

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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EMPLOYER EMPOWERMENT

The 10th Circuit recently provided employers with a little more breathing room in regards to employees with an illegal drug use problem. In *Mauerhan v. Wagner Corp.*, Mauerhan was a salesman who had worked for Wagner for 10 years when, in 2004, he voluntarily entered an evening outpatient drug-rehabilitation program. Wagner was aware that Mauerhan was participating in this program, and he worked at Wagner while enrolled. Then, on June 20, 2005, Wagner asked Mauerhan to submit to a drug test. Mauerhan said he would fail the drug test, and Wagner summarily fired him but said he could return if he could get clean. He entered rehab on July 6, 2005 and completed the program on August 4, 2005. He was free of drugs during that time.

The crux, though, was that Mauerhan's counselor listed his recovery status at that time as "guarded" and at least 90 days of recovery was necessary to ensure significant improvement in his condition. So Wagner offered him another position at reduced pay, which Mauerhan refused. He subsequently filed an ADA discrimination claim

against Wagner on the basis that Wagner discriminated against his disability-drug addiction.

The ADA prevents employers from discriminating against a qualified individual on the basis of a disability. And although the status of being an alcoholic or illegal drug user may merit ADA protection, an employee or job applicant is excluded from being a qualified individual with a disability if he is currently engaging in the illegal use of drugs when the employer acts on the basis of such use. But the ADA also creates a safe harbor for those who are not currently engaging in the illegal use of drugs. The ADA specifically exempts from the exclusion, and thereby protects, an individual who:

- 1) has successfully completed a supervised drug rehabilitation program, or has otherwise been rehabilitated successfully, and is no longer engaging in such use;
- 2) is currently participating in a supervised rehabilitation program and is no longer engaging in such use; or
- 3) is erroneously regarded as engaging in such use, but is not, in fact, engaging in such use.

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The 10th Circuit determined that Mauerhan was, in fact, currently using drugs illegally and, thus, was not a qualified individual with a disability under the ADA because the drug use was sufficiently recent to justify Wagner's reasonable belief that the drug abuse remained an ongoing problem (even though Mauerhan technically was not using drugs at the time). This determination was largely based on the fact that Mauerhan's recovery status at that time was "guarded" and at least 90 days of recovery was necessary to ensure significant improvement in his condition.

The Court stated that mere participation in a rehabilitation program is not enough to trigger the protection of the ADA safe harbor provision for those who are not currently engaging in the illegal use of drugs. Refraining from illegal use of drugs also is essential. Although participating in, or completing, a drug treatment program will bring an individual closer to qualifying for the safe harbor provision, an individual must also no longer engage in drug use *for a sufficient period of time* such that the drug use is no longer an ongoing problem.

The Court, though, provided no bright-line rule or formula for determining whether an employee qualifies for the safe harbor for former drug users; instead, determinations must be made on a case-by-case basis, examining whether the circumstances of the employee's drug use and recovery justify a reasonable belief that drug use is no longer a problem. Factors to consider include the severity of the employee's addiction and the relapse rates for the drug(s) in question, the level of responsibility entrusted to the employee, the employee's job and performance requirements, the level of competence ordinarily required to adequately perform the task in question, and the employee's past performance record.

Tip: Employers need not feel helpless when faced with an employee who has a drug problem; just because the employee has completed rehabilitation doesn't necessarily mean the employer has to welcome them back with open arms, no questions asked. If there is a chance that the employee could relapse, the employer may be justified in holding off on bringing the employee back until a reasonable amount of time has passed. And in any event, if an employee's misconduct is based on the employee's drug (or alcohol) use, the employer has every right to discipline or terminate the employee for such misconduct.

NEW NOTICE TO BE POSTED

The National Labor Relations Board recently enacted a rule requiring all private-sector employers to post a notice of employee rights no later than November 14, 2011. The new poster can be found here: <https://www.nlrb.gov/poster>. The National Labor Relations Act applies to all but the smallest businesses, regardless of whether the employer employs members of a labor union. So all organizations are encouraged to review the new guidelines or contact an attorney to determine if they are covered by the Act. Also, be sure to download and post this new notice in the same place as other workplace posters by November 14!

OUT OF SIGHT, NOT NECESSARILY OUT OF MIND

As the age-old question goes – if a tree falls in a forest and no one is around, does it make a sound? Well, in a recent case, *Pantoja v. Anton*, the Fifth Circuit Court of Appeals, which does not cover Colorado, got to answer the question: if a plaintiff does not hear or witness inappropriate conduct, can the plaintiff use that conduct as evidence at trial? In this employment

discrimination case, the Court was asked to decide whether it was reversible error for the trial court not to allow the jury to hear “me too” evidence; that is, evidence of the employer’s alleged gender bias in the form of harassing activity against women other than the plaintiff.

Plaintiff Lorraine Pantoja filed her complaint naming as defendants attorney Thomas J. Anton and his professional corporation. The complaint alleged that while Pantoja was working there, Anton slapped Pantoja’s buttocks, touched her buttocks, touched her leg while offering her \$200, asked for a shoulder massage, and made other disparaging remarks to and about her and other female employees.

