The Employment Brief

Updates in labor and employment law to help your business succeed

CONTENTS

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Maryland Court Holds Disabled Employee May Be Entitled to Indefinite Leave of Absence

By Randi Klein Hyatt

In late November, the Maryland Court of Special Appeals (the state's intermediate appellate court) held that an employee who provided a doctor's note to his employer advising that he would need to be out of work "indefinitely" was not, as a matter of law, unqualified for the job.

In Hawkins v. Rockville Printing and Graphics, 2009 WL 4043349 (Md. Ct. Spec. App. Nov. 24, 2009), the plaintiff, Glenn Hawkins, brought suit under the Montgomery County Human Rights Act (MCHRA) against Rockville Printing & Graphics, Inc., (RPG) and Rockville Color, LLC (RC) for alleged disability discrimination. Hawkins worked for RPG as a pressman for nearly twenty years. He underwent back surgery in August 2003 and returned to work in March 2004. When he returned, he was "medically restricted from operating heavy machinery." For more than two years, RPG placed Hawkins in a light duty position or provided him part-time work to accommodate his medical restriction.

In late August 2006, Hawkins provided two doctor's note to RPG in which his doctor recommended that he be "off work on a temporary basis mostly because of the psychological stress that [he] was suffering from [his] employer" and also that he was "advised to remain off work for an indefinite period" for multiple medical and psychological problems. According to Hawkins, his leave was temporary, and he was instructed by his doctor to return to work when he felt "reasonably able to do so."

On August 30, 2006, RPG notified all of its employees that it was selling its assets the next day, and that RC would consider hiring RPG employees that filled out an employment application by September 1, 2006. As this process occurred while Hawkins was out on leave, Hawkins called and spoke with his manager and the Human Resources Director (both now working for RC), who both advised Hawkins that he would not be offered a job at RC.

(continued on page 4)

Employment Cases Figure Prominently in Supreme Court's Docket

By John Bolesta

The Supreme Court of the United States has recently focused much of its attention on employment related cases, and this term has been no exception. Of note is one case that may be heard by the Court in 2010, as it addresses an issue that is relatively common and carries potentially significant consequences for employers.

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. In Thompson v. North American Stainless, LP (docketed as 09-291), the Court is faced

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with the issue of whether section 704(a) forbids an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity. If so, the Court must decide whether that prohibition may be enforced in a civil action brought by the third party victim. Although certiorari is still pending, the Court has requested that the Solicitor General file a brief expressing the views of the United States, making it more likely than not that the Court will hear the case.

In Thompson, the 6th Circuit Court of Appeals (in a 10 to 6 decision) decided that Title VII does not create a cause of action for third-party retaliation for persons who did not themselves engage in protect activity. Eric Thompson claimed he was fired because his fiancé filed an EEOC charge. From February 1997 through March 2003, Thompson worked as a metallurgical engineer for North American Stainless, LP, the owner and operator of a stainless steel manufacturing facility in Carroll County, Kentucky. Thompson met Miriam Regalado, currently his wife, when she was hired by the employer in 2000, and the couple began dating shortly thereafter. At the time of Thompson's termination, he and Regalado were engaged to be married, and their relationship was common knowledge at North American Stainless. According to the complaint, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging that her supervisors discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, North American Stainless terminated Thompson's employment.

In his complaint, Thompson alleged that he was terminated in retaliation for his then-fiancé's EEOC charge, while North American Stainless contended that performance-based reasons supported the plaintiff's termination. Thompson sued the employer for violation of Title VII alleging retaliatory discharge based on the protected activity of Thompson's fiancée, a co-worker. The trial court granted the employer's motion for summary judgment. The 6th Circuit affirmed. The court described the sole issue as whether section 704(a) of Title VII created a cause of action for third-party retaliation for persons who did not engage in protect activity.

Because Thompson did not allege that he himself engaged in any statutorily protected activity (i.e., he did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation), the 6th Circuit found by the plain language of the statute that Thompson was not included in the class of persons for whom Congress created a retaliation cause of action.

Should certiorari be granted, many observers feel that the Court's current composition will produce a result favorable to Thompson's employer, i.e., that Thompson will be adjudged without standing to bring a retaliation cause of action. In light of the current composition of Congress, whose members have forced several quick legislative reversals of the Supreme Court's employment decisions (both in Gross and Ledbetter, resulting in far more expansive protections for employees), it is questionable whether such a narrow reading of Title VII will last for very long.

