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EMPLOYMENT LAW UPDATE

Providing new developments in Employment Law

Altoona, Pa.

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Inside ...

- *Department of Labor addresses breast milk at work*
- *U.S. Supreme Court rules that employee can sue for retaliation based on protected activity of fiancée*
- *Pregnant bank teller who did not return to work from leave lacked bias claim*
- *No liability with discrimination when response is prompt with remedial action*
- *Fifteen minutes found adequate for reviewing release agreement on job separation*

EEOC Issues Final Regulations Implementing ADA Amendments Act

The Equal Employment Opportunity Commission (EEOC) has issued its final Regulations for the ADA Amendments Act, and these Regulations make it much easier for employees to pursue a claim for Disability Discrimination under the ADA. The EEOC has already experienced some effects from the ADA Amendments Act, as discrimination charges rose 23 percent in 2010 from 2009.

In these Regulations, certain impairments are identified that “should easily be concluded as disabilities.” These impairments include diabetes, epilepsy, HIV infection, cancer, and post-traumatic stress disorder.

Further, the EEOC Regulations confirm that “mitigating measures” may not be taken into account when determining whether an impairment substantially limits a major life activity. Thus, if an impairment is episodic or in remission, it must be considered in its active state according to the Regulations.

Moreover, the Regulations make it easier to show a disability for “regarded as” disability, since the EEOC removed language in the “regarded as” section about symptoms or taking medication as being necessary to establish an ADA claim for “regarded as” disability.

The EEOC’s final rule emphasizes that the standard for determining disability is lower under the ADA Amendments Act. However, the Regulations do provide that not all impairments are disabilities.

Under these Regulations, a “condition, manner or duration” analysis is not going to be considered in dealing with certain impairments such as HIV, diabetes and epilepsy that will virtually always be considered a disability under the Regulations.

In addition, “working” is treated just like every other major life activity. It is listed in the Regulations along with sleeping, eating, and lifting. Once again, this provision will make it easier to show the effect on a major life activity. Thus, for example, if an employee cannot lift 15

(continued on page 3)

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Department of Labor Addresses Breast Milk at Work

The Department of Labor has issued a Fact Sheet interpreting the Fair Labor Standards Act to mandate Employers to provide a “reasonable break time for an employee to express breast milk for a nursing child for one year after the child’s birth each time such employee has need to express the milk.”

In fact, the Department of Labor has gone further than merely requiring the “break time” and has expressed the opinion that Employers are also required to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.”

In addition, the Department of Labor has emphasized that Employers must provide this reasonable break time as frequently as needed by the nursing mother, and the frequency of the breaks needed to express the milk, as well as the duration of each break, will likely vary.

The Department of Labor went so far as to state that a bathroom, even if private, is not a permissible location under the Fair Labor Standards Act for this type of break time. The Department of Labor has stated that the location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother’s use, it must be available when needed in order to meet the statutory requirement. The Employer can temporarily create a space that is converted into a space for expressing milk, provided it is shielded from view, and free from any intrusion from co-workers and the public.

The Department of Labor has stated that these breaks are required only for employees who are considered “non-exempt” under the provisions of the Fair Labor Standards Act. In addition, Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provisions would impose an undue hardship. Whether the compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific Employer in comparison to its size, financial resources, and structure of the

Employer’s business.

The Department of Labor did concede that Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where Employers already provide compensated breaks, an employee who uses break time to express milk must be compensated in the same way that other employees are compensated for break time.

Further, this requirement regarding the break time must provide that the employee be completely relieved from duty or else the time will be compensated as work time.

As a result of this determination by the Department of Labor, employees can file complaints with the Wage and Hour Division of the Department of Labor if they believe their Employer is not complying with the nursing break provisions. The Wage and Hour Division has said that it expects that nursing mothers typically will need breaks to express milk two or three times during an eight-hour shift, with the act of expressing breast milk typically taking approximately 15-20 minutes.

The DOL also directs that an Employer should also consider factors such as time necessary for a nursing employee to reach the lactation space, the time it takes for her to retrieve and set up her breast pump, the pump’s efficiency, the availability of a nearby sink, and the time needed to store the breast milk.

U.S. Supreme Court Rules that Employee Can Sue for Retaliation Based on Protected Activity of Fiancée

The United States Supreme Court has greatly expanded who can sue for retaliation under Title VII of the Civil Rights Act when it has recently held that an employee can sue for retaliation under Title VII of the Civil Rights Act based on the protected activity of his fiancée. In the case of *Thompson v. North American Stainless*, the Supreme Court justices ruled that “any conduct engaged in by the Employer that would have the effect of dissuading a reasonable person from engaging in protected conduct” is considered retaliation, and that firing someone’s fiancé would have that effect.

Importantly, this case has held that “a person aggrieved” who can bring a Title VII retaliation claim includes anyone within the “zone of interest” sought to be protected by the statute. The Justices found the Plaintiff-Fiancé in *Thompson* within that zone. However, the Supreme Court refused to establish a hard and fast rule as to what other relationships might qualify for coverage.

In fact, the Justices in this case found it an “open and shut” issue that firing someone’s fiancé would “dissuade a reasonable worker from engaging in protected activity.”

Thus, this decision has created a large gray area between actions against close relatives, which

are covered by Title VII, and actions against mere acquaintances which are not covered. There is no doubt that the Title VII retaliation provision has expanded significantly to include an unknown group of individuals who can now sue as a result of this decision. This case creates an opportunity for litigation by people who had previously not had the right to pursue such an action.

