Employment Law Memo 6/16/2014 **SAMPLE**

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***** Featured Cases *****

5th - At-will and union employees cannot bring fraud claims against the employer.

Sawyer v. E I DuPont De Nemours & Co (5th Cir 06/11/2014)
http://case.lawmemo.com/5/sawyer2.pdf

Sixty-three former hourly employees and some union members of the manufacturing facility sued the employer alleging that the employer fraudulently induced them to terminate their employment with it and accept employment with a wholly-owned subsidiary. The employees alleged that the employer worked hard to persuade them to transfer with their unit and become employees with the subsidiary. According to the employees, the employer represented that the subsidiary would remain a part of the employer and not be sold, but that months after they elected to become subsidiary employees, the employer announced that it was negotiating the sale of the subsidiary. The trial court granted summary judgment for the employer.

The 5th Circuit affirmed, holding that at-will employees who, under Texas law, self-terminated their employment, may not bring fraud claims. The court also held that while the collective bargaining agreement (CBA) altered those employees' at-will status, they too cannot bring fraud actions because their remedies are limited to those provided in the CBA.

6th - The Affordable Care Act requirement that employer-based health insurance plans cover all FDA-approved contraception, sterilization methods and counseling does not violate the RFRA and the First Amendment.

Michigan Catholic Conference v. Burwell (6th Cir 06/11/2014)
http://case.lawmemo.com/6/mcc.pdf

Non-profit entities affiliated with the Catholic Church (the entities) in a consolidated appeal objected to certain preventative care standards under the Patient Protection and Affordable Care Act (the Act or the Affordable Care Act). Specifically, the entities objected to the requirement that their employer-based health insurance plans cover all Food and Drug Administration (FDA)-approved contraception, sterilization methods, and counseling. All entities are eligible for either an exemption from the requirement or an

accommodation to the requirement, through which the entities would not pay for the contraceptive products and services and the coverage will be independently administered by an insurance issuer or third-party administrator. However, the entities alleged that the contraceptive-coverage requirement violated the Religious Freedom Restoration Act (RFRA); the Free Speech, Free Exercise and Establishment Clauses of the First Amendment; and the Administrative Procedure Act. The trial courts denied the entities' motion for a preliminary injunction.

Finding, inter alia, that: (1) because the entities agree that they are eligible for the exemption and because the entities do not identify any particular action that they must take to obtain the exemption that burdens their exercise of religion, the entities have not demonstrated a strong likelihood of success on the merits of their RFRA claim; and (2) the contraceptive coverage requirement does not violate the Free Speech Clause of the First Amendment because the exemption and accommodation provisions do not prefer a denomination or excessively entangle government in religious practice, the 6th Circuit affirmed.

11th - Applicant, who did not pass his medical examination for hire based on a mental illness, could not prevail under the ADA without showing that he is disabled.

Wetherbee v. The Southern Company (11th Cir 06/11/2014)
http://case.lawmemo.com/11/wetherbee.pdf

Wetherbee appealed the trial court's grant of summary judgment for the employer on his Americans with Disabilities Act (ADA) claim under Section 12112(d)(3)(C). Wetherbee alleged that the employer misused information obtained during his required medical evaluation. The employer extended a job offer as a systems engineer at the nuclear power plants contingent on satisfactory completion of a medical evaluation. The employer learned that he suffered from a mental illness and that in spite of his healthcare provider's recommendation, he was not being treated by a psychiatrist. The employer determined that Wetherbee could only be hired if several conditions were met, including compliance with his medication regimen and restriction from working on safety sensitive systems and equipment for one year while the employer verified his compliance with his medication regimen. Because the systems engineer position required that Wetherbee work on safety-sensitive systems and equipment, the employer determined that it could not hire Wetherbee and rescinded his conditional job offer.

The 11th Circuit previously affirmed in part the trail court's grant of summary judgment under Section 12112(a) of the ADA, but remanded the case in part to allow the trial court to enter an order addressing Wetherbee's claim under section 12112(d)(3)(C). On remand, the trial court held that the employer was entitled to the ADA's business necessity affirmative defense and granted summary judgment in its favor. The 11th Circuit affirmed, finding that Wetherbee could not prevail under Section 12112(d)(3)(C) without showing that he is a disabled individual.

