

L&E ALERT

October 31, 2011

This alert summarizes several recent court decisions addressing wage and hour statutes, reasonable accommodation, and employee right to privacy issues important to employers.

Recent Decision Clarifies the Deadline for an Employee to File a Claim for Penalty Wages

Russell v. U.S. Bank National Association, --- P.3d ----, 2011 WL 4820322 (Or. App. 2011)

Under Oregon's wage and hour statutes, if an employer fails to pay an employee's wages that are due and owing upon termination of employment, the employee can file a claim for the unpaid wages plus a penalty wage. ORS 652.150 states that if an employer willfully fails to pay wages at termination, then as a "penalty" for nonpayment, the employee's wages continue at the employee's hourly rate of pay for eight hours per day from the due date until paid, subject to a maximum of 30 days.

There is a three-year statutory limitation period for an employee to file this type of claim. In a decision filed October 12, 2011, the Oregon Court of Appeals held that an employee's cause of action for penalty wages did not accrue until the 30th day following the day on which the employee's earned wages became due and unpaid. This means that the clock on this statutory limitation period starts ticking on the 30th day after the due date for the final paycheck.

In deciding that the employee's cause of action for penalty wages did not accrue until the end of the 30-day period, the *Russell* court reasoned that "it is not the employer's initial wrongful act of failing to pay earned wages that triggers the statute of limitations for a claim for penalty wages. Rather, the limitation period can begin to run only when the employer commits the additional wrongful act of willfully failing to pay the earned wages on a day following the date on which those wages were originally due, as only that later act makes the employer liable for a penalty." The *Russell* decision reminds employers on the importance of complying with Oregon's wage and hour law when issuing an employee's final paycheck. The court's full decision in *Russell*, including rationale behind the decision is available at: <http://www.publications.ojd.state.or.us/A144289.pdf>

Employer's Failure to Pay Post-Judgment Interest Not Grounds for Penalty Wages

Young v. State of Oregon, --- P.3d ----, 2011 WL 4954018 (Or. App. 2011)

In an October 19, 2011 decision, the Oregon Court of Appeals held that post-judgment interest does not constitute "wages" or "compensation" under



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Oregon's penalty wages statute, ORS 652.150. As discussed above, an employer who willfully fails to timely pay an employee his or her wages or compensation upon termination of employment may be required to pay the wages owed plus penalty wages for the non-payment. Young clarifies that post-judgment interest owed to an employee upon termination does not constitute "wages" or "compensation" under the penalty wage statute. Therefore, an employer's failure to pay post-judgment interest at termination cannot form the basis of a claim for penalty wages under ORS 652.150. The court's full decision in *Young* is available at: <http://www.publications.ojd.state.or.us/A145273.pdf>

Employee's Poor Attendance Precludes ADA Protection

Colon-Fontanez v. Municipality of San Juan, --- F.3d ---, 2011 WL 4823189 (C.A.1 (Puerto Rico))

In an October 12, 2011 decision, the First Circuit Court of Appeals held that an employee's disability discrimination claim under the federal Americans with Disabilities Act (ADA) against a municipal employer failed because the employee was unable to show that she was a qualified individual under the ADA. To bring a claim for disability discrimination under the ADA, a plaintiff must prove, among other things, that s/he is a "qualified individual" who can perform the essential functions of the job, either with or without reasonable accommodation. In determining whether the plaintiff was "qualified," the court looked at the employer's evidence that the employee had a long-established and consistent record of absenteeism from her job. The court expressed that, similar to the position taken by most circuit courts, "attendance is an essential function of any job." Since the plaintiff was unable to show she could perform an essential job function (i.e., maintain regular attendance), she was not a "qualified" individual entitled to ADA protection. The *Colon-Fontanez* decision stresses the importance of employers having job descriptions outlining the essential functions for each position and tracking and maintaining employee attendance records.

Inappropriate Videotaping Results in Fourteenth Amendment Right to Privacy Claim

Doe v. Luzerne County, --- F.3d ---, 2011 WL 4823387 (C.A.3 (Pa.))

In an October 12, 2011 decision, the Third Circuit Court of Appeals held that Doe, a female deputy sheriff, had a constitutionally protected privacy interest under the Fourteenth Amendment to the U.S. Constitution arising from a male co-employee secretly videotaping Doe during a mandatory decontamination shower. After taping, the co-employee uploaded the video onto his work computer and shared the video with other employees on the computer network. Doe sued the County pursuant to 42 U.S.C. § 1983 and claimed, in part, that the videotaping violated her federal constitutional right to privacy under the Fourteenth Amendment. The lower court granted summary judgment in favor of the County, finding that the case did not fall within the "zone of privacy" interests protected by the Fourteenth Amendment. In reversing the district court, the appellate court noted that one of the protected privacy interests rooted in the Fourteenth Amendment is an "individual interest in avoiding disclosure of personal matters [without consent]," and that the question is whether the disclosure at issue falls "within an individual's reasonable expectations of confidentiality." Under this analysis and based on the specific facts of the case, the court concluded that Doe had a protected reasonable expectation of privacy while in the decontamination area, particularly while in the presence of members of the opposite sex.

Doe illustrates how an employee's inappropriate or improper use of technology in the workplace (e.g., videotaping, unlawful disclosures over computer networks) can result in privacy claims against the employer. *Doe* is a reminder that employers should have clear policies in place addressing the permissible use of technology in the workplace.

