



IT'S THE LAW



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**Federal Court Gives
Employers a Road Map on How
to Defeat a Sexual Harassment Complaint**

In Jackson v. County of Racine, the 7th Circuit Court of Appeals ruled that the County was not liable for the male supervisor's sexual harassment of female employees. The Court found that the County exercised reasonable care to prevent the alleged acts and promptly corrected the harassing behavior.

The County also had a comprehensive anti-harassment policy which was posted in every department. The County's Human Resource Department always responded promptly to every complaint and even attempted to work with

complainants who wished not to lodge formal complaints.

Once the County was notified of the harassment, it made an immediately investigation which resulted in discipline of the supervisor in the form of a demotion. The Court also noted that the Complainant waited four (4) months before complaining to the HR Manager even though the Complainant alleged harassing behavior on a daily basis.

From this case, every employer should have: 1) a written anti-harassment policy which is user friendly; 2) the harassment policy should be posted in conspicuous places, or in the alternative, distributed to all employees with their pay checks at least twice a year; 3) Once a harassment claim is lodged, the investigation should commence immediately; and 4) take disciplinary action when appropriate.

Traveling Contractor's Clauses - Beware!

In a case recently decided by a federal judge in Michigan, an employer was ordered to pay over \$140,000.00 in contributions and dues for work performed outside the geographic jurisdiction of the local Bricklayer's union to which it was signatory. The employer was ordered to make payment to a "foreign" Bricklayer's Union to which it was not signatory pursuant to a provision in the collective bargaining agreement ("CBA")

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which contained a “traveling contractor’s clause” and provided in pertinent part:

"When the employer has any work specified in Article I of this Agreement to be performed outside of the area covered by this Agreement and within the area covered by a standard collective bargaining agreement of another affiliate of the Bricklayers, the employer agrees to abide by the full terms and conditions of the standard agreement in effect in the jobsite area with respect to all employees, wherever hired, who perform such work."

The geographic jurisdiction of the Bricklayer's CBA encompassed nine counties within the state of Michigan. The Union and the Funds argued that the language of the CBA clearly and unambiguously required employers to comply with the terms and conditions of the standard Bricklayers' agreement entered into by all Union employers working in that jurisdiction when employers are working outside the home jurisdiction of Michigan. The Bricklayers further argued that the traveling contractor's clause required employers to comply with the “standard” Bricklayers agreement in the "foreign" jurisdiction and that there was no need for employers to sign the CBA in that "foreign" jurisdiction.

The employer argued that the traveling contractor's clause only binds it to the collective bargaining agreement which it actually signed with any Bricklayer's union in the foreign jurisdiction. The employer further argued that the Bricklayer's union's argument was a strange and overly broad interpretation which obligates an employer to make certain contributions to the pension and welfare funds that will benefit members of the Bricklayer's Funds but not its employees whenever they work on a job in a "foreign" jurisdiction and regardless of whether members of the Bricklayer's union actually perform work on the job.

In deciding this issue, the Michigan Federal Court examined the language of the CBA which refers to “a standard collective bargaining agreement

of another affiliate of the Bricklayers” in a foreign jurisdiction and requires the employer “to abide by the full terms and conditions of this standard agreement in effect in the jobsite area.” In ruling that the language in the CBA clearly refers to the collective bargaining agreement generally and customarily entered into by employers and a foreign Bricklayer's affiliate, whether or not the employer itself was signatory to that foreign agreement, the Court reasoned that the United States Supreme Court, Webster's and Black's Law Dictionary defines “standard” as established by authority, custom, or general consent.

In siding with the Union and its Funds, the Michigan Court rejected the employer's additional argument that the Union's interpretation of the clause would lead to anomalous results that could not have been contemplated by the parties. In so doing, the Court indicated that the employer did not demonstrate that the plain meaning of the traveling contractor's clause would be fundamentally unworkable or somehow lead to an absurd result.

When working outside of the geographic jurisdiction covered under a local union's CBA, an employer should determine its obligations to any "foreign" local unions before entering into a contract for such work in order to properly assess any obligations to such union and its pension and welfare funds in order to make sure that the work will not only be profitable but also that proper contributions will be made as required under the CBA.

ADA Will Not Allow Exclusion of Entire Class Such as Hearing Impaired

In October 2006, the Ninth Circuit affirmed the decision of the United States District Court for the Northern District of California in Bates v. United Parcel Service, where the District Court ruled against UPS when UPS excluded hearing impaired drivers from employment. The case stemmed from the UPS requirements for its drivers. All drivers must pass a DOT physical, which included a hearing standard. Even though the DOT physical/hearing standard applies only to drivers of vehicles over 10,000 lb. gross vehicle weight, UPS applied the standard to all drivers even though UPS' vehicles weigh less than the 10,000 lb. limit. As a result of the requirement to pass a DOT physical, UPS was excluding all hearing impaired employees from driving positions.

