ANDREWS AND BEARD

EMPLOYMENT LAW CLIENT ALERT

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

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Articles

NLRB Notice Posting Rule Delayed Indefinitely

The District of Columbia Circuit Court of Appeals has issued an injunction delaying indefinitely the effective date of the NLRB's Final Rule requiring most Employers to post a Notice of Employee Rights in their workplaces. The Rule, which was previously scheduled to take effect April 30, 2012, has now been postponed indefinitely due to conflicting opinions by the Federal District Courts.

Previously, the District Court for the District of South Carolina had struck down the Final Rule in its entirety in a lawsuit by the Chamber of Commerce. However, prior to that time, the U.S. District Court for the District of Columbia upheld the NLRB's authority to enact the Rule.

Thus, as a result of the conflicting opinions, the D.C. Circuit Court enjoined the enforcement of the Final Rule pending appeal. The Chairman of the NLRB, Mark Gaston Pearce, expressed the Board's opposition to this Order but confirmed that all regional offices have been directed to comply with the injunction. The D.C. Circuit Court will now hear this appeal, and is scheduling Oral Argument for September of 2012.

Recent Cases Reflect Broader Standards Under ADAAA

The Federal Courts, in recent cases, have reflected the lesser standards for an ADA claim in light of the ADA Amendments Act of 2008. Clearly, it is much easier for a Plaintiff to get coverage under the ADA because of these amendments. Under these amendments, the worker no longer needs to show that he or she was severely limited because of an impairment, and the Courts now look to what is going on in the employee's body.

A recent Federal Court decision for the Western District of Pennsylvania reflected this fact when the Court permitted a disability claim to proceed for an employee who had claimed fibromyalgia, back problems and sleep apnea. In the case of *Kravits v. Shinseki*, the Federal Court cited the "less searching analysis" required under the changes in the Federal Disability Bias Law. In that opinion, Judge Lancaster cited the new EEOC Regulations and explained that "the term 'substantially limits' is not meant to impose a demanding standard, and determining whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."

In this case, the Employer cited the fact that the employee alleging a disability was able to buy and renovate a home, deal with his father's estate, pursue a college education, and vacation in Thailand. However, the Court noted that the new Regulations under the ADA provide that the focus is not what the individual can achieve, but how a major life activity is substantially limited.

Although the employee was fired for poor performance in this case, the Court found that a jury could find that the deficient performance of the employee was caused by a lack of accommodations for his disability.

A review of other cases across the country under the ADAAA reveals that Courts are applying these less stringent standards to determining what constitutes a disability under the ADA. In the case of *Katz v. Adecco USA, Inc. (S.D.N.Y. 2012)*, the Court found that a job applicant who had breast cancer "in remission" still had the right to bring an ADA case. The Court found that although the cancer was inactive at that point in time, it was not relevant under the new law, in that a major bodily function of "cell growth" was affected for this employee.

Similarly, in the case of *Feldman v. Law Enforcement Associates Corp.* (E.D.N.C 2011), an employee who had a "mini-stroke," or transient ischemic attack was able to bring an ADA claim under the new analysis of what the Plaintiff could not do, rather than what the Plaintiff can do.

Likewise, in *Gibbs v. ADS Alliance Data Systems, Inc.* (D. Kan. 2011), an employee who had previously experienced carpal tunnel surgery was disabled. Previously, conditions such as carpal tunnel syndrome and arthritis were conditions that were often found not to constitute a disability under the ADA. However, the relaxed standards have also found these conditions to be the basis of a disability claim.

In addition, another issue that has received attention in the Federal Courts is whether under the ADA Amendments the Plaintiff's testimony alone may constitute sufficient evidence to form the basis of a disability claim without the testimony of an expert. Although the Courts have not been consistent on this fact, it is clear, nevertheless, that a Plaintiff's testimony with a minimal amount of expert testimony can constitute a basis for the disability claim.

