THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
PREPARED BY ATTORNEYS BETTY BECHTEL, MICHAEL SANTO, JIM COLLING AND JULIE SPRINKLE

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YOU'RE GETTING SLEEPY, SLEEPY, VERY SLEEPY. . .

It is okay to fire someone who falls asleep on the job, right? The answer depends on why the employee nods off. When sleeping is a side-effect of medications taken to treat disabilities, the Americans with Disabilities Act (ADA) must be considered. Recently, a California Court was presented with such a situation in *Halsey v. JP Morgan Chase Bank, 2009 WL 3353459.*

That case concerned James Halsey, who JP Morgan Chase Bank ("Chase") hired in May 2006. During the next few months, Halsey's performance could best be described as hit-and-miss; some supervisors thought he was doing a fine job, while others thought he acted inappropriately. Halsey's direct supervisor, Kradel, testified Halsey was "on track" and that he was not thinking of terminating Halsey before a certain sleeping incident.

In the beginning of August, Halsey attended a training seminar with Kradel and other account executives. During the first day, Kradel approached Halsey and said that Halsey appeared to be nodding off during the morning session. Halsey responded that he may have been drowsy because he had just flown cross-country. Later that day, it occurred to Halsey that his HIV medication was probably causing his drowsiness. Halsey had not disclosed to Kradel, or anyone else at Chase, that he was HIV-positive. Halsey followed up with his doctor about the effects of his medication and was told that the medication could "absolutely effect his energy levels." Halsey then reported this concern, and his condition, to Kradel.

A short time later, Kradel contacted Chase's HR Department to discuss Halsey's condition, his sleeping during meetings, and past performance issues reported to Kradel by other supervisors. A week later, Chase terminated Halsey for sleeping at the conference and those performance issues.

In the resulting ADA lawsuit, Chase relied upon several court cases approving discharges for falling asleep at work. But the Court pointed out that those lawsuits involved situations where the sleeping employee's conduct violated safety rules and essential functions of the position (e.g., bus drivers sleeping while driving, electrical workers falling asleep while monitoring a plant reactor). Chase, on the other hand, did not establish that sleeping or nodding off during a training session

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rendered Halsey unable to perform the essential functions of an account executive position.

Chase next argued that it demonstrated a legitimate basis for terminating Halsey when it identified the complaints about Halsey from other supervisors. But the Court found this argument unconvincing in light of the fact that hours after Kradel learned of Halsey's HIV diagnosis, Kradel changed the location of a previously-scheduled company dinner, did not tell Halsey of the change, and told the other account executives to turn off their cell phones. Then, the next day, Kradel would not interact or make eye contact with Halsey and, the following day, Kradel made the decision to terminate Halsey. For these reasons, the Court denied Chase's motion for summary judgment (i.e., the case went to the jury for determination).

The Court also noted that Chase's failure to reasonably accommodate Halsey's drowsiness could violate the ADA's reasonable accommodation requirement. As an example, the Court cited a case where an employee was given a written warning for sleeping at work, despite the fact that the employee had informed his supervisor that his doctor had prescribed medication that made him drowsy. In that case, a court determined that the employer failed to demonstrate that finding a way to accommodate the employee's drowsiness imposed an undue burden.

Practical Tip. At its core, the ADA is a reactive law. That is, until the employer receives definitive information that an employee suffers from a disability, the employer should focus all adverse actions on the employee's performance, without assuming that the cause of the performance issue is a physical or mental condition or medication for such condition. But once an employer learns such information, then the employer needs to discuss with the employee potential reasonable accommodations and must refrain from taking any adverse action based on the condition, unless the condition renders the employee unable to perform an essential function of the job that can not be reasonably accommodated without causing undue hardship to the employer.

WRONG ON SO MANY LEVELS

For ten years, between 1994 and 2004, an unknown individual placed a series of hoax telephone calls to McDonald's restaurants, pretending to be a police officer. His MO was to convince restaurant managers, employees, and others to conduct strip searches and even sexual assaults at his direction. The caller's hoax was successful more than thirty times at different McDonald's restaurants.

On April 9, 2004, Donna Summers, a McDonald's assistant manager who was unaware of these previous incidents, received a call from the faux police officer stating he was conducting an investigation of a recent purse theft at that restaurant. His description of the female suspect fit 18-year-old employee Louise Ogborn. Ogborn was summoned to the office and informed that she was the subject of an "investigation" into this theft.

The series of bizarre events that unfolded thereafter lasted more than three hours and included Summers, at the instruction of the caller, giving Ogborn two choices: she could be searched in the office by her managers or at the police station after arrest. Ogborn agreed to be searched in the office. In accordance with the caller's detailed instructions, Ogborn disrobed and Summers took Ogborn's clothes, cell phone, and other belongings, and removed them from the office. The caller then instructed Summers to summon a series of males to sit with Ogborn during the investigation, including

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Summers' fiancé, Walter Nix. Nix, who was not an employee, acting on the instruction of the caller, after Summers left the room, sexually assaulted Ogborn. Throughout the "investigation," Ogborn objected and requested to leave. Finally, a maintenance employee, who was brought into the office to sit with Ogborn and speak with the caller, assessed him as a fraud, and the call terminated.

