

# Employment & Labor Law Newsletter

## October 2009

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2009 has been a busy year for those who must stay abreast of changes in labor and employment law. There has been tremendous activity on all levels of law-making including decisions from the courts and action by state and federal legislatures as well as administrative agencies. In this issue of our labor and employment newsletter, we have included legislative activity, various decisions from the courts and administrative agencies and rules proposed and/or promulgated by the EEOC.

### NEW AND POTENTIAL LAWS

#### Federal

#### Legislation Amending the Victims' Economic Security and Safety Act (VESSA) goes into Effect

Senate Bill 1770, which makes changes to the Victims' Economic Security & Safety Act ("VESSA"), went into effect on August 24, 2009. VESSA allows employees who are victims of domestic or sexual violence, or who have a family or household member who is a victim of domestic or sexual violence, with up to 12 work weeks of unpaid leave in any 12-month period to seek medical attention, legal assistance and counseling.

Among the changes are: employers with 15 or more employees are now covered under the Act and the definition of "family or household member" has been expanded. Other changes concern the notice to an employer of an employee's intention to take leave, victims' employment sustainability, prohibited discriminatory acts and notification to employees.

**Possible Repeal of Mandatory Arbitration Clauses**

Congress continues to debate whether to strike down or severely restrict mandatory arbitration clauses used by several employers with their employees. As a condition of employment, employees can be required to execute an agreement which provides that any employment-related disputes they have with their employer can only be resolved through mandatory arbitration and not through pursuit of legal action in the courts or administrative agencies. These clauses are a valuable tool for employers to limit costly litigation.

Various court decisions have previously held such agreements enforceable but they have come under increasing scrutiny and criticism in preventing employees from having "their day in court."

Congress has been exploring and debating the possible repeal or extensive limitation of such agreements for the past several months under H.R. 1020 Arbitration Fairness Act of 2009. There is no certainty whether and when such legislation will be passed.

We will keep our clients apprised if such legislation is put into effect.

**Illinois**

**Minimum Wage Increase:** The minimum wage in Illinois increased to \$8.00 per hour on July 1, 2009. The minimum wage will increase by an additional 25 cents on July 1, 2010.

**Indiana**

**Minimum Wage Increase:** The minimum wage in Indiana increased to \$7.25 per hour on July 24, 2009.

**Illinois Extends Filing Periods for Gender Pay Discrimination Claims**

On August 14, 2009, Illinois amended its Equal Pay Act to give complainants with gender pay discrimination claims more time to file a complaint with the Department of Labor (from 180 days to within one year of the employee learning of the underpayment) and more time to file a claim in civil court (from three years to five years). The new law also clarified language in the statute regarding when a violation of the Act has occurred. The law now requires employers to keep payroll records for up to five years rather three years.

**FROM THE COURTS****U.S. Supreme Court****Reverse Race Discrimination**

The case *Ricci v. De Stefano*, 129 S. Ct. 2658 (2009), raises questions of when discrimination on the basis of race against one group of employees can be legally justified.

The New Haven, Connecticut fire department administered civil service tests for applicants for positions as captain and lieutenant. The examination resulted in disproportionately higher scores for white applicants than for minority applicants. The department decided not to implement the exam results for fear that doing so would put them in violation of Title VII. The Department made this decision despite the fact that it had hired an outside company to design the test and had determined that the test did not discriminate against minority applicants. Nonetheless, based upon the unsubstantiated fear that the Department could face lawsuits for disparate impact, the test results were invalidated and the positions remained unfilled. A group of white and Hispanic applicants sued claiming they had been unlawfully discriminated against on the basis of race.

The U.S. Supreme Court held that the City's action in discarding the tests violated Title VII. Because the City did not show a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.

### Proving Age Discrimination

In a case alleging age discrimination, the U.S. Supreme Court was asked to resolve confusion created by the lower courts regarding the applicable standard of proof. *Gross v. FBL Financial Service*, 129 S. Ct. 2343 (2009), The Supreme Court held that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The Court noted that the burden of persuasion does not shift to the employer, as it can in a Title VII case, to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

### CBA Requiring Arbitration of ADEA Claims Enforceable

A provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law but such an agreement to arbitrate claims is a condition of employment under the NLRA, and is therefore, subject to mandatory bargaining. *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009).

