



# Employment Law COMMENT

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## AMERICANS WITH DISABILITIES ACT

### ADA permits fitness-for-duty examinations

by Max Nuyen  
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The U.S. Court of Appeals for the 9<sup>th</sup> Circuit decided a “fitness-for-duty examination” does not violate the Americans with Disabilities Act (ADA) prohibition against medical examinations.

A police officer worked for a city in Washington. One year later after starting work, he was involved in an off-duty car accident suffering closed-head injuries. His symptoms included reduced self-awareness. He recovered and returned to full duty one year after the accident. Following the employee’s return, his performance reviews were mostly positive, and he received several commendations over the next three years.

In 2004, however, the employee began to obsessively complain about a fellow officer who worked on a task force with him. He compiled notes about the other officer’s behavior and passed them to his superiors. He made accusations that the officer’s job conduct was unethical or unlawful. His accusations appeared to be paranoia and unreasonable. He admitted he was consumed with anger and fear over the other officer, and needed to take a break.

The employee was also involved in several work-related incidents which caused the city to question his mental stability. First, he was involved in a heated argument with another officer, where he was so visibly upset that he could barely speak in full sentences. Second, he reported that during a routine traffic stop, he felt himself losing control when a bystander taunted him. He stated he was so upset that his legs started shaking and he was not sure what he would do. Third, his ex-wife called in a domestic violence complaint against him. She complained

he tried to injure her by slamming a car door on her. The employee disputed the complaints, and no formal charges were filed against him. Finally, his captain became concerned when the employee made suicidal-type statements such as, “I’m not sure if it’s worth it,” and “It doesn’t matter how this ends.”

*see “examinations,” page 2*

## SEXUAL HARASSMENT

### Woman’s lawsuit dismissed after contrary positions taken in court

by Roxana Correa  
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The U.S. Court of Appeals for the 6<sup>th</sup> Circuit has dismissed a woman’s sexual harassment lawsuit against a former employer after concluding she asserted contrary positions about her sexual harassment claims in proceedings before the bankruptcy and district courts.

In 2006, the woman filed a complaint with the Tennessee Human Rights Commission and the Equal Employment Opportunity Commission (EEOC). In her complaint, the woman claimed her supervisor made sexually suggestive and derogatory comments toward her and engaged in improper sexual contact at work. In May 2008, the woman asked the EEOC to issue a Notice of Right to Sue, which was granted.

*see “positions,” page 3*

## TITLE VII

### Retaliation for “silent” opposition

by Patrick Ogilvy  
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According to the U.S. Court of Appeals for the 1<sup>st</sup> Circuit, an employer who terminates a supervisor for assisting a subordinate report a claim of sexual harassment may be liable for retaliation under Title VII.

### Report of sexual harassment

A laboratory scientist working for a pharmaceutical manufacturer complained to her supervisor of sexual harassment by another scientist in her work group. She explained the alleged harasser made comments about her, followed her, asked other employees what she was doing, and frequently called her. She also heard the alleged harasser criticizing her work. The supervisor noticed the alleged harasser staring at the scientist, “undressing her with elevator eyes,” and calling her regularly. He also remembered a situation in which he warned the alleged harasser about making a sexually charged comment around the scientist.

The supervisor discussed the complaints with the alleged harasser, who apologized for criticizing the scientist’s work, but not the other allegations. Over the

*see “opposition,” page 2*

<i>In this issue:</i>	<i>Page</i>
<i>Workers' Comp</i>	<i>4</i>
<i>Sexual Harassment</i>	<i>6</i>
<i>FMLA</i>	<i>8</i>
<i>Wage &amp; Hour</i>	<i>9</i>
<i>Independent Contractor</i>	<i>10</i>
<i>Labor Law</i>	<i>12</i>
<i>Title VII</i>	<i>13</i>

from “examinations,” page 1

Due to these factors, the employer placed him on administrative leave and requested he undergo a fitness-for-duty examination. The employer’s doctor concluded the employee was not fit for police duty because of “emotional, cognitive, behavioral, and physical problems” and his disability was permanent. The employee requested a second opinion. The second doctor came to the same conclusion, except he believed the employee could get better with treatment. The employee underwent a treatment program for a short time, but stopped cooperating with the doctor. The employer ordered him to attend another fitness-for-duty examination, but he ignored the request. The employer terminated him for insubordination and being unfit for duty.

The employee filed a lawsuit against the employer alleging it violated his ADA rights. Specifically, the employee alleged the employer subjecting him to a fitness-for-duty examination, which violated the ADA’s prohibition against medical examinations. The employee argued an employer may not require a medical examination to determine whether an employee is disabled unless such examination is job-related and consistent with business necessity. According to the employee, there was no

from “opposition,” page 1

next two weeks, the supervisor arranged several meetings between the scientist and the manufacturer’s human resources. Though he accompanied her to these meetings, the supervisor did not actively participate. However, after the scientist left the first meeting, the supervisor explained the seriousness of the situation to the specialist. When several days passed without action, the supervisor followed up with human resources. A day after leaving a voicemail inquiring about the scientist’s sexual harassment claim, the supervisor was terminated. He then filed suit for retaliation under Title VII.

### Retaliation for opposition

The manufacturer claimed it was not liable for retaliation because the supervisor had not “opposed” the alleged harasser’s conduct, explaining the supervisor had not spoken during the meetings between the scientist and human resources. The court disagreed, as the supervisor had spoken separately with the scientist, the alleged harasser, and the specialist. Further, the court noted the supervisor’s conduct of arranging the meetings could alone constitute opposition to the harassment. Although human resources ultimately decided the scientist had not been sexually harassed, the court found the supervisor had a reasonable, good-faith basis to believe harassment had occurred based on his own observations and the scientist’s complaints.


