ROBINSON & COLE LLP
Labor, Employment & Benefits

Napping on Job May Trigger Duty to Offer FMLA Leave

When John Byrne, an engineer for Avon Products, was caught napping for extended periods in the employee break room and missed the resulting disciplinary meeting, he was fired. The following day, Avon learned that Byrne was hospitalized for depression. After two months of treatment, Byrne attempted to return to work but Avon refused to reinstate him. Byrne sued Avon under the Americans with Disabilities Act and the Family and Medical Leave Act. The trial court dismissed Byrne's claim, concluding that Byrne's on-the-job naps justified his firing and the news of Byrne's hospitalization, one day after his termination, was too late to place Avon on notice that Byrne qualified for FMLA leave.

In Byrne v. Avon Products, Inc. (5/9/03), the U.S. Court of Appeals for the Seventh Circuit reversed and reinstated Byrne's FMLA claim. Relying on Byrne's previous exemplary employment history, the Seventh Circuit concluded that Avon could have deduced that Byrne suffered from a serious health condition requiring FMLA leave based on the change in his behavior. In addition, given evidence that Byrne was suffering from debilitating depression weeks earlier, the appeals court noted that there remained a question as to whether someone in Byrne's mental condition was even capable of communicating the need for leave. The appeals court explained that, under the FMLA, a person unable to give notice of the need for leave may be excused from doing so.

Admission of Incompetence Defeats Employee's Claim of Discriminatory Evaluation

By his own admission, Antonio Jenkins, who is African-American, was "incompetent as a teacher." Nonetheless, when he was informed that he would receive an unsatisfactory performance evaluation and a transfer to another school district, Jenkins sued for race discrimination. Jenkins also claimed that a decision by the principal of his school, also African-American, not to remove a number of "problem students" from his class was discriminatory. Jenkins' lawsuit was dismissed by the trial court and Jenkins appealed.

In Jenkins v. Board of Education of New York City (4/28/03), the U.S. Court of Appeals for the Second Circuit rejected Jenkins' argument. The Second Circuit concluded that, even assuming that a single negative performance evaluation constituted an adverse employment action, Jenkins' own admission that he was incompetent as a teacher destroyed his claim. In addition, the fact that the principal did not remove "problem students" from his class, without more, could not constitute an adverse employment action. Finally, the appeals court relied on evidence that Jenkins had previously requested a transfer to conclude that the transfer was insufficient to constitute an adverse employment action.

No Claim Recognized for Employee Fired for Seeking Attorney

When Deborah Porterfield, an Administrative Assistant at Home Instead Senior Care, received a written employee warning, she told her supervisor that she had been advised to consult an attorney before signing the warning. Almost immediately, she was fired. Porterfield sued in state court alleging wrongful discharge. The trial court dismissed her claim and an intermediate appeals court agreed. Porterfield then appealed to the Maryland Court of Appeals, its highest court.

In Porterfield v. Mascari II, Inc. (5/8/03), the Maryland Court of Appeals concluded that Home Instead's decision to terminate Porterfield was not unlawful because Maryland's public policy in favor of access to counsel does not extend to Porterfield's discharge. In a 3-2 split decision, the Maryland high court concluded that Maryland law does not recognize the general right to freely consult with an attorney concerning employment matters as a public policy sufficient to support a wrongful discharge action. The court further observed that the possibility that Porterfield may exercise an assumed right is not the same as if she had actually exercised that right.

A heated dissent characterized the majority's decision as "incomprehensible" and hypothesized that under the majority's ruling, an employer would not violate public policy by coercing an employee to sign, without legal advice, an unconscionable employment document by threat of termination.

"Constructive Demotion" Claims Increasing

Ronald Fenney worked as an "on-call" locomotive engineer, which required him to be available to report to work at any time. As a result of a previous work-related injury, Fenney had only limited use of his right arm and hand. Although it was required to provide on-call engineers with one and one-half hours notice, the railroad typically phoned Fenney up to three hours prior to his shift to allow him extra time to get ready. After new management took over, the railroad's policy changed and Fenney and other on-call engineers no longer received more than two hours advance notice.

