Missouri Supreme Court Makes it Easier for Employees to Pursue Workers' Compensation Retaliation Claims

The Missouri Supreme Court has completed a clean sweep of the employment law arena by imposing the minimalist "contributing factor" causation standard on workers' compensation retaliation cases. Previously, in a series of cases beginning in 2007, the Court had ruled that this standard – which does not require that the discriminatory intent be the primary or even a substantial motivation for the adverse job action – should govern employment discrimination and retaliation and public policy (whistleblowing/wrongful discharge) cases. In the current ruling the Court expressly overruled two of its long-standing precedents which had required the plaintiff to prove that anti-workers' compensation bias was the exclusive reason for the discharge or other adverse job action. The case is *Templemire v. W & M Welding, Inc.*, No. SC93132 (Mo. en banc April 25, 2014)

The prohibition of discrimination against an employee for exercising rights under the Missouri workers' compensation program is based on a statute enacted in 1925 as part of the original workers' compensation law. It provides that "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under" the worker's compensation law. In two cases it decided in 1984 and 1998, the Missouri Supreme Court ruled that this statute required the employee to prove that the exclusive reason for the adverse job action was because the employee exercised his rights to workers' compensation benefits. Briefly stated, the Court in *Templemire* determined that it had incorrectly decided these prior cases because there was nothing in the statutory language which required that the anti-workers' compensation element be the only reason for the adverse job action.

The *Templemire* decision continues the trend of lessening the amount of proof employees need to present in employment cases which began with the Court's decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. en banc 2007). In *Daugherty*, the Court held that there is a violation of the Missouri Human Rights Act (MHRA) if discriminatory intent is a mere "contributing factor however slight" in a discharge decision or other job action. This light burden of proof means the employee can recover even if discriminatory intent was, for example, 10% of the reason for the job action. The *Daugherty* standard is commonly believed to be the easiest burden of proof for an employee in the entire country. The Court in *Daugherty* reached this decision in spite of the language of the MHRA that prohibits discrimination only where the job action was "because of" a protected characteristic such as age. In subsequent years the Court followed *Daugherty* with cases imposing the "contributing factor" standard in retaliation cases and in public policy discharge cases. With it now being applied to work comp retaliation cases, it governs all common forms of employee versus employer litigation.

The US Supreme Court, incidentally, has recently held that "because of" as used in Title VII, the principal federal anti-discrimination statute, means that the discriminatory intent must be the predominant reason for the adverse job action. *Univ. of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). This is what in the law is called "but for" causation, that is, the job action would not have occurred "but for" the improper bias; in other words, it was at least 51% of the decision. The Court did not have to look much further than the dictionary to reach this conclusion. Thus, all of Missouri's employment cases will now be decided under a legal interpretation at odds with that of the United States Supreme Court. Because the Missouri Supreme Court cases arise under Missouri law, however, the Missouri Supreme Court is free to decide them as it sees fit.

The decision in *Templemire* was controversial within the Court, with two of the seven judges dissenting. Their dissent was based on the fact the Court was overruling its past decisions, which in the dissent's opinion were settled law, regardless of whether the original cases had been correctly decided. This doctrine of *stare decisis* – that a court should usually adhere to past decisions - has proved to be no barrier to the Missouri Supreme Court in recent years. Notably, its landmark decision in *Daugherty* was itself an overruling of its prior case of *Mid-State Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842 (Mo. en banc 1984).

There are several inevitable consequences which will flow from *Templemire*. First, under Missouri law it will become as scarce to obtain summary judgment - dismissal by the court before trial - in workers' compensation retaliation cases as it now is in employment discrimination and retaliation cases. Accordingly, employers will be faced with the choice of bearing the cost of the lawsuit all the way through trial, or settling. This dilemma will result in, as it has in discrimination cases, some employers deciding to pay settlements for marginal or even less meritorious claims. Second, it will make even more difficult the employer's decision whether to discharge an employee who suffered an on-the-job injury and who has been unable or unwilling to return to full duty

after a reasonable period of time. Thereby, it will contribute to retention of unproductive employees and unnecessary costs.

