FENWICK & WEST LLP

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Amy Becker Contributor
Allen Kato Co-Editor 415.875.2464
Thomas Moyer Co-Editor

EEOC Says No to Genetic Testing

Genetic testing may not be the wave of the future for employers. In *EEOC v. Burlington Northern Santa Fe Railroad*, the EEOC reached a settlement with the employer who agreed to stop its controversial genetic testing program. The company wanted to perform genetic tests on its employees to see if the employees had a genetic predisposition to develop carpal tunnel syndrome. Before the settlement, the agency planned to argue that if the employer conducted genetic testing to uncover the employee's propensity to develop carpal tunnel syndrome, then that employee would automatically be regarded as having a disability under the Americans with Disabilities Act. Based on this case, employers that are considering using genetic testing to make employment decisions should re-think that decision. California statute already prohibits genetic testing in most circumstances.

Fired For Refusal to Sign, Not Because of Discrimination

A bad business decision does not necessarily amount to discrimination. In *O'Reagan v. Arbitration Forums, Inc.*, a Federal court found that an employer's decision to fire a manager who refused to sign a noncompetition agreement was not motivated by either race or gender discrimination. The 47 year-old manager refused to sign the noncompetition agreement because she believed it was unnecessary and unenforceable. She told her employer that she would not sign the agreement but that she would be willing to negotiate a new one. Her employer fired her, and replaced her with a 32 year-old man. The manager sued for gender and age discrimination, arguing that the employer was using unenforceable noncompetition agreements to justify the firing of older women. The court found she did not have any evidence to support her case because, even if the agreement was unenforceable, she could not show that the employer was using the agreement to fire older women. The court also found that there was no gender discrimination because the agreement had the same affect on both male and female managers.

Employers May, For Now, Continue to Use "Consultants" in Union Organizing Campaigns

Labor-management disputes may become even more heated in the months ahead. Last month, the new Secretary of Labor, Elaine Chao, announced a new interpretation of the Labor Departments rules for law firms who help company management in union organizing campaigns. Under the new guidelines, law firms that produce documents to help companies in an ongoing labor disputes will be required to disclose to the federal government the names of all their clients and the money the firm is paid to represent the clients. This is a serious impediment to lawyers assisting clients faced with union organizing. Lawyers are concerned that this infringes on the attorney-client privilege, and will substantially limit the advice law firms will be able to give to companies. This new interpretation has yet to be implemented, but companies in ongoing disputes with unions should be aware that the new interpretation may limit the advice and assistance they can get from legal counsel.

Employers Need More ADA Training

It has been in effect for nine years, but the Americans with Disabilities Act isn't getting any easier to understand. A recent study suggests a great need for employers to conduct training on ADA legal requirements. In particular, training should focus on the reasonable accommodation process for HR and line managers and supervisors. Survey of case law suggests that management failure to exhaust the reasonable accommodation process is one of the grounds that plaintiffs frequently rely on to assert an ADA violation.
