



AUGUST 2010

PILCHAK COHEN & TICE, P.C.
THE EMPLOYERS LAWYERS

WORKPLACE CHRONICLE

DOL INTERPRETS “SON OR DAUGHTER” BROADLY UNDER FMLA

By Rhonda H. Armstrong

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Recent Victories for Our Clients

PC&T recently obtained summary disposition dismissing a widely publicized lawsuit by three plaintiffs against the largest operator and franchisor of quick service restaurants in the world. Touted as a \$10 Million dollar lawsuit in the local and worldwide media, the case alleged that three plaintiffs were not hired at a Dearborn franchise location, because they wore the hijab, the head covering traditionally worn by Muslim women. The case against the national corporation was dismissed because the franchisor did not affect or control the terms or conditions of the plaintiff’s employment. (See related article, this edition.) Instead of receiving \$10 Million, the plaintiffs will be subject to case evaluation sanctions under the Michigan Court Rules, and be liable for part of the costs and attorney fees incurred in the defense of the matter.



Though the DOL recently announced that they would cease their practice of issuing opinion letters (that are generally helpful to employers) the DOL has issued a recent “Administrative Interpretation” that broadly defines the definition of “son or daughter” under the FMLA. 2010 DOL FMLA LEXIS 1 (June 22, 2010). As one might expect from the current administration, this interpretation is NOT favorable for employers.

Under the FMLA, employers must extend job-protected leave to eligible employees “[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter,” “[b]ecause of the placement of a son or daughter with the employee for adoption or foster care,” and “to care for ...the son [or] daughter ... [with] a serious health condition. 29 USC §2612(a)(1)(A) - (C); 29 CFR §825.200. The FMLA defines a “son or daughter” as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is-- (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.” 29 USC 2611(12); 29 CFR §§ 825.122(c), 825.800.

While the regulations previously indicated *in loco parentis* status is not limited to biological or legal relationships, they explained that one stands *in loco parentis* by assuming the day-to-day responsibilities of care for *and* financial support of the child. The new interpretation, however, states that *both* factors need not be present; one will suffice. Further, the DOL opined that no numerical limit exists for *how many* persons may serve in this

role for one child (in other words, several persons—not necessarily just two—could serve *in loco parentis* to one child). According to the DOL, *in loco parentis* occurs where:

- An employee shares equally in raising a child with the child’s biological parent (*e.g.*, in a same-sex partner relationship).
- An employee provides day-to-day care for his/her unmarried partner’s child (with whom there is no legal/biological relationship) but does not financially support the child;
- A grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care; or
- An aunt assumes responsibility for raising a child after the death of the child’s parents.



The new interpretation appears to be largely motivated by groups advocating rights for the gay, lesbian, bisexual, and transgender community. In fact, the DOL’s interpretation was issued the same day President Obama was scheduled to welcome such advocates to a White House reception to celebrate “LGBT Pride Month.”

Not surprisingly, the DOL has issued little guidance on how employers will be able to curb abuse and stated that each determination will depend on the particular circumstances. While courts have looked to factors such as the child’s age, degree of child’s dependence on the employee, amount of support by the employee, and

(See “DOL Cont.” on page 2)

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- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

DOL Cont.

extent of employee’s parental duties, the new interpretation stresses that “a simple statement asserting the requisite family relationship exists is all that is needed.” The only example the DOL cited as NOT within coverage is “an employee who cares for a child while the child’s parents are on vacation.” This obvious exclu-

sion provides little helpful insight. Of course, with no mechanism for testing the bona fides of the assertion of *in loco* parentis status, the DOL is content to leave it to chance whether employees will exercise “good faith.”



H-1B and L Visa Fees Sharply Increased

New U.S. legislation signed into law by President Obama sharply boosts visa fees to pay for tighter border security.

The measure, signed into law on Friday, August 13, 2010, is expected to raise operating costs for outsourcing firms that use large numbers of foreign-born employees to serve their U.S. customers.

The fee increase applies only to companies with at least 50 employees in the U.S. and 50% or more of their work force holding H-1B or L visas. The fee for an additional H-1B visa - which covers temporary skilled workers - rises under the legislation to \$2,320 from \$320. The fee for additional L visas, which covers transfers within a company, increases to



\$2,570 from \$320. The money is expected to pay for improvements that include hiring more border guards, boosting the number of federal agents and drone aircraft used for surveillance.

Sen. Schumer (D - NY), the legislation’s major sponsor, said the visa fee increase would make it more expensive to bring in foreign tech workers to compete with Americans for tech jobs in America - and cited comments by some Indian companies that the fee increase would push them to hire more American workers. Of course, Senator Schumer’s comments ignore the fact that these visas were permitted to fill the void created by the lack of tech workers in the U.S.

ANOTHER A-LIST NOMINATION FOR PC&T

PC&T received notification this week that Bill Pilchak has been nominated by his peers as one of “The Best Lawyers In America” in the practice area of Labor and Employment Law. With this nomination, PC&T attorneys are now represented on all three “A-List” rankings of attorneys, including “Michigan Super Lawyers” and Dbusiness “Top Lawyers.”

Decision Swings Both Ways, Freeing Some Companies From Discrimination Claims by Non-Employees, Ensnaring Others Specifically Mentions Staffing Industry

By William E. Pilchak

The "Recent Victories" column for this month reports our huge win on behalf of the largest "quick service" restaurant chain in the world, where three plaintiffs sued the national corporation/franchisor for acts alleged to have been committed by personnel of a local franchise. A 2005 case, *McClements v Ford Motor Co.*, paved the way to the dismissal of the case.

