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Weekly Employment Brief

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Cat Got Your . . . Dog?!?

A former news reporter has sued the city of Escondido for $1.5 million, accusing the Escondido public library of "putting the welfare of [its] dangerous cat above people with disabilities." Espinosa, who allegedly suffers from disabling sudden panic and anxiety attacks, claims that the library's adopted cat dove off a counter "and then suddenly, and without provocation, began clawing [his service dog], at times with all four paws." After dragging his dog outside, Espinosa claims "the terror of the sudden and malicious attack" caused a panic attack. Espinosa also alleges that the neither the library staff, an onlooker, nor the Escondido police would help him. Espinosa acknowledges that the vet and chiropractor bills total less than one hundred dollars, but asserts that the lawsuit is about something more: denying access to the disabled. In *Espinosa v. City of Escondido*, Espinosa alleges the library has violated the rights of all disabled persons who rely on service dogs because the sign in the library window limits admission to guide dogs for the blind. Kimba, Espinosa's service dog, has recovered from the incident, and L.C., the library cat, has been temporarily relocated, pending outcome of the litigation.

"Walking Timebomb:" A Rare Direct Threat Disability Case

The Ninth Circuit held that a former employee was not a "qualified person" under state or federal disability laws because his employment posed a direct threat to the safety and health of other workers. In *Hutton v. Elf Atochem North America, Inc.*, the plaintiff, a chlorine finishing operator who suffered from diabetic episodes, sued his employer for firing him because of his diabetes. The court recognized that persons whose employment poses a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation are not "qualified persons" protected by disability laws. Here, plaintiff's diabetic episodes left him unconscious once and unable to communicate several other times. Doctor's reports concluded that a chlorine spillage caused by the plaintiff's diabetic episodes could be "catastrophic," and the court likened the plaintiff's continued employment to a "walking timebomb." The harm was "of sufficient magnitude and likelihood to disqualify [the plaintiff] from the chlorine finishing operator position." This rare case confirms that employers may terminate a disabled employee where the disability, even with reasonable accommodation, still poses a significant risk of substantial harm to other workers.

Marriage? Not In My Workplace!

The Sixth Circuit recently upheld the validity of a workplace policy barring the employment of married couples. In *Vaugh v. Lawrenceburg Power Sys.*, the plaintiffs, Keith and Jennifer Vaugh, sued their employer for violating their First Amendment rights of association and for retaliatory discharge. The plaintiffs got engaged while working for the defendant, but a personnel policy indicated that "when two employees working for the Lawrenceburg Power System are subsequently married, one must terminate employment." After the honeymoon, Keith indicated that he would continue working, and the manager requested a resignation letter from Jennifer. The plaintiffs and defendant disagree as to what followed, but Keith was terminated for insubordination and

Jennifer was terminated for failing to submit a written resignation. The court dismissed the free association claim holding that the policy barring employment of married couples addressed a legitimate government concern: the inherent loyalty that one spouse will show to another, making discipline more difficult. Still, the court upheld Keith's claim for retaliatory termination because Keith's "mental dissent [to the employer's policy] could be interpreted as protected by the First Amendment," making the termination retaliatory. Therefore, employers should be cognizant that personnel policies may potentially implicate constitutional rights and consult counsel before implementing any policies. Additionally, in light of the court's allowing the retaliatory discharge claim, employers should be careful about terminating an employee solely for disagreeing with personnel policies.

EEOC Hits Seventh Circuit Brick Wall

The Seventh Circuit refused to enforce the Equal Employment Opportunity Commission's subpoena for data on gender bias. In *EEOC v. Southern Farm Bureau Casualty Ins.*, the EEOC sought production of information addressing gender bias after reviewing the information produced on a racial bias charge. The defendant refused to produce the material, even after subpoenaed. The district court and the Seventh Circuit refused to enforce the subpoena. The Seventh Circuit noted that "even though the EEOC is the agency with primary responsibility for enforcing Title VII, it does not possess plenary authority to demand information that it considers relevant to all of its areas of jurisdiction. . . .[I]nformation requested by EEOC must be based on a valid charge filed by either an aggrieved individual or by the EEOC itself." Here, neither the EEOC nor an aggrieved individual had filed a gender bias claim, so the EEOC could not demand information on the subject. Thus, the EEOC does not have a carte blanche to demand all types of information relating to Title VII claims. Rather, employers should be aware that the charge filed with the EEOC limits the type of information the EEOC may demand.

No Policy, Bad Policy

A California federal judge recently certified a class of deaf and hearing-impaired employees, former employees, and applicants in a lawsuit alleging that UPS violated the ADA. In *Bates v. United Parcel Service*, the class alleges that UPS denied deaf and hearing-impaired employees opportunities for promotion and access to communication devices. According to the class, UPS failed to address communication barriers in the workplace and essentially created a glass ceiling preventing deaf and hearing-impaired workers from advancing in the company. The court rejected UPS's argument that the proposed class could not be certified for failure to identify a specific or easily identifiable policy. The court surmised, "UPS's position would lead to the unacceptable conclusion that an employer could protect itself from any class action suit simply by failing to adopt specific policies. That result seems particularly egregious in cases like this one, where plaintiffs claim that an employer's failure to adopt specific policies is the very reason that the employer is in violation of anti-discrimination policies." Thus, employers cannot escape liability under anti-discrimination laws by merely not creating policies. An employer's best protection to discrimination suits is to implement and enforce. anti-discrimination policies in the workplace.