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Briefly

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EMPLOYERS INCREASINGLY BEING SUED
OVER INFLEXIBLE LEAVE POLICIES

Mary Moffatt Helms

"The bottom line of much of this litigation is that the EEOC insists that in some circumstances an exception may have to be made to an objective leave of absence policy as a reasonable accommodation"

A number of cases are being brought across the country challenging employers inflexible leave policies, sometimes known as administrative separation policies, when an employee is terminated for failure to return to work following a maximum period allowed for a leave of absence. Many, if not most employers, have policies that if an employee is absent for leave for more than a set period of time, e.g., 3 months, 6 months, 12 months, or 24 months, they are administratively terminated from employment. Such policies have traditionally been seen as desirable, inasmuch as otherwise an employee can stay on the employment rolls forever, and the objective nature of the policy is often considered desirable in avoiding discrimination claims. More recently, however, these traditional notions of sound policy are being challenged.

On August 28 of this year, the Equal Employment Opportunity Commission (EEOC) announced that it filed a major class action lawsuit against United Parcel Service (UPS). The suit alleges that UPS terminated the employment of the plaintiff because of her disability rather than accommodating her by extending her leave of absence in violation of the Americans With Disabilities Act (ADA), and the lawsuit further claims that UPS discriminated against a class of individuals with disabilities by maintaining an inflexible 12-month leave policy which did not provide for a reasonable accommodation and which instead provided for termination of employment, also in violation of the ADA. The EEOC seeks an order requiring UPS to grant full relief to a class of disabled individuals by providing them with appropriate back pay with pre-judgment interest, compensation for past and future monetary losses resulting from their unlawful termination, compensation for non-pecuniary losses including but not limited to pain and suffering, and punitive damages. *U.S. Equal Employment Opportunity Commission v. United Parcel Service, Inc.*, Case No. 1:09-C V-05291, in the U.S. District Court of the Northern District of Illinois.

According to a press release issued by the EEOC, the plaintiff administrative assistant took a 12-month leave of absence from work when she began experiencing symptoms of what was later diagnosed as Multiple Sclerosis. She returned to work for a few weeks, but soon thereafter needed additional time off after experiencing what she believed to be negative side effects of her medication. The press release further claims that although the plaintiff allegedly could have returned to work after an additional 2-week absence, UPS fired her for exceeding its 12-month policy.

UPS in its public statement expressed frustration with the governments attack on one of the most generous and flexible leave policies in corporate America. The employee in this case never asked for an accommodation under the ADA, and following nearly a years leave of absence, she returned to work after having been released to return to her regular job without restrictions. After returning to work for just 18 days, she then, in essence, abandoned her position without ever providing management with any medical documentation justifying additional time off. The UPS public statement says it intends to vigorously defend its leave policy as the litigation progresses.

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INTERESTING SEX HARASSMENT CASES

INVOLVE ADMISSIBILITY OF PLAINTIFFS PROVOCATIVE CLOTHING, AND ALLEGED SEXUAL RELATIONSHIP ON THE PART OF HIGHER-UPS

Tamara Gauldin

"The court ruled that because the plaintiff claimed that she had been unwillingly subjected to a sexually hostile environment, she made relevant her own behavior in the workplace with co-workers, customers and supervisors."

Two recent sexual harassment cases raise some extremely interesting issues. In one, testimony and photos about a plaintiffs allegedly provocative dress, speech and conduct at the office was used to fight claims she was subjected to a sexually hostile environment. *Dahms v. Cognex Corp.*, 914 N.E. 2d 872 (Mass. 2009). Apparently photographs were introduced into evidence of company-sponsored Halloween parties and other functions. This information was relevant to whether she was subjectively offended by her work environment. According to the court, It [the information] concerned behavior in the workplace and at company events, or interaction with the defendants by whose conduct she claims to have been harassed, the court said. It was not admitted (nor admissible) as character evidence or to paint Dahms as a loose woman. The court said that throughout the trial it engaged in constant and careful weighing of probative evidence versus potential prejudice of evidence regarding the plaintiffs dress, speech and conduct.

