

Mistake Of The Month - - Do Not Let These Things Drag On

In a case brought under the Rehabilitation Act of 1974, the model for the Americans with Disabilities Act, *Sutton v. Potter*, U.S. Dist. LEXIS 4656 (E.D.Ill., 3/19/03), plaintiff was hired by the Postal Service ("USPS") in 1988. Early on her work in the dusty environment caused her to develop allergic rhino conjunctivitis. In 1991, she went home and never returned to work at USPS. In 1992, a USPS doctor recommended that plaintiff "needs to be transferred to an office environment free of dust mites and irritants that may exacerbate her symptoms." Between 1993 and 1997, neither plaintiff nor USPS demonstrated any practical interest in getting her back to work either at her old job or in a new assignment.

In 1997 USPS finally offered to put plaintiff back to work at her old job but with a clean air machine installed near her work station. She rejected this offer after her doctor opined that it would inadequately accommodate her condition. Additionally, under USPS regulations, a disabled employee's rejection of a job offer should trigger a "suitability" determination. This entails USPS investigating whether the offered job would sufficiently accommodate the disabled employee. A USPS finding that the job is "suitable" would result in the employee losing disability benefits. Here, USPS failed to ever conduct the required suitability determination - permitting plaintiff to reject the job offer without losing her disability benefits. USPS reacted to plaintiff's rejection of this job offer by effectively doing nothing for nearly three years.

On July 6, 2000, plaintiff was notified that her benefits would end effective July 15, 2000, more than eight years after she first went on disability leave. When she did not show up for work on July 15, 2000, USPS informed her that it considered her absence undocumented leave and informed her that if she was ill, she would need to submit medical verification of her inability to work. Plaintiff responded by contacting USPS's Leave Control and requesting an additional 30 days of unpaid leave due to sickness. For the next sixteen months, she followed the same procedure of calling in sick once a month and requesting more unpaid leave, supported by letters from her doctor. At no time during this period did plaintiff express a desire to return to work or request a transfer or other employment accommodation. For its part, USPS concedes that it had dust-free jobs to which it could have transferred plaintiff during both her time on disability and unpaid medical leave.

Finally, in October 2001, USPS sent plaintiff a letter offering her a choice of three ways to end her career at USPS: resignation, optional retirement, or disability retirement. She instead elected the unmentioned option four: she filed an informal complaint with the USPS' Equal Employment Opportunity office (the "EEO"), asserting a claim of "unreasonable accommodation for medical restriction." In November 2001, Sutton received a notice of "administrative separation" (*i.e.*, termination) from USPS. She then sued, basically claiming that the USPS failed to reasonably accommodate her.

The Court first ruled that her claims prior to 2000 were barred by the statute of limitations, although the Court also noted that USPS's failure to transfer the plaintiff to a dust-free environment despite her doctor's repeated requests "probably constituted disability discrimination." That certainly narrowed the case. Remaining then were two claims: first, the 2000 order to return to work and then forcing her to take medical leave rather than place her in a dust-free environment; and second, her administrative separation. As to the latter claim, at that point the USPS had been told by her doctor that she was totally disabled and thus could not perform her job with or without a reasonable accommodation. Thus she was not disabled and the

Court dismissed that claim.

However, as to the 2000 return-to-work situation, the USPS had information at that time that plaintiff could work in a dust-free environment, USPS had dust-free environments available, and thus plaintiff was a qualified person with a disability within the meaning of the Rehabilitation Act because she could perform her job with a reasonable accommodation. So at least between July 15, 2000 and March, 2001 (when the doctor first stated that she was permanently disabled from all work), she had a claim. The Court, highly critical of the USPS, found that the USPS had failed to engage in an interactive process, and failed to comply with its own rules, and specifically noted that putting the plaintiff on an unpaid medical leave in 2000 rather than at least offering her a dust-free environment, was sufficient to grant the plaintiff's motion for summary judgment on that issue. Her damages, however, were limited to her lost disability benefits, and not lost wages.

Finally, the Court had a word to say about the USPS's conduct in this situation:

“Before concluding, the Court feels compelled to make note -- unfortunately -- of the bureaucratic and ineffective conduct of the Postal Service in this matter. First, it appears that the Postal Service slept through nearly eight years of Sutton collecting disability at government expense. Second, once awakened from its slumber, the Postal Service's sole action was so woefully inadequate as to suggest a total lack of effort on their part to comply with the statutory requirements of the Rehabilitation Act. In so doing, the Postal Service has done a disservice not only to Sutton, but also to the public at large. After all, it is we, the Postal Service's customers, who ultimately financed both Sutton's extended disability "vacation," and the judgment that this opinion requires the Postal Service to pay. The Court hopes that, in the future, the Postal Service endeavors to become a better steward of the American people's stamp dollars.”

The Harshbarger Report

Navigating The New Governance Terrain

While we are likely to see periods of relative certainty and predictability in the governance standards, it is unlikely that they will ever completely level off. The environment will always, at least to some degree, be changing. The important point then is to recognize the shifting landscape, and work to stay out in front of the shift, so that your organization is not caught by altered expectations. While nothing that either Richard Grasso or his board at the New York Stock Exchange did was explicitly illegal, everyone involved was clearly tone deaf to the shifting environment and were forced to pay a heavy price. Successfully navigating the new realities of corporate governance thus requires not only an in-depth understanding of the entity itself, but also an in-depth understanding of the new environment in which every entity now operates. It requires understanding the 180° response that has taken place. Here are a few relatively simple steps to take that will help keep your organization ahead of the curve:

Maintain tone sensitivity to the shifting environment

It is critical to have an independent monitor with a global perspective. By global perspective, I mean an independent body that understands the regulatory environment and enforcement efforts, as well as their impact across multiple sectors.

Adapt efficiently and appropriately

Stay out in front of the curve by complying with the spirit of new regulations, standards, and expectations, not just the letter.

Communicate the standards under which your organization operates

Internally and externally communicating the organization's standards helps both to build an ethical organization and to create the perception of an ethical organization, which keeps inquiries to a minimum.

