KOLLMAN & SAUCIER, P.A. SUMMER 2012

THE EMPLOYMENT BRIEF

HELPING YOUR BUSINESS THRIVE

IN THIS ISSUE

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Our Summer 2012 publication is the third issue of *The Employment Brief* that we have sent out in 2012. In this issue, we report on the Supreme Court's recent decisions on the Affordable Care Act ("Obamacare") and the exempt status of pharmaceutical reps under the FLSA, as well as lower court decisions on discrimination, retaliation, the FMLA, and the ADA. We also write on the EEOC's new guidance on the use of arrests and convictions in the hiring process. As we go to press, what occurs to us is that the labor and employment landscape is changing rapidly. In the past year, we have seen — among other developments — social media emerge as a "hot" issue at the NLRB, revised FMLA regulations from the DOL, new enforcement initiatives at the EEOC, and new Maryland laws on password protection and credit checks. Now that "Obamacare" has been upheld, employers will be saddled with a new array of healthcare obligations. And with a Presidential election in November, it is likely we will see a lot more changes at the federal level, regardless of who wins the White House. To help keep you abreast of these changes, we will continue to provide you with updates on current developments through our Twitter and Facebook pages, our website and — in the near future — a blog to which readers can subscribe. In the meantime, stay cool and enjoy summer!

SUPREME COURT DECIDES THAT PHARMACEUTICAL REPS ARE EXEMPT EMPLOYEES

By Randi Klein Hyatt

Issuing a decision that resolved years of uncertainty in the pharmaceutical industry, resolved the split among the Second and Ninth Circuits, and most significantly, made clear that the Department of Labor's (DOL) interpretation of the Fair Labor Standard Act's outside sales exemption was not owed deference, the Supreme Court upheld the Ninth Circuit's decision that drug company reps are exempt employees under the FLSA's outside sales exemption.

In *Christopher v. SmithKline Beecham Corp.*, (U.S., June 18, 2012), pharmaceutical sales reps alleged that they were denied overtime pay for their hours worked in excess of forty per week. The drug reps' primary duties were to persuade doctors to write prescriptions for the products sold by their employer. They worked in the field, had no office, and very little supervision. They made yearly wages of more than $70,000, of which about 25-30% was incentive pay connected to sales within their territory.

In order to persuade the doctors to write prescriptions for the drugs sold by their employer, the drug reps provide product information to physicians to promote the products and encourage the doctors to write the scripts for that company's drugs (a process called "detailing" where the employees are called "detailers"). Under federal law, the detailers cannot sell the drugs to the physicians. Indeed, the drugs can only be dispensed by a prescription written by the physician and no money can be exchanged between the drug sale rep and the physician. As such, the detailers argued that they were not actually making sales, meaning that they are not exempt outside salespersons within the meaning of the FLSA, and, therefore, entitled to overtime.

The FLSA defines an outside sales person exempt from overtime as an employee whose primary duty is making sales within the meaning of Section 3(k) of the FLSA (or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer) and who is customarily and regularly engaged away from the employer's place of business in performing such primary duty. 29 C.F.R. 541.500(a)(1)-(2). Section 3(k) states that a "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

"For the pharmaceutical industry, there is finally resolution that its longstanding practice of treating detailers as exempt is proper."

The DOL also agreed that the detailers were not exempt outside salespersons and filed a "friend of the

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court" brief to advance its position. In the Ninth Circuit case, the DOL maintained that the employees were engaging in non-exempt promotional activities, not exempt outside sales, because there was no actual transfer of property from the drug companies to the doctors. This position, first taken in 2009, was contrary to the DOL's prior position on the issue. Indeed, the DOL had regularly "acquiesce[d] in the sales practice of the drug industry for over seventy years" that pharmaceutical drug reps were exempt because the non-binding commitments from the doctors to write prescriptions was sufficient sales activity in that the transaction required the employees to "in some sense" make a sale.

Justice Samuel Alito, who wrote the 5-4 majority opinion, first explained that the Court was not going to give deference to the position taken by the DOL on this issue. The majority saw the DOL brief as an attempt to circumvent the required notice-and-comment process for regulations. The majority also noted that until 2009, when the DOL first wrote its *amicus* brief announcing a change in position, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside sales persons was an FLSA violation.

