

# **ANDREWS AND BEARD**

## **EMPLOYMENT LAW UPDATE**

**An E-Newsletter prepared for our EMPLOYMENT LAW clients presenting recent changes in the law.**

*November 10, 2009*

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### **Third Circuit Rules Work at Home and Compensatory Time May Count Towards Hours Eligibility for FMLA Claim**

In a recent decision the Third Circuit Court of Appeals issued September 23, 2009, the Court ruled that although an employee had less than 1,250 hours at work that would have made her ineligible for FMLA leave, hours worked at home and hours of compensatory time could count towards eligibility when the Employer had condoned such usage. In this case of *Erdman v. Nationwide Insurance Company*, the Employer filed an FMLA claim and an ADA claim when she was fired a month after requesting a leave to care for her disabled child. Erdman did not have 1,250 hours of work in the preceding twelve months that would qualify her for FMLA leave except for the fact that she alleged that she had compensatory time hours and hours worked at home that would put her above the 1,250 hours requirement. Nationwide Insurance had permitted her to work at home on occasion and had granted her the use of compensatory time.

Thus, the Third Circuit Court of Appeals found that such hours could count toward making her eligible for FMLA leave. The employee also attempted to state that she was entitled to FMLA leave because the Employer had not notified her that she was ineligible under the 1,250 hours requirement when she requested the FMLA leave. However, the Third Circuit followed the recent Department of Labor regulation that it has followed case law that an Employer does not need to notify the employee of ineligibility if the employee does not have the requisite number of hours to be eligible under the law.

The Court also found that the employee could pursue a claim for retaliation of the FMLA. The Employer had taken the position that since the law speaks of retaliation for the “use” of leave, there could be no claim for retaliation since the leave had not actually been taken by the employee. The Court stated that it would be absurd to permit this position of the Employer, who could punish an employee for requesting FMLA leave by firing the employee before the leave begins.

The Court did dismiss an ADA claim whereby the employee alleged that she was covered by the provisions of the ADA which prohibits discrimination against an employee because of the known disability of an individual with whom he or she is associated. The employee alleged that by firing her for requesting leave to care for her daughter who has Down Syndrome, the Company violated the ADA. The Third Circuit ruled that there was no basis for an ADA claim, since the decision to fire Erdman was not motivated by her daughter’s disability. The Court found that the most that the employee could show was that she was fired for requesting time off to care for her daughter, which was the basis of the FMLA claim.

This case again shows the danger of allowing employees to work at home and also allowing employees to accrue compensatory time. Since Nationwide Insurance was not a public Employer, they had no basis to grant compensatory time under the law. However, Nationwide’s practice of condoning the granting of such time gave reason for the Court to find eligibility under the FMLA.

## **Federal Legislation to Ban Bias Based Upon Sexual Orientation and Gender Identity Close to Passage**

Congress has recently completed debate on the Employment Non-Discrimination Act known as Senate Bill No. 1548 and House of Representatives Bill No. 3017. This legislation would prohibit Employers, employment agencies, labor organizations and joint labor-management committees with more than fifteen employees from firing, refusing to hire or discriminating against those employed or seeking employment on the basis of perceived or actual sexual orientation or gender identity.

At recent hearings before the House Education Labor Committee, former Georgia State Legislator Vandy Beth Glenn knows that she was fired after she told the General Assembly of Georgia that she would be coming to work dressed as a female, after reporting to work for two years dressed as a man. The Congress and the House of Representatives seemed sympathetic to this individual based upon transgender discrimination.

This Bill specifically exempts the US Military, Veteran service groups and religious organizations from its prohibitions. The legislation would also not require Employers to provide benefits to domestic partners of their employees.

Given the Democratic majorities in both the House and the Senate, it is expected that this Bill should receive passage before the end of the year.

## **Commonwealth Court Reverses Grant of UC Benefits for Sexual Harassment Claimant**

An employee who quit her job after she was sexually harassed by a Vice President subjected to inappropriate comments by male employees was not eligible for unemployment compensation benefits, despite being ruled eligible by the Unemployment Compensation Board of Review, in the Commonwealth Court decision of *Three SI Security Systems v. UC Board of Review*.

The Unemployment Compensation Board of Review had approved benefits on the basis that the employee had a “necessitous and compelling” reason to leave her job based upon the fact that she needed treatment by a psychiatrist for Post Traumatic Stress Syndrome following her sexual harassment encounter.

The facts of the case showed that while on a business trip, a male Vice President asked her to remove her shirt and made vulgar comments about another woman’s appearance. He purportedly asked her if she loved her husband and would ever cheat on him. She also asserted that another male employee supplemented a business presentation with a photograph of a female prostitute linked in news stories with New York Governor Elliott Spitzer.

After the employee filed an internal complaint of sexual harassment, the Company required each of the males involved in the harassment to watch a video tape on sexual harassment on their own time, placed a disciplinary memorandum in each employee's file and temporarily suspended bonus payments to the men.