The court rejected the manufacturer’s argument the supervisor had acted in his supervisory capacity because

decline in his job performance, so a medical examination was not warranted.

The 9<sup>th</sup> Circuit disagreed. The court found in jobs that involve public safety, an employer may preemptively order a medical examination, if it has legitimate reasons to believe the employee is not mentally stable, even if the employee’s job performance has not declined.

Although the bar to the business necessity standard is high, and employers may not require a medical examination out of mere convenience or expediency, there are situations in which the business necessity standard may be met even before an employee’s work performance deteriorates. In this case, the employee’s personal behavior would have caused a reasonable person to inquire as to whether the employee was still capable of performing his job. Due to the nature of his duties, the city was not required to wait until the employee hurt another person or himself before requesting he undergo a fitness-for-duty examination. The court cautioned an employer must raise serious objective concerns about an employee’s mental stability and whether he can continue to perform his job duties. ■

the supervisor was not a personnel manager. Instead, he was a supervisory scientist who had assisted a subordinate employee file a sexual harassment complaint. Though the manufacturer maintained an equal employment policy requiring employees to report unlawful conduct, the court determined this was not sufficient to avoid liability for retaliation under Title VII. ■

**“I Didn’t Know That”™**  
(Why We Say The Things We Say) by **Karlen Evins** 

*“Deadbeat” - The first deadbeats were technically “debt beaters.” These were people who avoided their creditors by leaving their debts behind. In the early days of this country, there were two ways to shirk your financial obligations: (1) by declaring bankruptcy, or (2) by actually moving out of the colony where the debt was incurred. Those choosing the latter were known as debt beaters, which later was shortened and mispronounced as deadbeats.*

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from “positions,” page 1

Exactly one month after the EEOC issued the notice, the woman filed for Chapter 13 bankruptcy. In her filing, she did not mention the harassment claims against her employer, despite being required to do so in two sections of the bankruptcy petition – one section requiring a list of all suits and administrative proceedings in which a petitioner is a party, and another requiring a list of personal assets, including contingent and unliquidated claims of every nature along with the value of each claim.

Almost two months after filing bankruptcy, the woman sued her former employer for \$1.25 million for sexual harassment.

The employer claimed by omitting reference to the harassment claim in her bankruptcy filings, the woman essentially asserted no claims existed. By filing a claim for sexual harassment, the employer argued the woman asserted a contrary position.

Although the woman conceded her bankruptcy petition failed to mention the claims against her employer, she contended the information was inadvertently omitted. She further claimed she made several attempts to correct the omissions. In support of her argument, the woman submitted an affidavit from her bankruptcy attorney, stating he was aware of the harassment claims and the lawsuit had been discussed during a bankruptcy proceeding. The woman also pointed to her Application to Employ Counsel, which she argued gave the bankruptcy court notice of the claims against her employer. Finally, the woman asserted she amended her Statement of Financial Affairs to reflect her harassment claims.

In dismissing the lawsuit, the court rejected all of the woman’s assertions. First, the court concluded the

attorney’s affidavit was insufficient because it did not mention what exactly was discussed in the bankruptcy proceeding, with whom it was discussed, or whether the omission from the initial filing was discussed. Also, the court noted a copy of the official transcript of the proceeding did not indicate the harassment claim was discussed. The court further noted neither the bankruptcy court nor the trustee requested additional information as to the claims and the woman’s creditors were not made aware of the claims.

Second, the court concluded the Application to Employ Counsel was also insufficient because it did not state whether she was suing or being sued, the amount of the lawsuit, the facts giving rise to the lawsuit, or when the actions giving rise to the lawsuit occurred.

Lastly, the court did not look favorably to the fact the woman amended her initial filings because she did not do so until after the employer attempted to have the case dismissed because of the contrary positions she had taken. Additionally, even after the employer tried to have the case dismissed, the court noted, the woman only amended part of her initial filings, in adding the harassment claim to the section that requested information on suits or administrative proceedings in which a petitioner is a party.

In conclusion, the 6<sup>th</sup> Circuit determined the woman asserted a position before the bankruptcy court contrary to the position she asserted in the district court. Furthermore, she had a motive to conceal her harassment claim and her subsequent attempts to advise the bankruptcy court of her harassment claims were insufficient to excuse the initial omissions. ■

## FAMILY AND MEDICAL LEAVE ACT

### Fitness-for-duty may include reliable attendance

by J. Wallace Irvin  
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The U.S. Court of Appeals for the 8<sup>th</sup> Circuit held an employer does not interfere with an employee’s rights where the employer did not deny Family and Medical Leave Act (FMLA) leave to the employee, but discharged the employee based upon a fitness-for-duty exam.

#### Employee seeks indefinite, intermittent leave

In 1979, an employee was hired by a city as an emergency dispatcher, which required the employee to receive calls for emergency service and dispatch emergency service units on a regular basis. The city expected the employee to function accurately while working under considerable pressure and to act quickly and calmly in emergency situations.

Although the city never previously disciplined the employee, the city issued the employee a written warning in

2007 for taking excessive sick leave. Following a recommendation by the city, the employee applied for intermittent FMLA leave based on depression and anxiety, claiming she had a serious health condition that rendered her unable to perform the essential functions of her job. The employee provided a medical documentation stating she suffered from depression and anxiety that interfered with her sleep, energy level, motivation and concentration. The documentation indicated the employee would need to take time off work intermittently over a period of six months or longer.

