EMPLOYMENT LAW UPDATE

Gallagher Sharp LLP

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Individual Highlights:

Supreme Court of the United States

Statute of limitations runs from date of discharge in constructive discharge cases.

In a constructive discharge claim, a former employer alleges the employer engaged in discriminatory conduct so severe it made working conditions intolerable and any reasonable person would have felt they had no choice but to quit. In *Green v. Brennan*, Slip Op. No. 14-613 (May 23, 2016), the Supreme Court of the United States addressed the date from which the Statute of Limitations runs in such cases.

Marvin Green, an African American employee of the Postal Service for 35 years, was postmaster for Englewood, Colorado when he applied for a promotion for a vacant position in Boulder, Colorado in 2008. He was denied the promotion and complained the denial was based upon his race. Following his complaint, his relationship with his supervisors deteriorated and on December 11, 2009, they accused Green of intentionally delaying the mail, a criminal offense. The Office of Inspector General (OIG) of the Post Office investigated the allegation and reassigned Green during the investigation. After the OIG informed Green's supervisors no further investigation was warranted, they continued to tell him "the OIC is all over this" and a criminal charge "could be a life changer." Green was then given the "option" to leave his post in Englewood either through retirement or by taking a position in Wamsutter, Wyoming, at a considerably reduced salary in exchange for the Postal Service's promise not to pursue criminal charges. Green retired and the parties executed a settlement agreement. Green then filed a Charge of Discrimination with the EEOC.

Before the Court accepted this case, there was a split among the lower courts as to whether the statute of limitations for a constructive discharge discrimination claim runs from the date of the employee's resignation or the date of the employer's last discriminatory act. In concluding the statute of limitations runs from the date of resignation, the Court found no difference between when the harm occurs in constructive and actual discharge cases, reasoning such consistent application of the limitations period made practical sense because "[s]tarting the limitations period clock ticking before a plaintiff can actually sue for constructive discharge serves little purpose in furthering the goals of a limitations period – and it actually negates Title VII's remedial structure."

This decision extends the time within which an employee who resigns months after an internal complaint of discrimination is resolved, can file a Charge and then a lawsuit. For this reason, employers should follow up with an employee who has submitted an internal complaint to ensure and document that the situation continues to be resolved. *Green v. Brennan*, Slip Op. No. 14-613 (May 23, 2016).

Recovering attorney's fees in baseless discrimination lawsuits.

Although Title VII permits the prevailing party to recover attorney's fees, it is often difficult for an employer to recover such fees because it must establish the lawsuit was "frivolous, unreasonable or groundless" in addition to being the "prevailing party." The Supreme Court of the United States recently addressed the meaning of the term "prevailing party in *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission*, Slip Op. No. 14-1375 (May 19, 2016) .

CRST has a lengthy procedural history. In 2005, the EEOC received a Charge of Discrimination alleging sexual harassment from a female driver (Stark) and notified her employer, CRST Van Expedited, Inc. During its investigation, the EEOC identified other drivers who filed Charges against the employer. Following investigation, the EEOC found probable cause discrimination occurred and attempted conciliation, which failed. In 2007, the EEOC filed suit alleging Stark and other similarly situated employees were subjected to sexual harassment. Discovery identified 250 aggrieved women. In 2009, the district court dismissed all of the sexual harassment claims, found CRST to be the prevailing party and awarded $4 million in attorney's fees. The Eighth District Court of Appeals reversed the district court's dismissal of only two claims (Jones and Stark) and vacated the award of attorney's fees because in its view, CRST was no longer the prevailing party. On remand, the EEOC withdrew its claim for Jones and settled Stark's claim. After which, the district court reinstated the $4 million attorney's fees award. On appeal again to the Eighth District, the court reversed the award of attorney's fees finding in its opinion CRST was not the "prevailing party" because it did not prevail on an element of the Title VII claim.

On appeal, the Supreme Court reversed. In so doing, the Court noted the differences in objectives between a plaintiff and defendant in litigation. Specifically, while a plaintiff's goal is to alter the legal relationship between the parties, the defendant's goal is to rebuff plaintiff's challenge, regardless of the precise reason for the court's decision. Thus, a defendant prevails regardless of whether the final judgment is on the merits or for a reason other than on the merits.

