The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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OSHA Penalties to Worsen

By Frank Kollman

While the current administration has not been successful in getting its labor agenda passed by Congress, its appointees at the Department of Labor have been gearing up to terrorize their favorite target: employers. The Occupational Safety and Health Administration ("OSHA") is no exception.

Recently, OSHA announced so-called administrative changes to the way it assesses penalties for safety violations. Among the biggest change is an increase in the number of years OSHA will go back to determine if a more costly "repeat" citation is warranted, namely, from three years to five. OSHA will also go back five years to determine if the employer's history calls for increased penalties for current violations.

In Maryland and Virginia, OSHA regulations are enforced by state agencies, MOSH and VOSH, and while these agencies have some ability to run their own shows, they are subject to review and scrutiny by OSHA and the Department of Labor. In fact, there are rumors afoot that OSHA and the DOL – led by anti-employer labor unions – will take harsher stands in states where safety is considered a joint effort, not a government crusade to assess and collect penalties.

OSHA has been around now for more than 40 years, and in that time, it has not responded to legitimate criticism about the way it does business. Many years ago, Philip Howard in his book "The Death of Commonsense" took OSHA to task for issuing regulations designed to eliminate judgment and discretion by OSHA inspectors. Rather than allowing a trained safety inspector to evaluate a condition to determine if it is safe or if there are alternate methods of doing the task, OSHA tells safety inspectors what the conditions have to be to be in compliance with safety regulations.

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Facebook Firings: The NLRB Does Not "Like"

By Randi Klein Hyatt

Some of you may recall the story of Heather Armstrong, the first person to get "dooced" (fired for blogging about her employer). The word "dooce" originated from Ms. Armstrong's personal blog: www.dooce.com. Per my recent Wikipedia search on Ms. Armstrong, in 2002, "Armstrong ignited a fierce debate about privacy issues when she was allegedly fired from her job as a web designer and graphic artist because she had written satirical accounts of her experiences at a dot-com startup on her personal blog, dooce.com. Ms. Armstrong did not challenge her termination and has refrained from identifying her place of employment in interviews. Wikipedia claims that urbandictionary.com defines the term "dooced" as "getting fired for something you've written on your website."

While there have been countless stories of other workers getting "dooced," it was not until just recently that the

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IS AN ASTHMATIC TRIATHLETE DISABLED UNDER THE ADA?

By Kelly Hoelzer

Terry Latham worked as a substitute teacher for the Albuquerque Public School ("APS") system for several years. Latham had chronic asthma since childhood. Despite her condition, each year Latham regularly trained for and participated in several Olympic-distance triathlons, both domestic and international.

In March 2008, APS learned that Latham took a therapy dog, Bandit, with her during teaching assignments. APS asked Latham to leave Bandit at home, and she responded with a formal request for accommodation pursuant to the ADA. Latham claimed that she had stress-induced asthma with flare-ups often triggered by emotional issues. According to Latham, she needed to bring Bandit to work because he could warn her of an impending asthma attack, fetch her medication and inhaler, and dial "9-1-1" for help. Latham also submitted notes from her doctor and psychiatrist stating that she could perform all the essential functions of the teaching job with the help of a "service" dog.

As required under the ADA, the school system engaged in the interactive process with Latham to determine whether she was, in fact, disabled and the feasibility of her requested accommodation. Because Latham's doctor did not specify the severity of her condition or her need for accommodation, APS had its physician consultant review Latham's medical records. Based on the records, the consultant concluded that Latham had the "mildest physiological category of pulmonary impairment" with no medical necessity for a service or therapy dog. His conclusion, in part, was based on the fact that Latham never brought Bandit to the many triathlons in which she competed and was apparently able to engage in vigorous competition without the dog's assistance.

After consideration of the consultant's findings, the school system denied Latham's request for accommodation. Though Latham continued to work for APS, she sued for disability discrimination under the ADA and the relevant state human relations act. *Latham v. Bd. of Educ. of the Albuquerque Public Schools*, No. CV-09-0643, 2010 WL 4137537 (D. N.M. Sept. 21, 2010).

A federal court dismissed Latham's claim, finding that her asthma was not a disability within the meaning of the ADA. Latham claimed that her asthma met the definition of a disability under the Act because she was substantially limited in the major life activity of breathing. The court disagreed, noting that while Latham's condition was chronic, it was never diagnosed as severe. Latham had no evidence, other than her doctor's note, to show the nature and severity of her asthma.

