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PERSPECTIVES

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EEOC IS REQUIRED TO ENGAGE IN CONCILIATION EFFORTS BEFORE INSTITUTING LITIGATION

On April 29, 2015, the U.S. Supreme Court decided the case of *Mach Mining v. Equal Employment Opportunity Commission*, unanimously holding that courts may review whether the Equal Employment Opportunity Commission (EEOC) has fulfilled its statutory duty to conciliate discrimination allegations. However, the power to review is narrow. A court may act as a factfinder only when presented with evidence that the EEOC: (1) did not provide sufficient information about a charge, or (2) did not attempt to engage in a discussion about conciliating the claim.

In *Mach Mining*, the EEOC investigated a sex discrimination charge against the employer. After the EEOC issued a "reasonable cause" determination that unlawful discrimination could have taken place, it issued a letter inviting the parties to engage in an informal conciliation process. The letter stated that a representative would contact the employer to begin the process. Mach Mining claimed that it did not hear anything until a year later, when the EEOC issued a determination letter that conciliation efforts "had failed" and then sued the company in federal court.

The employer defended the case on the basis that the EEOC had not made a good faith effort to conciliate as required by statute. The EEOC countered that: (1) the conciliation process was not subject to judicial review, and (2) the two letters it issued were sufficient to fulfill the organization's statutory duty to conciliate. The United States District Court for the Southern District of Illinois agreed with the employer but the Seventh Circuit Court of Appeals reversed, holding that courts could not review the EEOC's conciliation processes. Rather, Title VII left it solely to the EEOC's "expert judgment." The U.S. Supreme Court granted certiorari to address the question and to resolve the circuit split created by the Seventh Circuit's decision.

The Court reviewed Title VII's conciliation requirements finding that it mandates that the EEOC engage in informal discussions with the employer after issuing a finding of "reasonable cause." However, Title VII grants significant discretion to the EEOC in determining whether the conciliation process has been successful, stating that the EEOC may file suit if it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission itself."

Additionally, the Act requires conciliation discussions to be confidential: "Nothing said or done during and as part of such informal endeavors" may

Continued on pg. 2…EEOC

EEOC…Continued from Pg. 1

be publicized by the EEOC or "used as evidence in a subsequent proceeding without the written consent of the parties concerned."

The EEOC first argued that this language requiring confidentiality prohibited courts from reviewing whether it had engaged in the conciliation process at all. The Court said, however, that, absent express statutory language, there is a strong presumption to allow for judicial review of administrative actions. Further, the Court continued, Title VII made conciliation a mandatory prerequisite to filing a lawsuit, and required at a minimum that the EEOC tell the employer about the claims and provide an opportunity for voluntary compliance. The Court compared this language to the Title VII requirement that a plaintiff must exhaust administrative remedies before filing a suit and noted that if the EEOC did not conciliate, then it had not satisfied its statutory prerequisite. Nothing in Title VII, the Court concluded, prevented the judiciary from reviewing whether this requirement had been satisfied. Thus, courts are permitted to review whether the EEOC engaged in conciliation.

Next, the EEOC argued that such a legal review in this case should be limited to the facial validity of the two letters it sent to the employer. Mach Mining argued that the review process should be much more detailed. The Court declined to adopt either party's proposed approach. Instead, it will require evidence that: (1) the EEOC informed the employer about the specific allegation and which employees (or what class of employees) have suffered as a result of the allegation; and (2) the EEOC tried "to engage the employer" in oral or written communication to give it a chance to remedy the alleged discriminatory practice. A reviewing court may evaluate whether the EEOC attempted to confer about a charge, not what happened during the negotiations, thus preserving the confidentiality of the process.

Based upon this decision, Employers should have a better opportunity to attempt resolution of EEOC cases before having to incur litigation costs. Also, this decision now establishes conciliation as a mandatory administrative step for the EEOC prior to instituting litigation, much the same way that plaintiffs must file an administrative charge with the EEOC before they may proceed to court on their own.

ADMINISTRATIVE AGENCIES WEIGH IN ON TRANSGENDER EMPLOYEE RESTROOM USE

OSHA:

The Occupational Safety and Health Administration (OSHA) recently released new "best practices" guidance regarding restroom access for transgender employees. Citing potential psychological harm to employees not able to use restrooms corresponding with their gender identity, and potential negative health effects of not using workplace restrooms at all, OSHA recommends employers allow employees to use the restroom of the gender with which they identify. OSHA's guidance is not a standard or regulation, and it creates no new legal obligation.

