Employment Law Matters

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

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Employees Returning from Military Leave Should be Given More than Old Job Title

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a person whose military service has lasted 91 days or more, must be promptly reemployed in the job the person would have held had he/she remained continuously employed, or a "position of equivalent seniority, status, and pay." A recent case has shed some light on h courts will interpret the phrase "position of equivalent seniority, status, and pay." *Middleto v. City of Sherwood, et al*., No. CV 08-604-HA (D.Ore. 2009).

In *Middleton*, the City's Chief of Police (Middleton) was on active military duty for approximately 18 months. During his leave, the City filled that position with an Acting Chie of Police. Upon his return, the City asked Middleton to accept a different position as Deput Police Chief. Middleton refused. The City then created a new position of Director of Public Safety and placed the Acting Chief of Police in that position. While they gave Middleton the job title of Chief of Police, many of his previous responsibilities were reassigned to the new Director of Public Safety. Middleton sued the City for USERRA discrimination.

The City argued that Middleton was placed in a "position of equivalent seniority, status, an pay" to the position he had held before his military leave. The court disagreed holding tha Middleton was no longer the top law enforcement officer in the City and therefore the City "constructively demoted" him in violation of the USERRA.

As this case illustrates, any changes to an employee's job responsibilities, shifts, schedules

etc., upon return from military duty may result in a USERRA violation. If you have any questions about returning an employee to work after a military leave, feel free to contact us at 315-437-7600.

Using Keylogging Program to Keep Tabs on Employee Internet Use Could Create Employer Liability Under Federal Law

Unauthorized use and/or abuse of Internet access while on the job can be a difficult matter for employers to police. Recent developments in technology have made this effort substantially easier by permitting an employer to keep track of (or log) every keystroke made on its computers. However, according to a recent case, these so-called "keylogger" programs may violate the federal Electronic Communications Privacy Act (ECPA). *Brahmana v. Lembo*, 09-106, 2009 WL 1424438 (N.D. Cal. May 20, 2009).

The ECPA is essentially an updated version of the federal anti-wiretapping laws, prohibiting the "interception of electronic communications" (as opposed to telephonic communications) while "in transit." Courts have discovered, however, that attempting to apply laws against wiretapping to Internet communications can be problematic. Generally speaking, courts have held that communications such as email can be accessed by employers on their systems (without violating the ECPA) because the emails are "stored" there. In other words, the communications are no longer "in transit." This has held true even for email that has not been received or opened.

Brahmana, however, involved an employer intercepting an Internet communication one keystroke at a time using a keylogger program. Specifically, the employer allegedly used a keylogger program to discover the password to an employee's personal e-mail account, and then, used the password to access that personal account. The employee sued and the employer sought to have the case dismissed for failing to state a valid claim under the ECPA. The California federal court refused to dismiss the case holding that keylogging may in fact be an impermissible interception of electronic communications.

If you have questions about using keylogger programs (and/or other means) to keep track of your employees' use of the Internet, please feel free to contact us.

Employees Outside of New York May Sue Their Employers Under New York's Anti-Discrimination Laws

New York-based employers should be aware of a recent change in how New York's anti-employment-discrimination law, the New York State Human Rights Law ("NYSHRL") is applied. Until recently, courts have held that employees residing in other states must use the law of the state where the "impact" of the alleged discrimination was felt. Now, a new court ruling suggests that the proper law to be applied is the law of the state where the employment decision complained of was made. *Hoffman v. Parade Publ'n*, 2009 NY Slip Op 3678 (App. Div., 1st Dept., May 7, 2009).

In this case, Howard Hoffman was employed by Parade Magazine as what amounted to a "traveling salesman" who resided in Atlanta, Georgia. He reported to management in New York, but only occasionally travelled to New York for meetings. Mr. Hoffman alleged that in 2007 he received a telephone call from the President of Parade Magazine advising him that the Company had decided to close the Atlanta office and terminate his employment.

Mr. Hoffman (age 62 at the time) then sued Parade in New York state court under the NYSHRL for age discrimination. Mr. Hoffman alleged that the "economic rationale given for his termination was pretextual, and...that his former responsibilities were transferred to an employee .. who, at the age of 56, was 'considerably younger' than [Hoffman]."

Parade Magazine sought to dismiss the action on the grounds that the New York court lacked subject matter jurisdiction over the action because the employer's alleged discrimination did not occur inside New York State, as required in an earlier decision *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169 (N.Y. App. Div. 2005). In *Shah*, the court held that "the locus of the decision to terminate [the employee] is of no moment. What is significant is where the impact is felt. Thus, even if the termination decision had been made in New York ... [New York Law] would not apply since its impact on [the employee] occurred in New Jersey...." The lower level court followed the *Shah* holding and dismissed the case. On appeal, however, New York's First Department Appellate Division reversed and reinstated Hoffman's complaint.

Specifically, the court refused to apply the "impact rule", holding that "*Shah* should not be applied so broadly as to preclude a discrimination action where the allegations support the assertion that the act of discrimination, the discriminatory decision, was made in this state." The court further added, "[W]e do not take issue with the result in *Shah*, insofar as it says it is based on facts exclusively pointing not only to an impact in New Jersey but also to a termination decision made in New Jersey, and the absence of an allegation that a discriminatory employment decision was made in New York." However, the court took issue with the statement in *Shah* that "the locus of the decision to terminate [the employee] is of no moment". The court held that that portion of the decision was "overbroad and unnecessary, lacking sufficient support in prior case law."

This ruling will likely result in an increase of New York employment discrimination cases filed by employees based outside of the State. This is because the NYSHRL is more attractive than Federal and/or other states' laws to many potential employee plaintiffs because of its broad scope. For example, the definition of a "disability" under the NYSHRL is essentially any medically diagnosable physical or mental condition. This is much broader than the disability definition under the federal Americans with Disabilities Act (ADA), for example, which requires employees to prove that their condition interferes with a "major life activity" as well as other factors.

If you have any questions regarding this case or addressing potential litigation from out-of-state employees, please contact us at 315-437-7600.