Further, the standard for proving a claim under the "regarded as" prong of the ADA's definition of disability is also very different under the new law. Now, the Plaintiff is only required to show that the Employer took adverse action because it perceived the Plaintiff to be impaired, not that it viewed the Plaintiff as disabled or substantially limited in a major life activity, which was the prior standard before the enactment of the ADAAA. For example, in the case of *Wells v. Cincinnati Children's Hospital Medical Center* (S.D. Ohio 2012), the Court found a "regarded as" disability and held that there was no need for the Plaintiff to show a substantial limitation on a major life activity. Also, the Court noted that even though there had been beneficial effects of "mitigating measures" taken by the Plaintiff, the mitigating measures cannot be considered in considering whether the individual was disabled under the ADA.

Employers may, however, still take advantage of the "transitory and minor" exception. Generally, transitory conditions are those of six months or less. An ADA claim was dismissed by a Federal Court in Florida in the case of *Lewis v. Florida Default Law Group,* (M.D. Fla. 2011), when the basis for the disability claim was a Plaintiff who had the flu.

In addition, in the case of *George v. TJX Cos.* (E.D.N.Y. 2009), the Court found that a Plaintiff's fractured arm was transitory and dismissed the claim for disability.

Consequently, there is a heightened responsibility of Employers to make reasonable accommodations for these disability claims that may not have been covered under the prior law. For example, in a recent decision this year in a Federal Court in the Eastern District, *Solomon v. Philadelphia School District* (E.D. Pa. 2012), the Court found that there may be a denial of a reasonable accommodation when the School District refused to move a teacher with a back problem to a lower floor of the school rather than a higher floor.

These Amendments and the cases resulting from the Amendments have led to an increase in the number of disability claims. Disability charges now make up 25% of all charges filed with the EEOC. Further, last year, the EEOC reported obtaining $103.4 million dollars for claims under the ADA.

Workplace Romance Policies Can Protect Companies from Sexual Harassment Litigation

Recent news articles concerning the termination of the CEO at Highmark over his relationship with a subordinate employee have again brought forth the potential for litigation as a result of workplace romances. In the Highmark situation, the President/CEO, who is 58 years of age, was living with a 28-year old subordinate employee, who he had promoted several times. After he was arrested following an altercation with the woman's husband, Highmark proceeded to terminate the CEO.

Given the increase in litigation as a result of relationships in the workplace, many Employers are turning to policies to prevent exposure to such litigation.

Much of the litigation results from the relationship, much like the Highmark case, of a supervisor and non-supervisory employee. If the relationship ends, the subordinate employee may claim that the relationship was never voluntary in the first place. Conversely, if the subordinate employee ends the relationship, and any subsequent change is made to his/her terms or conditions of employment, a retaliation claim is the likely result. The EEOC has reported that for fiscal year 2011, more than one-third of its claims were for claims of retaliation.

Thus, many Employers have promulgated policies prohibiting workplace dating or have enacted anti-fraternization policies that prohibit all office romances. However, many Employers have merely prohibited relationships between supervisors and subordinate employees.

However, when a relationship between a supervisor and subordinate endures, other employees within the workplace can become possible Plaintiffs, as they may claim favoritism to the employee engaging in the affair. For example, in the case of *Miller v. Department of Corrections*, the California Supreme Court found that widespread sexual

favoritism was accorded the numerous female employees with whom a prison warden was having sexual affairs, and thus created a case for sexual harassment because it created an atmosphere that was demeaning to women.

Similarly, in the case of *Broderick v. Ruder*, a Federal Court in the District of Columbia found that a female staff attorney at the SEC was subject to a hostile work environment, not due to behavior directed specifically at her, but because other employees benefitted from sexual relationships with their male supervisors.

Some Employers have gone so far as to use what are known as "Cupid Contracts." Such contracts are essentially an informed consent agreement, requiring employees involved in a workplace romance to state in writing that their relationship is consensual. These contracts typically further require the affected employees to confirm that they are aware of the sexual harassment policies of the Employer, as well as its discrimination policies, and agree that they will continue to abide by these policies at all times.

Interestingly, one of the most famous spousal relationships was formed by two individuals working in the same law firm where one lawyer was mentoring the summer law clerk. The mentor happened to be President Barack Obama, and the summer associate was Michelle Obama.

