

Employee Terminations Law Bulletin

How Employers Face the Challenges of Litigation Associated with Dismissals, Restructuring, and Layoffs

in this issue:

Spotlight

How to manage a veteran's performance/terminations and avoid legal risks 1

Family and Medical Leave

Was former Wal-Mart employee's subjective belief that she was fired for exercising right to take protected leave enough? 3

Collective Bargaining Agreement

Employer says arbitrator made the wrong call by ordering reinstatement of employee who tested positive for drug use 3

Retaliation

Reinstated employee files retaliation lawsuit alleging she was fired initially for exercising Second Amendment rights 4

Public Employment

Was public employee lawfully terminated for using racial slurs in Facebook post following a presidential election? 5

National Origin Discrimination

Former supermarket employee claims he was the target of discrimination on basis of national origin and race 6

Points To Remember

7

Spotlight

How to manage a veteran's performance/terminations and avoid legal risks

by Laura Scott, Esq.

The Equal Employment Opportunity Commission (EEOC) recently revised three publications that provide insight into how to avoid discrimination claims when employing a veteran. The publications deal primarily with the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The January 25, 2021 edition of *HR Compliance Law Bulletin* covers how these federal laws apply to job applications and the hiring of veterans. Here, we'll cover how they relate to performance management, discipline, and terminations.

It's important to recognize that a disabled veteran may be entitled to a reasonable accommodation under the ADA during the course of employment. These may include:

- **equipment modifications such as assistive technology**—for example a screen reader for a blind veteran, a computer-monitor glare guard for someone with a traumatic brain injury, or a one-handed keyboard for a veteran who's missing an arm or hand;
- **physical alterations to the**

workplace, such as making adjustments to desk height for individuals in wheelchairs; **having a job coach who can work with a veteran who has memory issues** or issues with learning generally; and

- **having a job coach who can work with a veteran who has memory issues** or issues with learning generally; and
- **reassignment to a vacant role when the veteran's disability prevents the performance of the current job.**

OTHER ISSUES TO CONSIDER

A veteran may suffer from invisible injuries including post-traumatic stress disorder (PTSD). Thus, it's important to make sure that an employee is not singled out, harassed, or otherwise subjected to hostile conduct as a result.

In 2018, the EEOC settled a case against a Wyoming-based manufacturer that allegedly forced a veteran to quit after a supervisor ridiculed him for having PTSD. The supervisor called him derogatory names based on his mental health condition and make fun of the fact that he attended weekly therapy sessions to treat his condition, the EEOC asserted when the harassment became intolerable for this employee, he was forced to quit, the EEOC's lawsuit alleged.

"Employers must ensure that all kinds of workplaces are free from discrimination and harassment . . . unlawful harassment because of a mental health condition will not be

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POSTMASTER: Send address changes to, Employee Terminations Law Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.



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St. Paul, MN 55164-0526
1-800-229-2084

west.customerservice@thomsonreuters.com
ISSN 1063-097X

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tolerated,” said Elizabeth Cadle, the EEOC’s Phoenix District director, about this case, which settled for \$75,000.

Here’s another example of how the way an employer treats a veteran during the course of employment could lead to legal trouble for the organization. Let’s say a veteran presents a note to a manager indicating the veteran requires a service dog at work to assist with one or more disabilities. The company has a “no pets” policy and the employee’s manager angrily alerts the employee to this fact—saying, “No dogs, no exceptions. If you feel the need to have your animal friend at work I suggest you find another job.”

Such conduct would violate the ADA. And that’s similar to what happened in a case the EEOC filed against a trucking company, which allegedly retaliated against a Navy veteran with PTSD who used a service dog.

“The ADA requires employers to make reasonable accommodations to employees’ disabilities so long as this does not pose an undue hardship,” the EEOC explained in a press release announcing a settlement of \$47,500 on the worker’s claim.

