Summer 2014

PERSPECTIVES

A Periodic Publication of Fishel Hass Kim Albrecht LLP

Supreme Court Weighs In On Affordable Care Act

Court's Invalidates Obama Appointments to NLRB

Employee Denied Workers' Compensation after Misconduct Discovered

Divided U.S. Supreme Court Finds Anonymous Tip Sufficient

U.S. Supreme Court Tackles Warrantless Search of Cell Phones

Prayer Returns to Public Meetings

Public Records: Cruiser Cam Video May Be Withheld Pending Resolution of Criminal Case

Arbitrator Clarifies What Begins and Ends Investigation Timeline in Union Contract

Opinion Clarifies Release Information About Recipients Of Public Assistance?

Severance Payments Are Taxable FICA Wages

What is Happening at FHKA

SUPREME COURT WEIGHS IN ON AFFORDABLE CARE ACT

On June 30, 2014, the United States Supreme Court issued its decision in the case of *Burwell v. Hobby Lobby Stores, Inc.* In this case, the Court was asked to determine whether the Religious Freedom Restoration Act of 1993 prohibits the government from requiring companies whose owners have a sincere belief that life begins at conception to provide certain contraceptive drugs or devices that would be inconsistent with such a belief. This case actually involved three different corporations that sued the U.S. Department of Health and Human Services (HHS) concerning these requirements. HHS has issued regulations requiring contraceptive coverage that encompass twenty different drugs or devices. These companies objected to four of the twenty requirements. In this case, there was no dispute that the owners of these companies held a legitimate religious belief that the four methods to which they objected would violate their religious beliefs. The Court concluded that the HHS regulations advance a compelling Government interest, but that the contraceptive mandates substantially burdens the exercise of religion.

The majority of the Supreme Court justices, in a 5-to-4 decision, concluded that the Government failed to satisfy the Religious Freedom Restoration Act's least restrictive means standard for imposing the requirement on the businesses. For example, the Court concluded that the Government could assume the cost of providing the four contraceptives to women who are unable to obtain coverage due to their employer's religious objections. The Court also stated that HHS could extend the accommodation that already applies to religious non-profit organizations and non-profit employers with religious objections to the contraceptive mandate. In those situations, the individual employees can choose to purchase and pay for additional coverage that would cover the contraceptive methods not provided for by the employer's health insurance.

The Court went onto state that this decision only relates to the contraceptive mandate and does not apply to all insurance mandates or components such as vaccinations or blood transfusions that may conflict with an employer's religious beliefs.

For questions about the Affordable Care Act, contact Marc Fishel at mfishel@fishelhass.com or (614) 221-1216.

COURT INVALIDATES OBAMA APPOINTMENTS TO NLRB

On June 26, 2014, the Supreme Court rejected several "recess" appointments made by President Obama to the NLRB in 2012. From December 2011 to January 2012, the Senate held "pro forma" sessions every three days. The Senate conducted no official business during these sessions, but the Court held the sessions were valid and did not constitute a recess during which the President could make appointments. The Court held that a Senate break of fewer than ten days is too short a time to constitute a recess. Thus, the Court invalidated the appointments ruling that the President may only make appointments if the recess is longer than ten days.

The improperly appointed board issued over 400 decisions while President Obama's appointees served on the board. These decisions addressed issues involving social media, confidentiality, off-duty access, discipline, etc. which were viewed by many employer advocates as "controversial." Reportedly around 100 cases pending in federal appellate courts were stayed awaiting the Court's decision about the recess appointments. Several could be returned to the board for reconsideration or reversed.

For more information, please contact our Firm at info@fishelhass.com.

EMPLOYEE DENIED WORKERS' COMPENSATION AFTER MISCONDUCT DISCOVERED

A recent Ohio Supreme Court decision demonstrates the importance of well-written job descriptions and employment policies, and of appropriate documentation of discipline. *State ex rel. Robinson v Indus. Comm.,* 138 Ohio St. 3d 471 (2014). An injured worker who is incapable of returning to her job due to a workplace injury is entitled to Temporary Total Disability Compensation ("TTD") through the Ohio BWC. Ohio Courts hold, however, that where the employee was terminated for violation of her employer's written work rules that 1) clearly identify the prohibited conduct, 2) identify the misconduct as a dischargeable offense, and 3) were known or should have been known to the employee, the employee has voluntarily abandoned her job for reasons unrelated to the injury and is ineligible for TTD.

Shelby Robinson was employed as a licensed practical nurse by Progressive Parma Care Center. When hired, she was given a written job description and an employee handbook. In her first decade of employment Ms. Robinson was disciplined for violation of several work rules and notified in writing that continued violations may result in termination of employment. On April 10, 2008, she was injured at work and filed a workers' compensation claim, which was allowed. The employer provided her light duty within her medical restrictions.

