



Recent Developments In Employment Law

Detroit

34th Floor
100 Renaissance Center
Detroit, MI 48243
(313) 259-7777
Fax (313) 393-7579

Oakland County

755 West Big Beaver Road
Suite 2020
Troy, MI 48084
(248) 362-2110
Fax (248) 244-0780

Ann Arbor

110 Miller
Suite 300
Ann Arbor, MI 48104
(734) 761-3780
Fax (734) 930-2494

Northern Michigan

229 Court Street
P.O. Box 405
Cheboygan, MI 49721
(231) 627-4351
Fax (231) 627-2802

www.bodmanlongley.com

**PROPOSED REGULATIONS UNDER COBRA
PROVIDE OPPORTUNITIES FOR EMPLOYERS**

Immediate Reliance

Although the proposed regulations described in this article are not final, the IRS states that it will accept compliance with them as good faith compliance with COBRA. While this protects employers from the IRS, courts may not give the usual deference to proposed regulations in suits by private individuals. You should consider this in close cases.

Small Employer Exemption — Counting Part-Time Employees

The proposed regulations change the way in which employers determine whether they have fewer than 20 employees on more than 50% of their typical business days in a calendar year. Employers may count part-time employees as fractions, so it is possible, for example, to have 19-7/8 employees and escape COBRA obligations.

To compute the fraction associated with a part-time employee, divide the weekly hours worked by the part-time employee by the number of hours which the employer requires for full-time status, but not more than 40.

Instead of calculating the number of employees on each business day, the proposed regulations also permit the calculation to be made for each payroll period.

Separate Plans for Separate Benefits

The proposed regulations say that the plan documents will govern in determining whether separate plans exist for different health care benefits subject to COBRA. Thus, employers may document prescription drug, dental and vision benefits as separate plans, for example. This would permit COBRA beneficiaries to separately elect or reject coverage under each plan rather than requiring an all or nothing election. The employer benefits by reducing COBRA elections under the peripheral benefit plans.

Inside

U.S. Supreme Court Clarifies Definition of a Disability.....2
Ellerth and Faragher: How Lower Courts Have Applied the Supreme Court's Standards.....3
U.S. Supreme Court Rules That Receipt of SSDI Benefits Does Not Bar Disability Discrimination Claim.....5
Rights of Returning Reservists Under USERRA.....6
Don't Forget to Register for the Employment Law Update6

COBRA and Health Care Flexible Spending Accounts

Until now, employers were uniformly required to offer COBRA coverage under health care flexible spending accounts ("FSAs") in cafeteria plans. Generally, employees may contribute to FSAs maintained by their employers through payroll deductions. Some employers also contribute either on a matching basis or through outright grants. An employee may then present uninsured medical bills to the FSA administrator for payment from the employee's account. Because contributions to an FSA are not included in the employee's taxable income, the employee saves the amount of income taxes which would have been paid on the amount of money needed to pay the medical expenses.

If an employee elects COBRA coverage under an FSA he or she must pay the premium which cannot be more than 102% of the employee's payroll deduction contribution plus the employer's contributions, if any. Moreover, since the premium cannot be paid by payroll deduction if the participant is no longer employed by the FSA sponsor, the employee experiences no income tax savings.

While it might appear at first glance that it makes no economic sense to elect COBRA coverage under an FSA, this is not always the case. If an employee terminates employment without having incurred reimbursable medical expenses in at least the amount of the FSA account balance, then the employee would lose the remaining balance if he or she were not able to continue the coverage through COBRA. In that case it makes sense for the participant to pay the COBRA premiums so that the unspent FSA account balance is not lost.

On the other hand, COBRA coverage under an FSA presents a risk to the employer. By law the FSA must pay any reimbursable medical expense presented up to the total amount available from the FSA for the entire year, even if the demand for reimbursement exceeds the contributions to the account at that time. This creates an incentive for an FSA participant to elect COBRA, present reimbursable bills for the total remaining FSA liability, and then cease paying the COBRA premium leaving the employer with an uncollectible loss.

The proposed regulations reduce employers' risks by curtailing the circumstances under which an employer must offer COBRA coverage to FSA participants.

In order to qualify for the exemption from COBRA under the proposed regulation, an FSA must first be an excepted benefit under HIPAA which is the case if the employer offers other major medical coverage in addition to the FSA, and the maximum benefit under the FSA does not exceed two times the employee elective contribution.

