



Newsletters

Employment Practices Newsletter - May 2012

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Citing Employee's Receipt of SSDI Benefits, Fourth Circuit Rejects EEOC's ADA Action Against Medical Center

The U.S. Equal Employment Opportunity Commission (EEOC) brought suit against a medical center, claiming that the medical center violated the Americans with Disabilities Act (ADA) when it refused to reinstate a disabled employee because he was not able to return to work with the same job classification and hours. During the time the employee sought reinstatement, he had applied for and received Social Security Disability Insurance (SSDI) benefits, stating on his application that he was unable to work. The district court granted the employer's motion for summary judgment, holding that under *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999), the EEOC had not offered a satisfactory explanation for the conflict between the employee's assertion that he could work "with or without reasonable accommodation" under the ADA and his prior application for and receipt of SSDI benefits. In *Cleveland*, the U.S. Supreme Court held that although an employee's application for SSDI benefits does not necessarily mean that he or she is presumptively ineligible to make a claim under the ADA, under certain circumstances, a claimant's application for SSDI benefits may require the dismissal of his or her ADA claim. When faced with an employee's previous statement that he or she is totally disabled, *Cleveland* requires the court to require an explanation of the apparent inconsistency with an ADA claim that a reasonable jury could believe. On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's application of *Cleveland*. Significantly, the court rejected the EEOC's argument that *Cleveland* does not apply to ADA suits brought by the EEOC. The court further found that the employee could not have maintained a good-faith belief in his ability to return to work without reasonable accommodation, and simultaneously believed that he had no obligation to inform the Social Security Administration of the change in his condition. It also rejected the EEOC's argument that an employee's mere "passive receipt" of disability benefits after becoming able to work does not mandate the kind of scrutiny applied in *Cleveland*. Rather the court found that the employee's continued receipt of benefits contradicted his assertion to the employer that he was cleared to return without restriction. This decision is significant because the court has made clear that the EEOC is held to the same standard as individuals when asserting claims of this nature.

Attorneys

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Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation
Defense



EEOC v. Greater Baltimore Medical Center, No. No. 11-1593 (4th Cir. Apr. 17, 2012)

Employee Permitted to Combine Two Separate Health Issues Into One "Serious Medical Condition" Under FMLA

A telemarketer was incapacitated for four days due to bladder problems. Her doctors determined that the first two days of bladder problems were caused by her intestinal cystitis and that the second two days were caused by her genital herpes. The telemarketer required a one-day leave of absence from work because of her bladder problems, and was terminated as a result. She subsequently sued the employer, claiming that it had interfered with her rights under the Family and Medical Leave Act (FMLA), which provides employees 12 weeks of unpaid leave every 12 months for their "serious health conditions" that involve a "period of incapacity of more than three consecutive, full calendar days." The employer moved for summary judgment, arguing that the employee had actually been incapacitated for two days due to intestinal cystitis and two days due to genital herpes, and therefore did not have a qualifying "serious health condition" under the FMLA. The U.S. District Court for the District of Minnesota held that medical conditions can be considered jointly to constitute a single "serious medical condition" under the FMLA as long as the two conditions: (a) are "temporally linked," and (b) affect "the same organ system." Finding that both of those requirements were present in this case, the court ruled that the employee's claim for interference with her FMLA rights could proceed. This case is a reminder that employers should instruct managers and supervisors to consider FMLA protection even where there is not a single identifiable illness causing the employee's absence. The key, as the court found, is that it is the individual—not the disease—that determines FMLA eligibility. Thus, where multiple medical conditions have a cumulative effect that causes an employee to leave work, a best practice is generally to treat that employee as protected by the FMLA.

