Fenwick Employment Brief

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Victor Schachter Editor 650.335.7905
Dan Ko Obuhanych Contributor 650.335.7887
Soo Cho Contributor 650.335.7833

Fenwick
FENWICK & WEST LLP

EMPLOYERS SHOULD BE PREPARED FOR SWINE FLU ISSUES IN THE WORKPLACE

Flu season is upon us, and this year the concerns are heightened due to the threat posed by the H1N1 influenza virus (also referred to as the swine flu). Presently, thirty seven states, including California and Washington, have reported widespread swine flu activity, and the Centers For Disease Control (CDC) is recommending that individuals take precautions to reduce the likelihood of virus transmission. In light of the possible impact of the swine flu (or other communicable disease) on businesses, employers should be prepared to address both the practical and legal concerns arising from an outbreak.

Employers have an obligation to maintain a safe workplace, which requires companies to take reasonable steps to provide for the safety of their employees. If faced with swine flu contagion, these steps may include both administrative controls (such as educating employees, encouraging employees to get vaccinated, promoting proper hygiene, relaxing or modifying leave, telework and scheduling policies, and minimizing face to face contact) and physical controls (such as disinfecting work areas, providing alcohol-based hand sanitizers, and ensuring adequate air circulation within the workplace).

Employers should also be prepared for the possibility that a significant portion of their workforce, or distribution or supply chains, could be affected by the virus. Having a thorough contingency plan in place (which may include cross-training employees in core business functions, teleworking, and staggering shifts) will be essential to minimize a disruption in business operations and ability to service customers.

Finally, employers must be aware of their legal rights and obligations, to address the myriad issues which may arise from the spread of swine flu. Issues regarding privacy rights (*i.e.*, what employers can reasonably require of employees), reasonable accommodation (*i.e.*, how to respond to employee requests), employee safety concerns (*e.g.*, how employers handle employees who refuse to work due to fear of infection) are just some examples of how a flu outbreak could impact the workplace.

For more information about H1N1, including how to reduce the chances of H1N1 transmission, please see the CDC's H1N1 website: www.cdc.gov/H1N1FLU/. For more information on how to prepare your workplace for an influenza pandemic, see OSHA's guidance at: www.osha.gov/Publications/influenza_pandemic.html. For guidance on how to address disability discrimination issues relating to the swine flu, please see the EEOC's guidance at: www.eeoc.gov/facts/pandemic_flu.html.

NINTH CIRCUIT RULES THAT PHYSICAL CAPACITY EVALUATION MAY CONSTITUTE A PROHIBITED MEDICAL EXAMINATION UNDER THE ADA

In *Indergard v. Georgia-Pacific Corp.,* an employee was required to participate in a physical capacity evaluation (PCE) prior to returning to work after surgery. When the employee failed several parts of the PCE, she was terminated.

California's Ninth Circuit held that measuring the employee's heart rate and recording observations about breathing and fitness independently established that the PCE was a medical exam. Additionally, the exam (1) was administered by a licensed occupational therapist who interpreted the results, (2) could reveal physical and mental impairments, and (3) measured the employee's responses to various tests. Under these facts, the court concluded that the PCE was a medical exam for ADA purposes, and remanded the case to the trial court to determine whether the PCE was job related and consistent with business necessity.

Under the ADA, an employer may not require current employees to undergo medical examinations unless the exam is shown to be job-related and necessary for the business. The Equal Employment Opportunity Commission has laid out seven factors to evaluate to determine whether a test is a "medical examination" for purposes of the ADA. Not all of the factors need to be present and, in some cases, the presence of even one factor may be enough to determine that a test is a medical examination. Employers should be aware of these EEOC factors and exercise caution in crafting any tests required for injured employees returning to work:

(1) Whether the test is administered by a health care professional;

(2) Whether the test is interpreted by a health care professional;

(3) Whether the test is designed to reveal an impairment of physical or mental health;

(4) Whether the test is invasive;

(5) Whether the test measures an employee's performance of a task or measures his or her physiological responses to performing the task;

(6) Whether the test normally is given in a medical setting; and

(7) Whether medical equipment is used.

The employee filed a complaint for disability discrimination under the Americans with Disabilities Act (ADA) and Oregon disability law.

EMPLOYEE WITH AUTHORIZATION TO ACCESS COMPANY DOCUMENTS DID NOT VIOLATE ANY LAW BY COPYING FILES BEFORE RESIGNING

In *LVRC Holdings LLC v. Brekka*, the Ninth Circuit ruled that an employee did not violate the Computer Fraud and Abuse Act (CFAA) by emailing numerous company files to his personal email account prior to his termination. Christopher Brekka was hired to oversee various aspects of LVRC, including maintenance of the company's internet services. In the course of his duties, Brekka was authorized to use LVRC computers and had administrative rights to the company website. During negotiations regarding his purchase of an interest in LVRC, Brekka emailed various LVRC documents – including financial information – to himself at his personal email address. The parties did not have a written employment agreement and LVRC did not maintain guidelines prohibiting employees from emailing LVRC documents to personal computers. After the negotiations broke down, Brekka left LVRC and LVRC brought an action in federal court alleging that Brekka had violated the CFAA when he emailed LVRC documents to his personal computer "without authorization" under the terms of the statute.

