FENWICK & WEST LLP

# Weekly Employment Brief

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**Denial of Lateral Transfer May Be Adverse Action**

The D.C. Circuit Court of Appeals recently decided that a denial of a lateral transfer may constitute an adverse action sufficient to support a Title VII violation. In *Stewart v. Ashcroft*, plaintiff Howard Stewart, a senior litigation attorney in the Environmental Crimes Section ("ECS") of the Department of Justice, filed suit against Attorney General John Ashcroft. Stewart, an African-American male, applied for the opening as Chief of the ECS, a position with no increase in salary or benefits over his existing position. The DOJ selected a white candidate instead. Plaintiff alleged he did not receive this transfer due to his race. The court confirmed that the denial of transfer to a position with equivalent pay and benefits typically does not result in an objectively tangible harm and thus is not an adverse employment decision actionable under Title VII. However, in this situation, denial of the transfer prevented Stewart from advancing within the hierarchy of the ECS and DOJ and thus essentially denied him a promotion. Nonetheless, the Court affirmed dismissal of Stewart's claim because he failed to rebut the government's legitimate reason for denying him the transfer: lack of interest in management and attention to the application process. Employers should be aware that denying transfer requests may lead to discrimination claims, so they must ensure there is a legitimate justification for any such action.

**Federal Court Holds That Learning Disabilities and ADD Do Not Constitute Serious Health Conditions Under FMLA**

The federal Sixth Circuit Court of Appeals (which covers Ohio, Michigan, Kentucky and Tennessee) affirmed the dismissal of an employee's claim that his employer violated the FMLA by refusing to allow him to return to his job after taking leave to care for his son who had learning disabilities and attention deficit disorder ("ADD"). In *Perry v. Jaguar of Troy*, plaintiff Jeffrey Perry sought leave during the summer of 2001 to care for his son. After beginning his leave, Perry received notice his absence did not qualify for FMLA coverage. Nonetheless, he remained absent from work. At the end of the summer, Perry contacted his supervisor about returning to work but was informed his position had been filled in the interim. The court found that since Perry's son was not "incapacitated" during the summer of 2001, he did not have a serious health condition. Rather, the plaintiff's son was able to perform regular daily activities, even if not at the same level as another child of the same age. To demonstrate a serious health condition, an employee requesting FMLA leave for his or a family member's condition must demonstrate the condition requires inpatient care or continuing treatment by a health care provider. Here, Perry's son simply needed greater supervision than other children his age. This case demonstrates the importance of timely notifying employees whether their leave qualifies for FMLA status.

**Employee's Admitted Use of Marijuana Does Not Bar Her Harassment Claim**

A federal district court in Iowa ruled that an employee's admission of marijuana use on the job does not bar her Title VII lawsuit for sexual harassment. In *Ricklefs v. Orman*, plaintiff Diana Ricklefs sued Jiffy Lube and the franchise owner alleging she was subjected to various acts of sexual harassment and the employer ignored her complaints. During the discovery process, Ricklefs admitted to having smoked marijuana on multiple occasions, including on the clock with Jiffy Lube employees on at least two occasions. Jiffy Lube responded that had it been aware of this marijuana use, it would have terminated her employment. The court refused to dismiss the lawsuit, finding a triable issue of fact whether Jiffy Lube would have fired Ricklefs had it known of the misconduct at the time. Specifically, the court pointed to Ricklefs' evidence that her manager initially promoted her despite knowledge of her marijuana habit and that she smoked marijuana with other Jiffy Lube employees,

including her manager, on two occasions. This case is instructive to reinforce the notion that employers must react promptly to remedy any misconduct and that failure to do so may hinder their ability to rely later on such misconduct as a justification for future termination.

**Employee's Stress Over Employer's Uncertain Future Not a Compensable Event For Workers' Compensation Purposes**

The California Court of Appeals found that uncertainty about an employer's future in the face of a downturn in business is not a compensable event of employment for workers' compensation purposes. In *PG&E v. Workers' Compensation Appeals Board*, PG&E appealed the Workers' Compensation Appeals Board's award of benefits to an employee for work-related psychiatric injury. The employee claimed to suffer stress from various events: anxiety over company downsizing, interaction with irate customers, stock losses based on investments in employer stock and concern over the company's future. The court held that concern over the company's downsizing, stock losses and future were not compensable events of employment. An "event of employment" is something that arises out of an employee's working relationship with his or her employer. Under that standard, only the stress from interacting with irate customers was an event of employment. The court held that stress factors arising from broad societal events or trends do not satisfy this requirement because they do not arise out of the employment relationship.

**Minimum Hourly Rate of Pay Rises for Exempt Computer Software Employees**

Effective January 1, 2004, the California Department of Industrial Relations has raised the minimum hourly rate of pay requirement for computer software employees from $43.58 to $44.63. Employees who otherwise qualify for the computer software exemption must receive this higher hourly rate to maintain their exempt status.