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THE EMPLOYERS' LAWYERS™

LABOR LORE

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EEOC Issues New Guidelines Regarding Discriminating Against Caregivers

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The Equal Employment Opportunity Commission (EEOC) recently issued a set of guidelines to help determine whether employees or applicants have been discriminated against based on their status as caregivers. These guidelines do not establish "caregivers" as a new class of protected workers, but clarify how disparate treatment of caregivers violates Title VII or the ADA when based on gender, race, disability, or other characteristics which *are* protected.

Adverse Action Taken Against Caregivers Based on Sex

Women continue to be the primary caregivers in the U.S. And, as noted by the EEOC, women now make up almost half of the workforce. This presents a conflict between work and family duties that has left many women subject to gender stereotypes.

Men, however, are increasing their caregiving responsibilities, and with it, their exposure to these work-family conflicts. According to the EEOC, men have tripled the amount of time they devote to childcare since 1965.

Title VII "does not prohibit discrimination based solely on parental or other caregiver status," however, it "does not permit employers to treat female workers less favorably merely based on the gender-based assumption that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her performance." Thus, an employer would not necessarily violate Title VII if, for example, "it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers." But, employers would violate Title VII where employment decisions are based on gender stereotypes: e.g., that female caregivers will not be as committed to their jobs, that pregnant women will be unable to perform certain tasks, or that males shouldn't be caregivers.

Adverse Action Taken Against Caregivers Based on Disability

In the most recent U.S. Census, "nearly a third of families have at least one family member with a disability, and about one in ten families with children under 18 years of age includes a child with a disability." The ADA not only prohibits discriminating against an employee who has a disability but also from discriminating against an employee who is taking care of a disabled person (e.g., child, spouse, or parent). An employer may not, for example, "refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent leave…to care for his wife."

Hostile Work Environment/Retaliation

As with other EEO laws, employers are prohibited from harassing caregivers because of their gender, race, or other protected characteristic. Likewise, they are not permitted to retaliate against caregivers for complaining about discrimination. Workers with substantial caregiving responsibilities are more susceptible to retaliation because of their work-family conflicts -- for example, "a schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school aged children."

Practical Tips:

1. Avoid stereotypes and assume nothing: a working mother may want to work overtime, relocate to a new city for a promotion, or travel frequently. Your failure to promote her -- based on the assumption that she would not want to -- violates Title VII, even if your intentions were to "help" her.

2. Use caution in asking employees about their family status or discussing these issues. Such questions or comments may be evidence of discrimination if the employer takes an adverse employment action after the inquiry.

3. Review your pregnancy leave policy. To be nondiscriminatory, a policy of paid leave needs to be equally applicable to men and women, unless it is limited to the period in which women are "incapacitated because of pregnancy, childbirth, and related medical conditions"

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Corporate Whistleblowing

July 30, 2007 marks the fifth anniversary of the Sarbanes-Oxley Act ("SOX" for short), enacted to address corporate securities fraud and, among other things, protect those who "blow the whistle" on fraud against retaliation. The report card on SOX is mixed. Some commentators see the recent performance of the stock market and the increase in corporate earnings restatements as signs that SOX is working; others demur. Two recent studies question the effectiveness of SOX from a different perspective: post-SOX whistleblower activity and success rates.

The first study -- "Who Blows the Whistle on Corporate Fraud" -- looked at data on U.S. corporate frauds between 1996 and 2004. It found that while various groups identify corporate fraud -- e.g., regulators, investors, analysts, etc. -- employees do so at the highest rate (19%). In addition, 82% of employee whistleblowers who identified themselves (45% blew the whistle anonymously) also alleged "that they were fired, quit under duress, or had significantly altered responsibilities." According to the study, the protection against retaliation under SOX has not increased employee whistleblowing: i.e., such whistleblowing has dropped from 21% before SOX down to 16% after SOX.

The second study -- "An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win" -- concluded that employee whistleblowers under SOX fair worse than almost any other whistleblower or employee claimant. The study examined 491 complaints filed between August 2002 and July 2005. In the 361 cases resolved by OSHA, employees won only 3.6% of the time. Employees didn't fair much better in the 93 cases appealed to administrative law judges, winning only 6.5% of the time. And, in fiscal year 2006, SOX whistleblowers were winless at OSHA. These win rates, however, do not include settlements (of the 491 cases reviewed, 11.6% settled at the investigation stage and 18.3% settled on appeal).

These studies, however, inadequately address some important realities behind why SOX whistleblowers do -- and often should -- "lose" their claims. SOX has an intentionally limited reach -- i.e., it only protects whistleblowers who report about securities fraud (not simply how a company spends its money). Countless SOX whistleblowers complain about things that are not fraud; thus, their complaints are not "protected." One recent example is Welch v. Cardinal Bankshares, Corp., ARB Case No. 05-064 (May 31, 2007). Welch reported what he believed to be accounting irregularities. He also claimed that his advice was not being followed and that he was being denied access to outside auditors. He planned to hold a meeting with managers, discuss the irregularities, then ask the CEO and the head of HR for a retirement package in return for his silence. Welch held his meeting but later refused to meet with company officials to discuss his allegations. He was ultimately terminated for his failure to cooperate. Welch then filed a SOX whistleblower claim. OSHA denied his claim but Welch appealed. The Administrative Review Board (ARB) ultimately rejected Welch's claim, holding that none of the things Welch reported amounted to violations of federal securities laws. ► 3

"Damn it, Farrell, if you're going to blow the whistle, blow it."