Build cordial and professional relationships with regulators

Manage the entity's relationship with regulators rather than waiting to be managed by the regulator.

At The Supreme Court

Supreme Court Accepts ADEA "Disparate Impact" Case

On March 29, 2004, the Supreme Court once again has agreed to try to determine whether or not a claim of "disparate impact" discrimination (as opposed to "disparate treatment") can be brought under the Age Discrimination in Employment Act ("ADEA"). *Smith v. Jackson, Miss.*, 351 F.3d 183 (5th Cir., 11/20/03), *cert. granted* 3/29/04).

Thirty over-40 police officers and dispatchers for the Jackson, Miss. police department sued the City after the implementation of a new performance pay plan that granted substantially higher salary increases to employees with less than five years of service, most or all of whom were under 40 years of age. The 5th Circuit Court of Appeals had held that such "disparate impact" claims were not available under the ADEA. A "disparate impact" claim is where plaintiffs over age 40 claim that, as a group, they were adversely affected by an age-neutral employment practice. This type of claim often arises in large layoff situations where older employees argue they were laid off in disproportionate numbers to younger employees. Among the federal circuit courts of appeal, the First, Fifth, Seventh, Tenth, and Eleventh circuits have refused to recognize ADEA disparate impact claims, while the Second, Eighth, and Ninth circuits have recognized such claims.

This case likely will not be argued or decided until the Court's next term beginning in October, 2004.

High Court Also Agrees To Decide Whether Contingent Attorney's Fee Is Gross Income To A Prevailing Plaintiff

Again on March 29, 2004, and again to resolve a dispute amongst the federal circuit courts of appeal, the Supreme Court has agreed to decide whether or not that portion of a case settlement used to pay an attorney's contingency fee constitutes "gross income" which a settling party must include in gross income and possibly pay taxes on. In a 6th Circuit case, the lower court had held that while a settlement payment received by a taxpayer in satisfaction of his or her claim of employment discrimination against a former employer is not eligible for exclusion as personal injury damages, that portion of the settlement payment paid by the taxpayer to an attorney

pursuant to a contingency fee arrangement is excludable from income. Similarly, in a companion 9th Circuit case, the Court had held that portions of a settlement representing economic and punitive damages are includable in the taxpayer's gross income but that portion paid directly to the taxpayer's attorneys is excludable from gross income. While the two courts had the same results, their reasoning differed, and other circuits have come to differing conclusions.

Again, it is unlikely that this case will be argued and decided before the Court's next term beginning in October, 2004.

Supreme Court Hears HMO Preemption Cases

On March 23, 2004, the United States Supreme Court heard oral arguments on two consolidated cases on ERISA preemption, a constant topic of litigation in the federal courts and a frequent flyer at the Supreme Court as well. We first reported on these cases in our December 1, 2003, Client Alert.

In these cases, *Aetna Health, Inc. v. Davila* and *CIGNA Healthcare of Texas, Inc. v. Calad*, (together reported at *Roark v. Humana, Inc.*, 307 F.3d 298 (5th Cir. 2002) with two other consolidated cases which are not subject to Supreme Court review), the Court agreed to determine whether or not ERISA restricts the ability of HMO participants to sue the HMO for negligence under state laws, which generally are more generous in terms of the damages available. With respect to the claims of Davila and Calad, the 5th Circuit found that the respective HMOs in their cases were not acting as plan fiduciaries when they denied medical treatment, and thus Section 502 of ERISA did not preempt their claims. The Court relied on a prior Supreme Court case, *Pegram v. Herdrich*, 530 U.S. 211 (2000), in which the Court had held that mixed eligibility and treatment decisions were not subject to ERISA because those types of decisions are not fiduciary acts.

A decision on this case should issue this Spring.

OTHER EMPLOYMENT LAW HEADLINES

Supreme Court "Failure To Rehire" Remand Case Decided Again By 9th Circuit

As we reported in our January, 2004 Client Alert, on December 2, 2003, the Supreme Court issued a unanimous decision in *Raytheon Co. v. Hernandez*, 124 S.Ct. 513 (12/2/03), a case in which an employee challenged an employer's "no-rehire for prior misconduct" policy because it amounted to disability discrimination against former substance abusers. The Court remanded the case to the 9th Circuit for reevaluation in light of the Supreme Court's decision. The 9th Circuit, wrote the Court, had analyzed the case under the wrong theory, and that the focus should have been on this individual plaintiff's treatment rather than how the alleged "no-rehire" policy may have affected a broad class of employees. The Court did, however, emphasize that a no-rehire for prior misconduct policy was a legitimate non-discriminatory reason for not rehiring someone in the proper analysis, and thus the burden on remand was for the employee to show that this reason was a pretext for disability discrimination.

In its March 23, 2004, decision, *Hernandez v. Hughes Missile Systems*, 2004 U.S. App. LEXIS 5402 (9th Cir., 3/23/04), the 9th Circuit remanded this case back to the District Court for a trial. The Court ruled that there was a genuine issue of material fact as to whether the employer

failed to re-hire the plaintiff because of his being an alcoholic, rather than in reliance on a uniform no re-hire policy. Despite testimony to the contrary, a reasonable juror could find that the employer was aware that plaintiff had been a substance-abuser and based its decision on that ground. Moreover, a juror could reasonably infer that plaintiff's history of addiction, not an oral no-rehire policy, actually motivated the decision not to re-hire him. The fact that the employer had provided conflicting explanations of its conduct could provide a reasonable basis for a jury to conclude that the employer's explanation was pretextual. Finally, the jury reasonably could infer from the fact that nobody at the employer could identify the origin, history, or scope of the alleged unwritten policy, that it either did not exist or was not consistently applied.