The COBRA exemption under the proposed regulation comes in two parts. COBRA coverage need not be offered under an FSA for the next plan year after the COBRA event if the premium chargeable for the COBRA coverage exceeds the maximum FSA benefit. This will nearly always be the case, since the maximum premium chargeable is 102% of the contributions to the FSA.

In addition, COBRA coverage need not be offered for the balance of the plan year in which the COBRA event occurs if the maximum benefit available under the FSA for the balance of the plan year is less than the maximum COBRA premium which the employer can charge for the balance of the plan year. The application of this part of the COBRA exemption will depend upon how much of the balance of the FSA has been spent at the time of the COBRA event compared to the prorated COBRA premium chargeable over the balance of the plan year.

We will conduct a workshop on the COBRA exemption for FSAs under these proposed regulations at the Annual Employment Law Update. (See the registration reminder at page 6.)

U.S. SUPREME COURT CLARIFIES DEFINITION OF DISABILITY

On June 22, 1999, the United States Supreme Court issued two decisions that significantly alter the application of the Americans With Disabilities Act (ADA). In *Sutton v United Air Lines, Inc.*, and *Murphy v United Parcel Service, Inc.*, the court ruled in 7-2 decisions that the determination of whether an individual is disabled under the ADA should be made with reference to measures that mitigate the individual's impairment. The decisions mean that people with disabilities that can be mitigated or corrected by medicine or medical devices may not claim protection from discrimination under the ADA.

Sutton involved severely myopic twin sisters who applied to United for employment as commercial pilots. Although both sisters had uncorrected visual acuity of 20/200 or worse, their vision was 20/20 with the use of eyeglasses. They were rejected for the positions, however, because they did not meet United's minimum requirement of uncorrected visual acuity of 20/100 or better. They then filed suit under the ADA claiming discrimination. In dismissing their claims the trial court reasoned that the sisters were not actually disabled under the Act because they could fully correct their visual impairments. The court also found that the sisters were not "regarded as" disabled by United. The airline, at most, regarded them as unable to perform one job and not a broad range of jobs. This reasoning was endorsed by the Court of Appeals and the Supreme Court.

The Supreme Court examined the definition of "disability" in the Act. It determined that the ADA does not permit the evaluation of a person in his hypothetical uncorrected state:

"A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."

The court also ruled that individuals who are "regarded as" having a disability are disabled within the meaning of the ADA. The court noted, however, that the airline only excluded the sisters from one job because of their vision and that many other jobs were available to them. Thus, their allegation did not support their claim that United regarded them as having a *substantially limiting* impairment.

The court employed similar logic in affirming the dismissal of the plaintiff's ADA claim in *Murphy*. The plaintiff was employed as a mechanic, a position that required a commercial driver's license. He was fired when the employer discovered he could not obtain the necessary medical certificate from the Department of Transportation (DOT) due to his exceedingly high blood pressure. Because the plaintiff's condition was controllable with medication, the court concluded he was not disabled under the ADA.

Moreover, he was not "regarded as" disabled because of his inability to obtain a commercial license due to high blood pressure. According to the

court, the employer regarded him as unable to work as a mechanic in jobs that required a commercial driver's license. There was ample evidence to show that he could perform mechanic jobs not requiring DOT certification.

Although the lesson from *Sutton* and *Murphy* is that mitigating circumstances must be considered in determining whether a person is disabled under the ADA, employers should continue to exercise care in making these determinations. One reason is the court's insistence on an individualized or case-by-case approach to assessing coverage under the ADA. Another is that individuals who employ mitigating measures may still be substantially limited in the major life activity of working. Finally, the Supreme Court did not suggest that any conditions as mitigated are *per se* excluded from coverage under the ADA.

ELLERTH AND FARAGHER: APPLYING THE SUPREME COURT'S "DELPHIC PRONOUNCEMENT" ON EMPLOYERS' VICARIOUS LIABILITY FOR SEXUAL HARASSMENT

Last summer, the U.S. Supreme Court issued two decisions, *Burlington Industries, Inc v Ellerth* and *Faragher v City of Boca Raton*, which provided additional guidance on an employer's liability for sexual harassment perpetrated by a supervisor with authority over the plaintiff-employee. In dissent, Justices Thomas and Scalia criticized the majority for its "Delphic pronouncements" that provided "shockingly little guidance about how employers can actually avoid vicarious liability." A review of several post-*Ellerth* and *Faragher* cases reveals that the lower courts have taken differing approaches in applying the *Ellerth* and *Faragher* standards, giving some credence to the dissenters' concerns.