McDonald's fired Summers. Nix was found guilty and imprisoned on three felony indictments. And Ogborn filed suit against McDonald's. The jury found for Ogborn and against McDonald's on Ogborn's claims of sexual harassment, false imprisonment, premises liability, and negligence, awarding Ogborn over $1 million in compensatory damages and $5 million in punitive damages. Summers also sued McDonald's for intentional infliction of emotional distress and was awarded $100,000 compensatory and $1 million punitive damages.

Where did McDonald's go wrong? A key factor was McDonald's failure to warn its managers and employees of the hoax. The evidence indicated that McDonald's corporate management made a conscious decision not to train or warn store managers or employees about the calls. The evidence further supported a finding by the jury that proper training or warning would have prevented successful repetition of the hoax.

This case is so outrageous that you may feel it could never happen in your workplace. Doesn't everyone know not to strip search an employee? Even so, take note of the false imprisonment claim because it can arise under much more subtle circumstances. Train managers not to prevent an employee, customer, or other person from leaving a confined area. The court explained that false imprisonment is "any deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise." And it's accomplished by words or acts that induce a reasonable apprehension that force will be used if the individual does not submit.

The court gave examples of situations where false imprisonment was found (store manager accused customer of theft, said she could not leave the store, and grabbed her purse; a company inspector identified himself as a "detective" and required a man suspected of stealing golf clubs to get into a car for questioning). The fact that Ogborn was deprived of all her clothes and other possessions, and told not to leave by fake police authority and the real authority of her supervisors, supported her false imprisonment claim. McDonald's argument that Ogborn voluntarily stayed to clear her name and save her job did not work for the Court or jury.

Normally, workers' compensation insurance is a defense to damage claims by employees against their employers for negligence, false imprisonment, and other torts, because workers' comp. is the exclusive remedy for job-related injuries. Although McDonald's stated this affirmative defense in its pleadings, it failed to present any evidence that it actually carried workers' comp insurance. The Court refused to assume this fact without proof. *McDonald's Corp. v. Ogborn*, 2009 WL 3877533 (Ky.App.,2009).

HIT THE ROAD, JACK!

Have you ever told a grousing employee, "If you don't like it, just quit?" After all, employment is at will in Colorado. Nevertheless, a "just quit" response to employee complaints can, under certain

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circumstances, be an unlawful employment practice. Take the Piester case, for instance.

In January, Alton H. Piester, LLC, a trucking company, announced to its drivers that going forward, it would decrease their net pay by applying a fuel surcharge to their paychecks. Many drivers protested and were told that if they didn't like it, "they could clean out their trucks and move to another job," which meant they could quit.

After that time, many employees complained among themselves about the surcharge, which was reported back to Piester. Darrell Chapman, in particular, was concerned about how the surcharge was affecting his paycheck. In April, Chapman approached the company's secretary and then Piester, asking them to explain the calculation process to him. He asked that the fuel surcharge be reflected on his paycheck stub. When the secretary refused to do this and told him to clean out his truck, Chapman got loud and took a step toward the secretary, at which point Piester fired him.

Chapman filed a charge with the National Labor Relations Board (NLRB) claiming he was fired for engaging in protected concerted activity, in violation of the National Labor Relations Act (NLRA). The NLRB and the U.S. Court of Appeals found that, in fact, the employees were engaging in protected concerted activity in January when they complained of the fuel surcharge being added to their checks, and that Piester's "clean-out-your-truck-if-you-don't-like-it" statement was an implied threat to discharge the employees for this activity. Even if Piester meant only that the drivers were free to leave if they didn't like the new system, the statement was still unlawfully coercive. It was also found that in April, Chapman was engaged in protected concerted activity when he asked that the surcharge be shown on his paycheck stub. *Piester v. NLRB,* 591 F.3d 332.

Legal Refresher: Concerted activity protected by the NLRA occurs when two or more non-supervisory, non-management, non-public employees act together to protest or complain about terms and conditions of employment, such as wages and benefits. This can occur in a union or non-union setting. Some examples include:

- 2 or more employees addressing their employer about improving their working conditions and pay;
- 1 employee speaking to his employer on behalf of himself and co-workers about improving workplace conditions;
- 2 or more employees discussing pay or other work-related issues with each other.

Thus, it is illegal to have a policy prohibiting such employees from discussing their wages with each other, or sharing information about their benefits, evaluations, treatment by supervisors, or other conditions affecting their jobs or workplace.

It is tricky to recognize concerted activity when an employee acts alone. Nevertheless, a single employee's conduct may be concerted, even if the employee was never selected as a spokesperson by others, so long as he is among those who considered that they had a grievance and decided, among themselves, that they would take it up with management.

An employer's actions can constitute an unfair labor practice if, under any circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees regarding protected concerted activity. It does not matter whether the conduct was actually coercive, or whether the

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employer intended to coerce. NLRA § 8(a)(1), 29 U.S.C.A. §158(a)(1).

