

The Employment Brief

Updates in labor and employment law to help your business succeed



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KOLLMAN'S CORNER

Kollman & Saucier P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
P:410-727-4300
F:410-727-4391

to be added to our mailing list or if you have any questions or comments, please

e-mail us at

lmaffei@kollmanlaw.com

EEOC Proposes New ADAAA Regulations

By Eric Paltell and Andreas Lundstedt

The Equal Employment Opportunity Commission ("EEOC") has voted to approve a Notice of Proposed Rulemaking ("NPRM") that would revise the Americans with Disabilities Act ("ADA") regulations to comply with the ADA Amendments Act of 2008 ("ADAAA"). The proposed rules were published in the Federal Register on September 23, 2009, and the public has until November 23, 2009 to provide comments to the EEOC.

The proposed rules would make it easier for employees to meet the definition of disability, which likely will result in an increase in disability discrimination cases. They would shift the focus of an ADA case analysis from whether a person meets the definition of "disability" to whether discrimination has occurred. In doing so, the determination of whether someone is substantially limited in a major life activity should follow a common-sense standard without having to rely on medical or scientific data, and the focus should be on how a major life activity is substantially limited, not what a person can do despite a disability.

The proposed rules are making some significant changes, including broadening interpretations of the terms "disability" and "substantially limits," expanding "major life activities," and adding examples of "major bodily functions." Highlights of major changes include: **Major Life Activities.** "Major life

activities" are now defined as "those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty." The regulations cite the following as examples: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."

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Here Comes The Swine Flu

By Cliff Geiger

We have entered the 2009-2010 flu season, and this time around employers have to deal with the impact of the 2009 H1N1 influenza pandemic. The Centers for Disease Control and Prevention (CDC) has issued guidance for businesses and employers to plan for and respond to the 2009 H1N1 virus. Assuming flu conditions in the coming months are similar to those experienced during the spring and summer of 2009, the CDC's recommendations include: (1) keeping sick workers home until they are free of fever for 24 hours without medications; (2) asking employees who are sick at work to go home; (3) providing employees information on cleaning commonly touched surfaces;

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(4) encouraging employees to get vaccinated; (5) informing employees that some people have a higher risk of complications from flu and encouraging those employees who are at risk to contact their health care provider if they become ill; (6) cancelling travel for employees who have flu like symptoms; (7) planning for essential business functions to continue during periods of increased employee absence; and (8) preparing for the possibility of school dismissals and temporary closures of child care programs.

If the 2009 H1N1 outbreak is more severe than experienced so far this year, then additional measures may be necessary to slow down the spread of the virus. These additional measures include: (1) actively screening employees who come to work for signs of illness; (2) considering alternative work environments for employees at a higher risk of complications from the flu; (3) increasing the physical distance between employees in the workplace; and (4) and cancelling non-essential business travel. These recommendations are designed to reduce the contact between employees by encouraging more teleworking where possible, having fewer face to face meetings, using staggered shifts, and even reassigning at risk employees to positions where they have less contact with coworkers, clients, or customers. The full text of the CDC's guidance can be found at www.cdc.gov/h1n1flu/business/guidance.

The U.S. Equal Employment Opportunity Commission (EEOC) has issued guidance on how employers can adopt the CDC's recommendations in a manner consistent with the Americans with Disabilities Act (ADA). According to the EEOC, the ADA is relevant to pandemic preparation in at least three major ways. First, the ADA regulates disability related inquiries and medical examinations for applicants and employees. Second, the ADA prohibits employers from excluding individuals

with disabilities from the workplace for health or safety reasons unless they pose a direct threat. Third, the ADA requires employers to make reasonable accommodations for individuals with disabilities, unless doing so would pose an undue hardship.

Many of the CDC's recommendations do not implicate the ADA at all. For example, an employer can send employees home if they have flu-like symptoms. Employers also may ask employees who feel ill or call in sick whether they are experiencing flu-like symptoms, as long as this information is treated and kept as a confidential medical record in compliance with the ADA. Employers can ask whether employees were exposed to flu during travel, and may also ask if an employee has visited certain locations that public health officials have identified as warranting several days of quarantine before returning to work, even if the travel was personal. Furthermore, employers can always ask why an employee has been absent from work and when she will return, even if the employer suspects the employee is absent for a medical reason. Similarly, encouraging teleworking and adopting infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, do not implicate the ADA.