Vicarious Liability and the Court's Guidance on the Affirmative Defense

Essentially, in *Ellerth* and *Faragher*, the court ruled that when a supervisor's sexual harassment culminates in a tangible employment action, such as dismissal or an undesirable reassignment, the employer is automatically liable. However, when no tangible employment action is taken, the employer may avail itself of an affirmative defense.

The defense has two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The First Element: The Employer's Reasonable Care

An employer must initially establish that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Today, most employers have established and distributed policies prohibiting sexual harassment. Whether an employer can satisfy its burden that it exercised reasonable care by virtue of such a policy has varied from case to case.

In some cases the courts have held, as a matter of law, that the employer met the first element of the affirmative defense by distributing a policy of which plaintiff was aware. In *Fierro v Saks Fifth Avenue*, the court recognized that "the employer's promulgation of 'an antiharassment policy with complaint procedure' is an important, if not dispositive, consideration."

In contrast, in *Lancaster v Sheffler Enterprises*, the court said that having a policy and forcing all new employees to sign the policy is not sufficient to establish reasonable care. Rather, the employer must demonstrate reasonable steps to enforce the policy, and prevent and correct violations of it.

The Second Element: The Employee's Unreasonableness

The second part of the affirmative defense requires that an employer show "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." In *Fierro*, the court categorized this second element as "the crucial inquiry" and ruled that the employee's failure to report alleged harassment because of "conclusionary assertions of fear of repercussions" will not defeat the affirmative defense.

Establishing the unreasonableness of the employee's conduct is, of course, easiest when the employee has not complained about the harassment at all. Thus far, where the employer has disseminated an anti-harassment policy and the complainant knows of it, most courts have had little sympathy for

employees who failed to use the policies to make their employers aware of the harassment.

A review of the cases suggests that an employee will have to do more than merely allege she had a reasonable explanation not complaining about harassment. She will have to articulate specific facts that support the alleged reason.

Prompt Remedial Measures

Before *Ellerth* and *Faragher*, an employer could avoid liability in many cases "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." The Supreme Court in *Ellerth* and *Faragher* did not address this method for avoiding liability and the effect that *Ellerth* and *Faragher* were meant to have on it. The courts so far have varied in the significance they have placed on an employer's prompt remedial action.

In *Gunnell v Utah Valley State College*, the district court dismissed an employee's claim because the employer stopped the harassment after the employee complained. The Tenth Circuit reversed and sent the case back for further proceedings in light of *Ellerth* and *Faragher*, stating, "an employer whose supervisory personnel has harassed subordinates will be liable for the harassment that occurred even though the employer ultimately stopped further harassment."

In contrast, in *Indest v Freeman Decorating, Inc.*, the Fifth Circuit ruled that the employer was not vicariously liable because it took prompt remedial measures in response to the employee's complaint, characterized by the court as "presenting only an incipient hostile environment," which the court ruled was not a tangible adverse employment action. The court concluded that "[i]mposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would undermine . . . Title VII's deterrent policy."

Recommendations

At a minimum, an employer must establish and distribute an anti-harassment policy, with avenues of relief, to its employees. The employer should also have employees sign a receipt for the policy to prevent an employee from subsequently claiming he or she never received the policy. Simply

distributing the policy is probably not enough and the employer should provide supervisors and managers with sexual harassment training or, at the very least, train them regarding the employer's policy.

If there is a complaint, an employer should investigate and take prompt remedial action to end the alleged harassment. At best, such action may be a defense to a claim and at worst, it may limit the employer's liability.

Drafting a Sexual Harassment Policy

In light of *Ellerth* and *Faragher* and the lower courts' interpretations of the Supreme Court's rulings, an employer's anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

U.S. SUPREME COURT RULES THAT RECEIPT OF SOCIAL SECURITY DISABILITY BENEFITS DOES NOT PRECLUDE DISABILITY DISCRIMINATION CLAIM

The U.S. Supreme Court has ruled, in *Cleveland v Policy Management Systems Corp.*, that pursuit and receipt of social security disability insurance ("SSDI") benefits does not automatically preclude the recipient from pursuing a claim of discrimination under the Americans with Disabilities Act ("ADA"). The court further decided that receipt of such benefits also does not erect a strong presumption against a recipient's success under the ADA. The

court rejected those lower court opinions that had decided that a claim of total disability for SSDI benefits precluded a subsequent ADA claim that the person could perform his or her work, with or without a reasonable accommodation.

In making its decision, the court reasoned that despite the apparent conflict between the SSDI program and the ADA, "the two claims do not inherently conflict to the point where courts should apply a special negative presumption" like some courts had done in the past. According to the court, there existed many situations "in which an SSDI claim and an ADA claim can comfortably exist side by side."