Pharmacist Who Breaks the Law Gets His Job Back

By Kelly Hoelzer

Employment disputes involving union employees often end up in arbitration, sometimes with questionable results. Because arbitration is encouraged as an effective and less costly method of dispute resolution, courts are reluctant to vacate an arbitration award – even where the arbitration decision is legally or factually incorrect. Not surprisingly, there are cases where judicial deference to an arbitrator's findings creates a quandary for an employer. The situation raised in Medco Health Solutions of Columbus West, Ltd. v. The Ass'n of Managed Care Pharmacists, Case No. 2:08-cv-1181, 187 LRRM 2618 (BNA) (S.D. Ohio Nov. 13, 2009) is one such case.

Medco Health Solutions ("Medco") is a large mail order pharmacy in Ohio, processing about 380,000 patient orders per week. In March 2007, one of its pharmacists, Brian Scott, spoke to a patient on the telephone about an order the patient sent in without the required prescription. Scott then falsely documented on the order form that the patient's physician had issued a prescription for the drug requested. Scott's falsification of the patient order violated Ohio civil and criminal laws. When his supervisor asked Scott about it, he lied and stated that he had talked to the doctor personally. As a result of Scott's unlawful and unethical conduct, Medco fired him.

Scott's union filed a grievance protesting his termination, which ultimately ended up in arbitration before Floyd D. Weatherspoon, a law professor. Weatherspoon found that Scott was terminated without just cause and reduced his penalty to a seventeen month unpaid suspension.

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Weatherspoon's reasoning was that, even though Scott violated state law (putting his employer at substantial risk of liability), he did not act maliciously or with reckless disregard for the patient's safety and did not deserve to be fired.

Medco petitioned in federal court to vacate the arbitration award on the grounds that reinstating the pharmacist would expose the company to possible liability for any future misconduct and force it to risk compromising public safety in violation of public policy. Following the deferential standard in favor of enforcement of arbitration awards, the court disagreed. The court noted that the real issue was whether the arbitrator's decision to convert the termination to a 17 month suspension violated public policy. Because the arbitration award punished Scott, though less severely, and did not condone his behavior, the court refused to vacate the award on the grounds that it violated public policy. So, even though he consciously violated the law, Scott got his job back.

Arbitration Follies

By Pete Saucier

An employee of Santa Cruz County, California, whose name is not available, had been counseled without formal discipline about smelling like alcohol. The sanitation truck driver came to work with indicia of drinking on the job. Her charitable supervisor told the employee that she should get help, but he did not give the employee a disciplinary reprimand.

Later, the employee began drinking vodka when she reported for work at 5:00 a.m. on a workday, and continued drinking from a flask throughout the day. By the end of the day, the employee, who drove her truck all day, ending with a fender-bender accident, "smelled of alcohol, had bloodshot eyes, slurred speech, and staggered when she walked." Her blood alcohol level was 0.20. Santa Cruz fired her, after which her union, SEIU, dutifully brought the matter to arbitration.

Arbitrator Paul D. Staudohar, whose name is available, ruled that the drunk truck driver was entitled to a "one-time exception." The earlier counseling was too gentle to count as an exception. According to Staudohar, "[T]he county did not have just cause to discharge [the driver]." Remarkable!

Court Grants Summary Judgment in Racial Discrimination Claim Based on Employer Remedial Action

By Michael Severino

In Griffin v. Harrisburg Property Services, Inc., the U.S. District Court for the Middle District of Pennsylvania granted summary judgment in favor of Harrisburg Property Services (HPS) based on actions it took in response to claims of racial harassment from Rasheen Griffin, one of its employees. This decision emphasizes how an employer's response to impermissible employee behavior is often more important than the actual behavior being complained about.

Rasheen Griffin, who is African-American, was employed by HPS as a security officer. During the course of his employment, Griffin was supervised by Robert Kimble, who is Caucasian. Griffin alleged that Kimble made two racially offensive comments to him in June and August 2007, and that Kimble sent him a racially offensive text message in October 2007.

Shortly after receiving the text message, Griffin filed a complaint with Carol Rossi, HPS' Vice President of Human Relations. Three days after Griffin filed his complaint, Rossi directed Anne Simmons, HPS' Human Relations Manager, to investigate the allegations. Simmons met with Griffin, who requested, and was granted, a request to transfer to another property so that he would not be supervised by Kimble. Griffin also raised other racially based complaints. HPS investigated these other complaints, interviewing Kimble and at least six other employees. HPS thereafter issued Kimble a final warning and conducted an in-house diversity training session to educate its staff.