Further, the general sales exemption regulation adopts the broad statutory definition of "sale" which includes the catchall phrase "other disposition." The Court recognized that phrase could be reasonably construed to encompass a nonbinding commitment from a physician to prescribe a particular drug (the employee was "in some sense" making a sale). Further, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested it thought the industry was violating the law with its longstanding practice of paying detailers as exempt sales employees. It remained silent and inactive for decades, and the Court did not want an entire industry of 90,000 employees, whose work has remained relatively static over time, suddenly to be in violation of wage and hour laws, without sufficient notice and rulemaking.

For the pharmaceutical industry, there is finally resolution that its longstanding practice of treating detailers as exempt is proper. For those outside of the industry, if anything, the Supreme Court made clear that it will not tolerate the DOL trying to circumvent the notice and comment rulemaking requirements by filing a backdoor *amicus* brief announcing a change in position on the legality of a long-standing industry practice.

NEW COURT CASES REDEFINE PROTECTED ACTIVITY FOR TITLE VII RETALIATION CLAIMS

By Adam Simons

Two recent cases, one from the Second Circuit Court of Appeals, and another from the United States District Court of Maryland, redefine the parameters of the protected activity required to state a retaliation claim related to Title VII sexual harassment. In *Townsend v. Benjamin Enterprises, Inc.*, 2012 U.S. App. LEXIS 9441 (2d Cir. May 9, 2012), the Second Circuit considered for the first time whether an employee's participation in an internal investigation of a harassment complaint was protected under the participation clause of Title VII. The Second Circuit held that participation in an internal-only investigation is not a protected activity, unless it is congruent with, or occurs after, the filing of a formal charge.

"The District Court for Maryland [held that] rejecting a supervisor's sexual advances was "protected activity for a retaliation claim under Title VII, and not just a hostile work environment claim."

Townsend involved a case brought by a former Human Resources Director against her employer, Benjamin Enterprises, Inc. (BEI), after she was terminated for discussing an ongoing internal sexual harassment investigation with a consultant for the company. BEI provides training and development for disadvantaged workers for employment placement with the company's clients. Michelle Benjamin is President and co-owner of BEI. Her husband, Hugh Benjamin, is the co-owner and only corporate Vice President of the Company. The two plaintiffs, Martha Townsend and Karlean Grey-Allen, worked as Office Manager/Receptionist and Human Resources Director, respectively. BEI retained the services of management consultant Dennis Barnett to train Grey-Allen, who considered Barnett to be her mentor.

On March 9, 2005, Townsend complained to Michelle Benjamin that Hugh had sexually harassed her for nearly two years. Townsend claimed that Hugh made sexually offensive comments, propositioned her, touched her inappropriately, and sexually assaulted her. Michelle asked Grey-Allen to investigate.

During the course of her investigation, Grey-Allen told her mentor, Barnett, about Townsend's Complaint. Michelle fired Grey-Allen for breach of confidentiality when she learned of the discussion. Michelle then retained an HR consulting firm to conduct the investigation, which found nothing to substantiate the claim. As a result, Townsend quit.

Townsend and Grey-Allen filed a joint complaint in the United States District Court. Townsend alleged claims for unlawful sexual harassment in violation of Title VII and the New York Human Rights Law. Grey-Allen alleged that she was unlawfully terminated in retaliation for her participation in the investigation of Townsend's internal harassment complaint.

The court granted summary judgment on Grey-Allen's retaliation claims, finding that her participation in the internal investigation of Townsend's complaint, not connected to any formal EEOC charge, was not protected

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activity under Title VII's participation clause. Townsend's claims went to trial, where she was awarded $30,400 in damages and $141,308.80 in attorneys' fees.

Grey-Allen appealed the grant of summary judgment to the Second Circuit, claiming that her internal investigation into Townsend's allegations of unlawful harassment, prior to the filing of any formal charge by Townsend, constituted protected activity under Title VII's participation clause. The Second Circuit looked at the language of the participation clause and held it was limited only to those activities associated with the EEOC's enforcement and investigation powers under Title VII. It concluded that an investigation, therefore, refers to an investigation in conjunction with or after a formal charge is filed.

