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CYPEN & CYPEN NEWSLETTER for JULY 3, 2014

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Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001

and

Always Remember May 2, 2011

1. COUNTY PENSION PLAN VIOLATED ADEA BY DETERMINING EMPLOYEE CONTRIBUTION RATES BASED ON AGE RATHER THAN BY ANY PERMISSIBLE FACTOR: On interlocutory appeal, the United States Court of Appeals for the Fourth Circuit considered whether an employee retirement employee retirement benefit plan maintained by Baltimore County, Maryland, unlawfully discriminated against older county employees based on their age, in violation of the Age Discrimination in Employment Act. The challenged plan provision involved the different rates of employee contribution to the plan, which required that older employees pay a greater percentage of their

salaries based on their ages at the time they enrolled in the plan. The district court initially determined that the plan did not violate the ADEA, holding that the disparate rates were based on permissible financial objectives involving the number of years an employee would work before reaching retirement age. In a prior appeal, the court concluded that the district court failed to consider a critical component of the plan regarding retirement eligibility, namely, that an employee's years of service could qualify the employee to retire irrespective of the employee's age. Thus the court vacated the judgment and remanded the case for further consideration. On remand following the first appeal, the district court concluded that the plan did violate ADEA, and awarded partial summary judgment in favor of the Equal Employment Opportunity Commission on the issue of the county's liability. The county filed the instant interlocutory appeal. Upon review, the Court of Appeals held that the district court correctly determined the county's plan violated ADEA by determining employee contribution rates based on age rather than by any permissible factor pursuant to ADEA. Consideration of the "Kentucky Retirement" factors was not warranted, because they were not germane to the issue, as the district court was not confronted with the question of whether pension status unlawfully constituted a proxy for age. Finally, ADEA's safe harbor provision under 29 U.S.C. § 623(l)(1)(A)(ii)(I) did not shield the county from liability for the alleged discrimination, because it was not an applicable defense to the challenged disparate treatment. The court affirmed the judgment as to liability, and remanded for consideration of damages. *Equal Employment Opportunity Commission v. Baltimore County*, Case No. 13-1106, (U.S. 4th Cir. March 31, 2014). (An informed source tells us that the county has just filed a petition seeking review in the United States Supreme Court.)

2. WHERE DEPUTY SHERIFF DRIVING PERSONAL CAR FROM HOME TO JOB SAW DISTRESSED VEHICLE REQUIRING HIS INTERVENTION, SUFFERED INJURY WHICH WAS SUFFERED IN THE COURSE OF EMPLOYMENT, AND WAS COMPENSABLE: Deputy Allen, came upon a tractor-trailer in the right-of-way and jutting into his lane. He decided to take steps to protect other motorists from the hazard, but ran into the tractor-trailer before he could do so. On appeal by the employer, the question before the District Court of Appeal was whether Allen's injuries were compensable because he was "acting within the course of employment" or non-compensable

because he was "going to or coming from" work. The employer disputed that Allen's accident arose out of his employment, arguing that it arose during his personal time while going to work. It also argued that Allen's primary responsibility was to provide courthouse security services, and that these more limited obligations govern whether he was acting within his course of employment in deciding to intervene when he spotted the tractor-trailer. Deputy Allen and the sheriff testified that office policy requires off-duty officers to conduct themselves as if they were on-duty to resolve hazards they observe. Based on this testimony, the court concluded that Allen's duty assignment as courthouse security does not relieve him from his obligation to resolve hazards when he sees them while off-duty. Allen's fundamental primary obligation is to safeguard the citizens of the county and the state. By protecting motorists from road hazards, Allen was discharging one of his primary obligations. Because of the going and coming rule, if Allen was driving his personal vehicle to work, an accident ordinarily would not be compensable. But extraordinary intervening events made the fact he was going to work irrelevant. He was a full-time deputy with the authority to bear arms and make arrests, who happened upon a situation that his employer deemed by written policy to require him to intervene. At that moment, Allen was no longer going to work but was, for purposes of the statute, engaged in his primary responsibility, which was prevention or detection of crime or enforcement of the penal, criminal, traffic, or highway laws of the state as per county policy. And he was discharging that primary responsibility within the state in a place and under circumstances reasonably consistent with that primary responsibility. *Levy County Sheriff's Office v. Allen*, 39 Fla. L. Weekly D1356 (Fla. 1st DCA June 30, 2014).

