Employment Law Matters

June 2007

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Employer's Attempt to Protect an Employee's Health Leads to ADA Violation

Employers must remember that the Americans with Disabilities Act (ADA) protects not only employees who have disabilities but those who are "regarded as" having disabilities. An employee may be "regarded as" disabled by their employer if the employer believes that the employee has an impairment substantially limiting one or more of life major activities – even if the employee is not actually disabled. A recent case illustrates the importance of an employer gathering accurate information and responding to a report of illness or injury without overreacting. (*Taylor v. USF-Red Star Express, Inc*.)

FACTS OF CASE:

Edwin Taylor (Plaintiff) was a truck driver / dockworker for USF-Red Star, Inc. In March 2001, Taylor was hospitalized following two seizures; he returned to work within a couple weeks after the seizures. Upon his return, Taylor reportedly told his manager that he was unable to drive a truck due to the seizures. There was a dispute among the parties whether Taylor told the employer that he had been diagnosed as an epileptic. The employer refused to allow Taylor to return to work until he could provide assurance from his doctor that he could safely operate a forklift.

Taylor was evaluated by multiple physicians / specialists. After 18 months, he was finally cleared to return to work without restrictions after a neurologist evaluated him and concluded he was at no greater risk of seizures than the general public. The employer then allowed Taylor to return to work.

Several months after returning to work, Taylor filed a lawsuit against his employer under the ADA alleging that Red Star discriminated against him by delaying his return to work for 18 months because the employer "regarded" him as disabled. Red Star argued that this delay was not due to it regarding Taylor as being disabled, but because his doctors failed to clear him to return. Taylor was awarded $158,796.34 in damages by the jury (for back pay, lost pension benefits and compensating damages). The employer appealed.

THE COURT'S RULING:

The Court of Appeals for the Third Circuit upheld the trial jury's determination that Red Star regarded Taylor as being disabled in violation of the ADA. The court focused on the testimony of company witnesses and internal company documents which could have been reasonably interpreted by a jury as proving that the company did not want to bring Taylor back because he might get injured (or injure someone else) having another seizure at work. In particular, the court pointed to the testimony of the company manager who testified that upon sending Taylor home, he told him:

> [D]riving a forklift seems to me places yourself and some other employees in just as much danger as driving a truck might. ….[U]ntil we get further information from your treating physician with them telling us it's a good idea for you to be doing this or medically possible for you to be doing this…. we [will] not be calling [you] for work.

Additionally, an internal e-mail discussing the employer's possible response to Taylor's union also reflected the perception that the employer regarded Taylor as disabled, to wit:

> We need to disclaim Local 107's claims that we have enough "floor" work to have kept Mr. Taylor supplied with work. This is a [sic] simply untrue. You can't work our dock in [Philadelphia] or anywhere without the need to operate a forklift being prevalent through 70 to 90 percent of your time…. Since just walking a dock requires careful awareness of everything around you, suppose a seizure would occur and the afflicted person falls into the path of a forklift. The person risks serious injury or death. Suppose the seizure prone person is walking into a trailer and is near the edge of the deck for other reasons. Suppose a seizure occurs and the person falls from the deck to the pavement… below?

Red Star argued unsuccessfully that even if there was evidence that it re-

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In This Issue …

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garded Taylor as disabled, Taylor should be denied recovery because he "caused and fostered" any mistaken impression that Red Star had about his condition. Specifically, Red Star contended that Taylor a) told his supervisor that he had been diagnosed with infantile epilepsy; b) provided Red Star with literature on accommodations of epilepsy; c) signed an EEOC discrimination charge in which he falsely stated he had been diagnosed with epilepsy, and Red Star had discriminated against him for that reason; d) wrote a letter to Red Star requesting accommodation for epilepsy on May 17, 2001; and e) testified he never believed he had epilepsy.

The Court observed that there was conflicting evidence on the issue and the jury resolved it in favor of Taylor. Accordingly, the Court deferred to the jury and found that Red Star's perceptions of Taylor's condition were not the result of Taylor's failure to dissuade Red Star from its mistaken belief that he was disabled.