#### Mentally fit for duty?

The city began to question whether the employee could adequately perform her job, based upon the medical docu-

see “attendance,” page 4

from "attendance," page 3

mentation which stated the employee's concentration and motivation were affected by her depression. In response, the city scheduled an appointment for the employee to undergo a fitness-for-duty exam with a psychiatrist. After examining the employee and reviewing the employee's job description, the psychiatrist determined the employee suffered from chronic relapsing depression that interfered with her ability to function at full capacity at work. The psychiatrist also found the employee was not fit for duty as described in her job description, especially as related to tiredness, ability to concentrate and her ongoing propensity to miss work.

In April 2007, the city terminated the employee based on the results of the fitness-for-duty exam and the determination she was unfit for duty. Nevertheless, the city encouraged the employee to avail herself of the city's long-term disability benefits. Instead, the employee filed a lawsuit claiming the city violated her rights under the FMLA.

#### **FMLA does not provide right to indefinite leave**

The 8<sup>th</sup> Circuit affirmed a trial court ruling dismissing the employee's lawsuit. The employee claimed the em-

ployer interfered with the exercise of her rights under the FMLA. The appellate court disagreed.

Interference includes not only refusing to authorize FMLA leave, but also discouraging an employee from using such leave. To establish an interference claim, an employee must only show he or she was entitled to the benefit denied. If an employer grants every request an employee makes to take FMLA leave, the employee may only make a claim for retaliation. Here, the employer did not deny the employee's request for leave.

However, the court noted the FMLA only provides leave with an expectation an employee will return to work. The FMLA does not provide an employee a right to take unscheduled and unpredictable, but cumulatively substantial, absences or a right to take unscheduled leave at a moment's notice for the rest of her career. A person is not qualified for a position where reliable attendance is a bona fide requirement. Therefore, because the employee requested intermittent leave for six months or longer, she did not have a right to FMLA leave. Without the right to FMLA leave, the city did not interfere with the employee's rights under the FMLA. ■

## **WORKERS' COMPENSATION**

### **Payments increased because driver was not re-certified**

by Bruce Buchanan, Editor  
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Many state workers' compensation statutes mandate employees, who are unable to have a meaningful return to work following a work-related injury, are entitled to an increased settlement for their injuries. In this case, a truck driver employed by a Tennessee company was entitled to an increased settlement because the employee's physician would not re-certify the employee as eligible to drive a tractor-trailer under the U.S. Department of Transportation (DOT) standards; thus, the employee was not able to return to work.

#### **Injury**

The employee worked as a tanker truck driver for a transportation company. In August 2005, the employee fell while disconnecting a hose during a delivery. The injury was properly reported and the employee was treated promptly.

Throughout treatment, it was discovered the employee needed surgery on his right shoulder. In the spring of 2006, the employee underwent surgery. The employee then participated in physical therapy and returned to light duty employment. In July 2006, the employee reached

maximum medical improvement and was assigned a permanent impairment rating. The employee was also permanently restricted from overhead pushing and pulling with his right shoulder. This restriction was significant because one of the requirements of the employee's job was to climb to the top of the tanks, which he transported, in order to make sure they were properly sealed. The employee's physician did, however, state he saw no reason why the employee could not return to his position as a truck driver.

#### **Employer requested re-certification**

When the employee was released to return to full duty, the transportation company sent the employee to the company physician to re-certify he was eligible to drive a tractor-trailer under the DOT standards. The company physician refused to certify the employee. As a result, the employee was terminated. Because the employee was terminated and was not returned to a position with compensation equal to or greater than his pre-injury wage, the employee was entitled to a substantially increased permanent partial disability settlement. ■

## EDITOR'S CORNER

# Crackdown on employers' immigration practices continues

by Bruce Buchanan, Editor  
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Bruce Buchanan

The Department of Justice, Office of Special Counsel (OSC) has recently stepped up its enforcement of unfair immigration practices involving employees' citizenship status. In one case involving a landscaping company, the company settled charges alleging it preferred to hire H-2B visa holders over U.S. citizens or lawful permanent residents (LPRs). Under the settlement agreement, the company will modify its hiring policy to significantly extend the time period during which it will recruit U.S. workers for jobs that would otherwise be filled with H-2B temporary visa holders. The employer also agreed to pay \$11,173 in back pay to the only U.S. applicant who was identified during the investigation as a discriminatee.

In a second case, a pool management company settled a document abuse claim concerning a LPR, who presented a Permanent Resident card and a restricted Social Security card, with the notation "valid for work only with DHS authorization," during the I-9 verification process. Thereafter, the employer withdrew the job offer. Since the Permanent Resident card was legally sufficient to prove work authorization, the company violated the law. The OSC and the pool management company agreed to settle the claim for \$1,500 in back pay and civil penalties.

The third case involved a university, who initially selected a LPR for hire, but then withdrew the offer because it did not think it could hire non-U.S. citizens. Eventually, the university relented and re-offered the job, but not before a manager at the university reprimanded the charging party for contacting the OSC. The settlement agreement provided for back pay of \$7,100 to the charging party, training for the university's management and human resources staff regarding the anti-discrimination provision of the Immigration and Nationality Act, and modification of the university's policy regarding the employment of foreign nationals.

If you are concerned about whether your employment practices regarding immigration are current and/or lawful, please feel contact me or your immigration attorney.

