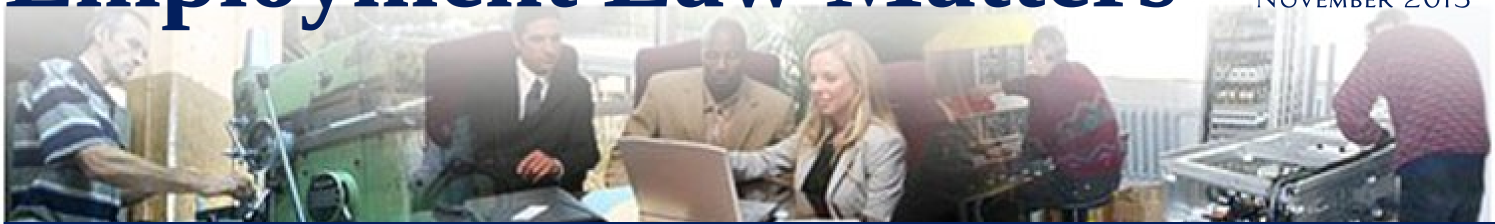
Employment Law Matters

November 2013



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

Hot Topics

Jury Awards $200,000+ to Employee Claiming ADA Discrimination Based on "Association" with Disabled Son: A Cautionary Tale for All Employers

A recent federal case should serve as a stark reminder to employers that the Americans with Disabilities Act (ADA) not only protects applicants/employees from discrimination based on their own disabilities but also from discrimination based on their "association" with others who have disabilities. See *Buffington v. PEC Management II, LLP, d/b/a Burger King*, Civil Action No. 11-229 (W.D. Pa, 10/18/13). The facts of the *Buffington* case are also instructive with respect to what **not** to do when terminating an individual's employment.

"Association" Discrimination under the ADA

The "association" provision of the ADA (i.e., 42 U.S.C. §12112(b)(4)) prohibits employment discrimination against a person, whether or not he/she has a disability, because of his/her known relationship or association with a person with a known disability. This means that an employer is prohibited from making adverse employment decisions based on unfounded concerns about the known disability of a family member or anyone else with whom the applicant/employee has a relationship or association.

Facts of the Case

PEC employed Theresa Buffington as a manager of one of its 34 Burger King Restaurants operated in Western Pennsylvania. Ms. Buffington, who was not herself disabled, had a 14-year-old son who had cancer. While working for PEC, Buffington's son was repeatedly in and out of remission. During his relapses, Ms. Buffington missed a substantial amount of work to care for him. Beyond attendance there were other performance issues which went either undocumented and/or not shared with Ms. Buffington. In fact, PEC's management consistently rated her job performance as average or above average on her performance evaluations and gave her raises throughout her tenure with the Company.

> *This case is a reminder that the ADA protects applicants/employees from discrimination because of their association with disabled individuals. It also reminds us that to successfully defend against discrimination claims, employers need to follow certain basic HR rules/protocols to protect themselves.*

However, one night in late 2010, Ms. Buffington was the only manager on duty when she ran out of a product called "funnel sticks" at her restaurant. She sent an off-duty crew member to obtain the product from another of PEC's restaurants using his own vehicle. This was against Company policy. When PEC's management learned of this breach, it terminated Ms. Buffington's employment.

PEC explained the termination as follows:

> Theresa Buffington was terminated for violating the policy of allowing a non-management employee drive for company business. Compounding the violation was the fact that the employee was a minor and had come to the restaurant as a guest using the drive-thru to purchase food. He was then asked to punch in and transport product. Ms. Buffington did not explore any other options that would have been acceptable and consistent with company policy. Ms. Buffington admitted she knew it was not the correct procedure stating that she knew

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she should have called … her District Manager.

During the termination meeting with Ms. Buffington, PEC's District Manager stated that the rule violation of sending the off-duty employee to run an errand using his own vehicle "was the straw that broke the camel's back…." There were also disputed allegations that he made other statements at the termination meeting such as: "We need someone whose head is there 100 percent;" "Now you can go spend all your time with your son;" and, "Please go spend some time with your son."

Buffington then sued PEC claiming discrimination on the basis of her association with her disabled son. PEC attempted to get the case dismissed stating that it had legitimate reasons for Ms. Buffington's termination, i.e., her violation of the Company's Use of Vehicle policy and other poor performance. The Court rejected these claims noting that the Vehicle policy was not enforced consistently with respect to other managers in the past and "[Buffington] was never given a poor performance review, received pay raises, was never disciplined, and was a long-term employee of PEC." The Court ruled that a jury could find that the reason for Ms. Buffington's termination was unlawful discrimination and not the reasons cited by PEC.