Some coping strategies will implicate the ADA. For example, employers may want to survey their employees to identify employees who are at a higher risk of experiencing complications from the flu. Given that those at higher risk of complications include people with compromised immune systems and chronic illnesses, such an inquiry is considered disability-related, because the answer may disclose the existence of a disability. The ADA prohibits this disability-related inquiry unless there is objective evidence that the severity of the illness associated with the pandemic will

cause a direct threat to health or safety of the employee or others. Generally, employers will have to rely on the CDC or state or local health authorities to determine whether the illness is this severe. So far, it is not. The same standard would apply to taking employees' temperatures to determine whether they have a fever. Under the ADA, this would be considered a medical examination that is prohibited unless the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others.

Employers may also want to screen new hires before they bring flu into the workplace. The ADA's rules on medical examinations apply. An employer may require a new entering employee to undergo a post-offer medical examination to determine her general health status, provided that all new entering employees in the same job category are required to do so. But rescinding a job offer just because a medical exam revealed that an individual was at greater risk of complications from the flu (e.g., compromised immune system from a chronic disease) would be risky business. A job offer could not be rescinded unless objective evidence indicated the individual posed a direct threat and a reasonable accommodation (e.g., changing physical work location or restructuring job responsibilities to reduce contact with workers, customers, and clients) could not reduce the risk to health or safety below direct threat level.

With any luck the 2009 H1N1 flu will turn out to be more hype than real, but it never hurts for an employer to know its options.

Arbitrator Reinstates Cursing Employee

By Eric Paltell

As any of our clients who have been through a labor arbitration know, it can be an unpredictable process, fraught with risks for both unions and employers. Indeed, even where an arbitrator finds an employee guilty of the very misconduct for which he was disciplined, arbitrators will not hesitate to reduce the disciplinary penalty. This point was recently brought home to a Safeway store in Danville, California, when an arbitrator reinstated an employee who had repeatedly cursed out her manager. *Safeway, Inc.*, 120 L.A. 1249 (Staudohar 2009).

The case involved a ten year employee of Safeway Store No. 1211 in Danville, California. Two days before Thanksgiving in 2008, the grievant was working at the "quick check" register, handling customers with less than a certain number of items to check out. When the grievant became impatient about her upcoming break, she asked another clerk to cover her register and left to take a restroom break and to purchase a pizza stick and a cup of tea. When she returned to her register, she was told to report to the manager's office.

When she got to the manager's office, her manager explained to her that restroom breaks are normally only to be taken during regular breaks and lunch periods. Grievant responded by asking her manager "were you born a prick?" When her manager told her she was being insubordinate, grievant responded with "well fuck you then." Suffice it to say that Safeway did not find this conduct to be appropriate, and the grievant was discharged.

Since the grievant was represented by United Food and Commercial Workers, the union grieved her termination. The arbitrator found there was no doubt the grievant had used the language at issue, and also found that she was insubordinate. The arbitrator also found that she was not

treated any differently than any other employee, and found that insubordination could be grounds for discipline, up to and including discharge, under the parties' collective bargaining agreement. Nevertheless, the arbitrator reinstated the grievant, finding that her ten year history of good employment and stress caused by the fact that it was the one year anniversary of her father's death excused her behavior. The arbitrator did throw something of a bone to Safeway, finding that she was not entitled to any back pay for the nine month period that she was out of work.

The Safeway decision is a reminder to employers of the risks of taking cases to arbitration. Although an arbitrator may find the employees guilty of misconduct, was treated the same as other employees, and that termination is an allowable penalty under the agreement, an employer may still be required to bring the employee back to work. This is especially true when a relatively long service employee has a good employment history as was the case here. For these reasons, an employer who is considering discharging a longer term unionized employee must take care to build as strong a case as possible before proceeding to arbitration.

