EMPLOYMENT LAW BULLETIN

The Newsletter of

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TO OUR CLIENTS AND FRIENDS

We are often asked, "Must an employer be able to prove that an employee is guilty of misconduct in order to terminate the employee for such behavior?" This same question in the context of sexual harassment was considered by a California court in the case of *Cotran v. Rollins Hudig Hall International, Inc.* (Cal. App. September 29, 1996). The plaintiff was employed as a senior vice president until his termination in 1993, after the company investigated his alleged harassment of two women employees. The two women signed affidavits as part of the investigation describing in graphic detail Cotran's behavior. The company took two weeks to look into the behavior, and interviewed twenty-one people along the way, including those Cotran asked the company to interview. According to the court, the company's equal employment compliance manager (who conducted the investigation) "concluded that it was more likely than not that sexual harassment had occurred." Based upon that outcome, the company terminated Cotran. Cotran sued, claiming that he had an implied employment contract with the company. The jury concluded that he did not commit the acts that resulted in his termination and awarded him $1.8 million, which was reversed by the appeals court.

The appeals court stated that, "The choice between the lawsuit [the company] got and the ones it arguably avoided is a choice that cannot be arbitrarily made but can and must be viewed with both feet firmly planted in the real world." Otherwise, according to the court, an employer will be required "to have a signed confession, or an eyewitness report from every co-worker before it can feel confident in discharging an employee accused of sexual harassment, or risk a jury determination that the factual basis for its personal decision was the wrong one, a prospect we find immensely troubling." The court suggested a balance between the employee's interest in keeping his job, and the employer's interest in making a necessary personnel decision, even if it turns out that factually the employer's decision is the wrong one. The court suggested that the following factors should be considered in these situations:

1. What are the employee's responsibilities with the company?

2. What were the reasons given to the employee for his termination?

3. What information did the employer know or should the employer have known at the time of termination?

4. Did the employer handle the investigation in a thorough manner, with good faith, and with consideration for information provided by the accused?

5. Are there any other circumstances that should be considered?

It is not necessary for an employer to "catch" an employee engaging in unacceptable behavior in order to terminate the employee for that behavior. However, the investigation must be thorough, and fair to the accused.

FMLA JURY VERDICT: INDIVIDUAL SUPERVISOR LIABILITY; TECHNICAL COMPLIANCE WITH CERTIFICATION OF SERIOUS HEALTH CONDITION NOT REQUIRED

Freemon v. Foley (D. Ct. Ill, September 26, 1996) is the first reported case of a jury concluding that individual supervisors and managers were liable for violations of the Family and Medical Leave Act. The total jury verdict on behalf of the plaintiff was $58,000.00. The case also involved the sufficiency of documentation an employee must provide in order for an absence to be protected under the Family and Medical Leave Act.

Jimmye Freemon worked as a nutritionist for the employer. She missed three consecutive weeks of work to care for two of her children, one of whom had chicken pox and the other who had a fungal infection. When she returned to work, she provided the employer with doctors' notes describing the nature of her sons' medical problems. The employer required her to meet the certification for serious health condition requirements under the Family and Medical Leave Act. She refused to do so, which resulted in her suspension and termination.

At trial, Freemon provided medical bills in addition to the doctors' excuses, all of which showed the nature of her sons' conditions. The employer argued that the doctor reports were conflicting and therefore that it needed additional documentation in order to determine whether the leave was permitted under FMLA. The jury found that Freemon's medical substantiation was sufficient, although apparently it did not meet the certification requirements of the Family and Medical Leave Act.

The case will be appealed by both parties. Freemon seeks double damages, attorney fees, interest, and reinstatement. The employer will argue that it interpreted the FMLA properly by not accepting Freemon's doctors' excuses. The appeal will also address the issue of whether supervisors and managers may be personally liable for violations of the FMLA. We will keep you informed on what may become the first Court of Appeals decision on the questions of individual liability and sufficiency of certification of a serious health condition.

MICROSOFT'S INDEPENDENT CONTRACTOR CLASSIFICATION GOES OUT THE WINDOWS: COMPANY OWES BENEFITS TO FORMER INDEPENDENT CONTRACTORS

The improper designation of individuals as independent contractors can be expensive for employers, as Microsoft found out in the case of *Vizcaino v. Microsoft Corporation* (9th Cir. October 3, 1996). The case involved individuals hired by Microsoft between 1987 and 1990 to work on international projects. They signed documents stating that they were independent contractors, not employees, and that they would not be eligible for benefits provided to "permanent" company employees. They were compensated through the accounts receivable department after they submitted invoices for their services. The so-called independent contractors worked on projects with "permanent" Microsoft employees, actually reported to the same supervisors and worked the same hours as Microsoft employees. They also received the same support staff assistance and access to company premises as Microsoft employees.