The bottom line: Don’t outright refuse to make a reasonable accommodation for a disabled veteran. Once a request for accommodation has been made or you believe the employee may need one to perform essential job functions, engage in the interactive process to determine if a reasonable accommodation would place an undue hardship on the organization. If the answer to that question is no, an accommodation should be granted.

WHAT ABOUT IF THE VETERAN’S PERFORMANCE IS TERRIBLE?

If any employee is not meeting your legitimate performance expectations, be sure the reason for disciplining and/or terminating that worker is due to objective and reasonable business concerns. Remember: You cannot fire someone because they have a

protected trait, such as a disability. But, if the employer has granted the employee reasonable accommodation and the employee cannot perform the essential job functions, that is when a discussion about performance and the future of that worker’s position at the organization may be addressed.

Also, under USERRA, “if [a] veteran has a disability [that] incurred in, or [was] aggravated during, . . . service, the employer must make reasonable efforts to accommodate the disability and return the veteran to the position in which he or she would have been employed if the veteran had not performed military service,” the EEOC’s guidance stated. “If the veteran is not qualified for that position due to disability, USERRA requires the employer to make reasonable efforts to help qualify the veteran for a job of equivalent seniority, status, and pay, the duties of which he or she is qualified to perform or could become qualified to perform. This could include providing training or retraining for the position at no cost for the veteran.”

A CLOSER LOOK

A request for reasonable accommodation is the first step in an informal interactive process between the individual and the employer,” the EEOC noted, adding that a valuable resource employers can turn to is *Accommodating Service Members and Veterans with PTSD*, a publication found on the Job Accommodation Network’s website (askjan.org).

BEST PRACTICES

Visit eeoc.gov/newsroom/eeoc-issues-revised-publications-employment-veterans-disabilities-0 to access the EEOC’s three revised publications. And, if you have specific performance and discipline-, protected leave-, or other employment-related questions with respect to veterans in your workplace, contact a competent labor and employment in your jurisdiction.

Laura Scott is an HR compliance writer and attorney based in Massachusetts. Content in this newsletter is provided for informational

purposes and shall not be construed as legal advice of any kind.

Family and Medical Leave

Was former Wal-Mart employee's subjective belief that she was fired for exercising right to take protected leave enough?

Citation: *Hazelett v. Wal-Mart Stores, Inc.*, 829 Fed. Appx. 197, 2020 A.D. Cas. (BNA) 385216, 171 Lab. Cas. (CCH) P 36819 (9th Cir. 2020)

The Ninth U.S. Circuit has jurisdiction over Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

The Ninth U.S. Circuit Court of Appeals has ruled against a former Wal-Mart Stores Inc. (Wal-Mart) who was terminated for not calling into work after injuring her foot in the course and scope of employment.

The worker went out of work on temporary disability, but Wal-Mart offered her a temporary alternate duty (TAD) assignment.

The TAD form included an option for refusing the temporary duty assignment, which stated, "I REFUSE the Temporary Alternate Duty (TAD) position being offered to me and acknowledge that my benefits could be suspended or denied due to noncompliance."

Under the TAD, the worker would need to report to work in the wee hours of the morning, before public transportation ran. She couldn't drive due to her injury and concluded that taking a taxi to work wouldn't be an option, so she called out sick every day that she was absent.

Then, Wal-Mart terminated the worker on the grounds that she had racked up excessive absences.

In the worker's lawsuit, she asserted she was fired for exercising the right to request protected leave under the Family and Medical Leave Act

(FMLA). After the lower court granted Wal-Mart judgment without trial, the worker appealed to the Ninth U.S. Circuit Court of Appeals.

Reversed, the appeals court concluded. Wal-Mart "gave [the worker] a TAD offer that instructed that if she did not accept, she could lose her job and benefits," the court wrote. "A reasonable juror could conclude that [she] thought she had to sign the form . . . to keep her workers' compensation benefits despite the fact she was likely unable to commute to the offered light duty position," the court found. "Further, there w[e]re issues of material facts regarding whether [she had] failed to comply with the policy and procedures for requesting leave, and whether such policies were ambiguous. The attempts she made to comply created issues of material facts to be decided at trial," it added.

