Labor and Employment Law Newsletter

April 2014

Bryce Downey & Lenkov Case Results

- **Storrs Downey** and **Jeff Kehl** were successful in obtaining a decision from the Seventh Circuit Court affirming a summary judgment motion granted on their clients' behalf on claims of age discrimination and breach of contract brought by a former executive against his prior employer.

- Storrs and Jeff also were successful on their motion to dismiss six counts of an employee's age, race and FMLA-based complaint in Federal Court. This paved the way for a successful case result on behalf of our client.

- Storrs Downey and **Maital Savin** won an appeal of an Illinois Department of Employment Security (IDES) determination on behalf of their client. A former employee had filed a claim for unemployment benefits with the IDES, which was initially denied. The former employee appealed the decision denying benefits. At the appeal hearing, we presented evidence that showed that our client discharged the former employee for misconduct. Specifically, the evidence showed that the former employee violated the employer's rule requiring that he work his entire shift or get his supervisor's permission to leave early, and that such misconduct was willful and deliberate.

Upcoming Webinar

- **5/7/14 –** Storrs Downey and Maital Savin will present **"Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace."** Click Here for more info and to register.

Court Decisions and Legislation

Vegas Trip Covered Under FMLA

In *Ballard v. Chi. Park Dist.* 2014 WL 294550 (7th Cir. Jan. 28, 2014), the Seventh Circuit defined "care" under the FMLA expansively, to include a trip to Las Vegas.

Plaintiff accompanied her dying mother on an end-of-life trip to Las Vegas. She was

terminated for unauthorized absences accumulated during the trip. The Seventh Circuit held that the District Court correctly denied Defendant's summary judgment because FMLA assures eligible employees unpaid leave "in order to care for" a family member suffering from a serious health condition, regardless of whether the care is provided at home or elsewhere. The Seventh Circuit interpreted "care" broadly, to include both physical and psychological care, without regard for geography.

Practice Tip:

If you learn that an employee on FMLA leave to care for a family member is out of town, even in a place such as Vegas, you must carefully scrutinize whether the purpose of his or her trip would fall under the protection of the FMLA.

Please contact us with any questions you may have regarding FMLA leave.

Employer Should Have Accommodated Sleepy Employee

In *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055 (7th Cir. 2014), the 7th Circuit held that the Defendant's failure to engage in the "interactive process" to accommodate Plaintiff's sleepiness under the ADA was actionable because it prevented identification of a reasonable accommodation.

Plaintiff had difficulty staying alert at work and was suspended after she was found sleeping in the restroom. Shortly thereafter, she again fell asleep on the job and received a final warning. Several days later, she advised her employer that her performance issues might be related to a medical condition. Defendant provided her with ADA paperwork for her doctor to complete. The doctor confirmed that Plaintiff was disabled and had excessive drowsiness but did not diagnose a disability. Defendant terminated Plaintiff. Several weeks later, Plaintiff was diagnosed with narcolepsy.

The 7th Circuit found that Defendant terminated Plaintiff after learning that she suffered from a medical condition and then turned a blind eye to further information or determination of whether accommodation was possible. The Court denied Defendant's motion for summary judgment and held that failure to engage in the interactive process was actionable under the ADA if it prevents identification of an accommodation.

Practice Tip:

Even if an employee is not diagnosed with a specific disability, if he or she advises you of any medical conditions, you should engage in the interactive process to determine whether accommodation is possible under the ADA.

Is Your Severance Agreement Valid?

The Equal Employment Opportunity Commission (EEOC) recently filed a lawsuit in the U.S. District Court for the Northern District of Illinois in Chicago against CVS, the nation's largest provider of prescriptions and health-related services, alleging that CVS violated employees' right to communicate with the EEOC. *EEOC v. CVS Pharmacy, Inc.*, Civil Action No. 14 C 0863. Specifically, the EEOC claims that CVS conditioned the receipt of severance benefits on an overly broad severance agreement, which interfered with the employees' right to file discrimination charges and/or communicate and cooperate with the EEOC.

The question is whether including language in a severance agreement that prevents an employee from filing suit or speaking with the EEOC violates Section 707. Section 707 of Title VII of the Civil Rights Act of 1964 prohibits employer conduct that constitutes a pattern or practice of resistance to the right protected by Title VII.

Given the implications of this case on all employers, we will be closely watching this case and will keep you posted with how this may affect your severance agreements.