### Continued availability of H1-B visas

Since the initial filing period for H1-B visas began on April 1, 2010, almost 34,000 regular petitions, out of a cap of 65,000 have been filed. It appears the rate of petition filing has been increasing in recent months. If your company is still considering sponsoring someone for a H1-B visa, now is the time to act. Although you may have read about an increase in filing fees for H1-B visas, this only applies to companies with more than 50 percent of its workforce comprised of H1-B visa holders. If you have any questions, please feel to contact me or your immigration attorney. ■

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## SEXUAL HARASSMENT

# Poor performance preceding termination defeats harassment

by Mo Syed  
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A former employee filed a lawsuit against her former employer alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Arkansas Civil Rights Act (ACRA). A federal court in Arkansas decided the case in the employee's favor, which was upheld on appeal by the U.S. Court of Appeals for the 8<sup>th</sup> Circuit.

### Background

This case involved a claim by a former employee of a railcar and tank manufacturing company. The employee developed an extensive disciplinary record while in the material control department. In March 2003, she was given a written warning about her failure to arrive promptly and received at least nine written citations. She also made mistakes in adjusting inventory that required a correction of several thousand dollars.

Her male supervisor offered her time off to look for another job in November 2003 and warned her, shortly afterwards, she would be fired at the end of the month unless she showed improvement. When she received a pay increase in November 2004, her supervisor stated it was not merit-based and he was still not satisfied with

her performance. She was reprimanded again in May 2005 along with other employees in the material control department, for "unacceptable, repeated mistakes."

In October 2006, the employer conducted an annual inventory and discovered \$500,000 worth of unaccounted materials. While she did not have sole responsibility for this discovery, the employee was still at fault. She was suspended for five days and then fired.

She claimed the disciplinary action and the termination were retaliation for a complaint of sexual harassment by her male supervisor in March 2006. She testified she had seen her supervisor view pornography daily. She alleged he often shared and sent sexually explicit e-mails with co-workers. On two occasions, he sent sexually explicit e-mails to the former employee. On another occasion, the supervisor brought her into his office to show her an e-mail with sexual content.

At some point, she found a CD containing sexually provocative images of a woman. The CD also contained copies of e-mail messages between the supervisor and the woman's son, who had taken the photos of his mother. The supervisor allegedly encouraged the son to have sex with his mother in these e-mails.

*see "performance," page 7*

## FAMILY AND MEDICAL LEAVE ACT

# Flood emergency not covered by FMLA

by Kathleen Henderson  
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A Michigan hospital did not violate the Family and Medical Leave Act (FMLA) by terminating an employee who called in stating he would not be at work due to flooding in his mother's home.

The employee, a medical technologist, had previously taken FMLA without any difficulty after providing his supervisor with notice that his absence was necessary to care for his mother who was suffering from diabetes, high blood pressure and arthritis.

The hospital terminated him under their absentee policy after he failed to show up for work between July 23 and August 1. Under the policy, absence for seven or more consecutive calendar days without proper application or approval is grounds for termination. The employee alleged his termination violated the FMLA. However, a Michigan federal judge found the employee failed to: (1) provide substantively-sufficient notice of his need for FMLA leave; and (2) establish, through medical certification, his absence was medically necessary care for his mother.

After conceding his absences from July 23 to July 28 were not protected by the FMLA, the employee alleged

the absences after July 28 were covered and he gave proper notice. Specifically, he claimed on July 28, he called his supervisor to inform him of his absence due to flooding in his mother's basement. However, he did not state the flooding posed a danger to his mother's health nor his absence was necessary to care for her.

Despite the employee's argument to the court that his absence was necessary due to the danger the flooding could pose to his mother's hepatitis condition, he did not timely disclose this to his employer. He also failed to provide medical certification that his absence was necessary to care for his mother.

### Lesson

Although no FMLA violation was found in this case, employers should be aware the FMLA regulations provide broad coverage for qualifying leave. Absences which are taken to care for a family member encompass both physical and psychological care, including situations where the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety. ■

from “performance,” page 6

The supervisor’s conduct became known to human resources in October 2005. He was warned to stop viewing pornography and sending explicit e-mails at work or be terminated. The former employee complained about her supervisor to another supervisor. She also complained to human resources about one e-mail that was found to be pornographic. The supervisor was suspended for five days without pay and warned he would be terminated if he continued to send sexually explicit e-mails.

After the supervisor was suspended, the former employee did not get any further non-work e-mails or offensive comments from him. The former employee alleged after his suspension, the supervisor ceased speaking to her and other employees became unfriendly toward her. She was eventually fired in October 2006 because of the mistakes made in inventory.

### Employee files lawsuit

The employee filed an Equal Employment Opportunity Commission (EEOC) charge on December 5, 2006, far more than 180 days after her supervisor’s last offensive e-mail to her. She did not allege sexual harassment acts within the statutory period. Her federal claim for sexual harassment was therefore time barred. The employee filed suit on December 26, 2007, more than one year after the last date of alleged sexual harassment. Because her EEOC charge alleging sexual harassment was un-

timely filed, the employee could not rely on it to support the timeliness of her ACRA harassment claim.

Retaliation claims are subject to the burden shifting framework. Courts analyze Title VII and ACRA retaliation claims in the same manner. To state a *prima facie* case of retaliation, the employee must show: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. If the former employee establishes a *prima facie* case and the employer then proffers a legitimate, non-retaliatory reason for the action it took against her, she has to present evidence creating a question of fact as to whether the employer’s proffered reason is pretextual and reasonable inference that the defendant acted in retaliation.

The court concluded the first two factors were not in dispute. However, because there were so many disciplinary actions and poor performance preceding the challenged employment action, the causal connection could not be proven. Even if the employee could establish a *prima facie* retaliation case, no reasonable fact finder could conclude the employer’s proffered reason was pretextual.

