



Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
10 Madison Avenue
Suite 400
Morristown, NJ 07960
T: (973) 656-1600
F. (973) 656-1611
www.ogletreedeakins.com

New Jersey eAuthority

August 2012

From the Courts

Unreviewed NJDOL Determination Not Binding in Subsequent Lawsuit, New Jersey District Court Rules

In *Kiernan v. AAA Mechanical, Inc.*, No. 10-4421 (MLC), 2012 U.S. Dist. LEXIS 90655, (D.N.J. June 29, 2012), the plaintiff sued her employer for overtime compensation under the New Jersey Wage and Hour Law shortly after the New Jersey Department of Labor (NJDOL) conducted an investigation on her behalf and determined the employer was in violation of the law. Although the employer requested a hearing to contest the NJDOL's finding, the NJDOL terminated the administrative proceeding without holding a hearing when the plaintiff filed the lawsuit. Despite the lack of a hearing below, the plaintiff argued that the NJDOL's finding mandated a ruling in her favor in the lawsuit. The court rejected that position, holding that because the NJDOL's conclusions were subject to further review (including the hearing), they did not constitute a final and binding determination on the merits of the plaintiff's overtime claim.

Non-Probationary Employee Not Proper Comparator for Probationary Employee, Third Circuit Holds

In *Mercado v. Donahoe*, No. 11-2972, 2012 U.S. App. LEXIS 13226, (3rd Cir. June 26, 2012), the plaintiff, a probationary part-time employee, sued his employer alleging that he had been discriminated against on the basis of his gender (male) and national origin (Hispanic). In support of his claims, the plaintiff pointed to the employer's allegedly more favorable treatment of a white, female, non-probationary employee. Affirming the district court's order granting summary judgment to the employer, the Third Circuit Court of Appeals held that the employee identified by the plaintiff was not a proper comparator and was not similarly situated to the plaintiff because, among other reasons, she had completed her probationary period and was no longer a probationary employee at the time that the plaintiff was hired.

FMLA Does Not Prohibit Termination of Employee Who Abuses Leave or Engages in Misconduct During Leave, Third Circuit Holds

In *Warwas v. City of Plainfield*, No. 11-1736, 2012 U.S. App. LEXIS 15324, (3rd Cir. July 25, 2012), an employee terminated while on FMLA leave sued for interference with her FMLA rights. The employer asserted it terminated the plaintiff because while on leave she continued to work at home on a part-time job with another employer, in violation of its policy on outside employment. The Third Circuit Court of

Appeals affirmed summary judgment for the employer because it was clear that the plaintiff was not terminated for her use of FMLA leave, but rather, for her perceived misuse of her FMLA leave and her failure to return to work. The court observed that the FMLA does not prohibit the termination of an employee who abuses her leave, nor does it shield an employee from termination simply because the alleged misconduct which led to the termination occurred while the employee was on FMLA leave. The court confirmed that an employer may defeat an FMLA claim if the discharge was based on the employer's honest belief that the plaintiff misused her leave or failed to use her leave for the intended purpose.

Conditional Certification of FLSA Misclassification Claim Denied by New Jersey District Court to Putative Class of Assistant Store Managers

In *Harriel v. Wal-Mart Stores, Inc.*, No. 11-2510 (MLC), 2012 U.S. Dist. LEXIS 97527, (D.N.J. July 13, 2012), the District Court of New Jersey denied the plaintiff's motion for conditional certification as an FLSA collective action because the plaintiff failed to meet his burden of demonstrating that he and other members of the putative class of overnight assistant managers were similarly situated. The existence of a uniform job description for the position, paired with superficial allegations that the plaintiff was required to perform many non-exempt duties, were insufficient to meet the similarly situated requirement, because the plaintiff failed to present any evidence that other assistant managers were likewise required to primarily perform non-exempt duties.

Employer Not Required to Accommodate Bus Driver's No Sunday Work Request, Third Circuit Holds

In *Fouche v. New Jersey Transit*, No. 11-3031, 2012 U.S. App. LEXIS 14524, (3rd Cir. July 16, 2012), a bus driver sued his employer under Title VII and the New Jersey Law Against Discrimination for refusing to accommodate his religion-based request not to drive on Sundays. Rejecting the plaintiff's claim, the Third Circuit Court of Appeals held that the plaintiff's requested accommodation would have caused the employer an undue hardship, insofar as it would have required the employer to shift some of the Sunday driving to other drivers, and it would have resulted in a breach of the seniority provision of the union's collective bargaining agreement.