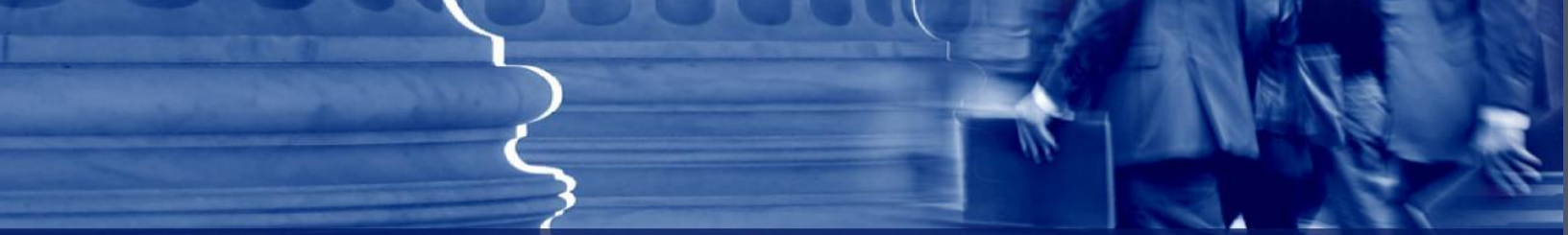

Managing Workplace Risk

Monthly Newsletter June 2016

I. Maximum Leave Policy May Violate the Americans with Disabilities Act

On May 13, 2016, the Equal Employment Opportunity Commission ("EEOC") announced that it settled a nationwide discrimination lawsuit against a home improvement, appliance and hardware chain for $8.6 million. By way of background, the EEOC's lawsuit stemmed from complaints it received between 2007 and 2010 from three individuals, who asserted that their employer refused to accommodate medical conditions by providing extended medical leaves of absence. Instead of granting extending unpaid leave, their employment was terminated. The lawsuit alleged violation of the American with Disabilities Act ("ADA") by engaging in a pattern of discrimination against workers whose medical leaves exceeded a 180-day, and subsequently 240-day, maximum leave policy. The EEOC also alleged that employees were discharged who were regarded as disabled or who were associated with someone with a disability. In addition to monetary relief, the four-year consent decree settling the suit requires, among other things, retention of a consultant with ADA experience to review and revise personnel policies; implementation of ADA compliance training for supervisors and staff; development of a centralized tracking system to monitor employee requests for accommodation; and maintenance of an accommodation log. Finally, the class action settlement requires submission of regular reports to the EEOC verifying compliance.

Employers may find lengthy leaves of absence to be difficult of monitor and manage, but unpaid leaves of absence are a possible form of reasonable accommodation depending on the circumstances. It is better to err on the side of longer unpaid leaves (while the worker is on COBRA in place of discharge. Employers should carefully review their leave policies for compliance with the ADA as well as state and local laws, particularly as many states and localities begin to adopt paid leave legislation. Maximum leave policies or other rigid rules concerning leaves of absence may violate the ADA and subject employers to significant exposure.

II. Pay Inequity Claim Conditionally Certified

In Smith v. Merck & Co., a New Jersey federal district court recently granted conditional certification to a group of former female sales workers seeking $250 million in connection with gender bias claims under the Equal Pay Act. Plaintiffs are now permitted to provide other potential members going back to 2009 with notice of their right to "opt in" to the lawsuit. Plaintiffs allege that Merck systemically paid female sales employees less than similarly situated male employees. In an effort to tie themselves together as "similarly situated" and to avoid the reasoning in the Supreme Court's ruling in Dukes, they asserted: (1) the Company maintained a centralized, tiered compensation system for sales representatives that resulted in pay discrimination against females; (2) senior management

systemically assigned female sales representatives to the lowest compensation tier; and, (3) front-line supervisors lacked authority on pay decisions. Since this is a collection, not class, action, the District Court found that Plaintiffs met their meager burden to provide a modest factual showing of how Merck's policies impacted Plaintiffs and others similarly situated. It found premature Merck's argument that certification should be denied because the claims are "based primarily on individual managers' decisions." Class based discrimination claims remain viable notwithstanding predictions of their demise after the Supreme Court's 2011 decision in Walmart v. Dukes. In addition, the federal government's increasing focus on gender pay inequity, including the EEOC's recent proposal to require many employers to submit employee pay data in connection with its EEO-1 reporting, provides further basis to address pay disparity prospectively.