Further, she was fired seven months after her March 2006 complaint. The court stated a gap in time between the protected activity and the adverse employment action weakens the inference of retaliatory motive. ■

## LABOR LAW

# Businesses are not required to host union protests

by Eugene Long, Jr.  
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A Court of Appeals in California issued a favorable ruling for property owners by holding an owner of private property, which is not a public forum, cannot be forced to give an uninvited group, such as a union, access to the private property in order to engage in speech. The court held such laws violate the First Amendment to the United States Constitution.

### A peaceful protest on private property

A property owner owned a large warehouse grocery store in a retail development and the store’s employees were not represented by a union. The store had only one entrance for customers. In front of that entrance was a sidewalk that extended out about 15 feet to the asphalt. The entrance area was 31 feet wide.

In July 2007, the union picketed the store, encouraging people not to shop there because it was not a union store. The union’s agents walked back and forth in front of the entrance, carrying picket signs and handing out flyers. The union’s agents picketed five days a week and eight hours a day.

In January 2008, the store gave the union a memorandum containing rules for speech on the premises. The rules prohibited the distribution of literature and the carrying of signs larger than two by three feet. The rules also prohibited speech within 20 feet of the store entrance and banned all speech during specified hours of the day and for a week before designated holidays.

The union’s agents did not comply with the rules. The store managers attempted to have the local police remove the union’s agents, but the police refused as it was against their policy to remove peaceful protesters. The store subsequently filed a complaint against the union seeking an injunction to prevent the union from using the store’s property as a forum for expression of the union’s views. The trial court denied the request for the injunction. The store appealed.

### Violation of First Amendment rights

The appellate court reversed the trial court’s decision to deny the injunction. The First Amendment guarantees  
*see “protests,” page 9*

## FAMILY AND MEDICAL LEAVE ACT

# Employers are not expected to be mind readers

by Daniel Moskowitz  
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Daniel Moskowitz

Employers are faced with a myriad of legal concerns when an employee takes leave. An employer must be aware of their obligations under the Family and Medical Leave Act (FMLA), while ensuring their employees know about their FMLA leave rights. There is no better ingredient than an employer's due diligence in following the law to help

and liability in employee leave situations, the U.S. Court of Appeals for the 8<sup>th</sup> Circuit recently ruled.

### What is exactly the matter?

A maintenance employee at a college was diagnosed with depression and prescribed medication. The employee notified his direct supervisor he was suffering from stress and anxiety. However, the employee failed to mention that he had been diagnosed as suffering depression and taking medication. The employee said he was "not proud" of his need for the drugs and did not want to tell anybody about it.

Over a year later, the employee was having a difficult personal time and felt "everything was piling up." As such, the employee informed his supervisor that he may need time off to deal with his stress and anxiety. Like before, the employee did not mention his depression diagnosis or medication. After speaking to the employee, the supervisor gave the employee a request for FMLA leave form. The employee failed to review the contents of the form and put it in his desk, telling his supervisor, "I didn't need any leave—not just FMLA, any leave. I did not need a leave at that time because I thought I could handle it."

Later that same month, the employee was disciplined for excessive absenteeism, and two months later, the

employee was reprimanded for missing work. In the ensuing telephone conversations with his supervisor, the employee told his supervisor he was having neck and head pain due to family problems and asked for "mental health leave." Like before, the supervisor mentioned the availability of FMLA leave to the employee, and told him he needed a doctor to sign the leave request form. The employee then stated, "I don't have a doctor. Is there any other way I can go?"

After speaking to the employee, the supervisor conferred with human resources and they denied the employee's request for mental health leave. The supervisor informed the employee and advised him the employer was working on a severance offer for him. As a result, the employee promptly submitted his resignation and subsequently brought a lawsuit alleging violations of the FMLA and the Americans with Disabilities Act (ADA) concerning the leave of absence denial.

### Resulting litigation

In affirming the dismissal of the employee's claims, the appellate court noted the employer fulfilled its obligations under the FMLA by providing the employee with information on the possibility of taking FMLA leave when it suspected it might be required. The court held the employee, once advised of his FMLA rights, simply chose to ignore them. Thus, the employee's absences were unprotected under the FMLA.

Additionally, the court found the employee's failure to advise the employer of his depression and need for an accommodation doomed his claim for a reasonable accommodation under the ADA. The court concluded the employee's inaction in providing the employer with necessary information concerning the extent of his limitations or need for an accommodation failed to trigger any reasonable accommodation obligations by the employer. ■

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from “protests,” page 7

the right to freedom of speech. This right includes the choice of what not to say. Forcing one speaker to host or accommodate another speaker’s message violates the host’s right to free speech. The Moscone Act, a California law, however, declares conduct relating to a labor dispute, such as peaceful picketing, shall be legal and prohibits courts from issuing injunctions.

In reaching its decision, the court found the area in front of the entrance to the store was not a public forum as it was not presented to the public as a public meeting space. As a result, the store had the right to limit the speech allowed and could exclude anyone wanting to engage in prohibited speech. Following that determination,

the court found the Moscone Act violated the First Amendment because it gave preferential treatment to speech based on its content. By declaring that speech in a private forum concerning labor disputes was legal, even though similar protests concerning different issues would constitute trespassing, the Moscone Act violated the First Amendment rights of the property owners who could be required to host speech they did not agree with.