Don't Mess With Those HR People

In *Adams v. Master Carvers of Jamestown Ltd.*, 2004 U.S.App. LEXIS 3381 (2d Cir., 2/23/04), the plaintiff was hired as a Human Resources Coordinator by defendant in 1999. His direct supervisor was the CFO and Vice President Terwilliger, who in turn reported to CEO and President Haines. Plaintiff suffered from heart disease and diverticulitis. He was hospitalized in late July, 1999, for his diverticulitis, and again on August 24, 1999, after having been diagnosed with an abscessed colon related to his diverticulitis. He then underwent surgery to remove part of his colon. Consequently he missed work until September 27, 1999. During his convalescence, Terwilliger allegedly asked plaintiff when he would be able to return to work and stated in substance that, "when you get back we have to sit down and discuss if you can physically do the job." Terwilliger also allegedly told plaintiff that "we're behind in [Human Resources] and not where we want to be. There's a lot of work to do." Moreover, one current and one former employee both claimed that Terwilliger made statements to the effect that he wanted to terminate Adams because he was ill and missing work. After plaintiff's August hospitalization, defendant hired another Coordinator in early September, 1999. This person assumed the plaintiff's responsibilities and occupied his office. When plaintiff returned to work on September 28, 1999, he was terminated. Terwilliger told Adams that the termination was made for economic reasons and that with the new hire, the company now had two people performing the same functions.

The 2nd Circuit Court of Appeals reversed the District Court's entry of summary judgment on behalf of the employer and remanded the case for trial. In essence, plaintiff made two key arguments with which the Court agreed. First, he argued that he was "regarded as" being unable to work at all, not just in one job or just temporarily while he was convalescing, and thus satisfied the "regarded as" prong of the ADA's disability definition, and the Court agreed. The Court specifically noted Terwilliger's statement that "when you get back we have to sit down and discuss if you can physically do the job" as evidence that the employer regarded the plaintiff as not being able to work at all.

Second, the District Court had held that because plaintiff required time off from work he was unable to perform an essential function of his job - going to work. However, plaintiff argued, and the Court agreed, that many courts have held that temporary leaves of absence can be considered reasonable accommodations. "If his health-related absences are deemed reasonable accommodations," the Court wrote, "it cannot be said that Adams could not perform the essential functions of his job with or without a reasonable accommodation."

The Court also noted that the date on which an adverse employment action is taken is the relevant date for determining whether an employee is qualified under the ADA. Here, the defendants stated in an affidavit that Plaintiff was unable to perform any essential human

resources duties from August 11, 1999 until September 27, 1999. According to the Court “[t]his statement demonstrates that Adams was able to perform the essential functions of the job on the date that he was terminated, September 28, 1999, the day that he returned to work. The date that an adverse employment decision is made is the relevant date for determining whether an individual is qualified under the statute. Thus “[b]ased on the evidence in the record and the foregoing law, it was improper for the district court to find, as a matter of law, that Adams was not a qualified individual with a disability.”

Office Romances Can Be Trouble

In a Massachusetts Appeals Court case, *Ritchie v. Department of State Police*, 2004 Mass. App. LEXIS 297 (Mass. App. Ct., 3/19/04), the plaintiff allegedly was disturbed by an apparent office romance between her superior officer and his administrative assistant and by the favors that accompanied the relationship. She objected first informally and then formally. After learning about the plaintiff's objection, her superior officer criticized her performance, lowered her evaluations, and threatened her with transfer. Plaintiff sued the Department, claiming that she was subjected to a sexually hostile work environment and to retaliatory conduct by the department in violation of G. L. c. 151B. A Superior Court judge entered judgment on behalf of the Department on the basis that the conduct alleged did not rise to the level of either a hostile work environment or retaliation. The plaintiff appealed.

The Appeals Court reversed and remanded the case for trial. On her hostile environment claim, while the Court expressed some skepticism that an oppressive and hostile environment could be created by an office romance in which the plaintiff was not a participant (and in which the allegations were more or less of hand-holding and playing “footsie”), it basically ducked the issue by holding that the retaliation claim should not have been resolved in the Defendant's favor in any event, so the case would have to be remanded anyway.

As to the retaliation claim, the Court noted that a claim of retaliation may succeed even if her underlying claim of harassment fails. A plaintiff need only “prove that [she] reasonably and in good faith believed that the [employer] was engaged in wrongful discrimination,” not that the employer actually engaged in wrongful discrimination. Here the Court concluded that “the facts alleged are sufficient to satisfy the requirement that the plaintiff ‘reasonably and in good faith’ believed that the employer was engaged in conduct in violation of G. L. c. 151B given the office romance” and the favoritism toward one of the participants. To establish retaliation, a plaintiff must also show that she engaged in legally protected conduct, she suffered an adverse employment action, and a causal connection existed between the protected conduct and the adverse action. “[C]omplaining to management or filing an internal complaint of harassment,” or “meeting with co-workers to discuss how to stop sexual harassment in the workplace,” can trigger the protections of G.L. c. 151B.

Here the plaintiff asserted that she complained about her work environment on multiple occasions. Thus the Court concluded that “the plaintiff's allegations are sufficient to support a claim that she was the subject of adverse employment action as a consequence of her protected activity. Prohibited retaliatory actions are those that constitute a change in working conditions that ‘create a material disadvantage in the plaintiff's employment.’” Here, the plaintiff alleged the following as impermissible retaliation: “misuse and improper issuance of an employee observation report, threat of removal from the CSSS, misuse of the employee evaluation system, and ‘retaliation by superior officers’ following her filing an internal harassment complaint.” Thus

the Court wrote that “[w]e reverse the judgment as we conclude that the factual allegations of office romance, favoritism, and reprisals alleged here are sufficient to state a G. L. c. 151B claim, at least for retaliation.”

Shelving Books Maybe Not Essential Function Of Harvard Research Librarian’s Job

In another case decided by the Massachusetts Appeals Court under state anti-discrimination law (G.L. c. 151B), *Cargill v. Harvard University*, 2004 Mass. App. LEXIS 251 (Mass. App. Ct., 3/8/04), the Court vacated part of the Superior Court judge’s decision and remanded the case for trial. This case involved the dismissal of a lead reference librarian at Harvard University “Harvard”. There was no dispute in this case that plaintiff, who suffered from rheumatoid arthritis, was handicapped within the meaning of G. L. c. 151B. Nor was there any dispute that plaintiff possesses the requisite academic and professional qualifications for the position. Rather, the crux of the dispute revolved around issues of material fact concerning whether, among the multiple activities performed by the lead reference librarian, it was essential that plaintiff perform two particular tasks (retrieval and shelving of books among 5 separate libraries in 3 locations) in order to accomplish the fundamental and principal objectives of the position, and whether, and the degree to which, Harvard had any obligation to make an accommodation for plaintiff’s disability.