According to a 2012 report from CareerBuilder.com, nearly four out of ten individuals questioned in a recent survey said they have dated a co-worker, 17% reporting they have dated someone at work at least twice in their career. With today's employees spending 160 hours or more each month of their time at work, Employers have come to the realization that consideration of instituting such policies is an issue worth considering.

EEOC Issues Final Age Discrimination Regulations

The EEOC has issued its final Regulations amending its existing Age Discrimination in Employment Act Regulations by addressing the interpretation of two Supreme Court decisions that have recognized disparate impact claims for age discrimination. These new Regulations will become effective April 30, 2012, and these Regulations put the burden on Employers to prove "reasonable factors other than age" as a defense to a disparate impact claim.

Under these EEOC Regulations, Employers will need to be more diligent in examining whether traditional neutral practices have a discriminatory impact on older workers. The subjective decision-making of Employers will be called into question, and will allow the EEOC and Plaintiff lawyers to "second-guess" even routine business decisions affecting older workers.

The EEOC Regulations state than when an Employer attempts to present a defense of a reasonable factor other than age, the Employer must show more than a

"rational basis" to support a factor other than age. The EEOC Regulations emphasize the need for "objective evidence" from an Employer in order to take advantage of the defense of "reasonable factor other than age."

Importantly, the EEOC's Rule states that it will look at the extent to which an Employer took steps to define and apply accurately a factor other than age through "training, instruction, and guidance." Thus, Employers who can show thorough training of its managers on age-related factors will be in a better position upon the filing of a charge of age discrimination with the EEOC.

Although training is not required under the Regulations, it is a key component of efforts to provide a workplace free from discrimination under the language of the Regulations.

The EEOC Regulations interpret the Supreme Court cases on disparate impact to note that Employers may be liable under disparate impact analysis for giving supervisors "unchecked discretion" to engage in subjective decision-making that allows conscious and unconscious age-based stereotypes to affect employment decisions.

Thus, Employers must be careful to avoid letting managers make decisions affecting older workers in a vacuum, and must take efforts to have a coordinated decision-making process that involves Human Resource Directors and labor counsel.

EEOC Attacks Inflexible Attendance Policies

Employers with no-fault absentee policies and inflexible leave policies are at a substantial risk under the Americans With Disabilities Act. The EEOC has been very aggressive on filing against Employers with such inflexible leave policies. In fact, the largest ADA settlement by far was reached within the last year when the EEOC obtained a $20 million dollar settlement with Verizon Communications because of Verizon's no-fault attendance policy. The EEOC disapproved of the Verizon policy that provided room for flexibility when the employee has exhausted the available leave under the no-fault policy.

Under the terms of the settlement agreement, Verizon's attendance policy was modified to provide that excusing an absence as "non-chargeable" may be considered a reasonable accommodation under the ADA.

Thus, Employers that currently have "no-fault attendance policies should consider adding some language to the policy clarifying that non-chargeable, job protected absences will not be counted against the employee under the policies and that employees should inform the Employer if they believe an absence is for a job-protected reason.

The EEOC believes strongly that Employers must conduct individualized assessments regarding employees on leave. In fact, Employers must be careful to

assure that third-party administrators handling any employer's leave programs do not inform employees that they are automatically terminated when the leave comes to an end. Employers must effectuate procedures and systems for doing individualized assessments of employees with disabilities.

In addition, the EEOC reached a $6.2 million dollar settlement with Sears Roebuck & Co. because Sears had an inflexible policy of terminating injured employees who had exhausted their workers' compensation leave. Once again, the EEOC found that such an inflexible policy violated the ADA in that it did not evaluate the employee's individual disability on a case-by-case basis.

In addition, Employers should avoid any type of policy that provides for an automatic termination of employment following any period of leave. Virtually every Federal Appeals Court has recognized that leave can be a reasonable accommodation of the ADA. However, still, some Employers mistakenly believe that an employee has no legal rights after exhausting the FMLA's maximum 12-week leave. If the employee is still disabled under the ADA, and the employee requests an ADA leave, the Employer must grant such an accommodation unless it can demonstrate an undue hardship under the law.

