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FHKA LLP℠
Fishel Hass Kim Albrecht LLP℠
Attorneys at Law

PERSPECTIVES

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THE SUPREME COURT DECIDES IN FAVOR OF FORMER UPS WORKER ON PREGNANCY DISCRIMINATION CLAIM, ALLOWING HER CLAIM TO MOVE FORWARD

In a 6-3 decision, the Supreme Court of the United States issued an opinion on March 25, 2015, reviving a former UPS driver's pregnancy discrimination suit against her former employer, UPS. In *Young v. United Parcel Services*, the Court vacated the Fourth Circuit Court of Appeals' decision granting judgment to UPS, and has potentially made it easier for all plaintiffs to prevail on pregnancy discrimination claims against their employers going forward.

In 2006, UPS denied light duty accommodations to a pregnant employee, Peggy Young, citing their policy of only extending light duty or reassignments to employees who were injured on the job or to employees qualifying as disabled within the meaning of the Americans with Disabilities Act. Young brought suit, alleging the policy resulted in disparate treatment for pregnant workers compared to other employees who were similarly situated in their inability to work. Young alleged that UPS' actions were in violation of the Pregnancy Discrimination Act, which prohibits employers from discriminating against individuals based on an employees' pregnancy. The Fourth Circuit had affirmed judgment in favor of UPS, and held that the employee was not entitled to an accommodation based on the language of UPS' light duty policy because she was not disabled under the Americans with Disabilities Act, nor was she regarded as disabled under the Act.

In its decision, however, the Supreme Court held that individual pregnant workers bringing these types of disparate treatment claims may show disparate treatment through indirect evidence, and may do so using a modified *McDonnell-Douglas* analysis. Under this analysis, the individual pregnant worker can make out a prima facie case of discrimination by showing:

(1) The worker belongs to a protected class (i.e. she is or was pregnant);
(2) She sought accommodations from her employer;
(3) The employer did not accommodate her; and
(4) The employer accommodated other employees <u>similar in their ability or inability to work</u>.

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Once the worker has met these four elements, the employer can then show that it did not accommodate the employee based on legitimate, non-discriminatory reasons. The Court made it clear that those reasons cannot include that it is more expensive or less convenient to accommodate pregnant workers. Once the employer has offered a legitimate reason, the worker can then show that these reasons are pretextual. Workers can take the case to a jury on the "pretextual" issue if the worker shows enough evidence that, "the employer's policies impose a significant burden on pregnant workers," and the employer's reasons "do not justify the burden on pregnant workers." This showing of pretext can be shown through evidence that the employer accommodates a large percentage of non-pregnant workers, but fails to accommodate a large percentage of pregnant workers. The Court did not seem to consider the glaring fact that most employers limit light duty assignments to on-the-job injuries only. Therefore, such policies will, by their very nature, not accommodate large percentages of pregnant workers since pregnancy is not an on-the-job injury. Hence, this statistical hurdle will be easy for pregnant employees to meet in such circumstances.

Nonetheless, the Court applied this analysis to Young's case, and to UPS' policy, and determined that Young presented genuine disputes of fact, "… as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers." The Court then remanded the case to the Fourth Circuit to determine whether Young had created as issue of fact regarding whether UPS' reasons for treating Young less favorably than non-pregnant employees were pretext for discrimination.

This new, modified prima facie case will make it easier for employees to assert a pregnancy discrimination case based upon an employer's denial of a light duty assignment even if light duty has been reserved solely for on-the-job injuries. Employers are encouraged to immediately conduct an in-depth review of their light duty policies and practices in light of the Supreme Court's ruling.

Click here to read the full opinion of the Court.

FMLA POLICY COULD EXPOSE EMPLOYER TO LIABILITY

Employer policies can impact an employee's Family Medical Leave (FMLA) eligibility. The Sixth Circuit Court of Appeals recently reversed summary judgment for an employer based on the employer's policy that indicated the employee was eligible for FMLA leave. *Tilley v. Kalamazoo Cty. Road Comm.*, 2015 WL 304190 (6th Cir. 2015).

An employee of the Kalamazoo Road Commission was subject to a written reprimand requiring him to submit three separate assignments by deadlines set by his supervisor. On the morning of his final assignment, August 1, the employee complained of chest pain, presented symptoms of a heart attack and was taken to the hospital. He was discharged from the hospital the following day and informed the Road Commission that he would not return to work until August 5. He did not submit the final assignment. On August 9, an employer representative mailed the employee FMLA paperwork stating he was eligible for FMLA leave due to his absence. On August 12, however, the Road Commission terminated his employment for failing to complete his final assignment. The employee sued for FMLA interference and FMLA retaliation.