For example, the Social Security Administration does not consider the possibility of reasonable accommodation in determining SSDI disability, whereas the ADA requires such accommodation. Thus, a person's ADA claim that he or she could perform the job with accommodation would be consistent with an SSDI claim that the person could not perform his or her job without an accommodation. Also, a person's condition could change over time, so that a claim of disability at the time of application for SSDI benefits might not be determinative of the person's condition at the time of the relevant employment decision.

The court recognized, however, that in some cases, an earlier SSDI claim may conflict with an ADA claim. The court, therefore, also decided that "an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work." The court explained what steps a plaintiff must take to survive summary judgment, the process by which a defendant seeks to have a case dismissed before a trial. Specifically, the court determined that plaintiffs must explain why their SSDI benefits claim that they are too disabled to work is consistent with their ADA claim that they could have performed the essential functions of their previous job, with or without reasonable accommodation.

The Michigan Court of Appeals had already reached a similar conclusion, in *Tranker v Figie Int'l* (1998), for purposes of the Michigan Persons with Disabilities Act ("PDA"). (See *Fall 1998 Recent Developments in Employment Law*). Thus, under both the ADA and the PDA, employers cannot simply rely on an employee's claim for SSDI benefits when deciding their duty and ability to accommodate the employee's disability. Rather, although employers should consider SSDI claims

and should ask their employee to explain any contradictions, they must perform their own analysis about whether an employee is disabled and able to perform the essential functions of the job, with or without a reasonable accommodation.

RIGHTS OF RETURNING RESERVISTS UNDER USERRA

Reservists returning to employment from duty in Kosovo have rights to employer funded benefit accruals in pension plans in which they participated before their call-up as prescribed by the Uniformed Services Employment and Reemployment Rights Act (USERRA). If your plan has not yet been updated for the "GUST" amendments, which need not be made until the end of the 2000 plan year, there will be no mention of these rights in your plan document. Nevertheless the reservists are entitled to their accruals, and you will avoid later difficulties by granting the accruals to those entitled in a timely manner. If you have returning reservists, contact your pension advisor concerning compliance.

DEADLINE NEAR FOR EMPLOYMENT LAW UPDATE

The registration deadline for Bodman Longley & Dahling LLP's Annual Employment Law Update is Friday, September 17. If you have not already done so, please mail your registration form as soon as possible. You can also register via our Web site at www.bodmanlongley.com. Simply follow the "Employment Law Update" link on the navigation bar to the electronic registration form.

The Update will be held in Dearborn on September 30, East Lansing on October 5 and Mackinaw City on October 6. This year's topics are:

- Conducting an Employment Practices Self Audit
- Training Supervisors to Prevent Employee Claims
- Designing an Employment Arbitration Program*
- How to Avoid the Most Common Wage/Hour Mistakes*
- The New COBRA Regulations*
- Legislative and New Case Update
- Effective Management of the Employment Lawsuit

Dearborn registrants may attend an optional breakout session in place of the sessions marked above with an asterisk. The breakout session topics are:

- Responding to a Union Organizing Effort
- Workplace Violence: Surviving Turbulent Times
- Workplace Safety: How to Avoid Being Trapped in a "Confined Space" by the New Regulations

For more information, see our Web site or call Ms. Marina Romano at (313) 259-7777 ext. 7260.

MEMBERS OF THE LABOR AND EMPLOYMENT LAW GROUP

Detroit

- James T. Heimbuch (313) 393-7537
- James R. Buschmann (313) 393-7507
- Robert G. Brower..... (313) 393-7533
- Karen L. Piper (313) 393-7586
- Diane L. Akers (313) 393-7516
- Kimberley Rogers Crouch..... (313) 393-7567

Oakland County

- John C. Cashen..... (248) 244-0777
- Christopher P. Mazzoli (248) 244-0766

Ann Arbor

- Harvey W. Berman (734) 930-2493
- Jerold Lax..... (734) 930-2491
- Susan M. Kornfield (734) 930-2488
- Stephen K. Postema (734) 930-2487
- David A. Shand..... (734) 930-2496
- Courtland W. Anderson..... (734) 930-2433

Northern Michigan

- Lloyd C. Fell..... (231) 627-8002
- Kathleen A. Lieder (231) 627-8004
- Amy J. Durant (231) 627-8009

We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

© 1999 Bodman, Longley & Dahling LLP. This document may be reproduced by the recipient so long as the content is not altered and copyright ownership is acknowledged.