THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
PREPARED BY ATTORNEYS BETTY BECHTEL AND MICHAEL SANTO

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NOW ACCEPTING APPLICATIONS FROM CUBS FANS

With the end of the baseball season, Cubs fans are left to spend another disappointing winter with the realization that their team will continue its near 100-year drought with no championship. But even if their disappointment matures into major depression and paranoia, a recent case from the 7th Circuit prevents potential employers from testing their sanity when seeking employment.

In order to secure a promotion from Rent-A-Center ("RAC"), its employees were required to take a 502-question personality test from the Minnesota Multiphasic Personality Inventory (MMPI). RAC claimed that the test was designed to measure personality traits. But the test did more than measure whether someone works well in groups or is comfortable in a fast-paced office. The test also measured such traits as depression, hypochondriasis, hysteria, paranoia, and mania. In fact, elevated scores on certain scales could be used in diagnoses of certain psychiatric disorders. And an employee could be denied any chance for advancement simply because of his or her score on the test. Some true/false questions on the test included:

> "I see things or animals or people around me that others do not see."
>
> "I commonly hear voices without knowing where they are coming from."
>
> "At times I have fits of laughing and crying that I cannot control."
>
> "My soul sometimes leaves my body."
>
> "I have a habit of counting things that are not important such as bulbs on electric signs, and so forth."

Most of us would agree that answering "true" to these questions could identify the applicant as depressed, paranoid, or a Cubs fan.

Two employees who scored poorly on the test sued RAC, claiming that the test was a "medical exam," and its use violated the Americans with Disabilities Act. The Act has three provisions which explicitly limit the ability of employers to use "medical examinations and

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inquiries" as a condition of employment: a prohibition against using pre-employment medical tests; a prohibition against the use of medical tests that lack job-relatedness and business necessity; and a prohibition against the use of tests that screen out people with disabilities.

The ADA defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairment or health." According to the EEOC, other factors to consider in determining whether a particular test is a medical examination include: whether the test is administered by a health care professional, whether the test is interpreted by a health care professional, whether the test is designed to reveal an impairment, and whether the test is invasive. Psychological tests that are designed to identify a mental disorder or impairment qualify as a medical examination, but tests that measure personality traits, such as honesty, personal preferences, and habits, do not. Therefore, the case largely turned on whether the test was designed to reveal a medical impairment.

RAC argued that, as used, the test only measured personality traits: "The test does not test whether an applicant is clinically depressed, only the extent to which the test subject is experiencing the kinds of feelings of depression that everyone feels from time to time." RAC also argued that simply because an employee scored particularly high on certain sections of the test did not necessarily mean that the person had "a paranoid personality disorder."

The Court, though, determined that "it seems likely that a person who does, in fact, have a paranoid personality disorder, and is therefore protected under the ADA, would register a high score. And that high score could end up costing the applicant any chance of a promotion." (Even though the employees were already working for the company, the test was treated as a pre-hire exam because it was used to weed out applicants for a new position.) Accordingly, "because [the test was] designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospect of one with a mental disability, the test ... is best categorized as a medical examination, ... [which] violated the ADA." *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (C.A.7 (Ill.), 2005).

Practical Tip: The Court noted that RAC could have also argued that even if the MMPI is a medical exam, it is "job-related and consistent with business necessity." By prevailing on the latter, RAC could have claimed that the test is permissible during employment, even if impermissible pre-offer. But RAC did not make this argument. It sought a clear finding that the MMPI is not a medical examination and thus not regulated at all by the ADA. It lost. If your company uses a personality test like the MMPI, do not administer it until after an offer of employment/new position has been made to the applicant or candidate for promotion. And be prepared, if challenged, to prove that the test is job-related and consistent with business necessity.

ANTI-UNION POLICY DOOMS EMPLOYER

Brandies Machinery & Supply Company sells and services heavy construction and mining equipment throughout the mid-west. The Company is non-union and explains its approach to employee relations at length in its employee handbook:

> We, as a Company, prefer to deal with people directly rather than

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> through a third-party. This is a non-union organization. It always has been and it is certainly our desire that it always will be that way.
>
> You have the right to join and belong to a union and you have an equal right NOT to join and belong to a union. If any other employee should interfere or try to coerce you into signing a union authorization card, please report it to your supervisor and we will see that the harassment is stopped immediately.

Based on this handbook policy, and other activity at Brandies, the Union filed a petition with the National Labor Relations Board (NLRB) claiming that Brandies violated the National Labor Relations Act (NLRA), which protects employees' union activities, by promulgating a written policy that encourages employees to report to management any employees who solicit support for a union. The union further claimed that Brandies' policy interfered with and restrained employee in organizing collectively.

