



FENWICK & WEST LLP

Weekly Employment Brief

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Jury Must Decide Whether Employer Lawfully Refused To Re-Hire Recovering Addict

In *Raytheon Company v. Hernandez* (reported in the December 16, 2003 WEB Update), the United States Supreme Court held that an employer lawfully may refuse to re-hire an individual previously discharged for violating workplace conduct rules, and directed the lower court to reconsider the case. On remand, the Ninth Circuit Court of Appeals allowed Hernandez's claim to proceed, holding a jury must decide whether Raytheon refused to hire Hernandez based upon its no-re-hire policy or because he was a recovered addict, which is a protected status under the ADA. During his first employment at Raytheon, Hernandez failed a drug test and resigned in lieu of being discharged. He alleged that he entered rehabilitation and was thereafter "clean and sober." Several years after his resignation, Hernandez re-applied for employment at Raytheon. Raytheon denied the application based upon its policy not to re-hire anyone previously discharged for misconduct (or who quit in lieu of being discharged for misconduct). However, in opposition to the employer's motion for summary judgment, Hernandez offered testimony of a Raytheon manager that she was aware of Hernandez's history of addiction. The court opined that notwithstanding her denial of any unlawful motivation, a jury must decide whether Raytheon refused Hernandez's application in reliance on its no-re-hire policy, or on account of his protected status as a recovered drug addict. This case highlights the difficulty of handling, in a nondiscriminatory fashion, applications for employment submitted by an applicant with a known history of substance abuse. A decision to reject must be based upon a legitimate nondiscriminatory reason (e.g., the applicant had lesser qualifications than the individual selected) and should be well-documented.

Saleswoman Facing "Glass Ceiling" Allowed To Pursue Constructive Discharge Claim

The Iowa Supreme Court recently allowed a former employee to proceed with claims for sex discrimination and constructive discharge arising out of her employer's failure to promote her to sales leader. In *Van Meter Industrial v. Mason City Human Rights Commission*, Jane Sires worked her way from part-time receptionist to branch operations manager, a position that included sales responsibility. Sales positions constituted the undisputed starting place and promotion path into management at the company. When a sales leader position opened, however, the regional manager, Mark Schon, selected a male salesperson with less sales experience than Sires. Sires complained to Human Resources that she should have gotten the job, and was told to speak directly with Schon about the issue. Schon explained that the male was selected because he could be "molded" into the position and that he expected Sires to help with that process. Sires resigned and brought suit. Distinguishing cases holding that the loss of a single promotional opportunity is not a sufficient reason to quit, the court allowed Sires' claim to stand, explaining that she was "foreclosed from a career path [into management], not simply deprived of one promotion." Further, when Sires complained to Human Resources, she was told to take it up with the person who made the alleged discriminatory decision. According to the court, Sires established that there was no "opportunity for fair treatment," leaving her no choice but to resign. It is unclear whether California courts would reach the same result. However, it is clear that when an employee complains to Human Resources about discrimination by a manager, HR should take immediate, independent steps to investigate, rather than simply refer the employee to the manager who made the allegedly discriminatory decision.

Employer Properly Discharged Female Employee For Crotch-Grabbing

Rejecting an employee's claim of race discrimination, the federal Eighth Circuit Court of Appeals (covering states including Missouri) held that the employer lawfully discharged her for grabbing the crotches of male co-workers. In *Wheeler v. Aventis Pharmaceuticals*, a co-worker complained that Wheeler, an African-American employee, on numerous occasions grabbed and fondled male co-workers in their crotch area. After an investigation by Human Resources corroborated the complaint, Aventis discharged Wheeler for violating the company's sexual harassment policy. Wheeler filed suit alleging Caucasian employees engaged in similar misconduct and were not discharged. The employer presented undisputed evidence that a male Caucasian was also discharged for unwanted touching. Wheeler still argued inconsistent treatment, in that a female Caucasian employee received a formal warning for baring her breasts in front of co-workers but was not discharged. However, the appellate court held that failing to terminate the female employee who bared her breasts did not amount to discrimination against Wheeler, because the baring of breasts was "objectively different conduct" than Wheeler's actions in grabbing men's crotches as to justify a less severe discipline. This case highlights the importance of consistency in imposing disciplinary measures.

Employee Required To Provide Clear Notice Of Need For FMLA Leave

The federal Seventh Circuit Court of Appeals (covering states including Illinois and Indiana) recently addressed the specificity of an employee's "notice" necessary to trigger the employer's obligation to afford an FMLA leave. In *Aubuchon v. Knauf Fiberglass*, Aubuchon's wife was pregnant and close to her delivery date. Aubuchon verbally told his manager that he wanted to stay home with his wife until she gave birth. He did not indicate that his wife was in

any way incapacitated or experiencing complications related to the pregnancy. The employer required Aubuchon to complete a request for leave form, specifying the medical condition that justified the request. Aubuchon failed to provide a completed leave request, so the employer denied his request. Despite the denial, Aubuchon took the leave. Because Aubuchon's unexcused absences violated the company's attendance policy, he was terminated. After his discharge, Aubuchon furnished a doctor's note stating that his wife was experiencing "complications" related to the pregnancy. Upholding the termination (and the dismissal of Aubuchon's FMLA lawsuit by way of summary judgment), the court explained that pregnancy, absent incapacity or complications, is not in and of itself a "serious health condition" as to justify FMLA leave. Absent notice of a serious health condition, an employer may lawfully deny the leave. Because Aubuchon produced a doctor's note only after his termination, the court held that he was too late. The court cautioned, however, that an employee does not have to write "a brief demonstrating a legal entitlement" to a leave. Rather, the employee only has to give the employer enough information to establish a reasonable entitlement to FMLA leave, and thus trigger the employer's duty to request additional information. This case demonstrates that an employer legitimately may impose reasonable requirements on an employee's ability to obtain an FMLA leave of absence.

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