Executive Briefing
Employment & Labor Law / Employee Benefits

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Missouri Supreme Court Issues Three Opinions Changing Whistleblower Landscape

On February 9, 2010, the Missouri Supreme Court issued three opinions that address the public policy exception to the at-will employment doctrine (which is also known as the whistleblower exception or wrongful discharge doctrine).

In the most significant decision, *Fleshner v. Pepose Vision Institute*, the court explicitly recognized the public policy exception to the at-will employment doctrine for the first time. Consistent with its recent employee-friendly rulings, the court also determined the employee need show only that her alleged whistleblowing was a contributing factor in the employer's decision to discharge her.

Michelle Fleshner worked for PVI, a refractive surgery practice. The U.S. Department of Labor (DOL) commenced an investigation into PVI for allegedly failing to pay employees overtime for hours worked in excess of 40 per week. A DOL investigator contacted Ms. Fleshner at her home; she spoke with him about the hours that PVI's employees worked. She told her supervisor about her telephone conversation with the investigator, and PVI terminated her employment the following day. Ms. Fleshner filed an action against PVI asserting wrongful termination in violation of public policy. The jury found in favor of Ms. Fleshner and awarded her $125,000.

Although several circuit courts and the Missouri Court of Appeals had recognized the public policy exception cause of action for some time, the Missouri Supreme Court had not previously done so. In *Fleshner*, the court expressly recognized, and defined the contours of, the public policy exception to the at-will employment doctrine. Employers cannot discharge an at-will employee for (1) refusing to violate the law or any well-established and clear mandate of public policy, or (2) reporting wrongdoing or violations of law to superiors or public authorities. The court further held that the public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. However, the public policy reflected by the statute or rule may be broader than what the statute or rule expressly prohibits. Finally, there is no requirement that the violation of law affect the employee personally, nor that the law violated prohibits retaliation.

Perhaps more importantly, the court determined the causal standard for wrongful discharge in public-policy exception cases. Before *Fleshner*, Missouri courts used an "exclusive causation" standard—employees had to show their whistleblower activities were the exclusive cause of their discharge. The *Fleshner* court decided, however, that employees need show only that their protected activities were a "contributing factor" in their discharge. This standard means that, as long as the employee's whistleblower activities played a part in the employer's decision to

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discharge the employee, the employee can prevail even if there were additional reasons for the employer's decision.

In the second case, the court seemed to somewhat narrow the public policy exception. In *Margiotta v. Christian Hospital Northeast Northwest*, the court required the plaintiff to specify the law allegedly violated by the employer's conduct at issue. The plaintiff must show he reported to superiors or public authorities serious misconduct that constitutes a violation of a law that reflects well-established and clearly mandated public policy. The statute or regulation allegedly violated by the employer cannot be a vague statement of policy. Instead, the law cited by the plaintiff must clearly proscribe the conduct that the plaintiff allegedly reported. In *Margiotta*, the plaintiff claimed the employer violated regulations stating that patients have a right to receive safe care and requiring hospitals to develop a mechanism to identify and abate safety hazards. Finding that these regulations were too vague as to the employer's duties, the court affirmed the trial court's grant of summary judgment to the employer.

In the last case, the court extended the wrongful discharge cause of action to contract employees. Before *Keveney v. Missouri Military Academy*, no Missouri case had permitted a contract employee to bring a claim for wrongful discharge in violation of public policy, as the Missouri Supreme Court had previously held that this cause of action was available only to at-will employees. Reversing course, the *Keveney* court held that there were compelling reasons to allow both at-will and contract employees the same right to bring a claim for wrongful discharge in violation of public policy.

The broadening landscape of wrongful discharge claims, especially in Missouri, is a reminder for companies of the importance of having sound, consistent discipline and termination practices and policies in place.

For more information related to this article, please contact Jasmine Campbell or Pat Konopka.

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Department of Labor Releases Model Employer CHIP Notice to Notify Employees Regarding Eligibility for Premium Assistance

The Department of Labor (DOL) recently released a model notice that employers can use to satisfy their obligations under the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA's overall purpose is to coordinate coverage under employer health plans with state Medicaid and children's health insurance programs (CHIP) that provide health insurance premium assistance to low-income children and families. CHIPRA accomplishes this

by, among other things, imposing additional notice and disclosure obligations on employers and plan sponsors.

The obligations imposed by CHIPRA have been implemented on a staged basis. Since CHIPRA's effective date of April 1, 2009, employers and plan sponsors have been complying with CHIPRA's provisions regarding notifying employees of special enrollment opportunities. This year, employers must begin providing employees notice of potential health insurance premium assistance programs on the later of (a) the first day of the first plan year after February 4, 2010; or (b) May 1, 2010. As a result, for calendar-year plans, the notice must be provided by January 1, 2011.

The new notice requirements mandate that employers notify employees annually of the potential opportunities for health care premium assistance under state Medicaid and CHIP programs. The relevant state programs are those of the state where the employee resides. This notice must be provided free of charge to the employee. The DOL recently released a model notice employers can use to comply with this obligation. While the model notice provides only a brief description of premium assistance programs, it offers detailed contact information for all state specific programs. Because the civil penalty for failure to comply with the new notice requirements is $100 a day, and because the state in which the employee, or the employee's family, resides may or may not be the same state in which the employer, the health plan, its insurer, or other service providers are located, we recommend all employers and plan sponsors use the full version of the model notice, which provides a detailed listing of all states that have a qualifying premium assistance program.

