THE PASCHOS LAW UPDATE NEWSLETTER
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February 1, 2010

## I. EMPLOYMENT LITIGATION

### Court Holds No Discrimination Where Pregnant Employees Placed on Leave of Absence Due To Work Restrictions

In Noecker v. Reading Hospital, 2010 WL 363840 (E.D. Pa. January 27, 2010), plaintiff, Rebekah Noecker was employed as a licensed practical nurse ("LPN") at the Reading Hospital and Medical Center. In October, 2006, plaintiff informed Reading Hospital she was pregnant and her ability to work would be limited because she could not lift more than twenty-five pounds. Because her job as an LPN required an ability to lift more than twenty-five pounds, Reading Hospital gave her odd jobs to perform. Most of the jobs were associated with a telephone survey Reading Hospital was conducting. On January 12, 2007, Reading Hospital informed Ms. Noecker it no longer had work for her to perform because the survey was ending, and her last day would be January 19, 2007. On January 19, 2007, Ms. Noecker began a leave of absence from Reading Hospital. Plaintiff then filed an employment discrimination action. The hospital filed a motion for summary judgment.

Reading Hospital did not dispute that plaintiff was a member of a protected class and was subject to an adverse employment action. However, the hospital maintained that Ms. Noecker was not qualified for the position and the adverse employment action did not occur under circumstances giving rise to an inference of discrimination. In addition, it alleged it produced a legitimate nondiscriminatory reason - Ms. Noecker could not perform the job-- and Ms. Noecker failed to produce sufficient evidence to establish pretext.

The court held that a fair-minded jury could not return a verdict for the plaintiff on the evidence presented. The court's holding was based on the fact that plaintiff was not qualified for the position, and her dismissal did not occur under circumstances giving rise to an inference of discrimination as she could not perform the required work because she could not lift more than twenty-five pounds. The court further considered that following the birth of Ms. Noecker's twins, Reading Hospital called her and sent her letters requesting information concerning her return date. She failed to respond to these requests.

The court rejected plaintiff's argument that Reading Hospital's "Modified Duty Accommodating Duty Program," should have applied to her. The policy's purpose was "[t]o provide an appropriate work situation for employees who, due to injury or illness, have work restrictions that are six months or longer." The policy does not contemplate pregnant employees. Furthermore, to be considered for the program, "a member of the Reading Hospital's Physiatry Department

must determine that the employee has reached maximum medical improvement with some permanent work restrictions." Ms. Noecker's work restrictions were not permanent restrictions.

The Court granted Reading Hospital's motion for summary judgment as to Ms. Noecker's gender/pregnancy discrimination claim.

**Employee Denied Overtime Pay Under the Fair Labor Standards Act (FLSA) Under the Administrative Employee Exemption**

In Smith v. Johnson & Johnson, --- F.3d ---, 2010 WL 347911 (3d Cir. N.J. February 2, 1010), plaintiff, Patty Lee Smith, who worked as a senior professional sales representative for a subsidiary of Johnson & Johnson (J&J), earned a base salary of $66,000 but was not paid overtime, though J & J, at its discretion, could award her a bonus. J & J considered the number of prescriptions issued in Smith's territory in determining her bonus. The collection of this data and its direct relationship to Smith's efforts was, however, subject to error as purchasers might fill their prescriptions in another territory or with a pharmacy that would not release the pertinent information to J & J. Plaintiff brought action seeking overtime pay under the Fair Labor Standards Act (FLSA).

J & J moved for summary judgment, arguing that plaintiff was not entitled to overtime pay under the FLSA because she was exempt from that statute under either the "outside salesman" exemption or the "administrative employee" exemption. The District Court analyzed the outside salesman exemption first, but found that it did not apply to plaintiff. When it turned to the administrative employee exemption, the Court found that it did apply to Smith. Accordingly, the Court granted J & J summary judgment. Plaintiff appealed.

Under the FLSA, employees who work more than 40 hours per week are entitled to overtime pay unless they fall within one of the FLSA's exemptions. 29 U.S.C. §§ 207, 213. The FLSA is remedial and is construed broadly, but exemptions to it are construed narrowly (against the employer).