Congress May Take Action to Reverse Supreme Court's Ruling In *Gross v. FBL Financial Services, Inc.*

By John Bolesta

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the United States Supreme Court made it tougher for employees to bring mixed motive discrimination claims under the Age Discrimination in Employment Act ("ADEA."). A number of civil rights advocates feel the holding in *Gross* veered far from the original intent of the ADEA, saying that the ruling has "narrowed the

scope of protection intended to be afforded by the Age Discrimination in Employment Act of 1967, and thereby eliminating protection for many individuals whom Congress intended to protect." As a result, legislation has been introduced in Congress to effectively overturn the *Gross* decision. See *Protecting Older Workers Against Discrimination Act*, S. ____, 111th Cong. § 2 (2009).

The *Gross* decision involved the claims of Jack Gross, who had been a claims administration director for FBL Financial Group for several years, and was then reassigned to the position of claims project coordinator when he was 54 years old. This new position, Gross argued, was a demotion because several of his job responsibilities had been reallocated to a younger employee. Gross filed suit in Federal District Court in 2004, alleging that his reassignment to the position of claims project coordinator violated the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." See 29 U.S.C. § 623(a). The District Court instructed the jury that (1) it must return a verdict for Gross if he proved, by a preponderance of the evidence, that his age was a motivating factor in FBL's decision to demote Gross; (2) that age would qualify as a motivating factor if it played a part or a role in FBL's decision to demote him, and (3) the verdict must be for FBL if it has been proved that FBL would have demoted Gross regardless of his age. After the jury returned a verdict for Gross, FBL challenged the jury instructions on appeal. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been instructed under the wrong standard and that Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motive claims.

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Not So Clear Arbitrator Vision

By Pete Saucier

An Area Supervisor for a local government had seen something in a movie that he found so intriguing that he had to share it with co-workers. Apparently, this jokester learned that drinking Visine induces distressful diarrhea. He announced to co-workers that he was going to put some in his boss's coffee. Later, the Area Supervisor told others that he placed the Visine in coffee and gave it to the boss, but the boss did not drink it.

When the employer learned about these acts, it terminated the employment of the Area Supervisor. Teamsters Local 252, his friendly union representative, pursued a grievance on his behalf, taking the matter through to arbitration. Arbitrator Robin A. Romeo "reinstated [the Area Supervisor] with full back pay and benefits . . ."

Arbitrator Romeo reached that conclusion despite finding, "The [Area Supervisor] made a threat of harm against his supervisor. Telling co-workers that you should put Visine in someone's coffee is a threat." But, Romeo said, there was no proof that the Area Supervisor had received copies of the Workplace Violence and Personal Conduct policies. Moreover, although the Area Supervisor's file contained "two prior incidents of misconduct," it also held "certificates of completion of training courses . . ."

So, unless you have clear written direction not to threaten to poison your boss, and as long as you apparently fail at the undertaking, you simply have to pocket a couple of certificates to counterbalance any prior misconduct. Then, a termination becomes a thirteen-month, fully paid vacation.

New ADAAA Regulations

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With respect to the major life activity of "working," to show that a person is substantially limited, he or she only needs to show that the impairment substantially limits his or her ability to perform or to meet the requirements for a "type of work" (for example, driving a forklift). "Type of work" can be determined by looking at the job that the individual has been performing, the nature of work, or job-related requirements. This is an easier standard to meet than the "broad range" or "class" of jobs standard used in the current regulations.

Examples of Disabilities. The proposed regulations provide a list of impairments that will "consistently" meet the definition of disability because of characteristics connected with associated impairments, including deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments that require the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia. This is a major change from prior law and regulations, which required an individualized assessment of the impact of the impairment on the individual.

Duration of the Disability. In a significant change from established caselaw holding that conditions with a duration of six months or less do not constitute a disability, the regulations state that such temporary conditions now may be covered by the ADA. However, the regs do provide that "temporary, non-chronic impairments of short duration with little or no residual effects" are not usually disabilities, and provide examples

of such minor impairments: common cold, seasonal or common influenza, sprained joint, minor and non-chronic gastrointestinal disorders, or broken bone. The commentary to the proposed regulations also provide that episodic conditions, like seasonal allergies, will not be considered disabilities.