CA - Employee exhausted administrative remedies for FEHA sexual harassment claims; and five employee requirement does not apply to wrongful discharge in violation of public policy based on gender discrimination.

Kim v. Konad USA Distribution (California Ct App 06/12/2014)
http://case.lawmemo.com/ca/kim.pdf

Kim sued the employer and her former boss, Whang, for sexual harassment both quid pro quo and hostile work environment, and retaliation in violation of the California Fair Employment and Housing Act (FEHA), and wrongful discharge in violation of public policy. The trial court granted the defendants' motion on the lack of evidence for the retaliation claim. The trial court found in favor of Kim and awarded $60,000 in a single lump sum. The California Court of Appeal affirmed.

Defendants contended that Kim failed to exhaust administrative remedies on the FEHA claims and that the employer had less than five employees on the violation of public policy claim. The court found that there was clear evidence in the record that Kim timely submitted verified administrative complaints against both defendants on all of the claims pursued at trial and received right-to-sue letters for both defendants. For this reason, the court stated it would affirm the judgment even if it were to conclude that exhaustion of remedies was a necessary precondition to the exercise of subject matter jurisdiction by California courts on FEHA cases. Regarding the five employee requirement on the wrongful discharge claim, the court explained that FEHA harassment claims based on sex (as opposed to those based on age) applied to all employers employing one or more persons (Gov Code, section 12940, subd (j)(4)(A)); and Article I, section 8 of the California Constitution reflected fundamental public policy against discrimination in employment on account of sex and could be brought against an employer of any size.

WV - West Virginia Code Sections 162-7-7.2 and 5-10-2(12) do not apply and cannot be used as a basis for estopping the Board from denying PERS eligibility where public employer erroneously informs an employee that he or she is eligible to participate.

Retirement Board v. Jones (West Virginia 06/11/2014)
http://case.lawmemo.com/wv/board.pdf

The West Virginia Consolidated Public Retirement Board (the Board) appealed the trial court's order reversing its final decision that found that it was equitably estopped from denying Jones participation in the Public Employees Retirement System (PERS). Jones, an attorney with the county, received a base pay of $613.46 per two weeks for up to eight hours of service per month. For each additional hour billed over eight, the attorney would receive $150.The Board reinstated Jones as eligible to receive PERS. Later, the Board notified Jones that he was ineligible to participate in PERS. The Board concluded that Jones had not worked the statutorily-required 1,040 hours a year necessary for participation in PERS.

The West Virginia Supreme Court reversed in a per curiam decision, remanding for reinstatement of the West Virginia Consolidated Public Retirement Board's final order denying Jones to participate in the PERS based on his employment with the county. The court held that W. VA C.S.R. Sections 162-7-7.2 and 5-10-2(12) do not apply and cannot be used as a basis for estopping the Board from denying PERS eligibility because the code section applies to a PERS member who has been underpaid or overpaid contributions as the result of an employer error. It does not apply in instances where a public employer erroneously informs an employee that he or she is eligible to participate in PERS.

Dissent: http://case.lawmemo.com/wv/board-dissent.pdf

There is no doubt that the Retirement Board is equitably estopped from denying Mr. Jones benefits under Hudkins v. Public Retirement Board.

***** Capsules *****

7th - Court followed majority of circuits holding that section 206(d)(1) of ERISA does not prohibit garnishment or attachment of funds after distribution to retiree.

NLRB v. HH3 Trucking (7th Cir 06/13/2014)
http://case.lawmemo.com/7/hh3.pdf

The National Labor Relations Board (NLRB) found that the employer committed unfair labor practices and ordered back pay for its workers. The 7th Circuit enforced the order. The owners of the employer have made one payment of $600. The owners concede they were able to pay something, but maintain they were legally privileged not to pay because the money was from their ERISA pension plan, which was forever free of all legal claims by third parties, section 206(d)(1) of ERISA. The court followed the 10th Circuit's decision in Guidry v. Sheet Metal Workers National Pension Fund, 39 F3d 1078 (1994)(en banc), which concluded that section 206(d)(1) did not prohibit the attachment or garnishment of funds after the plan had distributed them to the retiree (1st, 2nd, 3rd, 6th, and 9th Circuits followed; 4th Circuit contra). The court stated the owners were scofflaws who for a decade have failed to comply, preferring their own comfort over the welfare of their former employees. The court concluded that failure to pay $600 per month will lead to an order returning them to custody until they comply.