Collective Bargaining Agreement

Employer says arbitrator made the wrong call by ordering reinstatement of employee who tested positive for drug use

Citation: *Georgia-Pacific Consumer Operations, LLC v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, Local 9-0952*, 2020 WL 6821798 (11th Cir. 2020)

The Eleventh U.S. Circuit has jurisdiction over Alabama, Florida, and Georgia.

Georgia-Pacific Consumer Operations LLC (Georgia-Pacific) and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union Local 9-0952 (the union) were embroiled in a dispute over a dispute that went to arbitration. The union

represented employees at one of Georgia-Pacific's plants, including Roger Irvin who was fired for testing positive for drug use.

Under the applicable collective bargaining agreement (CBA) between the union and Georgia-Pacific, arbitration was permitted for issues like the one in this case involving an employee termination.

The arbitrator found that under the CBA's terms, Georgia-Pacific didn't have just cause to terminate Irvin. The failed drug test, the arbitrator concluded, was the result of an accident after Irvin woke up sick one morning and took his wife's cough syrup, which contained codeine.

As a result, the arbitrator ordered Georgia-Pacific to reinstate Irvin.

A lower court vacated the arbitrator's decision. The court found the arbitrator had exceeded the authority granted under the CBA. The court also refused to dismiss Irvin from the lawsuit. Then, the union and Irvin appealed.

Affirmed in part, the Eleventh U.S. Circuit Court of Appeals ruled. Specifically, the court affirmed with respect removing Irvin from the lawsuit, and it reversed the ruling that the arbitrator had exceeded the authority granted under the CBA and sent the case back for further proceedings.

A CLOSER LOOK

The lower court concluded that Georgia-Pacific's management had the discretion to fire any employee who had a second positive drug test, so it was within its right to terminate Irvin who had two positive test results. And because the contract stated that termination was acceptable for a positive test, that provision satisfied the just-cause standard for firing Irvin under the CBA.

But, the appeals court found, the "the language in the contract [wa]s . . . skeletal." For instance, "[t]he parties agreed to create a random drug-testing plan, listed 'elements' of that plan that would apply, and included among those elements '[d]ischarge for a positive test result.'" "That, though, is not a contract that

clearly and expressly gave management unfettered discretion to fire any employee with a positive result—it’s a contract that spelled out some general terms and punted on particulars until a fleshed-out policy could be crafted,” the court wrote.

The bottom line: The “portion of the contract that addressed instances where Georgia-Pacific ‘ha[d] reasonable cause to believe that an employee [wa]s under the influence of alcohol or a controlled substance’ expressly and specifically provided for when employees would be ‘subject to immediate discharge.’” the court noted. Also, “[o]ne provision within the ‘reasonable cause’ drug-testing plan even said that if an employee refuse[d] to take a test, ‘reasonable cause shall automatically exist to believe that the employee was under the influence and just cause shall exist for immediate discharge.’” These sections of the agreement “demonstrate[d] that the parties knew how to bargain for clear, specific language that synthesized” the article of the agreement pertaining to drug-testing plans with the article addressing the “just cause” standard.

PRACTICALLY SPEAKING

The contract’s wording left open room for interpretation. Georgia-Pacific and the union had agreed to settle disputes through arbitration. The arbitration, in turn, addressed the “interpretive questions,” which the parties had bargained for when forming the agreement. “[T]he ‘arbitrator’s construction holds, however good, bad, or ugly,’” the court wrote.

Retaliation

Reinstated employee files retaliation lawsuit alleging she was fired initially for exercising Second Amendment rights

Citation: *Calderone v. City of Chicago*, 979 F.3d 1156, 2020 I.E.R. Cas. (BNA) 430849 (7th Cir. 2020)

The Seventh U.S. Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

Keli Calderone, an off-duty police communications operator for the City of Chicago’s Office of Emergency Management and Communications (OEMC), was involved in a road-rage incident with another motorist on July 19, 2017. While idling at a red light, the other driver threw a drink into Calderone’s vehicle and pulled to the side of the road.

