Labor and Employment Law Reporter

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This Volume Includes:

BELIEF THAT EMPLOYEE VIOLATED POLICY SUFFICIENT TO DEFEAT DISCRIMINATION CLAIM

The Sixth Circuit Court of Appeals has emphasized that an employer's *belief* that an employee violated a policy, not that the policy was actually violated, can defeat a discrimination claim. *Allen, et. al. v Highlands Hospital Corporation*, 545 F.3d. 387 (CA6 2008).

In *Allen*, two employees were terminated for the improper release of a patient's x-rays. Employee Jo Ann Allen was the grandmother of the patient and received verbal permission from her daughter to retrieve the grandchild's x-rays, so that they could be taken to a doctor the following day. When she was told that she could not have the x-rays without a signed release, she ultimately persuaded another employee, Deborah Sloan, to give them to her. After the fact, Allen forged her daughter's signature on a release, backdated it, and then placed the "release" in the x-ray jacket. Both Allen and Sloan were terminated for violating patient privacy, allegedly pursuant to hospital policy.

The twist in this case was that the hospital had no policy governing the situation. The plaintiffs claimed that they were actually terminated because of their ages, rather than for a purported policy violation. They argued that because the hospital did not have a written policy governing specific procedures to follow when releasing medical records, the hospital could not defend the discharge for a policy violation. However, the court agreed with the hospital that "we should consider not whether [plaintiffs] *actually* breached confidentiality, but rather whether the hospital had an honestly held belief that they had committed a [terminable] offense." *Allen, supra*.

This case is beneficial to employers since, even if a written policy does not exist, if the employer is able to prove that it honestly believed a policy has been violated, such belief constitutes a legitimate nondiscriminatory reason for its action. In other words, it serves as a defense to a claim that the termination is based on an impermissible factor, such as age, gender, or race. Employers need to recognize that even if no written policies exist, they may still be able to defend against discrimination claims. Obviously, the defense of a case such as this would be stronger if there is a written policy. So, to the extent policies do not in fact correspond to actual "practices," they should be updated to reflect what transpires on a day-to-day basis.

ARBITRATION FEE SPLITTING IS PERMISSIBLE

In Michigan, agreements to arbitrate are valid so long as statutory rights and remedies are not waived and as long as the arbitration procedure is fair. The Michigan appellate courts have held that they will not include among the fairness requirements a blanket rule that the employer pay all the fees of the arbitrator and the arbitration service. *Cash v Spartan Tire*, Mich App No. 278174 (10/16/08).

In *Cash*, the question focused on how the arbitration agreement was created. When plaintiff was hired by Spartan Tire, he received an employee manual defining the rules and responsibilities of employment. The employee manual contained an arbitration provision which explained that by accepting or continuing employment the employee automatically agreed that arbitration would be the exclusive remedy for all disputes arising out of or relating to the employee's employment with Spartan Tire. Cash did not challenge the fact that his claims had to be arbitrated, only that the arbitration fees would be split. Plaintiff took the position that Michigan law only allows such provisions if they appear in individually negotiated employment contracts.

The court refused to follow that rationale and determined that regardless of where the fee splitting provision appears, it is nonetheless enforceable. Prior to this case, the decisions allowing fee splitting arose out of individually negotiated employment contracts. The Court of Appeals held that it made no difference whether the fee splitting language appeared in individual employment agreements, since it was ultimately agreed to by the plaintiff when he agreed to work for Spartan Tire. The court also concluded that the concept of fee splitting arbitration costs, in and of itself, is not so cost prohibitive so as to render the fee splitting provision unenforceable.

ULP BARS ARBITRATION OF THE SAME MATTER

In *Grand Rapids Employees Independent Union v City of Grand Rapids*, Mich App No. 280360 (10/16/08), the Michigan Court of Appeals clarified language customarily seen in labor contracts. Collective bargaining agreements frequently contain language restricting the filing of multiple claims. The Grand Rapids contract provided as follows:

> If proceedings involving any matter which is or might be alleged as a grievance or instituted in any administrative action before a government board or an agency or in any court, then such administrative or judicial proceedings shall be the sole remedy; and the grounds for a grievance under this agreement shall no longer exist.

The *Grand Rapids* court concluded that the "union's ULP [unfair labor practice] charges clearly comprised matters" that could be raised as a grievance. In other words, the unfair labor practice charges filed with the Michigan Employment Relations Commission were an administrative action before a government agency and involved a matter that could have been grieved. As such, the court held that the union could not maintain an action requesting an order to compel the employer to arbitrate a dispute because an administrative action was filed over the same matter. Upon filing the ULP claim, a grievance no longer existed under the collective bargaining agreement to be arbitrated.

