalty for late premium payments increases from 1% to 10%. H.B. 493 seeks to alleviate some of the burden that prior laws imposed on employers in terms of obtaining coverage for Ohio employees who are temporarily working out of state. The Bill allows the BWC Administrator to provide limited other states' coverage for employees temporarily working in another state. Additionally, the Bill eliminates the employer's obligation to provide coverage to out of state employees who are temporarily assigned to perform work in Ohio whose home states do not require them to obtain Ohio coverage.

EMPLOYERS MAY BE ELIGIBLE FOR BWC SETTLEMENT

In 2007, employers across Ohio filed a class action lawsuit against the Ohio Bureau of Worker's Compensation. This action resulted from allegations that the BWC had charged excessive premiums to non-group rated employers. The class of employers included certain private non-group rated employers for the policy years from 2001-2008. On July 23, 2014, a settlement was reached. The BWC agreed to pay $420 million dollars to reimburse those employers who had been overcharged from 2001 to 2008.

This was an "opt-out" class action meaning employers who did not want to be included in the class needed to file a "Notice of Exclusion" by February 29, 2012. Therefore, if an eligible employer did not file a Notice of Exclusion, it is certified as part of the class and could be entitled to compensation.

Employers included in the class should have a received a Notice of the action and should have received a "Claim Form" which is specific to that employer. Class members are required to file a claim form as a precondition to being considered to receive a payment from the Settlement Fund. The eligible employers who have not received a Claim Form should contact the Settlement Administrator. In order to receive compensation, Claim Forms must be postmarked no later than October 22, 2014. Objections to the action must also be filed by October 22, 2014. A Final Hearing will be held on November 19, 2014.

For additional information or to contact the Settlement Administrator, visit http://www.ohiobwclawsuit.com or call 1-844-322-8230.

EEOC FILES FIRST TRANSGENDER DISCRIMINATION CASES IN HISTORY

On September 25, 2014, the Equal Employment Opportunity Commission ("EEOC") filed the first suits in history challenging transgender discrimination under Title VII. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of sex, among other protected characteristics. The lawsuits challenge employer actions against employees that were allegedly taken on the basis of the employee's gender identity. The lawsuits are part of the EEOC's 2012 Strategic Enforcement Plan ("SEP"), which includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as a top Commission enforcement priority.
http://www.eeoc.gov/eeoc/newsroom/release/9-25-14d.cfm

FHKA will monitor these and other cases of importance from the EEOC in pursuing its SEP objectives. Please feel free to contact us if you would like more information.

OHIO SUPREME COURT TAKES STEP CLOSER TO FINDING NO INDIVIDUAL LIABILITY FOR DISCRIMINATION CLAIMS

In August, 2014, the Ohio Supreme Court found supervisors might not be individually liable for discriminatory acts under Ohio law. *Hauser v. City of Dayton Police Department, et al*.

Anita Hauser sued her employer, the City of Dayton Police Department, and her supervisor Major Mitchell Davis. She claimed age- and sex-based discrimination in violation of the Ohio Civil Rights Act and the federal Title VII of the Civil Rights Act of 1964. Davis argued that he was immune from individual liability. Davis relied on the Ohio Political Subdivision Tort Liability Act, which provides immunity to public sector supervisors from a lawsuit against them for their actions, with limited exceptions.

Hauser alleged Davis is individually liable, citing the Supreme Court's 1999 decision in *Genaro v. Cent. Transport, Inc.* In that case, the Court held that "a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112."

The Court found that its *Genaro* case does not foreclose the possibility of immunity to public sector supervisors. The Court specifically stated that the holding did not overrule *Genaro's* application to private-sector supervisors, though it did recognize that the *Genaro* holding is now called into question.

We expect Ohio courts, and possibly the Supreme Court, will continue to clarify the issue of individual liability of public and private sector supervisors under Ohio discrimination laws. For a copy of this decision, or if you have any questions about this issue, feel free to contact us.

EMPLOYERS ARE NOT LIKING FACEBOOK "LIKES"

Public and private employers should beware that an employee "like" on Facebook could be a protected communication. A federal court of appeals found that Facebook "likes" are protected speech under the 1st Amendment. *Bland, et al. v. Roberts*. In Bland, the court found that two Sheriff's deputies were improperly fired after "liking" the Facebook page of the Sheriff's political opponent. The deputies sued claiming the First Amendment protected their "like" of the Facebook page. The Court of Appeals found that pushing the "like" button is itself a substantive statement and that it is the internet equivalent of displaying a political sign in one's front yard. Their "liking" the sheriff's political opponents Facebook page was political speech, entitled to the highest level of protection.