Fenney made numerous requests to be exempted from the on-call policy change, which the railroad denied. Fenney asked the railroad to assign him to the only position available to Fenney that provided regular hours, weekend conductor, so that he could avoid arriving late and risking termination. The weekend conductor position paid less and provided fewer hours than the on-call position. Fenney agreed to the demotion and sued, claiming discrimination and failure to accommodate in violation of the Americans with Disabilities Act and equivalent state law. The trial court dismissed his claims and Fenney appealed.

In Fenney v. Dakota, Minnesota & Eastern Railroad Company (4/28/03), the U.S. Court of Appeals for the Eighth Circuit reversed the trial court's dismissal, recognizing for the first time the theory of "constructive demotion." Constructive demotion has been recognized by the First, Fifth, Sixth, Seventh, and now, Eighth Circuits and employs the same analysis as in a constructive discharge theory. The Eighth Circuit concluded that Fenney could proceed with his claim because he had demonstrated that his work environment was abusive and that an objective person faced with the railroad's failure to accommodate him would have felt compelled to self-demote. Thus, the appeals court concluded that a reasonable person could conclude that Fenney had no choice other than to demote himself as a result of the failure to accommodate.

Background Checks Required for Drivers Certified to Transport Hazardous Materials

Three federal transportation agencies announced interim final rules that require background checks for drivers certified to transport hazardous materials.

The Homeland Security Department's Transportation Security Administration, the U.S. Department of Transportation Federal Motor Carrier Safety Administration, and the Research and Special Programs Administration coordinated separate rules requiring 3.5 million commercial drivers to undergo background record checks, including a review of criminal, immigration and FBI records, prior to receiving certification to transport hazardous materials. Under the TSA interim rule, applicants convicted in the past seven years of certain felonies, including terrorism, espionage, treason, robbery, smuggling, murder, sedition, rape or aggravated sexual abuse, arson, and immigration violations, as well as those found to be mentally incompetent, will not be permitted to obtain or to renew the certification to transport hazardous materials. Applicants also will be checked to determine whether he or she is a citizen or a lawful permanent resident of the United States. State governments are expected to adopt uniform five-year renewal requirements for hazardous materials drivers and also require background checks.

Under the new rules, if a driver does not successfully complete his or her background check, the TSA will notify the individual and the applicable state will deny issuance of a commercial driver's license with a hazardous materials endorsement. To protect the employee's privacy, however, the company is not notified of the conclusions of the background check. Although the employee is not able to transport hazardous materials, the background check will not necessarily impact his or her continued employment as a driver of other materials.

The public has 60 days to comment on the rules. Comments may be sent to the Docket Management System, U.S. Department of Transportation, Room 401, 400 Seventh Street N.W., Washington, DC 20590-0001. You also can view or file comments at the DMS online docket.

Court Allows Employee To Sue Employer for False Background Check

When Edward Socorro was hired by Hilton Hotels, he replied "no" to the question on his application asking whether he had ever been convicted of a felony or misdemeanor. The application also authorized Hilton to conduct a background investigation. Hilton hired a private investigation firm, IMI, to investigate Socorro's background. IMI mistakenly reported to Hilton that Socorro had been convicted of a misdemeanor and had served six months in jail. Hilton confronted Socorro and asked him if he had ever been convicted or spent time in jail. Socorro truthfully replied that he had not. Hilton did not conduct an independent investigation or ask IMI to verify its report. Socorro was terminated for falsifying his application.

After his termination, Hilton allegedly repeated to others that Socorro was terminated for lying on his application and that he had been convicted of a crime and spent time in jail. Socorro sued both Hilton and IMI for, among other claims, defamation, false light invasion of privacy, and negligent infliction of emotional distress. IMI and Hilton asked the court to dismiss the claims. In Socorro v. IMI Data Search Inc. (4/28/03), the U.S. District Court for Illinois ruled that Socorro could proceed with his defamation and false light claims. The court ruled that the Fair Credit Reporting Act, however, preempted his allegation of negligent infliction of emotional distress and dismissed that claim.