Ultimately, this decision is fair for California employers. While employers cannot stop unions from spreading their messages, they will no longer be required to host the unions when picketing. ■

## WAGE & HOUR LAW

# No private right of action to challenge tip-pooling

by Max Nuyen

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In the last few years, there have been a number of cases challenging the practice of “tip-pooling,” where tips are divided among the workers. In this case, the California Supreme Court took up the question of whether a worker has a right to sue his employer to challenge tip-pooling.

An employee worked as a card dealer at a casino. The casino had a mandatory tip-pooling policy. The dealers must contribute 20 percent of their tips to distribute among other service employees, such as chip service people, hosts, floormen, and concierges. The dealers are permitted to keep the remaining 80 percent.

The dealer challenged the casino’s policy in a class action. He alleged the mandatory tip-pooling was a violation of California Labor Code Section 351. This code section states in relevant part: “No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron...Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.”

Thus, Section 351 prohibits employers from taking tips from employees. It also prohibits employers from considering the amount of tips an employee receives as wages. In California, tips are tips, and wages are wages. Neither can be used as a replacement for the other. The heart of the employee’s lawsuit was the mandatory tip-pooling policy violated his rights under Section 351 because it was an unlawful taking of his tips.

The problem with the employee’s lawsuit was Section 351 does not state he could sue his employer if he felt his rights were violated. Thus, the court dismissed the lawsuit. In California, wage disputes are generally handled by the Industrial Welfare Commission, which is tasked with enforcing wage laws and regulations. The court noted

some of California’s wage and employment laws expressly permit a private cause of action – the aggrieved person is permitted to directly sue the employer to enforce the law. In other situations, without a private cause of action, the aggrieved employee must rely on the government agencies to do their jobs to enforce the laws. The employee has no right to sue the employer. In this case, the court found Section 351 created no expressed or implicit right for a private cause of action. ■

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## INDEPENDENT CONTRACTOR

# Independent contractor may not sue general contractor

by Eugene Long, Jr.  
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In a lawsuit filed by an independent contractor against a general contractor for injuries sustained during a construction project, the California Supreme Court found the general contractor could not be held vicariously liable for a workplace injury.

### Independent contractor injured on job

An independent contractor was hired by a subcontractor on a building project. The subcontractor worked for a general contractor on the expansion of a commercial fuel facility. The subcontractor hired the independent contractor to be the foreman of a two-man canopy construction crew. The independent contractor, who had more than 20 years of experience in structural steel construction, held a state contractor's license under a sole proprietorship that he owned. It was undisputed the independent contractor was, in fact, an independent contractor, not the subcontractor's employee.

On his second day on the job, the independent contractor was injured when he fell into a hole at the worksite. The hole, which was four feet wide and four feet deep, was intended for bollard footings. Bollards are concrete posts intended to prevent cars from smashing into the fuel pumps. Prior to the accident, the independent contractor asked the general contractor's project manager to cover

the holes with large metal plates. However, the project manager failed to do so.

After the injury, the independent contractor sued the general contractor, seeking to hold the general contractor liable on a theory of vicarious liability. The general contractor could be found liable for the negligence of the subcontractor. The trial court dismissed the case; however, the California Court of Appeals reversed that decision. The general contractor then appealed to the California Supreme Court.

### Peculiar risk doctrine

The court began its opinion with a discussion of the "peculiar risk" doctrine. A peculiar risk is a special or recognizable danger inherent in the work itself that arises from either the nature or the location of the work and against which a reasonable person would recognize the necessity of taking special precautions. The peculiar risk doctrine is an exception to the rule that a person hiring an independent contractor to perform dangerous work is generally not liable to third parties. Some courts have expanded the doctrine to allow suits by employees of an independent contractor hired by a property owner to perform inherently dangerous work. Thus, property own-

*see "contractor," page 11*

## EMPLOYMENT LAW

# Federal and state legislation update

by Bruce Buchanan, Editor  
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**Federal** - The Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) was signed into law on July 21, 2010. For employment law purposes, one should know about the *creation* of whistleblower rights for reporting information to the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), and the *enhancement* of anti-retaliation provisions under Sarbanes-Oxley (SOX) and the False Claims Act.

Individuals, who provide "original information" to the SEC and/or CFTC resulting in monetary sanctions of more than \$1 million, will receive a reward of between 10 and 30 percent. The DFA also provides a private right of action to individuals who suffer retaliation for engaging in protected expression, such as providing information to the SEC, participating in investigations or SEC actions, or making appropriate disclosures under SOX or laws under the SEC's jurisdiction.

The DFA increases the SOX statute of limitations from 90 to 180 days, and clarifies SOX litigants are entitled to

a trial by jury. Moreover, subsidiaries and affiliates of publicly-traded companies are now subject to SOX if their financial information is included in the public company's consolidated financial statements. Last, SOX whistleblowing claims may no longer be subject to mandatory arbitration agreements or waivers through private agreements.

**Ohio** - Employers in Ohio with 50 or more employees are required, as of July 2, 2010, to provide two weeks of unpaid leave to an employee who is the spouse or parent of a member of the armed services called to active duty or injured while on active duty. The important difference between Ohio's law and the federal Family and Medical Leave Act (FMLA) is FMLA applies when employers have 50 or more workers within 75 miles of each other while Ohio law applies to employers with 50 employees or more.

**Illinois** - Effective January 2011, the Employee Credit Privacy Act prohibits Illinois employers from making hir-

*see "update," page 11*

from “contractor,” page 10

ers were vicariously liable for employees’ on-the-job injuries.