The *McClements* case has attracted little attention, but is of great importance to many of PC&T's clients, especially in the staffing industry.

The focus of *McClements* is the extent to which a company can be liable to a non-employee for discrimination under the Elliott Larsen Civil Rights Act ("CRA") and other discrimination or retaliation statutes. On first blush, one would think that an employer (or potential employer) relationship is *per se* required to run afoul of discrimination laws. In the vast majority of cases, discrimination claims are made against the employer who disciplined or discharged an employee or who failed to hire an applicant for employment. However, *McClements* now makes it clear that a business can be liable for discrimination against non-employees. The case makes two points.

First, to be liable under the CRA, one must be *an* employer, not necessarily *the* employer of the plaintiff. An "employer" for purposes of the CRA is "a person who has 1 or more employees," which includes virtually every business. There is no requirement that the plaintiff be one of those employees. This much is clear from the fact that applicants can sue companies, even when no employment relationship ever formed.

McClements states: "liability...does not require than an employment relationship exist, but that the employer defendant have the ability to affect a plaintiff's employment or potential employment."

The second point was that an employer becomes liable under the CRA when it utilizes a prohibited characteristic in order to adversely affect or control an individual's employment or

potential employment. Accordingly, an employer can be held liable under the CRA for discriminatory acts against a nonemployee if the nonemployee can demonstrate that the employer affected or controlled a term, condition, or privilege of the nonemployee's employment. Some language in *McClements* requires the defendant to take "adverse action" against the plaintiff in order to become liable, but plaintiffs will argue that the decision does not necessarily require adverse action. "Adverse action" is a judicially-created threshold that bars claims raising only minor grievances. (Terminations, failure to hire, suspensions, demotions, transfers to positions with measurably worse duties, are generally considered adverse actions.) Nevertheless, at a minimum, the defendant "must actually affect or control a term, condition or privilege of an individual's employment."

The *McClements* decision is a very effective shield for many deep-pocket entities that are historically sued for the acts of other companies, such as parent corporations sued for acts of subsidiaries, franchisors sued for acts of franchisees, and cities sued for acts of district courts. For example, one post-*McClements* decision dismissed General Motors, which was merely a customer of a company providing jet transportation services, in a case where a flight attendant was fired after complaining to GM about her employment.

However, the *McClements* case will ensnare other businesses. In fact, the Michigan Supreme Court described the typical staffing industry assignment as the classic situation where the customer of staffing services "dictate [s] the terms, conditions or privileges of...employment...at least during the pendency of her temporary employment." Accordingly, *McClements* specifically provides a legal theory permitting discrimination claims over every customer decision to end a contract staff assignment of one covered by the discrimination statutes (religion, race, color, national origin, age, sex, height, weight, marital status, disability).

Thankfully, our brethren of the bar on the plaintiff-side of the aisle don't have the financial motivation to read as much law as those of us paid to defend cases, because

if *McClements* were widely studied, it could be an effective sword to provide a cause of action well beyond the staffing industry. Here's one example: Approximately four times per year, PC&T advises clients on the employment implications of an individual being barred from the premises of another company, usually a customer. The reasons are many and varied: breach of security procedures, sexual advances to the customer's staff, rudeness, etc. For those in protected classifications, *McClements* arguably provides a legal theory to sue the entity issuing the ban. Imagine, for example, how an effective discrimination claim might arise if the plaintiff were barred from a customer's premises due to sexual advances to the staff members of different races. Plaintiffs will argue that the non-employer's act of banning them from the premises "affected" a term and condition of their employment, i.e., their assignment. Other examples exist: A customer's decision to change vendors where the demographics of the new workforce is significantly different than the workforce of the former workforce (e.g., a minority supplier, an offshore provider) might suffice because the decision to change vendors "affects" the employment status of those laid off from the former vendor.

Expect plaintiffs to push the envelope on this issue. In the case mentioned in our "Victories" column, the plaintiffs alleged that the franchisor dictated uniform requirements (it didn't), which became a central issue as to whether the defendant "affected" a term or condition of employment. Moreover, the change in the make-up of our Supreme Court will result in a more liberal reading of the ELCRA to favor plaintiffs. Former Chief Justice Clifford Taylor was specifically targeted by the plaintiffs' bar because he was a strict constructionist. He was replaced with Justice Diane Hathaway, the candidate the plaintiff's bar endorsed, who is expected to and has made rulings more favorable to plaintiffs.

Employers are thus cautioned to be vigilant as to decisions that could be perceived as discriminatory, even when they involve people outside of one's own workforce.



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AUGUST 2010

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5 to 8 p.m.

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Museum

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FEAST YOUR EYES

AND ENJOY A NIGHT AT THE (CHRYSLER) MUSEUM ON US!

Clients of PC& T are cordially invited to join our attorneys at the Taste of Auburn Hills event on Thursday, September 16, 2010, 5:00-8:00 pm., at the Walter P. Chrysler Museum on the grounds of the Chrysler Technology Center in Auburn Hills, as we support the Auburn Hills Chamber of Commerce in this fundraiser. Enjoy the tempting fare of 15 restaurants and cocktails while strolling among the fabulous automobiles and exhibits. Call Dawn or Kelly at (248) 409-1900 or e-mail us at PCT@MI-Worklaw.com to arrange for two free tickets. (If you do not receive a return e-mail confirming receipt within a day or two, e-mail again.) Additional tickets for family and friends will be available at the door (\$18.00, children 5-12 \$5.00) Bring your own classic car, as the museum parking lot is a common destination for cruisers and hot wheels.

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