Employers are encouraged to be mindful that in certain circumstances unions can be barred from filing multiple claims.

PREPARE YOURSELF FOR THE EMPLOYEE FREE CHOICE ACT

The Employee Free Choice Act (EFCA) is reported to be an early priority of President-elect Obama's new administration. The EFCA was passed last year by the House of Representatives, but it was blocked by a Senate filibuster. At the time, one of the EFCA's co-sponsors was then-Senator Obama.

While the final language of the EFCA remains to be established, one of the key features is sure to be the elimination of secret ballots in union representation elections. The importance to labor unions of the EFCA is best reflected by the fact that millions of dollars have been spent by unions to get it passed. If the EFCA is passed, union membership may dramatically increase.

Instead of allowing for a campaign period, affording both sides the opportunity to state their positions before a secret ballot election is held, the EFCA would require automatic recognition of the union if an employer is given signatures from a majority of its employees. This could potentially allow union organization to occur without the employer ever having the opportunity to state its case against unionization.

In addition to eliminating the secret ballot process, the EFCA would drastically change the collective bargaining process. Instead of negotiating on their own, if the union and the employer cannot agree to the terms of a contract within 90 days after starting negotiations, the matter would be referred to binding mediation. If the parties do not agree on a contract within 30 days of the request for mediation, the EFCA would empower an arbitration board established by the federal government to set the terms of the party's initial collective bargaining agreement, including setting wages. Further, the EFCA would stiffen the available remedies and add fines for unfair labor practices committed by the employer during an organizing drive and before the first contract is executed.

Passage of the EFCA would drastically increase organizing efforts by unions. To address the EFCA's potential impact, employers must be prepared to respond if unionization efforts appear imminent. Some of those efforts should include: educating management and HR personnel about the new law; reminding supervisors about the importance of maintaining the independence of employees; addressing outstanding issues that may make employees susceptible to support union organization; and remaining vigilant so that the employer may immediately react and begin an information campaign should there be a union organizing drive.

RETIREE HEALTH BENEFITS CANNOT BE ELIMINATED

The Sixth Circuit Court of Appeals recently reaffirmed the principle that retiree health care benefits granted under a collective bargaining agreement cannot unilaterally be eliminated by an employer. *Cole et. al. v Rockwell International et. al.*, _____ F.3d. _____ (12/16/08). The suit was filed by several retirees, on behalf of themselves and similarly situated individuals, and the UAW. They challenged the decision of their former employer to reduce, restrict, or eliminate retiree health care benefits. The trial court entered an injunction barring the employer from eliminating those benefits and entered summary judgment in the employees' favor.

On appeal, the Sixth Circuit confirmed that decision. The court ruled that when collective bargaining agreements grant health care benefits to retirees, those rights vest at the time the employee retires. As a vested benefit, the employer cannot eliminate them any time thereafter. Therefore, since the collective bargaining agreement unequivocally granted retirees lifetime health care benefits, Rockwell was barred from changing them after those individuals retired.

The collective bargaining agreement did have language which, on its face, seemed to limit

(continued on Page 4)

Cont. from Page 3 - RETIREE HEALTH BENEFITS CANNOT BE ELIMINATED

the duration of health care benefits. The contract provided:

> The insurance agreement and insurance program is modified and supplemented by the insurance agreement and *shall continue in effect until the termination of the collective bargaining agreement* of which the insurance is a part.

The employer argued that since the collective bargaining agreement had terminated, the benefits were no longer available to retirees. The court disagreed and found that for those individuals who had already retired, the benefits continue beyond the expiration of the collective bargaining agreement. The court interpreted the above language as just a general durational limit, not a specific limitation on insurance benefits. For those who had not yet retired, however, the benefits would no longer be available and those employees cannot expect lifetime health insurance when they retire.

Obviously, the precise language used in labor contracts is critical to ascertaining potential legacy costs for any employer. This decision applies only to retiree health care benefits granted by a labor contract. It requires any modification of retiree health benefits to be negotiated by the employer and the union. It does not mean that benefits for retirees who are not covered by a labor contract cannot be changed.

NEW STUDY SHOWS SETTLING MIGHT BE BEST OPTION FOR LITIGANTS

Many have always believed that settlement is a better option than trial to resolve a dispute, but there is now scientific evidence to support that theory.