Calderone followed the individual and stopped right behind their vehicle. Calderone and the other driver then both exited their vehicles. After about a minute, the other driver returned to the vehicle and tried to drive away. Calderone stood in the way, at which point the other driver got back out of the vehicle and pushed Calderone several times.

The other driver grabbed Calderone by the hair and threw her to the ground. Then, Calderone, who had a license to carry, shot the other driver, who was severely injured as a result.

Calderone was arrested, and a grand jury indicted her for attempted murder. The city administratively charged her with violating its personnel rules.

At a bench trial, Calderone asserted she had shot the other driver in self-defense. A state court agreed and acquitted her of the criminal charges. After that, the city reinstated Calderone to her job with the OEMC.

Calderone filed suit against the city and her supervisors claiming they fired her in retaliation for exercising her Second Amendment rights. The city asked the court to dismiss the lawsuit, arguing Calderone’s conduct wasn’t within the scope of the activity protected under the Second Amendment.

The lower court granted the city’s request. It found that even if Calderone had a constitutional right to discharge her firearm in self-defense, qualified immunity shielded her supervisors from the lawsuit because caselaw had not clearly established that right.

Then, the Seventh U.S. Circuit Court of Appeals heard the case on

appeal. It affirmed the lower court’s ruling “on the sole ground that Calderone’s supervisors [we]re entitled to qualified immunity.”

A CLOSER LOOK

Calderone’s retaliation claim against the public employer supervisors could survive if they weren’t entitled to “qualified immunity.” Qualified immunity shielded a public official from civil liability if their conduct did not violate a “clearly established statutory or constitutional rights of which a reasonable person would have known.”

Here, the lower court had correctly found that the individual supervisors were immune from Calderone’s Second Amendment claim. Calderone contended she had the absolute right to carry and possess a gun for self-defense in Illinois. But, the supervisors “did not fire Calderone for possessing a firearm in self-defense; they ‘fired her for shooting [the victim] about the body.’”

So, Calderone had to show there was a “clearly established right to discharge a gun under these circumstances, not to simply possess a gun in public,” the court explained.

THE BOTTOM LINE

While Calderone asserted the absolute and clearly established right to carry and have a firearm for self-defense under the Constitution, the Supreme Court had cautioned in *Kisela v. Hughes* “to not identify a constitutional right at too high a level of generality.” “Otherwise, plaintiffs could ‘convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights,’” the court noted, citing another one of the Court’s rulings—in *Anderson v. Creighton*.

“At the proper level of generality, just about the only thing that is clear about this case is that existing precedent did not establish whether Calderone’s shooting of [the other driver] was constitutionally protected. The individual defendants [the supervisors] are immune from suit on the

Second Amendment claim,” the court found.

Also, Calderone didn’t identify any other employees whose rights under the Second Amendment were harmed as a result of the city’s personnel rules. “Without that evidence, she claims only that the application of the [c]ity’s personnel rules resulted in her termination from municipal employment in violation of the Second Amendment. The single constitutional violation Calderone allegedly experienced cannot establish . . . liability* in view of the [c]ity’s facially constitutional personnel rules,” the court found.

CASE NOTE

The court referenced “*Monell* liability,” that is liability established in the Supreme Court’s 1971 ruling in *Monell v. Department of Social Services of New York*. In *Monell*, the Court ruled that a municipality could be held liable for violating Section 1983 (the means by which a party may seek to enforce civil rights in existence) if the party could show the deprivation of a federal right occurred as a result of the municipality’s policy.

Practically Speaking:

The lower court had “properly dismissed this claim on the grounds of qualified immunity” and the absence of *Monell* liability,” the Seventh Circuit explained.