The Ninth Circuit, however, rejected LVRC's CFAA claim. The court held that a person uses a computer "without authorization" under the CFAA when they have not received permission to use the computer for *any* purpose or when the owner of the computer has *rescinded* permission granted earlier. In this case, there was no dispute that Brekka had permission to access LVRC's computers – in fact, his job required such access. At the time he emailed the company documents to himself, Brekka still had authorized access to LVRC's computers. The court found as a result that Brekka did not violate the CFAA and affirmed his motion for summary judgment on LVRC's claim against him.

Employers should note that the result in *LVRC Holdings* is somewhat anomalous in that cases involving employees sending confidential company information to personal email accounts typically include a variety of claims beyond merely an alleged violation of the CFAA, such as misappropriation of trade secrets, breach of confidentiality agreements and even claims of theft. For example, a California appellate court in *Pillsbury, Madison & Sutro v. Schectman* ruled that employees who removed documents from their employer's files without authorization were wrongfully in possession of the documents and were required to surrender originals and all copies along with any documents summarizing, quoting or recording information concerning the nature or contents of the documents.

In all events, employers should be mindful of the authorization given to employees to access company records, including computer systems and electronic files when drafting technology policies as well as general employment policies.

NEWS BITES

Washington State Court Decides That Employers Need Not Accommodate Employee Use of Medical Marjiuana
In *Roe v. TeleTech Customer Care Management, LLC,* a job applicant informed her prospective employer, TeleTech, she used medical marijuana at home with medical authorization to do so under the Washington State Medical Use of Marijuana Act (MUMA). Roe offered to provide a copy of her medical authorization, but TeleTech declined to receive it. Roe tested positive for marijuana, and her employment was terminated under TeleTech's drug policy

providing that applicants must pass a drug test prior to employment. Roe filed an action for wrongful termination, claiming that Washington State's MUMA implied a cause of action against employers who fail to hire a person based on their use of medical marijuana in accordance with MUMA. The Washington Court of Appeal disagreed, and held that MUMA did not impose any duty on private employers to accommodate the use of medical marijuana.

Federal Appellate Court Rules That Laid Off Employees Must Meet Higher Standard of Proof In Discrimination Cases

In *Geiger v. Tower Automotive,* the Sixth Circuit Court of Appeals (Cincinnati) held that employees who have been terminated as part of a work force reduction must meet a higher standard of proof to establish a valid claim for age discrimination. The court held that if an employee is terminated as a part of a reduction in force, the employee must provide "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." As the employee was unable to provide such additional evidence, his case was dismissed. This case creates a substantial hurdle for age discrimination claimants who have been terminated in conjunction with a reduction in force.

Subjective Criteria Not Allowed To Defeat A *Prima Facie* Case Of Discrimination

In *Nicholson v. Hyannis Air Service, Inc.*, Tiffany Nicholson sued her former employer for gender discrimination after she was suspended from flying due to problems with "communication and cooperation" skills. Nicholson claimed she was the only female out of eight pilots flying the routes in question, and she was not given any training or opportunity to improve her skills even though male-pilots who had failed exams in the past had received training and second chances to pass the exams.

The Ninth Circuit held that deficient communication and cooperation skills were subjective job criteria which could not be used to determine whether an employee was "qualified," and therefore could not bar proof of a *prima facie* case of gender discrimination. Using objective criteria only, the court believed Nicholson was qualified for the position. The Ninth Circuit held it was an error for the trial court to find that Nicholson was not qualified based on her alleged insufficient communication skills. That error, along with evidence that male pilots may have been treated differently, was sufficient to show discriminatory motive such that that Nicholson's claims should have survived summary judgment.

Employees Need Not Complain of Every Discriminatory Comment To Support A Finding Of Protected Activity And Reasonable Belief Of Discrimination

In *Equal Employment Opportunity Commission v. Go Daddy Software, Inc.*, the Ninth Circuit held unreported workplace comments are relevant in retaliation cases to determine whether an employee engaged in protected activity by complaining of discrimination.

At trial, Youssef Bouamama testified he complained to Human Resources that his supervisor had asked Bouamama what language he spoke, where he came from and what religion he practiced. Bouamama claimed that he was terminated in retaliation for his complaints. The company argued that Bouamama's complaint related to an "offhand comment" that did not amount to discrimination and, therefore, did not constitute protected activity. The Ninth Circuit held that a decisionmaker must look at all the circumstances, not only those which the employee specifically complains of, to determine whether the employee reasonably believed discrimination had occurred. In light of *all* the comments made – including "Muslims need to die. The bastard Muslims need to die", comments that Bouamama had *not* formally complained about – the Court held that a jury had ample evidence to support a finding that Bouamama was reasonable in believing he had been discriminated against, and his complaint did constitute protected activity.