Employment and Labor Law Newsletter

March 2013

INSIDE THIS ISSUE:

Bryce Downey & Lenkov News

- **Noah Frank** was selected as a 2012-2013 co-chair of the Chicago Bar Association's YLS Labor & Employment Committee.

- **Cary Schwimmer** has been named as a Tennessee Rule 31 Listed General Civil Mediator focusing on resolution of employment disputes.

Bryce Downey & Lenkov Case Results

- **Storrs Downey** secured the dismissal of an age, race, disability and national origin claim filed before the Illinois Department of Human Rights.

- **Geoffrey Bryce** and **Natalie Lange** successfully defended a construction client in an administrative wage claim filed against it with the State of Illinois, Department of Labor Fair Labor Standards Division. The Department found in favor of the employer as both counts of vacation and sick leave.

- **Noah Frank** successfully settled a terminated groundskeeper case with disputed employment and workers' compensation issues for $1,000.00, less than 1% of the demand.

- In a Missouri federal court age discrimination suit, the plaintiff agreed to dismiss his case after **Cary Schwimmer** filed a motion for summary judgment seeking dismissal. Cary also defeated a former Missouri union employee's discharge grievance, obtaining a ruling in the employers favor from a national arbitration committee.

- In an Arkansas state court race discrimination suit, the plaintiff voluntarily dismissed his case after **Cary Schwimmer** filed a motion for summary judgment seeking dismissal. He also obtained a determination in the employer's favor on an EEOC race discrimination charge in Arkansas.

Court Decisions and Legislation

Who Are the Supervisors and Where is the Liability for Employers?

The United States Supreme Court recently heard oral arguments in *Vance v. Ball State University*, Supreme Court Case No. 11-556. Currently, the federal circuits are split as to the question of who

qualifies as a "supervisor" under Title VII, which prohibits employers from discriminating on the basis of race. Regardless of whether companies encourage the harassment, they can be held strictly liable for harassment by an individual's "supervisor." If the harasser is a co-worker of the claimant and not a supervisor, then the claimant has a higher burden of proof and must show that the employer was negligent in discovering or stopping the co-worker's harassment. Given the strict liability that automatically attaches to employers through their supervisors, employers eagerly await the final decision of the Supreme Court in *Vance.*

To provide clarity for employers and a stronger foothold for the liability question, the Supreme Court is examining the definition of "supervisor" and will decide whether the term: (i) broadly applies to those management-level employees whom the employer vests with authority to direct and oversee other employees' daily work, or (ii) is narrowly limited to only those management-level employees who specifically have the power to "hire, fire, demote, promote, transfer, or discipline." The answer to this question will likely sculpt the future of Title VII litigation and may provide guidance for employers.

Practice Tip:

If the Supreme Court adopts a broad definition of supervisor, employers could face increased exposure to liability and more Title VII litigation. In the meantime, employers should carefully review their anti-harassment and anti-discrimination policies, as well as any job duties and descriptions for supervisors, managers and the like.

Unraveling The Confusion Between Recent 7th Circuit FMLA & ADA Decisions

The Seventh Circuit's recent decisions in *James v. Hyatt Regency Chicago* (Family and Medical Leave Act matter) and *EEOC v. Autozone, Inc.* (Americans with Disabilities Act matter) may seem confusing and discordant at first blush as they came to different conclusions regarding the employer's liability for failing to provide light duty work. The important distinction is the purpose of the FMLA vs. the ADA.

The FMLA provides for *job protected* (not necessarily paid) leave for serious health conditions under certain circumstances. The *James* court therefore found that the employer had no duty under the FMLA to provide light duty work.

The ADA is intended to protect qualified individuals with disabilities from discrimination, and requires employers to engage in an individualized assessment to determine whether any reasonable accommodations are possible to enable that individual to perform the essential functions of the job. The *Autozone* court found the employer liable under the ADA for failing to provide a reasonable accommodation to a qualified individual with a disability.

