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LABOR UPDATE

Recent Developments in Labor and Employment Law

COURTS ADDRESS EMPLOYERS' RESPONSIBILITY FOR VIOLENT EMPLOYEES

In a pair of recent decisions, Illinois courts have interpreted the cause of action known as negligent hiring and retention with mixed results for employers.

Illinois courts have recognized the negligent hiring and retention theory -- under which employers have been held liable for the actions of "unfit" employees -- for over 100 years. Originally, this cause of action provided a means for employees to recover for workplace injuries caused by incompetent co-workers. With the establishment of the workers' compensation system, however, employees were generally relegated to that compensation system for such injuries. Nonetheless, negligent hiring and retention claims did not fade away, but merely shifted their focus.

Today, such claims are typically brought by third parties who are injured by employees who perform specialized job functions or have especially close contact with the public. Employers have been found liable where they failed to exercise reasonable care in selecting careful and skillful employees for these type of positions.

Recently, an Illinois Appellate Court, in upholding a jury verdict of \$115,000 against an employer, appeared to expand the reach of the negligent retention claim. In that case, a store manager stopped by his employer's store, while off duty, to check on its operations. He was intoxicated at the time in violation of company rules. While outside the store, the store manager observed a boy urinating on the store wall. The manager followed the boy to a waiting car and shouted racial slurs. He then mistakenly grabbed another boy out of the car and threw the child, causing injuries.

At trial, it was shown that the employer had knowledge that the store manager was

involved in one prior incident in which he was disciplined for throwing an empty milk carton at an employee. Additionally, the store manager had pled guilty to aggravated battery for breaking his son's collar bone while disciplining him. The store manager did not tell his supervisors about this conviction, however, he did disclose the incident to co-workers.

Because of these past incidents, the court found that the employer knew or should have known that the store manager had a propensity toward violence. Disturbingly, the court held that even if no one in management knew of the store manager's conviction, his co-workers' knowledge could still be imputed to the employer. The court reasoned that the employees who knew of the store manager's conviction had the responsibility to inform management about it.

The employer also argued that it should not be responsible for the store manager's outrageous actions since they occurred outside the scope of his employment. The court, while admitting that his conduct was not normal actions for a store manager, disagreed. The court held that the store manager's actions were prompted "in part" to protect the store property. (*Bryant v. Livigni*, 250 Ill. App. 3d 303, 619 N.E.2d 550 (5th Dist. 1993)).

On the other side of the spectrum, the Illinois Supreme Court recently found that an employer could not be liable for negligent retention in a case of sexual harassment. The court held that the employee's claim was exclusively within the jurisdiction of the Illinois Human Rights Act ("Act"), and could not be brought as a separate cause of action. The court reasoned that the Act is the exclusive remedy for civil rights violations in the workplace, which includes sexual harassment claims. The fact that the employee styled her harassment claim as one for negligent retention was insufficient to create an alternative means of recovery in addition to that under the Act. (*Geise v. Phoenix Company of Chicago, Inc.*, 159 Ill. 2d 507, 639 N.E.2d 1273 (1994)).

While these cases present mixed results, employers must continue to be vigilant in their pre-employment screening practices and actions toward employees that exhibit violent behavior. Due to the continuing changing landscape of the negligent hiring and retention theory, employers should remain watchful of their obligations to avoid liability.

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DISABILITY ACT CLARIFIED

In a recent trilogy of decisions, the United States Court of Appeals in Chicago helped clarify the scope of an employer's duties and liabilities under the Americans with Disabilities Act ("ADA"). Employers should take note of these latest developments.

Determining a "Reasonable" Accommodation

As most managers know, the ADA obligates employers to provide a reasonable accommodation of a qualified person's disability, unless doing so would cause undue hardship. However, it has often been difficult to ascertain precisely what kind of accommodation is "reasonable" under a particular set of circumstances. The court recently tackled this dilemma and helped define what is---and more importantly what is not--a "reasonable accommodation."

Confronted with a case wherein the defendant-employer had already made substantial adjustments and modifications to its workplace to accommodate a paraplegic employee, the court held that the employer was not required to accommodate the employee's absences from work by allowing her to work unsupervised at home. The court also excused the employer from having to lower workplace sinks, in order to make them more accessible to this employee.

