

# **ANDREWS AND BEARD**

# **EMPLOYMENT LAW CLIENT ALERT**

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

*May 6, 2010*

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## **FEDERAL COURTS UPHOLD DRUG AND ALCOHOL TESTING**

Two recent Federal Court decisions have supported the rights of Employers in administering drug and alcohol testing on the job.

In a case that originated in Pennsylvania in Luzerne County, the U.S. Court of Appeals for the Third Circuit upheld the termination of a Corrections Officer in Luzerne County for failing a breathalyzer test.

The employee had challenged the breathalyzer test on many fronts, including a Fourth Amendment claim that the breathalyzer invaded his privacy. The Court ruled that the breathalyzer was not an invasion of privacy and explained that a breathalyzer test is "minimally intrusive," and that the results of the breathalyzer test "reveal the level of alcohol in the employee's bloodstream and nothing more." Thus, the Court ruled that the breathalyzer was not an unreasonable search under the Fourth Amendment.

This employee was not deterred, and also brought claims under the ADA, FMLA, and the First Amendment. The employee had been on light duty when his violation occurred, and alleged that non-disabled Corrections Officers had not been given the breathalyzer. The Court rejected that claim, and also rejected the claim of interference under the FMLA. The Court noted that the Employer had given the employee FMLA leave in the past, and the breathalyzer was a separate and distinct offense.

Interestingly, the Employer gave this employee a chance to remain employed by offering a Last Chance Agreement. The employee rejected the Last Chance Agreement and was thus terminated. The employee alleged that the Last Chance Agreement was a violation of his First Amendment rights. However, the Court noted that "purely personal speech" is not protected under the First Amendment, and that this employee's speech was not a matter of "public concern" that would be protected under the law.

In this case of *Majewski v. Fischi*, the Third Circuit spoke strongly in upholding the right of an Employer to have a breathalyzer test to determine impairment on the job.

In another Federal Court decision, the United States Court of Appeals for the Second Circuit upheld the termination of an employee for refusing to take a drug test in the case of *Kinneary v. New York*. In that case, a boat captain working for the City of New York was terminated for his refusal to complete a random drug test.

Interestingly, the employee claimed that he suffered from "shy bladder syndrome" and thus was protected under the ADA, entitling him to refuse the random drug test.

However, the Court rejected the ADA claim for several reasons. First, the Court noted that being free from drug use was "an essential function" of the employee's job as a boat captain. Second, the Court also noted that the Employer had accommodated this employee by letting him submit a doctor's report regarding his condition, and subsequently, providing additional time for the submission to the drug test.

This decision of the Second Circuit actually reversed a decision of a Federal jury that awarded the employee \$225,000 in damages for his termination of employment.

The Second Circuit noted that the medical report submitted in this matter did not show that the employee "had a medical condition that precluded, or with a high degree of probability could have precluded him from providing sufficient urine for a drug test."

Thus, once again, the Courts have shown support for Employer drug and alcohol testing in this case.

## **SEX HARASSMENT CLAIM UPHELD FOR ASSISTANT MANAGER WHO QUIT AFTER TWO DAYS OF WORK**

In a case giving strong support for a sexual harassment claim, the Fourth Circuit Court of Appeals upheld a sexual harassment claim for an employee who resigned after two days of work.

Importantly, the Federal Court in this case of *Whitten v. Fred's, Inc.* followed the strict liability standard of the United States Supreme Court in *Burlington* and *Faragher* by finding that the harassment was done by a supervisor, even though the supervisor lacked the authority to hire, fire, demote, or otherwise affect the female Assistant Manager's job status. The Court found that since the manager who committed the harassment had the ability to set and change the victim's work schedule and job tasks, that the manager was a "supervisor" under the law, subjecting the Employer to liability. Under the standard of the United States Supreme Court, an Employer is "vicariously liable" for the sexual harassment by a supervisor unless no tangible job action occurred as a result of the harassment.

Also, importantly, the Federal Court in this case found a "tangible action" by the "constructive discharge" of the employee. The Court found that the resignation was a constructive discharge since the employee did not have to tolerate the harassment in the workplace and was entitled to resign after two days of work.

In this particular case, the Manager told the Assistant Manager that if she wanted long weekends off, she needed to "be good to him and give him what he wanted." In addition, the employee alleged that on her first day of work under the Manager's supervision, the Manager pressed his genitals against her back in a semi-private office.

Although the male Manager denied ever making any physical contact with the female victim, the Court found sufficient evidence to sustain a claim of sexual harassment.

This Court decision demonstrates the strict standard in which the Courts will apply the applicable law on sexual harassment. Employers must be careful to make sure that their own supervisors are adequately trained on sexual harassment, in order to avoid the strict liability standard for any possible sexual harassment of a supervisor, even when it is a first level supervisor.

## **MANAGER FIRED AT AGE 69 FOR SEXUAL HARASSMENT FAILED AN AGE DISCRIMINATION CLAIM**

Even though the employee who was fired for sexual harassment had been once called an "old, gray-haired fart" by a Company executive, he did not have a claim for age discrimination when he had been fired for adequate reason for violation of the Sexual Harassment Policy of the Company.

In the case of *Jackson v. Cal-Western Packaging Corp.*, the Fifth Circuit Court of Appeals upheld the termination of employment and rejected an age discrimination claim for a 69 year-old worker. The Court dismissed the "old, gray-haired fart" comment as a "stray remark" insufficient to raise an issue of age discrimination. Importantly, the comment was made a year before the termination and was found to be wholly unrelated to the termination.

Most importantly, a female employee had complained that the older worker, Jackson, had commented on the size of her breasts and that her boyfriend must like her "big boobs." The female employee also asserted that Jackson repeatedly tried to touch her, and that one time when he cornered her, he asked her to raise her skirt. Jackson was also alleged to have made sexually inappropriate remarks in front of her and other female employees.

