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# Weekly Employment Brief

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**Employer Liable For Retaliation Based On Employee's Protected Activity Prior To Employment**

A Tennessee state court recently concluded that an employer can be liable for retaliation where it terminates an employee because he filed a workers' compensation claim with a previous employer. In *Hayes v. Computer Sciences Corp.,* Hayes, a temporary painter at the Arnold Engineering Development Center at the Arnold Air Force Base in Tennessee, sustained an on the job injury while working for Brighton Painting Company, filed a workers' compensation claim, and received benefits. After he left Brighton, Hayes was hired by Computer Sciences Corporation ("CSC"). Hayes was fired a few months later. He sued, claiming that his supervisor was ordered to fire him because of his workers' compensation suit at Brighton. CSC initially convinced a trial court to dismiss Hayes' suit on the ground that Hayes did not file his workers compensation claim (or engage in any other protected activity) while employed by it. The Court of Appeal disagreed, however, and sent the case back to the trial court. The court relied on precedent from several other states (including Michigan and Illinois) to conclude that a cause of action against a subsequent employer for wrongful discharge in retaliation for filing a workers' compensation claim is permissible, even if the plaintiff suffered no injury, nor made any claim, during his employment with the subsequent employer. Although California courts have not directly addressed this question, employers who know that an employee filed a workers compensation claim with a prior employer should proceed cautiously before terminating or taking any other adverse action against the employee based on that past filing.

**Employee May Sue For Retaliation Under The ADA Even If She Is Not Disabled**

The Third Circuit (which includes Pennsylvania) recently clarified the nature of a retaliation claim an individual may bring against an employer under the ADA. In *Shellenberger v. Summit Bancorp, Inc.,* Sally Shellenberger, a customer service representative at Bancorp, made numerous requests for accommodation based on her allergies to perfumes and other fragrances in the workplace. Bancorp attempted to accommodate her requests, such as by moving her workstation and giving her a fan. However, Shellenberger was not satisfied, and filed an EEOC complaint, claiming failure to accommodate under the ADA. Shellenberger and Bancorp continued to discuss possible accommodations for her affliction (including Shellenberger's request for a "perfume free" policy," which the bank rejected). Eventually, the bank concluded that Shellenberger was insubordinate, and it terminated her employment. Shellenberger sued the bank under the ADA on two theories: (1) failure to accommodate a disability; and (2) retaliatory discharge under the ADA. The trial court dismissed both claims, but the court of appeal held that Shellenberger could maintain a retaliation claim under the ADA even though she was not disabled within the meaning of that statute. Indeed, the ADA "protects any individual who has opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA." Thus, the Court concluded that "an individual who is adjudged not to be a qualified individual with a disability may still pursue a retaliation claim under the ADA." This decision is a warning to employers who may mistakenly believe they are immunized from ADA claims where the employee fails to establish a disability.

**California Supreme Court "Substantially Limits" Employers' Ability to Defend Disability Discrimination Suits**

The California Supreme Court recently clarified an employee's burden of proof under various state laws that protect against disability discrimination. In *Colmenares v. Braemer Country Club, Inc.,* Francisco Colmenares, who suffered from a bad back, sued Braemer County for disability discrimination under California's Fair Employment and Housing Act (FEHA). The trial court dismissed Colmenares' claim, because it arose prior to the amendment of FEHA in 2001, whereby the California Legislature determined that employees need only show their disability "limits" (rather than "substantially limits") a major life activity. The California Supreme Court rejected this analysis, holding that FEHA, both before and after its 2001 amendment, only required a plaintiff to establish a limitation - not a substantial limitation - on a major life activity in order to prove the existence of a disability. The Court also concluded that the 2001 amendment to FEHA amended related California statutes (including the Unruh Civil Rights Act and the state Civil Service Act), which required employees to establish that a disability substantially limits a major life activity. Thus, as of January 1, 2001, all state statutes protecting employees from disability discrimination provide that an employee need only establish a limitation, not a substantial limitation, on a major life activity for purposes of the definition of disability. California employers should be mindful of this divergence from federal law, which requires that an employee demonstrate a "substantial limitation" in order to qualify for protection under federal disability laws.

**DID YOU KNOW???**

One out of every two people entering the U.S. workforce was born in another country, and some reports estimate that over 7 million currently-employed workers are undocumented.