Mitigating Measures. Mitigating measures (other than ordinary eyeglasses or contact lenses) can no longer be considered in determining whether an impairment is substantially limiting. Thus, for example, the diabetic whose condition is completely controlled by insulin will be considered disabled if their condition, if untreated, would substantially limit a major life activity. Similarly, an individual who can hear normally with a hearing aide would also be considered disabled. The regulations also confirm that impairments that are episodic or in remission, such as cancer or bipolar disorder, are disabilities if they would be substantially limiting when active.

Regarded As Disabled. The proposed regulations also make a major change in who is disabled because they are "regarded as disabled." Contrary to prior law, it is not required that the employer perceive the individual to be substantially limited in a major life activity. Rather, it is enough if the person is subject to an adverse employment action (e.g., failure to hire, transfer or termination) based on the employer's belief that the employee suffers from an impairment that is not transitory (lasting less than 6 months) and minor. Examples from the proposed regulations of perceiving someone as being disabled are refusing to hire someone because they have a skin-graft scar or a facial tic. Individuals covered only because they are "regarded as disabled" are not entitled to reasonable accommodation.

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Substantially Limits. The proposed regulations place “substantially limits” in the context of comparison to the abilities of “most people in the general population.” According to the regs, “[A]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.” Thus, a person is covered if their ability to perform a single major life activity or bodily function is limited when compared to that of most people in the general population.

Going forward, regardless of what form the rules ultimately take, employers should be aware that common conditions that previously were not considered disabling will soon be considered so. With the new rules, employers’ efforts should be less on trying to challenge an employee’s ability, and more on trying to show they made a good faith effort to accommodate an employee. Feel like voicing your opinion? The EEOC will hold town meetings on the proposed regulations on November 20 in Philadelphia, Chicago, San Francisco, and New Orleans. For a detailed view of the Notice of the Proposed Rulemaking, see: <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>

State Law Discrimination Claims Preempted by Labor Management Relations Act of 1974

By Michael Severino

In *Giant of Md., LLC v. Taylor*, the Maryland Court of Special Appeals (No. 223 September 30, 2009), ruled that the Labor Management Relations Act of 1974, 29 U.S.C. § 185(a), preempted Julia M. Taylor’s state law discrimination and retaliation claims. The Court reversed a

Prince George’s County jury verdict in Taylor’s favor for \$644,750.00.

Taylor went to work for Giant in 1988 as a tractor-trailer driver. During her employment, Taylor was a member of the Teamsters Local Union 639, which entered into a collective bargaining agreement (“CBA”) with Giant. Among other things, the CBA requires Taylor to give Giant at least an hour and a half notice if she is going to be late or miss work. Taylor subsequently violated that rule, and Giant imposed discipline pursuant to the CBA.

In response, Taylor claimed that she had a medical condition that prevented her from providing Giant the requisite notice. Taylor also filed for intermittent leave under the Family Medical Leave Act, which was approved. Because Giant disputed the scope of Taylor’s medical condition, Giant required Taylor to submit to an independent medical examination by a doctor chosen by Giant. Taylor did not present for the IME.

Unhappy with the turn of events and Giant’s demand that she submit to an IME, Taylor filed a charge of race and gender discrimination with the Prince George’s County Human Relations Commission. She asserted that Giant improperly disciplined her for violating the call in requirement, improperly requested her medical records, and improperly ordered her to undergo the IME.

After Taylor filed her charge, Giant reiterated its demand that she undergo the IME and took her off the work schedule pending the results of the IME. Believing that she had been fired, Taylor filed a retaliation charge with the HRC.

Taylor subsequently filed state law discrimination, retaliation, misrepresentation and deceit claims in the Circuit Court for Prince George’s

County. Giant removed the case to federal court, arguing the Taylor’s claims were preempted by the LMRA. The federal court disagreed and remanded the action to state court. After the jury ruled in favor of Taylor on her state law gender discrimination and retaliation claims, Giant appealed based on, among other things, subject matter preemption.