The Court held that UPS' use of the hearing standard is discrimination unless the standard is shown to be job-related for the position in question and consistent with business necessity when a safety-related qualification standard, such as hearing impairment, excludes a class of disabled individuals is at issue. The employer can utilize the business necessity defense if it can show that either 1) substantially all excluded individuals with disabilities present a higher risk than individuals not excluded, or 2) there is no practical criteria for determining which excluded disabled individuals present a heightened risk and which do not.

UPS attempted to show that a hearing driver would pose less of a safety risk than a driver with identical characteristics/training but with impaired hearing. However, the District Court noted that even if UPS could make such a showing, it would not establish that all or substantially all deaf drivers pose more of a safety risk than drivers without impaired hearing. UPS instead would have to establish that substantially all individual deaf drivers present a risk greater than the risk per driver already accepted by UPS. UPS' general analysis that a hearing driver was safer did not address whether there are some

hearing impaired drivers who are as safe or safer than some or all of UPS' employed drivers. UPS' general position is in violation of the ADA because there could be an individual deaf driver (who is no more dangerous than a current UPS hearing driver) denied a position solely due to his or her hearing impairment. The Court also noted that the employer's risk avoidance must be considered. In other words, UPS may accept a certain level of risk in hiring some drivers with past accidents, and if a hearing impaired driver, with no past accidents, has the same chance of getting into an accident as a hearing driver with past accidents, UPS had already shown it will accept that risk and cannot justify the exclusion of a hearing impaired driver.

Ultimately, an employer should not exclude an entire class of disabled individuals. Under the ADA, the employer must make an individualized determination that the disabled individuals cannot safely perform the job at issue.

FMLA Victory for Employer - Bonus Prorations May Not Violate the FMLA

Congress enacted the FMLA in 1993 to accommodate "the important societal interest in assisting families, by establishing a minimum labor standard for leave. To accomplish these goals, the FMLA grants an "eligible employee" the right to 12 work-weeks of leave over any 12-month period because of, among other things, "a serious health condition that makes the employee unable to perform the functions" of the employee's position. After a period of qualified leave, an employee is entitled to reinstatement to his former position or an equivalent one with "equivalent employment benefits, pay and other terms and conditions of employment." Moreover, the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which leave commenced. This

right is limited, however, by the provision that the restored employee shall not be entitled to “the accrual of any seniority or employment benefits during any period of leave or any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

To protect these rights, the FMLA declares it unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided in the FMLA.. Such a claim is typically referred to as an “interference” claim. A Federal Court was recently presented with a particular interference claim never before decided in any Federal Court - whether an employer illegally interfered with an employee’s rights when it awarded him a production bonus payment prorated based on the basis of time he was absent due to FMLA leave.

The facts of the case are as follows. The plaintiff employee had taken FMLA leave from December 7, 2000 until February 4, 2001. Under the defendant employer's written policy, an employee is granted a full annual bonus upon reaching 1,950 hours of service annually. The employer's written policy provided an employee who is on disability leave and shall not be credited with hours of service during the leave of absence. However, the policy provided hours spent performing duties, vacation, holidays, sick time, bereavement leave, court duty leave and military leave counted towards hours of service. As a result of taking FMLA leave, the employee failed to reach 1,950 hours of service for the 2001 calendar year, and his bonus was prorated for the amount of hours he was deficient. The employee claimed the employer "interfered" with his FMLA rights by prorating the bonus. The District Court concluded the proration of a production bonus was allowed and the employer, therefore, did not interfere with the employees' FMLA rights.

On appeal, the Court analyzed the Department of Labor (“DOL”) regulations and opinion letters pertaining to the FMLA. The DOL

regulations distinguish between the "absence of occurrence" bonuses that reward employees for perfect safety records or perfect attendance and "production bonuses" which reward productivity and performance. The regulations provide that employees who satisfy the requirements for an "absence of occurrence" bonus prior to taking FMLA leave cannot be penalized because of the leave. As for “production bonuses,”the Department of Labor has opined that employees who take FMLA leave during a period in which the bonus is calculated based on production would receive a lesser bonus than employees who were not absent if the bonus is calculated solely in the basis of hours worked.

After reviewing this information, the Court of Appeals ruled that the employer can prorate production bonuses paid to an employee who took FMLA leave based on hours worked or by the amount of lost production attributable to the FMLA leave. The Court reasoned since employees on FMLA leave cannot have any benefits that accrue prior to the leave and are not entitled to accrue benefits while on leave other than those to which he would have been entitled had he not taken leave, the employer can prorate bonuses that are tied to an hour's rate production requirement. Accordingly, the proration bonus was unlawful.