LESSONS TO BE LEARNED:

Again, this case illustrates the importance of an employer not overreacting to perceived dangers in the workplace and the importance of accurately assessing the impact of an injury or illness upon an employee's ability to perform their job. Moreover, this case illustrates the importance of taking reasonable steps to attempt accommodations prior to concluding that an employee cannot perform.

This should also serve as a cautionary tale for employers with respect to internal email correspondence. Remember, once a lawsuit has been commenced, the plaintiff's attorney will demand to see all relevant emails; and they are legally entitled to see them. Deleting those records or failing to produce them, under those circumstances, would be unlawful and possibly criminal. Employers should make certain that their managers understand that email is not "confidential". It is evidence that can — and will — be used against employers in cases similar to this.

If you have any questions, regarding this case or its implications for your business, please contact us at 315-437-7600.

New Identity Theft Prevention Laws

New York State has joined a growing list of states which have recently enacted identity theft laws. At the end of last year, the New York State Legislature enacted the Disposal of Personal Records Law, the Anti-Phishing Act of 2006, and the Security Freeze Law. Each of these laws have implications for businesses in New York.

Disposal of Personal Records Law

The Disposal of Personal Records Law, *General Business Law (GBL) Section 399-h*, requires all private sector businesses to dispose of all records containing "personal identifying information" by certain specified methods. "Personal identifying information" includes: social security numbers, driver's license numbers, mother's maiden name, savings/checking account numbers, etc. In other words, any information of this type that a business owner possesses, ***regardless of whether it pertains to a customer or an employee, can only be disposed of by means permitted by this new law.***

Specifically, the law requires businesses to use one of the following methods: shred the record before the disposal of the record, destroy the personal identifying information contained in the record, modify the record to make the personal identifying information unreadable, or take actions consistent with commonly accepted industry practices that are reasonably designed to ensure that no unauthorized person will have access to the personal identifying information contained in the record. *GBL 399-h(2)(a-d).* The statute imposes a civil penalty of up to $5,000 for each violation.

Security Freeze Law

The Security Freeze Law, *GBL 380-t*, allows consumers, who are either identity theft victims or are concerned that they may be at risk of identity theft, to stop a (potential) identity thief's access to credit, loans, leases, goods and services by placing a "freeze" on their consumer credit report. A "freeze" is defined as "a notice placed in the consumer credit report of or relating to a consumer, … that prohibits the consumer credit reporting agency from releasing the consumer credit report, the contents of such report or the credit score of such consumer."

Once an individual requests a security freeze, it will remain in place until the consumer requests that it be removed. For employers who obtain background credit check reports on job applicants, such freezes could substantially delay the processing of those reports.

Anti-Phishing Act of 2006

The Anti-Phishing Act, *GBL 390-b*, prohibits the deceptive solicitation of personal information through electronic communications. The new law makes it unlawful for "any person, by means of a web page, electronic message, or other use of the internet to solicit, request or collect identifying information" by falsely claiming to be an established legitimate enterprise. *GBL 390-b(3).* Any person who violates the statute will be financially responsible for the actual damages a victim has suffered due to the violation, or $1,000 for each violation, whichever is greater.

If you have any questions about these laws, please contact our office at 315-437-7600.

NLRB to be More Aggressive with Employers Negotiating First Union Contract

When a company's employees vote to become unionized, the company is required by law to negotiate with the union in good faith over an initial collective bargaining agreement. A new directive from the National Labor Relations Board's (NLRB or "Board"), Office of General Counsel could substantially weaken an employer's bargaining position when negotiating that first union agreement.

In a memorandum issued on May 29, 2007, the NLRB General Counsel directed NLRB officers to take a more aggressive approach in seeking injunctions and other remedies in cases where the parties have not yet negotiated their first collective bargaining agreement. The memo states that:

> Our experience ... has led me to conclude that additional remedial measures should be undertaken to adequately protect employee free choice in initial bargaining cases. This memorandum sets forth additional remedies that should regularly be considered in cases where unfair labor practices occur during first contract bargaining.