The Court of Special Appeals began its analysis of Giant’s preemption argument by reviewing §301 of the LMRA, which establishes subject matter jurisdiction in the federal courts over employment disputes covered by a collective bargaining agreement. The Court cited what is commonly known as the *Lucas Flour* test from *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)), which states that preemption of state law claims is proper “when resolution of a state law claim is substantially dependent upon analysis of the terms of a [collective bargaining] agreement.”

With this standard in mind, the Court of Special Appeals turned to Taylor’s claim that Giant discriminated by requiring her to undergo an IME and then retaliated against Taylor after she filed her original charge of discrimination. The operative language of the CBA follows:

“Physical, mental or other examinations required by a government body or the Company shall be promptly complied with by all employees, provided, however, the Company shall pay for all such examinations except in the cases of disability such as sickness or industrial disability.”

The Court of Special Appeals found that claims were preempted, relying in part on the fact that the Court would need to look to the CBA to determine if it authorized Giant to require her to submit to an independent medical examination by a doctor chosen by Giant

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INDEPENDENT CONTRACTOR HAS NO WRONGFUL DISCHARGE CLAIM

By Kelly Hoelzer

All employers are familiar with the concept of at-will employment allowing either the employer or employee to end the relationship with or without cause or notice. Many state courts recognize a narrow exception to the at-will relationship – the tort of wrongful discharge. This exception arises only when an employee can prove that he or she was fired in violation of the public policy of the state as set forth in statute, regulation, or case law. Courts are usually reluctant to impose liability for wrongful discharge and do so only in the limited circumstances where the employer requires an employee to commit a crime, prevents an employee from performing a statutory duty, or a statute prohibits termination. Employees pursuing wrongful discharge claims usually do not prevail.

It is surprising, then, that an independent contractor would sue for wrongful discharge. Yet Catherine Spyridakis did just that in Pennsylvania. Spyridakis worked as a part-time, online teaching assistant for CE Credits Online (“CE Credits”), a company providing continuing education and professional development classes for educators. In June 2004, Spyridakis signed an Agreement and Fee Schedule with the company, agreeing that she was an independent contractor, that she would be paid hourly, that she would follow company procedural guidelines, and that she was working at-will.

In 2005, Spyridakis contacted the Pennsylvania unemployment insurance agency regarding her status as an independent contractor. The agency investigated her work status and contacted CE Credits in July 2006. On

August 11, 2006, the company terminated Spyridakis’s services. The agency subsequently determined that Spyridakis was an employee and granted her unemployment benefits. After the agency affirmed the decision to award benefits, CE Credits appealed to the Commonwealth Court of Pennsylvania in 2008. Upon review, the court reversed the agency’s determination, holding that Spyridakis was an independent contractor and, therefore, not entitled to unemployment benefits.

Not satisfied with that result, a few months later, Spyridakis sued CE Credits for wrongful discharge and violations of the Pennsylvania wage payment laws. *See Spyridakis v. Riesling Group Inc. d/b/a CE Credits Online*, Civil Action No. 09-1545, slip op. (E.D. Pa. Oct. 6, 2009). After CE Credits removed the case to federal court, it moved to dismiss her lawsuit, arguing that because she was not an employee, Spyridakis had no wage claim against the company and could bring a claim for wrongful discharge.

The federal court dismissed most of Spyridakis’s claims and remanded her breach of contract claim back to state court. Because the state court already held that Spyridakis was an independent contractor rather than an employee, the federal court ruled that she was precluded from relitigating that issue. As such, the court considered whether Spyridakis could assert a claim for wrongful discharge alleging that her termination violated some public policy of the state.

Spyridakis alleged that she was fired after she contacted the unemployment insurance agency in violation of the public policy supporting her rights to free speech and to petition the government. The court found that Pennsylvania law limits constitutional violations of public policy to just incidents involving state actors. Because CE Credits is a private employer, it could not violate Spyridakis’s constitutional rights by firing her.