Prior to trial, the Company sought to exclude all evidence, including substantial witness testimony, of acts of discrimination and harassment unless Pantoja “personally witnessed such acts” and the acts “adversely affected her working environment.” The trial court granted the request, and the parties conducted the trial without the excluded evidence and testimony. At the trial’s conclusion, the jury found for the defense. To the question “Was Pantoja subjected to unwanted harassing conduct because she was a woman?” the jury answered no.

Pantoja appealed the trial court’s decision to exclude her “me-too” evidence by arguing that the trial court erred when it ruled that evidence of sexual harassment by Anton of other employees was admissible only if it took place in Pantoja’s presence or otherwise affected her working environment. The Fifth Circuit Court of Appeals agreed with Pantoja determining that the “me-too” evidence could have assisted the jury not by showing that Anton had a propensity to harass women sexually, which would have been

inadmissible character evidence, but by enabling the jury to evaluate the credibility of Anton and his other witnesses’ assertions that, although he yelled profanities in the office, he did not use the words Pantoja claimed; he did not direct profanities at Pantoja; and he did not have a discriminatory intent. In making this ruling, the Court of Appeals also held that the “me-too” evidence was also relevant to showing that he harbored a discriminatory intent or bias based on gender and to rebut the Company’s evidence that Anton had a policy of not tolerating harassment and a practice of not directing profanity at individuals: “If, as the me-too evidence tended to show, Anton lacked this policy and practice when Pantoja was not present and during times when she was not an employee, the jury could rationally infer that he also lacked them when she was an employee and was present.”

So, based on these holdings, the Court of Appeals reversed the decision in favor of Pantoja.

Practical Tip: Although the Court’s decision in *Pantoja* concerned, primarily, an evidentiary issue, the rationale underlying that decision provides critical guidance for employers. That is, the *Pantoja* decision makes it clear that the Fifth Circuit, and perhaps other courts, will permit evidence of inappropriate conduct when the plaintiff isn’t even present when the conduct occurred. So, for example, an employer’s defense that the alleged harasser(s) never engaged in the claimed conduct in front of the plaintiff (*e.g.*, “oh, those guys would never make that joke in front of a woman” or “they never looked at that video on YouTube when a woman was in the office”) will not prevent the evidence from being heard by the jury. For this reason, it is critical for organizations to train their supervisors about the importance of not engaging in any inappropriate conduct at work – no matter who is present when they engage in the conduct.

FEDERAL AGENCY COOPERATION DURING EMPLOYER AUDITS

Executive Order 11246 requires employers who employ at least 50 employees and who also have contracts with the federal government for at least \$50,000 to implement a written affirmative action plan. This year, employers have seen an increase in audits that refer to affirmative action plans. Not only are affirmative action plan audits coming from the Office of Federal Contract Compliance Programs (OFCCP), which is tasked with enforcing Executive Order 11246, but the Equal Employment Opportunity Commission has also gotten into the act when investigating charges of discrimination.

This summer, the director of the OFCCP explained at an industry conference that federal employment agencies have indeed started working together to enforce affirmative action plan requirements and other employment-related laws such as the Equal Pay Act. The director mentioned that the EEOC, the Department of Labor, and the Department of Justice are taking steps to work together in enforcing employment and civil rights-related laws. Not only are federal agencies cooperating to a greater extent than they have in the past, but since 2009, the OFCCP has hired a significant number of new employees, many of which will inevitably play a role in employer audits.

Along the same lines, the OFCCP director mentioned that new regulations are in the works.

What does this mean for employers? It is important to be aware of the fact that an audit may not be limited to the agency actually conducting the investigation. For example, if the

Department of Labor audits your organization seeking information about employees' wages, the DOL may also request information about affirmative action compliance during the same investigation. The Department of Labor may pass this affirmative action information on to the OFCCP if it so chooses, and the OFCCP has the ability to initiate its own investigation. Proactively ensuring that your organization complies with all applicable laws and regulations will help ensure that an audit from any federal agency will go as smoothly as possible.

REVISITING THE EEOC'S POSITION ON CONVICTIONS

This summer, the Equal Employment Opportunity Commission held two conferences regarding employers' use of convictions to screen applicants or to discipline or terminate employees, and regarding policies to assist people with criminal records with reentry into the workforce. Based on these meetings, the use of criminal convictions and the hiring of people with criminal records may become a hot topic in the near future. With that in mind, here is an overview of the EEOC's current position on hiring applicants with criminal records and what employers can do to put them in the best position possible should a charge of discrimination relating to criminal convictions come along.

For more than 20 years, the EEOC has maintained its position that employers cannot use criminal convictions as an absolute bar to hiring employees. The EEOC believes that using any criminal conviction as a bar to employment may disproportionately impact certain protected classes of people under Title VII (e.g., race, sex, national origin, and religion). To that end, the EEOC advises employers to consider three factors when evaluating applicants who have been convicted of a

crime: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.