In essence, the Court found that the principal duties of the lead reference librarian involved “provid[ing] academic-based research and reference assistance to scholars seeking sources within the vast array of [library] materials -- principally patrons who visit the library, but also nonresident scholars who submit written inquiries to the reference librarian. . . . The job description does not include paging/retrieval and shelving.” The Court found that there was a genuine issue of material fact about how essential retrieval and shelving was for a lead reference librarian, and thus reversed the Superior Court’s grant of summary judgment for the employer and remanded the case for trial. The Court wrote that “Based on our independent review, we determine that the record reveals sharply conflicting evidence on the essential function issue, thereby presenting genuine issues of disputed material fact for trial, in which a fair-minded jury could reasonably find that paging/retrieval or shelving were not necessary to accomplish the principal objectives of the job of reference librarian.”

Moreover, “[t]he summary judgment record reflects that [plaintiff] offered sufficient evidence to make a facial showing that a reasonable accommodation was possible, including, but not limited to, utilization of the available student workers and part-time staff employees, and the use of shelving carts. On the basis of this record, summary judgment was not warranted.”

Fired Workplace Proselytizer Has No Religious Discrimination Claim

In *Grant v. Fairview Hosp. and Healthcare Servs.*, 2004 U.S. Dist. LEXIS 2653 (D. Minn., 2/18/04), the plaintiff was an ultrasound technician at a medical clinic. According to the Court, he “has a religious belief that requires him to counsel women out of having abortions.” There was no dispute that there are circumstances in which plaintiff’s belief required him to act in hopes of dissuading women from having abortions. The defendant agreed that plaintiff should not have to perform ultrasounds on women contemplating abortion, but also told him that under no

circumstances was he to attempt to provide “pastoral care” to a patient. In response, plaintiff stated that his belief required him to try to dissuade a woman from having an abortion, even if that meant losing his job. As a result of his statements, the clinic discharged the plaintiff for his unwillingness to agree to cease from providing pastoral care to patients in the future.

Obviously plaintiff sued the clinic, claiming that it discriminated against him on the basis of his religion when it fired him for his refusal to forego providing pastoral care to patients. The clinic, in turn, moved for a summary judgment on the basis that it had offered a reasonable accommodation to the plaintiff’s religious belief (allowing him to not perform ultrasounds on women contemplating an abortion).

To establish a *prima facie* case of religious discrimination for failure to accommodate under Title VII, an employee must show: (1) the employee has a bona fide religious belief that conflicts with an employment requirement; (2) the employee informed the employer of this belief; and (3) the employee was disciplined for failing to comply with the conflicting employment requirement. Once the plaintiff makes a *prima facie* case, the burden shifts to the employer to show either that it made a reasonable accommodation or that it could not make a reasonable accommodation without suffering undue hardship. The parties agreed that the plaintiff established his *prima facie* case; the parties disagreed about whether the clinic offered the plaintiff a reasonable accommodation.

The Court ruled that it did, and entered summary judgment on behalf of the clinic. The Court noted that the statute and caselaw required the clinic to “reasonably accommodate” plaintiff, not “accommodate” him. The use of the word “reasonably” is not accidental Fairview agreed to accommodate Grant insofar as it agreed that he should not have to perform ultrasound examinations on any patient it knew was contemplating having an abortion. Fairview also agreed to allow Grant to leave any examination in which a woman disclosed to him that she was contemplating having an abortion, but it did not agree to allow Grant to provide pastoral care to any patient. Title VII does not require employers to allow employees to impose their religious views on others.” Thus the Court concluded that there was no genuine issue of material fact that the clinic offered the plaintiff a reasonable accommodation, and granted the clinic’s motion.

LEGISLATIVE AND REGULATORY ACTIONS OF NOTE

NIOSH Posts Workplace Health And Safety Guide On Website

On March 9, 2004, the National Institute for Occupational Safety and Health (“NIOSH”), posted a new guide for employers with guidance on how to evaluate workplace safety and health changes. The guide assists employers in evaluating the success or not of their workplace health and safety initiatives and changes. The guide includes three sections: (1) case studies illustrating collaborative efforts of employers and employees evaluating occupational safety and health changes; (2) an outline of how to conduct an evaluation of occupational safety and health changes; and (3) a list of additional resources.

The NIOSH webpage is at www.cdc.gov/niosh. The guide is a PDF document that can be found at www.cdc.gov/niosh/docs/2004-135/.

Update On New Wage/Hour Regulations

By the time you read this, the federal Department of Labor’s (“DOL”) final rule containing revisions to federal wage/hour regulations should have been published, and we will

follow up with a summary of the final rule. The final rule was forwarded to the Office of Management and Budget for review on March 26, 2004. One original revision that will be missing is DOL's original proposal that any individual with the authority to hire or fire be considered an exempt executive. DOL initially drafted the revisions to omit the long-standing requirement that an individual customarily exercise independent judgment and discretion in order to be considered an exempt executive. In the face of withering criticism, DOL has backed down and restored that requirement.

DOL claims that the final rule responds to most of the criticisms received and that there will be substantive changes in a number of areas of the proposed rule. As noted in prior Updates, Congressional Democrats have threatened to use the Congressional Review Act to rescind the new rules, or at least those portions not considered acceptable. There has been much wrangling in Congress of late over these overtime regulations, with Congressional Democrats most recently seeking to attach an amendment to an export tax bill to bar the DOL from proceeding any further with the new regulations. On March 24, 2004, the Senate Republican leadership pulled that tax bill from the floor after failing to bar a vote on that amendment. Stay tuned.