In September 2008, Griffin filed a complaint alleging unlawful racial harassment and discrimination in violation of Title VII of the Civil Rights Act and 42 U.S.C. § 1981. The Court acknowledged that Griffin produced evidence that he suffered from severe or pervasive harassment due to his race, as required to prove liability. However, Griffin also needed to show that HPS was liable for the hostile work environment created by its employee, Kimble. Employer liability is not automatic. Here, HPS took immediate steps to stop Kimble's harassment. HPS investigated all of Griffin's claims, transferred him to a different location, interviewed several employees, issued Kimble a final warning, and conducted an in-house training session. The Court ruled that these steps were reasonably designed to prevent further instances of harassment by Kimble and, therefore, HPS could not be liable for Kimble's acts.

Employers should take some measure of comfort from the fact that if a business takes reasonable, thorough and prompt steps to remedy harassment, it can often avoid the added burdens of trial and potential damages.

Reminder to Maryland Employers on Direct Deposit and Debit Card Pay

By Darrell Van Deusen

Employers, and most employees, recognize the benefit of foregoing a manual paycheck in favor of direct deposit or debit cards. But, it's easy to forget that a Maryland employer cannot make direct deposit or debit card mandatory.

In an opinion letter issued in February 1994 (79 Op. Att'y 340), Maryland's Attorney General stated that, because Maryland Wage law provides an employee must authorize the direct deposit (and now a debit card), an employer cannot demand employees take their pay that way, since you cannot penalize an employee for refusing to authorize the use of direct deposit or debit card.

Maryland's Wage Payment & Collection Law (Md. Code Ann. Lab. & Emply. § 3-502) provides (emphasis added):

(c) Each employer shall pay a wage:
(1) in United States currency; or
(2) by a check that, on demand, is convertible at face value into United States currency.

(d) . . .
(2) An employer may not print or cause to be printed an employee's Social Security number on the employee's wage payment check, an attachment to an employee's wage payment check, a notice of direct deposit of an employee's wage, or a notice of credit of an employee's wage to a debit card or card account.

(e) This section does not prohibit the:
(1) direct deposit of the wage of an employee into a personal bank account of the employee in accordance with an authorization of the employee; or
(2) credit of the wage of an employee to a debit card or card account from which the employee is able to access the funds through withdrawal, purchase, or transfer if:
(i) authorized by the employee; and
(ii) any fees applicable to the debit card or card account are disclosed to the employee in writing in at least 12 point font.

Indefinite Leave

(continued from page 1)

Hawkins thereafter sued both RPG and RC in the Circuit Court for Montgomery County, Maryland for various disability discrimination claims. With respect to RC, Hawkins claimed a discriminatory failure to hire. RC countered that on the date that RC began operations and hiring its workforce, Hawkins was medically unable to work, and therefore, was not a qualified individual with a disability protected by the MCHRA. The trial court agreed with RC and entered summary judgment in its favor, finding that an employee who could not provide a definite return-to-work date was not a "qualified individual with a disability" as a matter of law, and, therefore, not protected under the MCHRA. Hawkins appealed.

In reversing and remanding the case for a jury trial, the Court of Special Appeals held that there was a dispute of material fact as to whether Hawkins was a "qualified individual with a disability," even though his doctor's note stated that he should be off work for an "indefinite" period of time and he had not been released by his doctor to return to work. Interpreting the facts in the light most favorable to Hawkins, the Court of Special Appeals determined that his "indefinite" absence did not necessarily mean that he would not be able to attend work in a reasonably regular manner or that his absence would be for an extended period of time. The Court so ruled because Hawkins was advised by his doctor that he should return whenever he felt ready (and therefore a medical release was not necessary), and Hawkins had testified in his deposition that he would have been ready to return to work in early September 2006. Thus, the Court concluded, because Hawkins was denied the opportunity to apply, it was error to grant summary judgment.

Employers presented with an "indefinite" (or less than definite) statement of an employee's need for leave must proceed carefully before taking adverse employment action. As this case illustrates, it is very simple for an employee (and/or his doctor) to testify that the employee would be ready to return to work in the near future (or some other reasonable time period), and therefore, possibly be entitled to additional leave as a reasonable accommodation. As with all disability claims involving reasonable accommodations, a documented interactive dialogue is essential in order to avoid discrimination claims or, as the case may be, defend against them.

