

SEVENTH CIRCUIT UPDATE: WINTER 2006

This bulletin provides an update concerning recent developments in employment law for employers in states served by the United States Court of Appeals for the Seventh Circuit which include Illinois, Indiana and Wisconsin. Please contact us if you have any questions about these decisions or about their effects on your organization.

A Completed FMLA Certification: When It Absolutely, Positively Has to Be There (Or Else You're Fired)

The Seventh Circuit Court of Appeals, in *Kauffman v. Federal Express Corp.*, found that a doctor's certificate that simply indicated an employee had been out due to bronchitis was enough to satisfy the notice requirements of the Family and Medical Leave Act ("FMLA"). Peter Kauffman (a long-time FedEx employee) had two recent disciplinary "strikes" against him as 2002 got underway. Under FedEx's policy, an employee with three strikes in a 12-month period could be terminated. Kauffman called in sick on January 2nd, 3rd, and 4th. When he returned, his supervisor gave him an FMLA certification form and told him to return it, completed, within 15 days. Although the facts were a little more complicated than this, essentially the certification that Kauffman provided was not completed exactly as required; the physician had written in "bronchitis" rather than checking the appropriate box to categorize the condition and had also failed to include the probable duration of the condition. In response, FedEx terminated Kauffman for unexcused absences.

Kauffman appealed his termination, and FedEx stood by its decision, claiming that the certification was incomplete. The Court, however, in its October 18, 2005 opinion, made short work of this reasoning. The FMLA regulations state clearly that "[t]he employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.305. The Court stated clearly, "FedEx could not win its case by arguing that the form was incomplete; in that event, FedEx would have been required to, but did not, notify Kauffman and give him time to cure the deficiency."

Bottom line, don't lie in wait ready to pounce if your employees make technical errors in completing FMLA paperwork (and this is a good general principle to follow even beyond the requirements of the FMLA). As this case demonstrates, the FMLA regulations simply don't allow it.

Physician Heal Thyself (or at least Behave Thyself)

In *Dunn v. Washington Co. Hospital*, decided on November 17, 2005, the Seventh Circuit addressed the extent to which an employer can be held liable under Title VII for harassing conduct dished out by a **non**-employee. The Plaintiff, Lisa Dunn, was a registered nurse at a small public hospital. Thomas Coy, a surgeon, was hired as an independent contractor to lead the hospital's Obstetrics and Emergency Care Departments. Six different nurses alleged that Coy sexually harassed them. After the hospital told Coy about the reports of harassment, Coy then pressured the nurses, including Dunn, to revise or retract their statements. Dunn and several other nurses resigned and Dunn filed suit.

The hospital argued that, since Coy was not its employee, it could not be responsible for Coy's treatment of the nurses. The Court of Appeals, however, stated that, under Title VII, "an employer is responsible for every 'tangible employment action' (hiring, firing, promotion or its absence, wage setting, and the like) **plus any other discriminatory term or condition of employment that the employer fails to take reasonable care to prevent or redress . . . it makes no difference** whether the person whose acts are complained of is an employee, an independent contractor, or for that matter, a customer."

This is not a new concept, but it's an important principle to keep in mind. Employers should have a sense of ownership regarding the conditions at their workplace, and should implement broad workplace harassment policies that address the behavior of non-employees such as contractors, vendors, customers, or other visitors to the premises. Complaints of third-party harassment should essentially be handled in the same manner as harassment complaints levied against employees: investigate, analyze the findings from the investigation, take prompt action geared at stopping any harassing conduct, and monitor the situation reasonably to ensure that no further harassing conduct takes place.

It's Hard to Shake the Past

Finally, in *Wernsing v. Illinois Dep't of Human Services*, the Seventh Circuit reaffirmed its prior holdings establishing that the Equal Pay Act allows pay differentials based on wage history. In that case, the employer hired Jenny Wernsing at a salary of \$1,925 a month at the same time that it hired a male employee for the same position at a salary of \$3,739 a month. Although that appears discriminatory on its face, the **rest of the story** is that the employer paid Wernsing 30% more than she had earned at her previous job, while it only raised the male employee's rate of pay by 10% over his prior employer. The employer in this case actually had a policy of giving lateral hires a salary that was at least equal to their previous job, and it preferred to give raises if possible. The customary raise for lateral hires was 10%. Thus, the employer gave the male employee its standard raise, but gave the female employee **three times** its standard raise.

Although other courts in other areas of the country have required employers to show an "acceptable business reason" for taking prior wages into account when salary decisions result in pay differentials, the Seventh Circuit reaffirmed that it would not get into the business of determining what constitutes an "acceptable" business practice. Therefore, it is appropriate for employers in the Seventh Circuit to choose to pay their employees differently based on the employees' salary histories.

This Seventh Circuit update was prepared by Donna Eich Brooks, an attorney with the law firm of Lehr, Middlebrooks, Price & Vreeland. Donna can be reached for questions/further information at dbrooks@lmpv.com or at (205) 226-7120.

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