[*Fries v. TRI Marketing*, No. 11-1052 \(D. Minn. Apr. 23, 2012\)](#)

Ninth Circuit Finds "Attendance" to Be Essential Function of Nurse's Job

A hospital had an attendance policy under which employees could take up to five unplanned absences during a rolling 12-month period. Unplanned absences related to family medical leave, jury duty, bereavement leave and other approved leaves were not counted towards this limit. A part-time neo-natal intensive care unit nurse employed by the hospital always exceeded the number of allowable absences. She was later counseled on several occasions about her absences, but this led to no changes. The nurse was ultimately terminated. She consequently sued, alleging that the hospital had violated the Americans with Disabilities Act due to failure to accommodate. The district court found that the employee was unable to adhere to the hospital's attendance policy and was thus unqualified for her position as a matter of law, that she had been accommodated, and that her request to be exempted from the attendance policy was unreasonable. On appeal, the U.S. Court of Appeals for the Ninth Circuit carefully considered the essential functions of a neo-natal intensive care nurse and determined that her "regular, predictable presence to perform specialized, life-saving work in a hospital context" was specialized, and that this was not a case where "workers were basically fungible with one another, so that it did not matter who was doing the [job] on any particular day; [and the employer] did not follow any fixed policy . . ." Affirming the district court's ruling, the Ninth Circuit said that "[the employee's] performance is predicated on her attendance; reliable, dependable performance requires reliable and dependable attendance. An employer need not provide accommodations that compromise performance quality—to require a hospital to do so could, quite literally, be fatal." This case emphasizes the importance of engaging in the interactive process to consider whether accommodations are required and whether accommodations can be provided. It also highlights the importance of having good documentation—from the policy itself, to the corrective actions.

[*Samper v. Provident St. Vincent Medical Center*, No. 10-35811 \(9th Cir. Apr. 11, 2012\)](#)

Title VII "Ministerial Exception" Does Not Apply to Technology Teacher in Catholic School

A technology teacher at a Catholic school was terminated after her employer learned that she had become impregnated by artificial insemination. The teacher sued for discrimination on the basis of pregnancy under Title VII of the Civil Rights Act of 1964, as amended, and the Pregnancy Discrimination Act. The Archdiocese of Cincinnati argued that the teacher fell within the "ministerial exception" based upon her inherent role as a model of Catholic values for students. The court rejected that argument for two reasons. First, the court found important differences between the case before it and the facts of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), which involved a Lutheran teacher who felt that she was "called" to her position by God, taught religious education, led worship, and



studied in a theological program; here, the technology teacher did not teach any religion, did not participate in any worship, and, in fact, was not even Catholic herself. Second, the court found, the teacher's status as an educator in a Catholic school and alleged duty to act as a Catholic role model was not sufficient to make her a "minister"; such a rule, the court found, "would create an exception capable of swallowing up the rule." This decision is helpful to religious employers who are concerned about the scope of the ministerial exception. The case shows that, even after *Hosanna-Tabor*, real ministerial activities and status are still necessary in order to claim the exception. Religious employers should expect that all employees will continue to be protected by nondiscrimination laws unless there is strong evidence that the employee is actually a religious minister.

[*Dias v. Archdiocese of Cincinnati, et al.*, No. 1:11-CV-00251 \(S.D. Ohio Mar. 29, 2012\)](#)

NLRB Issues New Rules Affecting Elections

April 30, 2012 was the effective date for several new National Labor Relations Board (NLRB) rules affecting union elections, which will likely reduce the amount of time for an employer to campaign. The NLRB's articulated rationale for the new rules was the elimination of unnecessary delays between the filing of a petition for an election and the actual employee vote. The new rules significantly reduce the legal and factual issues that were previously decided before the election, and postpones those determinations until after the election. In addition, hearing officers are empowered to limit the evidence in hearings, and may limit post-hearing briefs. Pre-election hearings will be scheduled five working days after the filing of the petition. Although the NLRB was enjoined from requiring employers to post the "Notice of Employee Rights" on April 30, 2012, the new elections rules were not affected by that injunction. The next step in creating a more favorable environment for union organizing may be for the NLRB to reduce the current 42-day period between the filing of a petition for election and the employee vote. All employers that want to maintain union-free status are strongly advised to be vigilant and proactive, because they may have a significantly reduced amount of time to conduct an election campaign in the future.

