To view this email as a web page, go here.

OCTOBER 16, 2006

Labor, Employment & Benefits e-News

In This Issue

- Long-Awaited NLRB Decision Defines Who Is a "Supervisor"
- Retiree's ERISA Claim Allowed to Proceed 15 Years after Employer Offered Enhanced Benefits
- Lack of Evidence about How Depression Substantially Impaired a Major Life Function Doomed Employee's ADA Claim
- Dismissal of Age and Gender Discrimination Claims Affirmed Despite Alleged Comments by Decision-Makers
- Claim of Title VII National Origin Discrimination Rejected, Alleged Harassers Were Foreign-Born
- DOL Opinion Letter Clarifies Sick/Vacation Leave Plans under the FLSA

Long-Awaited NLRB Decision Defines Who Is a "Supervisor"

In a highly anticipated decision in a case that has been pending since 2002, the National Labor Relations Board clarified the definition of "supervisor" under the National Labor Relations Act. The decision, Oakwood Healthcare, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (9/29/06), defined the terms "assign," "responsibility to direct," and "independent judgment" as those terms are used in the NLRA. As explained by the NLRB, these terms are used by the NLRA to define who is a "supervisor." The NLRB defined "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties ... to an employee." The term "responsibility to direct" was defined to mean accountability, including the authority to direct the work of others, take any necessary corrective action, and face the prospect of adverse consequences that may arise from directing other employees. The definition of "independent judgment" incorporated two concepts: the judgment must truly be independent and not controlled by another authority, such as detailed instructions or regulations, and the level of discretion exercised must be above that considered routine or clerical.

Applying those definitions to charge nurses working at Oakwood Heritage Hospital, the NLRB ruled that certain charge nurses, who as a regular part of their duties assigned nursing personnel to specific patients and exercised independent judgment in making those assignments, were supervisors. However, other charge nurses, including rotating or emergency room charge nurses, did not spend a regular and substantial portion of their time on supervisory functions to qualify as supervisors.

The definitions articulated in *Oakwood Healthcare Inc.* were applied to two other cases pending before the NLRB. In Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center and United Steelworkers of America, AFL-CIO, CLC (9/29/06), the NLRB found that the charge nurses employed at a nursing home did not have the authority to "assign" or "responsibly direct" employees. Those charge nurses did not have the right to require other employees to stay past their shifts, to come in from off-duty status, or to shift section assignments. In addition, there was no evidence that the charge nurses were accountable for the job performance of other employees. Therefore, those charge nurses were not "supervisors" within the meaning of the NLRA.

In Croft Metals, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (9/29/06), the NLRB ruled that lead persons were statutory employees, not supervisors. Lead persons did not assign employees, but directed crews assigned by others. Although lead persons were accountable for the work of their crews, their direction was not the product of independent judgment, but was either routine or controlled by pre-established guidelines. [back]

Retiree's ERISA Claim Allowed to Proceed 15 Years after Employer Offered Enhanced Benefits

Jean Stavola worked for the Connecticut Light and Power Company and, after a long career, retired in 1991. At the time of her retirement, she had been employed by CL&P for 40 years and was over 60 years old. As a result of her length of service and age, she was eligible for pension benefits under the utility's retirement plan. She contacted CL&P's human resources department to obtain information about the pension benefits. She was told to "go for it" and retire and that there would not be much of a change in those benefits in the future. Believing that there was not going to be any change in the near future, Stavola decided to retire. Seven months later, CL&P announced a Special Retirement Program with enhanced benefits. Upon seeing a law firm advertisement announcing the program and informing readers that, if they did not receive those benefits, they may be able to file a claim under the Employee Retirement Income Security Act, Stavola contacted CL&P and asked whether she should have been eligible for the enhanced benefits. CL&P's senior vice president responded that the decision to offer the enhanced benefits occurred after Stavola had decided to retire and, as a result, she was not owed any additional benefits. At about the same time, Stavola read in the newspaper about a lawsuit filed by former employees of CL&P alleging that CL&P breached its fiduciary duty under ERISA by failing to inform them about the possibility of offering enhanced benefits. Seven years later, Stavola read in a newspaper that 15 retired employees had won their lawsuit. The article described a court decision that found that CL&P had deliberately withheld information about enhanced retirement benefits they would have received had they waited a few more months to retire. After reading the article, Stavola hired the same attorney who represented the other retirees and commenced a lawsuit seeking the same enhanced benefits. In defense, CL&P asserted that ERISA's statute of

limitations barred Stavola's claims.

In Stavola v. Northeast Utilities (10/3/06) the U.S. District Court for Connecticut explained that ERISA's three-year statute of limitations depends on whether Stavola had actual knowledge that CL&P had failed to disclose all material information about the enhanced benefits at the time of her retirement. The court determined that, despite the 15-year passage of time, the first time when Stavola had actual knowledge that CL&P had withheld information from her was when she read in the newspaper that CL&P had deliberately withheld information from employees. The court noted that, although she may have suspected that not all information had been provided, she did not have actual knowledge until reading that the other retirees had won their lawsuit. As a result, the court allowed the case to proceed to a full trial on the merits. [back]

Lack of Evidence about How Depression Substantially Impaired a Major Life Function Doomed Employee's ADA Claim

After working for Jefferson County, Colorado for seven years, Christie McWilliams was told that the county intended to terminate her employment. She had been repeatedly warned about her rude and inappropriate behavior. McWilliams suffered from depression and claimed that her condition made it difficult to deal with people and to cope with work situations. During her employment, McWilliams had taken several approved leaves of absence under the Family and Medical Leave Act but she also had numerous unexcused absences. She was given the option of termination or of resigning and receiving severance. After resigning, McWilliams sued for disability discrimination in violation of the Americans with Disabilities Act and other claims. The trial court dismissed all of her claims and she appealed.