The other case analyzing whether activity is Title VII protected activity for purposes of a retaliation claim is *Hilton v. Shin*, 2012 U.S. Dist. LEXIS 60204 (D. Md. April 30, 2012). In that case, the District Court for Maryland considered whether rejecting a supervisor's sexual advances was "protected activity for a retaliation claim under Title VII, and not just a hostile work environment claim." The District Court held that it was.

In *Hilton*, the plaintiff, Gynese Hilton, was hired by Defendants Transcom, Inc. and Yoon S. Shin in May 2008. In January 2010, Hilton claims Shin confessed to being attracted to her, placed his hand on her lap, started pressuring her for sex, asking her for hugs and kisses, and making other sexual advances. He began to send her emails signed "XOXO" and asking her to meet with him. After she repeatedly refused his advances and he ultimately got the hint, Shin finally emailed "I'm nothing more than your employer and you're nothing more than an employee." He allegedly treated her differently and, ultimately, fired her.

During the subsequent litigation, Shin's primary argument was that an employee does not oppose sexual harassment for the purposes of a retaliation claim "simply by spurning it." He argued that Hilton's claim was a sexual harassment claim in disguise. The District Court analyzed the Supreme Court's decision in *Crawford v. Metro. Gov't of Nash. & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009), which holds that "oppose" for the purposes of the opposition clause, means resisting an unlawful employment practice under Title VII. According to the District Court, this also meant resisting sexual harassment.

These cases represent divergent views as to what is protected activity under Title VII. In *Townsend*, the Second Circuit took a limited view of Title VII, while the District of Maryland's view in *Hilton* obviously expands the scope of protected activity. Fortunately, however, the District Court's opinion should not open the door for retaliation litigation with every sexual harassment claim. The District Court noted that retaliation claims may not be appropriate where the sexual harassment is done by a mid-level manager and there are ways for the employee to lodge a complaint with a higher-ranking company official, and where the sexual harassment is not as pervasive. Accordingly, the "faintest refusal to submit to sexual solicitation" will not constitute opposition.

THE SUPREME COURT UPHOLDS "OBAMACARE"

By Eric Paltell

On June 28, 2012, the Supreme Court upheld "Obamacare" (officially known as the Patient Protection and Affordable Care Act of 2010). *National Federation of Independent Business et al. v. Sebelius*, No. 11-393 (June 28, 2012). In a 5-4 decision, Chief Justice John Roberts wrote that the law is constitutional as an exercise of Congress' power to tax, notwithstanding the fact that it was an impermissible exercise of Congressional Power under the Constitution's Commerce Clause and the Necessary and Proper Clause. As a result, the changes made by the health care reform law to the Employee Retirement Income Security Act of 1974 (ERISA), Internal Revenue Code of 1986 (Code), and other statutes will take effect as scheduled, and employers need to get ready to comply. Here is a summary of the key provisions affecting employers that will now begin to take effect (the PPACA already requires plans to provide coverage for children up to age twenty-six, provide specific preventive care benefits on a first-dollar basis, and supplement the claim procedures already required under ERISA):

- *Play or Pay.* Each employer with fifty or more full-time employees will have to either provide at least a specified minimum level of health coverage or pay a penalty beginning in 2014.
- *Restrictions on Benefit Limits.* Employer group health plans are prohibited from imposing lifetime or annual limits on benefit amounts, waiting periods in excess of ninety days, and pre-existing condition limitations.
- *Tax Reporting.* Employers must report the annual cost of health coverage on each employee's W-2.
- *Limits on FSA's.* Health care flexible spending accounts are capped at $2,500.
- *Non-discrimination.* Insured group health plans cannot discriminate in favor of highly compensated individuals in providing coverage and benefits.
- *Automatic Enrollment.* Beginning in 2014, employers with more than two-hundred full-time employees are required to automatically enroll new full-time employees in group health plans.