After *Templemire*, employers can expect a significant uptick in lawsuits claiming some form of retaliation because the employee exercised rights under the workers' compensation law. Previously, the "exclusive cause" standard tended to discourage marginal cases. It now becomes more important than ever for employers to carefully review with counsel any adverse action contemplated in regard to this class of employees.

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Tenth Circuit: Employer Can Cap Leave of Absence at Six Months Without Violating Duty to Reasonably Accommodate

One of the many challenges facing human resource professionals is how to comply with the various (and sometimes inconsistent) requirements of state and federal laws when dealing with an employee who is on a medical leave of absence. The EEOC has suggested that an employer must allow a lengthy leave of absence unless it poses an "undue hardship" to the employer, and courts have provided little guidance about how much leave an employer must allow. On May 29, 2014, the US Court of Appeals for the Tenth Circuit (which includes the federal courts in Kansas and Colorado) affirmed a district court's judgment in favor of Kansas State University in a disability discrimination case and ruled that in general, requiring an employer to keep a job open for more than six months does not qualify as a "reasonable accommodation."

When dealing with employee medical issues, employers must comply with a variety of laws, including the Family and Medical Leave Act, workers' compensation laws, and state and federal laws prohibiting disability discrimination. An employee facing a serious illness may exhaust his or her entitlement to twelve weeks of leave under the FMLA but still may not be able to return to work. In that situation, an employer may have satisfied its obligations under the FMLA, but it still must consider whether to allow the employee additional time off as a reasonable accommodation under the Americans with Disabilities Act or similar state laws. Courts including the Tenth Circuit have long held that an employer need not provide an indefinite leave of absence to comply with the ADA's "reasonable accommodation" requirements. But decisions about exactly how much leave to provide have proved difficult for employers in the absence of more specific guidance from the courts.

In *Hwang v. Kansas State University*, Case No. 13-3070, 2014 WL 2212071 (10th Cir. May 29, 2014) the Court provided some much-needed clarification about the outer limits of an employer's obligation to provide a leave of absence as a reasonable accommodation under the ADA. The Court's analysis was under the Rehabilitation Act, but it is equally applicable to the ADA. The Tenth Circuit noted that an employee may establish a claim for disability discrimination under the ADA by showing: (1) that she is qualified for her job; (2) that she can perform the essential functions of the job with or without a reasonable accommodation; and (3) that her employer failed to provide a reasonable accommodation although the employee requested one. Once the employee has established these elements, the employer generally can avoid liability only if it proves the requested accommodation would have posed an undue hardship on the employer.

The plaintiff in *Hwang* – a professor who requested and was given a six-month leave of absence for cancer treatment – argued that the University's policy, which allowed no more than six months of sick leave in any case, necessarily violated the law. Ms. Hwang had requested an additional leave of several months after her initial six-month leave, but her request was denied due to the University's inflexible policy. In support of her argument that this policy violated the law, Ms. Hwang pointed to the EEOC's 2002 Enforcement Guidance, which states that if an employee needs additional unpaid leave as a reasonable accommodation, the employer "**must** modify its 'no-fault' leave policy" (emphasis added) to provide additional leave to an employee, unless the employer can show that there is an alternative accommodation that would be effective or that granting the leave would pose an undue hardship. The court, however, noted that Ms. Hwang's argument concerning undue hardship and her reliance on the EEOC guidance skipped over the fundamental question of whether the requested modification to the University's leave policy was *reasonable* in the first place. Instead, the court focused its analysis on whether Ms. Hwang had met her burden of showing that she was able to perform the essential functions of her job with a reasonable accommodation.

In deciding whether Ms. Hwang was able to perform the essential functions of her job with a reasonable accommodation, the court held that "an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions – and…requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation." The court went on to note that the purpose of a reasonable accommodation is to enable an employee to *work* – not remain off work. Although the court was sympathetic to Ms. Hwang's situation, it made clear that the federal anti-discrimination laws are not intended to turn employers into "safety net providers" for those who are unable to work. The court acknowledged that an employer's analysis of whether a leave of absence will enable an employee to perform the essential functions of her job will depend on various factors such as: (1) the essential duties of the job; (2) the nature and length of the leave sought; and (3) impact on fellow employees. But the court also stated that "it's difficult to conceive how an employee's absence for six months – an

absence in which she could not work from home, part-time, or in any way in any place – could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a *reasonable* accommodation."