The IRS reviewed Microsoft's independent contractor relationship, and concluded that they were not true independent contractors: "Microsoft either exercised, or retained the right to exercise, direction over the services performed." In compliance with the IRS determination, Microsoft paid back pay in overtime and taxes, and converted the employees to "permanent." However, those independent contractors whose relationship with Microsoft had been terminated requested that Microsoft provide them with benefits that included the right to participate in the employee stock option plan. After this was denied, they brought a class action lawsuit, claiming that they should be entitled to participate in the benefits plans. The court ruled that because

these independent contractors were employees, they were entitled to the same benefits that they should have received had they been properly classified as "permanent" employees rather than independent contractors.

This case illustrates the care an employer must exercise when determining whether an individual is truly a bona fide independent contractor. To misidentify an individual as an independent contractor can lead to damages for benefits the individual should have received, back pay and overtime, back taxes, interest, and penalties.

COURT UPHOLDS DIFFERENCE IN BENEFITS FOR PHYSICAL COMPARED TO MENTAL IMPAIRMENTS

The EEOC claimed that it was a violation of the Americans with Disabilities Act for an insurance company to offer less favorable benefits for mental health impairments compared to physical impairments. The Seventh Circuit Court of Appeals, in the case of *EEOC v. CNA Insurance Company* (September 27, 1996), disagreed, observing that "However this is dressed up, it is really a claim that benefit plans themselves may not treat mental health conditions less favorably than they treat physical health conditions. Without far stronger language in the ADA supporting this result, we are loathe to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years."

The court concluded that offering a different level of benefits for physical impairments compared to mental impairments was not discrimination on the basis of disability, although such a policy "may or may not be an enlightened way to do things." The court was careful to limit the impact of its decision to Title I of the ADA, regarding employment, and stated that there are different factors regarding other programs or services covered by the ADA where the same decision may not apply, such as concerning public sector entities.

BUREAU OF LABOR STATISTICS REPORTS GREATER INCREASE IN PAY FOR NON-UNION COMPARED TO UNIONIZED EMPLOYEES

On September 25, 1996, the Bureau of Labor Statistics released information regarding pay increases American workers received through collective bargaining in 1996. Based upon those collective bargaining agreements negotiated to date in 1996, employees in all industries received a median first-year wage increase of 3 percent, the same as in 1995. Manufacturing employees' pay increased 2.8 percent, compared to 2.6 percent in 1995, and construction employees' pay increased 3.5 percent compared to 3 percent in 1995.

Covering all employers, union and non-union, the Bureau of Labor Statistics reported that the average annual pay rose 3.4 percent for 1995, compared to 2.2 percent for 1994. Overall manufacturing and construction pay increased by 3.7 percent. Based upon an analysis of the 1995 and 1996 information, increases for non-union employees actually are higher than those for unionized employees during the same time period. The states with the highest average increases in pay were New York, Arizona, Massachusetts, Delaware, Missouri, Oregon, Idaho, New Hampshire, Washington, and Nebraska. The ten states with the lowest average increase in pay were Alaska, Hawaii, Wyoming,

Montana, Oklahoma, West Virginia, Maryland, Vermont, New Mexico, and Indiana.

EMPLOYEE UNSUCCESSFULLY CLAIMS RETALIATION FOR USE OF SICK DAYS

Employers usually consider the risk of a retaliation claim in the context of an employee exercising a statutory right, such as filing a workers' compensation claim or raising a concern about equal opportunity, wage and hour, or safety and health. The case of *Lindmann v. Mobil Oil Company* (D. Ct. Ill, September 23, 1996) involved a claim that an employee was terminated in violation of ERISA because she used the employer's short-term disability benefits. The employee called in sick over twenty-five times during an eighteen-month period. Each

time she was able to use paid sick leave, but the absences counted as occurrences according to the terms of the employer's no-fault attendance policy. The employee was disciplined and received a final warning that future absences could result in termination. The employee was terminated after she was absent for two consecutive days due to illness.