In a separate recent case, the National Labor Relations Board ("NLRB") (which has jurisdiction over private employers and whose holdings are informative for the State Employment Relations Board that has jurisdiction over public employers) found that two employees were improperly terminated for Facebook activity. In *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, two employees were upset over their employer's tax withholding calculations. One employee was terminated for "liking" a Facebook discussion stream employees were engaged in on the topic. Under the National Labor Relations Act, union and non-union employers cannot discipline employees who are engaged in protected "concerted activity" related to the terms and conditions of employment. That is, employees cannot be disciplined for engaging in activity (including speech activity) with at least one other employee for mutual aid and protection. The NLRB did not go into a detailed analysis of the Facebook "like" button, but did note that the ALJ found that the employee's use of the "like" button expressed his support for others who were sharing their concerns and "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of protected activity."

Public and private union and non-union employers must be cautious when disciplining employees for activity taking place on Facebook and other social media. For more information about social media issues or policies, please contact Stacy Pollock at spollock@fishelhass.com.

PROPOSED RULE TO RE-DEFINE "SPOUSE" UNDER FMLA

In June 2014, the United States Department of Labor (DOL) proposed a revision to the Family Medical Leave Act's (FMLA) definition of "spouse." The proposal will allow eligible employees to take FMLA leave for his or her spouse so long as the employee is legally married, and shifts the focus to whether the *place* where the employee was married recognizes the marriage as legal. If the place where the marriage was entered into (commonly called place of celebration) considers the marriage legal, then the employee will be eligible for FMLA leave to take care of his or her spouse. This is a change to current regulatory language, which focuses on whether the employee's state of residence recognizes the marriage as legal.

The proposed language would entitle an employee who entered into a same-sex or common law marriage in a state or country where the marriage was legal to take FMLA leave for a qualifying reason. Currently, employees are only entitled to FMLA leave

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if the state where the employee resides recognizes the marriage. The DOL is making the change in light of the United States Supreme Court's 2013 decision in *U.S. v. Windsor*. In *Windsor*, the Supreme Court found section 3 of the Defense of Marriage Act (DOMA) unconstitutional. That section limited the definition of marriage and spouses to opposite sex marriages and spouses. At this time, 19 states as well as the District of Columbia recognize same-sex marriage: CA, CT, DE, HI, IA, IL, ME, MD, MA, MN, NH, NJ, NY, OR, PA, RI, VT and WA. Public comment on the proposal closed on August 11, 2014, and the attorneys at FHKA will continue to monitor this issue.

EEOC ISSUES PREGNANCY DISCRIMINATION GUIDELINES

On July 14, 2014, the U.S. Equal Employment Opportunity Commission ("EEOC") released a number of guidelines regarding the Pregnancy Discrimination Act ("PDA"). The PDA prohibits discrimination based on pregnancy, childbirth, or a related medical condition. The guidelines address generally prohibited acts and employer requirements under the PDA.

General Prohibitions

Claims under the PDA are not confined to employees who are currently pregnant. The PDA also prohibits discrimination based on previous and potential or intended pregnancy.

The Act prohibits discrimination based on an employee's plans to either prevent pregnancy or increase the likelihood of conceiving. An employer may not take action against an employee based on the employee's choice to use contraception, seek infertility treatment, or to have or not have an abortion.

The PDA prohibits discrimination against medical conditions related to pregnancy or childbirth. Related conditions may include symptoms such as back pain; disorders such as pregnancy-induced high blood pressure and gestational diabetes; complications requiring bed rest; and the after-effects of a delivery. Lactation is also a pregnancy-related medical condition.

Disparate Treatment

The PDA requires that employers treat employees affected by pregnancy, childbirth, or a related medical condition similarly to other employees who are not pregnant but are similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or other benefits. Employees with pregnancy related conditions are required to have equal access to benefits as other employees with similar abilities or inabilities.

An employee who is lactating must be able to address lactation-related needs to the same extent as she and her coworkers are able to address other similarly limiting medical conditions. Additionally, an employer shall offer light duty to pregnant employees on the same terms that it offers light duty to other workers similarly able or unable to perform the functions of their jobs.

Policies

Employers should also be mindful of policies that either blatantly discriminate against employees affected by pregnancy, childbirth, or related conditions and of policies that will have a disproportionately adverse effect on those employees. Examples of policies that could have a disparate impact on pregnant employees are weight lifting restrictions, light duty limitations, and restrictive leave policies.

