FENWICK & WEST LLP

Fenwick Employment Brief

June 22, 2005

Shawna Swanson Co-editor 650.335.7905
Dan McCoy Co-editor 415.875.2464

Reminder: Fenwick & West will host a Breakfast Briefing on July 14, 2005 entitled "Employers' and Employees' Rights in the World of Blogs." We hope to see you there. A detailed seminar description and registration information are available at www.fenwick.com/blog.html

Employer's Use of "Personality" Test Violated ADA

A decision from the Seventh Circuit Court of Appeals (covering Illinois and other Midwestern states) highlights the risks associated with an employer's use of personality tests with applicants. In *Karraker v. Rent-A-Center, Inc.,* three account managers sued their employer in an Illinois federal district court claiming that Rent-A-Center's ("RAC") use of a popular personality inventory/test to disqualify them from promotion violated the Americans with Disabilities Act ("ADA"). RAC implemented a multi-part test for its promotion applicants, which included hundreds of questions from the Minnesota Multiphasic Personality Inventory ("MMPI"). RAC claimed that it used the MMPI questions solely to measure personality traits.

The Equal Employment Opportunity Commission, which investigates and prosecutes alleged ADA violations, takes the position that psychological tests "designed to identify a mental disorder or impairment" qualify as unlawful pre-offer/pre-promotion medical examinations, while psychological tests "that measure personality traits such as honesty" do not. In *Karraker,* the court found that the MMPI questions used by RAC did not necessarily diagnose or detect psychological disorders, but that the responses to various questions could clearly reveal mental illness (for example, paranoid personality disorder). Thus, the court concluded that the MMPI questions constituted an unlawful pre-offer medical examination in violation of the ADA. The court also rejected RAC's defense that, because it did not engage a psychologist or other medical professional to interpret the responses to the MMPI questions, the questions did not constitute a medical examination.

Employers should exercise extreme caution when implementing pre-offer tests with applicants (which includes current employees who seek promotions). If such tests are designed to reveal, or have the effect of revealing, mental illness or other medical disorders, employers face substantial risks if they decide not to hire or promote an individual based on the results of such tests.

Decision Highlights Risk of Using E-Mail to Distribute Important Personnel Policies

Employers frequently rely upon e-mail to distribute new and/or updated personnel policies and agreements to employees, including mandatory, binding arbitration provisions. A decision from the First Circuit Court of Appeals (covering Massachusetts and other Northeastern states) provides guidance to employers regarding the effective use of e-mail to notify employees of, and bind them to, a mandatory arbitration policy.

In *Campbell v. General Dynamics Gov't Sys. Corp.,* Campbell worked for General Dynamics ("GD") for two and a half years before GD terminated his employment for absenteeism and tardiness. Approximately one year after Campbell commenced employment, GD

distributed a company-wide e-mail announcing the implementation of a new "Dispute Resolution Policy." The cover e-mail made broad and vague references to arbitration of workplace disputes, and it included links to the actual arbitration policy and a related brochure that set forth the terms of the arbitration policy. GD did not require employees to respond to the e-mail or otherwise acknowledge that they had received and read the e-mail and attachments. Further, although GD monitored whether employees opened up the cover e-mail, it did not track whether employees clicked on and read the attached links.

Following his termination, Campbell sued GD in a Massachusetts state court. GD removed the matter to federal court and then sought to compel arbitration of Campbell's claims. The District Court denied GD's motion on the ground that the mass e-mail message failed to provide the minimal level of notice required to enforce an agreement to arbitrate ADA discrimination claims. The Court of Appeals affirmed, finding that actual notice of the new policy did not occur. However, the Court identified certain measures GD could have taken to cause a different result.

First, GD should have required a specific response to the e-mail from all employees or otherwise confirmed receipt of the e-mail and policies by forcing employees to click a box on a computer screen. Second, GD should have explicitly stated in the cover e-mail that employees would be bound by a mandatory arbitration policy and prohibited from pursuing discrimination claims in the courts. Indeed, the e-mail "downplay[ed] the obligations set forth in the [attached] Policy … [and] omitted the crucial fact that [the Policy] would become an employee's exclusive remedy for employment-related claims of virtually every kind and description." In short, the Court found that "the e-mail announcement undersold the significance of the Policy."