### 7<sup>th</sup> Circuit

#### Attorney Fees to Defendant

In a case of turning the tables against plaintiffs who maintain suits without justification, the 7<sup>th</sup> Circuit Court awarded defendant employer attorney fees. *Mach v. Will County Sheriff*, 580 F. 3<sup>rd</sup> 495 (7<sup>th</sup> Cir. 2009) The court reasoned that fees were appropriate after it determined that plaintiff litigated in bad faith by not voluntarily dismissing claims after discovery revealed that five of six claims were "worthless."

### No Employer Liability for Sexual Harassment where Employer Acted Reasonably

The case of *Roby v. Camping World*, 579 F. 3d 779 (7<sup>th</sup> Cir. 2009), stands for the proposition that an employer with an effective sexual harassment policy will prevail if an employee does not fully avail herself of the policy's requirements. In this case, Roby sued the employer, asserting Title VII claims for sexual harassment by a supervisor, and retaliation. The trial court granted summary judgment in favor of the employer.

The 7th Circuit affirmed, concluding that the employer established the *Ellerth-Faragher* affirmative defense to the sexual harassment claim because it had adopted a sexual harassment and reporting policy, and took prompt, remedial action as soon as it was made aware of the harassment. Moreover, the court found there was no retaliation and rejected the argument that Roby was constructively discharged since the discrimination had been eliminated and Roby unreasonably refused to return to work.

### Informal Complaint May be Protected Activity under ADA

In the case of *Casna v. City of Loves Park*, 574 F. 3d 420 (7th Cir. 2009), an employee sued his employer, asserting (among other things) a retaliation claim under the Americans with Disabilities Act (ADA). The trial court granted summary judgment in favor of the employer. Finding that Casna's informal, internal complaint did not constitute protected activity under the ADA. However, the 7<sup>th</sup> Circuit court disagreed, holding an informal complaint may constitute protected activity for purposes of ADA retaliation claims.

### Standard for Recognition of Internal Complaints under FLSA Clarified

The 7<sup>th</sup> Circuit Court of Appeals was presented with two issues in the case of *Kasten v. Saint-Gobain Plastics*, 574 F. 3d 834 (7<sup>th</sup> Cir. 2009): whether intra-company complaints not filed with an external agency are protected activity and whether unwritten verbal complaints are protected activity.

Kasten sued his employer, asserting a retaliation claim under the Fair Labor Standards Act (FLSA). The trial court granted summary judgment in favor of the employer. The 7th Circuit affirmed.

Kasten alleged that he was discharged in retaliation for making verbal complaints to his superiors that the employer's placement of time clocks violated the FLSA. The FLSA's anti-retaliation provision prohibits an employer from retaliating against an employee because (among other things) the employee "has filed any complaint...." The court held that "any complaint" includes an employee's internal ("intra-company") complaint but also held that an employee does not "file" such a complaint in this context when he submits the complaint in purely unwritten form.

#### **Driving is not a Major Life Activity under the ADA**

After a series of long absences, Winsley sued her employer, asserting (among other things) a disability discrimination claim under the Americans with Disabilities Act (ADA). The trial court granted summary judgment in favor of the employer. The 7th Circuit affirmed, holding that "driving" is not a major life activity under the ADA. *Winsley v. Cook County*, 563 F. 3d 598 (7<sup>th</sup> Cir. 2009)

However, the court observed that although driving is not itself a major life activity, the inability to drive nevertheless could create a disability if it caused an impairment of a major life activity, such as working.

#### **Employer Can Deny FMLA to Employee who "Doctors" Certification**

Smith sued the employer, asserting retaliation and interference claims under the Family and Medical Leave Act (FMLA). The trial court granted summary judgment in favor of the employer. The 7th Circuit affirmed. *Smith v. The Hope School*, 560 F. 3d 694 (7<sup>th</sup> Cir.2009).

Smith altered the FMLA certification form provided by her doctor and then forwarded it to her employer. Smith would have been entitled to FMLA leave even without the alteration. The court held "where an employee adds to a medical care provider's

certification form a condition that she has not been diagnosed with, without the knowledge or approval of her physician, an employer can deny her request for FMLA leave." The court's decision was limited to the specific facts of the case but noted "[w]e obviously do not reach the question of whether other, more insignificant alterations, such as correcting a typographical error or correcting or adding to a portion of the form with the knowledge and approval of a treating physician, would result in a similar ruling."

