Managing Workplace Risk

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I. Employee's Contradiction With Regard to Her Disability Results in Grant of Summary Judgment to Employer

In *EEOC v. Vicksburg Healthcare, LLC*, a recent decision from the District Court for the Southern District of Mississippi, the Court granted the employer's motion for summary judgment dismissing the EEOC's discriminatory termination and failure to accommodate claims under the Americans With Disabilities Act. Under the ADA, employers are prohibited from discriminating against a "qualified individual with a disability on the basis of that disability." *42 U.S.C. § 12112(a)*. The Court concluded that the EEOC, which brought suit on behalf of Beatrice Chambers, did not establish that Chambers was a qualified individual based on Chambers' inconsistent statements regarding the extent of her disability.

Following Chambers' termination, which was the result of her failure to return to work following the expiration of her leave and the employer's denial of additional leave, her physician prepared and signed a disability claim form indicating that she suffered from a "temporary total disability" and that her recovery date was "unknown." Chambers reviewed the form and sent it to her insurer without any disagreement. The employer argued that the physician's statement demonstrated that Chambers was not qualified for her position as a licensed practical nurse because she had applied for disability benefits and was disabled for an indefinite period. Chambers' physician testified at deposition that she was able to return to work prior to her termination, which contradicted the earlier form. Relying on United States Supreme Court precedent, the Court concluded that a plaintiff cannot ignore a contradiction arising out of a claim for total disability benefits. The Court stated that absent an explicit explanation, the Court cannot assume one exists that can resolve the apparent contradiction. As such, the EEOC could not demonstrate that Chambers was a qualified individual under the ADA, resulting in the dismissal of the EEOC's claims.

As *Vicksburg Healthcare* demonstrates, employers should carefully scrutinize all documentation signed or submitted by an employee-plaintiff, in particular disability claim forms in a disability discrimination case. Often, forms signed by the plaintiff early in the process, when they are not considering litigation, reveal valuable evidence that may result in dismissal of the claim.

II. 2d Circuit Eases Plaintiffs' Pleading Burden in Title VII Discrimination Cases

Two recent decisions out of the Second Circuit have relaxed the initial pleading requirements in employment discrimination cases brought under Title VII of the Civil Rights Act, limiting opportunities for defendants to obtain early dismissal and potentially increasing the cost of defending cases in this jurisdiction.

In *Littlejohn v. City of New York*, the Second Circuit considered the pleading requirements for a plaintiff alleging discrimination claims brought under Title VII. *Littlejohn v. City of New York,* No. 14-1395-CV, 2015 WL 4604250 (2d Cir. Aug 3, 2015). The District Court had granted the defendant employers' 12(b)(6) motion to dismiss in its entirety on the grounds that the plaintiff had failed to adequately plead her discrimination claims. After closely examining the pleading standards for Title VII discrimination claims, the Second Circuit reversed the District Court, clarifying that at the pleading stage, the plaintiff is not required to plead facts *establishing* a prima facie case. Significantly, the Second Circuit held that a Title VII plaintiff satisfies the notice pleading standard of "plausibility" under the Supreme Court's *Iqbal* decision simply by alleging "plausible support for a minimal inference of discriminatory motivation." In *Iqbal*, the Supreme Court held that a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009). The Second Circuit held that *Iqbal*'s "plausibility" standard applies to Title VII complaints for employment discrimination, but does not affect the minimal burden on plaintiffs at the initial phase of the *McDonnell Douglas* framework. The Court explained, "absent direct evidence of discrimination, what must be plausibly supported by facts alleged in the complaint is that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by discriminatory intent."

In *Vega v. Hempstead Union Free School District*, the Second Circuit reiterated its earlier decision in *Littlejohn*, holding that in Title VII employment discrimination cases a plaintiff "need only give plausible support to a minimal inference of discriminatory motivation" at the initial pleading stage. *Vega v. Hempstead Union Free School District, et al.,* No. 14-2265 (2d Cir. Sept. 2, 2015). The Court clarified that, "to defeat a motion to dismiss or a motion for judgment on the pleadings in a Title VII discrimination case, a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision."

Littlejohn and *Vega*, taken together, clearly establish that plaintiffs in the Second Circuit asserting Title VII employment discrimination claims are held to a relaxed standard of pleading. Thus, the likelihood of prevailing on a motion to dismiss is low, absent a discrete defense such as, for example, statute of limitations or failure to exhaust administrative remedies. Further, making even a successful motion to dismiss may accomplish little more than providing the plaintiff an opportunity to amend the complaint to allege claims in a more persuasive fashion. Accordingly, defendants must carefully consider this authority before making a motion to dismiss in a Title VII discrimination case in the Second Circuit and other jurisdictions that might follow this line of cases.

III. 4th Circuit Grants Employer Summary Judgment on ADA Accommodation Claim

In a recent decision, *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, the Fourth Circuit affirmed a district court's grant of summary judgment in favor of the employer on the EEOC's claim under the Americans with Disabilities Act (ADA). In *Womble*, the complainant, who was diagnosed with breast cancer and later with lymphedema, was terminated from her employment as a support service assistant after her doctor restricted her from lifting more than twenty pounds. Although the employer accommodated the complainant's lifting restriction for about six months by assigning her light-duty work, the complainant eventually became idle at work because of her limitations. The Fourth Circuit found that, because the support service assistant position was "multifaceted" and many of the tasks could require lifting over twenty pounds, the ability to lift that amount was an essential function of the job. Reviewing the general components of the job rather than the complainant's particular experience, the Fourth Circuit observed that, even though the complainant worked primarily in the copy room, she could have been called at any time to move or carry heavy materials. That the complainant created work-around methods to perform some of the job's responsibilities did not negate the fact that she remained unable to do many more. The Fourth Circuit further held that excusing the complainant from all heavy lifting would not have been a reasonable accommodation, nor would have reallocating essential functions to other employees.