Under the administrative employee exemption, anyone employed in a bona fide administrative capacity is exempt from the FLSA's overtime requirements. 29 U.S.C. § 213(a)(1). An administrative employee is defined as someone:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week ... exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. §§ 541.200. The parties agreed that Smith's salary qualified her for the administrative employee exemption, but disputed her qualification for that exemption under the remaining two sections.

After analyzing plaintiff's deposition testimony, the court found that the administrative employee exemption applied to Smith. While testifying at her deposition Smith elaborated on the independent and managerial qualities that her position required. Her non-manual position required her to form a strategic plan designed to maximize sales in her territory. The court found that this requirement satisfied the "directly related to the management or general business operations of the employer" provision of the administrative employee exemption because it involved a high level of planning and foresight, and the strategic plan that Smith developed guided the execution of her remaining duties. The court then turned to the "exercise of discretion and independent judgment with respect to matters of significance" requirement noting that Smith executed nearly all of her duties without direct oversight. Plaintiff even described herself as the manager of her own business who could run her own territory as she saw fit. Given these descriptions, the court concluded that Smith was subject to the administrative employee exemption. As such, the Third Circuit Court of Appeals affirmed the lower court's granting of J&J's motion for summary judgment.

## II. INSURANCE LAW

### Third Circuit Holds Economic Loss Doctrine Bars Tort Claims Seeking Damages for Foreseeable Losses Which Plaintiff Could Have Contractually Allocated a Risk.

In Travelers Indem. Co. v. Dammann & Co. Inc., --- F.3d ---, 2010 WL 395915 (3d Cir. N.J. February 5, 2010), Dammann, a producer of raw foods, including vanilla beans, agreed, via a written contract, to sell vanilla beans to IFF and delivered shipments in January 2004. IFF manufactures, among other things, food and beverage flavoring, including vanilla extract. IFF incorporated the beans into its vanilla extract, which it later sold to several of its customers. In February 2004, IFF learned that some of the beans may have contained mercury. Subsequent tests confirmed as much. In May 2004, IFF sent a letter to Dammann claiming more than five million dollars in damages in connection with the contaminated beans. Dammann thereafter sought coverage from Travelers, its insurer, for liability arising out of IFF's claim.

In November 2004, Travelers commenced this action by filing a one-count complaint against Dammann and IFF seeking a declaration that the insurance policy it had sold to Dammann did not cover IFF's damages claim. Dammann subsequently filed a counterclaim against Travelers, seeking a declaration that Travelers was obligated to cover IFF's claim and asserting additional claims for breach of contract, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. Dammann also filed a third-party complaint against Cooperative Business International, Inc. ("CBI"), and CBI's insurer, Nationwide Mutual Insurance Company. In its third-party complaint, Dammann alleged it had bought the contaminated beans from CBI and sought

indemnification from CBI-or from Nationwide-for any liability Dammann might incur as a result of IFF's claim.

More than three years after the suit was initiated, IFF sought leave to file crossclaims against Dammann for breach of express warranty, breach of implied warranty, and product liability. The District Court denied that request on futility grounds, concluding that the proposed crossclaims either were time-barred or failed to state a claim. IFF appealed the District Court's denial of its request.

IFF argued that the District Court erred in denying its request to assert a product liability crossclaim. The District Court found that IFF's crossclaim sounded in contract and thus was governed by the U.C.C. and its four-year statute of limitations. The court rejected IFF's contention that its crossclaim sounded in tort and was therefore governed by the New Jersey Product Liability Act ("NJPLA") and New Jersey's accompanying six-year statute of limitations for tort claims. In making these determinations, the District Court reviewed New Jersey's economic loss doctrine. While recognizing that New Jersey law was unsettled on this point, the District Court, after surveying the law in other jurisdictions, predicted that the Supreme Court of New Jersey would interpret that doctrine to bar tort claims where a plaintiff seeks economic damages for foreseeable losses for which the plaintiff could have contractually allocated risk. Concluding that IFF was just such a plaintiff, the District Court reasoned that the economic loss doctrine barred application of the NJPLA in this case. The Third Circuit affirmed.

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