OSHA recommends allowing transgender employees, without requiring proof of legal or medical changes, to use whichever restroom corresponds with their gender identity. OSHA cautions that requiring such individuals to use separate facilities from the rest of the employees may lead to his or her feeling isolated from peers, the report suggests offering an additional gender-neutral facility. OSHA's recommendations may be found at: http://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf

EEOC:

On April 1, 2015, the Equal Employment Opportunity Commission ("EEOC") interpreted Title VII's prohibition against sex discrimination and found it to apply to an employer who denied transgender employees access to the restroom that corresponds with their gender identity. *Tamara Lusardi*, *Complainant*. This holding is not binding on Ohio employers, but the EEOC may be more aggressive, post *Lusardi*, to pursue potential violations. With that being noted, the law within the U.S. Court of Appeals for the 6th Circuit, which governs Ohio, does not recognize an employer's denial of access of a transgender employee to the restroom that corresponds with their gender identity as a Title VII violation.

State of the Law:

Case law applicable to Ohio employers provides that an employer does not discriminate against transgender employees when denying them the ability to use the restroom that corresponds with their gender identity. *Johnson v. Fresh Mark, Inc*. The distinction between employers targeting an employee because of his or her being transgender for adverse employment actions (violation of Title VII) and disallowing his or her use of gender-specific restrooms according to their self-identified gender (not a violation of Title VII) may seem disjointed, but it is the current state of the law in the Court of Appeals. The Court of Appeals has held that it is illegal under Title VII to treat an individual differently because of stereotypical notions of how a gender should act or behave. *Barnes v. City of Cincinnati*.

Continued on pg. 3…Transgender

Transgender…Continued from Pg. 2

Employer Takeaway:

If at all possible, employers should work with transgender employees to develop a restroom access plan beneficial to all. This will help reduce the possibility of discrimination claims that may be costly to defend against even when the employer prevails. Nonetheless, an employer does not discriminate against an employee if it restricts restroom access to the restroom corresponding with a transgender employee's actual sex, not the sex with which they identify. Given the EEOC's and OSHA's aggressive position it is wise to consult legal counsel when faced with this issue.

NLRB GENERAL COUNSEL ISSUES GUIDANCE ON WORKPLACE RULES

On March 18, 2015, National Labor Relations Board ("NLRB") General Counsel Richard Griffin issued a report concerning the employee handbook provisions under the National Labor Relations Act ("NLRA"). His agency investigates and remedies violations of the NLRA, a federal law that governs labor relations in many private companies.

Under Section 7 of the Act, employees have a federally protected right to engage in certain "concerted activities" for the purpose of obtaining union representation and/or collectively bargaining with their employees for wages, hours, terms and conditions of employment. Section 7 has been construed to permit criticisms by employees of management, dissemination of employee information and other acts employers have not traditionally tolerated. The NLRB has held that a work rule may violate the NLRA if the rule has a chilling effect on employee Section 7 activity. Mr. Griffin notes that the NLRA does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the NLRA.

Mr. Griffin's report offers his views on this evolving area of labor law, suggesting employers review their handbooks and other rules and ensure they are lawful. He presents recent NLRB case developments arising in the context of employee handbook rules which have been upheld or invalidated by the NLRB. He stated that most employee handbook violations occur when employees would reasonably construe the workplace rule's language to prohibit Section 7 activity, whether or not the employer intended it.

Mr. Griffin suggests that some language that appears in many confidentiality agreements could violate the NLRA. For example, he stated the NLRB found the following rule to be unlawful because it restricts disclosure of employee information and therefore are unlawfully overbroad: **"Do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses.'"** He stated that, in the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is facially unlawful.

Mr. Griffin also suggests that some variations of employee handbook language regulating employee conduct toward the company or supervisors also violates the NLRA. He stated the following rules have been found unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general: **"[B]e respectful to the company, other employees, customers, partners, and competitors."**

In addition, an employee's right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. Therefore, Mr. Griffin states the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public: **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**

The General Counsel's report cautions against including broad employee handbook prohibitions on use of cell phones/cameras, speaking disrespectfully to or about the employer or supervisors, use of company trademarks or logos, and disclosing confidential information. The report also makes clear that the NLRB considers context surrounding suspect provisions and how employees may reasonably interpret those provisions in deciding compliance issues. The full 30 page report may be found at: http://www.nlrb.gov/reports-guidance/general-counsel-memos

Some suggest this report reflects the expansive view of Section 7. In any event, employers are wise to frequently review their employee handbooks for compliance with the NLRA and other laws. Policies should not be reviewed in isolation, though. The NLRB has made it clear that it will not read workplace rules in isolation. Even when a rule includes phrases or words that, alone, reasonably would be interpreted to ban protected criticism of the employer, if the context makes clear that only serious misconduct is banned, the rule will be found lawful.