The California Supreme Court rejected that expansion to cover claims made by independent contractors and in doing so overruled the decision of the appeals court. When an independent contractor is hired to perform inherently dangerous construction work, that contractor, unlike a mere employee, receives the authority to determine how the work is to be performed and assumes a corresponding responsibility to see the work is performed safely. The independent contractor has received this authority by delegation. An independent contractor hired by a subcontractor working for a general contractor has therefore indirectly been delegated the authority to insure the work is performed safely. As a result, the independent contractor, who suffered an injury resulting from risks inherent in the hired work, after having assumed responsibility for fall safety precautions, is not the innocent third party that the peculiar risk doctrine was intended to protect. ■

## INDEPENDENT CONTRACTOR

# Choice-of-law provision may not be a shield

by R. Eddie Wayland  
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The U.S. Court of Appeals for the 9<sup>th</sup> Circuit ruled an employer cannot rely on a choice of law clause within an independent contractor agreement to skirt California’s labor laws. Companies should take this ruling into consideration when drafting independent contractors’ agreements to avoid unwanted results, especially with respect to California operations.

### Independent contractors’ agreements

A group of drivers for a Texas-based shipping company sued a global transportation company for benefits under California’s Labor Code. The drivers were residents of California and provided freight pick-up and delivery services for the company in California. Each of the drivers signed independent contractor service agreements, which acknowledged the contractor would not be considered an employee of the company. In addition, the contractor service agreement included a choice-of-law provision establishing all lawsuits arising out of the agreement would be decided under the law of Texas.

### California lawsuit

Despite signing these agreements, the drivers filed a lawsuit in California against the company, alleging they were employees of the company and were deprived of employee benefits mandated under California’s Labor Code. Specifically, the drivers alleged the company de-

from “update,” page 10

ing, recruiting, or discharge decisions, or discriminating against an individual with respect to compensation or terms of employment, based on an individual’s credit history or inquiring about an applicant’s or employee’s credit history or obtaining an applicant’s or employee’s credit report from a consumer reporting agency.

**Massachusetts** - Effective November 4, 2010, Massachusetts will ban public and private employers from requesting criminal record information on initial job applications, sometimes called “ban the box” provision. The only exception is if: (1) the applicant is applying for a position for which any federal or state law creates a mandatory or presumptive disqualification based on a conviction of certain criminal offenses; or (2) the employer is subject to an obligation under any federal or state regulation not to employ persons in one or more positions who have been convicted of certain criminal offenses. ■

prived them of overtime compensation, business expenses, and meal compensation, and made unlawful wage deductions in violation of California’s Labor Code.

The company argued Texas law applied to the drivers’ lawsuit, and under the laws of Texas, the drivers were independent contractors who are not entitled to employee benefits under California’s Labor Code. The 9<sup>th</sup> Circuit did not agree with the company’s argument.

### Choice-of-law provision not applicable

The 9<sup>th</sup> Circuit found, under California law, the scope of the choice-of-law provision within a contract is to be examined under the law designated in the contract, which, in this case, was Texas. Under Texas law, a choice-of-law provision within a contract will only apply to the interpretation and enforcement of the contract itself, not all issues that may arise out of the agreement. The main issue in this case was whether the drivers were independent contractors or employees. The 9<sup>th</sup> Circuit stated an individual’s employment status is determined by law, not a contractual provision. Therefore, the court found the choice-of-law provision within the independent contractor service agreement was not controlling in this matter. The employer must now establish the drivers are independent contractors under California law. ■

## ADEA

# Position eliminated because of reduction-in-force, not age

by Roxana Correa  
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The decision of a Tennessee corporation to eliminate a salesman's position was due to a reduction-in-force, not based on his age in violation of the Age Discrimination in Employment Act (ADEA).

The salesman was 64 years old at the time of the reduction-in-force. The salesman's position was among three positions eliminated as a result of a budgetary shortfall. The employer also eliminated an assistant manager position, held by a 62-year-old who planned to retire at the end of the year, and a service technician position, held by a 24-year-old. The service technician was later rehired to fill a vacancy that arose when another service technician moved to a different position.

Although the salesman asked to stay on the job for 19 more months, when he would be eligible for full retirement, the employer denied his request. Following his termination, the salesman applied for long-term disability and Social Security benefits. Along with his application for benefits, the salesman submitted letters from three physicians, confirming his inability to work due to a spinal condition.

In support of his claim that his position was eliminated because of his age, the salesman claimed there was no reduction-in-force, rather his position was the only one eliminated. He asserted he was essentially replaced by a 30-year-old, who assumed his duties and would receive his title after the lawsuit was over. The employer disagreed, arguing the positions were eliminated as part of a reduction-in-force because the work could be performed by other existing employees. The employer also claimed the salesman voluntarily ceased working because of his

disability and the disability meant he was not qualified for the salesman position.

In holding the salesman was terminated as part of a reduction-in-force, not because of his age, the U.S. Court of Appeals for the 6<sup>th</sup> Circuit concluded the salesman did not offer sufficient evidence to establish his age was the "but for" cause of his termination, as required under the ADEA. Because of a reduction-in-force, the salesman was required to provide direct or circumstantial evidence that "age was a factor in eliminating his position, or where some employees are shifted to other positions, that he was qualified for another position, he was not given a new position and that the decision not to place him in a new position was motivated by his age."

Although the salesman offered evidence that after his position was eliminated, his duties were handled by a 30-year-old, who would get his former title after the lawsuit, the court concluded this evidence was insufficient to establish age discrimination. According to the court, an employee is not "replaced" in discrimination cases when an employee takes over the former employee's duties. The court further rejected the salesman's claim his position was the only one eliminated. The court found the service technician's position was also eliminated and he was only rehired because of a subsequent vacancy. The court also determined the assistant manager position was terminated immediately upon the manager's retirement.