The cases cited are *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611, 17 Fair Empl. Prac. Cas. (BNA) 873, 16 Empl. Prac. Dec. (CCH) P 8345 (1978); and *Kisela v. Hughes*, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) (disapproved of by, *O’Farrell v. Board of Commissioners for County of Bernalillo*, 455 F. Supp. 3d 1172 (D.N.M. 2020)); and *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Public Employment

Was public employee lawfully terminated for using racial slurs in Facebook post following a presidential election?

Citation: *Bennett v. Metropolitan Government of Nashville & Davidson County, Tennessee*, 977 F.3d 530, 2020 I.E.R. Cas. (BNA) 385718, 105 Empl. Prac. Dec. (CCH) P 46616 (6th Cir. 2020)

The Sixth U.S. Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

Danyelle Bennett was fired from her job with the Metropolitan Government of Nashville & Davidson County (Metropolitan) for a Facebook comment she made about the 2016 presidential election. Bennett filed suit against Metropolitan, alleging she was terminated for exercising her right to engage in free speech under the First Amendment.

Several employees and a member of the public complained to leadership in Bennett’s division and the Mayor’s Office. The division for which Bennett worked found that she had violated three Civil Service Rules. She was placed on paid administrative leave and following a due process hearing, she was terminated.

That’s when Bennett filed suit against Metropolitan alleging she was the victim of First Amendment retaliation. A jury trial ensued and judgment in Bennett’s favor was issued.

On appeal, Metropolitan argued that the lower court erred by giving Bennett’s speech more protection than what it was entitled to under the law. Also, in its view, the court erroneously found that the disruption her speech caused to the division for which she worked was minimal.

The Sixth U.S. Circuit Court of Appeals reversed the lower court’s ruling. In its view, the lower court erred in its analysis, so the case had to be sent back for further proceedings.

A CLOSER LOOK

The court ruled:

- Bennett’s speech on the social-networking site wasn’t included in the “highest rung of speech” protected under the First Amendment; and
- several “*Pickering* balancing test” factors weighed in favor of Metropolitan.

A CLOSER LOOK AT THE PICKERING BALANCING TEST

The court applied the “*Pickering* balancing test” to determine if Bennett was entitled to First Amendment protection for her speech. To establish a First Amendment retaliation claim, Bennett, as a public employee, had to show that she had “engaged in constitutionally protected speech or conduct,” had been subjected to an adverse action that would deter someone “of ordinary firmness from continuing to engage in that conduct,” and there was “a causal connection between [the] elements . . . that is, the adverse action was motivated at least in part by his protected conduct.”

“To determine whether the discharge of a public employee violate[d] the First Amendment,” the court applied a two-step process outlined in the Supreme Court’s ruling in *Connick v. Myers*.

This involved analyzing “whether the statement in question constitute[d] speech on a matter of public concern,” and if it did, then the court would apply “the *Pickering* balancing test to determine whether [Bennett’s] ‘interest in commenting upon matters of public concern . . . outweigh[ed] the interest of [Metropolitan], as an employer, in promoting the efficiency of the public services it performs through its employees.’ ”

“To determine whether the discharge of a public employee violate[d] the First Amendment,” the court applied a two-step process outlined in the Supreme Court’s ruling in *Connick v. Myers*.

The court found that Bennett’s speech, while protected, wasn’t the

highest level of protected speech, which was what the lower court had concluded. The bottom line: Metropolitan had an “interest in maintaining an effective workplace with employee harmony that serve[d] the public efficiently,” and this “outweigh[ed] Bennett’s interest in incidentally using racially offensive language in a Facebook comment.”

Case Note:

Bennett’s social media post at issue in this case included derogatory terms referring to individuals of various ethnicities.

The cases cited are Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708, 1 I.E.R. Cas. (BNA) 178 (1983); and Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811, 1 I.E.R. Cas. (BNA) 8 (1968).

National Origin Discrimination

Former supermarket employee claims he was the target of discrimination on basis of national origin and race

Citation: *Tamba v. Publix Super Markets, Inc.*, 2020 Fair Empl. Prac. Cas. (BNA) 451945, 2020 WL 6816964 (11th Cir. 2020)

The Eleventh U.S. Circuit has jurisdiction over Alabama, Florida, and Georgia.