COURT UPHOLDS TERMINATION OF DJFS DIRECTOR WHO WAS CRIMINALLY CHARGED EVEN WHEN THE CHARGES WERE DROPPED

FHKA recently received a favorable decision from the U.S. Court of Appeals for the 6th Circuit upholding the dismissal of sex and national origin discrimination claims. In *Voltz v. Erie County*, Mr. Voltz, a Hispanic male, was promoted over female applicants to the position of Director of the County Department of Job and Family Services. Months after his promotion, Voltz failed to report to work after being arrested and charged with rape. Based upon the seriousness of the charges and the negative publicity such an allegation carries, the board immediately terminated Voltz's employment. The criminal charges against Voltz were subsequently dropped and he re-applied to his former position but was rejected. Instead, a Caucasian female was awarded the recently vacant position.

Voltz sued claiming discrimination based upon his gender and race. However, the trial court and the Court of Appeals both found that Voltz could not establish discrimination for several reasons. First, both courts found that Voltz could not prove the employer held an unlawful discriminatory intent. The Court recognized the "same actor" defense – essentially, Voltz could not overcome the glaring fact that the same board that terminated him had promoted him only months earlier to the top position. The Court found that the only thing that had changed during those months was that their director-the "face" of the department- had been arrested and charged with rape. The Court found that this provided the board with a legitimate business reason to terminate Voltz that was wholly unrelated to his race or gender. Second, Voltz was unable to overcome the board's legitimate business reason for his removal because he was unable to point to any similarly situated co-workers who had been criminally charged but were treated differently. Therefore, there was no evidence of unlawful disparate treatment.

Voltz also attempted to utilize the "cat's paw" theory of discrimination, but the Court rejected that argument. The cat's paw is when one uses a person unwittingly or unwillingly to accomplish their own purpose. Voltz alleged the agency's HR director disliked him because he was a male and the HR director had influence into the board's decision-making. Voltz claimed the HR director's discriminatory intent should be imputed to the board as well. However, the Court found that the evidence did not support that the HR director held any anti-male animus. The HR Director investigated a charge of harassment against Voltz before he was promoted to director. However, the HR director did not recommend any disciplinary action occur after the investigation was completed. She did, however, advise Voltz that his "command presence" style of management was not going to work well in an office of female employees. Voltz tried to use this lone statement as evidence of anti-male animus. The Court, however, found this one statement was merely advice on how to better manage the workforce. Further, had the HR director held animus, it would have been more probable that she would have recommended discipline, which she did not. The Court found the largest nail in the coffin for Voltz's "cats paw" claim was that the HR Director also interviewed the applicants for the director position and ultimately recommended Voltz for the director position. The HR Director admittedly recommended his removal months later but the reason for recommending removal was legitimate, namely, that Voltz had been arrested and charged with a heinous crime that brought dishonor to the agency.

For any additional information on this case, please contact Marc Fishel at mfishel@fishelhass.com or Paul Bernhart at pbernhart@fishelhass.com

EMPLOYER'S EFFORT TO CATCH MYSTERY POOPER VIOLATES GINA

Beginning in 2012, an unknown number of employees of Atlas Logistics began defecating in Atlas' Warehouse. The defecations occurred numerous times and necessitated the destruction of grocery products on at least one occasion. Atlas subjected two employees to DNA testing to determine if they were the culprits. Neither was the mystery pooper.

On May 5, 2015, a federal court in Georgia held that Atlas' testing of the two employee suspects violated the Genetic Information Nondiscrimination Act ("GINA"). On June 22, 2015, a federal jury awarded the two employees $2.2 million. GINA was enacted May 21, 2008. GINA prohibits a broad range of invasive actions that reveal genetic information or one's pre-disposition to health conditions such as: internet searches regarding health matters, asking health-related questions and inadvertent receipt of health information. In light of the broad spectrum of prohibitions, employers should review their policies, practices, and management training to ensure compliance with GINA.

While this case, *Lowe v. Atlas Logistics Group Retail Servs. Atlanta*, presents an extreme set of facts it reminds employers to generally avoid DNA testing or undertaking efforts that may reveal information protected by GINA. Other traditional investigatory techniques were available to Atlas, such as fact based interviews and video surveillance of common areas.