This decision serves as a reminder to employers that it is important to keep job descriptions up-to-date. According to the decision, it seems the primary reason for the favorable result for the employer was due to the fact that the 20 pound lifting requirement was contained in the job description.

IV. New York City's Ban the Box Bill is Enacted

On June 29, 2015, Mayor de Blasio signed the Fair Chance Act, a bill that amends the New York City Human Rights Law ("NYCHRL") by further restricting employers from inquiring about an applicant's criminal history and otherwise making employment decisions based on such information. The Fair Chance Act will go into effect on October 27, 2015. The NYCHRL and the New York State Human Rights Law ("NYSHRL") have long prohibited employers from inquiring about or taking an adverse employment action based upon an arrest or criminal accusation that is <u>not pending</u> against an applicant <u>and</u> that was terminated in favor of such person. The NYCHRL and the NYSHRL have also required employers to engage in a multi-factor analysis required by Article 23(a) of the New York Correction Law to determine whether there is a "direct relationship" between the criminal offense and the position sought or if employment would involve an unreasonable risk to property, or the safely or welfare of specific individuals or the general public.

<u>What is Required by the Fair Chance Act?</u>

<u>Once the Fair Chance Act becomes effective, employers will be prohibited from making an inquiry about an applicant's pending arrest or criminal conviction record prior to extending a conditional offer of employment to the applicant</u>. Based on the definition of "inquiry" employers will not only be prohibited from asking an applicant questions verbally or in writing but also from searching publicly available records or consumer reports to obtain information about an applicant's criminal background.

Employers also will be prohibited from stating on any job advertisement or other solicitation or publication that employment is conditioned on or limited based on an applicant's arrest or criminal conviction.

Finally, after a conditional offer is made but before taking any adverse action based on an applicant's criminal history, employers will be required to follow the following process:

- Provide the applicant with a written copy of the inquiry, which complies with New York City's Commission on Human Rights required, but yet to be issued, format;

- Conduct an Article 23(a) analysis and provide the applicant with a written copy of such analysis, also in a manner that complies with the Commission's required format, together with supporting documents and an explanation of the employer's decision to take an adverse employment action; and

- After providing the applicant with the required documentation, allow the applicant at least three (3) business days to respond and during this time, hold the position open for the applicant.

Exceptions to the Fair Chance Act

There are several exceptions to the law. One exception applies to employers that are required under applicable federal, state or local law to conduct criminal background checks or where criminal history serves as a bar to employment. Under this exception, employers may inquire about an applicant's criminal history prior to extending a conditional offer of employment.

Another exception removes prospective police officers, peace officers, and law enforcement-related employees from coverage.

Enforcement of the Act

Employers that violate the Fair Chance Act may be liable for all damages available under the NYCHRL including, back pay, front pay, uncapped punitive and compensatory damages (such as emotional distress) and attorneys' fees.

V. Workplace Use of Marijuana

David Ige, Governor of Hawaii, recently signed into law a statute creating a commercialized system for the delivery of marijuana to "seriously ill" individuals in Hawaii. (A copy of the bill can be found here: http://www.capitol.hawaii.gov/session2015/bills/HB321_CD1_.HTM) By doing so, Hawaii amended its 15-year-old law that allowed the use of medical marijuana, but provided no legal way to obtain the drug. Many employers in Hawaii, like employers elsewhere in the United States where marijuana has been legalized, maintain "zero tolerance" drug policies. The new law did not modify existing Hawaii law on workplace use of marijuana and specifically continued to recognize the right of employers to maintain "zero tolerance" policies. The new law expressly states that "the authorization for the medical use of marijuana shall not apply to the medical use of marijuana in the workplace of one's employment." The matter further is complicated by the fact that marijuana remains a Schedule I drug ("no currently accepted medical use and a high potential for abuse") under both Hawaii and federal law.

Depending on several different factors (including, but not limited to, frequency of use), marijuana can be detected in urine for a period of between a week and a month after consumption. Accordingly, some plaintiffs' attorneys in Hawaii have argued that the mere presence of marijuana metabolites, detected during a drug test, does not indicate "use" in the workplace. To date, neither the Hawaii Civil Rights Commission nor an appellate court in Hawaii has decided the issue. Thus, while it is an almost universal practice of Hawaii employers to consider a positive marijuana drug test result as a disallowed "use" in the workplace, the issue remains open. Further, the Hawaii courts have not provided any guidance as to whether an employer must allow the use of a Schedule I drug as part of a reasonable accommodation of an employee's underlying medical condition.

This issue is not unique to Hawaii. Several states that have legalized the medicinal use of marijuana face the same issue – legal for medicinal use, but still prohibited in the workplace. Several states also have "lawful activities" laws, which prohibit an employer from taking adverse action against employees that engage in a lawful off-duty activity. Those states with "lawful activity" laws complicate the matter and analysis even further, particularly those states that have legalized not only the medicinal, but also the recreational use of marijuana.

Employers should consult with employment counsel to analyze each case of employee marijuana use on an individual basis under applicable state law.

Questions?

Jackson Lewis attorneys are available to answer questions about employers' compliance obligations. Please contact Paul J. Siegel, at siegelp@jacksonlewis.com, John Porta, at portaj@jacksonlewis.com, Ana Shields, at shieldsa@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work. Visit us at www.jacksonlewis.com.