On appeal, the Commonwealth Court found that although the claimant may not have agreed with the punishment imposed, "she did not speak to her Employer about her reservations, nor did she attempt to return to work." The Court noted that she did not make a reasonable effort to preserve her employment, and the evidence did not show that her only choice was to quit her job. Further, the Commonwealth Court found that the Employer here took reasonable steps to address the harassment and it was incumbent on the claimant to make an effort to preserve her employment, such as requesting to be assigned to other duties or at least waiting to see if the discipline imposed by the Employer stopped the offensive conduct.

This case emphasizes the need to take swift and appropriate disciplinary action upon the report of sexual harassment. Also, the Employer should be aware that unemployment compensation claims involving sexual harassment are merely an attempt to obtain evidence for the furthering of a Federal Court claim for sexual harassment. An Employer should not proceed to unemployment compensation hearings on sexual harassment claims without appropriate counsel.

## **EEOC Issues and Proposed Regulations Implementing the ADA Amendments Act**

The EEOC has issued proposed rules to implement the ADA Amendments Act and those rules were published in the Federal Register effective September 23, 2009. Interested parties will now have sixty days after publication of the notice to submit comments to the EEOC. The EEOC rules do expand the ADA Amendments Act in certain areas. For example, the EEOC said that its proposal includes a non-exhaustive list of examples of major life activities that tracks the ADAAA, but adds three activities not mentioned in the Act: sitting, reaching and interacting with others.

Likewise, the proposed EEOC rule also supplements the Act's examples of "major bodily functions" by specifying that the hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary and cardiovascular systems are covered.

Also, in the section addressing "mitigating measures," where the ADAAA stated that these measures should not be considered in determining whether an impaired individual in substantially limited activity, the EEOC proposal adds to the enumeration of mitigating measures. The EEOC's proposal lists surgical intervention that does not permanently correct an impairment as an example of a mitigating measure that should not be considered in determining whether an individual is disabled.

Moreover, the ADAAA has stated that impairments that are episodic or in remission meet the definition of “disability” if they substantially limit a major life activity. The EEOC provides examples of episodic impairments, including epilepsy, multiple sclerosis, hypertension, asthma, diabetes, major depression and bipolar disorder. The EEOC states that if such an impairment is in remission but could return in a substantially limiting form it would meet the definition of “disability.”

On the other hand, the EEOC states in its proposed rule examples of temporary, non-chronic impairments that usually would not be deemed disabilities, such as the common cold, seasonal flu, sprained joints, and broken bones expected to heal completely.

The EEOC rule also addresses situations for individuals “regarded as” disabled. The proposed rule provides that Employers have no obligation to reasonably accommodate an individual who is “regarded as” disabled, as opposed to one who has an actual disability or a record of disability.

Overall, the EEOC regulations on the ADAAA provide a liberal and expansive interpretation of the ADAAA and gives examples that can provide additional support to employees who claim disability under the ADA.

### **Third Circuit Implements Lilly Ledbetter Act – An Allegheny County Case**

In the case of *Mikula v. Allegheny County*, the Third Circuit Court of Appeals reversed a Lower Court decision based upon the recently passed legislation of the Lilly Ledbetter Law. Even though the case had previously been dismissed based upon the statute of limitations, the Court allowed the case to proceed finding that each paycheck would start a new statute of limitations.

In this case, Mikula requested a raise, saying she should be paid the same as the Grants Coordinator for the Police Department. The County did not answer Mikula’s request, and the County did not adjust her pay. The Third Circuit found that under the Lilly Ledbetter Law, each paycheck that Mikula received after request for a pay adjustment started a new statute of limitations. The Court also noted that the failure to answer a request for a raise qualifies as a compensation decision under the Equal Pay Act, because the result is the same as if the result had been explicitly denied. Thus, an Employer must be diligent in addressing any pay increases made by employees.

This case makes it clear that under the Lilly Ledbetter Law it will be difficult to assert any statute of limitation defense involving any pay rate of an employee.

## **Interoffice Email, Facebook and Twitter**

The recent rash of sexual harassment cases have been based upon evidence obtained through the inspection of interoffice email communications. One of the easiest sources to prove a sexual harassment case against an Employer or any type of employment discrimination is by a review of interoffice email communications.

Employers who do not regularly monitor email communications within their own offices are only asking for trouble when it comes to discrimination cases such as sexual harassment. In fact, Court decisions have recently noted that it is expected that Employers will have monitored their own email systems, such that failure to discover sexual harassment occurring through interoffice email communication is the responsibility of the Employer to ascertain.

Also, under the new E-Discovery rules, such communications must be kept in the event of threatened or actual litigation. Lawyers suing Employers will now first go to the Employer's offices to inspect computers rather than taking depositions.

Also, some Courts have ruled that sexual harassment and threats and harm done in facebook or twitter accounts even though they occur outside of their workspace can be the basis for a claim. Many Employers are now reviewing facebook, for example to look at prospective employees as well as conduct of current employees. Employers are not only relying on criminal background checks, but are often doing facebook and my space review before hiring individuals.

