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LABOR UPDATE

Recent Developments in Labor and Employment Law

SUPREME COURT UPHOLDS REFUSAL TO HIRE APPLICANT BASED ON RISK TO APPLICANT'S HEALTH FROM WORKPLACE EXPOSURE TO TOXINS

Mario Echazabal worked for an independent contractor of Chevron at one of its oil refineries. Echazabal had a liver condition that physicians believed could get worse, and possibly be fatal, if Echazabal worked at a refinery because of the highly toxic work environment. Echazabal also applied for employment with Chevron. Chevron rejected his application because of the potential risk to Echazabal's health. Chevron then told its independent contractor to transfer Echazabal to a job where he would not be exposed to toxins or to remove him from the refinery. In response to these instructions, the contractor laid off Echazabal and he sued Chevron for violation of the Americans with Disabilities Act (ADA). Echazabal contended that he had no current symptoms of liver disease, could perform all the essential functions of the job he wanted, and was entitled to decide for himself whether a refinery job was too risky for his health.

Chevron defended its actions by claiming that Echazabal's liver condition posed a direct threat to himself if he continued working in the refinery. Chevron was concerned about knowingly exposing Echazabal to toxins, Echazabal having to take an excessive amount of sick time, Echazabal having to take early medical retirement or even dying, and the threat of being sued for injury to Echazabal. Chevron was also concerned about violating OSHA standards requiring employers to provide safe and healthful working conditions.

The United States Supreme Court ruled for Chevron. It upheld the ability of employers to refuse to hire an individual because the individual's performance on the job will endanger his or her own health because of a medical condition or disability. The Court refused to put Chevron in the position of having to decide whether to face liability for violating OSHA requirements if it hired Echazabal and having to defend an ADA lawsuit if it refused to hire him because of his condition.

The Court's decision gives employers in industry more discretion in making hiring choices, provided that there is credible medical evidence that a worker's health will be threatened if they are given a certain job. Each case involving a threat to someone's health will have to be evaluated on its own in light of current medical knowledge and practices. However, employers do not have to give a

disabled person a job that will wreck their health just because the employee or applicant wants the job. In deciding whether a disabled applicant or employee's health is threatened by the duties of the position, medical and legal advice will be required.

The Chevron decision follows two prior ADA decisions this year and is yet another in a growing trend of decisions under the ADA favoring employers. In the last six cases brought under the ADA, the employers have won in each instance. This trend suggests that the Court is not inclined to interpret the ADA as broadly as employee and disability advocates would wish. *Chevron U.S.A., Inc. v. Echazabal*, 2002 WL 1270586 (2002).

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COURT UPHOLDS SALESMAN'S TERMINATION FOR VIOLATION OF EMPLOYER'S DRIVING RECORD POLICY

Tony Brummett, an African-American, was a ad salesman for the daily Herald, a Decatur, Illinois newspaper. As a salesman, Brummett spent the bulk of his time driving to and meeting with advertising clients to establish and maintain good customer relations. The Herald's company policy required a valid driver's license and good driving record for any employee that had to drive in connection with company business.

Brummett had problems maintaining a good driving record while employed at the Herald. Brummett was cited two times for driving under the influence of alcohol. After these incidents, the Herald warned Brummett that his job depended upon his maintaining a good driving record and that his excessive drinking might lead to the termination of his employment if it caused him to run afoul of the Herald's driving policies. A short time later after being warned about the consequences of future incidents of drinking and driving, Brummett was arrested a third time for driving under the influence. Because Brummett chose not to take a field sobriety test, his license was immediately suspended for six months.

The Herald then terminated Brummett's employment because he had no driver's license, did not have a good driving record, and failed to report the third incident to the Herald. Brummett claimed that he did in fact report the third arrest to his supervisor and that he eventually would have obtained work related driving privileges. Believing he had been terminated because of his race, Brummett filed suit against the Herald. The trial court granted judgment to the Herald and Brummett appealed.

On appeal, Brummett argued that the judgment for the Herald was improper because of the dispute about whether Brummett reported the third arrest to his supervisor. Brummett also claimed that the Herald should have relaxed the strict application of its driving policy for him and allowed him time to regain his driving privileges. The court rejected these arguments and affirmed the judgment for the Herald.