The Kalamazoo Road Commission's Personnel Manual stated, "Employees covered under the Family Medical Leave Act are full-time employees who have worked for the Road Commission and accumulated 1,250 work hours in the previous 12 months." However, the Manual failed to include that, under the FMLA, employees are only entitled to leave if the employees work at, or within 75 miles of, a site where the employer employs at least 50 employees. In this case, the Road Commission did not employ at least 50 employees within a 75-mile radius. Essentially, the Commission's policy included the first two requirements for FMLA eligibility but failed to include the third. Thus, the employees were not technically entitled to leave under the actual regulations of the FMLA.

The Court of Appeals, however, held that an employee's reasonable reliance on the Manual allowed the employee to proceed to trial on his interference and retaliation claim for taking FMLA leave. The Court indicated that the Road Commission "could have qualified its statement concerning employee eligibility by adding that its full-time employees would only be covered by the FMLA if they worked at, or within 75 miles, of a site at which the Road Commission employed at least 50 employees." As this case teaches, Employers should be careful when drafting FMLA policies so that they do not inadvertently establish a greater right to leave benefits than the law allows.

UPCOMING SUPREME COURT DECISION ON EMPLOYER'S REQUISITE NOTICE FOR RELIGIOUS ACCOMMODATION

The U.S. Supreme Court recently heard arguments in a religious discrimination suit brought by the EEOC against clothing retailer, Abercrombie & Fitch. This case arose from an Abercrombie & Fitch applicant who wore a hijab, or headscarf, during her interview and was subsequently not hired. Abercrombie & Fitch has a strict "Look Policy," which requires employees to dress in clothing consistent with the store's brand. These requirements include no black clothing and no "caps." The policy does not define "caps." The applicant in this case was a Muslim woman who wears a headscarf for religious purposes. The applicant was offered an opportunity to interview for a position on the sale's floor. The store manager was familiar with the applicant, as she had seen her in the store talking with another Abercrombie employee. The manager had previously seen the applicant wearing her headscarf.

The manager testified that she believed that the applicant wore the headscarf for religious purposes and "assumed she was Muslim." Although the applicant wore her headscarf during the interview, neither the applicant nor the manager addressed her wearing the headscarf at work or the particular requirements of the "Look Policy." After the interview, the manager consulted the district manager about whether or not the applicant could wear her headscarf. The district manager instructed the manager to change the applicant's scores on her evaluation sheet so that she would not be recommended for hire. Abercrombie did not offer the applicant the job.

A Federal Court of Appeals held that Abercrombie did not fail to accommodate the applicant's religious beliefs and was entitled to summary judgment because the applicant never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs or that she would need an accommodation because her religious practices conflicted with Abercrombie's clothing policy. The issue before the Supreme Court is: Whether an employer must have actual knowledge that a religious accommodation is required from direct, explicit notice from an applicant or employee before liability under Title VII will attach for refusing to hire or for discharging an individual based on the individual's "religious observance and practice."

FHKA will continue to monitor this decision.

AN INDIVIDUAL CAN SUE BASED ON A DENIAL OF PUBLIC RECORDS EVEN THOUGH SOMEONE ELSE MADE THE REQUEST

In a case of first impression, on March 25, 2015, the Ohio Supreme Court held that a person has standing to bring a lawsuit for denial of public records even though that individual did not make the disputed public records request. *State ex rel. Quolke v. Strongsville City School Dist. Bd. of Edn.*, Slip Opinion No. 2015-Ohio-1083.

Teachers in the Strongsville City School District went on strike early 2013 resulting in the School Board hiring replacement teachers. An attorney on behalf of the President of the Cleveland Teacher's Union made a public records request for identifying information (e.g. home address, phone number, etc.) of replacement teachers. The attorney did not disclosure the request was made on behalf of the Union President.

The School Board initially denied the request and later provided some records, but redacted much of the information requested. The School Board did not provide non-redacted records even after conclusion of the strike. The School Board argued releasing the requested records even after the strike violates the replacement teachers' constitutional right to privacy and personal safety. The Court found to the contrary.

The School Board also argued that the Union President lacked standing to sue because he is not an "aggrieved person" under the statute as he did not make the original request. The Court rejected this argument holding that the identity of the original requester is irrelevant as well as his reason for requesting the records. Therefore, the Union President is an "aggrieved person" even though his attorney made the original request on his behalf.

This case reinforces that public agencies must focus on the records request at hand with little to no consideration given to the identity of the requester. Feel free to contact us with questions or if you would like a copy of this case.