Of course, there is also the controversial "individual mandate," which requires individuals to purchase health coverage or pay a tax penalty and increases the Federal Income Contributions Act (FICA) tax on individuals with compensation in excess of $200,000 (and married couples making in excess of $250,000).

At this point, it seems that the only thing that will preclude the changes from taking effect will be a Mitt Romney victory in the November election. Barring that, employers need to prepare for a new health-care landscape.

BEER IS MEDICINAL? HONEST BELIEF OF FRAUD NETS VICTORY FOR EMPLOYER IN FMLA CASE

By Darrell R. VanDeusen

As a general rule, an employer who thinks that an employee is faking the need for FMLA leave had better have some pretty good evidence of that suspicion before taking action against the employee. Where such evidence exists, however, an employer may avoid liability when it shows that it took action because it reasonably believed the employee had abandoned his job, was not on FMLA qualified leave, or committed fraud in obtaining the leave. One of the early cases to address this sort of thing was *Medley v. Polk*, 260 F.3d 1202, 1207 (10th Cir. 2001), where the court held that an employer who discharges an employee while mistakenly, but honestly, believing that the employee had abandoned her job does not violate the FMLA.

Following *Medley*, there have been many cases where the employer has tried to claim that it had an honest belief of FMLA abuse to justify the adverse action that it took against an employee. There are, however, no bright lines in these "honest belief" cases, and they are hard to win on summary judgment because, for the most part, the employer's motivation – was its belief really "honest" – is often a question of fact.

Once in a while it does happen that an employer wins this sort of case on summary judgment. Recently, in a 2-1 decision, the Sixth Circuit Court of Appeals upheld the dismissal of an employee's FMLA claim after the company fired the employee based on reports that he attended an Oktoberfest celebration while on FMLA leave for back problems. *Seeger v. Cincinnati Bell Tel. Co.*, 2012 U.S. App. LEXIS 9291 (6th Cir. May 8, 2012).

Tom Seeger had worked for CBT for about 30 years when he requested six days of FMLA leave for a herniated disc, which was granted. Seeger said that his pain was a ten on a scale of ten, and that he had great difficulty sitting, standing, or walking. His doctor said Seeger was unable to perform and work, even light duty. Just a few days into the FMLA leave, co-workers reported seeing Seeger walking around unimpaired and drinking beer at the downtown Cincinnati Oktoberfest.

CBT met with Seeger, who defended his conduct by basically saying that a couple of hours of beer drinking – and he was in pain while imbibing – was different from having to work an eight hour shift. Another employee who saw Seeger that day said that Seeger "appeared to be in a lot of pain" while drinking. Seeger was fired and he sued, alleging FMLA retaliation.

Affirming the district court's entry of summary judgment, the Sixth Circuit held that CBT demonstrated that it had an honest belief Seeger was committing disability fraud. As long as CBT made a "reasonably informed and considered decision based on particularized facts before firing Seeger," it had acted legally. CBT was not required to "leave no stone unturned" in its investigation of Seeger's behavior.

In dissent, Senior District Court Judge Tarnow, sitting by designation, stressed that whether the company had an honest belief was undermined by the "poor and one-sided" investigation into the underlying facts of whether Seeger's actions at Oktoberfest really constituted FMLA fraud. The company, said Judge Tarnow, focused on isolated and flimsy evidence while ignoring strong contrary evidence. Thus, said Judge Tarnow, it should be for a jury to determine whether CBT's reason for firing Seeger was its "honest belief" of FMLA fraud, or a violation of Seeger's FMLA rights.

NEW GUIDANCE ON THE USE OF CRIMINAL RECORDS

By Cliff B. Geiger

On April 25, 2012, the EEOC issued updated Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended (Title VII). The guidance is intended to clarify, consolidate and update the agency's position on the use of criminal records for hiring and retention decisions in light of previous guidance documents and federal court decisions issued over the last twenty years.