Two points from this case should be kept in mind. First, according to the court, a "good driving policy" is so clearly related to a traveling salesman's employment that courts will not be inclined to second guess it because its clear that such a policy is, by its own terms, racially neutral

and legitimate. Thus, employers can feel confident that strict enforcement of such an important policy will be upheld. Second, an employer is under no duty to ease its strict enforcement of a good driving record policy to accommodate an employee who claims he may eventually get his license back. This is especially true, said the court, when the problems faced by the employee are of his own making. Because Brummett could not meet the Herald's legitimate expectations, his claim of discrimination was properly rejected. *Brummett v. Lee Enterprises, Inc.*, 284 F.3d 742 (7th Cir. 2002).

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“IF IT AIN’T WHITE IT AIN’T RIGHT” POLICY LEADS TO DISCRIMINATION AND HARASSMENT CLAIM

In October, 1995, Tony Cerros went to work at Steel Technologies, Inc. In less than a year, Cerros was promoted to the position of slitter operator. The promotions, however, were not the result of a positive working environment. Cerros believed that Steel failed to train him properly for his position as slitter operator, and claimed it was providing better training for its white employees. Some of the supervisors and employees at Steel Technologies openly asserted a policy that "if it ain't white it ain't right." Cerros was also the frequent target of verbal harassment.

During 1996 and 1997, employees, including supervisors, would call Cerros "brown boy," "spic," "wetback," "Julio" and "Javier" (neither were Cerros's given name nor nickname). Employees and supervisors also talked down to him and muttered comments under their breath. One of the supervisors who made racial remarks to Cerros was Jeff Colvin.

Cerros switched to the first shift to get away from Colvin. Despite Cerros' protests, Colvin was later transferred to the first shift and the harassment resumed. Not only was Cerros verbally harassed, he was also the target of racist graffiti. Although the graffiti was cleaned off the walls, Steel never conducted any investigation, nor did it attempt to ascertain who was responsible for the defacement of the room.

Cerros sued Steel Technologies claiming that he had been discriminated against and subjected to a hostile working environment because of his race and national origin. The trial court discounted Cerros' claim that he had been inadequately trained. The trial court also rejected his harassment claim. Cerros then filed an appeal with the 7th Circuit court of appeals.

The court of appeals rejected Cerros' discrimination claim, ruling that even if he had been inadequately trained, this did not qualify as an adverse employment action. Because the failure to train was not an adverse job action, Cerros' discrimination claim failed despite the evidence of racial bias and hatred. Cerros fared better on his racial harassment claim, however. The 7th Circuit, calling the harassment suffered by Cerros an "appalling litany of misconduct" sent the case back to the trial court, noting that it had found lesser instances of harassment to be a violation of the law.

In cases of alleged discrimination, not every employee complaint amounts to a materially adverse job action. Without evidence of a materially adverse job action, a claim of discrimination

will fail, even if there's clear evidence of outrageous behavior. In contrast, in a harassment claim, it is the harassing conduct itself which violates the law. In any event, Steel Technologies would have fared better had it implemented and enforced a strict anti-harassment policy and had it taken Cerros' claims seriously. *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040 (7th Cir. 2002.)

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BITS & PIECES

The United Auto Workers has reported membership gains of 4.3 percent in 2001, the first increase in its membership in more than twenty years. In annual reports filed with the United States Department of Labor, the UAW claimed 701,818 members in 2001, 29,865 more than in 2000. The UAW's ranks slowly thinned starting in 1979 as the "Big Three" automakers trimmed their workforces in response to competitive pressures from overseas. The gains in membership have resulted from the UAW's aggressive attempts to recruit workers from other industries, such as aerospace, defense, farm workers, health care employees, the service sector, and even graduate teaching assistants at certain colleges. Workers in non-automotive related industries now comprise almost one-half of the UAW's membership.

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A San Francisco fitness buff recently filed one of the first complaints of discrimination against her employer under the City's law prohibiting discrimination against people based on their weight and height. Jennifer Portnick, a 5 foot 8 inch, 240 pound "Jazzercise" devotee, who has practiced high impact aerobics six nights a week for 15 years, wanted a teaching job as a certified Jazzercise instructor. Jazzercise, however, rejected her application based on her physical appearance, believing that she looked too heavy to be a good role model for students. Jazzercise wrote Portnick that her application would have to be delayed until she had a "more fit appearance", although it acknowledged that she was in good physical condition. The parties are attempting to mediate their dispute.

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QUOTABLE

The Law is the true embodiment
Of everything that's excellent
It has no kind of fault or flaw,
And I, my lords, embody the Law

-Sir W.S. Gilbert, *Iolanthe*, 1892

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