Download to read: [NLRB's Guidance Memorandum](#)

California Supreme Court Issues Long-Awaited Ruling on Meal Breaks

For several years, employers in California have been waiting with bated breath for the state's high court to decide whether employers must *ensure* that employees receive and take their 30-minute, duty-free meal period, or whether employees must merely *make available* the opportunity to take such breaks. The wait is over. The California Supreme Court has determined that, pursuant to the California Labor Code, an employer has the duty to provide employees with meal periods but is not required to "police" employees to ensure that they are, in fact, taking their meal periods. The Court emphasized that once the employer fulfills its obligation of relieving employees of duty, it is thereafter up to the employee what he or she does during that time. The Court further clarified the timing of meal and rest periods throughout an employee's shift, and emphasized the continuing obligation of employers to maintain records reflecting the accurate hours worked by each employee. Meal and rest break claims have been the center of most employment class action litigation in California over the past several years. Employers must ensure that their break policies are communicated, implemented and enforced.

[*Brinker v. Superior Court*, No. GIC834348 \(Cal. Apr. 12, 2012\)](#)

EEOC Rules That Title VII Covers Gender Identity Discrimination

A prospective employee who was a transgender person spoke to a prospective employer about an open position. The employer offered the employee the position, conditioned upon a background check. While the background check was pending, the employee informed the employer that she was in the process of transitioning from male to female. The employee then received notification that the position was no longer available due to budget reductions. The employee filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that she was not hired because she made her transgender status known and was therefore discriminated against on the basis of her gender identity. The EEOC determined that the prohibition under Title VII of the Civil Rights Act of 1964, as amended, against discrimination on the basis of sex covered the employee's claim because "[w]hen an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim." Additionally, Title VII's prohibition against discrimination based on sex extends to preclude discrimination based on "gender," which



"encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity." Accordingly, the EEOC found that intentional discrimination against a transgender individual because that person is transgender is prohibited by Title VII. Employers should be aware of the EEOC's decision as it is the first time the agency has held that Title VII extends to claims of discrimination based on gender identity.

[Macy v. Holder, \(EEOC Apr. 20, 2012\)](#)

Private Individual Temporarily Retained by Government May Seek Qualified Immunity

A city hired a private investigation firm to conduct surveillance on a firefighter employed by the city because of an extended absence from work due to illness. The city commenced an internal affairs investigation after the firefighter was observed purchasing fiberglass insulation and other building materials, and hired a private attorney to interview the firefighter about his absence and the building materials. At the interview, which was attended by fire department officials and the firefighter's attorney, the firefighter admitted to having purchased the building materials but denied doing any work on his home. The city's attorney asked the firefighter to bring the materials out of his home, which prompted the firefighter's attorney to threaten the city and the attorney with a civil rights action. Subsequently, the firefighter produced the building materials. Thereafter, he sued under 42 U.S.C. § 1983, alleging that the order to produce the building materials violated his Fourth and Fourteenth Amendment rights. The district court granted summary judgment as to all defendants on the basis of qualified immunity. The U.S. Court of Appeals for the Ninth Circuit affirmed, except as to the private attorney, concluding that he was not entitled to seek qualified immunity. The U.S. Supreme Court reversed, holding that the private attorney temporarily employed by the city was entitled to seek qualified immunity under Section 1983. Reasoning that government has always relied upon private individuals to fulfill certain government responsibilities, the Court found that those who perform work on behalf of the government should be extended the same immunities that their counterparts within the government workforce receive.

[Filarsky v. Delia, No. 10–1018 \(S. Ct. Apr. 17, 2012\)](#)

EEOC Issues Guidance on Employers' Use of Arrest and Conviction Records

When can an employer conduct a criminal background check on an applicant or existing employee? Employers screening the criminal backgrounds of applicants and employees must demonstrate that their use of the acquired information is job-related to avoid potential discrimination claims, the U.S. Equal Employment Opportunity Commission (EEOC) reminded employers in its most recent enforcement guidance. Citing concerns that employers could use arrest and conviction information to illegally discriminate against job applicants, especially black and Hispanic applicants, the EEOC clarified that criminal record information obtained during background checks cannot be used to screen potential or current employees under Title VII of the Civil Rights Act of 1964, as amended, unless a conviction is related to the work to be performed or if an applicant is applying for a fiduciary-based position. The EEOC did not impose an outright ban on the use of criminal checks, but called for careful consideration of how and when such reviews can be used in pre-employment screenings and in the workplace because of their potential to be biased against certain groups, such as racial minorities. Employers must assess their hiring protocol and the use of criminal checks to ensure compliance with the new regulations.

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