On April 15, 2008, the employer was notified that Ms. Robinson had failed to communicate a patient's dietary needs and engaged in other misconduct. In the following days, a supervisor attempted to review the situation with Ms. Robinson, but Robinson refused to meet with her in person. On April 21, 2008, Ms. Robinson's physician opined that she was totally incapable of working effective April 10, 2008, On April 30, 2008, Parma Care terminated Ms. Robinson's employment for violation of work rules.

The IC denied her TTD, finding her discharge was for violating written work rules, and not as a result of her workplace injury. The Commission observed that Robinson had been provided with a copy of the employee handbook that set forth policies, rules, and disciplinary procedures. Moreover, Robinson acknowledged on a prior discipline form that her violation of another workplace rule would result in termination. The Court upheld the decision, stating Robinson's job duties were "sufficiently identified in the employee handbook and her job description" so that she was on notice that her actions could result in termination. Thus, her discharge constituted a voluntary abandonment of employment barring her TTD.

The Court also rejected Robinson's argument that the timing of her termination, after the employer learned of her disability, evidences that the employer's motivation was to fire her to avoid paying TTD. The Court found that the evidence, particularly Robinson's failure to communicate with her employer when requested, supported the finding that Parma Care terminated her effective April 16, 2014, prior to any physician certifying that she was temporarily and totally disabled.

Critics of the decision point-out that workers' compensation is a "no fault" system and argue that terminating an injured worker who is absent because of the injury is inconsistent with the purpose of workers' compensation. Employers would be well served to be sure the job descriptions and employment policies are up-to-date and clearly communicate the expected standards of conduct.

For more information about workers' compensation, please contact David Riepenhoff at driepenhoff@fishelhass.com or (614) 221-1216.

DIVIDED U.S. SUPREME COURT FINDS ANONYMOUS TIP SUFFICIENT

On April 22, 2014, the U.S. Supreme Court found that an anonymous tip to 911 that a motorist was intoxicated was

Continued on pg 3…Tip

Tip…Continued from pg. 2

sufficient for the officer to stop the motorist on suspicion of drunken driving. In *Navarette v. California*, a police dispatcher relayed a tip from a 911 caller, which was recorded as follows: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8–David–94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago." A police officer heading northbound toward the reported vehicle responded to the broadcast and stopped the truck. As officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The officers arrested the driver and passenger. After a lower court would not suppress the evidence, both motorists pleaded guilty to transporting marijuana.

The Court first noted that an anonymous tip *alone* is seldom enough to justify a stop of a motorist. In this case, however, the officer reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. The Court found that conduct bears too great a resemblance to manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.

Dissenting justices opined that the anonymous accusations are inherently doubtful, and the caller in this case gave no indication that the other driver was drunk. Those justices pointed out "[t]he truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian," and that intoxication was an "unlikely reason" and far too improbable to justify a vehicle stop.

All justices agreed that the justification for stopping a motorist must be based on an analysis of each specific situation.

For more information, please contact our Firm at info@fishelhass.com.

U.S. SUPREME COURT TACKLES WARRANTLESS SEARCH OF CELL PHONES

On June 25, 2014, the Supreme Court unanimously held that police must ordinarily obtain a warrant to conduct a search of an individual's cell phone incident to a lawful arrest. *Riley v. California*. The *Riley* case involved two separate arrests. In the first case, Mr. Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officers accessed and examined the phone's digital contents. Based in part on photographs and videos found on the phone, the State charged Riley in connection with a shooting.

In the tandem case, Mr. Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. The evidence was used to support convictions of Riley and Wurie.

The Court had to determine whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court concluded that police must ordinarily obtain a warrant to conduct a search of an individual's cell phone incident to a lawful arrest. In previous cases, the Court established that concerns for officer safety and evidence preservation allow a limited search of the person and his property incident to arrest. In *Riley*, the Court distinguished cell phones from the historical pieces of evidence, such as the physical portions of a vehicle or a home. The Court analogized cell phones to minicomputers, easily capable of being called "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." The immense storage capacity of cell phone provides officers a much larger picture, revealing far more in combination than any one isolated piece of information or document.

The *Riley* decision is in line with a 2009 Ohio Supreme Court case of *State v. Smith*. In *Smith*, officers arranged for an informant to call Smith on his cellphone to set up a drug buy. Upon arresting Smith, officers searched his cell phone call log to confirm the informant had actually made the call. The Ohio Supreme Court held that the officers should have first obtained a warrant before searching the cell phone. Equating a cell phone to a laptop computer, the *Smith* Court found that people have a high expectation of privacy in a cell phone's contents.

The *Riley* Court did indicate that other exceptions to the warrant requirement, such as exigent circumstances, may justify a warrantless cell phone search depending on the facts of each case. However, privacy concerns involved with modern cell phones outweigh any blanket exception for the warrantless search of a cell phone incident to arrest.

