THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LAW

Third Circuit Holds Testing Company Obligated to Turn over Requested Information to the EEOC

In *E.E.O.C. v. Kronos Inc.*, --- F.3d ----, 2012 WL 4040258 (3d Cir. September 14, 2012), Vicky Sandy, who is hearing and speech impaired, applied for a job at Kroger supermarket in West Virginia. As part of the application process, she completed a written questionnaire called the Customer Service Assessment. Sandy was not offered a job and the store manager admitted that his decision not to hire Sandy was based, in part, on her poor performance on the written test. Subsequently, Sandy filed a claim with the EEOC alleging she was denied a job because of her disability, which was a violation of the ADA.

The EEOC subpoenaed the creator of the test, Kronos Incorporated, a non-party, for information on any and all tests supplied by Kronos to Kroger for evaluating potential employees. The subpoena also asked for any documents discussing the potential adverse effect of these tests on individuals with disabilities or racial minorities. Kronos objected to the subpoena and the EEOC went to the United States Court for the Western District of Pennsylvania to get its subpoena enforced.

The district court found that the subpoena was too broad and entered an order narrowing the scope of the subpoena to those facts relevant to Sandy's claim only. The Court also imposed a confidentiality agreement on the EEOC. The EEOC appealed.

On appeal, the Third Circuit Court reviewed the evidence and determined that the district court applied too restrictive a standard of relevance in limiting the information related to geography, time, and job position. When the EEOC discovered that the Kronos assessment test was being used by Kroger nationwide for all its retail positions, it found that it was appropriate to expand the scope of its investigation nationwide.

With respect to the EEOC seeking information related to race, the Third Circuit disagreed with the EEOC's contention that the district court abused its discretion. The court held it was "unprepared to hold that a reasonable investigation of [a charge of disability discrimination by a white female] can be extended to include an investigation of race discrimination." Regarding the grant of a confidentiality order, the Court found the district court must apply a multi-factor "good cause balancing test" on remand.

Fair Labor Standards Act's Fluctuating Workweek Method Violates Pennsylvania Minimum Wage Act

In *Foster v. Kraft Foods Global, Inc.*, --- F.Supp.2d ----, 2012 WL 3704992 (W.D.Pa. August 27, 2012), the parties' dispute centered around the fluctuating workweek method of overtime compensation. The court was presented with the question whether the fluctuating workweek method is permissible under the Pennsylvania Minimum Wage Act ("PMWA") and the regulations promulgated thereunder. The court summarized the fluctuating workweek method:

> [The FWW method] allows an employer to pay an employee a fixed, weekly salary, regardless of the number of hours worked. Each week, the employee's fixed salary is divided by the number of hours worked during the week to determine the employee's regular rate of pay. Because the fixed salary is designed to compensate the employee upfront for some overtime, an employee is paid *one-half her regular rate*

> *for every hour she works over forty, instead of one and one-half times her regular rate*. Thus, the more the employee works and the more overtime the employee logs, the less ... she is paid for each additional hour of overtime. This result is permissible because the employee's salary compensates the employee for some overtime upfront, allowing the employer to drop her hourly rate with every additional hour worked and to pay the employee at one-half her regular rate ... for every hour worked over forty.

Defendant maintained that the fluctuating workweek method is permissible under 34 Pa.Code § 231.43(d)(3) which, in relevant part, states:

> No employer may be deemed to have violated [the PMWA] by employing an employee for a workweek in excess of [40 hours] if, under an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in the workweek in excess of [40 hours] ... [i]s computed at a rate not less than 1 1/2 times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder ....

The court relying on the case, *Cerutti v. Frito Lay, Inc.*, 777 F.Supp.2d 920 (W.D.Pa.2011). held that "the payment of overtime under [the fluctuating workweek method}, at any rate less than *one and one-half* times the 'regular' or 'basic' rate," is impermissible under the Pennsylvania Minimum Wage Law.

II. INSURANCE LAW

In Bad Faith Action, Statute of Limitations Starts to Run When There is Exposure to Damages

In *Katzenmoyer v. Allstate Ins. Co.*, unpublished, 2012 WL 3764998 (E.D.Pa., August 30, 2012), the underlying incident occurred eleven years ago when Allstate's insured, Donald Drumheller ("Drumheller") invited Katzenmoyer to ride on his ATV through a wooded area near his house. He then drove the ATV into a raised manhole cover. The impact threw Katzenmoyer from the ATV and caused her to suffer serious injuries. Before filing suit, Katzenmoyer wrote to Allstate and requested that Allstate tender policy limits in exchange for a release. Allstate refused and filed a declaratory judgment action against Drumheller alleging the ATV incident occurred away from the insured premises, and denied coverage under its policy. The trial court granted Allstate's motion for summary judgment, concluding that Allstate homeowner's policy imposed no duty to defend or indemnify Drumheller in the underlying litigation.

While the Drumheller appeal was pending, the Pennsylvania Superior Court issued an opinion in a factually similar case, *State Farm Fire & Casualty Company v. MacDonald*, 850 A.2d 707 (Pa. Super. Ct. 2004), holding that the insurer had a duty to defend and indemnify its insured. Based on that decision, Katzenmoyer made a demand for the $100,000 policy limit in exchange for a full release for Drumheller. Katzenmoyer notified Allstate that if it failed to tender the $100,000 policy limit within 30 days, she would hold Allstate responsible for any excess verdict in *Katzenmoyer v. Drumheller*. Allstate again refused. While the appeal on the declaratory judgment action was still pending, a jury rendered an excess verdict against Drumheller in the personal injury action. Drumheller assigned all the claims that he had against Allstate to Katzenmoyer and she brought a common law bad faith claim against Allstate for its refusal to settle with her in 2004.

Allstate sought summary judgment arguing both that the four-year statute of limitations began to run on the date that Allstate refused to settle and that it had not acted in bad faith. Katzenmoyer argued that Drumheller could not have maintained a bad faith suit against Allstate without showing damages, so the limitations period should begin when the jury rendered the verdict against him in 2009 and awarded excess damages. The court determined that the statute of limitations did not begin to run until 2009. The court provided:

> The limitations period should begin when the jury rendered its verdict against Drumheller, not when Allstate denied the settlement offer. When Allstate denied the settlement offer, it was unclear whether Allstate had any duty at all. Drumheller could

> not have maintained a suit against Allstate for bad faith in July 2004 because he had not yet suffered damages . . . . Although Pennsylvania law is unclear on this issue, it seems unlikely the Pennsylvania Supreme Court would adopt a rule requiring plaintiffs to file bad faith suits within 4 years of a failure to settle without an explicit, unambiguous denial of coverage.

As such, the court denied Allstate's motion for summary judgment on this ground.

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