While the *CRST* case is favorable to employers, it is still difficult to recover attorney's fees due to the requirement of a finding that plaintiff's actions were "frivolous, unreasonable, and without foundation." *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission*, Slip Op. No. 14-1375 (May 19, 2016).

Consumer cannot bring a lawsuit in federal court based upon only a bare procedural violation of the Fair Credit Reporting Act (FCRA).

An increasing number of class action lawsuits are filed by employees against employers for often technical violations of the FCRA. The Act imposes requirements on employers using "consumer reports" and "investigative consumer reports" for employment purposes, both before and after such reports are obtained, and permits lawsuits against employers for negligently or willfully failing to comply with any FCRA requirement. Recently, the United States Supreme Court placed limits on when a consumer can file suit.

Spokeo is a "people search engine." A person can input a name, phone number or email address and Spokeo searches a variety of databases for information regarding that individual. Spokeo's search for information regarding Thomas Robins allegedly contained inaccuracies. As a result, Robins filed a federal class action complaint alleging willful failure to comply with the FCRA. The district court dismissed the lawsuit, holding Robins "had not 'properly pled' an injury in fact as required by Article III [to file a lawsuit in federal court]," and the Ninth Circuit reversed.

The Supreme Court vacated the decision of the Ninth Circuit and remanded the case because in the Ninth Circuit's analysis of whether Robins suffered an injury in fact was incomplete -- they did not analyze whether the alleged injury was concrete. A concrete injury is an injury that is real and not abstract, but need not be tangible. For this reason, bare allegations of procedural violations devoid of any risk of real harm do not satisfy the requirement of concreteness necessary to file a federal lawsuit.

Instructive to understanding this decision are two examples provided by its author, Chief Justice Alito: "A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."

While the holding appears to be favorable for employers who use consumer reports, its ultimate impact remains to be seen. Under the FCRA, claims can be filed in federal and state court and it is unknown whether state courts will require an injury in fact. Thus, employers should be aware of the technical requirements of the FCRA and consider evaluating their FCRA compliance. *Spokeo, Inc. v. Robins,* Slip Op. No. 13-1339 (May 16, 2016).

Coincidentally, a few days before this decision was rendered, on May 10, 2016, the Federal Trade Commission (FTC) released a publication entitled *What Employment Background Screening Companies Need to Know About the Fair Credit Reporting Act*. Although directed to consumer reporting agencies, it indirectly highlights compliance requirements applicable to employers.

See: What Employment Background Screening Companies Need to Know About the Fair Credit Reporting Act

U.S. Department of Labor

Final rule on overtime pay.

Released on May 18, 2016, the DOL's final rule on overtime pay under the Fair Labor Standards Act (FLSA) requires employers to adjust their compensation practices. Effective December 1, 2016, the standard salary threshold for executive, administrative and professional (EAP) exempt employees increases from $455 per week ($23,660 per year) to $913 per week ($47,476 per year). Up to 10 percent of EAP employees' salaries can be met with nondiscretionary bonus incentives and commissions paid on a quarterly or more frequent basis. The Rule also increased the salary level required for the highly compensated employee exemption to be set at the annualized value of the 90th percentile of weekly earnings of fulltime salaried workers nationally, meaning that as of December 1, 2016, the new salary level will be $134,004 annually, a 34 percent increase from the current level. The salary levels will be updated automatically every three years starting January 1, 2020. The DOL estimates the salary level for the EAP exemptions for 2020 will be $984 per week, or $51,168 annually.

Applying these rules, the DOL noted the only options employers have for workers newly eligible for overtime are:

- Increase salary to $47,476 to retain exempt status;
- Pay overtime;
- Reduce or eliminate hours;
- Reduce the amount of pay allocated to base salary and add pay to account for overtime hours worked to hold total pay constant; or
- Some combination of the above.

See: https://www.dol.gov/whd/overtime/final2016.

Equal Employment Opportunity Commission

New resource document addressing leave as a reasonable accommodation under the Americans with Disabilities Act (ADA).

On May 9, 2016, the EEOC provided guidance on when and whether an employer must provide extended or intermittent leave as a reasonable accommodation under the ADA with the issuance of a resource document entitled Employer-Provided Leave and the Americans with Disabilities Act. Nine key issues are addressed:

1. Equal Access to Leave Under an Employer's Leave Policy: If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing paid leave policy, the employee should be treated the same as one requesting leave for a reason unrelated to the disability.