Jury Award

The case ultimately went to a jury who found in favor of Ms. Buffington and awarded her $115,000 in front pay, $70,000 in compensatory damages, and more than $48,000 in back pay. A potential award of attorneys' fees (of an undisclosed amount) is also pending.

HR-Related Lessons to be Learned

While the jury was clearly sympathetic to Ms. Buffington's troubles, there were a number of common errors that PEC's managers made in this case that may have affected its outcome. These include:

- ***Rating an employee as "average" when perhaps his/her performance is unacceptable.*** Too often managers are afraid to be totally honest in performance evaluations for fear of confrontation or for fear of appearing unkind especially in situations where the employee may be having difficulties at home. Managers need to learn to be unflinchingly honest in their evaluations. The evaluation is considered to be the "official word" of the employer with regard to an employee's performance. An employee with an "average" rating will be viewed by judges and juries as an employee who is meeting standards and performing at a satisfactory level. Terminations of such employees are viewed with skepticism and suspicion which can, in turn, lead to outcomes similar to *Buffington*.

- ***Too much conversation during termination meeting.*** Often even well-meaning statements in a termination meeting can be misinterpreted as having discriminatory intent behind them. In this case, there was a dispute about what was said (e.g., "We need someone whose head is there 100 percent") and what was meant by those statements. Consider instead terminating by letter as an alternative to the face-to-face meeting. You can choose your words carefully and avoid disputes about what may or may not have been said during the meeting. If you must have a face-to-face meeting with the employee, have it carefully scripted and keep good notes about what is said by all parties in attendance. The face-to-face meeting in *Buffington* led to questions about what PEC's true motivation was in deciding to terminate Ms. Buffington. Do not give judges or juries an opportunity to misinterpret your motivation when terminating a worker's employment.

- ***Lack of documentation.*** In the *Buffington* case, the District Manager is alleged to have said that Ms. Buffington's policy violation was the "final straw" but there were no other prior written warnings (at least none that were shared with Ms. Buffington) or poor performance evaluations to show that Ms. Buffington had been a "problem" employee. State and federal agencies that enforce the anti-discrimination laws (as well as courts and juries) believe that if an employer has an employee with performance deficiencies there will be documentation to prove it. From their perspective, it is suspicious if it does not exist. Document all performance problems and share them with the employee to, again, avoid any misinterpretations of your actions.

- ***Inconsistent enforcement of company policies.*** It was undisputed in the *Buffington* case that Ms. Buffington violated PEC's policy on vehicle use. But that was not the end of the inquiry for the Court or the jury. They wanted to know if the policy had been consistently enforced in the past. When they found that other managers had violated the policy and had not been terminated, they concluded that Ms. Buffington was singled out for unfair treatment. Remember that if you are selective with the enforcement of a policy, you cannot expect to convince a judge or jury that the policy violation is the true reason why you terminated a worker's employment.

If you have any questions with respect to the foregoing, please feel free to contact us.

Unemployment Insurance Reform

Unemployment Insurance Reforms Penalize Employers for Late Responses to Inquiries and May Effect the Next Severance Agreement You Negotiate

Due in part to a 2011 Congressional amendment to federal unemployment laws (which required States to change certain unemployment insurance [UI] practices to continue receiving federal funds) and in part to the fact that New York's Unemployment Insurance Fund is grossly underfunded, the New York legislature recently enacted a number of UI reforms designed to comply with the new federal guidelines and to save itself some money. Two of these reforms are of particular importance to New York employers: 1) new penalties for failing to respond in a timely and complete fashion to requests for information by the New York State Department of Labor's Unemployment Insurance Division (Division) when it receives a UI claim; and 2) severance pay will be taken into consideration and may delay a former employee's receipt of UI benefits. The former change took effect on October 1, 2013 and the latter will become effective on January 1, 2014.

Late Responses to UI Inquiries

The first New York reform penalizes employers who provide incomplete information on -- or who are late with their responses to -- the Division's request for information. This request is a standardized form which is automatically sent out to the individual's former employer when the Division receives a UI claim. The form requests information about -- among other things -- the employee's previous pay and the circumstances of his/her separation from employment. The form generally must be completed and returned to the Division within 10 days. The Division bases its initial determination about whether an applicant is entitled to benefits, at least in part, on the information received from employers on that form. If the individual is initially awarded benefits, the employer has the right to appeal the decision and have the case heard before an administrative law judge (ALJ). Prior to the recent reforms, employers received a credit for any UI benefits paid to a former employee when the employer wins its appeal (i.e., when the Division's ALJ determines that the individual is ineligible for benefits or otherwise received a mistaken overpayment of UI benefits).