Bottom line

Employers must continue to analyze requests for medical leaves of absence on an individual basis and consider whether each request is "reasonable" under the circumstances. Employers should always consider how they have handled leave requests by other, similarly situated employees and whether they have been consistent in the application of any leave policies. For example, as the court noted in *Hwang,* if other employees are routinely granted exceptions from leave policies that are not granted to disabled employees, an inference of discrimination will arise and an employer may be liable for disability discrimination. Even employers that adopt inflexible leave policies (policies that specify a maximum amount of leave for all employees) should consult with counsel to ensure that the policies are reasonable on their face, consistently applied and allow for longer leaves of absence if legally required in extraordinary circumstances.

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IRS: Dumping Employees on Health Exchanges Will Trigger Excise Tax

Immediately after the Affordable Care Act ushered in a new regime of health care coverage, cost-conscious employers began pondering an obvious question: Could an employer scrap its group health plan in favor of pushing employees into the government-regulated health exchanges while reimbursing them for premiums paid? Last month the IRS reiterated its answer to this question: No, unless the employer is willing to pay a substantial excise tax.

In a brief Q&A posted on its website, the agency stated that an arrangement in which an employer does not establish a health insurance plan for its own employees, but reimburses those employees for premiums they pay for health insurance, would be considered a "group health plan" subject to the market reforms of the Affordable Care Act. As the recent Q&A and IRS Notice 2013-54 clarify, "such arrangements cannot be integrated with individual policies to satisfy the market reforms," including the prohibition on annual limits for essential health benefits and the requirement to provide certain preventive care without cost sharing.

An employer that runs afoul of these requirements will be subject to a $100 per day excise tax per applicable employee (totaling $36,500 per year per employee) under Section 4980D of the Internal Revenue Code.

On a separate note: The Affordable Care Act's "employer mandate" – requiring employers of 50 or more full-time employees to pay an excise tax or to offer such employees and their dependents affordable, minimum essential coverage – is slated to become effective January 1, 2016 for mid-sized employers (50-99 full-time employees), and phased in beginning January 1, 2015 for large employers (100 or more employees).

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Senate Democrats Introduce Legislation to Expand Overtime Protections Under the Fair Labor Standards Act

On June 18, 2014, Senate Democrats introduced a bill to amend the Fair Labor Standards Act and raise the salary threshold necessary to qualify for three common exemptions to the FLSA's minimum wage and overtime requirements. The amendment is designed to increase the number of salaried employees who are eligible for overtime pay.

The Fair Labor Standards Act requires that employers pay most employees at least the minimum wage and overtime pay at a rate of not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 hours in a workweek. The FLSA, however, contains various exemptions from these requirements, including exemptions for administrative, executive and professional employees.

In order to qualify for the administrative, executive or professional exemption, employees generally must satisfy certain requirements with respect to their job duties (the "duties test"). For example, an administrative employee must demonstrate that: (1) his or her primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (2) his or her primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. In addition, employees can only qualify for these exemptions if they are paid on a salary basis at no less than $455 per week.

The proposed legislation – the Restoring Overtime Pay for Working Americans Act – would raise the $455 per week salary threshold over the next three years, more than doubling it (to $1,090 per week) by the third year. In addition, the proposed legislation also provides that in order to meet the

duties test for the administrative, executive and professional exemptions, the employee cannot spend more than 50% of the employee's work hours on tasks that are not exempt. For example, an employee may qualify for the executive exemption if his or her primary duty is managing a business or managing a customarily recognized department or subdivision of the business. But under the proposed legislation, a manager who performs other duties in addition to his or her management duties (for example, a store manager who spends a significant portion of his or her time on sales or customer service) may not qualify for the exemption unless he or she spends at least 50% of the time performing actual management tasks.

Given the divided Congress, this legislation is not likely to proceed to enactment anytime soon—but it is a sign of where the FLSA could possibly move in the future.

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