One of the rights under the NLRA is the right to solicit on behalf of a union organizing campaign. In fact, proponents of unions may "engage in persistent union solicitation even when it annoys or disturbs employees who are being solicited." According to the NLRB, employers interfere with this right, and violate the Act, when they invite their employees to report instances of fellow employees bothering, pressuring, abusing, or harassing them with union solicitation, and imply that such conduct will be punished.

The Court determined that the above-language in the handbook violated the Act. First, the policy was contained in its own section in the handbook, as opposed to being located in the more general anti-harassment policy. Thus, Brandies' anti-union sentiment was the focus of the policy. Second, the policy was focused on pro-union activity; there was no acknowledgment that opponents of a union may harass fellow employees into rejecting union representation. Finally, the Court found that employees could conclude that engaging in protected activity was tantamount to harassment under the policy.

Practical Tip: The National Labor Relations Act takes a harsh view toward employers who treat pro-union employees differently than other employees. Employers should review their policies to ensure that nothing stated in their handbook makes that distinction. For example, if the employer prohibits employees from posting pro-union information on bulletin board, then the employer should also prohibit employees from posting other information on the board, no matter what the content.

THE $4 MILLION GOING-AWAY PARTY

"Boys will be boys," but in the case of *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657 (C.A.6, 2005), blatant sexually discriminatory treatment of a female co-worker in the peroxide plant cost the employer in excess of $4 million dollars in compensatory and punitive damages when the female employee left her employment and sued for violation of Title VII and intentional infliction of emotional distress.

The sex discrimination toward Pollard began when a male co-worker placed a Bible on

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her desk open to the passage, "I do not permit a woman to teach or have authority over man. She must be silent." Then, after DuPont asked Pollard to give a talk to a group of girls coming to visit the plant for Take Your Daughter to Work Day, some of the men loudly complained about DuPont's participation in the program. A number of men in peroxide circulated an email entitled "Bull Malarky" to everyone in the plant discussing their displeasure with the program. After Pollard had discussions with her male co-workers about Take Your Daughters to Work Day, all of the men on the shift stopped talking to her. One of the men instructed the others not to eat with her, or take her instructions. It was common knowledge in the peroxide area that many of the men did not approve of women working in that department. One of the men made remarks to this effect approximately five times per week, and several consistently, and routinely referred to women as "bitches," "heifers," "split tails" and "c__ts." The men opposed the company-sponsored support group called the Women's Network and disapproved of Pollard attending. The men played tricks on her that were unsafe and created the appearance that she was not doing her job. When she found another highlighted note on her desk, saying "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent," she left on medical leave.

The crowning blow came after she left. The entire shift, including her supervisor, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, and at the party, one of the men said "Glad the bitch is gone, glad the bitch is not coming back."

The appellate court recently upheld the $4.7 million awarded to Pollard by a jury for intentional infliction of emotional distress.

Lesson: Permitting abusive behavior toward a co-worker based on the co-worker's sex can have severe consequences, even if the employee is not fired, but quits in dismay. Having a going-away party to celebrate the employee's departure without inviting the employee, is never a good idea!

HIDDEN SURVEILLANCE CAMERA–A BARGAINING ISSUE

Anheuser-Bush installed two hidden surveillance cameras in response to concerns that an elevator motors room on the roof of one of its buildings was being used for activities "inconsistent with its employees' work assignments." The cameras monitored that room and the rooftop stairs leading to it. The impetus for installation was a supervisor's discovery of a table, chairs, mattress-sized foam pads and pieces of cardboard in the room, when the room was to be used only for immobilizing elevators for cleaning.

Both cameras operated continuously for over a month. When the video was reviewed, it revealed sixteen identifiable employees engaging in misconduct by smoking marijuana, urinating on company property, and/or being away from their assigned work areas for extended periods. It also showed four employees not engaged in misconduct, but doing job-related tasks. Anheuser-Busch did not inform the Union of the cameras until after they were removed. The Company's position was that this was a matter of "corporate security" over which it had no obligation of bargain with the Union. After many

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meetings, the Company discharged, suspended or disciplined all 16 employees based on its investigation of the video-taped activities.

The Union filed an unfair labor practices charge with the National Labor Relations Board against Anheuser-Bush. The NLRB found that Anheuser-Busch violated section 8(a)(5) and (1) of the National Labor Relations Act by failing to notify and to bargain with the Union before installing and using hidden surveillance cameras in the workplace. The use of such cameras is a mandatory subject of bargaining for unionized employers. It ordered the Company to cease and desist its conduct. But a majority of the NLRB ruled that the employees who engaged in misconduct were not entitled to a make-whole remedy, even though the misconduct was discovered through unlawful means.