As of October 1, 2013, if an employer is late in responding to the Division's form or provides incomplete information, the Division will no longer credit the employer's account for these overpayments. In other words, even if the Division's ALJ decides that the former employee is not entitled to benefits or has been otherwise overpaid, the Division will not credit the employer's account; instead, that money will be paid into the State's general Unemployment Insurance Fund.

The bottom line for employers is if you plan to contest a UI claim, you need to make a timely and complete response to the Division's initial request for information.

Severance Agreements Effected

The second important amendment changes how UI benefits will be paid to individuals who receive severance payments from their former employer. Beginning January 1, 2014, if the Division determines that an individual is entitled to UI benefits but learns that the individual is also receiving severance payments (within 30 days of his/her separation from employment), the former employee may not be permitted to collect UI benefits immediately. Specifically, if the severance amount is greater than the maximum UI benefit rate, the UI benefits will not begin until the severance pay has been exhausted.

In other words, if you plan to give severance to a departing employee in exchange for a waiver and release of all claims against your company, for example, you may need to negotiate further with the outgoing employee to account for this delay in receiving UI benefits.

If you have any questions or need assistance with respect to the foregoing, please feel free to contact us.

WEBINAR REMINDER

Join us on Thursday, November 21, 2013, from noon to 1:00 p.m., for

New York's New Wage Deduction Rules:
What You Don't Know Can Hurt You!

Before making a single deduction from an employee's paycheck, you **must** know the newly-drafted New York Department of Labor's rules for doing so. Employers who make deductions - ***even at an employee's request*** - without following these new rules can be held liable for labor law violations. This webinar will walk you through the new requirements.

For more information or to register, visit our firm's website at www.ferrarafirm.com.

Employment Law Matters is published by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Wage and Hour Issues

Unpaid Internships Under Fire: Know the Six-Factor Test!

Frequently, we receive questions from clients and friends regarding whether their organizations can utilize unpaid interns in their facilities. It often seems like a great way to learn more about a potential hire and to give them on-the-job training without incurring any risk. Unfortunately, recent lawsuits and Department of Labor actions have made it clear that most of the arrangements as described above are unlawful for private sector employers.

Over the past few years, a number of lawsuits have highlighted the need to ensure that when utilizing interns, employers must carefully review whether the individuals are truly interns or whether they are more properly classified as "employees" under the Fair Labor Standards Act (FLSA). If the latter is true, the individual is entitled compensation (generally, at least minimum wage for all hours worked) for the services performed.

These cases cite the United States Department of Labor, Wage and Hour Division's guidance on unpaid interns under the FLSA. (Please note that this guidance is directed to for-profit, private sector employers, because the Wage and Hour Division recognizes exceptions from the FLSA requirements for unpaid internships in the public sector and for non-profit charitable organizations.) With that in mind, the Division's guidelines remind private sector employers that all individuals whom they "employ" must be compensated. The FLSA's broad definition of "employ" is to "suffer or permit [an individual] to work." Interns who perform services under this broad definition are entitled to be paid for their services, unless all conditions of a six-part test are met. According to the Wage and Hour Division, an unpaid internship is only permissible under the FLSA if:

- The internship is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under the close supervision of existing staff;
- The employer that provides the internship derives no immediate advantage from the intern's activities (and on occasion, its operations might actually be impeded);
- The intern is not necessarily entitled to a job after the conclusion of the internship; <u>and</u>
- Both the employer and the intern understand that the intern will not be paid during the internship.

If <u>**all**</u> six of these factors are met, then there is no employer-employee relationship for purposes of the FLSA. If the nature of the relationship between the employer and the intern fails the test, then under the FLSA, the intern must be compensated for the work he or she performs. Again, this compensation in most cases must be at least the minimum wage.

Reviewing a particular employer-intern relationship for compliance with this test is a case-by-case analysis, and is a fact-specific inquiry. But the Wage and Hour Division describes an acceptable unpaid intern relationship as follows:

> When interns receive training that is a practical application of material taught to them in a classroom; the training primarily benefits the intern by allowing the intern to observe the practical application of the classroom instruction in a work environment; the duration of the internship is short; interns are assigned to "shadow" an employee; the interns perform little to no actual services for the employer; and the intern is not entitled to a position with the employer at the conclusion of the internship …. *See*, Wage and Hour Division opinion letter FLSA2006-12 (April 6, 2006).

Under such circumstances, there is a true internship and the employer is not required to compensate the individual for the time spent at the employer's facility.

If you have concerns about any aspect of any portion of the above-described test with respect to your interns, please contact our office for further guidance.