Two theories of Title VII discrimination are addressed by the EEOC: disparate treatment and disparate impact. Disparate treatment claims arise when an employer intentionally treats an employee differently because of a protected classification such as race or national origin. For example, consider an employer who is assessing two recent college graduates with similar educational backgrounds, skills, and work experience. One of the applicants is Caucasian; the other is Hispanic. Both of them pled guilty to marijuana possession and distribution during high school, but they have had no other run-ins with the criminal justice system. It is discriminatory for the employer to exclude the Hispanic applicant from employment because he is a "drug dealer type," but pass through the Caucasian applicant because of his youth at the time of conviction and subsequent clean record. In other words, rejecting a job applicant based on ethnic stereotypes about criminality is disparate treatment prohibited by Title VII.

Disparate impact claims are more subtle. They do not require evidence of discriminatory intent. An employer can be liable for discrimination when a neutral policy or practice has the effect of screening out individuals disproportionately on the basis of race, national origin, or other protected categories. This is why employers should not use arrest records (which do not establish criminal conduct has occurred) to make employment decisions. Such a policy, although facially neutral and consistently applied to all job applicants, will have a disparate impact on African American and Hispanic men, who are arrested at a rate two to three times higher than their proportion of the general population.

Under the disparate impact theory, an employee must use statistical

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evidence to establish that an employment practice results in a substantial adverse impact on a protected group. If the employee can do so, the employer may defend itself by demonstrating that the employment practice in question is "job-related and consistent with business necessity." The EEOC has concluded that national data "supports a finding that criminal record exclusions have a disparate impact based on race and national origin." Therefore, employers who exclude applicants from jobs based on having criminal record will have to show the screen is job-related and consistent with business necessity.

"The guidance is intended to clarify, consolidate and update the agency's position on the use of criminal records in light of previous guidance documents and federal court decisions issued over the last 20 years."

According to the EEOC, an employer must be able to show that its policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position. The EEOC identified two instances in which it believes employers will consistently meet the "job related and consistent with business necessity" defense:

1. The employer validates the criminal conduct screen for the position per the Uniform Guidelines on Employee Selection Procedures (which may not be possible given the rarity of studies linking criminal convictions to future behaviors, traits, or conduct with workplace ramifications); or

2. The employer develops a "targeted screen" for a particular position and then provides an opportunity for an individualized assessment of those excluded by the screen to determine whether the policy, as applied, is job-related and consistent with business necessity.

An employer using a "targeted screen" will have developed its policy by assessing the following factors to determine whether an exclusion based on a criminal conviction is job-related for the position in question and consistent with business necessity: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense or conduct and/or completion of the sentence; and (iii) the nature of the job held or sought. These factors are known as the *Green* factors because they were identified by the Eight Circuit in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975). In *Green*, the Court held it was discriminatory for an employer to exclude from employment any job applicant who had been convicted of any crime other than a minor traffic offense. Even though the policy was neutral, it had a disproportionate negative effect on African-American applicants.

If an applicant is screened out based on his criminal record, the EEOC suggests that employers conduct an individualized assessment of that decision. The employer would inform the applicant that he may be excluded from a position because of past criminal conduct and provide the applicant with an opportunity to show that he should not be excluded. The employer would consider additional information showing that the policy, as applied, is not job-related and consistent with business necessity. Such information may include: (i) the facts and circumstances surrounding the offense or conduct; (ii) the number of offenses involved; (iii) the individual's age at the time of conviction or release from prison; (iv) evidence that post-conviction an individual successfully performed the same or similar work without incident; (v) the length and consistency of employment history before and after the offense or conduct; (vi) rehabilitation efforts; (vii) employment or character references; and (viii) whether the individual is bonded under a federal, state, or local bonding program.

The EEOC also addressed the interaction of its new guidance with other laws. In some industries there are federal, state or local laws prohibiting individuals with certain criminal records from holding certain jobs or engaging in certain occupations. For example, federal law prohibits individuals convicted of certain crimes from working as airport security screeners, law enforcement officers, bank employees, port workers, among other positions. Title VII does not preempt federally imposed restrictions. However, state and local laws excluding certain individuals from employment do not preempt Title VII, and if a disparate impact is shown, the EEOC would require employers to demonstrate that the state or local exclusion is job-related and consistent with business necessity.

