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THE EAGLE'S VIEW

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CAN YOU DISCHARGE A WORKER ON WORKERS' COMP?

Most employers are aware of their responsibilities to grant a leave of absence up to twelve weeks for an employee eligible for leave under the Family and Medical Leave Act, and to an employee with a physical or mental impairment serious enough to constitute a disability under the Americans with Disabilities Act. However, the issues can get quite confusing considering possible ramifications under the workers' compensation statutes of the various states. The quite popular question is "can I discharge an employee who is absent from work on workers' comp?" A recent decision of the Ohio Supreme Court, Coolidge v. Riverdale Local School District, 20 IER Cases 865 (10/22/03), addresses this issue in some detail.

In Coolidge, an employee had exhausted her sick leave, although she continued to receive temporary total disability workers' compensation. She was terminated for exhaustion of available leave and continuing inability to return to work. She sued, and the court addressed the overriding issue as to whether public policy under workers' compensation law protects an employee who is receiving temporary total disability compensation from being discharged solely because of the disabling effects of the allowed injury, that is, absenteeism and inability to work.

The court first noted that any claim of wrongful discharge in violation of public policy, whether based on workers' comp or another law, would be an exception to the employment-at-will doctrine. The plaintiff conceded that she was not terminated for filing a workers' comp claim, but argued that the policy of protection contained in the workers' comp law should cover an employee who is discharged for being absent from work, when the reason for the absence was a work-related injury. Otherwise, she argued, people will lose their employment while receiving workers' comp benefits.

The employer argued that public policy does not exempt the workers' comp claimant from the provisions of a neutral absenteeism policy or practice that is applied even-handedly to all employees. The employer argued that the workers' compensation anti-retaliation provisions are limited in scope to protecting employees from being discharged from having invoked or participated in workers' comp proceedings and should not be extended beyond those specific parameters. It argued that retaliatory discharges are a narrowly defined exception to employment-at-will, which is not applicable unless an employee proves a causal connection between the pursuit of workers' comp benefits and the discharge. The employer cited the fact that a majority of courts hold that the workers' comp system is not designed to provide the injured worker with job security or guaranteed employment during periods of work-related disability and that basic discrimination law does not require the employer to treat a workers' comp claimant more advantageously than other workers.

The Ohio Supreme Court noted that it had never addressed this specific issue, although noted that the issue had been litigated in a number of other jurisdictions. Instead of following the "prevailing" view that an injured worker may be discharged or otherwise penalized for absenteeism or inability to work during a period of compensated disability, the Ohio Supreme Court chose instead to follow the "minority" of courts that hold it is a violation of public policy for an employer to discharge or otherwise penalize a temporarily and totally disabled employee pursuant to a "neutral" absenteeism or attendance policy, where the absence or

Inside.....

inability to work is directly related to a compensable injury. The Court cited rulings of courts in Kansas, and Maine, as support for its conclusion. The Court finds that ... "we agree with the minority of courts that employees who are temporarily and totally disabled as a result of their work-related injuries have a right not only to the compensation provided in the Act, but also to whatever period of absence from work is deemed medically necessary to complete their recovery or stabilize their injuries. We hold, therefore, that an employee who is receiving [workers' compensation] may not be discharged solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed condition."

The court next addressed the issue as to whether the employee had cooperated with her employer, in terms of applying for uncompensated leave as contemplated by her employer's policies, and failing to respond to phone calls in order to determine the plaintiff's plans. The court addressed the contention that the employer may have had independent grounds for discharging the plaintiff on the basis that she failed to submit requests for leave of absence or provide notice of her ongoing status or condition. The Court found, however, that the plaintiff's failure to complete the employer's required leave-of-absence forms cannot justify termination where the employer is on notice of the employee's work-related injury and that her injury was the cause of her continued absence, notwithstanding that she failed to fill out the appropriate documentation. Thus, according to the court, an employee who is receiving workers' compensation may not be discharged for failing to complete forms required for a leave of absence or for failing to notify the employer as to the length of the absence, where the employer is otherwise on notice of the employee's condition and status.

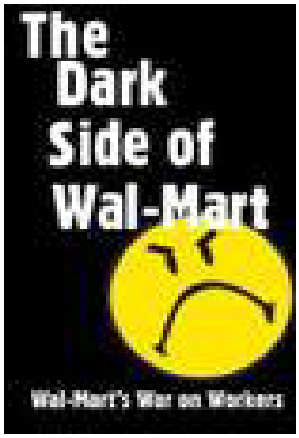
Editor's Note - *Only a few states would agree with the Ohio Supreme Court that an employer must grant a leave of absence to an employee as long as the employee is receiving workers' comp benefits. However, this is an issue that is often raised in state courts, and employers need to be aware of the rulings in their particular state. Two states, Ohio and Colorado, recently changed their rulings to allow such claims. In certain other states, such as North Carolina, the issue is in a state of confusion.*

WAL-MART FACING IMMIGRATION AND RICO LAWS

In October, federal agents swept through 60 Wal-Mart stores in 21 states, arresting about 250 allegedly illegal workers. Most worked for companies who were contractors of Wal-Mart, although ten were Wal-Mart employees that the company hired as it moved to bring its floor cleaning operations in-house. The raids on October 23 included a visit by investigators to the company's headquarters, where they left with boxes of files.

