FENWICK & WEST LLP

Weekly Employment Brief

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Brian K. Nagatani Contributor 650.858.7181
Trey Wichmann Co-Editor 650.858.7813
Patricia Nicely Kopf Co-Editor 650.858.7219

No Religious Discrimination Unless Decision-Maker Knows Applicant's Religion

The federal Eleventh Circuit Court of Appeals has held that an employer cannot intentionally discriminate against an individual based on his religion, if the decision-maker does not know the individual's religion. In *Lubetsky v. Applied Card Systems, Inc.,* after an applicant received a conditional job offer, he informed the interviewer that he was Jewish, and inquired about the company's leave policy for religious holidays. According to the applicant, the interviewer allegedly responded that it would be illegal if the company did not allow time off for Jewish holidays, but that the individual should not abuse the system by taking off "minor" holidays. When the applicant's new supervisor was told the name of this new hire, he recognized it from a job fair where the applicant had behaved aggressively and rudely, and accordingly instructed the interviewer to rescind the offer. In order to spare the applicant's feelings, the interviewer falsely informed the applicant that, unbeknownst to her, the position was already promised to someone else. After the applicant subsequently saw a newspaper advertisement for the same position, he sued the company, alleging that the employer rescinded the offer because of his religion. Despite the false reason given, the court upheld summary judgment for the employer, because the supervisor who made the decision to rescind the offer did not know the applicant was Jewish. Although not a model for how to handle the hiring process, this case demonstrates the important principle that the knowledge of the decision-maker is an essential fact for "intentional" discrimination cases.

Unlawful to Deny Accommodation Request for Fear of Potential Violation of Seniority System

In one of the first reported decisions to apply the U.S. Supreme Court's recent decision in *US Airways, Inc. v. Barnett* (reported in the May 6, 2002 edition of the **W.E.B. Update**), the Tenth Circuit Court of Appeals has held that an employer may not refuse to accommodate an employee because of a potential violation of a union seniority system. In *Dilley v. SuperValu, Inc.,* an employee truck driver developed back problems, and his physician imposed a sixty-pound lifting restriction. As an accommodation, the truck driver requested that the company assign him to a route that did not require heavy lifting. The company denied this request, because the collective bargaining agreement's seniority system would permit a more senior truck driver to bump him from his new route in the future. The employee refused the company's offer of a dispatch job, because it involved a substantial pay cut, and he was eventually terminated. A jury found that the driver was disabled under the ADA and that the employer had discriminated against him. In upholding the jury verdict, the Tenth Circuit Court of Appeals found that, because there was only a potential, and not an actual, violation of the seniority system, the employee's requested accommodation was reasonable. The court held that when seeking to reasonably accommodate an employee under the ADA, an employer must first consider lateral moves to positions that are regarded as equivalent, and may only consider lesser jobs that constitute a demotion, like the dispatch job, if there are no lateral positions available. As this case demonstrates, employers must always conduct an individualized inquiry into potential accommodations, and may not deny an accommodation based on a mere hypothetical conflict with seniority systems.

Arbitration Agreement That Applies to Likely Employee Claims Held Unenforceable

The Ninth Circuit Court of Appeals recently invalidated an arbitration agreement that compelled arbitration of the claims employees are most likely to bring, but exempted from arbitration the claims the employer is more likely to bring against its employees. In *Ferguson v. Countrywide Credit Industries, Inc.,* the company sought to compel arbitration of an employee's sexual harassment and retaliation lawsuit. The arbitration agreement covered claims for torts, discrimination, harassment, and violation of federal or state statutes, but it specifically excluded claims for workers' compensation, unemployment compensation benefits, and injunctive and equitable relief for intellectual property violations—the latter claims more likely to be brought by the employer. The agreement further required the parties to split the arbitration costs. The Ninth Circuit found the entire arbitration agreement unenforceable under California law, because these provisions were too one-sided in favor of the company. This case serves as another reminder of the importance of drafting arbitration agreements that comply with legal standards and treat employees fairly.

Mastectomy Is a Disability under New Jersey Disability Statute

A New Jersey state court recently has held that a woman who had a mastectomy because of breast cancer is disabled under that state's disability statute. In *Harris v. Middlesex County College,* an assistant professor had received positive performance evaluations prior to undergoing several surgeries for breast cancer, including a mastectomy with reconstructive surgery. After the surgery, however, the professor's evaluations suggested she needed to improve her attitude, and her application for promotion to associate professor was rejected. Accordingly, the professor sued for disability discrimination. After her claims under the ADA were dismissed in federal court, the professor pursued her state law claims in New Jersey state court. The state trial court granted summary judgment in favor of the college, holding that the plaintiff was not covered by the state disability statute because she admitted in deposition that she was cancer-free. In reversing summary judgment, the appellate court held that the plaintiff was "handicapped" under the state disability law because her mastectomy constituted an "amputation," which specifically was covered by the statute. Despite the limited geographic scope of this holding, the case highlights how state disability statutes often can provide greater protection than the ADA.