EEOC Publishes Internet Job "Applicant" Guidance

Trying to catch up to the internet boom, the U.S. Equal Employment Opportunity Commission ("EEOC"), with the Departments of Labor and Justice and the Office of Personnel Management (OPM), published in the March 4, 2004, Federal Register, a coordinated document to clarify recordkeeping provisions concerning who is an "applicant" in the context of the Internet and related technologies. The Uniform Guidelines on Employee Selection Procedures (UGESP) issued in the 1970s have not kept pace with emerging technologies, and thus the above agencies have coordinated their efforts at updating.

The guidance provides that

"In order for an individual to be an applicant in the context of the Internet and related electronic data processing technologies, the following must have occurred:

the employer has acted to fill a particular position;

the individual has followed the employer's standard procedures for submitting applications; and

the individual has indicated an interest in the particular position."

The new recordkeeping guidance applies exclusively to the Internet and related technologies, including Internet resume banks and job boards, and employers' own web sites, resume databases and online job listings. Existing UGESP guidelines would continue to apply to traditional non-electronic recruitment and selection, for example, submission of hard-copy resumes to employers. The new guidance may be found on the EEOC's website at www.eeoc.gov/policy/docs/qanda-ugesp.html. There is a 60-day public comment period starting March 4, 2004. Written comments about the proposed guidance should be sent to the EEOC's Office of the Executive Secretariat at 1801 L Street, N.W., Washington, D.C. 20507.

WAGE & HOUR/FMLA DEVELOPMENTS

1st Circuit Rejects DOL Interpretation Of “Workday” In FLSA Case

In *Tum v. Barber Foods*, 2004 U.S.App. LEXIS 5427 (1st Circuit 3/10/04), a group of employees of a Maine chicken processor were expected to be on the production floor ready to work when their shift began, although they were required to wear various types of safety gear by both federal regulation and by the employer. Historically the employees had not been paid for any time spent donning or doffing such gear. Thus they claimed they should be compensated for time spent walking from one station to another while dressing for work, and for time spent standing in line to obtain equipment or to clock in to work.

The District Court had ruled in favor of the employer on the traveling and line-waiting issues but permitted the donning and doffing question to go to a jury. The jury in turn found the time donning and doffing was compensable but *de minimis* (comprised of average times of about 1-2 minutes). The employees did not appeal the jury’s finding, but did appeal the traveling and line-waiting issues.

The Court noted that the FLSA requires an employer to record, credit, and compensate employees for all of the time which the employer requires or permits employees to work, which is commonly defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Even when an activity is properly classified as "work," however, the Portal-to-Portal Act, 29 U.S.C. § 254, exempts from compensation activities which are preliminary or postliminary to an employee's principal activity or activities unless they are an "integral and indispensable part of the principal activities for which covered workers are employed and not specifically excluded by section 4(a)(1) [of the Portal-to-Portal Act]." Moreover, some activities that may qualify as "work" and fall outside of the Portal-to-Portal Act nevertheless do not require compensation because the activities require such little time that they are considered *de minimis*.

Thus the Court held that donning and doffing any gear required by the employer or government regulation was "integral to the principal activity," but that donning and doffing any nonrequired gear should not be compensable. The Court also ruled that “a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary Not everything an employee does in her workplace is compensable under the FLSA.”

The federal Department of Labor (“DOL”) argued that “workday” rule in the FLSA should be expanded to cover any activity that was “integral and indispensable” to the employee’s work. The Court rejected this argument and wrote that “[t]his extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m. at his own home, starts his workday for FLSA purposes at 5:00 a.m.--even though he is not required to punch in to work and does not punch in until 8:00 a.m. . . . This plainly cannot be what Congress intended.”

Insurance Agents Were Exempt Administrative Employees, Not “Production” Employees

In *Hogan v. Allstate Insurance Co.*, 2004 U.S.App. LEXIS 3824 (11th Cir., 2/27/04), 5 test plaintiffs in a class action of potentially 2,300 Allstate insurance agents lost their claim that

they were entitled to overtime. The plaintiffs sold, serviced, and promoted Allstate insurance products, operated out of their own offices, and they were not monitored on a day-to-day basis by Allstate. Allstate did, however, monitor their sales levels. The agents were paid a percentage of the revenue they generated with a guaranteed monthly minimum, and their commissions were always in excess of the guaranteed monthly minimum. On average, the plaintiffs earned \$122,700 per year, and also received a "office expense allowance" to use toward office-related expenses such as staff wages, advertising, rent, and bills. Claiming they were entitled to overtime because they were either "sales" employees or "production" employees, the agents sued Allstate. Allstate argued that the agents were independent contractors, and even if they were not independent contractors, they were exempt administrative employees.

The 11th Circuit Court of Appeals ruled that the agents performed mostly non-production, administrative tasks and worked under only general supervision. They performed tasks that were of "substantial importance" to Allstate and that the plaintiff's comparisons to bookkeepers, secretaries, and clerks understated the level of autonomy and responsibility the agents had. Thus they were not simply "production" employees. Neither were the agents engaged in traditional "sales" types of occupations, because insurance companies are not retail or service establishments within the meaning of the FLSA.

Finally, the Court rejected the plaintiffs' claim that agents did not exercise discretion and independent judgment in doing their jobs because Allstate regulated which products were sold, how they were sold, and the manner in which agents provided customer service. Just because the agents' acts might have been subject to review by Allstate, noted the Court, did not necessarily mean they did not possess the necessary discretion under the FLSA - some oversight of their work by an employer did not equate to a total lack of discretion and independent judgment.