The ADA and Medical Exams

By Cliff Geiger

The Americans with Disabilities Act ("ADA") prohibits employers from making disability-related inquiries or requiring medical examinations unless they are job-related and consistent with business necessity. Given these restrictions, employers frequently want to know what they can do when they believe a medical condition may be impairing an employee's ability to perform his or her job, or that an employee poses a safety threat because of a medical condition.

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In most cases, the short answer is that an employer may make disability-related inquiries or require a medical exam if the need to do so is supported by individualized, objective, and reliable information. After that, just be careful the inquiry or demand is no broader than it needs to be.

According to the EEOC, certain procedures are not considered medical examinations, so those can be carved out of consideration. These procedures include: (a) tests to determine the current illegal use of drugs; (b) physical agility tests or physical fitness tests; (c) tests that evaluate the ability to perform actual job functions, such as reading labels or distinguishing objects; (d) psychological tests that measure personality traits such as honesty, preferences, and habits; and (e) polygraph tests. However, it may not be that easy to distinguish a physical fitness test from a "medical examination." For example, a few months ago the U.S. Court of Appeals for the Ninth Circuit ruled that a Physical Capacity Evaluation ("PCE"), which an employer conducted before an employee could return to work from medical leave, was a medical exam. Indergard v. Georgia-Pacific Corp., 582 F. 3d 1049 (9th Cir, 2009). The ruling was based, in part, on the type of information that was collected and reported to the employer, which included blood pressure, heart rate, and other physiological measurements. The court believed this went beyond mere questioning whether the employee was capable of performing the certain job functions upon a return from medical leave.

Now let's address those situations where something with an employee appears off, and it could be related to a medical condition. An employer may require the employee to undergo a medical exam when it has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition, or (2) an employee will pose a direct threat (i.e., a significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) due to a medical condition. An employer may reach this conclusion several ways. The employer may know about an employee's medical condition, observe performance problems that could be traced to a medical condition, or even be given information by credible third parties.

Some of these circumstances are illustrated by James v. Goodyear Tire & Rubber Co., 6th Cir., No. 08-6332 (unpublished opinion 12/3/09). Between 1987 and 2004, Paul James worked as a banbury operator in a tire plant. The work environment was industrial, and the position required physical strength and dexterity. Early in his employment, James was diagnosed with progressive multiple sclerosis (MS). James initially performed his job without difficulty, but by 2003 the MS. Symptoms had worsened. In 2004, James experienced a number of physical difficulties attributable to the MS and the medications he took for MS. He held onto machinery for support when walking stairs, and coworkers drove him to and from his work station. Coworkers also helped James perform tasks that required climbing stairs or ladders.

Both union and employer representatives observed James working with "extreme difficulty" and expressed safety concerns. Goodyear eventually told James that it wanted him to take a functional capacity evaluation (FCE) to determine whether he could continue to work in his position as a banbury operator. The union advised James that if he failed the FCE, Goodyear would most likely terminate his employment. The union advised James that rather than take the FCE, he could retire for medical reasons and receive disability benefits. James chose to retire.

James later sued under the ADA. The parties agreed that James was disabled, and the only issue presented was whether James suffered an adverse employment action. The court determined that a valid demand to submit to an FCE cannot be an adverse employment action, and that Goodyear's demand was valid because there was evidence sufficient for a reasonable person to doubt whether James could perform his job without creating a direct safety threat. The court did not address the scope of the FCE and whether it was job-related and consistent with business necessity because James, unlike Indergard, did not actually take the FCE.

When determining whether to require an employee to take a medical exam, the key to compliance is to make an individualized assessment based on objective evidence. If the medical exam is warranted, it should be no broader than necessary to determine whether the employee can perform the essential functions of the job or poses a direct threat.

Nose Rings On The Sandwich Line

By Pete Saucier

Joseph Papin devoted his time and fortune to establishing two Subway franchises in New Smyrna Beach, Florida. That required Papin to subscribe to a set of duties and responsibilities enforced by Doctor Associates, Inc. (Doctor), the owner-franchisor of Subway. In December 2005, Papin hired Hawwah Santiago as a "Sandwich Artist." Santiago is a practicing Nuwaubian. She wore a nose ring, proclaiming that it is part of her religious practice to wear a nose ring.

