Fenwick Employment Brief

December 14, 2011
Daniel J. McCoy 650.335.7897
Sheeva J. Ghassemi-Vanni 650.335.7191

Fenwick
FENWICK & WEST LLP

EMPLOYEE'S ALCOHOLISM DOES NOT RISE TO THE LEVEL OF AN ADA DISABILITY, LEADING TO DISMISSAL OF CLAIMS

In *Kennedy v. Glen Mills School*, a federal court in Pennsylvania dismissed a terminated employee's claim of disability discrimination (based on alleged alcoholism) because the employee failed to prove that his alleged alcoholism rose to the level of a protected disability under the ADA.

Glen Mills employed Kennedy to monitor the daily activities of students, and transport them to appointments using a school car that Kennedy also used for personal purposes. One evening, Kennedy drove the car to a bar after work and struck a parked car while under the influence of alcohol. He pled guilty to driving under the influence and, pursuant to Glen Mills' zero tolerance drug and alcohol policy pertaining to operating school vehicles, the school terminated his employment. At no point prior to his termination did Kennedy mention his alleged alcoholism to anyone at the school.

Kennedy sued Glen Mills for disability discrimination and failure to accommodate his alleged alcoholism, and the court dismissed his claims. Specifically, the court held that Kennedy failed to prove his alcoholism substantially limited one or more major life activities. In fact, while at Glen Mills, he had received promotions and raises; had never shown up to work under the influence; carried out his duties without incident; and had not informed anyone at the school of his alcoholism. Further, there was no record that he was disabled, and the school did not regard him as such since no one was aware of his alcoholism. For these reasons, Kennedy's alleged alcoholism did not constitute an ADA disability, nor did it trigger a duty for the school to discuss potential accommodations.

This case serves as an important reminder to employers that alcoholism and drug addiction can rise to the level of a protected disability. However, employers will not be liable for disability discrimination or failure to accommodate if the alcoholism or addiction does not limit a major life activity and the employer has no knowledge of the condition.

COURT REFUSES TO ENFORCE ARBITRATION AGREEMENT FOR LACK OF CONSENT

Recently, the Northern District of California refused to compel arbitration of discrimination claims where an employee refused to sign an acknowledgment of a new mandatory arbitration agreement that expressly stated that continued employment constituted acceptance of the agreement.

In *Bayer v. Neiman Marcus Holdings, Inc.*, Neiman Marcus instituted a new mandatory arbitration policy in 2007. The store advised employees that the agreement was a condition and term of employment if the employee was employed or continued to be employed on or after July 15, 2007, and it required that they sign a written acknowledgment. Employee Bayer did not sign the acknowledgment and shortly thereafter filed two charges with the Equal Employment Opportunity Commission ("EEOC") through which he alleged disability discrimination and challenged the arbitration agreement. As part of the settlement of those claims, the parties signed a settlement agreement and release that specifically excluded claims Bayer might have as to the enforceability of the arbitration agreement. Bayer continued to work at Neiman Marcus until his termination in early 2009.

Following termination, Bayer filed another charge with the EEOC, received a right-to-sue letter, and filed a complaint in court. Neiman Marcus sought to compel arbitration of his claims under the 2007 agreement. However, the court refused to enforce the agreement because Bayer had refused to sign the acknowledgment. In its ruling, the court recognized the inherent inconsistency in an arbitration agreement requiring both express acceptance (*e.g.*, a signed acknowledgment) *and* implied acceptance (*e.g.*, employee's continued employment constitutes acceptance of the agreement). By refusing to sign the acknowledgment, Bayer specifically repudiated the agreement and his continued employment could no longer serve as consent.

This case is a reminder that, while continued at-will employment constitutes valid consideration for a mandatory arbitration policy, inconsistencies with application of such a policy can lead to unenforceability.

