ANDREWS AND BEARD

# EMPLOYMENT LAW UPDATE

*Providing new developments in Employment Law*

Altoona, Pa. August 2014

## *Inside …*



ANDREWS & BEARD
LAW OFFICES

## Employment Implications of Same-Sex Marriage Decision

In the case of *Whitewood v. Wolf*, the United States Federal Court for the Middle District of Pennsylvania declared Pennsylvania's marriage laws to be unconstitutional, thus permitting same-sex marriage to be legal in Pennsylvania. Governor Corbett did not appeal this decision and thus this decision is valid law for the Commonwealth of Pennsylvania.

Judge John Jones in the *Whitewood* decision found that the definition of marriage under Pennsylvania law being a contract between one man and one woman was a violation of the Fourteenth Amendment of the United States Constitution.

In the *Whitewood* decision, Judge Jones ordered that the enforcement of the Pennsylvania marriage laws on the books be prohibited, and he declared specifically that "same-sex couples who seek to marry in Pennsylvania may do so, and already married same-sex couples will be recognized as such in the Commonwealth."

The most immediate impact on Employers pertains to employee benefits. In particular, if an Employer offers its employees and their spouses health care benefits, same-sex married couples would have eligibility for such benefits. A same-sex spouse would be entitled to immediately enroll for health care benefits, even outside an Employer's standard open enrollment period. Federal law provides that a newly-married employee can enroll his or her spouse in the employee's health care coverage within 30 days of the date of the marriage. Therefore, the 30-day time period would start on the date of the marriage for same-sex couples who marry in the State of Pennsylvania.

Further, if a same-sex married couple married in a state other than Pennsylvania, such a marriage would now be recognized in Pennsylvania under the provisions of the *Whitewood* case. Consequently, if an employee produces a valid marriage license from Pennsylvania,

(continued next page)

## Same-Sex Marriage Decision

Continued from page 1

the Employer must recognize a same-sex marriage for spousal benefits for health insurance if the Employer provides spousal benefits.

Additionally, the Employer would need to also recognize a same-sex spouse if a valid marriage license is produced by a same-sex couple from another state that recognizes same-sex marriage as legal in that particular state.

From a legal perspective, it can be expected that a same-sex married couple may question the Employer asking for the production of a valid marriage license from either Pennsylvania or another state that recognizes same-sex marriage. The issue could be raised as to why an Employer may not be requiring marriage certificates for all spouses that are placed on coverage with that Employer. However, at least for the current time, given the recent decision at issue, we believe that an Employer is warranted in requesting proof of a valid marriage license before placing the same-sex spouse onto the Employer's health insurance coverage. But, going forward, Employers should consider a policy that would require all employees producing a valid marriage license before placing a spouse on the Employer's health insurance plan.

Another employment-related issue that is raised by the *Whitewood* decision is the obligation of Employers to provide FMLA leave to an employee who needs to care for a same-sex spouse with a serious health condition. Assuming that the same-sex spouse meets all of the other eligibility criteria under the FMLA, the Employer would need to provide FMLA leave for the same-sex spouse in the same manner that the Employer would provide for a heterosexual spouse.

The FMLA Act and regulations provide that "spouse" shall be defined by the laws of the state in which the employee resides. Thus, since the *Whitewood* decision provides that same-sex couples are permitted to marry in Pennsylvania, same-sex spouses would come under the purview of the FMLA Act and its regulations.

Therefore, Employers in Pennsylvania should be ready to provide FMLA leave for an employee who needs time off to care for his or her lawfully-married spouse with a serious health condition, even if that spouse is of the same sex.

Moreover, the Pennsylvania Workers' Compensation law provides for spousal benefits in the event of the death of a spouse injured in the course of employment. In the event of the death of a same-sex spouse, those Workers' Compensation spousal benefits would extend to the same-sex spouse, assuming that the same-sex couple has a valid marriage license.

# *Telecommuting May Be Reasonable Accommodation Under the Americans With Disabilities Act*

A recent Federal Court decision of the Sixth Circuit at *EEOC v. Ford Motor Company* has ruled that the "workplace" includes more than a brick and mortar location and that telecommuting may be a reasonable accommodation for a disability under the ADA.