Recognizing that the affirmative duty of accommodation typically obligates employers to make changes in their ordinary work rules, facilities, and terms and conditions of employment, the court nevertheless stated that the term "reasonable" connotes something less than "the maximum possible." Because the plaintiff-employee's job required participation in supervised teamwork, the court held that requiring her employer to permit her to work at home--where her productivity would inevitably suffer--would stretch the concept of "reasonable" accommodation too far.

The court also ruled that since the employer's bathroom sinks were already accessible to the employee, the employer was not required to lower kitchenette sinks for her use as well. In so holding, the court stated that an employer is not required "to bring about an absolute identity in working conditions between disabled and non-disabled workers." Instead, the duty of reasonable accommodation is satisfied when an employer "does what is necessary to enable the disabled worker to work in reasonable comfort."

Within these general guidelines, employers should assess the reasonableness of a particular accommodation by weighing its necessity, effectiveness, and cost. *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995).

Knowledge of Disability Required for Liability

In another case, the court held that an employer must know of a disability, before it can be liable for acting on it. Here, an employee suffering from primary amyloidosis (which is potentially fatal) alleged that he was discharged because of his illness. His employer denied any knowledge of the employee's disability and defended the termination by pointing to the employee's poor performance rankings, which partially derived from his record of tardiness and "lack of work ethic."

The employee was unable to prove that his employer knew of his disease. However, because chronic fatigue was a symptom of his illness and because such fatigue allegedly prompted his tardiness and poor work habits, the employee argued that he was terminated because of the symptomatic effects of his disability, in violation of the ADA. The court rejected this theory, holding that the ADA "does not require clairvoyance" and does not render an employer liable when it acts on the basis of a disability's symptoms, but does not know of the disability itself.

Although there was no obvious link between the employee's work behavior and his disability in this case, the court cautioned that there may be some conditions which are such obvious manifestations of a disability that employer knowledge of same could reasonably be inferred. The court further warned that an employer's "deliberate ignorance" would also fail to ward off liability. *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928 (7th Cir. 1995).

No Individual ADA Liability

In yet another decision, the court, to the certain relief of businesspersons, held that individuals who do not personally qualify as "employers" under the ADA can not be subject to the act's substantial compensatory and punitive damages provisions. Although sole proprietors who have 15 or more employees can be hit with such damages, individual decision makers acting on behalf of employing entities can not. *EEOC v. AIC Security Investigations, Inc.*, 66 EPD ¶ 82,710 (7th Cir. 1995).

Because of the substantial damages which can be assessed against businesses under the ADA, all agents of a company, especially managers, supervisors, and human resource personnel should be kept aware of their ADA duties and responsibilities. Furthermore, because employer obligations under this relatively recent act will continue to be refined by the courts, current legal advice should be obtained before taking any employment action that may adversely effect the rights of the disabled.

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BITS AND PIECES

Faced with a rising trend among young people to pierce various parts of their body, human resource managers are struggling to enforce company appearance policies. Bob Cortelyou, vice president of human relations for Wendy's International fast-food chain, recently received a call from a distraught store manager who asked what he should do with an employee who had his tongue pierced. Finding no guidance in the company policy, Cortelyou responded that if it could not be seen while the employee worked, then don't worry about it. Other employers, as reported in an August 21, 1995 Chicago Tribune article, however, do not take such a benevolent view. The Lettuce Entertain You restaurant chain has a specific policy that "body piercing" should be limited to the ears.

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A cosmetic-maker agreed to pay nearly \$1.2 million to settle a sexual harassment complaint brought by the Equal Employment Opportunity Commission on behalf of 15 women. The settlement is the largest ever won by the government in such a case. The complaint alleged that the chief executive, Dan K. Wassong, of Del Laboratories, engaged in lewd and abusive behavior toward the 15 subordinate female employees over a course of years. He grabbed the breast of one employee, conducted business with his fly open and routinely used vulgar and abusive language, the New York Times reported.

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QUOTABLE

A female client whose legal problems Clarence Darrow had solved bubbled, "How can I ever show my appreciation. Mr. Darrow?"

"Ever since the Phoenicians invented money," Darrow replied, "there has been only one answer to that question."

(Clifton Fadiman, *The Little Brown Book of Anecdotes*)

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