ON THE EMPLOYEE BENEFITS FRONT

Employee Whose Only "Disability" Was An Inability To Work With Specific Co-Workers Was Not Disabled Under Disability Pension Plan

In *Valeck v. Watson Wyatt & Co.*, 2004 U.S.App.LEXIS 4839 (6th Cir., 3/11/04), the plaintiff applied for a disability retirement under the employer's pension plan. The plan provided that an employee was "totally disabled" and eligible for a disability retirement when she could not perform the "material duties of his regular occupation." The SPD explained total disability as being "unable to perform any of the duties of your regular job." Her doctor stated that plaintiff "is unable to engage in stress situations or engage in interpersonal relations" and explained that the "stress" and "problems in interpersonal relations" suffered by his patient included her inability to tolerate "perceived harassment" by her supervisor and another co-worker. Plaintiff explained this perceived "harassment" as stemming from the supervisor and co-worker "talking about her" and telling her "on numerous occasions [that] she was incompetent [and] not doing [her] work." The plan administrator denied her application for disability retirement. She sued.

Plaintiff's theory, as described by the Court, was:

At issue . . . is whether the language of the SPD -- "regular job" -- or of the language in the plan itself -- "regular occupation" . . . are in conflict. Ms. Valeck argues that the term "regular job" is narrower than "regular occupation" and means

the specific job in the specific office and with the specific supervisor and co-workers with whom she worked, not just the kind of work she did, which she contends would define her "occupation." . . . And, because the SPD uses the word "job" while the Plan document itself uses the word "occupation," based upon the distinction between the two words that she herself has drawn, Plaintiff argues that the SPD and Plan document are inconsistent. Therefore, she argues that the Court is required to use the "regular job" language of the SPD and construe that phrase as she does.

The Court rejected this claim. First, the Court found that the plan granted the administrator discretion in making eligibility determinations, and therefore the appropriate standard of review was "arbitrary and capricious," meaning that "the court determines whether Watson Wyatt's decision to deny Valeck benefits was rational and consistent with the terms of the policy." Under this standard of review, the Court wrote that the "plan administrator determined that Valeck was not disabled because the undisputed medical evidence showed that while she could not work with two specific individuals, she could continue her same job as an employee benefit professional under different circumstances. Contrary to her assertions, Valeck was not prevented from generally working, nor was she prevented from continuing to work as an employee benefit consultant. The prohibition was her continued work under the specific management within her department at Watson Wyatt. The 'total disability' provision of both the plan documents and the SPD is that an employee cannot work because of a 'disability.' It was rational for the plan administrator to find that Valeck was not disabled when the only problem Valeck had with her employment was working with two specific individuals. Therefore, Watson Wyatt did not act arbitrarily or capriciously in denying Valeck's September 1999 application for disability retirement."

Plan Administrator Entitled To Use Discretion In Deciding Between Contradictory Medical Evidence

In a Massachusetts case, *Gannon v. Metropolitan Life Ins. Co.*, 2004 U.S.App. LEXIS 2795 (2/19/04), plaintiff was diagnosed with a tumor of the spinal cord in July 1997. She stopped working shortly thereafter and underwent surgery the following month. She then applied for, and on June 6, 1998 was finally awarded, long-term disability benefits under the Plan. On October 17, 2000, however, MetLife denied plaintiff's request for continued disability benefits, determining that she no longer qualified as "disabled" under the Plan because she was not unable to perform "the material duties of any gainful work or service for which [she was] reasonably qualified" under the terms of the plan. In a letter informing her of its decision, MetLife cited the following documents: an attending physician statement, which documented plaintiff's subjective complaints of pain but indicated that she could sit, stand, and walk on an intermittent basis; a functional capacities evaluation ("FCE"), which stated that she should be capable of performing a sedentary occupation; an independent medical consultant's analysis, which stated the same; and a transferable skills analysis ("TSA"), which identified three occupations that plaintiff should be capable of performing. MetLife subsequently denied plaintiff's appeal of its decision to terminate her disability benefits on June 25, 2001. This case followed.

The District Court found in favor of the plaintiff and awarded her summary judgment. That Court concluded that MetLife's decision to terminate plaintiff's disability benefits was arbitrary and capricious because it was not supported by reasonably sufficient evidence, especially in the face of her own physicians' numerous opinions to the contrary. More particularly, the court found the evidence relied on by MetLife to be "circumstantial, unconvincing and contrary to direct medical opinion."

The 1st Circuit Court of Appeals reversed and entered judgment for the plan. "Viewed in the aggregate," wrote the Court, "MetLife's evidence is both substantial and reasonably supportive of its decision to terminate Gannon's disability benefits. Gannon argues nonetheless that the evidence relied on by MetLife is inadequate to support MetLife's decision because it is contradictory to and outweighed by the opinions of the two physicians who examined her. We disagree. To be sure, both Dr. Davidson and Dr. Sweet consistently opined that Gannon was unable to work. Dr. Davidson also submitted to MetLife several attending physician statements in which he indicated that Gannon could only sit, stand, and walk intermittently and lift little or no weight. However, that evidence, while supportive of Gannon's position, is by no means unassailable. For one thing, ERISA does not require plan administrators or reviewing courts to accord special deference to the opinions of treating physicians. Moreover, MetLife relied on other credible evidence -- in particular, the FCE, Dr. Greenwood's opinion, and the SSA's denial of disability benefits -- which sufficiently contradicted Dr. Davidson's and Dr. Sweet's opinions that Gannon was completely disabled from working. Under the terms of the Plan, it was within MetLife's discretion to weigh that competing evidence to determine whether Gannon was 'disabled' and hence whether she was entitled to continuing benefits. And in the presence of conflicting evidence, it is entirely appropriate for a reviewing court to uphold the decision of the entity entitled to exercise its discretion."

More "Participant Protective" Plan Document Governs Over Inconsistent SPD

In Schultz v. Stoner, 2004 U.S. Dist. LEXIS (S.D.N.Y., 3/8/04), a pension plan's SPD had a more restrictive definition of who was or was not an "independent contractor" than the Plan's formal plan document had. The plaintiffs, employees leased to Texaco, were denied benefits as a result. They sued the Plan, claiming in part that a more generous formal plan definition should govern. The Plan Administrator argued that the SPD definition was consistent with at least one prior Plan definition (the Plan apparently had various definitions at various times), and thus her interpretation of the Plan and SPD language was entitled to deference. Moreover, she argued that even if there were an inconsistency, prior caselaw required the Court to find that the SPD language governed.