In McWilliams v. Jefferson County (9/6/06), the U.S. Court of Appeals for the Tenth Circuit upheld the dismissal of McWilliams' ADA claim. The court noted that McWilliams had presented no evidence that the county's reasons for her termination (her deficient interpersonal skills and multiple unexcused absences) were pretextual. The court also ruled that, because McWilliams had not established that her depression substantially impaired any major life activity, she was not a qualified individual with a disability entitled to protection under the ADA [back]

Dismissal of Age and Gender Discrimination Claims Affirmed Despite Alleged Comments by Decision-Makers

Bonnie Wittenburg was hired by American Express Financial Advisors as a research analyst. At the time of hire, she was 46 years old. Wittenburg was one of only two females in the 26-person Equity Investment Department. During her second year on the job, Wittenburg was named "Analyst of the Year." Three years later, she was terminated in a reduction-in-force based on her performance rating the prior year. She sued AEFA for age discrimination in violation of the Age Discrimination in Employment Act and gender discrimination in violation of Title VII. As evidence of discrimination, Wittenburg pointed to comments by AEFA executives such as Tom Mahowald, the Director of Equity Research, who once had told a female colleague worried about being the target of a potential lay-off that, as a woman, she had to make concessions since "a lot of these guys are the sole support of their families." She also alleged that two male analysts received higher ratings than her. In addition, the AEFA Chief Investment Officer had mentioned once that he was not "averse to hiring younger portfolio managers or analysts," while another AEFA

director had told a former employee that AEFA wanted to retain "those that were younger," and notes by the Human Resources Relationship Leader indicated that AEFA was looking to hire a "junior analyst." Within hours of Wittenburg's own termination, Mahowald asked her whether her husband had a job.

In Wittenburg v. American Express Financial Advisors, Inc. (9/28/06) the U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal of Wittenburg's ADEA and Title VII claims. The court determined that there was insufficient evidence of either age or gender bias. The statement about AEFA "not being averse to hiring younger portfolio managers or analysts" was deemed to be a generalized statement which did not establish that Wittenburg's termination - which occurred one year later - was prompted by age bias. The comment about retaining younger workers was a non-contemporaneous opinion by a non-decision maker that was not connected to Wittenburg's discharge. The court also explained that Wittenburg did not show that the term "junior person" was a label for a "younger person." Likewise, the court ruled that the comments that Wittenburg presented as evidence of gender bias were not causally related to her termination. The comment by Mahowald to his female colleague was made years before he became Director. The question to Wittenburg about whether her husband was employed did not reasonably infer gender bias, since he had previously hired a female analyst. In addition, statistics established that AEFA retained persons the same age or gender as Wittenburg. [back]

Claim of Title VII National Origin Discrimination Rejected, Alleged Harassers Were Foreign-Born

Sukumari Nair, who was born in India, worked as a nurse in a Veteran's Administration hospital. Nair filed a complaint alleging that she was subjected to a hostile work environment on account of her national origin and in retaliation for prior discrimination complaints she presented to the U.S. Equal Employment Opportunity Commission. In her complaint, Nair alleged that her co-workers insulted her, criticized her, avoided her, and poked her with scissors. In Nair v. Nicholson (10/2/06), the U.S. Court of Appeals for the Seventh Circuit rejected Nair's claims. The court ruled that the alleged hostile treatment claimed by Nair could not be attributed to her national origin. The employees who engaged in the harassment were themselves foreign-born; most of them were from the Philippines, though some were from Laos and China. The court also determined that the insults and criticism related to Nair's constant complaints to supervisors about the competence of the other nurses. Because none of the comments referenced Nair's national origin, the court ruled that there was no basis for a national origin claim. The court also rejected Nair's retaliation claim because the nurses were harassing Nair for complaining about them, not because she had previously filed an EEOC complaint. Moreover, the court noted that, even if the harassing conduct was not actionable under Title VII, the hospital took prompt remedial action by transferring Nair to a different department. [back]

DOL Opinion Letter Clarifies Sick/Vacation Leave Plans under the FLSA

On September 14, 2006, the U.S. Department of Labor released an opinion letter clarifying when a sick/vacation leave plan qualifies as a bona fide plan under the Fair Labor Standards Act and its corresponding regulations. The DOL explained that plans with defined benefits that have been communicated to eligible employees and that operate as described in the plan document have been considered bona fide. Further, a reasonable number of absences without loss of pay must be granted to exempt employees. The DOL further clarified that an employer may make salary deductions for absences of one or more full days due to sickness when an exempt employee does not qualify for leave or has exhausted his/her leave allowance under the bona fide sick/vacation leave plan. [back]

For more information, please contact Stephen Aronson or Alice DeTora or phone either of them at 800-826-3579.
Visit our Labor, Employment and Benefits website at www.rc.com.
To view back issues, visit our searchable archives. If you would like certain information covered in future communications, let us know. We welcome your feedback.