A separate mailing is not necessary. Rather, this notice may be included with other plan related materials, such as open enrollment materials or the plan SPD, as long as it is provided in a timely manner to all eligible employees and is marked in a manner that reasonably ensures an employee appreciates its significance.

Immediate Attention Required: All employers should prepare a notice (or adopt the DOL's model notice) to be included in plan-related materials provided to employees.

For additional information regarding this or other employee benefits notice requirements, please contact Tom Brous, Tom Dowling, or Mike Winkler.

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Inside Washington

New Laws, Regulations and Agency Guidance

COBRA . . . The Senate went into recess on February 26, 2010, without passing legislation to extend COBRA subsidies or extended unemployment insurance benefits provided by the American Recovery and Reinvestment Act (ARRA) that expired on February 28, 2010. On Monday, March 1, 2010, Senator Max Baucus and Senator Harry Reid introduced the American Workers, State and Business Relief Act, which includes retroactive extension of the COBRA subsidy for workers who lose their job through the end of the year and federal funding for extended unemployment benefits. Department of Labor Secretary Hilda Solis issued the following statement in response to Congress' failure to act to keep these benefits from expiring: "It is essential that Congress extend the unemployment insurance and COBRA safety net programs that are part of the American Recovery and Reinvestment Act past their current expiration date of Feb. 28. If Emergency Unemployment Compensation and full federal funding of the Extended Benefit program are not extended, 400,000 Americans will lose these vital benefits during the first couple of weeks in March. By May, nearly 3 million people would be left without these benefits. Furthermore, if the Recovery Act COBRA subsidy is not extended, thousands of families will lose access to affordable health care."

DOL . . . On February 12, 2010, the Department of Labor published a final rule governing the labor certification process and enforcement mechanisms for the H-2A temporary agricultural worker program. The new rules will go into effect March 11, 2010. According to a statement released by Department of Labor Secretary Hilda Solis, the overall benefits of the final rule include "increased wages for workers and greater access to the domestic labor market. The new rule ensures that U.S. workers in the same occupation working for the same employer, regardless of date of hire, receive no less than the same wage as foreign workers; provides more transparency by creating a national electronic job registry where job orders will be posted through 50 percent of the contract period; and protects against worker abuses by prohibiting cost-shifting from the employer to the worker for recruitment fees, visa fees, border crossing fees and other U.S. government mandated fees."

EEOC . . . Following its notice of proposed rulemaking on March 31, 2008, regarding disparate impact claims under the Age Discrimination in Employment Act (ADEA), the EEOC is now seeking comments on proposed rule changes regarding the meaning of the "reasonable factors other than age" (RFOA) defense under the ADEA. The proposed rule explains that the RFOA defense applies only if the challenged practice is not based on age and that a neutral practice that disproportionately affects older workers can be justified only by showing that the practice is objectively reasonable when viewed from the perspective of a reasonable employer under like circumstances. The proposed rule sets forth non-exhaustive lists of factors relevant to determining whether a factor is "reasonable" and "other than age." Comments are due April 19, 2010.

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Kansas . . . The Kansas Legislature is more than half way through its current session and the following employer-related bills are still open for possible debate: House Bill No. 2533 amending the Kansas Act Against Discrimination (KAAD) to conform to the Americans with Disabilities Act Amendments Act (ADAAA) that became effective January 1, 2009; Senate Bill No. 169 that would amend KAAD to prohibit discrimination on the basis of sexual orientation and gender identity; Senate Bill No. 143 and House Bill No. 2149 to require all state agencies and those doing business with the state to use E-Verify; and House Bill No. 2541 which would require all Kansas employers with one or more employees to use E-Verify. The full text of these bills can be found on the Kansas Legislature Web site.

NLRB . . . In response to numerous inquiries regarding the status of the National Labor Relations Board pending nominees, Board Chairman Wilma Liebman issued a statement regarding the board's frustrations with the delays: "I am disappointed that we still do not have a fully constituted board despite the naming of three nominees last summer. The board has been in limbo for a long time. For more than two years, the board has had to operate with three vacancies, leaving only myself and Member Peter Schaumber to decide the hundreds of cases that come before us. We have done our best to carry out the board's important work, issuing more than 500 decisions in cases involving thousands of workers across the country. But our authority to do so has been challenged and now the Supreme Court will decide whether we can continue to function. At the same time, the board has been unable to move forward on the most significant cases before it. I look forward to a time in the near future when the board is back at full capacity resolving issues vital to American workers and their employers."

Wage & Hour . . . the Kansas Court of Appeals issued an opinion on February 12, 2010, in *Brown v. Ford Storage and Moving Company, Inc.*, finding that employers who are exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA) because of the interstate motor carrier exemption found in 29 U.S.C. § 203(s)(1) are not "employers" required to pay overtime compensation under the state definition of "employer" under the Kansas Minimum Wage and Maximum Hours (KMWMHL) law. The KMWMHL excludes from the definition of "employer" those employers "subject to" the FLSA. The Kansas Court of Appeals found that although the employer was exempt from paying overtime to its drivers, it was still "subject to" other provisions of the FLSA such as the "minimum wage requirements, gender discrimination prohibitions, underage hiring restrictions, and record retention requirements of the FLSA." Accordingly, because it was still subject to the FLSA, no claim existed under state law. This case clarified confusion raised by prior decisions (including a decision by the Kansas Supreme Court) suggesting the opposite result which would have opened the door for overtime claims under state law when an employer was relying on federal law for an exemption. This case is likely to move to the Kansas Supreme Court for review.

For more information regarding these articles, please contact Stephanie Scheck.

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