

Fourth Quarter, 1998

LABOR UPDATE

Recent Developments in Labor and Employment Law

HIV-POSITIVE HEALTHCARE WORKER FOUND TO BE DIRECT THREAT TO PATIENTS

In one of the first federal appellate cases examining the dangers posed by HIV-positive hospital personnel, the United States Court of Appeals in Michigan ruled that a surgical technician who carried the HIV virus posed a direct threat to patients and, therefore, could be removed from his position.

The plaintiff, William Mauro, worked for Borgess Medical Center. His duties included handing instruments to surgeons, holding retractors, and occasionally touching a surgical wound with gloved hands. In June of 1992, an unidentified source telephoned the Medical Center and informed its director that Mauro was HIV-positive. Because of the Medical Center's concern that Mauro could expose a patient to HIV, a new, non-surgical position was created, which Mauro refused.

The Medical Center then created a task force to determine whether Mauro could safely perform the duties of a surgical technician. The task force concluded that requiring an HIV-positive employee to place his hands into a patient's surgical wound constituted a direct threat to patient care and safety. As a result, Mauro was given two options: accept the non-surgical position, or be laid off. When he missed the deadline to respond to the company's offer, he was terminated.

Mauro filed suit under the Americans with Disabilities Act alleging that he had been discriminated against on the basis of his disability, HIV. Mauro alleged that he was disabled but was qualified to perform the duties of a surgical technician by using universal precautions such as double gloves. While the parties agreed that HIV constitutes a "disability" under the Act, they disagreed on whether Mauro was qualified to perform his job. The Medical Center maintained that Mauro could not be qualified because he constituted a direct threat to the health and safety of patients.

Both the district and appellate courts agreed with the Medical Center. Citing testimony from medical experts, the plaintiff's physicians, and the plaintiff himself, the courts held that Mauro did constitute a direct threat to patients. Even though a recent report by the Centers for Disease Control estimated that the actual risk of transmitting HIV during a surgical procedure fell between 1 in 42,000 and 1 in 420,000, these odds increased where the individual was required to touch a surgical field in the presence of sharp instruments, particularly where viability was poor. The plaintiff had testified that he had sustained minor cuts and needle sticks many times in the past. Moreover, if transmission did occur, the patient would be infected with a fatal and incurable disease. Because of the significant risk that Mauro could transmit a fatal disease to a patient, he was not qualified to perform the essential functions of his job. *Mauro v. Borgess Medical Center, No. 95-1544.*

Coincidentally, the United States Supreme Court recently ruled that infection with HIV is automatically a disability under the Americans with Disabilities Act even if the individual has no symptoms. The court held that HIV infection substantially limits the major life function of reproduction and, therefore, constitutes a disability.

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EEOC ISSUES TOUGH NEW GUIDELINES ON AGE DISCRIMINATION SETTLEMENTS

Since we recently reported on the U.S. Supreme Court decision regarding the enforceability of settlement and release agreements under the Age Discrimination in Employment Act (ADEA) (Labor Update, Second Quarter, 1998), the Equal Employment Opportunity Commission has issued stringent new guidelines on the subject. Employers must now be more cautious than ever when drafting settlement and severance agreements for employees over forty.

The Older Worker's Benefit Protection Act, which addresses waivers of rights and claims under the ADEA, states that any release of age discrimination claims must be "knowing and voluntary". In the past, the courts have interpreted this to require that the release must specifically state that the employee is waiving his/her rights under the ADEA. However, the EEOC guidelines have added a number of new requirements.

- Waiver agreements must now be written with non-misleading and plain language that is geared to the comprehension and education level of the typical employee signing it.
- The requirement that employees must be given seven days in which to revoke the agreement cannot be shortened, even by

agreement.

- Employers must disclose the job titles and ages of employees affected by a reduction-in-force or early retirement program in a format that easily compares them to unaffected employees in the same job classifications.

These new guidelines, although not laws themselves, are likely to be considered by the courts in deciding the enforceability of severance and settlement agreements under the ADEA. Therefore, every agreement should be scrutinized to ensure that they comply with the EEOC's new guidelines.

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COLLECTIVE BARGAINING AGREEMENT USED IN DEFENSE OF DISCRIMINATION CLAIM

An employee's sex discrimination claim failed because a collective bargaining agreement (CBA) protected an employer's refusal to offer the employee a light duty assignment, ruled a Texas federal district court. The court held that following the provisions of the CBA constituted a legitimate and non-discriminatory reason for the employer's action.

The employee, Leonette Dudley, worked for UPS as a part-time sorter when she suffered a serious, on-the-job injury which resulted in her absence from work for over three months. At the time, she was a member of the Teamsters' Union and a collective bargaining agreement between UPS and the Union was in place. At the end of her leave, Dudley submitted a medical release stating that she could return to work only in a light duty position. UPS refused to permit Dudley to return to work unless she was fully recovered.

Dudley subsequently filed suit alleging that she had been discriminated against on the basis of sex and that UPS's refusal to create a light duty position was in retaliation for having spurned her supervisor's advances. In its defense, UPS testified that the CBA's provisions on job assignments, bidding, prequalification and seniority rights prohibited it from creating a light duty position for the Plaintiff. Therefore, refusing to accept the Plaintiff in a temporary work assignment or light duty position was based on a legitimate business reason, and not discriminatory animus.

The court agreed with UPS and dismissed the Plaintiff's claims. The employer cannot be faced with the Hobson's choice of either violating the CBA or violating the law, the court held. The employee, through her Union representatives, negotiated for the terms of the CBA. The Plaintiff cannot now be permitted to ignore those terms in pursuit of her discrimination

claims. Because the CBA constituted a legitimate, non-discriminatory reason for refusing to reappoint the Plaintiff, she could not prove her claims. *Dudly v. United Parcel Service, No. H-96-1803*

BITS AND PIECES

The Immigration and Naturalization Service has proposed comprehensive changes to the employment eligibility verification forms (I-9) used to ensure that employees are United States residents or legally registered aliens. The proposal reduces the number of documents used by new hires to establish their identity and eligibility to work from the current 29 to 13. It also creates a "short form" (I-9A) for reverification and contains more detailed instructions on when and how to complete the forms. The INS is also issuing proposals allowing employers to correct technical or clerical mistakes made on the forms and explaining how to treat the documentation of employees who are members of a collective bargaining unit.

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Vice President Al Gore announced plans for a 17% increase in spending on programs targeting gender and racial discrimination in employment. The proposal, to be included in the 1999 budget, is aimed at slashing in half the Equal Employment Opportunity Commission's current 64,000 case backlog and will also be used to hire undercover "testers" who pose as job applicants to check for discriminatory practices.

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Last June's Supreme Court rulings on sexual harassment (Labor Update, 3rd Quarter, 1998) are beginning to affect other types of discrimination cases. A federal judge in Tennessee ruled that Budget Rent-A-Car could be liable for alleged racial discrimination by a supervisor, even if the company did not know about the conduct. In rejecting Budget's bid to dismiss the case, the judge applied the Supreme Court's new standards and decided that Budget could be "vicariously liable" for the actions of the supervisor because it failed to take "reasonable care" to prevent the alleged discrimination.

QUOTABLE

If the law is upheld only by government officials, then all law is at an end.

Herbert Hoover

A jury consists of twelve persons chosen to decide who has the better lawyer.

Robert Frost

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