Since the raids, Wal-Mart has pledged its cooperation and instructed its store managers to preserve any relevant records. Wal-Mart initially announced that it would check all of its 1.1 million U.S. workers to insure they were legally employed. A company spokesperson later said that the company is reconsidering such a sweeping effort and is reviewing its existing process for checking the legal status of workers.

In November, federal prosecutors notified Wal-Mart that it is a target of a grand jury probe into the hiring of illegal immigrants. Wal-Mart said that it screens employees to try to



insure that they can legally work and that it requires contractors to use legal workers.

Also in November, nine of the 250 people arrested October 23 by federal immigration agents during the raids, filed a lawsuit under the Racketeering Influenced and Corrupt Organizations Act (RICO), accusing Wal-Mart of conspiring with contractors in a criminal enterprise that violate the civil rights and wage protections of immigrants who clean its stores. The federal court suit seeks class-action status for perhaps thousands of immigrants, both legal and illegal, hired by the contractors to clean the stores of the world's largest retailer. The suit says that Wal-Mart systematically deprived the workers of labor law protections over at least the last three years. Nine workers, who cleaned stores in New Jersey, maintain they were denied overtime pay despite working at least 56 hours a week and that contractors failed to withhold taxes or make required workers' compensation contributions. The contractor arrangement was "an effort to disguise Wal-Mart's role

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Gary is Managing Member of Wimberly Lawson Seale Wright & Daves, PLLC, Knoxville, Tennessee. He practices in the areas of labor and employment law, with a particular emphasis on NLRB defense work, union avoidance, collective bargaining, contract administration and arbitration law. He has served on the Executive Council of the Tennessee Bar Association, Labor Law Section, and is a member of the Labor and Employment Law Sections of the Tennessee Bar Association and the American Bar Association. He is a Rule 31 Listed General Civil Mediator. Prior to entering private practice, Gary was a federal prosecutor for the National Labor Relations Board working in its Peoria and Atlanta Regions. He has also served as an instructor of business law at Virginia Tech and Carson Newman College. Gary received his BS degree, cum laude in 1974 and his J.D. degree in 1977, both from the University of Tennessee.

as a joint employer of its janitors," the lawsuit said.

Editor's Note - *It is likely that Wal-Mart will face an increasingly heavy amount of litigation and adverse publicity over the next few years, as it is the target of attack from major labor unions and some civil rights groups. Wal-Mart is entirely non-union and is moving into broader areas of the retail trade, such as the grocery business, once dominated by unions. There are specialists in the union movement committing all their time trying to discredit and/or find corporate wrongdoing or anything that looks inappropriate to publicly allege against Wal-Mart. The unions have relationships with various plaintiffs' law firms and feed them information and encourage lawsuits. RICO is sometimes used as the basis for such suits, because if established, this law can allow the plaintiffs to recover treble (triple) damages, plus costs and attorneys fees. It can also force employers to make generous settlement offers. Regarding the specific allegations, an employer can become liable for law violations of its contractors if it exercises enough control over the contractor's workforce to be deemed a "joint employer" of those workers. As a general rule, the employer need not check the immigration papers of the employees of its contractor, but the employer could nevertheless be liable if it has direct knowledge that the contractor is not meeting its obligations.*

ARE UNDOCUMENTED WORKERS "EMPLOYEES" FOR WORKERS' COMPENSATION

The ramifications of the illegal immigrant status of workers continues to be litigated in various contexts. During the year, the Michigan Appeals Court addressed the issue of whether illegal aliens who work with false documentation are "employees" under state workers' compensation laws and thus entitled to compensation benefits when injured on the job. Sanchez v. Eagle Alloy, Inc., Mich. Ct. App. 1/7/03. An employee used a fake Social Security card to gain employment and later sustained an on-the-job injury. After being released to return to work, the employer fired him when it discovered that the worker had an invalid Social Security Number.

The Appeals Court noted that the employee had violated the federal immigration laws by presenting false documentation in order to obtain employment. When the employer discovered that it could not legally hire the worker as an employee, the employee became "unable to obtain or perform work" because of the commission of a crime within the meaning of the workers' compensation laws, and thus the suspension of the worker's weekly wage loss after the date the true employment status was revealed was appropriate. However, although employers are not required to pay weekly wage loss benefits once the worker's illegal employment status is discovered, the court ruled that employers are liable for undocumented worker's medical treatments.