The EEOC provides the following list of best practices for employers who consider criminal record information:

1. Eliminate policies and practices that exclude individuals from employment based on the mere existence of a criminal record;

2. Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct, including an opportunity for an individualized assessment;

3. Train managers hiring, officials, and decision-makers on how to implement the policy and procedures;

4. Limit questions about criminal records to situations in which such information is job-related for the position in question and consistent with business necessity; and

5. Keep information about an applicant's or an employee's criminal records confidential.

Unless mandated by federal law, a blanket policy that excludes an applicant with a criminal record from employment is subject to a disparate impact challenge under Title VII. To avoid and defend against such challenges, employers who consider criminal records should develop policies that consider actual job requirements, the specific criminal offenses that demonstrate unfitness for particular jobs, and individual circumstances. At a minimum, employers should be prepared to show that they considered the *Green* factors when developing a policy or excluding someone from employment based on a criminal record.

ILLEGAL ALIENS NOT PROTECTED BY TITLE VII

By Michael R. Severino

The United States Court of Appeals for the Seventh Circuit recently held that an individual's status as an illegal alien is not a basis for relief pursuant to Title VII of the Civil Rights Act. The Court affirmed the trial court's ruling that the plaintiff's termination from her job was the result of her association with and marriage to an unauthorized alien and, accordingly, did not give rise to a Title VII claim. *Cortezano v. Salin Bank & Trust Comp.*, No. 11-1631 (7th Cir. 2012).

Plaintiff, Kristi Cortezano, was employed by Salin Bank & Trust Company as a sales manager. Kristi's husband, Javier, was in the country illegally. While Javier was in the United States, Kristi and Javier opened a joint account at Salin Bank, and Kristi also helped him open his own accounts. In December 2007, Javier returned to Mexico. Around that time, Kristi revealed to her bank supervisor that Javier had been in the country without authorization. Her supervisor notified the bank's security officer and advised him of the accounts. The bank thereafter scheduled two meetings with Kristi. At the first meeting, the bank security officer expressed his displeasure with Kristi and her actions. Kristi brought her attorney with her for the second meeting but her attorney was not permitted to attend. Kristi then left the meeting and the bank terminated her employment.

Kristi filed suit in state court alleging state law tort claims and subsequently amended her complaint to add a claim for employment discrimination under Title VII, 42 U.S.C. § 2000e, *et seq*. Due to the addition of the federal claim, the bank removed the action to federal court. The federal court granted the bank's request for summary judgment on all of Kristi's claims.

"An unauthorized alien (or spouse) claiming discrimination due to his or her immigration status faces a difficult challenge."

On appeal, the Seventh Circuit considered two issues in regard to Kristi's discrimination claim. The first was that Kristi claimed discrimination due to her *husband's* admitted status as an unauthorized alien. Kristi did not allege discrimination because of any protected class to which she belonged, but rather because of her association with her husband, who she alleged was protected by Title VII. The Seventh Circuit has not yet decided if "association" claims are viable under Title VII (although other circuits have ruled that they are). Ultimately, the issue was not relevant to the disposition of Kristi's discrimination claim and the Seventh Circuit did not address it.

Kristi's second problem was that alienage is not a protected class pursuant to Title VII. Even assuming that Kristi could prosecute her association claim, the Seventh Circuit held that the bank's actions were motivated by Javier's unauthorized status and not because of his citizenship or national origin. Put another way, the problem was not that Javier was Mexican, but rather that he was in the country without authorization. The Seventh Circuit considered Supreme Court precedent that held that discrimination based on immigration status does not fall within national origin prohibitions. Indeed, the Seventh Circuit also noted that Congress passed additional legislation to prohibit discrimination based on citizenship but explicitly stated in the new law that it did not apply to discrimination against an unauthorized alien.

While other circuits could decide the issue differently, an unauthorized alien (or spouse) claiming discrimination due to his or her immigration status faces a difficult challenge.

INABILITY TO WORK OVERTIME IS NOT A DISABILITY UNDER THE ADA

By Kelly C. Lovett

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against disabled employees who are qualified to perform the essential functions of the job, with or without a reasonable accommodation. Because the ADA was enacted in 1990, countless court decisions have grappled with what, in fact, is a "disability" worthy of the law's protections. The statute's vague definition of "disability" as a "physical or mental impairment that substantially limits one or more major life activities" provides little guidance.

