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Notable Recent Court Decisions in Employment Law

This bulletin summarizes several recent federal court decisions addressing employment-related issues important to both public and private sector employers. Employers with questions about these cases or the impact they may have on business operations are encouraged to contact Mark Amberg, Sharon Rudnick, Andrea Nagles, or Kate Watkinson.

Last Chance Agreement Did Not Waive Employee's Right to Due Process Protections

Walls v. Central Contra Costa Transit Authority, ___ F.3d ___, 2011 WL 3319442 (9th Cir. Aug. 3, 2011)

In an August 3, 2011 decision, the Ninth Circuit Court of Appeals held that a Last Chance Agreement (LCA) entered into between a public employee, Walls, and his employer, Central Contra Costa Transit Authority (CCCTA), did not waive Walls' due process rights and transform him to an "at-will" employee because the agreement did not contain language specifically stating that Walls was relinquishing his due process rights. Walls sued CCCTA for wrongful discharge in violation of the Family and Medical Leave Act (FMLA) and violation of his due process right to a pre-termination hearing under the United States and California Constitutions. After being terminated by CCCTA, Walls was reinstated pursuant to a LCA executed during the grievance process between Walls, his union representative, and CCCTA. Within days after his reinstatement, CCCTA again terminated Walls because he incurred an unexcused

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absence in violation of the attendance requirements of the LCA. With respect to Walls' due process claim, the Ninth Circuit noted that the LCA stated that "non-compliance with the stipulations [of the LCA] will result in your immediate and final termination." However, the court found the use of the word "immediate" in the LCA did not mean that Walls' termination would take effect without a hearing of any kind and therefore was not an express waiver of a pre-termination hearing. Applying the presumption against waiver of constitutional rights, the court held that Walls did not *knowingly* waive his right to due process protections.

Walls is a strong reminder for employers who use Last Chance Agreements: If you want a LCA to effectively waive an employee's due process rights, the LCA must contain explicit, unequivocal waiver language to that effect.

First Amendment: Government Employer's Ability to Restrict Religious Speech

Johnson v. Poway Unified School Dist., ___ F.3d ___, 2011 WL 4071974, (9th Cir. Sept. 13, 2011)

Johnson, a public high school math teacher, displayed two large banners in his classroom containing phrases, written in large block letters, that appear in national and historical texts, such as, "IN GOD WE TRUST," "ONE NATION UNDER GOD," "GOD BLESS AMERICA," and "All men are created equal, they are endowed by their CREATOR." School district officials ordered Johnson to remove the banners. Johnson filed suit alleging, among other claims, that the district violated his First Amendment free speech and establishment rights under the U.S. Constitution by requiring him to remove his banners, but allowing other items to remain that displayed what he believed to be religious or sectarian viewpoints, like Tibetan prayer flags, posters of Malcolm X and Gandhi, and posters with lyrics for John Lennon's song "Imagine."

The Ninth Circuit Court of Appeals held that the proper test for determining whether a government employer unconstitutionally violated an employee's free speech rights is the "sequential five-step" *Pickering* test formulated by the U.S. Supreme Court in *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 88 S. Ct. 1931 (1968). The test examines whether: (1) the employee spoke on a matter of public concern; (2) whether the employee spoke as a private citizen and not a public employee; (3) whether the employee's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the government employer had an adequate reason for treating the plaintiff employee differently than the general public; and (5) whether the government employer would have taken the adverse employment action even if the plaintiff had not made the protected speech. The plaintiff employee must satisfy all five elements of the test to succeed on the claim. The Ninth Circuit found that the school district did not violate Johnson's free speech rights because Johnson failed to prove the second element: that he spoke as a private citizen. The court found that Johnson's speech owed its existence to his position as a teacher and that, for purposes of the *Pickering* test, teachers necessarily act as public employees and not as private citizens when they are at school or school functions, in the presence of students, and in other capacities that might reasonably be seen as an official capacity.