Leave

Under the PDA, an employer must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work.

There is a distinction between leave related to physical limitations and those related to parental bonding. Under the PDA, leave related to pregnancy, childbirth, or related medical conditions may be limited to women affected by those conditions, but parental leave must be provided to similarly situated men and women on the same terms.

Pregnancy and the ADA

Although pregnancy itself is not an "impairment" within the meaning of the ADA and thus is not a disability, pregnant workers and job applicants are not excluded from the ADA's protections. If an employee has a pregnancy-related impairment that substantially limits a major life activity, an employer must provide a reasonable accommodation.

Employers should be mindful of employment decisions or policies that either directly affect or could have disproportionately adverse effects on employees affected by pregnancy, childbirth, or a related medical condition. Employers should be willing to work with these employees to accommodate them both during and after pregnancy.

SAME-SEX MARRIAGE: WHY IS THE SUPREME COURT WAITING?

Last week, the U.S. Supreme Court announced several cases that it would take up this term but, despite having several pending appeals from federal courts, the same-sex marriage question was not one of them. So far, all courts of appeals have found that state laws defining marriage as a union between a man and a woman are unconstitutional. The Sixth Circuit, the federal court of appeal governing Ohio, has heard the issue but has not yet issued a decision. The consistency in how courts of appeals are holding may be the reason the Supreme Court has refused thus far to hear the issue. However, soon the Sixth Circuit will also have opined on the issue. If the Sixth Circuit find against marriage equality, that could prompt the Supreme Court to hear the issue. The Supreme Court is much more likely to hear cases to resolve conflicts between federal courts. FHKA will continue to monitor this matter and the Sixth Circuit's highly anticipated ruling.

COURT GRANTS IMMUNITY TO SCHOOL OFFICIALS

An Ohio Court of Appeals recently granted immunity to the Trotwood Madison City School District, a district principal, vice principal, and substitute teachers from claims brought by a sixth grade student. *Moon v. Trotwood Madison City School*s.

In *Moon,* a sixth grade student alleged recklessness following a neck injury the student received at school. On that day, all of the sixth grade teachers were out on leave and the school had arranged for six substitute teachers to oversee the 174 sixth graders. At the end of the school day, the substitute teachers were in the classrooms and students went into the hallway for dismissal. The school's established dismissal procedure requires students to line up in an orderly fashion and the teachers to lead the students through the hallways. However, on January 23, sixth graders were running through the hallway, and a group ended up pushing the plaintiff down and trampling over her. A substitute teacher asked the student if she was okay, and she said yes. After school, the student ended up being taken to the emergency room and was diagnosed with a neck injury.

The appellate court found that all defendants were entitled to immunity. Generally, under the Ohio Political Subdivision Tort Liability Act, political subdivisions are immune from liability for personal injuries caused by a political subdivision or its employees. There are five exceptions to this rule that can expose a political subdivision to potential liability, and the Court opined that the only potential exception that may be applicable to the school district in this case was an exception for negligent acts that occur within or on the grounds of, and are physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function. The court found the exception did not apply because the student produced no evidence and did not even allege that the injury was a result of physical defects on school grounds.

The student also alleged that the administrators were reckless in determining the amount of supervision needed and when they assigned substitutes, and that the substitutes recklessly failed to control the other students. The Court disagreed, and stated that the student presented no evidence indicating recklessness. No students had been injured in the 5 years the dismissal procedure had been used, students and teachers were trained on the procedure quarterly, and there was not an appropriate teacher to student ratio. As such, the Court found that the administrators and teachers were entitled to immunity.

Importantly, the Court noted that the amount of proof needed to show whether a defendant is reckless is extremely high. A party must show that the person or entity consciously disregarded or was indifferent to a known risk. Like this school district, others would be well served to update their policies and regularly train staff on the implementation of those policies.

For questions about school or premises liability, or about this case, please feel free to contact us.

WHAT IS HAPPENING AT FISHEL HASS KIM ALBRECHT LLP:

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

Does a legal question have you stumped? We have the solution. For our next "Free Friday," let Melanie Williamson be your guide – and it's on the house. You can submit your questions to Melanie Williamson on Friday, November 7, 2014 from 9 a.m. - 4 p.m. by calling (614) 221-1216. Please no emails as we will only be accepting and responding to phone calls. Be sure to check out our Events Calendar for future "Free Friday" dates by visiting www.fishelhass.com

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