A recent study published in the Journal of Empirical Legal Studies shows that litigants often make a number of errors in the course of settlement negotiations which, ultimately, lead to a significantly poorer outcome for one or the other litigant. Often, when settlement negotiations break down and the case proceeds to trial, the parties end up with a verdict that places them in a worse position than they would have gotten through settlement.

The study analyzed 2,054 contested cases where the parties had engaged in settlement negotiations, rejected a proposal by the opposing party, and proceeded to trial. Though similar studies had been conducted previously, notably absent was an examination of pretrial negotiations. This study evaluated the entire litigation process, from beginning to end, which is crucial in assessing the consequences of certain strategies.

The research carefully analyzed several elements of the litigation process – awards, settlement demands and offers, parties, attorneys, potential damages, insurance, judicial forum, and ADR attempts. All of these factors had an impact on the outcome. For example, in looking at the judicial forum, most of the cases studied (90%) were jury trials, while the rest were pretty evenly divided between bench trials and arbitrations. Defendants more often made the wrong decision ("decision error") in bench trials than in jury trials (22.1% vs. 42.6%), while plaintiffs more frequently committed decision errors in jury trials than in bench trials (64% vs. 42.6%).

The study further assessed who most benefited and lost from proceeding to trial rather than accepting a settlement offer. In other words, the study looked at how often the litigant made the wrong choice between going to trial and settling, and how costly that decision was. The data showed that it was more **common** for plaintiffs to make the an award less than what was last offered by the defendant, 61.2% of the time, while defendants

(continued on Page 5)

Cont. from Page 4 - NEW STUDY SHOWS SETTLING MIGHT BE BEST OPTION FOR LITIGANTS

only made that error 24.3% of the time. However, when a plaintiff made the wrong choice, the average error cost only $43,100; when a defendant made the wrong choice that average amount rose to $1,140,000.

Ultimately, plaintiffs more often made the wrong decision to go to trial (61.2% of the time), but when defendants made such an error it was significantly more costly. This study should serve as a reminder for both attorneys and litigants alike to more carefully consider all the potential factors and consequences prior to accepting or rejecting a settlement offer.

PRESIDENT SIGNS ADA AMENDMENTS ACT

On January 1, 2009, amendments to the Americans with Disabilities Act (ADA) became officially effective. The ADA Amendments Act (ADAAA) contains important changes to the original version. Below is a summary of some of the key modifications.

In both acts, a disability is defined as "an impairment that substantially limits a major life activity." However, past interpretation of this definition has excluded certain individuals from coverage under the Act, such as those with epilepsy, diabetes, and artificial limbs. The new amendments impose a less demanding standard which favors covering a broader spectrum of individuals.

Another significant change is that the amendments no longer allow an employer to consider mitigating measures to disqualify a person from being disabled. Before, if medication or medical devices enabled a person with an impairment to function well, that person was deemed **not** to have a disability under the ADA. However, with the exception of ordinary glasses or contact lenses, these mitigating factors can no longer be used as a disqualifier.

The term "substantially limits" in the original ADA was construed to mean "prevents or severely restricts" an individual from performing a specific activity. The new amendments state that the Equal Employment Opportunity Commission and Supreme Court have incorrectly imposed limitations on the terminology that exceed those intended by Congress. In other words, the old definition was too strict. Now, "substantially limits" is the only qualifier, and we expect it will take the courts some time to define what that actually means.

The ADA also had a vague definition of "major life activity," which was left to the courts to interpret, while the ADAAA lists specific examples – seeing, hearing, eating, sleeping, walking, learning, concentrating, and major bodily functions.

While some courts have concluded that individuals must be limited in **more than one** major life activity to qualify as having a disability under the ADA, the ADAAA clarifies that limitations in **one** major life activity is sufficient. Lower courts also concluded that episodic or intermittent impairments, such as epilepsy, would not be covered under the ADA, but the ADAAA qualifies such impairments if they substantially limit a major activity **when the condition is in its active state.**

Previously, individuals that were "regarded as" disabled were protected under the ADA. Under the ADAAA an individual is "regarded as" having an impairment if he or she shows themselves to have been subjected to an action prohibited by the Act "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major activity." This does not apply to impairments with an actual or expected duration of six months or less. The new amendments do not require accommodations for an individual "regarded as" having an impairment.

Obviously, these amendments are extremely important and change the complexion of ADA compliance greatly. The standard concepts of disability law have been changed, so we strongly suggest that you seek legal advice if ADA issues arise in your workplace.

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