The Court found that the summary judgment record was insufficient to determine the issue of how much deference the administrator's decision was entitled to, in part because there were several plans over the years. The Court did hold, however, that an SPD governs over an inconsistent Plan Document only when the SPD favors the participant. The Court reasoned that (1) the plan documents in front of the Court specifically provided that the plan document would govern over an SPD; and (2) ERISA is a participant protective statute, and most if not all of the prior cases in which an SPD was found to govern over a plan document, that was the case because "where conflicts were found and the SPD was found to govern, the SPD language was more favorable to the participant than the official plan language and the participant had suffered

prejudice” by relying upon the SPD.

The Court noted that these decisions are consistent with ERISA's policy requiring accurate plan communications to employees and placing the burden on plan sponsors and/or fiduciaries to the extent inaccuracies in communications prejudice the rights of plan participants. The Plan Administrator could point to no case holding that a plan or fiduciary can invoke narrow or inconsistent SPD language to preclude participants from exercising rights granted by formal plan texts.

Thus the Court remanded the case to the plan's administrator to determine whether the workers were entitled to benefits pursuant to the plan's formal documents.

Retirement Incentive Plan Not Governed By ERISA

In another Massachusetts case, *White v. Bell Atlantic Yellow Pages*, 2004 U.S. Dist. LEXIS 4720 (D. Mass., 3/23/04), plaintiffs took advantage in 1997 of an early retirement incentive program offered under a collective bargaining agreement (“CBA”) and retired. The early retirement plan created an incentive for employees to retire early by adding six years to a participant's age and term of service for the purpose of calculating the individual's pension benefit under the NYNEX Pension Plan. The effect of the plan was to increase significantly the pension benefits to which an individual would be entitled. The plan also contained a Social Security supplement, further increasing the benefits of the package. The company represented at that time that there was no other early retirement program under consideration. In a subsequent CBA, the company negotiated a new early retirement plan which then was offered to certain bargaining unit members. The plaintiffs sued, claiming a breach of fiduciary duty and several state law claims based on the alleged misrepresentation that the company was not considering another plan when the plaintiffs retired. Plaintiffs claimed that the newer plan was more generous and they would not have retired when they did had they known about the newer plan.

The Court noted that “an employer has `a fiduciary duty not to mislead [participants] as to the prospective adoption of a plan under serious consideration. . . . `Serious consideration’ occurs when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement that change.” Here, there was no such serious consideration at the time the plaintiffs retired. The Court also noted that if there is no ERISA “plan,” then there can be no claim under ERISA. The Court ruled that the plan was not an ERISA plan because it provided a one-time incentive to employees wishing to retire early, did not create a scheme for individualized discretionary determinations of the eligibility of employees for retirement benefits, and its operation was purely automatic and non-discretionary; it simply acted as a lump-sum grant of age and service credit that could be plugged into the existing pension plan.

Interestingly, the plaintiffs also made state law claims of misrepresentation and promissory estoppel, basically arguing that the company misled them about a newer early retirement plan and claiming that they relied on those promises/misrepresentations to their detriment. Because the plan arose under a CBA, the company argued that those state law claims were preempted by federal labor law because they required the Court to “interpret” the CBA. The Court agreed in part, but ruled that part of the state law claims hinging on a claim of “past practice” under the CBA was not preempted. The company then argued that if so, the employees were required to file a grievance under the CBA within 30 days and they had not, thus they waived any right they might have had to bring this claim under the CBA. The Court agreed, and held that even a retired employee, if seeking benefits under a CBA, had to exhaust the CBA’s

grievance and arbitration procedure before going to court. This conclusion was despite the union's contention that such retirees were not employees or even union members, and thus the union would not have allowed them to file a grievance under the contract.

Pension Fund Could Suspend Benefits Of Participant Who Engaged In "Prohibited Reemployment"

In *Militello v. Central States, S.E. and S.W. Areas Pension Fund*, 2004 U.S.App. LEXIS 4058 (7th Cir., 3/3/04), the truck driver participant retired, but then began operating his own trucking business. When he applied for benefits, he told the Fund that he owned trucks and trailers, and was told that mere ownership would not prevent him receiving a pension. However, under the fund's terms, a participant's benefits would be suspended if he engaged in "prohibited reemployment," which was defined as "Employment in any position ... including self-employment ... in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund." Later the Fund learned that the retiree was actively operating a trucking company and employing drivers, and thus suspended his benefits.

The 7th Circuit Court of Appeals, affirming the District Court, held that the Fund did not act "arbitrarily and capriciously" in suspending his benefits on the basis of his "prohibited reemployment" by earning income from a trucking business while he was receiving pension benefits. The Court found that while mere ownership of trucks was not prohibited by the Plan language, his benefits were not suspended just because he owned trucks. Rather, the benefits were suspended because the Fund determined he was operating a trucking business and employing drivers. On the basis of his tax return, which listed a \$20,000 driver bonus as an expense, the Court ruled that the Fund reasonably concluded that the plaintiff was "doing more than leasing" his trucks.

Lastly, the Court rejected the plaintiff's claim that the fund violated an ERISA regulation (29 C.F.R. Section 2530.203-3) that prohibits pension plans from suspending pension benefits because of a participant's self-employment. That regulation, ruled the Court, does not apply to participants who have not attained the normal retirement age of 65. Since plaintiff had retired at age 53 and now was still only 61, "this regulation does not pertain to Militello."

On The Labor Front

Unilateral Cessation Of Paid Time For Donating Blood Was Unlawful

Affirming a ruling of the National Labor Relations Board ("NLRB"), in *Verizon v. NLRB*, 2004 U.S.App. LEXIS 4855 (D.C.Cir., 3/16/04), the District of Columbia Court of Appeals ruled that an employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("Act") when it unilaterally stopped allowing employees to donate blood during paid time. For years the union and the company had jointly sponsored blood drives at the company's facilities, and worked together to schedule employees and provide coverage. The company then decided not to co-sponsor the drives and to cease allowing employees to donate blood on company time, and refused to bargain with the union over the change.