THE SUPREME COURT OF OHIO UPHOLDS THE ONE-TIME-FAILURE DEFENSE DENYING A VSSR AWARD

To establish entitlement to a Violation of a Specific Safety Regulation ("VSSR) award, a Workers' Compensation claimant must show that there is a specific safety rule ("SSR") applicable to the employer, that the employer violated that SSR, and that the violation caused the injury. The Supreme Court of Ohio recently held that a one-time failure of an otherwise compliant safety system that resulted in employee injury is not a violation of a specific safety requirement ("SSR") in the worker's compensation system. *State ex rel. Penwell v. Indus. Comm.*

The case involved a hydraulic press equipped with a "pullback" safety system designed to keep an operator's hands out of the press before closing. The employer reminded employees at monthly safety meetings not to rely on the safety system alone and to remove their hands before closing the press. The employer continually reminded employees that any mechanism can fail despite the pullback system operating properly for 38 years.

On the day of the injury, the pullback system was checked for hazards and used without incident by other employees. There appeared to be nothing wrong with the safety system. Later, Ms. Penwell's left hand was crushed in the press. An investigation revealed that one of the pullback restraints malfunctioned. It was the one and only time the pullback system malfunctioned. Ms. Penwell filed for a VSSR award which was denied.

The Supreme Court of Ohio held that the pullback system complied with governing safety regulations upholding the denial of the VSSR award. The Court found the "one-time-malfunction" defense applicable, and further held that proof of a better safety mechanism being available within the specific safety requirements is insufficient to prove a VSSR. The Court explained, "[t]he purpose of specific safety requirements is to provide reasonable, not absolute, safety for employees." Because this malfunction was the first of its kind in at least 38 years, and the company used an approved safety mechanism, the employer was not subject to VSSR liability.

Lesson for Employers: The Court emphasized the lack of a guard failure for 38 years coupled with the employer's strong commitment to safety. The Court did state that had there been previous guard failures or the employer was on notice of a guard defect it would have found that the employer committed a VSSR. This case underscores that employers must be committed to follow applicable safety regulations and document their efforts including communicating and training employees on safety.

OPERS CHANGES TO HEALTH COVERAGE FOR RE-EMPLOYED RETIREES TAKES EFFECT JANUARY 1, 2016

The Ohio Public Employees Retirement System ("OPERS") recently changed the health care coverage for re-employed retirees that will go into effect on January 1, 2016. The changes are in response to federal health care regulations that affect OPERS members who return to work for an OPERS covered employer after they've retired.

Those re-employed by an OPERS employer are considered active public employees under federal regulations. These regulations prevent OPERS from providing reimbursements or contributing allowances to re-employed individuals' Health Reimbursement Accounts ("HRA") during active employment. A re-employed individual is also unable to access funds within their HRA account for expenses incurred during active employment. These changes go into effect January 1, 2016, but only apply to those OPERS retirees re-employed by OPERS employers. Coverage for those re-employed by non-OPERS employers remains unchanged.

Potential impact on OPERS employers: These changes may cause re-employed retirees, especially those working few hours per month, to resign their OPERS re-employment positions. In order to best prepare for potential turnover it is important to stay informed and discuss with re-employed retirees their intentions relative to continued employment. OPERS frequently issues information regarding this issue at: http://perspective.opers.org/pensions/new-health-care-rules-for-re-employed-retirees/
Also, OPERS is making individual counseling available to re-employed retirees. Effected employees can obtain this assistance either online or by contacting OPERS directly.

UBER DECISION A GOOD REMINDER TO REVIEW INDEPENDENT CONTRACTOR RELATIONSHIPS

The question of whether drivers for the popular mobile ride-share service Uber are employees or independent contractors has been hotly contested since the founding of Uber in 2009. Uber has consistently characterized its business as a platform that connects people seeking

Continued on pg. 6…UBER

UBER…Continued from Pg. 5

rides with independent contractors. This arrangement is very valuable to Uber, if not necessary for its survival, because the company is not required to comply with complicated regulations in place for taxi services. Uber also avoids substantial expense for Social Security, Workers' Compensation, unemployment insurance, and other employment related expenses.

A California Uber driver alleged that the company violated California labor regulations by not paying for miles driven during work in accordance with the 2014 IRS mileage rate and not reimbursing toll expenses during employment. Uber maintained that such requirements did not apply because the driver was an independent contractor not an employee.

The determination of whether an individual is an independent contractor or employee is a fact intensive analysis and a parties' agreement labeling an individual an "independent contract" alone is not determinative. The California Labor Commission ("Commission") considered several factors including: whether the driver has a "distinct business" from Uber; whether the individual's work was a part of Uber's "regular business"; whether the worker supplied his or her own supplies for performing the work; and the extent to which Uber exercises control over its drivers.