Duty to Accommodate Under ADA

The Seventh Circuit recently affirmed a jury's award of $100,000 in compensatory damages and $200,000 in punitive damages against an employer who was found to have violated the ADA by not accommodating the plaintiff during the period between March to September 2003. *EEOC v. Autozone, Inc.*, No. 12-1017 (7th Cir. Feb. 15, 2013).

In 1996, while working for a prior employer, plaintiff-employee Shepherd sustained a back injury resulting in a chronic back condition. Shepherd could twist his torso, but repetitive twisting would cause a flare-up of severe back and neck pain. In 1998, he was hired by defendant-employer Autozone as a salesclerk and promoted to parts sales manager a year later. About 80% of Shepherd's work was devoted to sales and customer service, which did not affect his back condition. However, Autozone required Shepherd to mop the floors as part of his (and other

employees') regular job duties, which caused Shepherd's permanent back condition to flare up. Though Shepherd's store manager permitted Shepherd to perform duties other than mopping, the district manager reinstituted the job requirement. Subsequently, from March to April 2003, Shepherd took a medical leave of absence because the mopping had caused his condition to deteriorate. In September 2003, after Shepherd sustained a disabling flare-up while wringing a mop, the district manager granted Shepherd's requested accommodation of no mopping. Though Shepherd attempted to return to work in January 2004, Autozone involuntarily kept him on medical leave until February 2005, when he was terminated.

The Seventh Circuit affirmed the jury's finding that Shepherd had been qualified to perform his job; and that Autozone understood that Shepherd had a back injury, which it considered a disability. The court therefore affirmed the jury's finding that Autozone violated the ADA by repeatedly failing to provide to Shepherd a reasonable accommodation of no mopping.

No Such Thing as "FMLA Light Duty"

The Seventh Circuit recently held that an employer does not violate the FMLA for refusing to return an employee with restrictions to work. *James v. Hyatt Regency Chicago*, 2013 WL 514097 (7th Cir. 2/13/2013). Plaintiff-employee James took FMLA leave due to a non-occupational eye injury in March 2007. Following surgery, James's doctor provided a note returning James to "light duty," but did not specify the type or duration of any restrictions. James subsequently submitted conflicting medical records restricting him from any work related to his eye and an ambiguous back condition. Accordingly, his employer declined to take him back to work. Once James was released to work with permanent restrictions in February 2008, Hyatt returned him to work in the same position, shift, and seniority level as before his leave.

James claimed that he was left too long on his FMLA leave by his employer and should have been brought back earlier, after he provided his employer with various return to work releases from his physicians. Summary judgment was granted to the employer and James appealed.

The Seventh Circuit determined that the district court correctly found that under the FMLA there is no duty for an employer to return an employee to his prior position if that employee cannot perform the essential functions. In James's case, the ability to see, carry, and bend were essential functions of his job which he could not do while under temporary restrictions. Under the FMLA, there is no such thing as "light duty" and an employer need not accommodate a restricted employee.

Practice Tips: FMLA vs. ADA: Is Light Duty Work Required?

Due to the interrelatedness of the ADA and FMLA, employers should carefully analyze health-related leave issues under both statutes to mitigate risk of a discrimination claim.

The Americans with Disability Act puts a clear and distinct burden on the employer to consider and implement reasonable accommodations for qualified individuals with a disability. Managers and supervisors should be trained to consider reasonable accommodations, and determine whether a particular job task is an essential function of the job or a "one-off" task that could reasonably be delegated to another employee.

Under the Family and Medical Leave Act, an employer may refuse to return to work an employee who is still under restrictions and not able to perform the essential functions of his or her position.

We note with extreme caution that the alleged acts of discrimination in the *James* case occurred prior to January 1, 2009, and therefore the trial and appellate courts did not appear to examine in detail James's claim of failure to accommodate under the ADA.