## **Gender Stereotyping Is Basis for Discrimination Claim for Gay Worker**

In a decision issued August 28, 2009, a Third Circuit Court in the case of *Prowell v. Wise Business Forms*, held that the Company's failure to stop inappropriate comments that constitute gender stereotyping was a violation of Title VII of the Civil Rights Act.

In this case, Prowell alleged that his coworkers called him "Princess," "Rosebud" and "Fag." He stated that employees put a pink tiara on his desk as well as packages of lubricant jelly. Prowell noted that he reported the mistreatment to his supervisor and management. Although the tiara and lubricant package were removed from his workstation, he did not always receive a response and sometimes nothing was done to end the harassment that he asserted.

As a result, Prowell alleged discrimination based upon religious harassment as well as gender stereotyping. The Court dismissed the religious discrimination charge, but found the gender stereotyping claim could proceed. Although the Third Circuit noted that Title VII does not specifically prohibit sexual orientation discrimination, it noted that it did not mean that a homosexual individual is barred from bringing a sex discrimination claim under Title VII for gender stereotyping. The Court noted that "There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man could bring a gender stereotyping claim while an effeminate homosexual man may not."

Most importantly, the Employer did not take the claims of this employee seriously and did not take sufficient disciplinary action against the employees involved. Had the Employer taken sufficient action, there may not have been a basis for this claim.

### **Giving Steeler Season Tickets Valid Reason for Discharge and Not Age Discrimination**

The Third Circuit Court of Appeals in a decision rendered October 2, 2009 rejected an age discrimination claim when an employee was terminated for giving Steeler season tickets to a client as well as purchasing a boat for the client contact's son's rowing team. In the case of *Connolly v. Pepsi Bottling Group*, Connolly was fired by Pepsi for violating its code of conduct concerning business integrity, conflicts of interest, and business gifts. Connolly negotiated contracts with UPMC and about the same time he negotiated the contracts, he gave his UPMC counterpart Steeler season tickets as well as a contribution to his contact's son's high school rowing program. After being fired for this conduct by Pepsi, Connolly sued for age discrimination.

Connolly noted that he was replaced by someone five years younger and as evidence of alleged bias, he cited a number of age-based comments, that his birthdate was handwritten on a computer printout, and his assignment to a performance improvement plan despite being employed at Pepsi for 34 years.

The Third Circuit, in rejecting the age discrimination claim, found that Pepsi produced a legitimate, non-discriminatory reason for firing Connolly. The Court found that Connolly's conduct violated Pepsi's code of conduct and it also jeopardized a business relationship with a major account.

Importantly, the Third Circuit also relied on the recent U.S. Supreme Court decision in *Gross v. FBL Financial Services*, which was decided by the U.S. Supreme Court this summer on June 24, 2009, in noting that in bringing such an age discrimination claim, Connolly needed to show that age was the "but-for" cause of the adverse job action. The Court noted that given Connolly's conduct with respect to the UPMC contract and given the information available to the Defendant at the time of the termination decision, he could not show that he would not have been terminated but for his age.

## **Employee Fired After Failure to Return From Medical Leave Failed to Prove ADA Claim**

A female employee with post-partum depression did not show a violation of the Americans With Disabilities Act for failing to return to work from a medical leave in the recent District Court decision in Texas of *Cortez v. Raytheon Co.* The Court found that Cortez was not "qualified" under the ADA because she could not meet an "essential function" of her job as a senior information systems technologist, that is, "attendance at work."

Cortez wanted to continue on medical leave or telecommute in continuing her job. Raytheon did not permit her to work from home, and alleged that attendance at work was an essential function of the job, and thus rejected such an accommodation.

Importantly, the Court also found that Cortez requesting an "indefinite leave" did not constitute a reasonable accommodation. The employee could not give a specific date of expected return to work, and the Court found it significant in rejecting any claim of disability discrimination.

This case is helpful to Employers in showing that it is not necessary to permit an accommodation for the employee to work at home, and that an employee can be terminated following the expiration of a leave when the employee has no expectation of any return to work. In this case, the Employer had given extensions of the original FMLA leave and had given the employee nine months of leave. When the employee wanted an indefinite leave, it felt it could not permit any further leaves, and the Court supported this decision of the Employer.

## **FMLA Military Benefits Expanded**

FMLA legislation was signed on October 28, 2009 that extends the "exigency" leave to family members of "active duty service" where the prior legislation related to "reservists." That leave provides for twelve weeks of leave for urgent needs related to the family member's call to active duty.

In addition, the Caregiver Leave, which provides for 26 weeks of unpaid leave to an employee to care for a family member injured while serving on active duty was expanded to include veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness that occurred at any time during five years preceding the date of treatment.

Both of these provisions were effective on the date of signing, October 28, 2009.

*This E-Client Alert is designed to provide general information relating to new developments in Employment Law. It should not be construed as comprehensive coverage, or as legal advice concerning any specific factual issue. A legal opinion should be sought from an attorney of choice regarding any specific factual situation.*

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