In its ruling, however, the court rejected the corporation's arguments the salesman voluntarily ceased working because of his alleged disability and the disability meant he was not qualified for his position. ■

## LABOR LAW

# Secondary employer must show actual malice to win claim

by J. Wallace Irvin  
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There is no such thing as bad publicity. Although this statement might hold true for rock stars and actors, several hospitals disagreed and filed a lawsuit for defamation when a union mailed postcards to prospective patients claiming a company that cleaned the hospitals' linen cleaner did not ensure the cleaned linens would be free of blood, feces and other harmful pathogens. Although successful at the trial court, the California Court of Appeals reversed a judgment in favor of the hospitals because the trial court did not require the hospitals to prove the union acted with actual malice.

### **Trial court held the union "cried wolf"**

The union commenced a campaign to force a nationwide laundry company to employ only union members.

In furtherance of this goal, the union engaged in secondary picketing, directed at hospitals that used the laundry service to clean their soiled linens. The union mailed postcards to prospective patients warning them the hospitals used a laundry company that did not ensure clean linens. The hospitals filed a lawsuit against the union for defamation, alleging the union's postcard campaign caused fewer patients to use the hospitals. The hospitals presented evidence their inspection control and linen-handling policies ensured they delivered only hygienically clean laundry to their patients.

At the end of a jury trial, the trial judge refused to instruct the jury the hospitals needed to prove by clear and convincing evidence the union knew the statements

*see "malice," page 13*

*from “malice,” page 12*

were false or had serious doubts about the truth of the statements. Instead, the court advised the jury the hospitals only needed to show the union failed to use reasonable care to determine the truth or falsity of the statements. The jury found in favor of the hospitals and awarded them \$17 million.

### **Trial court instruction incorrect**

The union appealed the judgment alleging the trial court erred by not instructing the jury the hospitals needed to show actual malice – clear and convincing evidence the union knew the statements were false or had serious doubts about the truth of the statements. The court of appeals agreed, citing prior decisions of the Supreme Court that held defamatory statements in the context of a labor dispute are subject to the actual malice standard. Thus, libel and slander actions in the context of labor disputes are only deemed defamatory if the injured party shows by clear and convincing evidence, the union made the

statement with knowledge of its falsity or with reckless disregard of whether it was true or not.

### **Jury must decide again under new standard**

The union claimed it did not act with actual malice. Although the union did not know of any instance in which a patient acquired an infection from linen laundered by the laundry company or of the hospitals’ infection control procedures, the union claimed its research, interviews with employees of the hospitals and its own members, supported its assertions. In contrast, the hospitals argued they showed their infection control and linen-handling policies included extra layers of protection and ensured it delivered hygienically clean linens. The appellate court held because the jury could find in favor of both parties under the actual malice standard, the judgment should be reversed. The jury must now determine if the union made the statement with actual malice as opposed to failing to use reasonable care. ■

## **TITLE VII**

# **Television reporter terminated after encounters with police**

*by Roxana Correa  
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A television news reporter, who was involved in three domestic disputes in which the police were called, was properly terminated under her contract, the U.S. Court of Appeals for the 5<sup>th</sup> Circuit has ruled.

The reporter, who worked at a television station in San Antonio, Texas, was first involved in a domestic altercation in July 2004. The reporter got into a fight with a San Antonio councilman, she was dating, where the couple threw food at each other. The next day, the reporter and the councilman got into two more fights. In the latter incident, the police were called after the councilman allegedly pushed the reporter and pointed a gun at her. The story was covered by newspapers and other media, with some questioning the ethics of a reporter having a romantic relationship with a councilman.

The second incident, which occurred in 2006, involved a different boyfriend. The reporter claimed another woman, who was also dating her boyfriend, called the police because she got upset when she found the reporter at the boyfriend’s home. The other woman, however, claimed the reporter was drunk, had a gun, and damaged her vehicle. No arrests were made.

The third incident occurred in July 2007, and involved the reporter’s fiancé. The couple had gotten into an altercation at a bar in downtown San Antonio and the fight continued at the home of the fiancé’s sister. The police eventually intervened, and both the reporter and her fiancé were arrested. The incident attracted media attention, which included video of the reporter in handcuffs.

After seeing the news coverage, the news director met with the reporter and suggested counseling. Subse-

quently, the reporter was terminated, pursuant to a morals clause in her contract, which allowed the station to terminate any employee that “becomes involved in any situation or occurrence tending to degrade the Employee in the community or which brings Employee into public disrepute, contempt, or scandal . . . whether or not information in regard thereto becomes public.”

Following her termination, the reporter sued for sex discrimination in violation of Title VII of the Civil Rights Act and breach of contract. The reporter claimed the morals clause was ambiguous, she was damaged by her termination, and three similarly-situated male employees were given counseling, instead of termination.

In rejecting the reporter’s arguments, the court concluded the reporter’s domestic disputes clearly fell within the realm of the morals clause. Specifically, the court stated the third incident alone, in which the reporter was arrested and videotaped in handcuffs, constituted public disrepute, contempt and scandal. The court also noted although the morals clause does not require such information become public, the reporter’s conduct was made public. Furthermore, the court concluded the three male employees, who the reporter claimed were involved in similar situations but treated differently by the employer, were not similarly-situated to the reporter. None of the male employees, the court concluded, had as many infractions as the reporter or “a job so sensitive to misconduct as the reporter’s position on the police beat.” ■