Pape Tamba appealed a lower court’s decision to grant his former employer, Publix Super Markets Inc. (Publix) judgment without a trial on a claim that it discriminated against him on the basis of his national origin and race, in violation of Title VII of the Civil Rights Act of 1964 (Title VII). On appeal, the Eleventh U.S. Circuit Court of Appeals affirmed.

WHAT LED TO THE LAWSUIT

Tamba, who originally was from

Senegal, worked as a forklift operator for a Publix store in Lakeland, Florida. In 2016, he applied to be a truck driver/truck driver trainee at Publix’s warehouse and distribution center in McCalla, Alabama.

These positions were grouped together on the application, but the trainee and driver roles had different duties, responsibilities, and compensation, and Publix accepted Tamba’s application. He signed a job offer acceptance commitment form, which stated he was hired as a truck driver (not a trainee) even though Publix intended to hire him as a trainee.

Tamba also signed a relocation package repayment agreement, which identified Tamba as a trainee and under which Publix would pay his relocation costs. But, if he was terminated for any reason within one year, he would have to reimburse the relocation costs.

After moving to Alabama, Tamba claimed he experienced race and national origin discrimination at work. For instance, coworkers laughed at his accent and asked him where he was from. He also claimed the dispatch superintendent, asked him how he became a truck driver when “you have to be at least [10] years in [the] Publix warehouse” to become a truck driver.

Around this time, Publix learned that Tamba was erroneously classified and compensated as a truck driver even though Tamba had only trained, visited store locations, and performed spotter duties during his McCalla tenure. At that point, Publix reduced Tamba’s compensation to a truck driver trainee wage, and he complained to HR about the reduced wages and the discrimination to which he allegedly had been subjected.

Then, on June 8, 2017, Tamba caused an accident at the McCalla facility when he backed his tractor trailer into a return center dock. He shut off the engine, left the vehicle, and went into the return center without setting the parking brake.

The vehicle rolled forward and hit another trailer, which caused damage to both trailers. Moments later, Tamba

returned and noticed the damage his negligence had caused. He backed up his trailer into the loading dock and drove it to another location at the facility. Then, about 40 minutes later he drove his tractor back, realigned the damaged trailer, and backed it into place, which was all captured on surveillance footage.

Tamba reported the incident but told conflicting stories about what might have happened. Pursuant to Publix’s employee handbook it did not accept dishonesty of any kind. And, dishonesty could be grounds for termination, which is precisely the reason Publix gave for firing Tamba.

WHY TAMBA’S TITLE VII CLAIMS FAILED

Tamba didn’t assert valid claims of discrimination because he couldn’t “identify similarly situated comparators.” The evidence only showed that Tamba was terminated for dishonesty, not for damaging property, and he couldn’t point to anyone else who had been disciplined less severely for violating the dishonesty provision in the employee handbook.

Without any valid comparators, Tamba couldn’t establish valid discrimination claims under Title VII, which required a showing that the employee was a protected class member who was subjected to an adverse employment action and treated less favorably than similarly situated employees outside the protected class.

And, even if Tamba had met his “prima facie” burden, he couldn’t show that Publix’s reason for his discharge was a pretext for unlawful discrimination. “Tamba failed to submit any evidence that he ‘did not violate’ Publix’s dishonesty rule or that ‘other employees outside [his] protected class . . . engaged in similar acts’ but ‘were not similarly treated.’”

BREACH OF CONTRACT COUNTERCLAIM

Publix filed a counterclaim against Tamba asserting he breached the relocation agreement by not repaying the

\$15,000 in costs Publix incurred when he moved to Alabama. The court agreed with Publix, finding there weren't any questions of material fact at issue "as to parties' obligations under the [r]elocation [a]greement and [c]ommitment [f]orm," the court ruled.

