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Weekly Employment Brief

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CFRA "Leave" Does Not Include Exemption From Weekend And Overtime Work

Noting that neither the California Family Rights Act nor "any authority" cited to the court defines "leave" to include getting out of overtime or weekend work, the Court of Appeal for the Third Appellate District (which covers Sacramento) recently affirmed summary judgment in favor of an employer who terminated an employee who refused to do such work. In *Bristow v. Dome Printing,* Vincent Bristow, a printing company production worker, took time off to care for his pregnant wife, who had cancer. Upon his return to work, Bristow objected to Dome's requests that he work overtime and on weekends, and ultimately was terminated. Bristow sued, alleging that Dome violated his rights under CFRA when it refused to exempt him from overtime and weekend work. The Court looked to the definition of "leave" in both the CFRA and the Labor Code and determined that it does not include exemption from overtime and weekend work. Thus, it concluded that Bristow's CFRA cause of action was untenable. Bristow's claim that Dome was required to advise him of his rights under CFRA was also rejected by the Court, which held that the CFRA (unlike the Family Medical Leave Act) does not contain a provision requiring an employer to inform employees of their CFRA rights, and that there is no authority reading such a requirement into the CFRA. This ruling reminds employers that they should never assume that the FMLA and the CFRA impose identical requirements.

Employee's Late Filings Not Excused Where Employer Provided Notice Of Deadlines

The Ninth Circuit (which includes California) recently considered whether the doctrines of equitable tolling and estoppel applied where an employee claimed her failure to meet administrative filing deadlines was due to her former employer's actions. In *Johnson v. Henderson,* Betty Johnson, a postal worker, sued the U.S. Postal Service ("USPS"), claiming that she and her coworkers were sexually harassed on the job. USPS won summary judgment on the ground that Johnson had failed to comply with two administrative filing deadlines: a 45-day deadline to seek EEO counseling after the harassing conduct had allegedly occurred; and a 15-day deadline to file an administrative complaint following service of a notice of her right to do so. Johnson appealed, arguing that the missed deadlines should be excused by the doctrine of equitable tolling (which applies to excuse a claimant's failure to comply with deadlines where she has neither actual nor constructive notice of the filing period) and the doctrine of equitable estoppel (which applies where defendant has taken active steps to prevent the plaintiff from suing in time). Johnson argued that the language of USPS's sexual harassment policy was misleading, suggesting that if she complained to her supervisor (which she did, repeatedly) she would be complying with the EEO counseling deadline. While the Court agreed the policy language was misleading, it declined to apply tolling as USPS had provided other information which more clearly set forth the relevant time limits. The Court also declined to apply estoppel, finding no evidence that USPS had deliberately misled Johnson. The Court also rejected Johnson's arguments that she was entitled to the protection of the estoppel doctrine because her supervisor made statements (1) that she would be terminated if she complained, and (2) that she had fewer rights than a regular, full-time employee, finding no evidence that the statements caused her to delay filing. Finally, the Court held that neither doctrine applied to the missed 15-day complaint deadline, because Johnson was represented by counsel at the time of the deadline (and as such was charged with constructive knowledge of the law's requirements), and there was no evidence that USPS intended to deceive her by its conduct. This case affirms the importance of providing accurate information regarding employees' EEO rights and should encourage employers to maintain clear policies regarding harassment procedures.

Subjective Belief Insufficient To Show "Adverse Employment Action"

The Seventh Circuit (which includes Illinois) recently confirmed that a plaintiff must demonstrate that an alleged "adverse employment action" is objectively – not just subjectively – "adverse" under Title VII. In *Herrnreiter v. Chicago Housing Authority,* Siegfried Herrnreiter, an accountant, was transferred from a position he loved in the investigation division back to a position in the auditing division of the Chicago Housing Authority, and was subsequently fired for poor performance. He sued, claiming that his transfer and subsequent termination were motivated by his race (Caucasian) and national origin (German). Noting that "the two jobs were equivalent other than in idiosyncratic terms that do not justify trundling out the heavy artillery of federal antidiscrimination law," the Court rejected Herrnreiter's claims, finding that the auditor's job in question was not objectively inferior to the investigator's job, and that Herrnreiter had not suffered any adverse employment action as a result of the transfer. The Court also rejected Herrnreiter's claim that he was terminated for discriminatory reasons, holding that the "likeliest inference [from the evidence] is that [Herrnreiter] was sulking because of having been transferred…" The case was not all good news for employers, however. In rejecting the Housing Authority's argument that Herrnreiter's claims were barred because the same supervisor had approved his original transfer to the investigation division and ultimately terminated him, the Court noted that the so-called "common actor" presumption is not a legal presumption, but rather is simply another fact for the fact finder to consider. This ruling suggests that employers considering involuntary internal transfers will lower the risk of a successful Title VII claim if they ensure that the positions are objectively equivalent, even where the transferred employee subjectively prefers his or her original job.

DID YOU KNOW?

Whistleblowing is very "en vogue." *Time Magazine* recently awarded its "Persons of the Year" honor not to a world leader, scientist or humanitarian, but to the three "whistleblowers" of WorldCom, Enron and the FBI.