Non-Unionized Employer Found Liable Under the National Labor Relations Act

When an employer attempts to regulate its employees' use of social media such as Facebook, Twitter, or YouTube, it is important to be wary of hidden issues affecting both unionized and non-unionized workforces. The National Labor Relations Board (NLRB) recently took a red pen to portions of Costco Wholesale Corporation's (Costco) employee handbook and deemed its social media policies unlawful. *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371*, 358 N.L.R.B. 106 (2012). This controversial decision blends the worlds of unionized and non-unionized employees because the NLRB's decision is regarding "protected concerted activity." Employers are often at a loss as to whether union laws apply to them, much less how to deal with employees banding together against their company.

Under the National Labor Relations Act (NLRA), which is enforced by the NLRB, both union and non-union employees are allowed to engage in "concerted activity," e.g. to communicate with each other regarding wages, working conditions, unfair treatment, and other certain employment issues. While the temptation may be strong, employers must resist squelching these communications, even if they are disparaging or otherwise cast the employer in an unfavorable light. In the *Costco* decision, the Company was essentially punished for its vague social media policies which did not allow employees to post online negative statements about Costco.

The unlawful excerpt from Costco's employee handbook provided in part that employees were prohibited from posting statements electronically that, "damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement." At first glance, common sense may tell an employer that this policy sounds fair enough and gives enough specifics to help the employee reasonably apply it to his words and actions. The NLRB does not agree.

Like many other companies, Costco may have unwittingly made the mistake of creating a set of policies that could unreasonably chill employees from exercising their protected speech rights under the NLRA. Regardless of the Company's intentions, the NLRB found that the social media policy above was overly broad and included an unlawful prohibition on concerted communications among Costco's employees. However, in a different context, the NLRB may have found differently. For every employer, it is important to consider the context as well as the written policy.

Practice Tip:

The message for employers is clear: Be specific and be fair.

While appearing overbroad and interpreted as unlawful, perhaps Costco's unlawful policy could have been deemed lawful if Costco had included some other language in the policy or handbook which outlined detailed examples of disallowed defamation. By including a limited number of prohibited scenarios, a policy like Costco's may then be considered acceptable because it does not interfere with employee communications protected by the NLRA.

While the *Costco* decision may be confusing in its refrain from drawing a hard and fast rule for social media policies, it is clear that the NLRB has turned the tide against employers with pro-employee readings of the NLRA. To remain proactive in avoiding lawsuits like *Costco*, employers must be aware of any language or criteria in their social media or other employment policies that could be interpreted as unlawful. Accordingly, employers should continue to apply caution in deciding whether to implement social media policies and other employment policies involving employee communications and information sharing.

Family Medical Leave Act Marks 20th Anniversary This Month

On February 5, 1993, the Family Medical Leave Act ("FMLA") was enacted. For the last 20 years employers have struggled to fully understand and properly implement the well-intentioned law. The FMLA allows employees to utilize unpaid time off from work to take care of themselves or their families for issues ranging from pregnancy to serious illnesses. Eligible employees under the FMLA are entitled to 12 weeks of leave for certain family and medical reasons during a 12-month period. While calculating the 12 weeks of leave for a serious accident or illness may be simple, managing the unscheduled intermittent leave of employees continues to pose a challenge for employers.

Employers should be keenly aware of how thoroughly their employment policies address key points of the FMLA, such as:

- Which employees are eligible for FMLA, and who is considered a family member?
- How should employers make inquiries about employees during their leave?
- Under what circumstances may FMLA leave be denied?

Our Firm recently provided a training seminar for the administration of employee intermittent leave policies. If you have any questions regarding FMLA, or would like to schedule your employment seminar, please contact our employment law team.

Arrest and Conviction Records: Ignorance Is Bliss or Do Your Homework?

On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964." The "Guidance" reveals that the EEOC strongly looks at employers' use of arrest/conviction information through the lens of discrimination. Not only does the EEOC look at whether the employer is potentially discriminating, the agency also meticulously analyzes how the discrimination occurs.

Employers need to review their arrest/conviction policies to determine whether it is job related and necessary and whether there are less intrusive methods which achieve the same answer to their question. The EEOC's reasoning for passing the Guidance is founded upon statistics showing that there are disproportionately higher arrest, conviction, and incarceration rates for certain racial and ethnic populations. Further, use of arrest/conviction selection criteria will have a disparate impact on racial and ethnic populations in employment decisions. Therefore, employers engaged in; hiring, employing and/or firing such employee populations should be cautious in utilizing arrest/conviction selection criteria.