Here, the Commission emphasized the necessity of drivers to comply with Uber's numerous business requirements. The Commission acknowledged that drivers sign a contract labeling them as "independent contractors." However, Uber exerts significant control over drivers by requiring specific insurance coverage, vehicle specification, background checks, and other controlling measures. The Commission found drivers to be employees because Uber "retained all necessary control over the operation as a whole."

While this decision is not binding on Ohio employers, it does serve as a good reminder to review independent contractor relationships. Employers are well advised to closely scrutinize their relationships to ensure that employees are not mischaracterized as employees. FHKA Attorneys are well versed and available for more information or guidance on proper classification of employees and independent contractors.

CONSTRUCTION CORNER: ECONOMIC LOSS RULE IN OHIO

In *Federal Insurance Co. v. Fredericks*, an Ohio Court of Appeals upheld the dismissal of claims for intangible economic losses, such as lost profits, brought by related, unnamed parties to a construction subcontract. The Court applied the economic loss rule, which prevents recovery in tort of damages for purely economic loss.

The case involved a set of several companies (including Pasco, Carter Express, and Carter Logistics) owned by the same parent company (J.P. Holding Co). The sister companies were wholly owned subsidiaries of the parent company, all sharing the same company president. The president of the companies established a hand shake agreement with the head of Fredericks Construction to build a facility.

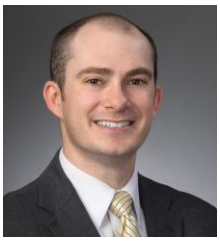
Fredericks then entered into a written subcontract with Skiles, in which it identified Fredricks as the contractor, Skiles as the subcontractor, and Pasco as the property owner. The subcontract also incorporated the prior agreement between Pasco and Fredricks for construction. Skiles was negligent in its work, and a severe wind storm during construction resulted in partial facility collapse. After Pasco's insurer (Federal Insurance Co.) paid Pasco for losses, it instituted a subrogation action against Skiles' insurer, J.P. Holdings.

Pasco was the only valid third party beneficiary, because it was named as property owner in the subcontract between Fredericks and Skiles. The other J.P. Holding Co. owned companies additionally sought compensation through a negligence claim, because their interest in the business was harmed by Skiles' negligent damage to Pasco's physical property. The Court held that interests of the other companies were intangible and could only be sought through a contract to which they were a named party. The Court also refused to disregard the corporate forms of each entity and allow the parent company to seek damages (through Pasco's inclusion in the subcontract) for itself and its subsidiaries.

Bottom Line: Ohio still applies the economic loss rule, and a party with intangible economic losses can only recover through a breach of contract action. This makes it even more important for all parties with an interest, e.g., a future tenant of a constructed facility, to be included in written contracts and subcontracts as beneficiaries. This step will ensure that the party can protect its interest and allocate risk predictably and transparently.

WHAT IS HAPPENING AT FISHEL HASS KIM ALBRECHT LLP:

Please Welcome Robert Abdalla to FHKA



Robert joined FHKA in May as our new associate. Before joining FHKA, Robert practiced as an Equal Justice Works Americorps Legal Fellow at Southeastern Ohio Legal Services. There he provided civil legal representation to homeless and low-income veterans with issues related to housing, disability benefits claims, consumer and employment law issues, and general family law matters. Robert is also accredited with the Veterans Administration to represent veterans before the VA. Robert can be reached at rabdalla@fishelhass.com.

UPCOMING EVENTS SEMINARS AND WEBINARS!

FHKA is Hosting a Free Webinar!

Now that the U.S. Supreme Court has ruled that same-sex marriage is a constitutional right, attorney Marc Fishel will be presenting a free webinar on the following topics: employee benefits under state and federal law, discrimination issues, transgender and gender identity matters, collective bargaining and personnel policies. Please click here to register or visit our website at www.fishelhass.com for additional details.

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

Save the date – the Civil Service Law and Discipline Seminar will be taking place on September 15-16, 2015 in Columbus, Ohio. The first day will concentrate on Civil Service Law and the second day concentrating on Managing the Discipline Process. We will be sending the formal invite in the upcoming weeks that will detail the time, location, topics, etc. Courses have been approved for CLE and PHR credits. We hope you are able to attend.

DON'T FORGET ABOUT FREE FRIDAY'S

Does a legal question have you stumped? We have the solution. For our next "Free Friday," let Brad E. Bennett be your guide – and it's on the house. You can submit your questions to Brad E. Bennett on Friday, August 7, 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

Stay connected with FHKA by visiting our website at www.fishelhass.com View our upcoming seminar, events and articles on the current news affecting our clients. Follow Fishel Hass Kim Albrecht for additional updates.