Importantly, the Court found that this Employer reacted appropriately in performing the investigation of sexual harassment. The Court found that the Employer retained an outside attorney to conduct an independent investigation, and that probe included interviews of male and female employees, confirming the finding of harassment against this employee.

The Employer in this case proceeded then to fire Jackson for non-compliance with its Anti-Harassment Policy, which the employee had signed when he was hired.

This decision reinforces the stringent manner in which the Federal Courts handle sex harassment cases even when the employee is an older worker protected by age discrimination.

## **LAY TESTIMONY OF EMPLOYEE CAN HELP SHOW "SERIOUS HEALTH CONDITION" UNDER FMLA**

In a case of first impression on the FMLA, the Third Circuit Court of Appeals has held that lay testimony can help prove a serious health condition under the FMLA. In a case emanating from Pennsylvania, *Schaar v. Lehigh Valley Health Services*, the Third Circuit held that the more than three days of incapacity constituting a "serious health condition" can be proven with a combination of medical testimony and lay testimony.

In this particular case, the employee was diagnosed with a urinary tract infection. She presented a doctor's note stating that she was unable to work on September 21 and 22. The employee was already scheduled to take vacation leave on Friday, September 23<sup>rd</sup>, and Monday, September 26<sup>th</sup>. However, the employee, by her own testimony stated that she remained ill with nausea and vomiting from September 21 through Sunday, September 25, 2005.

After the Employer terminated the employee for her absenteeism, the employee sued under the FMLA and alleged that she was suffering from a "serious health condition." The Company countered that she needed to show medical proof of an incapacity of more than three days under the FMLA. The Third Circuit found that the medical note covering two days of the four days, coupled with the employee's testimony of continued incapacity of an additional two days was sufficient to prove the serious health condition under the FMLA.

This case of first impression in the Third Circuit is contrary to the holding of the Eighth Circuit which has previously held that the period of incapacity of more than three days must be shown with medical testimony. The Third Circuit pointed to the fact that the FMLA regulations requiring a showing of at least three days of incapacity do not specify if expert evidence is required.

This decision is extremely significant under the FMLA, since it will open the floodgates to make it much easier for employees to claim an FMLA leave when an Employer attempts to discipline an employee for absenteeism.

## **ADA ACCOMMODATIONS NOT LIMITED TO ISSUES AT THE WORKPLACE**

The Third Circuit Court of Appeals which covers our region has expanded the coverage for accommodations under the ADA in a decision handed down April 8<sup>th</sup> of this year in the case of *Colwell v. Rite Aid Corp.*

In this particular case, Rite Aid denied a cashier's request for a schedule limited to day shifts as an accommodation for her blindness in one eye. The employee had presented evidence that the blindness in one eye made it difficult for her to drive to work at night.

The Third Circuit held that the ADA can obligate an Employer to accommodate an employee's disability-related difficulties in getting to work. The Court noted that "one such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an Employer's control and would allow the employee to get to work and perform her job." The Court went on to note that "a change in shifts" is that kind of accommodation.

The Employer argued that the changing of shifts was outside of the workplace and not covered as an accommodation under the ADA. However, the Federal Court in this case stated that "the scheduling of shifts is not done outside the workplace, but inside the workplace." The Court did note that other cases could be different depending on the business hardship on the entire workforce in the changing of shifts for a particular employee.

Further, the Court went on to state that their holding did not make Employers responsible for how an employee gets to work, but a shift change was sufficiently related to the work to require an accommodation.

Further, the Court rejected Rite Aid's contention that the blindness in one eye did not render the employee "disabled" for purposes of the ADA. Under the new ADA Amendments Act, the definition of a disability is much broader than it was prior to the Amendments.

## **EMPLOYER DEMOTION AFTER MATERNITY LEAVE FOUND NOT TO VIOLATE FMLA**

The Eleventh Circuit Court of Appeals found that an Employer did not violate the FMLA when demoting an employee returning from pregnancy leave in the case of *Schaaf v. SmithKline Beecham Corp.* In that case decided April 6, 2010, the Court found that the Employer in this case showed sufficient evidence of performance issues unrelated to the protected leave as a basis for the demotion.

In finding for the Employer, the Court noted that "the purpose of the FMLA is to allow individuals to temporarily put their careers on hold in order to tend to certain personal matters, like the care of a newborn child. However, the purpose of the FMLA is not to aid an employee in covering up her work-related deficiencies."

In this particular case, the Employer had adequate documentary evidence of the performance issues that led to the demotion. Under the FMLA, an Employer must reinstate an employee to the position he/she held prior to taking the protected leave, or to an equivalent position. However, that right is not absolute and the Employer can deny reinstatement if the employee was discharged or demoted for reasons independent of the protected leave.

This case demonstrates the necessity for good documentation on performance issues that can avoid a finding of liability under the FMLA.

## **LILLY LEDBETTER ACT SPURS EQUAL PAY ACT CLAIMS**

We have experienced the proliferation of Equal Pay Act claims in light of the Lilly Ledbetter Fair Pay Act. Under that Act, the definition of when the discrimination action "occurred" was extended to include whenever a new paycheck is issued, even though the claim is based upon past acts of discrimination that would ordinarily be outside of the statute of limitations.

There have been a number of new Federal Court actions filed based upon Equal Pay Act claims of gender discrimination in pay, even though the hirings and payments under the hirings occurred well outside of what would ordinarily have been considered the statute of limitations.

We recommend that Employers make sure a study is done on pay rates for positions performed by both genders to make sure that there is justification for "equal pay for equal work." Otherwise, Employers can be subject to large potential verdicts for multiple years of pay rate discrepancies.

*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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