FENWICK & WEST LLP

Weekly Employment Brief

June 24, 2002

Michael Weil Contributor 650.858.7253
Trey Wichmann Co-Editor 650.858.7813
Victor Schachter Co-Editor 650.858.7905

Policy Against Rehiring Employees May Be Unlawful Under ADA When Applied to Recovered Addicts

Employers may subject themselves to disability discrimination liability for refusing to rehire recovered addicts who were terminated because of drug or alcohol abuse. In *Hernandez v. Hughes Missile Systems Co.*, an employee resigned in lieu of discharge after he tested positive for cocaine while on the job. Two years later, after having successfully completed a drug rehabilitation clinic, the individual applied to be rehired. The employer rejected the application based on an unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of discharge. The former employee brought an ADA claim alleging he was not rehired because of his record of disability or because he was regarded as being disabled. The Ninth Circuit Court of Appeals held that the employer was not entitled to summary judgment, because "although the ADA does not protect an employee or applicant who is currently engaged in illegal drug use, it does protect qualified individuals with a drug addiction who have been successfully rehabilitated." The court held that the employer's general policy violated the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction, and who were rehabilitated when they applied for rehire. This decision underscores the rights of employees to not only be free from discrimination because of a disability, but also because of a record of impairment.

Failure to Interview Older Employee May Raise Specter of Discrimination

Rejecting highly-qualified older applicants based on their resume or other written application without an interview may lead to an inference of age discrimination. In *Danville v. Regional Lab Corp.*, an employer decided not to hire a 47-year-old job applicant without an interview and before the selection committee had even met. The applicant brought suit for age discrimination. Although the employer initially won summary judgment, the Tenth Circuit Court of Appeals reversed, holding that an "an employer's failure to give more than sham or pro forma consideration to a candidate or his or her qualifications, coupled with other circumstantial evidence of discriminatory intent, can demonstrate pretext" of age discrimination. Thus, employers should take steps to ensure that all highly-qualified applicants are given full and equal consideration in the hiring process, without regard to their age or other protected characteristics.

Court Rules that Heterosexual Perceived as Gay Cannot Show Harassment Because of Sex

Being perceived as gay by other employees may not constitute harassment. In *Hamm v. Weyauweg Products Inc.*, a male employee filed a sexual harassment lawsuit in which he claimed that a co-worker wrote "faggot" on his locker and another called him a "bisexual, a "girl scout" and a "fairy." He also alleged that rumors circulated that he and another male employee were having a sexual relationship. In granting summary judgment to the employer, a Wisconsin district court held that the plaintiff's "attempts to link his coworkers' accusations of homosexuality with some perception that [the plaintiff] was not 'manly' is too attenuated to meet his burden of showing that the harassment occurred because of his sex." The court further found that, although the interactions were harsh, they focused on the perception of the plaintiff being gay and not on his sex generally, and that the co-workers' remarks were "simply expressions of animosity or juvenile provocation" and not evidence of harassment. While this was a technical victory for the employer, companies should take steps to stop harassment of its employees in any form. Moreover, employers should be mindful that California (and other localities) expressly prohibit harassment on the basis of sexual orientation.

Sending Sexually-Related Informational Pamphlets May Not Constitute Sexual Harassment, But May Constitute Other Forms of Discrimination

Employees sending sexually-related pamphlets about erectile dysfunction to coworkers may not constitute sexual harassment, but can be age discrimination. In *Keown v. Richfood Holdings,* an older male executive sued for sexual harassment and age discrimination, claiming that in a four month period his co-workers gave him eight or nine sexually-related pamphlets, including pamphlets about erectile dysfunction in older men and testosterone levels in men over fifty. In granting the employer's motion for summary judgment on the sexual harassment claim, a Pennsylvania district court held that the sexual harassment the plaintiff allegedly suffered was not severe or pervasive enough to state a claim because, while the pamphlets may have been "seedy and in bad taste," there was no reason that they "should have interfered with his work performance or [have] a significant impact on his psychological well-being." However, the court held that the same pamphlets could be evidence of age bias, and allowed the executive to proceed to trial on that claim. This case underscores the importance of setting up specific guidelines identifying acceptable and unacceptable interoffice mail and email.

An Employee's Intent to Engage in Protected Activity May Be Protected

Employers should be careful when terminating employees not only when the employees have previously engaged in protected activities, but also when they announce their intention to engage in protected activities. In *Fortier v. U.S. Steel Group,* the employer terminated a pregnant accounting clerk after she announced her intention to breast feed her child after the baby was born. The employee sued for sex discrimination and harassment, claiming that before her termination she was advised against breast-feeding and warned that it might interfere with her work performance. In denying the employer's motion to dismiss, a Pennsylvania district court held that the employee stated

a valid claim for discrimination or harassment based on her status as a pregnant woman because, before her announcement, she received no criticism about her work, but after the announcement, the employer warned her against breast-feeding and terminated her. This case demonstrates how a mere expression of intent to engage in a protected activity can insulate an employee from a groundless termination.