It is important to keep in mind that the EEOC's position on this matter is a guideline and is not the law. Therefore, this position is open to interpretation in the courts. In fact, courts are generally unwilling to look at the EEOC's position on the use of convictions in the workplace if it would not assist the plaintiff in proving his allegations. For example, in April 2011, a federal court in Michigan declined to allow a plaintiff to present evidence of the disproportionate impact of convictions on protected classes of individuals where the plaintiff alleged that his former employer discriminated against him due to his criminal conviction status. The court held, in *May v. Wal-Mart Stores, Inc.*, that in order to state a discrimination claim that relates to an individual's conviction status, the individual must allege that he or she is a member of a protected class and that he or she suffered an adverse employment action because of that protected status. The court stated that "[r]egistered sex offenders are not afforded protected status under Title VII." Therefore, the plaintiff was not permitted to introduce evidence related to the rates of criminal convictions among groups of protected individuals, and his discrimination claims were dismissed.

In Colorado, courts have limited the use of information about employers' use of convictions and its impact on protected classes of individuals in situations where the complaining party in an EEOC investigation fails to allege that the discriminatory conduct impacted an entire class of individuals. For example, in *EEOC v. Sears, Roebuck and Co.*, the EEOC was in the middle of an investigation of a charge that an African-American female

employee was terminated because of an arrest. She did not allege that Sears' policy discriminated against a class of similarly situated people. The EEOC sought to enforce a subpoena against Sears which would have forced it to turn over records of employees affected by its arrest and conviction policy across the United States. The court held that the EEOC's subpoena request must be limited to the district in which the complaining party worked because she did not make a class allegation. Importantly, the court permitted the EEOC to investigate the effect of convictions upon protected classes outside the single store in which the complaining party worked but limited the extent of the investigation to prevent a nationwide fishing expedition.

While these cases show that it is difficult for plaintiffs to use the EEOC's position on convictions in order to prove discrimination by an employer, an employer may also find its policy on workplace decisions regarding individuals with criminal convictions under investigation when a complaining party mentions convictions in his or her complaint. Consequently, if an individual is otherwise qualified for a job and is not hired because of a criminal conviction, it is best practice for employers to document the reasons why the conviction affects his or her ability to do the job. Likewise, if a current employee is convicted of a crime while working for an employer, an employer should document why that conviction prevents that employee from continuing his or her work in that position before the employer terminates the employee.

Q&A

Q. An employee just left and I told him that I was going to hold on to his paycheck for 10 days to make sure that he returned all company equipment. That's legal, right?

A. Well, yes and no. While Colorado statute grants employers a ten-day window after the termination of an employee's employment to audit and adjust the accounts and property value of any items entrusted to the employee before it has to pay the employee's final wages, there must be a previous written agreement between the employer and employee that allows the employer to hold the employee's wages for that 10-day period. Otherwise, the employer is not lawfully allowed to hold the employee's wages for that 10-day period.

Q. [Taken from an actual "Dear Annie" column]. Dear Annie: I work in a small office. My office is understaffed [and I'm now] working a fair amount of overtime in our busiest season. My boss's boss decided that since my overtime wasn't "pre-approved," she isn't going to pay it. Furthermore, she had my time-clock card coded so that no matter what time I log in or out, I only get credit for a standard workday...what do I do about this no-win situation? – Workplace Dilemma

A. Annie answered that there was not much the employee could do and proceeded to say how it comes down to employees needing to feel valued at their workplace. Clearly, Annie may need to do some reading up on the Fair Labor Standards Act! After all, under the FLSA, non-exempt, private employees must be paid for all time actually worked, regardless of whether the time was pre-approved. And if a non-exempt employee works in excess of 40 hours in a workweek, she must receive overtime pay (only

public employers can be paid with compensatory time). Period. We, therefore, advise that employers have an explicit overtime policy in their handbook that spells out exactly what is expected of employees, and any unapproved overtime can then be dealt with through discipline, or even termination, if the misconduct continues. So it follows that the employer's solution of hardwiring the time clock is, in a word, unlawful.

Q. We just went through an EEOC investigation and at the end of it the EEOC issued a determination that there was probable cause that our organization discriminated against the former employee. We've been through a couple of these investigations before and we've always received a no-probable cause finding and the facts of the recent investigation seem to be about the same as the previous ones. What's going on?

A. Quite simply, the times they are a changing. Employment publications across the country have been filled with articles of what appears to be an increase in probable cause findings from the EEOC. One theory is that these determinations stem from the Obama Administration's announcement in February 2010, that it requested \$385.3 million for the Equal Employment Opportunity Commission for fiscal year 2011 and the EEOC is using this money to hire 125 investigators in 2010 and another 100 in 2011. So, the theory goes, with many federal agencies concerned about possible budget cuts, the EEOC is using this time to impress the folks in Washington D.C. that they are "fighting the good fight." But no matter the reason, this apparent shift in the EEOC's approach causes great concern for all employers involved in an EEOC investigation. And requires employers to take extra caution when making employment decisions and responding to the EEOC's request for information.