Practice Tip:

When a charge is filed at the EEOC alleging that the use of arrest/conviction information was discriminatory, the EEOC will expect the employer to be able to show that its use of the records was job-related and for a business necessity. It is helpful for the employer's case if the employer gave applicants the opportunity to explain the circumstances surrounding the arrest/conviction record. However, there is much more involved in generating the appropriate documentation and policies to protect a company from EEOC compliance issues in the areas of records use. As a standard practice, all employers should work to eliminate policies or practices that include "blanket exclusions" of applicants or employees based on such records because such policies are considered automatically discriminatory by the EEOC.

Chicago Ups the Ante For Failure to Pay Wages

On January 17, 2013, Ordinance 2012-8533 was passed unanimously by the Chicago City Council, and it will become effective July 1, 2013. The Ordinance authorizes the City's Commissioner of

Business Affairs and Consumer Protection to penalize businesses that violate the Illinois Wage Payment and Collection Act, 820 ILCS § 115/1, or any other federal or state wage payment laws. A violation includes but is not limited to failing to pay overtime, minimum wage, vacation time, or any other compensation owed to an employee by an employer pursuant to an employment contract or agreement.

An employer that admits guilt, or is found liable for wage violations during the five-year period prior to the date of an application for a business license, may be denied said license. Additional penalties include fines, suspension and/or the revocation of a business license.

Bryce Downey & Lenkov Employment Law Department

Everyone's heard the expression "a good defense is a good offense." Bryce Downey & Lenkov offers affirmative employment services *before* there is an employment nightmare. This includes preparation of employee handbooks, company policies, and procedures.

Bryce Downey & Lenkov handles all forms of employment matters including defense of discrimination, harassment, and wrongful discharge or treatment matters, enforcement and defense of noncompetition and nonsolicitation agreements, and union grievance and collective bargaining.

Did You Know…?

"Use it or lose it" paid time off policies are not valid in Illinois. This is one of the most common (e.g. vacation & sick time) legal errors in employment handbooks, resulting in untold accrued liabilities, and leading to potential wage and hour law suits.

Seminars

Our attorneys regularly provide free seminars on a wide range of employment topics. We speak to a few people or dozens, to companies of all sizes and large national organizations

Seminars:

- On March 7, 2013, Noah Frank presented "Dealing With Difficult Employment Issues" to the Northern Illinois Adjusters Association.
- Noah Frank presented a webinar on "Legal Employment Nightmares: The Intersection of FMLA, ADA and Illinois Workers' Compensation Act on Health Related Leave."
- Noah Frank also presented to the Chicago Bar Association "Health-Related Leave Issues: the Intersection of the FMLA, ADA and Illinois Workers' Compensation Act."

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We are happy to conduct seminars for individual clients upon request. If you would like us to come in for a free seminar, please email Storrs Downey at sdowney@bdlfirm.com, Noah Frank at nfrank@bdlfirm.com or Natalie Lange at nlange@bdlfirm.com.

Bryce Downey & Lenkov LLC is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Crown Point, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov LLC is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

Business Litigation
Business Transactions /Counseling
Corporate/LLC/Partnership
Organization and Governance
Construction
Employment and Labor
Insurance Coverage
Insurance Litigation
Intellectual Property
Medical Malpractice
Professional Liability
Real Estate
Workers' Compensation

The attorneys at Bryce Downey & Lenkov LLC are committed to keeping you updated regarding the latest developments in workers' compensation law in Illinois and Indiana. If you would like more information on any of the topics discussed above, or have any questions regarding these issues or any aspect of Illinois and Indiana employment law, please contact Storrs Downey at 312.377.1501 or sdowney@bdlfirm.com, Noah Frank at nfrank@bdlfirm.com or Natalie Lange at nlange@bdlfirm.com.

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