2. Unpaid Leave Must be Considered as a Reasonable Accommodation: An employer must consider providing unpaid leave to an employee with a disability as long as it does not create an undue hardship even when (1) the employer does not offer leave as a benefit, (2) the employee is not eligible for leave under the employer's policy, or (3) the employee exhausted the leave the employer provides as a benefit (including workers' compensation leave, FMLA leave, etc.).

3. Requests for Leave for a Medical Condition Must be Considered Requests for Reasonable Accommodation: All requests for leave for a medical condition are considered requests for a reasonable accommodation. If leave can be addressed under a particular leave policy (e.g., FMLA or workers' compensation), it may be provided under those programs. However, if leave

is not available under an existing employer leave policy, the employer is required to engage in the interactive process and is permitted to consider if an accommodation other than leave is feasible.

4. <u>An Employer May be Required to Provide Leave Beyond Its Policy</u>: Even if an employer has a policy specifying the maximum amount of leave or number of unplanned absences available to employees, it may have to grant leave of absences beyond its policy as a reasonable accommodation. Thus, employers should not automatically terminate an employee on leave for a medical condition if the leave exceeds the employer's policy, but must examine each need to extended leave on a case-by-case basis. Likewise, employers should consider as a reasonable accommodation additional days off for unplanned absences if such absences were the result of a medical condition.

   Employers should use caution in issuing form letters to employees on leave notifying them a failure to return to work may result in termination or discipline. The EEOC urges employers to amend such letters to include notification if an employee needs additional leave, s/he should contact the employer as soon as possible so the employer may consider whether it can grant an extension without causing undue hardship.

5. <u>100% Healed Policies are a Violation of the ADA</u>: Allowing an employee with a medical condition to return to work only after certification of 100% healed or recovered is a violation of the ADA. If an employer claims medical restrictions pose a safety risk, the employer must establish the individual is a direct threat posing a significant risk of substantial harm to themself or others and must still consider reasonable accommodations to diminish or eliminate the threat.

6. <u>Reassignment to a Vacant Position is Required</u>: Employers are obligated to reassign employees to a vacant position if the disability prevents the employee from performing one or more essential functions of their job, even with reasonable accommodation or because accommodation would result in undue hardship.

7. <u>Undue Hardship Determination Involves Consideration of Numerous Factors</u>: The undue hardship determination involves considering length and frequency of leave, flexibility in days off, predictability, whether others can chip in and perform job duties, and impact on operations.

8. <u>Indefinite Leave Remains An Undue Hardship</u>: The EEOC was clear "indefinite leave – meaning an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and does not have to be provided as a reasonable accommodation."

9. <u>Leave as a Reasonable Accommodation Includes the Right to Return to Original Position</u>: However, if holding the job will cause an undue hardship, alternatives must be considered.

See: https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

Final rules for wellness programs under the ADA and GINA.

In its Final Rules, issued on May 16, 2016, the EEOC described how employer-provided wellness programs can comply with the ADA and GINA. The rules, effective January 2017, apply to all workplace wellness programs and differ, as noted below, from the final wellness rules issued jointly in 2013 by the Departments of Health and Human Services, Treasury and Labor.

Under HIPAA as amended by the ACA, wellness programs may offer incentives of up to 30 percent of the cost of an individual's annual health premiums (whether family or employee-only), and for tobacco-cessation programs, up to 50 percent of the cost of health premiums. Yet, per the EEOC's Final Rule, wellness programs asking questions about health or including medical examinations may offer incentives up to 30 percent of the total cost of self-only coverage, and specifically:

- Where the employer requires the employee to be enrolled in a particular health plan to participate in the wellness program, the incentive to the employee may not exceed 30 percent of the total cost of the self-only version of the plan in which the employee is enrolled.

- Where the employer offers more than one self-only health plan, and does not require the employee to be enrolled in a particular health plan to participate in the wellness program, the incentive may not exceed 30 percent of the lowest cost major medical self-only plan the employer offers.

- Where the employer does not offer a health plan, and offers a wellness program that is open to employees, the incentive may not exceed 30 percent of the total cost to a 40-year-old nonsmoker purchasing self-only coverage under the second-lowest cost Silver Plan available on the state or federal exchange in the location that the employer identifies as its principal place of business.

