Managing Workplace Risk

Monthly Newsletter December 2015

I. Employee Termination Upheld Due To Failure To Comply with Employer's Prescription Medication Policy

Last week, a federal court in Utah upheld the termination of an employee who did not disclose his use of prescription medication in accordance with his employer's policy. *Angel v. Lisbon Valley Mining Co.,* Case No. 2:14-CV-00733 (D. Utah Nov. 23, 2015). Plaintiff was employed as a haul truck driver at a copper mine. In connection with his employment, the truck driver signed the Company's prescription drug policy which unequivocally required employees taking prescription drugs that may impair their ability to safely perform their jobs to inform human resources of the use of such medications. Following disclosure, the worker was required to obtain a release from the Company's occupational physician authorizing the employee to work. The policy stated that failure to comply could result in immediate termination.

Approximately two months after his hire, the plaintiff was selected for random drug testing and tested positive for Oxycodone. He stated he had been taking that medication without notifying human resources. He had not presented a copy of the prescription to the Company or obtained work release authorization from the Company's occupational physician. He was terminated for his failure to comply with the Company's policy, just as the employer had discharged all employees who failed to comply with the policy.

The plaintiff asserted a disability discrimination claim and retaliation claim under the Americans with Disabilities Act ("ADA"), contending that he had advised the Company that he took Oxycodone for back pain. He did so only after the positive drug test. The Court held that this statement was not enough to put the Company on notice that he was disabled, and therefore his purported disability could not have been a determining factor in the decision to terminate his employment. The Court also rejected the plaintiff's argument that the Company failed to accommodate him by excusing the positive drug test result. Finally, the Court held that plaintiff did not engage in any "protected activity" and could not establish any causal connection between his termination and any alleged protected activity.

This case highlights the importance of having a consistently enforced, well-publicized written policy requiring employees to report the use of lawful prescription medications that may impair the ability to perform their job duties safely.

II. EEOC Recovers $527.6 Million in Fiscal Year 2015

According to the U.S. Equal Employment Opportunity Commission's recently-released Performance and Accountability Report ("PAR"), the Agency recovered more than half a billion dollars through litigation and other enforcement activities in Fiscal Year 2015, which ended on September 30, 2015. The EEOC reports recovering $356.6 million through mediation, conciliation, settlements and other **pre-litigation** relief for charging parties in the private sector and in state and local government workplaces, along with an additional **$65.3 million through litigation** efforts. The EEOC secured an additional $105.7 million for federal employees and applicants through its federal sector process, bringing its total claimed monetary recovery to $527.6 million.

This is a marked increase from FY 2014, where the EEOC's combined pre-litigation and litigation recoveries for employees in the private sector and state and local governments amounted to only $318.6 million. The EEOC attributes the increase in part to its "record success" in resolving charges of systemic discrimination. The EEOC made a reasonable cause finding in 99 of the 268 (or 36%) of these systemic investigations – a rate far greater than the EEOC's historical average of issuing reasonable cause findings in less than 5% of charges filed with the Agency.

In addition to resolving charges, the EEOC resolved 155 merit lawsuits in FY 2015 – according to the Agency, it obtained a "favorable result" in almost 90% of these resolutions. Of the 155 merit lawsuits, 87 alleged violations of Title VII of the Civil Rights Act of 1964; 61 alleged violations of the Americans with Disabilities Act; and, 12 alleged violations of the Age Discrimination in Employment Act.

Other key facts in the Performance and Accountability Report include:

The EEOC received 89,385 charges in 2015.
Among all EEOC initiated litigation, the greatest number of lawsuits (53) was filed under the ADA.

It is clear that investigating and redressing alleged systemic discrimination remains the EEOC's highest priority, and employers can expect the Agency to point to these "successes" in resolving systemic investigations as justification for the EEOC's aggressive pursuit of potential systemic claims.

III. New York Enacts Gender Equity Laws

On October 21, 2015, New York Governor Andrew M. Cuomo signed a series of bills amending current laws with the goal of significantly targeting gender discrimination in the work place. The new bills impact New York employers as follows:

Fair Pay and "Pay Transparency": These amendments add several protections for New York employees, including: (1) prohibiting employers from discriminating against an employee who inquires about, discusses or discloses his/her wages or the wages of another employee; (2) narrowing the exceptions available to employers under the state law that prohibits differentials in rate of pay due to sex; and (3) increasing the amount of liquidated damages available to an employee for a willful violation of N.Y. Labor Law 194 from 100% to 300%.

Sexual Harassment: This law eliminates the current 4 employee coverage threshold for employers under the New York State Human Rights Law, but **only as it relates to sexual harassment claims**. Thus, all employers in New York are covered for purposes of sexual harassment claims regardless of the number of employees they employ.

Collection of Attorney's Fees: Under this amendment "any prevailing party" may recover attorneys' fees in a sex discrimination case. For a respondent or defendant to recover fees, it must establish that the claim was "frivolous." Under existing law, attorneys' fees were not available in any employment discrimination cases under the Human Rights Law.

Familial Status Discrimination: This amendment adds familial status as a prohibited basis of discrimination.

Accommodations for Pregnancy-Related Conditions: This new provision requires that employers provide reasonable accommodations for pregnancy-related conditions, unless doing so would cause an undue hardship to the employer.

The laws take effect 90 days after enactment, i.e., in January 2016. Employers should begin to familiarize themselves with their new obligations as anti-harassment and Equal Employment Opportunity policies likely will require revisions to comply with these new laws.

IV. Claim Under ACA for Failure to Provide Time and Place to Express Breast Milk Survives

On November 12, 2015, the U.S. District Court for the Eastern District of New York refused to dismiss the claims of a former employee seeking to represent a putative class of women alleging they were denied adequate workplace space for breastfeeding. See Lico v. TD Bank et al., 14-CV-4729 (E.D.N.Y.). Contained in the massive Affordable Care Act of 2010 ("ACA") is a provision that amended the Fair Labor Standards Act ("FLSA") to require employers to provide new mothers with time and a place to express breast milk. In Lico, the plaintiff alleged that TD Bank violated the FLSA by not allowing her to take needed lactation breaks during her workday and by terminating her employment after she tried to exert her rights. Specifically, she alleged that when she returned from maternity leave, her supervisor told her that her options for expressing breast milk were an unlocked mailroom, safe deposit room, or bathroom. The employer moved to dismiss the collective action, arguing that "whether plaintiff or any other nursing mother experienced a violation of the FLSA must necessarily be tested in its own right." (The employer previously moved to dismiss the claim on the grounds that Plaintiff did not have a private right of action to enforce the lactation provisions of the FLSA – the Court denied that motion as well, holding that a private right of action indeed exists). While the collective action has not yet been certified, the Court rejected the Bank's dismissal motion and now is allowing Plaintiff to move forward with her collective action and ultimate motion for certification of her collective action.

Plaintiff alleges her damages are comprised of the hours she was unable to work because of the Bank's alleged violations (i.e., hours she spent expressing breast milk while not on the clock). She additionally alleges the reason given for her termination, "attendance issues," are at least in part a result of the Bank's violation of the FLSA's lactation leave requirements. Accordingly, she is seeking back pay for the lost hours as well as back pay for her termination.

While many EPLI policies often do not cover wage and hour claims brought pursuant to the FLSA, such policies may cover claims brought under the lactation leave requirements of the FLSA – particularly, as here, if those claims are tied to an employee's termination. Employers should ensure they are complying with the lactation leave requirements of the FLSA to avoid similar claims (especially since Plaintiffs can take advantage of the collective action provisions of the FLSA).

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.

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