3. FIRST AMENDMENT PROHIBITS COLLECTION OF AN AGENCY FEE FROM REHABILITATION PROGRAM PERSONAL ASSISTANTS WHO DO NOT WANT TO JOIN OR SUPPORT THE UNION: Illinois's Home Services Program allows Medicaid recipients who would normally need institutional care to hire a "personal assistant" to provide homecare services. Under state law, homecare recipients/customers and the state both play some role in the employment relationship with the personal assistants. Customers control most aspects of the employment relationship, including hiring, firing, training, supervising, and disciplining personal assistants; they

also define the personal assistants' duties by proposing a service plan. Other than compensating personal assistants, the state's involvement in employment matters is minimal. Its employer status was created by executive order, later codified by the legislature, solely to permit personal assistants to join a labor union and engage in collective bargaining under Illinois's Public Labor Relations Act. Pursuant to the scheme, SEIU Healthcare Illinois & Indiana was designated exclusive union representative for rehabilitation program employees. The union entered into collective bargaining agreements with the state, which contained an agency fee provision, requiring all bargaining unit members who do not wish to join the union to pay the union a fee for the cost of certain activities, including those tied to the collective bargaining process. A group of rehabilitation program personal assistants brought a class action against SEIU-HII in Federal District Court, claiming that Illinois's PLRA violated the First Amendment insofar as it authorized an agency fee provision. The District Court dismissed their claims, and the Seventh Circuit affirmed in relevant part, concluding that the personal assistants were state employees. On certiorari to the United States Court of Appeals for the Seventh Circuit, the United States Supreme Court held the First Amendment prohibits collection of an agency fee from rehabilitation program personal assistants who do not want to join the union. Illinois's personal assistants are quite different from full-fledged public employees. Unlike full-fledged public employees, personal assistants are almost entirely answerable to the customers and not to the state, do not enjoy most rights and benefits that inure to state employees, and are not indemnified by the state for claims against them arising from actions taken during the course of their employment. Generally applicable First Amendment standards apply here. Thus, the agency fee provision here must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. *Harris v. Quinn*, 24 Fla. L. Weekly Fed. S986 (U.S. June 30, 2014).

4. AS APPLIED TO CLOSELY HELD CORPORATIONS, DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATIONS IMPOSING CONTRACEPTIVE MANDATE VIOLATE RELIGIOUS FREEDOM RESTORATION ACT OF 1993: The Religious Freedom Restoration Act of 1993 prohibits the government from substantially burdening a person's exercise of

religion even if the burden results from a rule of general applicability, unless the government demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. As amended by the Religious Land Use and Institutionalized Persons Act of 2000, RFRA covers any exercise of religion, whether or not compelled by, or central to, a system of religious belief. At issue in this case were regulations promulgated by the Department of Health and Human Services under the Patient Protection and Affordable Care Act of 2010, which, requires specified employers' group health plans to furnish preventive care and screenings for women without any cost sharing requirements. Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide. Nonexempt employers are generally required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Administration, including the four that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted religious nonprofit organizations with religious objections to providing coverage for contraceptive services. Under this accommodation, the insurance issuer must exclude contraceptive coverage from the employer's plan, and provide plan participants with separate payments for contraceptive services without imposing any cost sharing requirements on the employer, its insurance plan, or its employee beneficiaries. The owners of three closely held for-profit-corporations, have sincere Christian beliefs that life begins at conception, and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. They sued HHS under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health insurance for the four objectionable contraceptives. On writs for certiorari the United States Courts of Appeals for the Tenth Circuit and for the Third Circuit, the United States Supreme Court held that as applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 24 Fla. L. Weekly Fed. S965 (U.S. June 30, 2014).

5. LOS ANGELES MUST NEGOTIATE BEFORE CUTTING RETIREMENT BENEFITS: *Governing* reports that an independent hearing officer dealt a major setback to Los Angeles's effort to rein in public employee pension costs, concluding that elected officials violated labor law when they voted to roll back retirement benefits for new civilian workers without negotiating with labor leaders. The hearing officer said the city's employee relations board should order the city council to rescind its 2012 law, which scaled back pensions and hiked the retirement age of workers hired after July 1, 2013, creating a second tier of employees. The changes in benefits were supposed to have saved the city up to $4.9 billion over 30 years. The Coalition of L.A. City Unions, which represents an estimated 20,000 employees, filed an unfair labor practice challenge, arguing that the change could not be imposed unilaterally. The five-member employee relations board is scheduled to take up the recommendation July 28, 2014. If it sides with the coalition, the pension reductions will be null and void for workers hired over the last year.