The court also rejected Spyridakis’s allegation that her statutory right to unemployment compensation provided public policy grounds for her claim. Spyridakis contacted the agency to inquire about her employment status, not to request unemployment benefits. Because she was not seeking benefits at that time, her statutory rights were not triggered. Her termination for calling the agency did not, therefore, violate any public policy set forth in the unemployment statute.

Nor did her termination violate any vague public policy interest regarding an employer’s efforts to evade federal and state labor and tax laws by classifying independent contractors as employees. *Id.* Because Spyridakis could not identify any clear mandate of public policy violated by her treatment as an independent contractor, her wrongful discharge claim was dismissed.

Significantly, the Court never decided the issue of whether an independent contractor could bring a claim for wrongful discharge under Pennsylvania law. Recognizing that this is a state law issue best left to be decided by a Pennsylvania court, the federal court assumed that an independent contractor could bring a wrongful discharge claim, but nevertheless ruled that Spyridakis had failed to plead a viable cause of action for wrongful discharge. Nevertheless, the court expressed skepticism as to the viability of such a claim, noting the company’s “very strong argument that in view of Pennsylvania’s reluctance to allow employees to assert wrongful discharge claims except in the narrowest of circumstances, there is little reason to extend the tort to apply to independent contractors.”

Congress May Revise Ruling

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On appeal to the Supreme Court, the parties briefed and argued whether an employee in a mixed motive case must provide “direct evidence” that age was the reason for an adverse employment decision in order to shift the burden of persuasion to the employer to demonstrate that it would have made the same decision regardless of the employee’s age. The Supreme Court concluded that a mixed motive jury instruction is never appropriate in ADEA disparate treatment cases, and that the employee always retains the burden of proof to demonstrate the adverse action would not have occurred “but for” the employee’s age. In vacating the appellate court’s decision, Justice Thomas (writing for the majority) looked at the legislative history of Title VII of the Civil Rights Act, where Congress amended the statute to enable a plaintiff to establish discrimination by showing that his or her protected status was merely a motivating factor. In contrast, Justice Thomas wrote, “Congress neglected to add such a provision to the ADEA when it amended Title VII...”. Accordingly, the Court held that “the plaintiff retains the burden of persuasion to establish that age was the “but-for” cause of the employer’s adverse action” in ADEA cases.

Less than four months after the decision, some in Congress have decided to take action to reverse the Gross decision. On October 6, 2009, House and Senate Democrats introduced legislation designed to “restore” the burden-shifting approach to mixed motive ADEA cases. In a clear rebuke of the Supreme Court’s analysis, the Senate bill states that:

“Congress has relied on a long line of court cases holding that language in the [ADEA] ... that is nearly identical to language in title VII of the Civil Rights

Act of 1964 would be interpreted consistently with judicial interpretations of title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991. The Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents.”

Both bills would insert language into the ADEA requiring the employee to show only that age was a “motivating factor” for the decision. This change would ensure that the ADEA’s language parallels that of Title VII, and would place the burden of persuasion back onto the employer after the employee demonstrates—by either direct or circumstantial evidence—that age was a factor in an adverse employment decision. Notably, the proposed legislation (like the Lily Ledbetter Fair Pay Act) goes well beyond the case it is aimed at reversing, as it clarifies that this “motivating factor” framework applies not only to the ADEA but “any Federal law forbidding employment discrimination.” See *Protecting Older Workers Against Discrimination Act*, S. ____, 111th Cong. § 3 (2009).

Discrimination Claim Preempted

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The Court of Special Appeals also ruled that the federal court’s decision denying Giant’s removal based on §301 preemption does not bind the state court because the federal court’s review was limited to the four corners of Taylor’s complaint. In contrast, the Court of Special Appeals had the full trial court record before it, including evidence introduced by the parties regarding the need to interpret the CBA.

The *Taylor* decision is unusual in that state courts are far less likely to decide labor law preemption issues than federal courts. What makes this case even more unusual is that the state court decided the preemption issue differently than the federal court. It provides encouragement to Maryland employers who find themselves presented with a labor preemption issue in a state court case, and may even give employers and their counsel reason not to remove a case to federal court.