In another case, a federal judge in California responded to a plaintiffs demands of discovery of documents, by precluding release of information on an alleged sexual relationship between his supervisor and a subordinate. *Tumbling v. Merced Irrigation District,* 2009 WL 3287880 (E.D. Cal. October 13, 2009). The plaintiff had brought a paramour theory of gender discrimination contending that his supervisor was having an affair with a subordinate, because the supervisor had his eye on her, and he saw the supervisor touching her body. After several other incidents he attributed to the affair, the plaintiff was demoted, and sued.

The judge stated that discovery is available for material that is not privileged and that is relevant to a claim or defense. Some of what the plaintiff sought from his employer in discovery was either privileged or not relevant to the claims, the judge decided. The fact that two employees flirted with one another and went out for drinks does not equate with widespread sexual conduct necessary to support plaintiffs legal theories and justify embarrassing the employer, the supervisor, and his subordinate, the judge said. Further, the judge denied the plaintiffs request for the personnel files of the supervisor, the subordinate, and five other employees as being overbroad and irrelevant.

Editors Note - Sometimes harassment plaintiffs attempt to embarrass employer officials and/or secure a settlement by seeking discovery of affairs among high management officials. In the Merced Irrigation case, the judge did not allow such intrusions of privacy without a strong showing of relevance. In the Cognex case, the trial judge exercised his discretion to allow the admission of the plaintiffs provocative dress and conduct, as a defense to a hostile environment case, being careful to weigh the relevance with the potential prejudice of such evidence. This is a common approach for a judge to take in such situations.

SPECIAL THANKS. . . to all who attended our Thirtieth Annual Labor & Employment Law Update Conference held on November 5 - 6, 2009 in Knoxville. We had close to 400 clients and friends attend the conference this year. We thank you for your continued support and look forward to seeing you again. If you missed this year's conference, keep watch for the announcement of our 2010 conference coming soon!

2009 TARGET OUT OF RANGE

NOVEMBER ELECTIONS AND THE HEALTHCARE BILL

The November elections resulted in Republicans capturing the governorships of Virginia and New Jersey by substantial margins, and it could have an impact on the Democratic legislative agenda including the healthcare bill. Exit polls showed that the Democratic tickets in those states carried voters with incomes under $50,000 and over $200,000, and lost those in between. There are signs that the Obama majority coalition has splintered. The health-care bill financed by either higher taxes on high earners or those with generous, employer-provided health insurance, such as provided for some union workers, looks like a harder sell. Newly elected Democrats, appear to be particularly concerned about trends.

Jeff Jones

"The bill, which allegedly would cost over $1 trillion over 10 years, would raise the percentage of legal residents covered for healthcare from 83% now covered, to 96%."

A few days after the election, on November 7, the House of Representatives voted for the healthcare bill, but by a very small margin of 220-215. Only one Republican supported the bill, and thirty-nine Democrats opposed it. Some Democrats said they voted for the bill only so they could seek improvements in it. The President allegedly converted a few final holdouts during an appearance at a close-door meeting with Democrats just hours before the vote. Even Speaker Nancy Pelosi just before the vote allowed anti-abortion Democrats to tighten restriction on coverage for the procedure under any insurance plan that receives federal money. Such measures show the extent of the pressure to gain such a narrow victory.

About one-third of the remaining 18 million people uninsured would be illegal immigrants. About $460 billion of the cost over the next decade would come from new income taxes on higher earners. There would also be more than $400 billion in cuts in Medicare and Medicaid; a new $20 billion fee on medical device makers; $13 billion from limiting contributions to flexible spending accounts; sizable penalties paid by individuals and employers who don't obtain coverage; and a mix of other corporate taxes and fees.

Individuals must have insurance, or face a tax penalty of 2.5% of their adjusted gross income up to certain maximums. Employers must provide insurance to their employees or pay a penalty of 8% of payroll or less depending on the size of the employer. Some subsidies will be available for small employers. Individuals and families with annual income up to 400% of poverty level, or $88,000 for a family of four, would get sliding-scale subsidies to help them buy coverage. Beginning in 2013, a new health insurance exchange would be open to individuals and, initially, small employers. A committee would recommend a so-called essential benefits package, which would be the benefit package offered in the exchange. No higher premiums would be allowed for pre-existing conditions or gender, and there would be limits on higher premiums based on age. A new public plan available through the insurance exchange would be set up and run by the government. Medicaid would be expanded to cover all individuals under age 65 with incomes up to 150% of the federal poverty level, which is $33,075 per year for a family of four.