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MetLife Defeats Class Certification of Breach of Contract Lawsuit

Wing et al. v. Metropolitan Life Insurance Co., Case No. 04-8558 (S.D.N.Y.)

Metropolitan Life Insurance Company recently defeated a bid for class certification in a lawsuit to pay promised commissions to retired sales agents. Three retired Met sales agents sought class action status on behalf of the hundreds of retired Met agents who sold certain insurance products but did not receive life-long commissions.

Judge Barbara S. Jones denied class certification because Plaintiffs could not make the required showing that the potential class's questions of law or fact predominate over the individuals' questions of law or fact. "Because…common issues [must] predominate, courts deny certification where individualized issues of fact abound," Judge Jones noted.

Plaintiffs did not all enter the same agreement (e.g., agents did not sign the same form agreement, nor did managers use a script when hiring or training agents). Thus, to prevail, the class members would have to prove each of their claims individually. Although Plaintiffs futilely tried to refocus the court's attention on certain form documents, the court was unmoved, stating that "the utility of the generalized proof Plaintiffs would seek to offer…is outweighed by the individualized proof likely required." MetLife's affirmative defenses further persuaded the court to deny class certification, noting that each of MetLife's defenses "only compound the individualized proof required."

Congratulations to Marty Harris and Brian Spang on their win, who join others on the Connelly Sheehan Harris team who have defeated class actions. Most notably, are AIG v. McQuay, 2002 U.S. Dist. LEXIS 21307 (D. Ark. 2002), in which we persuaded the district court in Arkansas to limit an FLSA collective action from the 800 claims adjusters nationwide originally sought to just 11 Arkansas claims adjusters; and Robinson v. Tellabs, Case No. 02-2860 (Cook County Circuit Court, Illinois), filed on behalf of 2,455 former and current employees, where, after a bench trial, the court ruled earlier this year that Tellabs is not liable for a violation of the Illinois Minimum Wage Act ●

Workers at Treasure Island Vote to Decertify Union Representation

Since the founding of Treasure Island Supermarkets in 1963, the United Food and Commercial Workers Union ("UFCW") has had a foothold in the company. Not anymore. On July 2, 2007, eligible workers for the six Chicago-area supermarkets voted to decertify UFCW by a 189-91 vote.

CSH represented the petitioner, Dan Schalin, a Wilmette store employee, who campaigned for decertification. According to Schalin, "People felt that the union wasn't looking out for them. They weren't earning our union dues." CSH assisted Schalin and other employee committee members with strategies for the successful campaign.

The workers' drive to quit the union took off after UFCW barred its members from voting on the contract offer in 2004, and then urged shoppers to boycott the stores as a bargaining tactic. As Schalin explained, "There were more hard feelings against the union for boycotting than a fear that the company would not take care of us."

The victorious campaign against UFCW directly affects the overwhelming majority of Treasure Island workers. Congratulations to Rachel Cowen and Heather Bailey of CSH, whose efforts were instrumental in the outcome ●

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Another is Platone v. FLYi, Inc., 2006 DOL SOX LEXIS 105 (Sep. 29, 2006). OSHA denied Platone's claim that she had engaged in protected activity but she appealed. Ultimately, the ARB ruled that Platone -- a company labor relations manager who happened to be romantically involved with a high-ranking union rep -- had not engaged in protected activity when she reported a suspicion that certain pilots were misusing a contractual payment system. Accordingly, when Platone was fired for a conflict of interest (i.e., her relationship with a union official) there was no SOX violation.

In CSH's experience, there is another reason many SOX complainants lose: the high correlation between SOX whistleblowers and several diagnosable disorders in the DSM-IV ●

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Welcome Nathalie Collins

Nathalie Q. Collins joined Connelly Sheehan Harris LLP as an associate attorney in June 2007. Natalie earned her BA in Psychology from Northwestern University in 2002. After graduating, she left her hometown of Chicago and headed south to the Hoosier State, where she attended Indiana University School of Law - Bloomington.

During law school, Nathalie was selected as a Top Brief Writer in the Sherman Minton Moot Court Competition, and served as a Notes Editor for the Indiana Journal of Global Legal Studies. Fluent in French, she also spent a semester in Paris studying international law at the Université Panthéon-Assas. Nathalie graduated cum laude in 2005, and returned to her hometown to begin her legal career.

After a year and a half of practice at a general litigation law firm, Nathalie decided to shift her focus exclusively to employment law, and made the jump to CSH. In her free time, Nathalie enjoys traveling, reading and writing. Please contact Nathalie by phone at (312) 372-1969 or by e-mail at ncollins@csh-law.com ●

What's on myPod?

Nathalie Q. Collins

Fly Me To The Moon - Frank Sinatra

Let Go - Frou Frou

Such Great Heights - The Postal Service

Everybody's Changing - Keane

Canon - Pachelbel

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