FIREARM SPECIFICATION DOES NOT APPLY TO POLICE OFFICERS ACTING IN LINE OF DUTY

Ohio's firearm specification law imposes a mandatory three-year prison term when a person uses a gun in the commission of a crime. The Ohio Supreme Court has ruled that an on-duty police officer acting within the course and scope of his employment cannot be subject to Ohio's firearm specification.

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The case of *State v. White* (February, 2015) involved an Ottawa Hills police officer, Thomas White, who shot a motorcyclist he had pulled over for a traffic stop, leaving him paralyzed. White contended he thought the man was reaching for a weapon as White approached the motorcycle. It turned out the motorcyclist had no gun. White was convicted of felonious assault and sentenced to seven years in prison. The trial court sentenced him to an additional three years in accordance with the firearm specification statute.

The Supreme Court held that the firearm specification did not apply in this case because White was acting within the course and scope of his employment as a police officer. The Court said that the firearm specification exists to punish criminals who choose to use a gun. "A firearm specification is not intended to deter a peace officer from possessing a firearm, because the officer is required to carry a firearm and permitted to use it, when necessary, in the course of carrying out the duties of a law enforcement officer," the majority wrote. "The General Assembly did not intend the firearm specification to apply to a police officer who fired a gun issued to him to protect himself, fellow officers, and the public from a person he thought was about to brandish a weapon."

The Supreme Court found that a firearm specification could apply to a police officer if facts showed the officer engaged in criminal activity beyond the scope of his duties, such as an officer robbing a drug dealer at gunpoint. That was not the case with Officer White, however.

The decision is widely viewed as a victory for Ohio's law enforcement officers. If you have any questions regarding the decision, please contact Paul Bernhart at pbernhart@fishelhass.com.

HOUSE BILL 56 AND THE USE OF THE CRIMINAL BACKGROUND CHECKS

House Bill 56 was introduced on February 10, 2015. The bill seeks to amend several provisions of the Ohio Revised Code that deal with the use of prior criminal convictions and criminal background checks in the hiring process for public employers. The bill applies to the State and its political subdivisions but not to private employers.

Under H.B. 56, no appointing authority may consider an applicant's prior criminal record until the applicant has been selected for appointment and the appointing authority is prepared to make an offer of employment. In other words, the appointing authority must make a conditional offer of employment before inquiring into the criminal background of an applicant. The bill does permit an exception for those positions where the Ohio Revised Code or federal law disqualifies an applicant from the positions. In these situations, the appointing authority may only inform applicants of these disqualifiers but the restrictions on the timing of an inquiry contained in the bill will apply.

Unless specifically disqualified from a position under state or federal law, an appointing authority may not automatically disqualify an applicant for a conviction or guilty plea without first considering factors enumerated in the bill. These factors include whether the offense directly relates to the responsibilities of the position for which the applicant applied, the nature and severity of the offense, the age of the applicant at the time of the offense, the date of the offense, the length of the time the applicant has either not been incarcerated or under any correctional supervision, and any documentation that demonstrates the applicant's rehabilitation. Appointing authorities likely will need to keep detailed records of their consideration of these factors in the event an unsuccessful candidate challenges a decision not to hire.

The new bill indicates that a record of arrest without a conviction or guilty plea may not be considered although it is unclear whether an appointing authority could still consider the underlying facts relating to the arrest and reject a candidate on this basis. If a prior conviction or guilty plea is a basis for rejecting an applicant, the appointing authority must notify the applicant in writing, presenting the specific evidence that supported the decision to reject the applicant. This requirement will result in additional mandatory documentation of the reason an applicant was rejected. Currently, in general, it is adequate for an employer to state that a more qualified applicant was hired. If H.B. 56 becomes law, appointing authorities will be required to provide documentation that can later be used against the appointing authority in the event of litigation. Such a document also will be public record. It may be more difficult for boards and

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commissions to meet these requirements since those entities may have to approve a written explanation by resolution.

The bill also clarifies in Chapter 124 of the Ohio Revised Code that conviction of a felony may be a basis for removal or discipline if the conviction occurs while the employee is employed in the civil service. The bill does not indicate how alleged violations of the proposed law will be addressed.

These proposed changes will make it more difficult to reject candidates for employment. The proposed changes are similar to efforts by the Equal Employment Opportunity Commission to reduce an employer's reliance on criminal charges and convictions in personnel decisions. The bill has nineteen sponsors and has been referred to the House Commerce and Labor Committee. FHKA will continue to monitor the status of this bill.