In the court's view, Latham was required to do more than present her medical diagnosis – she also needed to explain through her own experiences how her impairment limited her ability to breathe. This she failed to do, particularly in light of her regular participation in triathlons and duathlons requiring considerable athletic training and endurance. Not surprisingly, the court found that an individual with sufficient lung capacity to compete in multi-sport races was not disabled to the point that her asthma rose to the level of a federally protected disability.

EMPLOYEE REQUIRED TO FOLLOW CALL-IN POLICY WHILE ON LEAVE

By Darrell Van Deusen

The FMLA provides job protection for qualified employees who need time off from work for their own serious health condition or that of a family member, and for other specific reasons. It is illegal for an employer to interfere with an employee's exercise of her FMLA rights. But what about the employee who fails to follow company policy regarding calling in daily while absent on FMLA leave? Does discipline or termination in such a case constitute interference?

According to the Eighth Circuit, it does not. The appellate court recently held that an employee who was fired for not complying with the company's policy requiring employees to call in daily could not proceed with her FMLA interference claim. *Thompson v. CenturyTel of Cent. Ark. LLC*, 2010 U.S. App. LEXIS 24796 (8th Cir. December 3, 2010), affirming 2009 U.S. Dist. LEXIS 93842 (E.D. Ark. 2009).

Loretta Thompson worked at CenturyTel. The company's employee handbook had a "call-in" policy that required employees to call in to a supervisor each day during a period of absence. An employee who failed to call in for three consecutive workdays or three workdays during a 12-month period would be deemed to have voluntarily quit. When Thompson took FMLA leave for about one month in 2006, she did not call in daily and received a verbal warning upon her return to work. She was advised that employees on FMLA leave could call in weekly rather than daily. The following year Thompson was absent for three days but did not call in. Her time away from work was later

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MARYLAND REAFFIRMS LIABILITY TEST FOR CONTRACTORS

By Mike Severino

In *Appiah v. Hall* (Maryland Court of Appeals, No. 33, September Term 2009, filed October 27, 2010), the Maryland Court of Appeals reaffirmed the nearly insurmountable burden faced by plaintiffs who try to impose the liability of an independent contractor on an employer. The Court confirmed the general rule that the liability of an independent contractor is typically borne by the contractor and does not attach to its employer.

The facts in *Appiah* are tragic, but evince a fairly common independent contractor arrangement. The Maryland Port Administration owns the Seagirt shipping terminal in Baltimore. It contracted with P&O Ports of Baltimore to conduct stevedoring and terminal operations at Seagirt. While P&O oversaw operations at Seagirt, Marine Repair Services (among other companies) leased space at Seagirt directly from the MPA. Marine Repair, for which Stephen Appiah worked as a longshoreman, services and loads refrigerated shipping containers. Sadly, Appiah was killed while loading a shipping container onto a truck. Appiah's wife and mother brought suit against the MPA and P&O, among others.

MPA and P&O filed motions for summary judgment and successfully argued that they were not liable for the negligent acts of Marine Repair or its employee because neither the MPA nor P&O had the right to control its work. The Maryland Court of Special Appeals affirmed the trial court's dismissal.

On appeal, the Court of Appeals restated the rule that an employer of an independent contractor is not liable for the negligence of the independent contractor absent (a) vicarious liability (usually associated with a non-delegable duty or as an owner of land) or (b) actual negligence by the employer. As long as the independent contractor is free to exercise its own judgment and discretion as to the means and methods of its own work, the employer is insulated (in most cases) from the contractor's liability. Liability may be imposed, however, when an employer retains control over the means and methods of the work that actually gives rise to the injuries suffered. The control retained by the employer must go beyond mere general control. For example, the right of an employer to stop work, order that work be resumed, inspect the work, or to make suggestions that may not be followed usually does not impose liability on the employer.

The Court rejected plaintiffs' owner/occupier theory of liability. While the "safe workplace" doctrine requires an employer to provide a safe workplace for the employees of the independent contractor, the plaintiffs' claims failed because the injuries did not arise out of the condition of the property, but rather from the actual work of the independent contractor. The condition of the land had not caused Appiah's injuries.

Plaintiffs' also argued that MPA and P&O were liable for Marine Repair's negligence because they retained some measure of control over Marine Repair and its employees. The Court disagreed. Appiah was injured during the process of connecting a shipping container to a truck. There was no evidence that MPA or P&O had any control over Marine Repair's work or had the authority to direct how this work was to be accomplished. Furthermore, the Court rejected the plaintiffs' arguments that the broad authority of the MPA or P&O to ban certain trucks or to inspect and remedy safety hazards at the Seagirt facility constitutes sufficient control over Marine Repair's work to impose liability. Accordingly, the plaintiffs could not impute Marine Repair's liability on the MPA or P&O.