Two-Month Gap Between FMLA Leave and Termination Enough to Avoid Liability Under FMLA

A Federal Court in the case of *Sisk v. Picture People* (8th Cir., 2012) has recently ruled that an employee who took leave for hip surgery could not establish a claim for retaliation under the Family and Medical Leave Act because there was more than a two-month gap between her Employer learning of her leave and her termination of employment. The case demonstrates the old legal phrase that "timing is everything" in that the Plaintiff's only evidence of retaliation under the FMLA was the "temporal proximity" argument trying to connect her termination with her FMLA leave.

The Court concentrated that other than the Plaintiff's claim of coincidental timing, there was no other evidence produced by the Plaintiff to show FMLA interference.

The Court stressed that since the Employer knew of the FMLA leave and the reason for the leave for more than two months, the termination of employment could not be automatically linked to the FMLA leave.

Additionally, the Court held that there was no definitive line on how close the timing between an employee's protected activity and an employer's adverse employment action must be to raise an issue of liability, but the Court clearly found that the two-month interlude did not produce a *prima facie* case of retaliation.

Third Circuit Finds Individual Liability Under the FMLA for a Public Agency Supervisor

In a case of first impression, the U.S. Court of Appeals for the Third Circuit has held that a supervisor at a Pennsylvania Court can be responsible individually for violating a subordinate employee's FMLA rights.

In this case, the Supervisor at the Probation and Parole Office at Lawrence County had recommended the termination of the office manager of the Adult Probation and Parole Office. This employee had filed an action alleging FMLA interference and retaliation from her termination of employment.

The Third Circuit found that the definition of "Employer" under the FMLA can include an individual supervisor. In this case, the supervisor noted that he had to obtain the approval of the Court Administrator and Common Pleas Judge for the termination to take place. However, the Court noted that the supervisor had sufficient control over the employee, since he made a supervisor recommendation to fire the employee, and also had supervised her work and disciplined her performance in the past.

This case has significant implications for any supervisor or human resource director who makes decisions regarding FMLA claims, or makes decisions regarding discipline or termination of employment for an employee who has exercised FMLA rights in the past. The possibility of individual liability should make all supervisors and human resource professionals much more cognizant of the rights and obligations under the FMLA.

Working Near a Bathroom Can Be Reasonable Accommodation Under ADA

In a case decided this year, working near a bathroom can be a reasonable accommodation under the ADA. A Federal Court in Pennsylvania has held that a corrections officer with a gastrointestinal condition that required him to work near a bathroom can proceed on a claim under the ADA. In the case of *Braheny v. Commonwealth of Pennsylvania*, (E.D. Pa., 2012), the corrections officer asked for a job assignment where his post at the corrections institution would be near a bathroom. The accommodation was not given, the employee's attendance record slipped, and he was ultimately terminated.

The Federal Court initially found that the employee was "disabled" under the Americans With Disabilities Act since the elimination of bodily waste is a major life activity. The employee had testified that he had "uncontrollable diarrhea" and that his colitis sometimes necessitated him to go to the bathroom between 30 and 60 times a day, leading to accidents at work.

The Commonwealth asserted that the employee was not able to perform the essential function of his job, that is, the ability to work all posts at the Prison without advance notice, since he could only work at posts near a bathroom.

However, the Court relied on the testimony of the Director of Human Resources for the Prison that the Department of Corrections had a modified duty program for employees and there had been temporary modified duties given in the past that did not require working at all posts.

The Court also concentrated on the fact that the Employer did not sufficiently engage in the "interactive process." When the employee repeatedly asked for accommodations, the Employer did not meet with the employee and merely responded with a letter.

This case emphasizes the need for Employers to promptly and adequately engage in meetings with the employee when there is a request for accommodation in order to satisfy the obligations under the law to engage in the "interactive process." Such meetings should be done on a formalized basis with adequate documentation supporting such meetings to ascertain possible accommodations for the employee.

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