In the *Ford* case, the Plaintiff was a resale steel buyer who suffered from severe irritable bowel syndrome which occasionally prevented the Plaintiff from coming to work. The Employer in that case allowed the Plaintiff to try a flex-time telecommuting arrangement to make up for time she was absent from work. However, her work outside of normal business hours proved to be problematic and became a work performance problem. The Plaintiff eventually requested that she be permitted to telecommute on an "as-needed" basis as an accommodation for her disability, and Ford denied this request. The employee was eventually terminated based upon her attendance record and poor job performance.

In its decision, the Sixth Circuit Court of Appeals acknowledged that regular and predictable attendance in the workplace is an essential job function, but ruled that the workplace has now been expanded in its definition, in light of technology..

The Court explained that the "workplace" is anywhere that an employee can perform her job duties. In this case, the Federal Court found that it was not an essential function of the job for the employee to be physically present at the Employer's facility. The Court noted that many of the communications by the employee in this case have been done via conference call, and that only occasional visits to suppliers were required.

The Court in this case found telecommuting to be a reasonable accommodation, but the Court was careful to distinguish telecommuting from flex-time arrangements. The Court made a distinction in noting that an employee working from home on a flex-time schedule may not be reasonable accommodation. Further, this case is clearly based upon the facts of the job in question where it was not essential to be present for significant periods of time at the job site.

The import of this decision shows that Employers may not automatically reject any request for telecommuting as a reasonable accommodation under the ADA. Employers should evaluate requests for telecommuting on a case-by-case basis. The Employer should have an interactive process meeting with the employee whenever there is the potential for accommodation and evaluate the employee's specific job duties and requirements as well as the type of technology that is available for the employee's use.

Employers should be mindful of documenting the interactive process meeting and noting the specific issues covered in any discussion of reasonable accommodations, including telecommuting.

# U.S. Supreme Court Grants Exception to Affordable Care Act Coverage

The United States Supreme Court, in a decision on June 30, 2014, held that the Affordable Care Act cannot be used to mandate Employers to furnish contraception in a group health plan. In the case of *Burrell v. Hobby Lobby Stores*, the U.S. Supreme Court stated that for closely held corporations, such as a family owned corporation like Hobby Lobby, Employers were not mandated to pay for contraceptive coverage as part of a health insurance plan.

It is important to note that the Supreme Court exempted only closely held corporations from covering contraception in these health insurance plans. The Internal Revenue Service has defined a closely-held company as a corporation where more than half of the value of its outstanding stock is directly or indirectly owned by five or fewer individuals at any time during the last half of a tax year. Personal service corporations, for instance, health care and law firms, do not qualify as closely held.

Nevertheless, the U.S. Supreme Court did put a limit on the mandates of the Affordable Care Act by finding that it could not mandate coverage that would be in conflict with the religious beliefs of the closely held owners of a corporation.

# Federal Court Rejects Employee's Age Discrimination Claim in a Refusal to Hire

In a case handled by our office, *Landmesser v. Hazelton Area School District*, the Federal Court of the Middle District of Pennsylvania decided in favor of the Hazelton Area School District where Landmesser alleged age discrimination because he was not hired for an elementary vacancy. Landmesser had qualified for an interview based on his application materials, but was not offered a position. Although the Court agreed that Landmesser may have a prima facie case for age discrimination, the Court found that the Employer gave a legitimate non-discriminatory reason for its actions.

Importantly, the School District delineated the qualifications of each successful candidate and the reasons were documented why these candidates were better qualified for the positions than Landmesser.

The Federal Court found that Landmesser failed to cite any evidence to show that the School District acted with pretext to avoid hiring him.

This case demonstrates the importance of Employers thoroughly documenting its hiring process and retaining all records regarding the hiring process in the event of a legal challenge.

# Failure to Conform With Gender Stereotypes Gives Rise to Discrimination Claim

In a decision decided by the Federal Court in Philadelphia on July 21, 2014, the Court found a basis for sex discrimination based upon an employee's failure to conform with gender stereotypes as to sexual partners and/or gender identity. In the case of *Barrett v. Pennsylvania Steel Company*, Barrett claimed that he had been made fun of and sexually harassed because he did not participate in cursing or engage in crude banter as did his male co-workers from the "shop" portion of the facility. Barrett had alleged that this mockery was a result of his not fitting the male stereotype of being sexually explicit and crude. Barrett cited the harassment, with examples of being told crude jokes and being called "Mary" and "gay."