OSHA RAMPS UP

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For example, guardrails must be 36" high. If they are 35 inches or 37 inches, there is a violation, regardless of the actual safety concerns. Regulations such as this one rarely take into account the possibility of innovation or changes in method that could eliminate hazards (or in rare cases, create new ones). OSHA does not want to know whether a condition is safe; OSHA wants to know whether a condition is in compliance with its regulations.

Unfortunately, OSHA only seems more inclined to issue regulations and punish alleged violators. OSHA's chief lawyer recently announced that it will not settle cases as easily as it has in the past and will not give employers exculpatory language in settlement agreements that the employer may need to avoid lawsuits. She said nothing about working with employers to determine how to make the workplace safer.

It would seem that OSHA's goal should be to issue fewer citations each year, not issue more and greater fines. Because OSHA's focus is enforcement, not safety, employers should respond in kind. If OSHA wants to punish safe employers for technical violations, it should be prepared to deal with employers unwilling to settle and pay fines. If OSHA is not reasonable, the employer risks nothing by insisting that the matter go to a hearing or trial, and that OSHA prove its case. Perhaps OSHA will respond more rationally if employers practice a little civil disobedience and employ a protest mentality when dealing with OSHA citations that bear no relationship to safety. That, after all, is the American way.

FACEBOOK FIRINGS

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National Labor Relations Board ("NLRB") finally injected itself into the controversy. The NLRB's General Counsel issued a complaint against a Connecticut ambulance service alleging that one if its union-represented EMTs was unlawfully terminated after she wrote harsh and negative comments about a supervisor on her own personal Facebook page. After making the Facebook post comments, some of the employee's Facebook "friends" wrote further negative comments in response to the employee's post about her supervisor, including several "friends" who were co-workers.

As the story usually goes, the postings got back to the company. The company investigated the Facebook postings and terminated the employee because the postings violated the company's internet and blogging policies. The Union here, Teamsters Local 443, filed an unfair labor practice charge with the NLRB. In addition to the alleged unlawful Facebook firing (based on the notion of protected concerted activity), the Union challenged that the employer denied the employee union representation during an investigatory interview, and maintained and enforced an overly broad blogging and internet posting policy.

The NLRB did its investigation and concluded that the employee's Facebook postings were protected concerted activity, and that the company's blogging and internet posting policy contained unlawful provisions. The unlawful provisions included one that prohibited employees from making disparaging remarks about the company or its supervisors and another that prohibited employees from describing the company over the internet without company permission. The NLRB concluded these provisions were an interference with the employees' right to engage in protected concerted activity.

There is a hearing on the case scheduled for January 25, 2011. While this case arises in the union context, remember that all employees, whether unionized or not, have rights under the National Labor Relations Act, including the right to engage in protected concerted activity such as discussions about workplace conditions. Therefore, firing any employee, even a non-union employee, for complaining about the workplace, could result in an NLRA violation (or at the very least, an allegation before the NLRB).

The NLRB has previously issued decisions that employees have the right to engage in free speech as a form of concerted activity for their "mutual aid or benefit" by way of website postings and emails. Therefore, the NLRB is not necessarily setting forth a new theory of liability so much as it is asserting a recent theme in a new context: social networking. Because of the significant attention social networking websites have received over the years, and their increasing impact on the workplace (internally and externally), this case is one that all employers will be anxious to see unfold.

EMPLOYEE REQUIRED TO FOLLOW CALL IN POLICY

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designated FMLA, but she received a written warning about not calling in.

A few months later, Thompson left work early and sent a voicemail message to her supervisor stating she would not return to work for about a week because of illness, including low back pain, bronchitis, and the flu. The next day she called in and talked to a co-worker who offered to transfer Thompson to the supervisor's voicemail, but she declined, saying that she would call back later. Thompson, however, did not call back that day or for the remainder of her absence. She was fired for violating the company's call-in rule seven times in a 12-month period.

The district court granted the company's motion for summary judgment and the Eighth Circuit affirmed. FMLA regulation 825.309(a) permits an employer to "require an employee on previous leave to report periodically on the employee's status and intent to return to work." Call-in policies have been found permissible under this regulation. *See e.g*, *Bacon v. Hennepin Co. Med. Ctr.*, 550 F.3d 711 (8th Cir. 2008).