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KNOW YOUR ATTORNEY

ANITA PATEL

ANITA PATEL has been Of Counsel with the offices of Wimberly Lawson Seale Wright & Daves, PLLC., since 2002. Her law practice exclusively focuses on immigration and nationality law. Anita received two Bachelor of Science degrees, both with honors, from the University of Tennessee, one in Finance and the other in General Business. She also received her law degree from the University of Tennessee, College of Law. Anita has been a sole practitioner in the Law Offices of Anita Patel, Knoxville, Tennessee since 1996. She is a member of the American Immigration Lawyers Association (AILA), the Knoxville Bar Association, and the East Tennessee Law Association for Women (ETLAW). Anita is fluent in Gujarati.

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"EMPLOYERS INCREASINGLY BEING SUED OVER INFLEXIBLE LEAVE POLICIES"
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In another lawsuit, in September of this year, the EEOC announced a $6.2 million settlement of a class action that accused the Sears department store chain of widespread disability discrimination. *Equal Employment Opportunity Commission v. Sears, Roebuck and Co.*, No. O4-7282 (N.D. Ill. Sept. 29, 2009). The EEOC said the $6.2 million settlement is the largest recovery in a single lawsuit filed by the agency over alleged violations of the ADA. According to the lawsuit, Sears maintained an inflexible 1-year workers compensation leave exhaustion policy and fired employees instead of providing them with reasonable accommodations for disabilities as required under the ADA.

In a third related case, involving slightly different issues under the ADA, a divided Ninth Circuit Court of Appeals has reinstated the disability discrimination claims of a former employee who sued her employer for requiring that she pass a physical capacity evaluation (PCE) before returning to her job after medical leave. *Indergard v. Georgia-Pacific Corp.*, No. 08-35278 (CA 9, Sept. 28, 2009). Company policy required employees to undergo PCEs before returning to work from medical leave, and GP sent Indergard to an occupational therapist for the exam. The PCE, which lasted 2 days, included, as Indergard described it, testing, poking, palpating and examining. The employer ultimately told Indergard that she could not have her old job and no other jobs were available for someone with her qualifications. Ultimately she was fired under a provision in the collective bargaining agreement that allowed the company to terminate employees who had been on leave for 2 years.

The 2-1 Ninth Circuit majority ruling agreed with Indergards argument that the PCE was an improper medical examination under the ADA, which prohibits employee medical examinations that are not job-related and consistent with business necessity. The majority concluded that the employers PCE went way beyond what was necessary to determine an employees ability to perform the essential functions of her job. Although the purpose of the PCE may have been to determine whether Indergard was capable of returning to work, the substance of the test clearly sought information about Indergards physical and mental impairments or health, and involved tests and inquiries capable of revealing to GP whether she suffered from a disability.

However, the law suggests that an employer is not required to make exceptions to their normal leave policies, unless the employee requests an accommodation.

Employers may wonder how to resolve all these conflicting considerations in properly developing and implementing a leave of absence policy. There are various steps that an employer can take to lessen if not eliminate such legal concerns. One approach is to write certain accommodations into its leave policy, such as one requiring employees who cannot return to work within the maximum leave policy and who have disabilities to request an accommodation prior to the expiration of their leave. The employer would then consider such exceptions or accommodations on a case-by-case basis, provided an accommodation does not work an undue hardship on the company. A similar approach is to send a reminder to an employee near the end of their leave, that they will be administratively separated from employment unless there is an appropriate request for an accommodation due to a disability, that does not work an undue hardship on the company.

Other approaches are to add provisions in the termination letter that lessen the potential for litigation. For example, the employee could be terminated, with a notation in the termination letter that if the employee has a disability and requests a reasonable accommodation, they may present such evidence to the company within a reasonable period of time and the company will review the letter to determine if the termination should be rescinded. Or, it may help to simply add a provision that if the employee should ever be in a position to seek to return to work with the company, they may re-apply at some point in the future.

A review of leave policies is desirable, inasmuch as the ADA as amended effective this year will likely result in employees on medical leave for a considerable period of time being deemed to have a disability under the ADA, and thus have the opportunity to sue alleging that their rights have been violated.