For more information, please contact our Firm at info@fishelhass.com.

PRAYER RETURNS TO PUBLIC MEETINGS

The U.S. Supreme Court ruled on May 5, 2014, that prayers that take place at the beginning of public meetings do not necessarily violate the Establishment Clause of the U.S. Constitution. *Town of Greece, NY v. Galloway.* The Establishment Clause requires the Separation of Church and State under the First Amendment. Since 1999, the Town of Greece held monthly meetings and a prayer was given at the beginning of each meeting by clergy selected from the congregations listed in a local directory. Nearly all of the local congregations were Christian, so nearly all of the prayers were Christian. Citizens filed suit claiming that the Town violated the First Amendment with these prayers.

The Supreme Court held that the prayers may have invoked the name of Jesus, but they also invoked universal themes, such as calling for a "spirit of cooperation." Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenged based solely on the content of a particular prayer will likely not establish a constitutional violation. So long as the Town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.

For more information on this case or the First Amendment, please contact Stacy Pollock at spollock@fishelhass.com.

PUBLIC RECORDS: CRUISER CAM VIDEO MAY BE WITHHELD PENDING RESOLUTION OF CRIMINAL CASE

Recently, in a case of "first impression" the Twelfth Appellate District Court held that cruiser camera video capturing the investigation of a specific alleged violation of law (e.g. OVI) is a confidential law enforcement investigatory record. ("CLEIR"). *State ex rel Miller v Ohio State Highway Patrol et al.,* 2014 Ohio 2244. Accordingly, such video records are not subject to disclosure in response to a public records request during the pendency of criminal matter.

Mark Miller is the founder of the Coalition Opposed to Additional Spending and Taxes (COAST). COAST's goal is to "bring to light" government waste, fraud or abuse. COAST made a public records request of the Highway Patrol for cruiser camera video regarding traffic-related incidents for a period of time in 2011. One incident captured by the cruiser camera was the field sobriety test and interrogation of an OVI suspect. The Highway Patrol denied the video recording of the OVI stop asserting that it constitutes investigatory work product of an ongoing criminal investigation.

CLEIRs are not subject to disclosure pursuant to a public records request if they create a high probability of releasing investigatory work produce compiled in connection with a criminal prosecution. However, CLEIRs do not include ongoing routine offense and incident reports because these reports initiate a criminal investigation, but are not a part of it. In this case the Court held that the video footage capturing a suspect's interrogation and field sobriety test is an investigation of a specific violation of Ohio law, rather than a routine monitoring investigation of all motorists on the road. Thus, the Highway Patrol was correct in denying COAST's request as the footage is a CLEIR.

This case provides some clarity and assistance to law enforcement agencies when discerning between CLEIRs and routine offense reports. Practically speaking, records that serve a specific investigatory purpose relative to potential criminal charges may be withheld as CLEIRs during the pendency of criminal matters.

For more information, please contact our Firm at info@fishelhass.com.

ARBITRATOR CLARIFIES WHAT BEGINS AND ENDS INVESTIGATION TIMELINE IN UNION CONTRACT

The City of Ontario and Fraternal Order of Police, Ohio Labor Council, Inc. (Patrol Officers) are parties to a Collective Bargaining Agreement. The contract requires the City to complete all investigations into alleged officer misconduct within sixty (60) days from the filing of a complaint. On or about May 2, 2013, a police sergeant received a disrespectful email and telephone call from a subordinate patrol officer. On May 3, the sergeant discussed the interactions with the police chief who advised the sergeant to submit the incident through the chain of command for review. On May 7, the sergeant emailed his superior officer apprising him of the incident. Exactly sixty days later, on July 6, the City issued a notice of pre-disciplinary hearing to the officer. The Union filed a grievance alleging the contract was violated because the City did not complete the investigation within 60-days of May 3, when the sergeant reported the incident to the police chief. The case proceeded to arbitration.

The Arbitrator denied the grievance finding that the 60-day timeline was not triggered until May 7, when the sergeant formalized his complaint in writing up the chain of command. The Arbitrator determined that the May 3, conversation between the sergeant and police chief was merely informal advice seeking. The Arbitrator noted that the police chief did

Invest...Continued from pg. 4

not take ownership of the issue by offering to look into the matter, he only advised the sergeant that in order to have the matter looked into, it should be sent up the chain of command. Only then did the 60-day timeline begin.

The Arbitrator also determined that the investigation ended with the City issuing the notice of pre-disciplinary hearing to the officer on July 6. The Union alleged that the investigation was ongoing through the pre-disciplinary hearing stage and therefore, even if the investigation did not begin until May 7, the investigation was still not completed within 60-days. However, the Arbitrator ruled that the notice of the pre-disciplinary hearing is notice that the investigation of the complaint had concluded and that the disciplinary process would ensue.