Editor's Note - *In Hoffman Plastics Compounds, Inc. v. NLRB, the U.S. Supreme Court divided 5-4 in its holding that federal immigration policy bars the Labor Board from awarding back pay to illegal aliens who were fired in violation of federal labor law. The Court found that awarding back pay to illegal aliens runs counter to policies underlying the immigration laws. Since the ruling in Hoffman Plastics, there have been many issues raised as to remedies sought by illegal aliens under various laws in various tribunals. The recent Sanchez workers' compensation ruling in Michigan, is another example as to how the courts are struggling with these issues.*

PROVING TRAINING TAKES ON NEW IMPORTANCE IN EEO CASES

Under federal discrimination laws, Title VII plaintiffs can receive punitive damages if they can demonstrate that an employer acted "with malice or with reckless indifference to their federally protected rights." The standard requires not "a showing of egregious or outrageous discrimination," but rather proof that the employer discriminated "in the face of a perceived risk that its actions would violate federal law." These standards were recently applied in a case in which a lower court had awarded over $200,000 in punitive damages to a plaintiff who contended that her employer had repeatedly discriminated against her in the job application process both because of her race and because she had complained about racial discrimination. Bryant v. Aiken Regional Medical Center, 92 FEP Cases 233 (CA 4, 6/27/03).

The court began its discussion of the issue by noting that in contrast to cases where employers "never adopted any anti-discrimination policy [or] provided any training whatsoever on the subject of discrimination," the employer had an extensively implemented organization-wide equal employment opportunity policy. That policy, a version of which was included in the employee handbook, stated that "all persons are entitled to equal employment opportunity regardless of race," and that "it is and shall continue to be our policy to provide promotion and advancement opportunities in a non-discriminatory fashion." The employer also created a grievance policy to encourage employees to bring forward claims of harassment, discrimination or general dissatisfaction and employees were explicitly informed that they would not be retaliated against for making a complaint. There was also a carefully developed diversity training program that included formal training classes and group exercises for employees. The employer also voluntarily monitored departmental demographics as part of an ongoing effort to keep the employee base reflective of the pool of potential employees in the area. These widespread anti-discrimination efforts, the court found, precluded the award of punitive damages in the case. The court cited a U.S. Supreme Court ruling, giving protection from punitive damages to "employers who make good-faith efforts to prevent discrimination in the workplace, accomplishing Title VII's objective of motivating employers to detect and deter Title VII violations."

The Bryant case demonstrates the type of policies an employer can implement that not only lessens the potential for

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punitive damages, but may also show a court or jury that discrimination has not occurred. Another federal appeals court ruling on the same subject, puts a different twist on the issue. Hall v. Consolidated Freightways Corp., 337 F.3d 669 (C.A. 6, 2003). In Hall, the plaintiff sued, alleging race discrimination, a hostile work environment and other claims, and the incidents alleged included racist graffiti, racial slurs, harassing behavior by co-workers, and a failure by supervisors to take action to stop the harassment. After a jury trial, Hall was awarded $750,000 in punitive damages under both Title VII and Ohio state law (in addition to lost wages, compensatory damages, costs, and attorneys fees). The Hall court cited the same U.S. Supreme Court rulings as precedent but reached a different conclusion than the Bryant court. The employer argued that it made extensive efforts to comply with Title VII, including instituting a "zero-tolerance" policy for racial harassment, holding meetings to educate staff about the policy, and enforcing the policy. The plaintiff disputed these efforts, and the evidence at trial presented conflicting accounts of the extensiveness of the employer's efforts. In particular, the plaintiff showed an aggressive policy against sexual harassment far exceeded the company's efforts against racial harassment. As a result, the court concluded, "the defendant cannot succeed in showing that it implemented its policy in good faith where it did not enforce the policy until 1998, despite numerous incidents of racial animus in the prior four years, and where the defendant did not implement the policy with the same force as to race that it did as to sex." The appellate court found the conflicting evidence on these points was a matter for the jury to resolve and that punitive damages therefore were appropriate. The employer in the Hall case apparently did not sufficiently document its efforts against racial discrimination, leaving it vulnerable to the conflicting evidence presented on the subject. A second and unusual issue arose in Hall, in that the plaintiff's punitive damages argument contended that the employer did not enforce whatever policies it had against racial harassment with equal vigor to the policies against sexual harassment. The case thus teaches that employers should show equal concern for preventing all forms of discrimination to avoid the impression that they do not care about some forms.

A related point was made by EEOC Vice-Chair Naomi Earp, during the American Bar Association's 2003 Annual Meeting, where she informed employers to not be surprised if their employment lawyers come preaching to them about the need for supervisor training. Earp stated that she observes a disconnect between what goes on between employees and their first line supervisors on the one hand, and the policies and procedures adopted by higher management. She stated there are not too many employment discrimination charges filed against CEO's and a lot of what does end up in charges may not be discrimination, but "a failure to communicate."