Medical Marijuana Update: Eye on the Pot

In November, 2013, we issued a newsflash article on the Illinois' Compassionate Use of Medical Cannabis Pilot Program Act, which went into effect in 1/1/14.

The most pressing issue for employers is what to do with positive drug test results. Given that marijuana can remain in a person's system for up to three months, disciplining an employee for a positive drug test may expose employers to discrimination claims. We have yet to see any litigation in Illinois on this issue. However, the Colorado Supreme Court announced that it will review a Court of Appeals decision from last year, *Coats v. Dish Network, L.L.C.*, 2013 COA 62, 303 P.3d 147 *cert. granted*, 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014), which upheld the termination of an employee who tested positive for marijuana but was not impaired at work. While the Colorado Supreme Court's ruling will not be binding on Illinois, it will be the first time the courts will address this issue and therefore, will provide guidance to other courts. We will be watching closely to see how Colorado decides this issue and will keep you posted.

Until then, it is important that employers avoid basing any employment decisions on drug test results alone, but instead, also base their decisions on articulable factors that support a good faith belief of impairment. For more information, please join us on 5/7/14 for a webinar entitled "Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace." To register, Click Here.

Please contact us with any questions you may have about this new legislation.

$4.26 Million for Retaliatory Discharge

In *Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, 992 N.E.2d 43, *appeal denied*, 996 N.E.2d 13 (Ill. 2013), the Illinois Appellate Court affirmed the trial court judgment, finding that Plaintiff was terminated in retaliation for exercising his rights under the Workers' Compensation Act, and upheld an award for $4.26 million, including $3.6 million in punitive damages.

Plaintiff was off work due to a work-related injury. A week prior to Plaintiff's return to work, Defendant sent a notice to Plaintiff, advising that his position had been reassigned based on his performance, record of unreliability and that he was no longer qualified for the position as he was unable to perform essential job functions. The notice advised that Plaintiff would be given 30 days to apply to and be accepted for another position within the company as posted. Plaintiff did not apply for the specially approved position and was terminated for failing to return to work. Plaintiff filed suit for retaliatory discharge.

Practice Tip:

Generally, once an employee is released to work full-duty, the work is available, and the employee has not previously been laid off, an employer should consider issuing a written work offer rather than require the employee to reapply for a position.

Please feel free to contact us with any questions you may have about retaliatory discharge claims.

Game Changing News: NLRB Rules Northwestern Football Players are Employees

On 3/26/14, the National Labor Relations Board's regional director for region 13 ruled that the Northwestern University football players are "employees" under the National Labor Relations Act. The regional director defined an employee under the Act as "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." The regional director noted that the football players generated as much as $76,000.00 per year and that although the players do not receive a paycheck in the traditional sense, they receive a substantial economic benefit for playing football. The regional director further noted that the players were required to sign a "tender," which was considered an employment contract. Additionally, the regional director found that Northwestern's coaches have "strict and exacting control" over football players throughout the entire year. Northwestern is appealing the decision.

The implications of this decision may potentially be a game changer (no pun intended). If college-athletes are considered employees under the NLRA, this may go beyond unionizing. For example, if college-athletes are considered to be employees under the Fair Labor Standards Act (FLSA), they could possibly be entitled to back wages, minimum wage and overtime. In addition, this could trigger state unemployment insurance laws. Last but not least, if employees are considered to be employees under state workers' compensation laws, it's no surprise that this would lead to numerous claims being filed on a regular basis.

We will continue to follow this story and keep you posted with any developments.

Time to Freshen Up Your Employment Handbook

Having an employment handbook can be the key to defending an employment claim. However, an outdated handbook is much less helpful and can even be detrimental to your case. It's a good idea to periodically review your employment handbook to keep it up to date with new laws and cultural trends. Some important issues that you may consider including and/or updating are:

Anti-Bullying: While workplace bullying is not illegal, legislation prohibiting bullying in the workplace is pending in a number of states. Even without legislation currently in place, it may be a good idea to include anti-bullying provisions in your employment handbook as it may improve workplace productivity. Additionally, such provisions may avoid having employees assert claims related to bullying that they may attempt to squeeze under existing laws. For example, an employee with gender identity disorder that recently underwent sex reassignment surgery

who is being bullied by co-workers may file suit under statutes affording protection against discrimination based on gender identity, which exist in a number of states. To learn more about gender identity disorder and the workplace, watch our 5/7/14 webinar entitled **"Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace."** To register, Click Here.