Thompson received the company's employee handbook, which set forth the call-in rules. Those rules applied to everyone, regardless of the reason for the absence. Thus, said the Eighth Circuit, the company "provided her a written and verbal warning of her absences, again explaining the policy. Therefore, we conclude CenturyTel did not violate FMLA's notice requirements."

The best way for employers who want to require employees to call in regularly while absent from work is to make sure that there is a documented policy provided to employees regarding call-in expectations. Document any instances where the employee fails to call in. It is probably best to make sure an employee has received at least one warning regarding any violation before taking more severe disciplinary action. And most importantly -- be sure that the policy is applied evenly and equitably, even to those employees who are out for reasons other than FMLA-protected leave.

FOURTH CIRCUIT APPLIES *IQBAL* TO DISCRIMINATION CASE

By Adam Simons

In *Coleman v. Maryland Court of Appeals*, 2010 U.S. App. Lexis 23291 (4th Cir. 2010), a recent decision from the Fourth Circuit, the Court, applying the Supreme Court's decision in *Ashcroft v. Iqba*l, 129 S. Ct. 1937 (2009), upheld the dismissal of the former employee's complaint against the Maryland Court of Appeals on the basis that his "allegations of race discrimination do not rise above speculation."

Coleman is an African-American male who worked at the Maryland Court of Appeals from March 2001 until August 2007. Starting in 2003, he served as executive director of procurement and contract administration. In October 2005, Coleman investigated a conflict between two employees and suspended one of the employees for five days. Coleman's supervisors later reduced the suspension to one day. Shortly thereafter, the affected employee falsely alleged that Coleman had inappropriately steered contracts to vendors in which he had an interest. Coleman's supervisors, aware that the allegation was untrue, nonetheless investigated it and shared the accusation with others.

During his employment, Coleman met performance standards and received all scheduled raises. He was disciplined on one occasion for his misuse of a "communication protocol" in April 2007. On August 2, 2007, he contacted his supervisor with a sick-leave request based on a "documented medical condition." For reasons unexplained in the Court's opinion, Coleman's supervisor contacted him the next day and advised he would be terminated if he did not resign.

After his termination, Coleman sued the Court of Appeals and his supervisors. He alleged, among other things, that he was terminated for taking sick leave and because of his race, in violation of Title VII of the Civil Rights Act. The defendants filed a motion to dismiss for failure to state a claim, arguing that he had not pled sufficient facts. Thereafter, his Title VII claims were dismissed for failure to state a claim, and his remaining claims were dismissed on alternative grounds. He appealed and the Fourth Circuit, relying on *Iqbal*, upheld the dismissal.

Iqbal held that a plaintiff cannot rely on conclusory allegations or threadbare recitals in a complaint and then survive a motion to dismiss. To survive a motion to dismiss, the complaint must state "a plausible claim for relief" that permits "the court to infer more than the mere possibility of misconduct." The facts alleged must be plausible and must rise above the level of a "mere possibility" of wrongdoing. The *Iqbal* standard creates a slightly heightened level of pleading than Federal Rule of Civil Procedure 8(a)(2), which requires that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief[.]"

The Fourth Circuit reasoned that Coleman's amended complaint contained only "conclusory" allegations that he was treated differently than similarly situated employees, without providing "a plausible basis" as to how other employees were similarly situated or that race was the actual basis for his termination. The court noted that, "absent such support, the complaint's allegations of race discrimination do not rise about speculation."

Specifically, Coleman had alleged only that his supervisors began a campaign against him in retaliation for his recommendation of a five-day suspension for an employee; that one of his supervisors also had outside business involvements; and that he was terminated because of his race. The Court held that these were "threadbare recitals" that did not amount to a statement of claim and did not demonstrate that he engaged in any protected activity. Accordingly, it upheld the dismissal.

Coleman is significant because decisions from other courts have held, in order to survive a motion to dismiss in the employment context, an employee need only make an assertion such as, "I was turned down for a job because of my race." *E.g. Rouse v. Berry*, 680 F. Supp. 2d 233 (D.D.C. 2010). Additionally, in the context of fairly straightforward employment discrimination complaints, plaintiffs traditionally have not been subject to a heightened pleading standard. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002). For employers in the Fourth Circuit (which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina), however, this case demonstrates that an *Iqbal* motion is a worthwhile consideration in the employment context, especially where the plaintiff has already amended the complaint. Courts are not willing to give a plaintiff an unlimited number of bites at the apple in order to permit him the chance to state a claim.