#### **FMLA Could Apply even if Employer has Fewer than 50 Employees**

Infohealth provided, among other things, an employee handbook to its employees. *Reaux v. Infohealth Management Corp.*, 2009 WL 635468 (N.D.Ill., 2009) The employee handbook contained a section outlining various types of leave the company offered to employees, including FMLA. After applying for and receiving approval, Deborah Reaux went on FMLA for the birth of her child. Ms. Reaux was terminated just days before her scheduled date to return to work. Reaux filed suit alleging interference with her rights under FMLA. Infohealth defended by arguing that the FMLA did not apply since it employed less than 50 people within a 75 mile radius. The court refused to grant Infohealth's motion to dismiss Reaux's claims noting that the doctrine of equitable estoppel applied. Equitable estoppel prevents a party from asserting a claim or defense against another party who has detrimentally altered her position in reliance on the former's misrepresentation or failure to disclose a material fact. Therefore, Infohealth could not defend by arguing Reaux's leave was not protected under the FMLA because Infohealth, through its employee handbook and actions, misled Reaux to believe her leave *was* protected under the FMLA.

#### **Employer Strictly Liable for any Supervisor's Sexual Harassment**

The Illinois Human Rights Commission (IHRC) found that the employer sexually harassed the employee. The Illinois Appellate Court reversed. The Illinois Supreme Court reversed the appellate

court and confirmed the decision of the IHRC, holding that the Illinois Human Rights Act provides that an employer is strictly liable for the sexual harassment of an employee by any supervisor, even when the harassing supervisor has no authority to affect the terms and conditions of the complainant's employment. *Sangamon County Sheriff's Department v. IHRC*, 233 Ill. 2d 125 (2009).

### **Record-Keeping Gaps Prove Costly in Pay Lawsuit**

The case of *People v. Madison Liquor Corp.*, 2009 WL 3151871, (Ill.App. 1 Dist. 2009) was brought under the Illinois Equal Pay Act by a former female employee who alleged she had been paid less than a male counterpart for substantially similar work. The state agency investigating her complaint agreed. Because the store's payroll records were incomplete, the investigator had to estimate the back-pay amount. The investigator used reasonable inferences from the payroll records as they existed, to cobble together what hours the female employee had actually worked, to ultimately determine the amount of back-pay she was owed. The employer objected to the use of "reasonable inferences." The court clearly enunciated that it will follow federal law which allows for the reasonable inference standard in cases where payroll records are incomplete or inadequate.

### **Workplace Bullying**

The Indiana Supreme Court in *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008), upheld a \$325,000 verdict against a cardiovascular surgeon accused of being a "workplace bully." Although Indiana does not currently have a law prohibiting workplace bullying, the theory of "bullying" was used to buttress plaintiff's legal claims of intentional infliction of emotional distress and assault. The trial and appellate court decisions in the case had received nationwide attention because of the interest in the concept of "workplace bullying."

## **FROM THE ADMINISTRATIVE AGENCIES**

### **Proposed regulations under ADAAA**

In response to a mandate Congress issued to the EEOC to propose regulations to implement the new act, the ADAAA, the EEOC recently published a Notice of Proposed Rulemaking (NPR) containing proposed amendments to its already existing ADA Regulations and Interpretive Guidance. The NPR was published in the Federal Register on September 23, 2009. The EEOC will accept comments on the proposed regulations until November 23, 2009. The proposed rulemaking can be accessed at <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>.

### **Guidance on Pandemic Preparedness in the Workplace and the ADA**

The EEOC, in light of the possibility of a swine flu pandemic, has issued guidance on how employers can manage the risk of influenza and not run afoul of the requirements of the ADA. According to the EEOC, the ADA is relevant to pandemic preparation because: it regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities; prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation); and requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic. The guidance discusses ADA requirements at three critical stages of a pandemic preparedness plan: before a pandemic; during a pandemic; and after a pandemic.

**NLRB Chicago Region Finds Window Company Violated Federal Labor Law**

Republic Windows & Doors, Inc. made national headlines last December when 250 members of the United Electrical Workers occupied the shuttered Chicago factory to protest its abrupt closing and the company's failure to pay severance pay. In March 2009, the NLRB's Chicago regional director found that Republic violated the National Labor Relations Act by illegally creating an alter ego company in Iowa to avoid its bargaining obligations with the union, shutting down and transferring the work of the Chicago operation without notice to or bargaining with the union, and failing to provide the union requested information for bargaining and processing grievances. The agency seeks to fine Republic two weeks of pay for about 200 workers who lost their jobs when the plant suddenly closed, unless a settlement can be reached. The case is complicated by the fact that Republic is operating under the protection of the U.S. Bankruptcy Court.