In 2008, Congress enacted the ADAAA, amending the law to clarify, among other things, the types of impairments that qualify as a disability. Indeed, the inquiry facing courts now is focused more on whether discrimination occurred, rather than the threshold question of whether the employee is actually "disabled" under the Act.

Even with the passage of the ADAAA, interesting opinions on what conditions may, or may not, qualify as a disability are still reported. Michael Boitnott's ADA claim presents such a case. In a lawsuit filed against his employer, Corning Incorporated (Corning), Boitnott alleged that his physical inability to work overtime hours rendered him disabled under the ADA and that Corning's failure to reasonably accommodate this so-called disability violated the law. *See Boitnott v. Corning Incorporated*, 669 F.3d 172 (4th Cir. 2012).

Boitnott started working for Corning in 1989 as a maintenance engineer. At that time, Corning operated on a twenty-four hour production schedule, and Boitnott worked rotating twelve hour shifts, alternating day and night shifts. In May 2002, Boitnott took medical leave for abdominal problems, and while on leave, suffered a heart attack. After he returned to his regular rotating shift schedule in September 2002, Boitnott had additional

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presented a doctor's note restricting him from working more than eight hours a day. Boitnott, however, did not return to active duty; instead, he applied for long-term disability (LTD) benefits with Corning's insurance carrier. He also filed an EEOC charge in May 2004, claiming that Corning failed to provide him with a reasonable accommodation when he tried to return to work. On October 1, 2004, the insurance carrier terminated Boitnott's LTD benefits because he was capable of working a normal forty-hour week.

"Following the other circuit courts to have addressed the issue, the Court held that the inability to work overtime – standing alone – was not a "substantial" limitation of a major life activity under the ADA."

Boitnott tried again to return to work. This time, he wanted to work in an available day shift position, but because that job required a ten-hour schedule, Corning refused to reinstate him and asked Boitnott to let them know if his medical condition changed. In January 2005, Boitnott's doctor released him to work up to ten hours per day, for four days per week, but made no mention of overtime. Finally, in April 2005, another physician released Boitnott to work up to ten hours a day, plus a "moderate" amount of overtime.

With the overtime restriction lifted, Corning and the union representing Boitnott started discussions on what jobs were available to him. None of the day shifts Boitnott sought earlier remained open, so the company negotiated with the union to create a new job for him that was limited to eight hours of day shift work, plus overtime. On September 5, 2005, Boitnott returned to Corning, and still works there today.

Boitnott pressed on with his lawsuit, claiming that Corning's failure to accommodate him between February 2004 and September 2005 violated the ADA. In June 2010, the U.S. District Court for the Western District of Virginia readily dismissed Boitnott's claim on summary judgment, finding that his restriction from working more than eight hours a day was not a disability within the meaning of the ADA. On February 10, 2012, the Fourth Circuit agreed, holding that Boitnott's inability to work overtime was not a substantial limitation on a major life activity. As a result, Boitnott was not disabled under the ADA.

According to the Fourth Circuit, the primary impediment to Boitnott returning to work was the restriction from working overtime hours. Assuming that his inability to work overtime constituted a "major life activity," the Court considered whether Boitnott's ability to work was "substantially limited" because he could work forty hours per week, but not more, due to his impairment. Following the other circuit courts to have addressed the issue, the Court held that the inability to work overtime – standing alone – was not a "substantial" limitation of a major life activity under the ADA. Accordingly, Boitnott was not disabled, and the Court affirmed summary judgment in favor of Corning.

The *Boitnott* decision is likely to be the first of many on which we report as cases arising under the ADAAA make their way to the appellate courts. With the passage of the ADAAA and its expanded coverage, pre-2009 case law on the definition of "disability" is of limited utility. Therefore, employers looking to get a disability discrimination case dismissed at the pre-trial stage will need to comb through the post-ADAAA court decisions to find support for an argument that a physical or mental impairment is not, in fact, a covered disability under federal law.

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