The Board had found that Verizon violated the Act by failing to give the union an opportunity to bargain over its decision to eliminate the blood drives during paid worktime. The blood drive program was, the Board ruled, a mandatory subject of bargaining under § 8(d) of the

Act because it concerned "wages, hours, and other terms and conditions of employment." The Board also rejected the company's defense that the union had not timely requested bargaining over the change in policy and had thereby waived its bargaining rights.

The Court agreed with the Board. The company's principal argument was that the change in its blood drive policy was not a mandatory subject of bargaining because discontinuing blood drives did not alter "wages, hours, and other terms and conditions of employment." As the Court explained, "Verizon's argument is that its decision to support, or not to support, a charity is a core entrepreneurial concern; that the blood drives benefitted Hudson Valley [the blood collection entity] not Verizon's employees; and that ending the blood drives did not "vitally affect[] the employees' wages, hours or terms and conditions of employment." While both the Board and the Court did not disagree with Verizon's first point, how management goes about this may be another matter. Permitting employees to receive wages for time not worked - up to four hours per blood drive twice a year - and to have these non-working hours counted as worktime, "is surely 'germane' to an individual's employment" wrote the Court; "[n]o one can doubt that time off with pay is a mandatory subject of bargaining." Thus the Court enforced the Board's Order.

Looking At Authorization Cards And Having Discussions Was Not "Recognition" Of The Union

In *IUOE, Local 150 v. NLRB*, 2004 U.S.App. LEXIS 4859 (7th Cir., 3/16/04), union organizers approached a manager, stating that the Union represented a majority of employees and giving the manager copies of signed authorization cards from all of the employees. They also gave the manager a copy of a voluntary recognition agreement which he did not sign. They then discussed employees' terms and conditions of employment, including better winter clothing and shoes, safety concerns and more time to inspect equipment and more HazMat training. The manager responded that this was "a good idea" and "a good way to go."

Later that day, the organizers returned to speak with the manager's boss, and roughly the same conversation followed. This supervisor also brought up the issue of union training, and was told the union had an apprentice program. Then the supervisor asked about union wages, and indicated that the company would not be able to pay union wages and would subcontract the drilling work if they were forced to pay union wages. Finally, the supervisor asked about the Union's insurance program and requested a copy of its benefit plan. The next day the organizers sent the Supervisor a letter stating that he believed the parties had begun bargaining and that the company had agreed to provide its employees with better winter clothing and HazMat training. In response, the company's new attorney drafted a letter stating that the Union's visit was a "courtesy call" and that no negotiations or bargaining had begun.

Later the employer filed an election petition with the NLRB. The union filed an unfair labor practice charge against the company, claiming that the company unlawfully withdrew recognition from the Union. When the company later unilaterally changed the starting times for its employees, the union filed another charge against the company for failing to bargain with the union. Although the Administrative Law Judge found in favor of the Union, the NLRB reversed and found that the company had not voluntarily recognized the Union and therefore did not violate the Act by withdrawing recognition from the Union or refusing to bargain with the Union.

The Court agreed. The Court noted that voluntary recognition can be either explicit or implicit. Explicit voluntary recognition occurs when an employer expressly agrees to a union's representation. Implicit voluntary recognition occurs when an employer's statements or conduct

clearly and unequivocally demonstrate that it has made a commitment to enter into negotiations with a union. Here the union argued that the NLRB's decision is not supported by substantial evidence because the evidence in this case showed that: (1) when the company reviewed the union authorization cards, it stated "you got them all"; (2) the company engaged in actual bargaining with the union; and (3) the company made a commitment to enter into future negotiations with the union.

The Court ruled that, as to #1, merely reviewing authorization cards does not count as implicit recognition of a union. As to #2, the Board had concluded that no bargaining took place in this case because the discussions between the union and the company did not have the give-and-take characteristic of negotiation, and there was substantial evidence in the record to support that conclusion. Merely "touching on" these issues did not imply recognition, and was not engaging in "serious give-and-take negotiation." Rather, the employer was speaking to the union "in order to obtain as much information as possible" so that it could determine what its employees were "looking for (and willing to accept) as compared with their expectations of what the Union could obtain for them through collective bargaining."

Finally, as to #3, the supervisor's statement that he "would be in touch" did not clearly show intent to enter into negotiations with the union. An equally logical account of his statement was that he would consider the union's request for recognition and inform them later of his decision. The Court noted a prior Board case in which the Board had held that an employer's statement that the Union should "get back to him" was too ambiguous to support a finding of commitment to enter into negotiations with the Union. Thus the employer did not recognize the union and did not commit unfair labor practices by withdrawing recognition from the union or for making unilateral changes in work hours.**Board Orders Posting Also Read Aloud To Employees by Board Agent**

In *McAllister Towing & Transportation Co.*, 341 NLRB No. 48 (3/5/04), a representation election was scheduled for July 2. The employer ordinarily granted a mid-year wage increase and other economic enhancements in July of each year. Here, the employer accelerated the mid-year increase to June, shortly before the election, and also extended its 401(k) plan to unit employees and granted five paid holidays. The Board affirmed the administrative law judge's ("ALJ") finding that the Respondent violated Section 8(a)(1) of the Act by accelerating the timing of a mid-year wage increase from July to June, extending its 401(k) plan to the unit employees, and granting the employees five paid holidays.

The Board also determined, contrary to the ALJ, that the employer did not engage in what the Board and courts have characterized as "hallmark" violations, (e.g. threats of plant closure, job loss, and discharge) justifying a bargaining order (an order by the Board to bargain with a union despite no election win by a union because of egregious employer misconduct during a campaign, assuming the union had a majority of cards in the first place) to remedy the violations, but that additional remedial action was warranted because the mere posting of a notice posting alone likely would be insufficient to permit the holding of a fair rerun election. Thus they required that the Respondent permit a Board agent to read aloud to employees the notice in the presence of a responsible management official at the yard.