The plaintiff employee also argued that even his employer’s written policy provided for a “production bonus” as opposed to an “absence of occurrence bonus”, the bonus proration interfered with his FMLA right because the written policy did not require a proration of bonuses of employees who took paid forms of leave such as sick leave or vacation time. The Court of Appeals dismissed this argument and concluded that the FMLA did not require equal treatment of those who take unpaid leave with those who took paid

leave. Accordingly, the Court of Appeals upheld the District Court's ruling.

This decision is a victory for employers and provides persuasive authority for the Northern District of Illinois and the Seventh Circuit Court of Appeals which preside over Illinois but have yet to address this issue. Nevertheless, employers will be well advised to consult legal counsel to review its existing written policies to determine the measure and criteria of employee bonuses and whether such bonuses may be prorated without "interfering" with an employee's FMLA rights.

Fired Employee On FMLA Leave Fails to Prove FMLA Violation

Our Federal Appellate Court in Illinois recently entered summary judgment in favor of an employer who had terminated an employee that was on FMLA leave. The employee worked as an assembly line supervisor and was prescribed medication for a lower back condition he had. The employee had side effects which included drowsiness and at times confusion and even delirium. Shortly after taking medications prescribed by his doctor, the employee met with his human resource administrator to inform her that he had ruptured a disc in his back and requested paperwork to complete for a possible FMLA leave. Approximately one week later, one of the employee's co-workers noticed that the employee looked impaired and that his speech was slurred and he looked confused and drowsy. Company personnel did not administer a drug test as required by standard company policy, but requested the employee to leave work which he promptly did do. Later in the afternoon of that same day, the employee's doctor put him on a one-week medical leave. Two days later, the Company approved the employee's one-week leave. Approximately five days later, the employee's doctor put him on an additional two-week leave. The employer's human resource department notified the employee that his

FMLA leave would need to be extended by two weeks. Around the same time and unbeknownst to the employee, the employee's immediate supervisor and company's general manager were conferring to discuss terminating the employee for his violation of the company's drug policy and ongoing performance problems.

Approximately one week after the Company approved the employee's one-week leave, the Company's general manager terminated the employee. The general manager was the Company decision maker. The termination notice stated that the Company had determined that the employee failed to comply with company drug and alcohol policy and the Code of Ethics. By itself, this offense is enough to terminate employment in light of the employee's previous poor performance, decision making and his failure to meet the performance improvement expectation as mutually agreed.

The employee filed suit and argued the Company retaliated and discriminated against him for taking FMLA leave. However, the Trial Court found that there was no need to go to trial on the employee's claim and entered summary judgment in favor of the Company and against the employee. On appeal, the Appellate Court affirmed the Trial Court's ruling but on a different ground. The Appellate Court examined the theory of the employee's case and declared that in order to establish his claim of retaliation or discrimination under FMLA (under the indirect method) he must show that after taking leave, the Company treated him less favorably than other similarly situated employees who did not take FMLA leave, even though he was performing his job in a satisfactory manner.

The Company argued that the employee could not meet his minimum requirement of showing that similarly situated employees who

did not take FMLA leave were treated more favorably than him. The employee's evidence under the similarly situated requirement was thin and consisted of a spreadsheet showing that 85 of the Company's employees were disciplined for violating Company drug use policy, but only three non-probationary (just like the employee at issue) were discharged for first-time violations of the policy over the course of ten years. Also, the Company had additional grounds which independently testified discharging the three non-probationary employees for which, for instance, included manipulation of urine samples. The Appellate Court said that although the evidence shows that the employee was likely punished with greater severity than virtually any other first-time violator of the Company drug and alcohol policy, this does not satisfy the Court's requirement for establishing a similarly situated comparison group. Specifically, the Appellate Court declared that the employee failed to show that at least one of the other three non-probationary employees (the comparators) were comparable to him and did not take FMLA leave.

The Court examined the evidence presented by the employee and concluded that there was simply not enough circumstantial evidence from which a reasonable jury could conclude the employee was fired because he took FMLA leave. The employee failed to present any evidence that would allow a meaningful comparison between the circumstances of his discharge and those surrounding the discipline meted out to his would-be comparators. For instance, the employee's evidence lacked any information pertaining to the job duties of the comparators, the supervisor involved in the comparators' discipline, and whether any of the comparators had job performance histories somewhat comparable to the employee. More fundamentally, the employee failed to present any evidence on the critical independent variable which is whether or not the would-be comparators took FMLA leave. In conclusion, the Appellate Court stated that the employee failed to show that his former employer simply enforced its policy in

accordance with its alleged disdain for workers who request to take FMLA leave.

This case reminds us that employers must not only review their policies to insure that they do not run afoul of FMLA or any other statutes which protect employees, but also that company policies are applied consistently and in a non-discriminatory manner. The importance of insuring that policies are consistently enforced and applied in a non-discriminatory manner cannot be overemphasized especially since an employee need not prove a causal relationship such as one that would demand the employee show the decision maker was aware the employee had requested FMLA leave and the subsequent adverse action taken against the employee.

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