On appeal, the Court agreed that an employer's unilateral use of surveillance cameras in the workplace, without first bargaining to impasse with the union representative, violates section 8(a)(5) and (1). There is no exception to mandatory bargaining for security-related matters. But the court noted that nothing prevents a unionized employer from using hidden surveillance cameras after bargaining over the issue, even if the Union doesn't agree.

The Court did not adopt the NLRB's reasoning for refusing to reinstate the employees who were discharged because of misconduct discovered through the unlawful videos, and remanded this issue to the Board for clarification. See *Brewers and Maltsters, Local Union No. 6 v. N.L.R.B.*, 414 F.3d 36, 2005 WL 1560399 (C.A.D.C. 2005).

This case only applies to unionized employers. So are there no limits on what non-unionized employers can do with video cameras in the workplace?

Generally speaking, a private employer can use unannounced video surveillance in areas of the workplace where employees do not have a reasonable expectation of privacy. Locker rooms and bathrooms are off limits! Private offices may be off limits also, depending on the circumstances. Whether an employee has an objectively reasonable expectation of privacy in the workplace is determined by courts on a case-by-case basis. Therefore, it is best to advise employees in advance that video surveillance may be used on the premises, and what areas are subject to surveillance, so that the expectation of privacy is lowered.

In *Williams v. City of Tulsa*, 2005 WL 2476206 (N.D.Okla.), the employees sued the City for violations of the Fourth and Fourteenth Amendments to the Constitution, the Electronic Communications Privacy Act (18 U.S.C. § 2510 et seq.), and privacy tort law because of alleged surveillance in the rest rooms, private offices, the maintenance shop, the lift station, the weld shop, and various other open areas. The Court concluded that the only area where the employees had a reasonably expectation of privacy was in the rest rooms. But it dismissed the claims because of lack of any proof that rest room surveillance occurred.

The Electronic Communications Privacy Act, 18 U.S.C. § 2510, et seq., creates civil liability for the intentional interception of wire, oral, or electronic communications. But the Act does not prohibit silent video surveillance, only interception of communication. In this case, there was no evidence of audio surveillance, so this claim was also dismissed.

Tip: If you are unionized, bargain with the Union before doing video surveillance; never do surveillance in rest rooms or other private areas; never record conversations when you are not visibly present. Surveillance video's must be silent.

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Q & A

Q. Sammy is an exempt employee paid on a salary basis. She was injured off the job and is restricted to working 6 hours a day during her rehabilitation. If we reduce her schedule, can we also reduce her salary or pay her on an hourly basis, or will this cause us to lose her exempt status and give us liability for overtime?

A. So long as you do not have a contract with her that would prevent you from reducing her salary for a reduced schedule during rehabilitation, the Fair Labor Standards Act will not be violated by the reduction. The Department of Labor approves the temporary pro-rata reduction of an exempt employee's salary or payment on an hourly basis because of medically restricted hours, without jeopardizing the employee's past exempt status. DOL Opinion Letter FLSA 2004-5.

Q. Our company gives applicants two weeks of training on computer applications before hiring them. Trainees are not employees and are not paid. But we promise that if they satisfactorily complete our course, we will hire them and give them a $500 signing bonus. Are we complying with the law?

A. No. Trainees must be paid as employees under the FLSA unless all of the following factors are met:

1) The training is similar to that given in a vocational school;

2) The training is for the trainee's benefit;

3) The trainee does not displace regular employees, and works closely under the observation of employees;

4) The employer derives no immediate advantage from the trainee's activities, which may occasionally impede the employer's operations.

5) The trainees aren't necessarily entitled to a job at the end of the training; and

6) The employer and trainees understand that they aren't entitled to wages for the training time.

You are probably not satisfying the fifth and sixth conditions. But the DOL has approved a "job view" program in which potential employees observe the job for which they might be hired but are not given a guarantee of employment, perform no productive work, and are told at the beginning that there is no pay for attending. Opinion Letter FLSA 2004-16 and 2004-18.

Q. One of our employees began using FMLA leave on October 10, 2005. He can't return until February 10, 2006 (17 weeks). We know he can only take 12 weeks FMLA per year, but our policy doesn't define "year." Is it calendar, anniversary date or a rolling year beginning when the leave started?

A. When your policy does not define "year," it is whatever year is most favorable to the employee. The calendar year will give your employee another 12 weeks of leave beginning January 1, and will allow the employee FMLA through the anticipated return date of Februrary 10. A rolling year would limit FMLA to December 31. A court will apply a calendar year because it is most favorable to your employee. You can change your policy to a rolling year for the future, but not for a leave that has already begun. 2004 WL 3421791.

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