The employee argued that if the sick days were considered approved sick days, termination for using those days violates Section 510 of ERISA because it retaliates against an employee for using an ERISA-protected benefit. (Under Section 510, an employee may not be terminated because they have exercised rights available to them under an employee benefit plan, such as sick pay.) The court disagreed, noting that there is a distinction "between terminating an employee for absenteeism, including absences for which she received short-term disability payments, and terminating an employee for collecting those benefits." Thus, the court held, while it is a violation of Section 510 of ERISA to terminate an employee because she collects benefits, it is not a violation to terminate an employee for absenteeism even though the absenteeism results in receiving benefits.

EMPLOYEE PERMITTED TO PURSUE CLAIM FOR VIOLATION OF CONFIDENTIALITY REGARDING DISCLOSURE OF AIDS

A hospital security guard was exposed to AIDS when he was called into an emergency room to help a nurse put a restraint on a patient's arm. The nurse knew that the patient had AIDS, but she did not tell the security guard. In the process of attempting to work with the nurse to restrain the patient, some of the patient's blood splattered into the security guard's eyes.

The security guard subsequently became a patient of the hospital. He was given AZT to reduce his risk of contracting AIDS. Furthermore, the hospital, on two separate occasions, tested his blood to determine whether he was HIV-positive. His exposure to AIDS was discussed by hospital management with employees who did not need to know it. He filed a claim for workers' compensation, but then he and his wife sued the hospital, claiming the hospital's disclosure of his exposure violated state confidentiality law. In *Goins v. Mercy Center for Healthcare Services* (Ill. App. Ct, July 29, 1996), the trial court had ruled that the guard's claims were barred by state workers' compensation law, which is the exclusive remedy for work-related injuries, since his exposure arose out of his employment as a security guard at the hospital. The Court of Appeals reversed that decision, explaining that once the security guard became a patient of the hospital, the exclusivity provisions of workers' compensation law did not apply. Thus, his claim regarding breach of confidentiality relates to his rights as a patient of the hospital, not an employee, and therefore he may proceed with that claim.

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DID YOU KNOW...

...that the AFL-CIO Building and Construction Trades Department on September 24, 1996, announced that it is going to pursue a nationwide organizing campaign to re-unionize the construction industry? The Department's President, Robert Georgine, said "We can't let anything stop our forward progress. We can't stop until every construction worker in the target area is in a union." Fifteen trade unions comprise the Building and Construction Trade Department. The Department has not yet identified its targeted cities for unionizing non-union construction employees.

...that the EEOC has a backlog of nearly 86,000 cases, and the average investigator's workload is 109 cases? In an effort to reduce the backlog, the EEOC has stepped up its issuance of Right to Sue Notices even though no investigation has been conducted and no decision has been made on the merits of the case. It appears that the EEOC is becoming a toll booth for charging parties to receive right to sue notices to proceed to court, rather than conducting a thorough investigation and attempting to conciliate charges of discrimination.

... that based upon legislation signed by President Clinton on September 26, 1996, health plans effective January 1, 1998 must allow a 48-hour hospital stay for childbirth and 96 hours if the birth is by cesarian section? The law prohibits insurance companies from offering incentives to mothers to encourage shorter stays. The law also requires that the caps regarding annual and lifetime benefits for mental health coverage should be the same as they are for other medical circumstances, unless to do so would increase the cost of group insurance policies by more than one percent.

...that under certain circumstances, pregnancy-related conditions may constitute a disability under the Americans with Disabilities Act? So ruled the court in the case of *Cerrato v. Durham* (D. Ct. NY, September 16, 1996). The judge declined to rule that a normal pregnancy is considered a disability, but the judge stated that pregnancy-related conditions, such as nausea and morning sickness "can qualify as disabilities under the ADA so that the woman suffering from such symptoms is protected from adverse employment decisions based solely on her symptoms."

...that the percentage of positive drug tests among employees continues to decline? This is based upon an analysis of over two million test results for 1995 by SmithKline Beecham Laboratories. During the first six months of 1996, 6.03 percent of all employees screened for drugs tested positive. During 1995, the percentage was 6.7 percent. Marijuana was found in 3.62 percent of those tested for the first half of 1996, while cocaine was found in 1.02 percent. In 1993, 2.4 percent of all employees screened for drugs tested positive for cocaine.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Brent L. Crumpton. Please contact Mr. Lehr, Mr. Crumpton, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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