E-cigarettes: Although some cities have issued regulations regarding indoor and workplace e-cigarette smoking, for those that have not, it is important to consider whether you will allow e-cigarette smoking in the workplace.

Allowing employees to smoke e-cigarettes at work may raise safety concerns for other employees. Some argue that e-cigarettes are also so similar to real cigarettes that they may cause employees to mistakenly believe it is acceptable to smoke real cigarettes at work. Additionally, some argue that smoking e-cigarettes at work can be a distraction and lower productivity.

On the other hand, proponents of allowing employees to smoke e-cigarettes at work argue that smoking e-cigarettes is not a safety hazard, and in fact, can save lives by helping employees addicted to nicotine to refrain from smoking real cigarettes. Further, some argue that allowing employees to smoke e-cigarettes at work may actually increase productivity by reducing smoke breaks.

An employer has a right to include in its handbook or employment policies a ban against the use of e-cigarettes in the workplace.

At-Will Employment Provisions: At-will employment provisions must make clear that employees still have the right to collectively bargain and participate in concerted activities to improve working conditions. It is best to avoid language that states that the at-will relationship cannot be amended, modified or altered in any way, which the NLRB has found to be a waiver of an employee's right to organize.

We recently successfully defended an alleged breach of employment contract claim heard before the Seventh Circuit Court. Our client's at-will provision was clearly stated in various portions of its handbook and was an important factor in the Court's decision that no employment contract existed.

Please feel free to contact us with any employment handbook questions you may have. We are also happy to review and help you update your current handbook.

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.

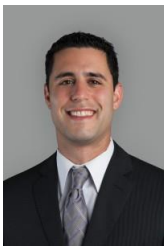
Bryce Downey & Lenkov handles all forms of employment matters including defense of discrimination, harassment, and wrongful discharge or treatment matters, enforcement and defense of noncompetition and nonsolicitation agreements, and union grievance and collective bargaining.

Recent Awards & Accolades

The following attorneys were named 2014 Leading Lawyers:

Geoff Bryce
Storrs Downey
Terrence Kiwala
Rich Lenkov
Terrence Madden

This distinction has been earned by **fewer than 5% of all lawyers** licensed to practice law in Illinois.



Michael Milstein has been selected to the 2014 Illinois Rising Stars list. This is an exclusive list, recognizing no more than 2.5 percent of the lawyers in the state.

Maital Savin has been appointed as a legislative liaison to the Chicago Labor & Employment section of the CBA Young Lawyers.

Giving Back

Team BDL – Hustles up the Hancock

On 4/13/14, Team BDL climbed 94 floors to help raise awareness and funds for lung disease research, education and advocacy. Team BDL had 19 full and 6 half climbers. Together, we raised over $6,000 for lung cancer research!

Team BDL Takes the Polar Plunge!

Lake Michigan may have been over 85% covered in ice but that didn't stop Team BDL from taking a quick dip! On 3/2/14, 7 brave

souls took the frigid Polar Plunge. Wearing polar bear hats and gripping their trusty plungers, the "Polar Plungers" (pun intended) braved wind chills of minus 12 and water a bone-chilling 32 degrees. The BDL Polar Plungers raised over $3,000 for Chicago Special Olympics and were even featured on GapersBlock.com. Be sure to follow us on Facebook to see more of Team BDL.

Did you know? **Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Coordinator, Jason, at jklika@bdlfirm.com.**

General Liability

- **Illinois Court of Appeals Broadens Distraction Exception to Open and Obvious Doctrine**
- **Two Illinois Appellate Courts Reach Different Conclusions in Accumulation of Ice Cases**

Labor & Employment Law

- **US Supreme Court Defines "Supervisor" For The Purposes Of Employment Discrimination And Harassment Litigation**
- **Timing Of Terminating Injured Worker Important In Retaliatory Discharge Cases**

Corporate & Construction

- **Trade Secrets: If It's Not A "Trade Secret," How Do I Protect It?**
- **Federal, State And Local Incentives Available For Businesses**

Contributors to the April 2014 Labor and Employment Law Newsletter

The Bryce Downey and Lenkov attorneys who contributed to this Newsletter were Storrs Downey and Maital Savin.

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

We have spoken this year at several national and regional conferences before such organizations as Council on Litigation Management and the Telework Summit on a variety of labor and employment topics. These have included presentations on employment landmines in workers' compensation and legal considerations for teleworkers.

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.

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 employment 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.

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