FEDERAL MARIJUANA BILL INTRODUCED

On March 10, 2015, a bipartisan group of U.S. senators introduced the Compassionate Access, Research Expansion, and Respect States ("CARES") Act. The primary focus of the legislation is to reclassify marijuana under the Controlled Substances Act from a "schedule I" substance to "schedule II" substance under Federal law. Schedule I drugs are defined to have a high potential for abuse, no currently accepted medical use in treatment and are considered unsafe to use. The reclassification would mean marijuana would no longer be a federally-criminalized substance but would be one that has recognized medical uses but is still regulated, like opioid narcotic pain relievers such as morphine and oxycodone.

To date, 23 states and the District of Columbia have legalized medical marijuana, though the substance remains illegal under Federal law. Four states have legalized recreational marijuana. Because the substance is illegal under Federal law, the Americans with Disabilities Act does not protect current users when the employer takes action on the basis of that use. Many employers have continued to enforce zero-tolerance drug free workplace policies and have refused to make workplace accommodations for medical marijuana users. Some believe the CARES Act could clear-the-way for additional State de-criminalization of medical marijuana and add to legal challenges by employees in states that have legalized medical marijuana use.

There are currently five organizations attempting to place marijuana deregulation amendments to the Ohio Constitution on the ballot within the next two years. These proposed amendments vary greatly in scope. The most limited proposals would decriminalize marijuana use for medicinal, or "therapeutic," purposes. Other proposals would decriminalize marijuana use generally and establish protections from termination for those who chose to consume marijuana. A proposal by Ohioans to End Prohibition would prevent employers from terminating an employee who has tested positive for any marijuana compound. The measure would limit employers' ability to terminate an employee to only those who use marijuana during work hours or on company property. How employers are to make that determination through testing is unclear.

This topic will continue to develop rapidly on the State and Federal level. Contact David Riepenhoff at driepenhoff@fishelhass.com with any questions.

UPDATE ON OHIO WORKERS' COMPENSATION BILLS

Last January, Fishel Hass reported on Senate Bill 252. In December of 2013, SB 252 was introduced in the Ohio Senate to exempt Police and Fire employees from the effects of a Supreme Court decision that held that psychiatric conditions, without an accompanying physical injury or occupational disease, are not compensable under workers' compensation. *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58 (2013). The purpose of the bill was "To amend [the Ohio Workers' Compensation Act] to make peace officers and firefighters diagnosed with post-traumatic stress disorder arising from employment without an accompanying physical injury eligible for compensation and benefits under Ohio's Workers' Compensation Law." That bill died in chamber in June of 2014.

On February 2, 2015, Senate Bill 5 was introduced, which also proposes that peace officers, firefighters, and emergency medical workers who are diagnosed with post-traumatic stress disorder (PTSD) would be eligible to receive workers' compensation and benefits under certain circumstances regardless of whether a physical injury accompanies the (PTSD).

If passed, this bill would create a category of workers' compensation for police officer and firefighters that does not exist for all other workers in Ohio.

If you have any questions regarding SB 5, or any other workers' compensation matters, please contact David Riepenhoff at driepenhoff@fishelhass.com.

WHAT IS HAPPENING AT FISHEL HASS KIM ALBRECHT LLP:

Did you know that Marc Fishel edits "Employment in Ohio – A guide to employment laws, regulation and practices," published by Matthew Bender? This publication provides information concerning the laws, regulations, and policies affecting labor and employment in Ohio. It has a variety of practical applications including developing a personnel policy, is a resource for answers to employment law questions, and offers guidance on new procedures and potential sources of liability.

Please Welcome Devon Collins to FHKA

Devon Collins joined FHKA last month as our new law clerk. Devon is currently attending The Ohio State University Moritz College of Law as a second year law student. Devon can be reached at dcollins@fishelhass.com.

UPCOMING EVENTS SEMINARS AND WEBINARS!

FHKA is Hosting a Free Webinar!

On April 30, 2015 from 10:00 a.m. to 11:30 a.m. and 2:00 p.m. to 3:30 p.m., Marc Fishel will be presenting two webinars on "Social Media – The Impact on Workplace & Employment Relationships. This presentation will focus on the latest uses of social media and how they impact the workplace and employment relationships. Both sessions are currently full, but we plan to post both webinars on our website at www.fishelhass.com.

Civil Service Law and Discipline Seminar – Refreshed and New, It's BACK!

Interested in attending a two day seminar on Civil Service Law and Discipline? Stay tuned for further information as we finalize the details for this upcoming event in September. CLE's will be offered with this two day event.

DON'T FORGET ABOUT FREE FRIDAY'S

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 Frank Hatfield be your guide – and it's on the house. You can submit your questions to Frank Hatfield on Friday, May 1, 2015 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

FISHEL HASS KIM ALBRECHT LLP 400 S. FIFTH STREET, SUITE 200
COLUMBUS, OHIO 43215**P** (614) 221-1216 | **F** (614) 221-8769
www.FishelHass.com