Back to Chapman: The NLRA and U.S. Court of Appeals found that although Chapman individually presented his protests, he engaged in an ongoing debate with the company concerning how much it took from his paycheck. The company knew he was reiterating a shared employee complaint even though, ostensibly, Chapman was only concerned about his own paycheck. Employees can lose their NLRA protection by using unacceptable means to express their dispute (e.g., theft or violence). But the Court determined that Chapman's conduct of speaking loudly and taking a step toward the secretary did not forfeit his protection because that outburst was relatively mild, brief, and provoked by the secretary's unlawful statement, "Clean out your truck!"

Practical Tip: Avoid telling your employees that if they don't like something having to do with the terms and conditions of employment, they can "hit the road," "take a hike," or "just quit" as this may be deemed coercive conduct interfering with the employees' protected concerted activity. A little tact goes a long way when responding to work-related concerns.

COBRA BITES EMPLOYER FOR BACKDATING

It is rarely a good idea to backdate documents. The Knights of Columbus learned this lesson, painfully, after it backdated Thomas Olick's date of termination from February 28, 2006 to November 1, 2005 in a COBRA Notice sent to him on February 28. By claiming that Olick resigned on November 1, the Knights cut off his group health insurance four months before his actual termination date and caused the insurer, Aetna, to go after Olick for reimbursement of health benefit payments made on his behalf during that 4-month gap.

The court found that the Knights used the November 1 date as the COBRA "qualifying event" in retaliation for Olick filing an age discrimination claim under the ADEA against his employer in February, shortly before the Notice. The COBRA Notice stated that the monthly premium for continuing coverage would be $1,144.09 and gave Olick until April 28 (59 days) from the date of notice to elect continued coverage. Thus, by the time Olick received the Notice, he would have had to pay $4,576.36 (4 months of premiums) to initiate his COBRA rights. Olick did not elect to do so. The Notice should have stated that his health benefits would terminate as of February 28, 2006 (the true date of his termination and therefore, the true date of the qualifying event) unless he elected continuation coverage within 60 days.

In imposing a discretionary statutory penalty of $110 per day from November 1 to February 28 ($13,200) against the Knights for this significant and willful defect, the court explained that the recipient of the COBRA Notice is entitled to accurate information regarding the consequences of electing or not electing coverage. A potential 4-month gap in health benefits coverage is material information that could have a substantial impact on whether to elect continuation coverage. The court suggested that the penalty would have been more if the Knights were not also liable for statutory damages for violating the ADEA, as well as for Olick's costs of the action, and the Knights' own attorneys' fees. *In re Olick*, 422 B.R. 507 (Bkrtcy.E.D.Pa.,2009); 29 U.S.C. § 1132(c).

Lesson: Don't Tread on COBRA!

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Q & A

Q. *Our company provides service employees with cell phones that have GPS tracking. Can we monitor if an employee is working based on the GPS and cell phone records?*

A. With prior notice to employees that you will track their location during the work day through the GPS and will review their cell phone records to confirm work, this is legal. But don't do it without first giving written notice to avoid invasion of privacy claims. And watch what you do with the information.

In a recent suit, an employee claimed unpaid wages and overtime for taking service calls off-the-clock and during unpaid lunch breaks. Although he failed to report the time on his weekly time sheet, he claimed that his employer knew of the unreported time because management regularly viewed the GPS and company cell phone records to verify his actual hours worked. The court agreed, stating that under the FLSA "[i]f the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted." Checking the GPS and cell phone records for over-reporting of work, arguably, gave the employer knowledge of and an obligation to pay for any under-reporting of work. *2010 WL 557940 (M.D.Fla.,2010).*

Q. *Can we include kitchen staff when redistributing tips from the tip pool?*

A. Yes, but only if you pay your wait staff a cash wage equal to or greater than minimum wage without using a "tip credit." No tip credit can be counted toward meeting minimum wage requirements if a tip pool is shared with staff who are not "customarily and regularly" tipped employees in the industry, like kitchen staff. *2010 WL 610603*; *29 U.S.C.A. § 203.*

Q. *An employee requesting FMLA leave returned the medical certification signed by a nurse practitioner instead of a physician. Do we have to accept this or can we demand that it be signed by a medical doctor?*

A. Nurse practitioners who are authorized to practice in the State and performing within the scope of their practice under the State law are "health care providers," as defined by the FMLA regulations, and can provide medical certification of a serious health condition. But if you have reason to doubt the validity of the certification, you may seek a second opinion and select the health care provider, at your expense. *29 CFR § 825.125 and 825.307.*

NOTICE!

April Seminar in Grand Junction: The Employer's Advisory editors will present a full-day Employment Law Update seminar in Grand Junction on April 21, 2010, sponsored by the Western Colorado Human Resources Association (WCHRA). See our website at www.bechtelsanto.com for more details.

New Member of Firm: Julie Rieke Sprinkle has joined Bechtel & Santo, LLP as an Associate Attorney and co-editor of the Employer's Advisory. See her bio at our website.

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