



HUMAN RESOURCES POTPOURRI

- Having a physical or mental impairment, that is, some physiological or mental disorder, is only the first part of the definition of disability under the ADA. An individual's impairment must be something which substantially limits the person's major life activity. The illustrative list of "major life activities" includes "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." "Sleeping" now joins "human reproduction" on this expanding list.

The U.S. Court of Appeals for the District of Columbia recently determined that, "Sleeping is unquestionably a significant activity—human beings spend roughly a third of their lives doing it. And it is certainly important. . . . Indeed, like human reproduction, which the Supreme Court labeled a major life activity in *Braydon v. Abbott* (524 US 624, 1998), sleep is 'central to the life process itself.'"

- The First Circuit Court of Appeals recently ruled that compensatory damages for pain and suffering, humiliation and loss of enjoyment are not available under the ADEA. The Court determined that the ADEA's remedies are limited to pecuniary benefits such as unpaid wages and overtime compensation, liquidated damages for willful violations, and equitable relief. *Collazo v. Nicholson*, 103 FEP Cases 1448 (1st Cir. July 2008)

- The Seventh Circuit ruled that an Indiana auto parts manufacturer did not violate the FMLA by firing an employee for suspected abuse of medical leave due to her intermittent migraine headaches. The Court determined the employer had an "honest suspicion" that the employee misrepresented her condition in order to obtain time off from work. *Vail v. Raybestos Prods. Co.*, 13 WH Cases 2d 1537 (7th Cir, July 2008)

IT CAN ONLY GET BETTER!

Interesting decision by the Ninth Circuit Court of Appeals (yes, it is California) in an FLMA case: The Court noted that the award which it sustained was not "a back-door means of recovery for psychic injuries" under the FLMA which holds employers liable for "any wages . . . lost . . . by reason of the violation" (Section 2617). In this case (*Farrell v. Tri-County Metro Transp. Dist. of Oregon*, 9th Cir., June 27, 2008), the Court upheld a jury verdict of \$1,110 for "lost wages." The Court's rationale: Plaintiff (Farrell) was not awarded FMLA damages for emotional distress, but rather for days of work he missed because of stress or other mental problems resulting from the (employer's) wrongful denial of (his) FMLA leave.

While admitting that it violated the FMLA, the employer argued that "Congress did not intend the FLMA to permit the recovery of consequential or emotional damages," but the Court thought otherwise. In its logic, the Court determined that the days of work missed by the employee were caused by the employer and thus were not for emotional distress. A rose by any other name. **Employers Beware:** It is only a matter of time.

Questions regarding the FMLA and other areas of employment law should be referred to experienced employment counsel.

HANDBOOK STATEMENTS ARE BINDING

So you thought you were safe with your employee handbook. The Seventh Circuit Court of Appeals recently held that statements made by the employer in an employee handbook regarding eligibility for FMLA leave were sufficient to create an enforceable contract under Indiana law. (*Peters v. Gilead Sciences, Inc.*, 7th Cir., No. 06-4290, July 2008). The Court determined that the employee can proceed with his claims for breach of contract or promissory estoppel based on statements made in the employee handbook which promised 12 weeks of family and medical leave for employees who had worked at least 1,250 hours during the previous 12 months, but no mention was made of the FMLA requirement that the employer have at least 50 employees working within 75 miles of the worksite. The Court stated: "There is no reason employers cannot offer FMLA-like leave benefits using eligibility requirements less restrictive than those in the FMLA . . . (the employee's) statutory ineligibility is irrelevant to the contract-based theories of liability."

The Court analyzed two legal concepts: equitable estoppel, a defensive doctrine used to bar the opposing parties from asserting a claim or defense, and promissory estoppel, which is a legal claim calling for "the enforcement of a promise that otherwise lacks the element of a contract."

The Court found that the Indiana Supreme Court has recognized promissory estoppel claims in the employment context which require proof that a promise was made with the expectation that a promisee would rely on it, that the promise induced reliance by the promisee of a definite and substantial nature, and that justice requires enforcing the promise.

Stay tuned; the case was remanded (sent back) to the District Court which must consider whether the employer's statements in its handbook and the letters which it sent to the employee promising 12 weeks of medical leave were sufficient to establish a binding contract under Indiana law.

Questions regarding the FMLA should always be referred to an experienced employment attorney.

ARE OVERWEIGHT WORKERS UNPRODUCTIVE?

According to a recently published study in the journal *Group and Organization Management*, it was so noted, stereotypes that obese and overweight people are lazy, unproductive and less conscientious at work are untrue. The study dispels a long-held bias against obese job applicants and employees.