**NLRB Creates Alternative Dispute Resolution Program for Settling Unfair Labor Practice Cases**

In 2005, the NLRB began a pilot program to assist parties in settling unfair labor practice cases pending before the Board. The agency started its program in response to the success other federal agencies such as the EEOC have had in settling claims through alternative dispute resolution. In March 2009, the NLRB made its ADR program permanent.

Participation in the program is voluntary. The Board provides an experienced neutral such as an NLRB administrative law judge who attempts to facilitate a settlement but has no power to impose one. The settlement discussions are confidential. Under the program, the NLRB stays further processing of the unfair labor practice case for 30 days while the parties undertake the ADR process.

For more information on this process, you can refer to [http://www.nlrb.gov/shared\\_files/Press%20Releases/2009/R-2684.pdf](http://www.nlrb.gov/shared_files/Press%20Releases/2009/R-2684.pdf).

**Bad Weather Requires New Election**

In *Goffstown Truck Center*, 354 NLRB No. 49 (July 21, 2009), the NLRB ruled that severe weather on the day of a union representation election voided the union's win and required a second election. Overruling the hearing officer and sustaining the employer's objection to the election results, the Board held that a severe New Hampshire ice storm on the day of the election denied employees an adequate opportunity to vote. The Board found that the hearing officer improperly sustained the election results based on the testimony of four employees that they declined to vote for reasons other than the ice storm. The proper focus, the Board held, is on whether the election was conducted in a manner ensuring that all eligible employees were given a sufficient opportunity to vote.

For other important earlier 2009 court decision and legislation we refer you to our March 2009 Employment and Labor newsletter which is available on our website, [www.brycedowney.com](http://www.brycedowney.com).

**RECENT SUCCESSFUL RESULTS**

**Storrs Downey** and **Betty Tsamis** teamed up to achieve an excellent result on behalf of a client in Indiana involving a claim for back wages pursued by the Department of Labor. Through the prompt and cooperative yet tough negotiating stance on the part of the client and Bryce Downey & Lenkov we were able to resolve this matter for well under the potential high six figures exposure that existed.

**Cary Schwimmer** obtained dismissal of a race discrimination charge filed with the Illinois Department of Human Rights on September 23<sup>rd</sup>. On June 10<sup>th</sup> Cary obtained summary judgment in a Title VII sex discrimination and retaliation suit filed in federal court in Nashville, Tennessee.

## SEMINARS AND SPEAKING ENGAGEMENTS

The attorneys at Bryce Downey & Lenkov continue to participate in several local, regional and national seminars on various labor and employment topics including the below topics in the last few months

**Storrs Downey** presented the topic of “Terminating Injured and Problem Employees” before the Illinois Branch of RIMS (Rebex) on October 22, 2009.

**Storrs, Betty Tsamis** and **Rich Lenkov** spoke before the City of Chicago Department of Business Affairs and Consumer Protection on a variety of employment-related topics on “Protect Your Business, Your Employees and Stay Afloat” on June 5, 2009.

**Betty** also spoke before several Illinois employers at the Best, Inc. Employers’ Conference on August 12, 2009 on the topic of “Employment Law Update 2009.”

Finally, she presented at the VIP Global Net CLE Webinar on October 23<sup>rd</sup> on the topic of “Bias, Discrimination & Harassment in the Legal Workplace.

On December 30, 2009 **Cary Schwimmer** will be making a presentation to the Memphis Bar Association on current issues in labor and employment law. He will also be speaking to Successful Entrepreneurs Engaged in Memphis, Tennessee on January 26, 2010. The subject of Cary’s presentation will be the ten employer legal mistakes and employer conduct that causes employees to seek union representation.

We also regularly present labor and employment seminars and training sessions to our individual clients in Illinois, Indiana, Tennessee and other states. If you are interested in a free seminar or webinar presentation in this practice area, please contact us.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients’ expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients’ needs with a regional concentration while maintaining a national practice. Our practice areas include:

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*The attorneys at Bryce Downey & Lenkov constantly strive to keep you updated regarding the latest developments in Employment law in Illinois, Indiana and other states. If you would like more information on any of the topics discussed above or have any questions regarding these issues, please contact Storrs W. Downey at 312.377.1501 or [sdowney@brycedowney.com](mailto:sdowney@brycedowney.com) or any member of our Employment Law team. © Copyright 2009 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*

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