The bottom line: Publix had paid relocation benefits to Tamba, he was fired within a year of relocating, he failed to reimburse Publix per the agreement, so he breached the contract and Publix was entitled to judgment without a trial on this counterclaim.

Practically Speaking:

Even if an employee could assert a valid discrimination claim under Title VII, unless that employee could show that the seemingly legitimate reason the employer gave for the termination was a pretext for unlawful discrimination under that federal law, the claim would fail.

Points To Remember

When failing to hire a past employee could lead to legal trouble

A behavioral healthcare provider will pay \$115,000 to settle a disability discrimination claim the Equal Employment Opportunity Commission (EEOC) filed alleging it failed to rehire an employee based on a previous workplace injury. According to the federal agency, Orlando-based Aspire Health Partners (Aspire) overlooked an employee who had more than 20 years' worth of experience with the company for rehire after it terminated her when she had exhausted medical leave due to a workplace injury. "The employee's doctor cleared her to work without restrictions shortly [after her termination], and, in August 2018, the employee applied for a position within Aspire's Village House program," which she previously had managed, the EEOC explained. "Hours before her inter-

view, the former employee was notified that she was ineligible for rehire at Aspire due to medical records in her prior workers' compensation file."

"Such alleged conduct violates the Americans with Disabilities Act (ADA)," the EEOC stated. "We encourage other employers to follow Aspire's lead and review their disability policies and practices to ensure that workers are not denied opportunities based on inaccurate conclusions about their physical abilities," Evangeline Hawthorne, director of the EEOC's Tampa field office.

Source: www.eeoc.gov

Is that employee who was fired for violating the drug policy entitled to unemployment compensation benefits?

The answer may be yes, according to a recent ruling by a Pennsylvania appeals court. The case involved an employee for Pittsburgh's Water and Sewer Authority (WSA) who was fired after the results of a random drug screening yielded a positive test result for marijuana. The employee produced a medical marijuana card, but the WSA concluded termination was the right call based on its drug and alcohol use policy.

The WSA's policy barred employees from using illegal drugs off duty, which included marijuana, which remains illegal under federal law.

After an unemployment compensation referee denied the employee's claim for benefits, the employee appealed that decision to the unemployment compensation board (UCB), which reversed that decision.

Then, the WSA appealed that determination in court. The court found that the UCB's decision awarding the employee unemployment compensation benefits should stand.

The employee had "provided the MRO [medical review officer] with his valid patient identification card to explain his use of prescribed medical marijuana," the court wrote. Therefore, the court could not "that the MRO's reporting of [the] drug test as positive was 'in accordance with employer's substance abuse policy.'"

That's because here the WSA's drug policy "expressly permit[ted] 'individuals [to] use . . . prescription drugs while at work strictly in accordance with . . . a physician's prescription[.]'" The drug policy also defined "legal drugs" as "prescription medications . . . that have been legally obtained."

In addition, the drug policy stated that "[a]ll individuals whose test results are confirmed to be positive . . . will be given the opportunity to explain to the MRO any medical reasons that would account for the laboratory findings" with the MRO considering the employee's explanation and whether that explanation was acceptable to the MRO.

Here the WSA's drug policy "expressly permit[ted] 'individuals [to] use . . . prescription drugs while at work strictly in accordance with . . . a physician's prescription[.]'"

The bottom line: This employee had a valid medical marijuana card at the time the drug test was performed and the results had been reported. This case illustrates the importance of understanding precisely what your drug and alcohol use policy applies to a situation where an employee tests positive and possesses a valid medical marijuana card. Consider, too, whether medical marijuana is legal under the applicable state law.

In Pennsylvania where this case took place, while medical marijuana is legal, recreational pot use currently is not, according to the National Conference of State Legislatures. For more on specific states' medical and recreational (also referred to as "adult use") rules, visit ncsl.org/research/health/state-medical-marijuana-laws.aspx.

The case cited is Pittsburgh Water and Sewer Authority v. Unemployment Compensation Board of Review, 2020 WL 6750475 (Pa. Commw. Ct. 2020).