Andrews and Beard recommends that, as a result of this decision, Employers make sure that their employment manuals and instructional materials emphasize that retaliation against third parties is illegal. While doing so will not necessarily help with liability, such provisions can reduce or eliminate the potential for punitive damages in the event of a retaliation lawsuit as a result of this decision.

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EEOC Issues Final Regulations

Continued from page 1

pounds and an ordinary person can, that worker may be substantially limited in the major life activity of lifting.

Furthermore, these new Regulations could also lead to more disability class action cases. For example, a number of individuals who work for the same employer and have the same condition, such as cancer, could lead to ADA class action suits proliferating.

Pregnant Bank Teller Who Did Not Return to Work from Leave Lacked Bias Claim

A bank teller who quit on the last day of her pregnancy-related leave could not proceed with a constructive discharge claim for gender discrimination according to the United States Court of Appeals for the Eighth Circuit in the case of *Trierweller v. Wells Fargo Bank*. The employee had alleged that she had a constructive discharge claim because the Bank subjected her to intolerable working conditions based upon her pregnancy.

The Court rejected the constructive discharge claim in finding that although the employee may have had “an unpleasant and unprofessional” working environment, a constructive discharge claim requires considerably more evidence to show that the treatment was intolerable. Further, the Court held that the employee never gave Wells Fargo a reasonable opportunity to address and remedy her concerns about her supervisor’s attendance demands. In this case, the Supervisor questioned the legitimacy of missed days of work of the employee numerous times during her pregnancy. However, the Court noted that “by not even attempting to return to work after her medical leave concluded, the Plaintiff acted unreasonably and failed to provide Wells Fargo with the necessary opportunity to remedy the problems she was experiencing.”

This case exemplifies the position of the Courts that in order to make out a constructive discharge claim, the employee has a major burden in proving intolerable working conditions. An employee cannot merely quit and allege constructive discharge, unless the conditions are not only intolerable, but the employee has given the Employer an opportunity to correct any problems in the work place.

No Liability with Discrimination When Response is Prompt with Remedial Action

The Third Circuit Court of Appeals has found that an African-American security officer could not proceed with a case for race-based harassment, even though there was evidence of such harassment, since the Company took prompt and adequate remedial action, and the alleged harasser was not a supervisor, but a co-worker.

In this case of *Griffin v. Harrisburg Property Services*, the African-American employee claimed that his supervisor told him racist jokes and sent him an offensive CD and text message. Once the harassment was reported, the Company began its investigation on the next business day. The African-American employee requested a transfer and was granted a transfer, the Caucasian employee was disciplined and issued a final warning. In addition, the Employer promptly conducted a diversity training seminar for its staff.

Importantly, the Third Circuit found that the harasser was not a “supervisor” under the law. Although he had the title of “security supervisor,” he functioned in that capacity only one day a week, supervising six to seven workers. The other four days he acted as any other security officer. The Court noted that it is not the nomenclature or title that defines supervisory status, rather the actual job duties.

Thus, since the harasser was not a supervisor, there was no automatic liability. Consequently, the Employer’s affirmative defense of prompt, remedial action, was permitted to be asserted. The Court noted that under the law, the Employer must have exercised reasonable care to prevent and correct promptly any harassing behavior, and the employee must have unreasonably failed to take advantage of this corrective action in order to make a case.

In this case, it is clear that the Employer began investigating on the first business day after report

of the harassment. Further, it promptly granted the employee’s request to transfer to another position, conducted training, and issued discipline to the harasser. The Court found that those actions constituted “adequate remedial action,” and thus dismissed the claim.

This case provides an excellent example of how an Employer should react when confronted with a complaint of unlawful harassment. The immediate investigation as well as prompt remedial action is necessary to avoid liability of an Employer in these situations.



Fifteen Minutes Found Adequate for Reviewing Release Agreement on Job Separation

A teacher who entered into a Separation Agreement with a Pennsylvania School District did not sign under duress and had adequate time of 15 minutes to review the document in a recent decision by the United States Court of Appeals for the Third Circuit. In the case of *Gregory v. Derry Township School District*, the Court ruled that there was no finding that the employee signed the document under duress. The Court noted that the law is clear that the existence of financial pressure to sign a waiver is insufficient to establish that it was executed involuntarily.

In this case, the teacher, an African-American, released claims for discrimination in exchange for an agreement which continued her health insurance and provided for a positive letter of recommendation. The teacher had been represented in negotiations by a Pennsylvania State Education Association representative.

However, the employee stated in her lawsuit that she had additional questions after meeting with the PSEA official, and the School Principal was unable to (continued next page)

Fifteen minutes

Continued from page 5

answer all of her questions. Nevertheless, the teacher proceeded to sign the Agreement, and the Court found that the teacher was free to consult with an attorney or take the Agreement home and review it further. Further, the teacher had acknowledged that no one physically forced her to sign the Agreement or in any way threatened her if she failed to sign the Agreement.

Further, the Court found there was adequate consideration for the Agreement, since the District provided evidence that it was “atypical” for the District to provide health insurance to a teacher after a voluntary resignation.

This decision relied substantially on the fact that the teacher had Union representation that was involved directly in the negotiation of the separation terms. This decision emphasizes that it is advantageous for an Employer to involve Union representation in the negotiation of any such Agreement and always provide for the right to consult counsel as part of the Agreement.

Andrews and Beard Employment Law Update

This *Employment Law Update* 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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