The authors of the study stated, "[T]he best evidence that we are aware of indicates that body weight is not a practically significant prediction of the personality traits, conscientiousness and extroversion in a broad range of working age adults, and, . . . should not be used as a predictor of personality in employment decisions We ought to make decisions using the best available human resource tools rather than based on stereotypes or beliefs."

Source: BNA, Daily Labor Report, Aug. 7, 2008

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Things I Have Learned:

- That if I don't know the answer, it's best to say, "I don't know."
- That you shouldn't call a \$100 meeting to solve a \$10 problem.
- That will power is the ultimate power.
- That the more mistakes I make, the smarter I get.
- That when you're too busy for your friends, you're too busy.
- That people are more influenced by how much I care than by how much I know.
- That when I drop a slice of bread with jelly on it, it always lands jelly-side down.

OF INTEREST

A factory worker with multiple sclerosis who was medically restricted from working overtime was determined unable to perform the essential functions of her job and was deemed not qualified for the job under the ADA. The Court noted that mandatory overtime has been recognized as an essential function, and as such the plaintiff's restriction barring overtime rendered her unable to perform an essential requirement of the job—being in attendance at work when needed. *Tjeanagel v. Gates Corp.* 20 AD Cases 1345 (8th Cir., July 2008)

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MORE ABOUT GINA

In the June 2008 issue of *Veritas*, we reported that Congress passed the long-awaited law known as the Genetic Information Nondiscrimination Act (GINA). One of the law's many purposes is to encourage employees to obtain genetic information about themselves without the fear of having that information negatively affect their job status. The statute's definition of genetic information does not apply to already manifest diseases, but rather to an individual's genetic predisposition to a disease. (Genetic testing only shows an individual's statistical chances, or contingent probability, for developing a certain disease.)

Based on Title II of the Act, which focuses on employer discrimination on the basis of genetic information, and more particularly Section 202, which prevents the acquisition, disclosure and use of genetic information by employers, employer practices are likely to change. For example, this section states that an employer will not be held liable for an "inadvertent" request of an employee's family medical history or that of a family member. However, the employer will likely be open to scrutiny as to whether a request was really inadvertent, or was it purposeful? Also of interest are employee wellness programs. While such programs are exempt under the statute, employers will likely need to request specific authorization from employees when they enter such programs so as to allow them (the employer) to ask questions about the employee's medical history.

The statute's "use" rule will also be of interest. While the employer can (and will) obtain genetic information, it cannot use that information in making any kind of employment decision, i.e., deny employment, deny promotion, discipline or terminate an employee. The rationale is simple: as long as an individual does not have a manifest disease, there is no need for the employer to use the information. An employer who already has the information must keep it segregated within the employee's file, apart from all other information that an employer has on the individual. Under the statute's disclosure provision, an employer that has received information cannot disclose that information, regardless of how the information was obtained. But exceptions exist, i.e., releasing information to the employee, to a family member, to an occupational or health researcher, and to government officials conducting investigations that relate to GINA.

How will GINA interact with state laws? Interestingly, 34 states have already enacted genetic discrimination laws, some with more extensive definitions of what is genetic information, but no lawsuits have been filed under these state laws, and none are likely to be preempted by the new federal law.

Reminder: The employment-related provisions of GINA will take effect on November 21, 2009.

The new law, unlike its state counterparts, will cause problems for employers when dealing with the disclosure of genetic information and in determining what constitutes genetic information. Such questions will increase the need for obtaining legal advice from experienced employment counsel.

SEXUAL HARASSMENT AND WORKPLACE PORNOGRAPHY

The 11th Circuit recently ruled that an employee's exposure to pornography in the workplace was "uniquely and extremely severe" (*Criswell v. Intellirisk Mgmt. Corp.*, unpublished opinion July 2008). The Court, in restating the standard, said: "A hostile work environment occurs when an employer's conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment The harassment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."

Query: Were the pictures or information to which the party was exposed severe enough to have altered the terms and conditions of an individual's employment? If so, the hostile work environment theory of sexual harassment will be successful. This may be further compounded if a tangible employment action (significant changes in employment status) is involved. Source: BNA, Daily Labor Report, July 2008

Employers take notice: Sexual harassment cases are alive, well and growing in number when these issues arise. Consultation with experienced employment counsel is advisable.

QUOTES OF THE MONTH

You cannot adopt politics as a profession and remain honest. ~Louis McHenry Howe

We judge ourselves by what we are capable of doing, while others judge us by what we have already done. ~Henry Wadsworth Longfellow

Democracy is a device that ensures that we will be governed no better than we deserve. ~George Bernard Shaw

The two hardest things to handle in life are failure and success. ~Dr. Joyce Brothers

If you accept losing, you can't win. ~Vince Lombardi

Many of life's failures are people who did not realize how close they were to success when they gave up. ~Thomas Edison

It's nice to be important, and it's more important to be nice. ~Unknown