7th - Employee's discharge for failure to perform on-call duty every fourth weekend is upheld.

Huang v. Continental Cas Co (7th Cir 06/13/2014)
http://case.lawmemo.com/7/huang.pdf

Huang, an engineer, sued the employer for wrongful discharge based on race and national origin, and for retaliatory discharge. The trial court granted the employer's motion for summary judgment. The 7th Circuit affirmed. Huang refused to perform pager duty or on-call duty every fourth weekend; after one last chance, the employer discharged him for failure to perform pager duty on a weekend. The 7th Circuit affirmed on the grounds that Huang refused to accept legitimate work assignments; Huang presented no evidence that the employer treated similarly situated non-Chinese workers differently. On the retaliation claim, the court found that Huang presented no evidence of protected conduct.

10th - Jury award to demoted employee who helped coworker pursue sexual harassment complaint is upheld.

Barret v. Salt Lake County (10th Cir 06/13/2014)
http://case.lawmemo.com/10/barrett.pdf

Barrett sued the employer for a demotion in violation of Title VII alleging retaliation for helping a coworker pursue a sexual harassment complaint against her boss. The jury found in favor of Barrett. The 10th Circuit affirmed. The court described the evidence of Barrett's fourteen years of employment as marked by promotions and positive reviews, until he helped his coworker which resulted in a demotion.

The court found the employer's argument that it was entitled to a judgment as a matter of law failed; viewing the evidence in the light most favorable to the jury's verdict, the court encountered ample evidence from which a rational jury could have found that Barrett suffered unlawful retaliation in violation of Title VII. The United States Supreme Court decided that Title VII retaliation cases required a "but for" causation standard after the jury decision; however, in response to the jury's special verdict form, the jury stated it relied only on a "but for" theory of causation in this case. The court reversed the portion of the attorney fee award related to representation at the optional internal grievance process before the career service council under Manders v. Oklahoma ex rel Dep't of Mental Health, 875 F2d 263 (10th Cir 1989).

CT - Unions did not plead sufficient facts that demonstrate that they were aggrieved by the Department's decision denying the unions' petition for a declaratory ruling.

CIUW Local 12924 v. DPUC (Connecticut 06/17/2014)
http://case.lawmemo.com/ct/ciuw.pdf

The Department of Public Utility Control (the Department) initiated an investigation after two gas companies announced layoffs only months after rate increases were approved based on representations that certain staffing levels were necessary. The unions requested party status and the right to cross-examination, which the Department denied. The Department instead designated the unions as "participants" and allowed submission of materials, presentation of oral argument, and written exceptions to its draft decision. The Department determined the lower staffing levels would not affect the gas companies' ability to provide for the safety of workers and of gas distribution. The unions filed with the Department a petition for a declaratory ruling under General Statutes Section 4-176 seeking a declaratory ruling that would establish that: (1) the Department's failure to promulgate regulations regarding its use of "participant" status in uncontested proceedings and the rights attendant to such status violated the APA and (2) the Department's designation of the unions in the investigatory proceedings as participants, rather than as parties, and its selective limitations on the unions' rights therein, violated the APA and the unions' due process rights.

The issue in this appeal was whether the unions pled sufficient facts to establish that they were aggrieved by the Department denying the unions' petition for a declaratory ruling. The trial court set aside the Department's decision. The Connecticut Supreme Court concluded that the trial court should have dismissed the unions' administrative appeal for lack of aggrievement because the unions did not plead sufficient facts that, if true, demonstrate that they were classically aggrieved by the Department's decision denying the unions' petition for a declaratory ruling.

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