INDEFINITE LEAVE IS NOT A REASONABLE ACCOMODATION

By Kelly Hoelzer

When an employee becomes disabled, as defined under the ADA, her employer is expected to make reasonable accommodations for her disability if she is otherwise qualified to perform the essential functions of her job. Employers are often faced with the question of whether they must give employees an indefinite leave of absence as a reasonable accommodation. A recent federal court decision confirms that the answer to that question is “no.”

Ana Cortez worked as a senior IT technologist for Raytheon and went out on medical leave in 2005 due to complications with her pregnancy. After she gave birth in December 2005, Cortez did not return to work as she had planned in February 2006. Instead, Cortez continued her medical leave due to her post-partum depression and a variety of other physical problems. Raytheon extended her medical leave six times until late 2006. Cortez received long-term disability benefits during that time.

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In September 2006, the LTD insurance carrier determined that Cortez was no longer eligible for benefits because there was no indication of any medical condition that prevented her from working. After the carrier told Raytheon about terminating Cortez's benefits, the company sent her a letter requesting her to return to work because she had exhausted her FMLA leave and no longer had medical certification of her need for LTD benefits. Cortez told the company that her doctor would not release her to return to work at that time because he wanted to monitor her progress for awhile, but that she might be able to come back a few months later. Cortez also inquired about telecommuting, staying indefinitely on medical leave, or taking educational leave. When Cortez ultimately failed to return to work as requested, she was fired.

Cortez sued for disability discrimination under the ADA. The court found that Cortez was not a qualified individual with a disability because she could not meet one of the essential functions of her job – i.e., coming into work. The court also ruled that Cortez essentially wanted "open-ended leave," which was not a reasonable accommodation. The court granted summary judgment in favor of Raytheon. (*Cortez v. Raytheon Co.*, No. 3:08-cv-00801-K (N.D. Tex. Oct. 1, 2009).

The Cortez decision confirms that an employer can require an employee on medical leave to provide an expected return to work date. Therefore, when presented with an employee whose doctor states only that the employee will be reevaluated at some future time but does not provide an expected date of return, the employer may be able to deny the additional leave without running afoul of the ADA.

Kollman's Corner by Frank Kollman

Government Hates Exercising Judgment

Discretion is a two-edged sword. If a person has good judgment, you want him or her to exercise discretion. If a person has bad judgment or is dishonest, discretion can be abused.

In criminal matters, federal court judges have less discretion than state court judges. There are sentencing guidelines in federal criminal matters that hamper judges from using discretion to reduce sentences. Many times, the Congress or a state legislature require judges to hand down certain sentences and exercise no discretion. For example, "three-strike" laws generally require tough sentences for repeat offenders. But do we really want to put all these people in jail for twenty years?

While we want judges to recognize that not all criminals are the same, we do not want judges putting criminals on the street too early because they are soft on crime. Discretion is therefore good or bad, depending on how one feels about its exercise. A good judge exercises discretion to give a fair result, not act arbitrarily. I want a judge to exercise

judgment, not blindly apply the law in ways that have ridiculous results.

Unfortunately, government does not like to exercise discretion. Take your average OSHA inspector. He looks at his rule book and a condition he finds in the workplace and decides, not whether the condition is safe, but whether the condition violates the rule. Discretion has nothing to do with it.

In labor and employment matters, discretion becomes a serious problem for employers. Let's say an employer decides that an employee does not deserve discipline because he has good character and there is a good reason for the employee's lapse. A court will, however, allow a jury to decide whether the employer actually exercised good judgment or was engaging in unlawful discrimination. The process is infuriating. Good judgment becomes a bad decision in the court room. Better to treat all employees the same, no matter how different individual employees are.

Government likes to regulate behavior without regard to good reasons for exceptions. Government does not want employers and companies to exercise good judgment. Government wants employers and companies to comply with its laws, even when compliance runs counter to commonsense.

This is especially troublesome because government is reactive, not proactive. Government would rather outlaw behavior than deal with the nuances. Plenty of times, it would make more sense to do nothing than enact a law that eliminates discretion and good judgment, whether by private individuals, judges, juries, or government officials.