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Individual assessment critical to success of "direct threat" defense

The Ninth Circuit Court of Appeals recently emphasized it is critical that an employer conduct a truly "individualized assessment" of an individual's medical condition if it wishes to assert a "direct threat" defense to allegations of disability discrimination. In *Echazabal v. Chevron USA, Inc.*, plaintiff Mario Echazabal sued Chevron for disability discrimination after he was denied a position based on the results of his medical exam. Echazabal, who had worked for maintenance contractors at one of Chevron's oil refineries, applied for a job with Chevron, and was offered a position contingent on successfully passing a medical exam. Echazabal failed the exam due to high levels of certain liver enzymes, and Chevron revoked the offer. When Echazabal claimed disability discrimination, Chevron argued that given Echazabal's medical condition, the at-issue position posed a "direct threat" to his health. To prove it had made the required "individualized assessment" of Echazabal's ability to perform the essential functions of the position, Chevron relied on the opinions of two doctors without specialized training in liver disease. Echazabal argued Chevron's decision was not "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence," and provided opinions from liver specialists contending Echazabal could work at the refinery without exacerbating his condition. The trial court accepted Chevron's defense and granted summary judgment. On appeal, the Ninth Circuit reversed, finding the testimony of Echazabal's experts raised material issues of fact as to whether Chevron had made the necessary "individualized assessment," and whether its decision was based on a reasonable medical judgment. This case is a strong reminder that, where an employer is concerned that an individual's medical condition could potentially pose a direct threat to that individual or to others, it must conduct a thorough individualized assessment to rebut allegations of disability discrimination.

Second Circuit allows exonerated harasser's retaliation and race claims to proceed

In *Deravin v. Kerik*, plaintiff Eric H. Deravin III was denied promotion and sued his employer, the New York City Department of Corrections ("DOC") and its former commissioner, Bernard Kerik, for race discrimination and retaliation. Deravin, an African-American, asserted Kerik had discriminated against Deravin on account of his race, and had retaliated against Deravin for successfully defending himself against a sexual harassment claim made by Kerik's girlfriend. In response to Deravin's discrimination claim, the defendants argued Deravin had failed to exhaust his administrative remedies because his EEOC complaint did not explicitly mention race discrimination. In response to his retaliation claim, defendants argued Deravin had not engaged in any "protected activity," since his involvement in the harassment investigation was as the accused harasser. The trial court accepted these arguments and entered judgment for defendants. The Second Circuit Court of Appeal (the federal appellate court encompassing New York, Connecticut and Vermont) reversed the judgment on two grounds and allowed the case to proceed. First, the court held that even though Deravin's EEOC complaint did not explicitly allege race discrimination, it alleged "preferential treatment for Irish-American employees," which was "sufficient to alert the EEOC to look for potential race discrimination." Second, the court held Deravin's participation in a sexual harassment investigation—even as the accused harasser—was protected activity under Title VII. Employers should be reminded that courts generally permit expansive interpretations of EEOC claims and that "protected activity" can be broadly defined. On a positive note, the court did reiterate that while an employer cannot retaliate against an individual solely because he or she participated in a sexual harassment investigation, it can of course discipline an employee where that investigation reveals culpable conduct.

Court finds miscommunication, not discrimination, in pregnancy lawsuit

The Seventh Circuit Court of Appeals (the federal appellate court encompassing Illinois, Indiana and Wisconsin) recently affirmed summary judgment for an employer accused of pregnancy discrimination, finding although there was evidence of miscommunication, there was no evidence of discrimination. In *Venturelli v. ARC Community Services*, plaintiff Celena Venturelli brought suit after applying for an administrative assistant position at ARC Community Services. ARC had hoped to hire Venturelli, who was working for ARC on a temporary basis, as a full-time employee. However, in communicating the offer of employment, an ARC employee went into a "detailed discussion" of Venturelli's pregnancy and "how she would deal with it in the event she took a permanent position with ARC." The employee also commented to Venturelli that "once you hold that baby, you're just not going to want to come back to work," which Venturelli interpreted as an indication that ARC did not want to hire her because she was pregnant. Venturelli went on leave from her temporary position shortly after this discussion. ARC held the administrative assistant position open for Venturelli and attempted but failed to contact her about the full-time position. Eventually, ARC filled the position with another applicant who was also pregnant. In affirming summary judgment for ARC, the court held Venturelli had failed to produce direct or indirect evidence of pregnancy

discrimination. The court emphasized that ARC had wanted to hire Venturelli and that Venturelli had wanted the position, and that poor communication had resulted in a needless lawsuit. Although in this case the court found for the employer, employers should ensure that any employee involved in the recruiting process understand the laws prohibiting pregnancy and other discrimination to avoid problematic comments such as those made in this case.

DID YOU KNOW???

Miles Locker, an attorney with the California Labor Commissioner's office recently stated that a cap on vacation accrual should be no less than 1.75 times an employee's annual rate of accrual. Employers may wish to review their vacation policies, as the Labor Commissioner now views the previously-accepted cap of 1.5 times the annual rate of accrual to be aggressive and to violate the California Labor Code's prohibition on vacation forfeitures.