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Recent Legal Developments Impact HR and Increase Employer Liability

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The second half of 2014 has brought several noteworthy cases to the attention of the HR and employment law communities. Here they are, in a nutshell:

Joint Employers Must Ensure Compliance with Washington's Minimum Wage Act

In early August, the Washington Supreme Court ruled that a joint employer may be liable for minimum wage law violations, regardless of the existence of a formal employment relationship with the affected employee. In *Becerra v. Expert Janitorial, LLC*, the plaintiffs were janitors that cleaned Fred Meyer stores for a subcontractor. The subcontractor classified the janitors as independent contractors to avoid paying minimum wage, overtime, and payroll taxes. The janitors sued the subcontractor, the main contractor, and Fred Meyer, claiming minimum wage and overtime violations. On appeal, the Supreme Court reversed the lower court, holding that the 13-part "economic reality" test was appropriate. Specifically, the Court held that a court should review independent contractor status using all 13 factors, not a select few. The decision brought Washington's minimum-wage jurisprudence in line with the 13-factor test used under federal law and makes it important for employers to ensure that their contractors and subcontractors follow minimum wage laws. Otherwise, employers may unwittingly be responsible for unpaid wages.

The Washington Law Against Discrimination Protects Independent Contractors

In another independent contractor case, the Washington Court of Appeals held that the employee vs. independent contractor distinction is immaterial with respect to the Washington Law Against Discrimination (WLAD). In *Currier v. Northland Services, Inc.*, an independent contractor truck driver overheard another independent contractor making a racist joke. He reported the incident and the employer terminated his contract two days later for "customer service issues." In the ensuing lawsuit, in which the plaintiff alleged retaliation in violation of the WLAD, the employer argued that the plaintiff was not protected by the WLAD because he was an independent contractor. The court held that the WLAD makes no distinction between employees and independent contractors, instead protecting "any person" from retaliation.

Plaintiff Fails to Show that His Interpersonal Problems Resulted from a Disability

In a decision favorable to employers, the Ninth Circuit recently dismissed a police officer's claim under the Americans with Disabilities Act (ADA) for failure to show a

disability. The employer fired the officer for severe interpersonal problems with other employees, which the officer blamed on attention deficit hyperactivity disorder (ADHD). The Ninth Circuit Court of Appeals found that the plaintiff had not produced sufficient evidence to show that his ADHD limited his ability to work in any way. The court also found that even if the plaintiff's ADHD had contributed to his interpersonal problems, "one who is able to communicate with others, though his communications may at times be offensive, inappropriate, ineffective, or unsuccessful," is not "disabled" as defined by the ADA. If applied in the right circumstances, this decision ought to give employers relief from "cantankerous" employees who insist that their offensive behavior is a symptom of a disability.

Washington Court Expands Scope of Public Policy Wrongful Discharge

Washington's Court of Appeals continued the state's trend of allowing wrongful-discharge-in-violation-of-public-policy claims, even when other remedies exist to protect the public policy. Historically, public policy claims have been limited to only those cases where the claim was necessary to protect some important public policy. Thus, a public policy claim has traditionally been unavailable where other remedies exist. Yet in *Becker v. Community Health Systems, Inc.*, the Court of Appeals recognized a public policy claim for a former chief financial officer who had been discharged after projecting a larger-than-expected operating loss. The employer had allegedly asked him to revise his projection to show a smaller loss, and when he refused to do so, the employer fired him. The CFO sued for wrongful discharge in violation of public policy. Even though other laws protected the public policy (such as the Sarbanes-Oxley Act), the Court of Appeals allowed the CFO's claim to proceed, opining that the statutes were inadequate to "fully vindicate public policy." The *Becker* decision will allow more of these claims to survive pretrial motions, ultimately increasing employers' defense costs. An employer's best defense to these and other wrongful-discharge claims is a well-documented termination for legitimate reasons.

Employees can choose not to count leave under the FMLA

Can an FMLA-eligible employee expressly decline to use FMLA leave? Yes, according to the Ninth Circuit Court of Appeals in *Escriba v. Foster Farms Poultry, Inc.*, which held that employees are free to decline FMLA leave, though in doing so they forfeit the protections of the Act.

Escriba was granted two weeks of vacation to care for her sick father. She then asked for an additional one to two weeks of unpaid leave, but her supervisor initially denied that request. Later, the supervisor asked Escriba whether she needed more time to care for her father. Escriba said she did not, and her supervisor told her to speak with the HR department if she later changed her mind. Escriba then spoke with the facility superintendent and asked him for an additional two weeks of vacation to care for her father, whom she described as "very ill." The superintendent said that he could not grant her request but instructed her to send a doctor's note or other documentation to the HR office. He did not inform Escriba about her FMLA rights. Escriba decided that she could not return to work within two weeks, but she did not contact Foster Farms to extend her leave. Foster Farms terminated Escriba's employment for violation of its "no call, no show" rule. Escriba sued under the FMLA and a similar California law. A jury found in favor of Foster Farms, because Escriba had expressly declined to use FMLA leave. The Ninth Circuit affirmed on appeal, holding that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." To the court, this meant that Escriba was not entitled to the return-to-work protections under the Act.

Many businesses have FMLA policies requiring employees to exhaust paid leave banks concurrently with FMLA leave. The Department of Labor expressly allows these policies under 29 CFR § 825.207. But under *Escriba*, the converse is not allowed: Employers may not require employees to exhaust FMLA leave concurrently with paid leave if the employees decline to use FMLA leave. Employers should examine each situation individually while carefully documenting their decision-making process. If the employee declines FMLA coverage, get it in writing!

I would like to thank Nate Bailey of Sebris Busto James who assisted in the preparation of this article.

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