Doctor zealously guards its marketing image and prides itself on cleanliness standards. To that end, it employs contractors to patrol franchises seeking out violations of policy. One such policy forbids Sandwich Artists, and others on the food line, from wearing facial jewelry. On one compliance visit, the inspector discovered Santiago's nose ring. Doctor told Papin that he was out of compliance with his franchise agreement.

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A second inspection and notice followed the next month. Papin stood to lose his cherished Subway shops if Santiago continued wearing the Nuwaubian nose ring. Naturally, Papin asked Santiago to remove the nose ring. She refused.

Hoping to retain Santiago, who was otherwise an exemplary employee, Papin offered her alternative choices: (1) cover the nose ring with a bandage or similar protection; or (2) leave the store whenever the compliance patrol was seen arriving. Santiago rejected both options. Papin terminated Santiago's employment "because she refused to remove her nose ring and not for any performance-related or other reason."

Santiago filed a charge of discrimination with the Equal Employment Opportunity Commission, which found reasonable cause to believe that Santiago had been discriminated against because of her religion. After the case failed to resolve in mediation, the EEOC brought suit on behalf of Santiago.

The essence of the defense was that Santiago had been offered reasonable accommodations, and that she had not cooperated in an interactive process to address the conflict. Allowing Santiago to display her nose ring, the defendants argued, caused undue hardship. The ban on facial jewelry was directed at protecting sanitation on the sandwich line, Doctor asserted.

The outcome at trial was: "The jury returned a verdict finding that Santiago did not wear the nose ring because of a sincerely held religious belief, and that finding was dispositive of the religious accommodation claim." Nuwaubianism's reputation as a Black Supremacist religion may have played a role in that determination.

Despite having unambiguously lost the jury trial concerning Santiago, the EEOC returned to the court to request an injunction and punitive damages. The EEOC believed that "routine efforts to verify the religious practices of Subway employees in considering their requests for uniform and jewelry waivers entitle it to injunctive relief and punitive damages."

The court disposed of both claims. First, absent a finding of discrimination against some person, punitive damages are not available. The EEOC lost its case on behalf of Santiago, and there was no evidence of discrimination against anyone else. Second, the court held that inquiry into the basis for a religious belief need not be enjoined. The court wrote:

"Indeed, as a matter of common sense, an employer must be permitted some inquiry into the purported beliefs of an employee before the duty to accommodate arises. . . . When a practice is not obviously based on a religious belief, an employee should expect inquiry by an employer asked to accommodate the practice."

Cases of this type promise to continue. For example, now pending in Texas is a case concerning the alleged right of a federal employee to bring into a federal building a kirpan (a ceremonial knife) as part of her religious practice.

Two important lessons emerge from the Papin cases. The first one is good advice at all times -- be honest and consistent. Second, contrary to the position adopted by the EEOC in the second phase of the Papin cases, it is prudent to seek documentation and understanding of peculiar or unusual religious practices. Seeking information in order to determine whether a reasonable accommodation is possible has been long accepted for disability cases. That principle extends to religion cases.

Kollman's Corner

By Frank Kollman

When I give seminars to employers, I frequently make the point that there are no secrets in the workplace. If more than two people know something in the workplace, by the end of the week, almost everyone will know (except for my partner Eric Paltell, but that is a story for another day). Of course, the last person to know is the boss, but that's because no one talks to the boss unless he or she has to do so.

As far as I know, Tiger Woods has never attended one of my seminars. Too bad for Tiger, because he might have avoided the mess he is in if he had. Tiger apparently never learned that secrets will remain secrets only if they are between one person and a dead man. [I think Ben Franklin said something to that effect.] I am not suggesting that he should have committed a crime to keep his secrets, but he should have been aware that people figure out things. In the workplace, employees figure things out.

Sometimes, however, employees get things wrong. So, employers must engage in rumor control to prevent employees from getting the wrong idea. Perhaps Tiger should have anticipated the questions his wife would ask if she noticed a text message on his cell phone that was more than "what time is our tee time tomorrow?" Of course, one wonders how a guy like Tiger cannot afford a couple of cell phones, especially if he could use one for business and one for pleasure (and what in the world was he thinking when he left a voicemail that starts with "Hey, this is Tiger…"?)

Finally, I agree that Tiger will eventually get through this, provided he does not insult the intelligence of his public (it may be too late to save the family). In the workplace, truth tends to be the best strategy. It is easier to explain bad times than to explain lies about good times. Better yet, don't give yourself a reason to lie.