6. *USA TODAY* SERVES UP SEVEN TIPS FOR WOMEN ABOUT TO RETIRE: Women live longer than men, on average, and that is mostly a blessing. But, as with a lot of things, it could be somewhat problematic in retirement. Why? Women face a unique set of issues that may require a somewhat different approach to financial planning. The average life span for women is 8% longer than for men. For a woman who expects to retire at the same age as her male counterpart, the couple is going to need more money. Here are some tips for women from financial planners:

- Find a financial adviser. Studies show women know less about investing and the stock market. Even the most financially literate woman should have her own financial planner who knows her situation and can serve as a go-to person before making that trip.
- Do the numbers. Start with a current budget and determine an average of everything you spent money on in the last six months. Look at every line item in the budget. It will go up or go down stay or go away in retirement. Once you have categorized each line item of that budget as one of those four, you can start creating a retirement budget.
- Be involved in your family's finances. Women need to be

involved in financial matters, especially since they are likely to outlive their husbands. Come prepared with questions for your financial advisor so you get your needs taken care of.

- Think about what retirement looks like. Will you both be home or travel? Have a conversation about such things before you retire. After retirement it becomes a much more stressful conversation.
- Know your Social Security options. The most important thing a women can do is research on claiming Social Security. A women's financial situation could be riskier than a man's. Financial planners say it is important to do everything you can to maximize your benefits. Doing so may mean waiting, and not taking benefits at age 62. The longer you wait, the higher the benefit. You also may want to take your spouse's benefits if they are higher than your own.
- Figure out a way to stretch your retirement benefits. A woman may consider working part time to stretch those retirement dollars or turn that hobby into a part-time job.
- Account for health care costs. You have to think about health care cost. Women have higher health care costs than men. Health care costs for women run about $5,600 per year; men pay about $4,900.

7. FUNDED STATUS OF CORPORATE PENSIONS RISES TO 92%: The funded status of the typical U.S. corporate pension plan increased 1.4 percentage points in June 2014 to 92.0%, driven by rising asset values, according to the BNY Mellon Investment Strategy and Solutions Group. Corporate plans also benefited from a slight rise in interest rates, which reduced liabilities. June ended a string of three consecutive months of falling rates, which had been driving liabilities higher. Assets at the typical corporate plan rose 1.4% and liabilities decreased 0.2% during the month. Public defined benefit plans, endowments and foundations also benefited from strong asset returns and exceeded their return targets. The decrease in liabilities for corporate plans in June was due to a 4 basis point increase in the Aa corporate discount rate to 4.32%. On the public side, defined benefit plans in June exceeded their target by 1.0%, as assets led by small cap equities and private equity rose. Year over year, public plans exceeded their target by 9.0%.

8. RETIREES MOVE TO LESS-TAXING AREAS: A retired letter

carrier estimated his cost of living would drop 80% when he moved from New York to a rental community in central Florida, according to a piece from Stateline.org. In 12 years he saw the taxes on his modest 1,200-square-foot house in Queens rise from $1,400 a year to almost $4,000, and other bills climbed as well. In the wintertime, it took $400 to $500 a month to keep the house warm. So, off to Florida. Retirement moves, which dropped sharply during the worst of the recession, are making a comeback. Florida, the top draw for movers 55 and older, is gaining about 55,000 older movers each year, more than twice the growth it saw after the housing bubble burst in the middle of the last decade. Florida's annual growth for this age group is 138%. Arizona has seen an 18% increase in retiree moves, and South Carolina 6%, as an average of annual moves in the post-recession years of 2009-2012 compared to 2006-2009. The 55 and older category is often used by researchers because people tend to be thinking of retirement when they make long distance moves at that age, although they could still be moving for job transfers or other reasons. Low cost of living and warm weather are prime draws for retirees. They tend to move from colder or high cost states such as New York, Illinois, New Jersey, Michigan and California, in search of warmer and lower cost states including Florida, Arizona, North and South Carolina and Texas. Many of the destination states also have relatively low property taxes. The top five most popular cities for seniors have all seen increases since the recession ended in 2009. They are the metropolitan areas around Phoenix; Riverside, Calif.; Tampa-St. Petersburg; Atlanta; and Denver.

9. WHY TEACHERS DRINK: Q. What is a seizure? A. A Roman Emperor.

10. TODAY IN HISTORY: In 1939, Lou Gehrig day; Gehrig makes "luckiest man" speech.

11. KEEP THOSE CARDS AND LETTERS COMING: Several readers regularly supply us with suggestions or tips for newsletter items. Please feel free to send us or point us to matters you think would be of interest to our readers. Subject to editorial discretion, we may print them. Rest assured that we will not publish any names as referring sources.

12. PLEASE SHARE OUR NEWSLETTER: Our newsletter readership is not limited to the number of people who choose to enter a free subscription. Many pension board administrators provide hard copies in their meeting agenda. Other administrators forward the newsletter electronically to trustees. In any event, please tell those you feel may be interested that they can subscribe to their own free copy of the newsletter at http://www.cypen.com/subscribe.htm.

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