Are more religious discrimination lawsuits on the horizon?

That's likely given that the Equal Employment Opportunity Commission is in the process of revising its

enforcement guidance on religious discrimination, which is barred under Title VII of the Civil Rights Act of 1964.

And, here's a recently filed lawsuit as the case in point: A woman has filed suit in New Jersey alleging she was terminated for refusing to wear a Pride T-shirt her employer, Starbucks, issued, the Atlantic Journal Constitution (AJC) reported recently. The lawsuit, which alleges that the T-shirt's message conflicted with the employee's religious beliefs, seeks back pay plus interest, as well as compensation for emotional distress and punitive damages against the multinational coffee house and roastery chain.

According to the EEOC, "Unless it would be an undue hardship on the employer's operation of its business, an employer must reasonably accommodate an employee's religious beliefs or practices." Also, "[a]n accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work," the EEOC explains on its website at eoc.gov/religious-discrimination.

In November 2020, EEOC General Counsel invited stakeholders to discuss how the federal commission could improve its development and litigation of religious discrimination claims. We'll keep you posted on further religious discrimination-related developments.

Sources: ajc.com; eoc.gov

Firing following ADA accommodation request likely to spark EEOC scrutiny

Just ask the Sierra Academy of Aeronautics, based in Atwater, Cali-

fornia, and Xing Kong Aviation Service LLC (collectively, the employer), which will settle claims it engaged in disability discrimination and retaliation, in violation of the Americans with Disabilities Act (ADA) against an employee who asked for medical leave due to a disability. Instead of engaging in the interactive process, the employer fired the employee, the Equal Employment Opportunity Commission asserted in its lawsuit.

The interactive process was required by law and the act of terminating this employee amounted to retaliation, the EEOC asserted. "Such alleged conduct violates the . . . ADA, which makes it illegal for an employer to discriminate against an employee due to a disability or retaliate against her for complaining about it," the EEOC stated in a press release.

"We continue to see employers failing to engage in the interactive process required by federal law," said Anna Park, regional attorney for the EEOC's Los Angeles District. "We encourage training on how to identify requests for accommodation and how to meet obligations under the ADA," Park added.

Keep in mind, too, that retaliation continues to be "a pervasive issue in American workplaces. Employees with disabilities cannot be retaliated against for simply needing accommodations to help them perform their work duties," Melissa Barrios, director of the EEOC's Fresno Local Office, said.

Source: eoc.gov

Recognize staffing agency and employer liability potential when discrimination and retaliation are alleged

Johnson Controls Inc. (JCI) and

ManpowerGroup US Inc. (Manpower) will pay \$40,000 to settle a sex discrimination and retaliation lawsuit the Equal Employment Opportunity Commission filed alleging violations of Title VII of the Civil Rights Act of 1964.

The EEOC contended the international manufacturer and staffing agency unlawfully removed Victoria Stafford from a position at JCI's Norman, Oklahoma facility. It alleged that Stafford reported to an onsite Manpower supervisor that a JCI employee was sexually harassing her but nothing was done to resolve her complaint.

After Stafford got into a confrontation with the alleged harasser, another employee came to Stafford's defense and all three of the employees were suspended. A week later, JCI terminated Stafford.

Subsequently, Manpower placed Stafford in other temporary assignments, but those jobs paid less. Also, the EEOC stated, the work environment and firing from JCI left Stafford in emotional distress.

"Such alleged conduct violates Title VII . . . , which prohibits employers from discriminating against an employee based on his or her sex and from retaliating against an employee who complains of sexual harassment," the EEOC stated in a press release.

"Temporary workers are entitled to the same protections against sexual harassment as permanent employees," said Andrea Baran, the EEOC's regional attorney in St. Louis.

"This resolution reflects the EEOC's commitment to protecting all workers from unlawful harassment, whether they are permanent employees or employed through a staffing agency," added Jack Vasquez, Jr., the EEOC's St. Louis District director.

Source: eoc.gov