EEOC FILES LAWSUIT OVER EMPLOYER USE OF CREDIT REPORTS

By Cliff Geiger

In our last newsletter, we reported that the Equal Employment Opportunity Commission (EEOC) was taking a hard look at whether it was appropriate for employers to consider a job applicant's credit history during the hiring process. Civil rights groups contend that using credit reports as a hiring criterion is unfair, because it has a discriminatory

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EEOC FILES SUIT

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impact on racial minorities, and that there is no evidence establishing that a good credit report is a predictor of good job performance, or vice versa. The EEOC's October 2010 public meeting followed proposed legislation in Congress (HR 3140), and in several states, that would make it illegal for private employers to use credit history when evaluating job applicants for most positions.

This is not a theoretical issue for employers. On December 21, 2010, the EEOC filed a nationwide class lawsuit against Kaplan Higher Education (Kaplan). According to its website, Kaplan is one of the largest for-profit providers of postsecondary education in the United States. Kaplan serves 68,000 students through online programs and more than 70 campuses located in the United States and abroad.

The lawsuit, which was filed in the United States District Court for the Northern District of Ohio (Case: 1:10-cv-02882-PAG), alleges that Kaplan has engaged in a nationwide pattern and practice of discriminating against a class of Black job applicants by refusing to hire applicants based on their credit history. The EEOC alleges that using credit history as a hiring criterion has an unlawful and significant discriminatory impact based on race, and using credit reports is neither job-related nor justified by business necessity. The lawsuit also contends that appropriate, less-discriminatory alternative selection procedures are available. The lawsuit was filed by the EEOC's Philadelphia District Office, which oversees a number of states, including Maryland.

This is at least the second such lawsuit filed by the EEOC's Philadelphia District Office. In September 2009, the EEOC sued Freeman (also known as TFC Holding Co.) in the United States District Court for the District of Maryland (Case: 8:09-cv-02573-RWT). In this lawsuit, the EEOC alleges that using credit history information and criminal justice history information to select job applicants has a significant disparate impact based on race in violation of Title VII. The EEOC also alleges that the use of criminal justice history information has a discriminatory impact on male and Hispanic job applicants, also in violation of Title VII. In this regard, the fight against considering criminal history during the hiring process also appears to be gaining momentum. At least two states, Hawaii and Massachusetts, have laws that ban public and private employers from requesting criminal record information on initial job applications for most positions.

Whether the EEOC litigation strategy is successful, or whether Congress passes new legislation addressing the issue, remains to be seen. However, an employer's use of credit reports (or criminal history) to screen all job applicants could be a risky and expensive practice. After more than a year of lawyers arguing about the timeliness of challenging certain hiring decisions, Freeman and the EEOC agreed to stay the judicial proceedings and explore potential settlement options through mediation.

While there is much debate over whether a job applicant's credit history is an indicator of future performance or judgment, there is little scientific evidence to support that position. On the other hand, there is some evidence linking credit score to race. So employers need to be very careful. Selection criteria, even those that appear neutral, cannot have a discriminatory impact based on race or any other status protected by Title VII, unless the selection criteria is job-related and consistent with business necessity.

COURT ALLOWS LAWSUIT AGAINST WATERBOARDING EMPLOYER

By Eric Paltell

Word to the wise - don't require your employees to participate in waterboarding as a motivational exercise!

In one of the more unusual cases I have read about in recent years, on November 23, 2010, the Utah Supreme Court ruled that an employee of a business coaching company could sue his employer and supervisor after they allegedly required him to participate in waterboarding during a motivational exercise. *Hudgens v. Prosper, Inc.* No. 20090391 (Nov. 23, 2010). The plaintiff in the lawsuit, Chad Hudgens, claims that in May 2007, his supervisor ordered his coworkers to hold him down by his arms and legs while the supervisor slowly poured water over Hudgens' mouth and nose. As Hudgens tried to escape because he could not breathe, the supervisor directed the coworkers to continue holding him down. At the end of the exercise, the supervisor told the other employees "they should work as hard at making sales as Mr. Hudgens had worked at trying to breathe" (that will get you motivated, won't it?)

Hudgens' lawsuit seeks damages for assault and battery, intentional infliction of emotional distress, wrongful termination, and intentional interference with contractual relationship. Given the outrageous allegations, it is not surprising that the court allowed Mr. Hudgens to proceed with his claim.

So here is a practice pointer for all of our clients: when trying to find ways to motivate your sales force, don't copy techniques used in Guantanamo Bay!