When the employee complained of this sexual harassment, his supervisor informed him to lock his office door so that shop employees could not enter. However, the Plaintiff stated that after taking this advice, he was further harassed and his office door was nearly broken down.

Shortly before he was fired, Barrett was given a positive performance review by his supervisor. After several workplace incidents, the Plaintiff was fired for "being the common denominator" in many workplace incidents.

The Federal Court found a claim for Barrett in that the harassment was severe and pervasive, and the Employer was negligent in controlling the work conditions in that it made no effort at all to address the sexual harassment complaints. Further, the Court found that Barrett stated a retaliation claim under Title VII of the Civil Rights Act, since after complaining of sexual harassment, not only did the Employer fail to act, but it proceeded to terminate his employment shortly thereafter.

This case is a good example of how not to handle complaints of sexual harassment. When there are negative comments that reflect on gender stereotypes in the workplace and a complaint is made, the Employer must not only immediately investigate, but give discipline and remedy the situation promptly and be sufficiently stringent. This Employer did not investigate, did not take the complaint seriously, and failed to take any action to remedy the complaints of discrimination.

---

# *Last Chance Agreement Prohibiting Continued Restraint on Alcohol and Drug Use Upheld*

The Third Circuit Court of Appeals has recently ruled in favor of an Employer, finding that requiring an employee to enter into a Last Chance Agreement in which he agreed to remain free of drugs and alcohol both during and off work hours was enforceable and did not constitute disability discrimination or a cause of action for a violation of the Family and Medical Leave Act.

In the case of *Ostrowski v. Con-Way Freight,* Ostrowski had been granted FMLA leave previously to undergo rehabilitative treatment for alcoholism. Ostrowski was permitted to return to his prior job with no discipline or change in his wages, hours or working conditions. However, Con-Way Freight required the employee to sign a "Return to Work Agreement," in which he agreed to remain free of drugs and alcohol.

(continued next page)

## Last Chance Agreement

*Continued from page 5*

Within 30 days after signing the Return to Work Agreement, the employee relapsed and was admitted into a rehabilitation program. At that point the Employer discharged the employee.

Ostrowski alleged disability discrimination and FMLA interference. The Court sided with the Employer noting that the Employer's application of the terms of the Return to Work Agreement was not a pretext for discrimination. The Court further explained that the Return to Work Agreement was not a discriminatory agreement simply because employees without such an agreement may be treated more favorably.

The Court further explained that there was no violation of the ADA, since the agreement did not prohibit alcoholics from working for the Employer, it merely prohibited the conduct of drinking alcohol.

Additionally, the Court ruled that there was no violation of the FMLA in that the Employer did not terminate his employment in order to deny him FMLA leave; rather, it was for a violation of the Return to Work Agreement and not his request for leave that triggered his discharge.

This case is helpful to Employers in supporting the right of an Employer to have an employee sign a Last Chance Agreement whenever the employee has had problems with drugs or alcohol abuse. This type of agreement can be enforced to provide for a termination of employment should there be a further relapse into drug abuse or alcohol abuse.

## *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.

If you would like to reach one of our attorneys, they can be reached at the following e-mail addresses:

David Andrews: *dandrews@andrewsbeard.com*
Carl P. Beard: *cbeard@andrewsbeard.com*
Elizabeth Benjamin: *ebenjamin@andrewsbeard.com*
Ronald N. Repak: *rrepak@andrewsbeard.com*
Brendan J. Moran: *bmoran@andrewsbeard.com*

To have someone added to or removed from our e-mail list, please reply to jandrews@andrewsbeard.com.

*Employment Law Update* is published by Andrews and Beard Law Offices.

ANDREWS & BEARD
LAW OFFICES

MAIN OFFICE:
3366 Lynnwood Drive P.O. Box 1311
Altoona, PA 16603-1311
814/943-3304 FAX: 814/943-3430
www.andrewsbeard.com

*Offices also located in Johnstown, Pa.*