$2.1 Million Judgment in Washington Wage and Hour Class Action

In *Pellino v. Brink's, Inc.*, the Washington Court of Appeals upheld a $2.1 million judgment against Brink's for failure to provide adequate meal and rest breaks for 182 current and former Brink's messengers and drivers. According to testimony from class members, they were required to remain vigilant at all times while on duty (including during meal and rest breaks). Such vigilance consisted of continuously observing their surroundings, anticipating and taking "every possible precaution" against possible attack, and being constantly suspicious of other vehicles and pedestrians (*e.g.*, even individuals who appear to be police officers or store employees). Further, Brink's employee handbook prohibited "engaging in any person business" while on duty except eating, drinking, and smoking in the truck. The handbook also prohibited employees from carrying books, magazines, personal cell phones, or tape players (among other items) while on duty.

The trial court determined that there was no time during work when the employees could relax or focus on eating. Testimony indicated that management urged crews to keep moving "for security and business reasons" and the sheer length of the routes and number of stops prevented employees from taking meal or rest breaks. Also, Brink's managers and supervisors allegedly instructed crews not to stop the trucks for breaks, but instead to "eat on the go," and they would monitor the trucks' progress and urge employees to hurry up to remain on schedule and meet deadlines.

The appellate court affirmed the judgment, holding that because the employees were required to remain at a hyper state of vigilance throughout their shifts, were urged not to stop to take any breaks, and were not in fact able to take such breaks due to the demands of their schedules and deadlines, Brink's violated Washington wage and hour law. Further, it confirmed that employers must provide adequate meal and rest breaks and ensure these breaks comply with the law in theory and practice.

NEWS BITES

New Law Provides Tax Incentives for Hiring Unemployed Veterans

In November, President Obama signed the VOW to Hire Heroes Act into law, which provides tax incentives to employers that hire unemployed veterans. Tax credits range from $2,400 to $9,600 depending on the length of unemployment and whether the candidate sustained service-related disabilities. This statute is effective immediately.

Hilton Agrees to Settle Following Investigation by Department of Labor

Texas-based Hilton Reservations and Customer Care agreed to pay 2,645 current and former employees $715,507 in back wages following a Department of Labor investigation finding violations of the Fair Labor

Standards Act. The investigation uncovered that Hilton failed to pay employees for pre-shift activities such as starting their computers, opening software programs, and reading important emails. This settlement highlights the importance of compensating employees for all required activities related to work.

Exempt Status of Pharmaceutical Representatives

Last month, the Supreme Court granted review of *Christopher v. SmithKline Beecham Corp.*, a case involving whether the outside sales exemption of the Fair Labor Standards Act applies to pharmaceutical sales representatives. In the prior Ninth Circuit opinion, the court held that the exemption applied. However, the Ninth Circuit's opinion directly contradicts a 2010 Second Circuit opinion, and is at odds with a Department of Labor amicus brief agreeing with the Second Circuit's position. The Supreme Court's ruling should resolve this split of authority.

$35 Million Settlement in Oracle Class Action

A long-litigated overtime misclassification class action lawsuit involving Oracle Corporation settled in November for $35 million. The class was comprised of nearly 1,725 technical support, quality assurance, and project management workers. This settlement underscores the importance of proper classification of employees serving in these roles.

Proposed OFCCP Rule Could Require Mandatory Hiring Goal for Disabled Workers

Last week, the Office of Federal Contract Compliance Programs ("OFCCP") proposed a new rule that would require federal contractors and subcontractors to set a hiring goal of 7 percent of their workforces consisting of people with disabilities. The proposed rule outlines required areas of compliance, including recruitment, training, record keeping, and policy dissemination. Further, the rule would provide specific guidance on how to comply with the law, thus clarifying the OFCCP's expectations for contractors.

Brinker Decision Expected in Early 2012

Just a reminder that the California Supreme Court will likely make a decision in the *Brinker Restaurant Corp. et al. v. Superior Court of San Diego* case early next year. This wage and hour class action primarily involves two issues: (1) whether employers must *ensure* that employees take meal periods or simply *provide* them and (2) whether a second meal period must be provided within five hours of the first meal, rather than after ten hours of work per day (as stated in Labor Code Section 512(a)). We look forward to the court's decision and will report on it in our next Fenwick Employment Brief or Special Bulletin.

Daniel J. McCoy is a partner in the Employment Practices Group. Sheeva J. Ghassemi-Vanni is an associate in the Employment Practices Group.

Follow us on Twitter at: http://twitter.com/FenwickEmpLaw