This case is a good example of the importance of knowing and adhering to contract timelines. Failure to follow a contractual timeline for conducting an investigation into employee misconduct could result in having any discipline reversed or nullified.

For more information, please contact our Firm at info@fishelhass.com.

OPINION CLARIFIES WHEN TO RELEASE INFORMATION ABOUT RECIPIENTS OF PUBLIC ASSISTANCE.

Law enforcement agencies often seek assistance from County Department of Job & Family Service ("JFS") agencies to obtain information about recipients of public assistance benefits. These requests have been met with resistance as there is much confusion about what information a JFS can legally provide to law enforcement agencies. An Ohio Attorney General ("OAG") Opinion issued May 15, 2014, looks to clear up some of the confusion about what information can be released and when. OAG 2014-021.

Ohio Works First (OWF) benefits, Disability Financial Assistance (DFA) benefits and Supplemental Nutrition Assistance Program (SNAP) benefits are all forms of public assistance under the Revised Code. A broad prohibition exists in the law regarding releasing information about recipients of these benefits. There are, however, limited circumstances when a JFS is authorized to provide information about benefits recipients to law enforcement agencies.

A JFS must release information about a benefits recipient to law enforcement if the information is needed for the purpose of an investigation, prosecution or criminal or civil proceeding relating to the administration of benefits. Further, a JFS must release information about a recipient of OWF or DFA to a law enforcement agency if the agency provides sufficient information to specifically identify the recipient and if the information is needed for the purpose of investigation, prosecution or criminal or civil proceeding within the scope of the law enforcement's agency official duties.

The release of information about SNAP recipients will depend on the purpose of the request. A JFS may release information regarding a SNAP recipient to a local prosecutor, if the prosecutor is investigating possible food assistance fraud or violations of the Food and Nutrition Act. Further, information about a SNAP recipient may be released to a law enforcement officer, if the recipient is fleeing to avoid prosecution or custody for a felony or the recipient is violating a condition of probation or parole.

While OAG Opinions are not binding authority, this opinion will hopefully provide some guidance to JFS agencies as well as law enforcement agencies. This is a complicated issue and each request for information will need to be thoroughly evaluated by the JFS agency to determine if any of the above discussed rules apply.

For more information, please contact our Firm at info@fishelhass.com.

SEVERANCE PAYMENTS ARE TAXABLE FICA WAGES

On March 24, 2014, a unanimous U.S. Supreme Court issued its opinion in *United States v. Quality Stores, Inc., et al.*, finding that severance payments are taxable wages for FICA purposes. FICA payroll taxes are paid by private sector employers and help finance Social Security and part of Medicare. The High Court's decision overturns the opinion of the Sixth Circuit which found severance payments were not "wages" subject to FICA.

Quality Stores, as part of bankruptcy reorganization, closed all of its stores and terminated its employees. In so doing, the employer issued severance payments to employees. Quality Stores reported the payment as wages and withheld income tax since they were "gross income" to the employees for IRS purposes. Quality Store also collected and paid FICA taxes from the severance payments but argued that the payments were actually "supplemental unemployment benefits" (SUB) and, therefore, not taxable under FICA.

The Sixth Circuit agreed with Quality Stores and found they were SUB payments and, therefore, not subject to FICA. On

further appeal, the U.S. Supreme Court reversed, finding that, under FICA, wages are defined broadly as "all remuneration for employment" and the lengthy list of exemptions from this definition did not include "severance payments." However, the listed FICA exemptions did include "supplemental unemployment benefits." The Supreme Court then turned its attention to the difference between severance payments and SUB payments, explaining that SUB plans originated in the 1950's as a second-level of protection against layoffs by supplementing unemployment benefits offered by the States. SUB payments are typically funded through a trust, paid weekly during the unemployment period and are tied to the receipt of unemployment benefits. Since Quality Stores provided payment to employees in a lump sum that was unrelated to unemployment benefits, the Court found the payments failed to meet the requirements of a SUB plan and were, therefore, taxable as wages under FICA.

For questions about this case, or about this issue, please contact Brad Bennett at bbennett@fishelhass.com or (614) 221-1216.

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

---

THANK YOU ATTENDEES - AFFORDABLE CARE ACT WEBINAR

Thank you to all the attendees of our first webinar on the Affordable Care Act. The ACA is a new normal for our country, so it's important that employers like you feel educated about the policy. We had some great questions and we hope you found the information helpful and if you have any questions, please contact us at info@fishelhass.com. We are looking to participate in more webinars in the future, so stay tuned and be on the lookout for future FHKA webinars. As always, check out our events page for future presentations, seminars and trainings that our FHKA attorneys are presenting at.