

SUPREME COURT CONFIRMS FICA TAXES MUST BE WITHHELD FROM SEVERANCE PAYMENTS

Finding severance payments to be a form of “remuneration for employment,” the United States Supreme Court in *United States v. Quality Stores, Inc.* held that such payments are taxable wages – and thus subject to withholding – under the Federal Insurance Contributions Act (FICA).

Quality Stores, an agricultural retailer, terminated thousands of employees before and during bankruptcy proceedings in 2001. The terminated employees received severance payments, from which Quality Stores deducted FICA taxes (which are used to fund Social Security and Medicare). Subsequently, Quality Stores sought refunds of the withheld FICA taxes on behalf of itself and 1,850 former employees, in the amount of roughly \$1 million. The Bankruptcy Court granted Quality Stores’ request for the refund, and the District Court and Sixth Circuit Court of Appeals affirmed the decision, finding that the severance payments were not “wages” under FICA. The United States appealed.

The Supreme Court first determined that severance payments fell within FICA’s definition of wages because they are “remuneration for employment.” The Court noted that “common sense” dictates that when employees receive severance, it is “for employment,” and that, when made, they are for the employee’s services to the employer. The Court also affirmed what is already well established: that severance payments fall within the broad definition of wages subject to income tax withholding under the Internal Revenue Code.

EMPLOYEE TERMINATED FOR STEALING CAUSED BY DISABILITY ENTITLED TO DISCRIMINATION TRIAL

Is an employer allowed to enforce a uniformly-applied workplace conduct policy against an employee whose misconduct was caused by her disability? A federal district court in California said “maybe, maybe not,”

and determined that the matter should be resolved by a jury.

In *EEOC v. Walgreen Co.*, Josephina Hernandez worked as a clerk at a Walgreens store for eighteen years, and was diagnosed with Type II diabetes five years into her employment. Walgreens was aware of Hernandez’s condition, and allowed her to possess candy in case of low blood sugar, keep her insulin in the break room refrigerator and take additional breaks to test her blood sugar or eat when necessitated by her diabetes. One day at work, Hernandez started shaking and sweating from low blood sugar. Because she did not have any candy with her, she opened a \$1.39 bag of potato chips and ate some of them. When she began to feel better about ten minutes later, she went to pay for the chips at the cosmetic counter but no one was there. Hernandez then put the bag of chips under the counter at her cash register and resumed her restocking duties. Walgreens management discovered the chips and subsequently terminated Hernandez for violating its strict “anti-grazing” policy. Walgreens asserted it had approximately \$350 million in annual losses from employee theft, and the strict policy was necessary to combat this significant theft problem. The EEOC, on behalf of Hernandez, sued Walgreens for disability discrimination and failure to accommodate under the ADA and Title VII.

Walgreens moved to dismiss the lawsuit, contending that it was entitled to rely on its neutral, non-discriminatory, and uniformly-applied workplace conduct policy in terminating Hernandez, regardless of whether her disability may have caused her to violate the policy. However, the court refused to dismiss or to rule as a matter of law on the issue, finding that whether Walgreens should have been required to “reasonably accommodate” Hernandez’s theft should be decided by a jury. The court further determined that whether Hernandez failed to properly manage her disability and whether Hernandez failed to timely request a reasonable accommodation also did not

entitle Walgreens to dismissal, and were factual issues that should be resolved by a jury.

Despite the unusual facts, the court's holding – that an employer's reliance on a neutral, job-related workplace conduct policy may not insulate it from ADA liability – is troubling, and emphasizes the importance of individualized, fact- and circumstance-specific assessments during the disciplinary process.

New Bites

SEC Cautions Employers Not To Discourage Whistleblower Claims

In a recent speech, the SEC recently warned businesses not to attempt to disincentivize company whistleblowers from bringing alleged wrongdoing to the attention of the SEC, and that the SEC is “very concerned” about any attempts to dissuade whistleblowing. The SEC also noted that the number of whistleblower tips it receives is growing, and those tips are beginning to result in enforcement actions.

This serves as a good reminder that employees cannot be precluded, or even discouraged, from filing claims with government agencies, even in the context of executing a general release of claims and covenant not to sue. Employers should carefully review their workplace policies and separation agreements to ensure that they do not discourage the filing of claims with government agencies.

NLRB Continues To Scrutinize Employee Handbook Provisions

In *Hills and Dales General Hospital*, the NLRB recently determined that an employer's standards of behavior policy that prohibited “negative comments” and “negativity or gossip,” and directed employees to represent the employer in a “positive and professional manner,” were held to be unlawfully overbroad under the NLRA.

The NLRB determined that prohibitions on “negative comments” and “negativity or gossip” were overbroad and ambiguous, and could be construed by employees as prohibiting NLRA-protected activity (i.e., the right to discuss workplace conditions in a critical manner and to otherwise engage in concerted action). The NLRB also found that the handbook's provision that employees were to represent the employer in the

community in a “positive and professional manner” could also be reasonably viewed by employees as prohibiting them from making any public statements on work-related matters that the employer did not perceive as positive.

Employers should keep the NLRB's penchant to heavily scrutinize seemingly neutral workplace policies firmly in mind, and take steps to ensure that their workplace policies do not overreach, no matter how benevolent the purpose.

FEHA Limitations Period Cannot be Shortened by Agreement

In *Ellis v. U.S. Security Associates*, a California Court of Appeal held that an employer's attempt to shorten the one year statute of limitations to file a harassment claim under FEHA was against public policy and unenforceable.

Ellis was hired as a security guard for Security Associates, and as part of the hiring process, executed an employment application that stated that she must file any claim or lawsuits related to her service within six months of the employment action, and further required her to “waive any statute of limitations to the contrary.” When Ellis later filed a harassment claim and related claims against Security Associates, her former employer moved to dismiss the claim as being untimely pursuant to the six month limitation in the employment application (even though it was timely under FEHA's one year statute of limitation).

The Court of Appeal determined that Security Associates' attempt to limit the limitations period to six months for the FEHA claim was against public policy and could not be enforced, and permitted Ellis to pursue her claims. The *Ellis* decision emphasizes that courts generally disfavor attempts to limit the ability of individuals to pursue remedies under employment laws.

EEOC Doubles Penalty For Violations of Posting Requirement

Effective April 18, 2014, the penalty for violating the EEOC's notice posting requirement doubles to \$210 (from the current \$110). Employers should periodically check that they are in full compliance with all of their legally required employment posting requirements. The following link describes the posting requirement

enforced by the EEOC: <http://www1.eeoc.gov/employers/poster.cfm>.

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