The court also rejected Johnson's claim alleging the district violated the Establishment Clause of the First Amendment by endorsing Buddhist, Hindu, and anti-religious speech while silencing his Judeo-Christian speech. The court reiterated that the Establishment Clause does not prohibit the government from making any religious references; it just may not be overtly hostile to religion and may not endorse a particular religion or religious belief. The court found the district's purpose in allowing the display of the other items was not to endorse a religion, but rather for secular purposes, like stimulating scientific interest.

The Johnson case illustrates that a government employer can impose certain restraints on its employees' speech to protect the employer's own legitimate interests, even if these restrictions would not be constitutional if applied to the general public. Examples of a government employer's legitimate interests for restraining employees' speech include ensuring the employer does not run afoul of the Establishment Clause or other laws. Additionally, this case provides a helpful reminder that government employers are not wholly precluded from referencing religion in the workplace so long as the employer does not endorse or advance one particular religious belief over others.

What Constitutes a "Willful" Violation of USERRA?

Fryer v. A.S.A.P. Fire & Safety, ___ F.3d ___, 2011 WL 3963585 (1st Cir. Sept. 9, 2011)

A jury awarded Fryer, a National Guard member, over $738,000 in damages (economic and non-economic), interest, and attorney fees against his former employer, A.S.A.P. Fire & Safety, for violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4311 et seq., Massachusetts anti-discrimination laws, and Massachusetts wage laws. Among other issues, the First Circuit Court of Appeals ruled on the meaning of "willful" as used in USERRA's rule, which permits a plaintiff to recover liquidated damages for the employer's "willful" violation. Following U.S. Supreme Court decisions under the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act (FLSA), the First Circuit held that the term "willful" refers to a "knowing violation or action taken in reckless disregard of the obligations imposed by USERRA." The court held that A.S.A.P.'s admission that it was aware of its USERRA obligation to reinstate Fryer, coupled with Fryer's testimony regarding his interactions with A.S.A.P.'s owners about his reinstatement, was sufficient to permit a reasonable jury to conclude A.S.A.P. acted "willfully"–that is, with reckless disregard in refusing to reinstate Fryer to his pre-service position. The appellate court affirmed the award of damages, including the award of liquidated damages under USERRA, to Fryer.

Fryer serves as a general reminder of the steep penalties employers may face for violating USERRA's duty to reinstate service members and anti-discrimination protections, which can be added to penalties for violations of state anti-discrimination and wage laws. Also, *Fryer* demonstrates USERRA penalties can be enhanced by a finding of willful action by the employer, which, consistent with interpretations of "willful" under the ADEA and FLSA, includes actions an employer takes in "reckless disregard" of statutory obligations.

Ninth Circuit Interpretation of the "Learned Professional" Exemption Under the FLSA

Solis v. State of Washington, ___ F.3d ___ (9th Cir. Sept. 9, 2011)

In reversing the district court's grant of summary judgment in the employer's favor, the Ninth Circuit Court of Appeals held that Washington's Department of Social and Health Services (DSHS) did not meet its burden of showing that social workers qualify for the "learned professional" exemption from overtime pay requirements under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et. seq., because social workers are not required to obtain a prolonged course of specialized intellectual instruction directly related to their professional duties. The Ninth Circuit noted that the FLSA exemptions to minimum wage and overtime pay requirements are to be construed narrowly against employers and that the employer has the burden of showing that a particular exemption applies.

Employers must scrutinize the educational requirements for employment positions and apply the "learned professional" exemption

only to employees who complete a particular course of instruction directly related to a position. Simply requiring a course of instruction that generally relates to a position, in addition to substantial practical experience, is not enough. Unfortunately, in the Ninth Circuit, application of the "learned professional" exemption is anything but intuitive. Athletic trainers, game wardens, and licensed funeral directors typically qualify for the "learned professional" exemption, but probation officers, aviation operation specialists, and EMT/paramedics generally do not qualify and are entitled to overtime pay.

Employers with questions about employee classifications under the FLSA and whether minimum wage and overtime requirements apply to a particular position or class of employees are encouraged to contact Mark Amberg, Sharon Rudnick, Andrea Nagles, or Kate Watkinson–our firm's most experienced labor and employment law attorneys–for further guidance.

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