While GD failed in this case to enforce an otherwise valid arbitration agreement, the First Circuit's analysis is a helpful guide for employers who seek to distribute arbitration agreements and other important personnel contracts and policies via e-mail.

Ninth Circuit Will Reconsider Casino's Requirement that Women Bartenders Wear Makeup

In January, we reported on a decision by a three-judge panel of the Ninth Circuit affirming the dismissal of a casino bartender's claim that the casino's requirement that all women wear makeup constituted sex discrimination. (http://www.fenwick.com/docstore/publications/Employment/EB_01-10-05.pdf) However, the Ninth Circuit recently announced that the decision of the three-judge panel will be reviewed by its entire panel, signaling a possible reversal. The larger panel will focus on the core issue: whether the makeup requirement imposes an unequal burden on women in violation of Title VII. We will post a further update following the publication of the Ninth Circuit's decision.

Hospital Settles Wage/Hour Class Action for $4.75 Million

Settlements of California wage/hour class actions continue to dominate the news. Recently, a Southern California hospital agreed to pay $4.75 Million to more than 1,000 hourly workers to settle claims that the hospital denied compensation to employees who missed rest periods and meal breaks, amongst other claims. The size of the settlement highlights the profound risks associated with employers' failure to ensure that employees receive appropriate meal and rest periods. Indeed, with a long statute of limitations for such wage claims and a rigid system of penalties, the amounts at issue can quickly skyrocket.

Employers should be vigilant regarding compliance with meal and rest period laws, and promptly correct any non-compliance.

Famous New York Hotel Settles National Origin Discrimination Complaint

The Equal Employment Opportunity Commission ("EEOC") recently announced a $525,000 settlement of claims it pursued against the Plaza Hotel on behalf of 12 Muslim, Arab, and South Asian employees.

The workers claimed that, following the September 11 terrorist attacks, co-workers referred to them in an offensive and derogatory manner, and otherwise subjected them to a hostile work environment. In addition to the monetary component, the settlement calls for hotel managers to receive improved training on employment discrimination.

Although nearly four years have passed since the 9/11 attacks, terrorism remains prominent in the minds of most Americans. Employers should recognize and be prepared to remedy instances of discrimination and hostile attitudes toward workers who are unfairly stereotyped as supporting terrorism or anti-Americanism simply because of their national origin and/or religion.

New FTC Regulations Address Disposal of Employees' "Consumer Information"

The Federal Trade Commission (FTC) issued new regulations, effective June 1, 2005, governing the disposal of consumer information (including background checks) about employees and applicants.

What do the new regulations require?

The regulations require that persons and entities who maintain or possess "consumer information" for a business purpose properly "dispose" of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal.

How is "Consumer Information" defined?

"Consumer information" means any record about an individual, whether in paper, electronic, or other form, that is, or derives from, a consumer report or a compilation of such reports. Examples include employee names, social security numbers, driver's license numbers, phone numbers, physical addresses and e-mail addresses. Consumer information does not include non-identifying information, such as aggregate information or blind data.

How do the regulations define "Dispose"?

"Dispose" means: (1) the discarding or abandonment of consumer information; or (2) the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.

What are "Reasonable Measures"?

Although the regulations do not define "reasonable measures," they do provide a number of examples, including:

1. Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practicably be read or reconstructed. To that end, documents covered by the regulations, when disposed, should be shredded rather than recycled;
2. Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so that the information cannot practicably be read or reconstructed. For example, companies should work with their IT/MIS departments to ensure that when replacing computers, particularly those of the Human Resources department, consumer information on the old computers is thoroughly deleted;
3. Monitoring compliance by a third party engaged to dispose of consumer information on the company's behalf (for example, by reviewing an independent audit of the disposal company's operations).

Does the regulation create new reporting requirements?

No.

Is there an exception or exclusion for small businesses?

No.

Where can I get more information?

A copy of the new regulations and a summary of the comments to the proposed rule are available at: http://www.ftc.gov/os/2004/11/041118disposalfrn.pdf