Another critical conflict is regarding tobacco cessation incentives. The ADA (and not the ACA) distinguishes between tobacco-cessation programs requiring testing for nicotine use as opposed to those simply asking employees if they smoke. Per the EEOC, if employees are merely asked if they smoke, the 30 percent limit does not apply because it is not a wellness program asking a disability-related question and employers can offer incentives of up to 50 percent of the cost of self-coverage only. Whereas, under the ACA, the 50 percent limit applies to both types of initiatives.

Employees offering incentives previously permitted under the ACA are urged to reexamine their wellness programs in light of these final rules.

See: https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm.

Occupational Safety & Health Administration

Electronic Recordkeeping Rule creates new reporting requirements.

On May 12, 2016, OSHA issued amendments to its recordkeeping regulations. One significant change is the new electronic reporting requirement. In the past, employers maintained illness and injury data internally and OSHA only gained access to a limited number of records in limited circumstances. Per the new rule, covered employers are required to provide injury and illness data to OSHA annually and OSHA intends to make the information publicly available.

Employers are currently required to have reporting procedures, inform employees of those procedures, and are prohibited from retaliating against employees for reporting injuries. The new amendments contain an anti-retaliation provision effective August 10, 2016, requiring:

- Employers affirmatively inform employees they have a right to report work-related injuries and illness free from retaliation,
- Specifically bars employers from retaliating against workers who report injuries, and
- Employers ensure reporting procedures are reasonable and do not discourage reporting.

Additionally, per the Rules, employers are prohibited from using drug testing or a threat of drug testing as a form of adverse action against employees who report injury or illness. Drug testing policies should limit post-incident testing to situations where drug use could have contributed to the incident.

The inclusion of the anti-retaliation provision in the record keeping requirements of OSHA has caused concern among employers. Some commentators believe it may signify OSHA's willingness to pursue whistleblower claims against employers based upon failure to fulfill their reporting requirements.

See: https://www.osha.gov/recordkeeping/finalrule.

Defend Trade Secrets Act

DSTA contains compliance requirements for employers.

Enacted on May 11, 2016, the DTSA permits employers to file suit in federal court for alleged improper disclosure of trade secrets. Before the DTSA, an employer's only avenue for suit was state court with each state adopting different versions of the Uniform Trade Secrets Act of 1979, and thereby complicating litigation for companies operating in multiple jurisdictions. The DTSA provides a uniform remedy to businesses whose trade secrets have been stolen, permits injunctions preventing actual or threatened misappropriation, and provides compensatory damages, punitive damages no greater than two times compensatory damages, and attorney's fees.

Gallagher Sharp LLP

CLEVELAND
Sixth Floor. Bulkley Bldg.
1501 Euclid Avenue
Cleveland, Ohio 44115
216.241.5310 PHONE
216.241.1608 FAX

TOLEDO
420 Madison Avenue
Suite 1250
Toledo, Ohio 43604
419.241.4860 PHONE
419.241.4866 FAX

DETROIT
211 West Fort Street
Suite 660
Detroit, MI 48226
313.962.9160 PHONE
313.962.9167 FAX

Also included in the Act is an immunity provision stating individuals shall not be held criminally or civilly liable under any trade secret law if they disclose the secret to a government official or attorney solely for the purpose of reporting or investigating suspected unlawful conduct and in court proceedings if filed under seal. Employers are required to provide notice of the immunity described above "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."

There are two options for providing notification -- amending nondisclosure, confidentiality and non-compete agreements with employees to provide such notice, or including the notice language in the whistleblower section of an employer's policy, usually included in the employee handbook. Because the language used in such notice is critical, legal assistance may be helpful in crafting language to ensure compliance.

See: https://www.congress.gov/bill/114th-congress/senate-bill/1890/text.

Gallagher Sharp's Employment Practice:

Gallagher Sharp has broad experience representing employers, managers, and employees in employment matters in federal, state, and bankruptcy courts, and at the administrative level. We successfully defend clients in matters alleging violations of state and federal employment laws, including discrimination, disparate treatment, hostile work environment, retaliation, wrongful discharge, wage and hour laws, whistle-blower protections, and FMLA. We counsel employers regarding hiring, retention, discipline, termination, severance, and the enforcement and defense of non-compete agreements.

Julie L. Juergens
Lori E. Brown
Paul D. Galea
Melanie R. Irvin
Kevin R. Marchaza

Contact the Business & Employment Group:
http://www.gallaghersharp.com

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