The "Remedies"

While some may argue that these "remedies" are justified when an employer commits an "unfair labor practice", it is important to remember that it is the Board who interprets the employer's actions as being either fair or unfair. For example, it is an unfair labor practice for an employer to refuse to bargain with a duly certified union. But there is a fine line between an unlawful refusal to bargain and an employer engaging in lawful "hard bargaining". Under the current law, employers have a right to say no to union proposals. That is not a refusal to bargain. It is a legitimate and useful bargaining tactic. However, if the NLRB interprets the tactic as an unfair labor practice, these new "remedies" will be employed. The use of these remedies by the Board — as well as employers' concern about their possible imposition — further erodes an employer's bargaining position at the negotiating table; especially when addressing an initial union contract.

Specifically, the remedies recommended in the memo include such things as:

- **Requiring bargaining on a prescribed or compressed schedule**

This generally involves a NLRB order that the parties meet at reasonable consecutive intervals, for a minimum number of days per week, or for a minimum number of hours per week, etc.

- **Periodic reports on bargaining status**

According to the memo, the additional requirement of periodic reports on bargaining status would be utilized in cases where there is a concern that the employer will repeat unlawful conduct. For example, the NLRB would consider it an appropriate remedy where the employer has previously violated a Board order or settlement agreement.

- **A minimum six-month extension of the certification year**

Generally, the Board will not allow a union's majority status to be challenged within one year of certification in order to provide the union with "a reasonable period in which it can be given a fair chance to succeed." Under this new directive, the Board not only has the discretion to extend the certification year, it now sets a minimum extension of six months. According to the General Counsel:

> I believe six months is the minimum time necessary to reestablish a solid initial bargaining relationship that has been undermined by the effects of the illegal bargaining tactics. At the same time, extending the period by six months, as opposed to a full year, would adequately accommodate employees' right to seek to decertify a union they no longer want to represent them. Certification year extensions of six months generally should be particularly valuable, especially when combined with prescribed bargaining schedules that may require more bargaining in a shorter timeframe.

"Employee Free Choice Act" Implications

In our March 2007 newsletter, we reported on the implications and progress of a bill which would dramatically change the National Labor Relations Act (NLRA) with respect to both union organizing and bargaining over initial collective bargaining agreements. The bill entitled "The Employee Free Choice Act" (EFCA) is still expected to pass both Houses of Congress but be vetoed by the President. However, given the political pressure being asserted by the AFL-CIO and "Change to Win" to get this bill signed into law, even if President Bush vetoes the leg-

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islation, it will likely be re-introduced following the election of a new president in 2008.

As you may recall, the EFCA makes the following radical changes to the NLRA:

- **The union can be certified as the bargaining representative of a company's employees without a campaign or secret ballot vote**.

Specifically, the bill would allow unions to simply submit "authorization cards" from a majority of employees (within a proposed bargaining unit) to become certified. In other words, if a majority of the employees in the unit signed authorization cards, the union would automatically represent them without any campaign or vote.

- **Once the union is certified, the EFCA would require the employer and union to reach agreement on their first contract within 90 days.**

If the parties cannot reach agreement during that time, either party can request assistance from the Federal Mediation and Conciliation Service. If that assistance does not result in a contract within a month, the matter will be referred to binding arbitration. The results of the arbitration will create the parties' first collective bargaining and will be binding for a period of two years.

Under the current law, the content of the union contract is left entirely to the bargaining process. There is no obligation on the part of the employer to accept union proposals nor is there a requirement on the part of the union to accept employer proposals. All the law requires is that the parties bargain in good faith. The EFCA would result in arbitrated labor contracts which will most likely be much more favorable to unions.

The addition of these new, more aggressive remedies by the Board's General Counsel with respect to initial contracts, will only serve to further weaken an employer's bargaining position should the EFCA become law. For example, it is hard to imagine how a negotiating schedule could be much more compressed than 90 days. But an employer who attempts hard bargaining and gets an unfair labor practice charge may be forced to a ridiculous timetable for reaching agreement, or face having an arbitrator set the terms of its initial contract with the union.

If you have any questions, please feel free to contact our office at 315-437-7600.

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