III. Revived Retaliation Claim Serves As A Reminder To Employers To Carefully Consider Termination Decisions Before Implementing Them

In Fox v. Leland Volunteer/Rescue Dep't, the Fourth Circuit reversed dismissal of a female lieutenant's claim of retaliation under Title VII against a North Carolina volunteer fire department. Fox alleged she was subjected to continuous condescending and disrespectful behavior from male subordinates. When Plaintiff consulted with an attorney to file a complaint with the EEOC, this information was communicated to the chief, who allegedly recommended that she be terminated for poor work performance and other reasons. Plaintiff asserted that she was discharged two days later. While both the trial court and the Fourth Circuit dismissed the harassment (despite finding that while co-workers were "discourteous, insubordinate and perhaps at times boorish," it was not demonstrative of sexual animus). However, said the Fourth Circuit, since there is "conflicting evidence" as to the timing plaintiff termination and her decision to file a complaint with the EEOC, the retaliation claim should not have been dismissed. In sum, and as employers and their insurers should recognize, even where harassment or discrimination claims may be defensible, retaliation claims may become the "tail that wags the dog". Employers should carefully and proactively review all termination decisions where such decisions are made proximate to protected activity.

IV. Failure to Hire DOT Driver After Positive Drug Test Result Leads to ADA Claim

A South Carolina company that hauls gasoline, diesel fuel and ethanol throughout the country will face an Americans with Disabilities Act suit brought by a rejected DOT driver applicant with a sleep disorder for which he was prescribed an amphetamine (Dexedrine), the U.S. Court of Appeals in Richmond has decided, reversing a lower's court's dismissal of John Lisotto's lawsuit. *Lisotto v. New Prime, Inc.,* 2016 U.S. App. LEXIS 8011 (4th Cir., No. 15-1273, decided May 3, 2016) (not officially reported).

A district court concluded that Lisotto had failed to exhaust his administrative remedies before the Federal Motor Carrier Safety Administration and threw out his discrimination complaint. However, the appeals court found the lower court had mischaracterized the issue as a conflict between physicians over Lisotto's physical qualifications to be a driver, for which FMCSA regulations provide administrative recourse (49 C.F.R. § 391.47 authorizes the FMCSA to resolve "conflicts of medical evaluation" where the physician for the driver and the physician for the motor carrier disagree concerning a driver's physical qualifications.)

That was not the case, the Fourth Circuit concluded. There was no such disagreement. As long as Lisotto took proper medication for his narcolepsy, he appeared to be qualified, according to the doctors. Rather, the facts alleged here focused on the refusal to hire Lisotto based on his positive pre-employment drug test result and the company's medical review officer's actions in regard to that test result. Specifically, the medical review officer allegedly did not communicate with Lisotto's physician to determine whether there was a legitimate medical reason to explain the positive drug test result. The Fourth Circuit concluded Lisotto's complaint could "only be read to lodge an ADA claim" against the company based on alleged conduct leading up to its failure to hire him, and by its failure to hire him, even though he had provided documentation that his narcolepsy had been controlled by medications. Lisotto's complaint also alleged the company violated the ADA: by failing to hire him because he tested positive for amphetamines on a FMCSA-required pre-employment drug test; by failing to accept his doctor's explanation for his positive drug test result; by failing to proceed with the hiring process in light of information provided by his doctor and insisting that he change medications; by reporting a positive drug test result; and, by failing to correct the false drug test report made to FMCSA, DOT or others. The Fourth Circuit remanded the case for further proceedings.

A prospective employer's alleged failure to address an applicant's lawfully prescribed medications that control his medical condition, consistent with DOT and FMCSA regulations, may result in ADA claims. Under DOT regulations, carriers may be held responsible for the regulatory compliance by their service providers, such as MROs, even though they are independent contractors.

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.