



Recent Developments In Employment Law

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SUPREME COURT VALIDATES THREAT-TO-SELF EXCEPTION TO THE ADA

The United States Supreme Court has upheld an employer's decision not to hire an individual whose medical condition would be exacerbated by the work environment and pose a direct threat to his own health.

In *Chevron USA, Inc v. Echazabal* (June 10, 2002), a contract employee sued after Chevron denied him direct employment because a physical examination revealed a serious liver condition which would be worsened by continued exposure to toxins present at Chevron's oil refinery. After the examination, Chevron requested that the contracting employer reassign Echazabal or remove him from the refinery. The employer responded by laying off Echazabal.

In the lawsuit Echazabal contended that Chevron's actions violated the Americans with Disabilities Act. The Supreme Court sided with Chevron, validating a regulation issued by the EEOC which permits the defense that a worker's disability on the job would pose a direct threat to his own health or safety. The court reversed the Ninth Circuit's finding that the direct threat exception only applies to an employee whose disability poses a risk to the health or safety of other employees. The court rejected the argument that expanding the exception would bring back pre-ADA paternalism, deciding that employers do not have to ignore "specific and documented risks to the employee himself."

The *Chevron* decision will assist employers in balancing ADA compliance with potential liability where an employee's disability makes

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a particular job or environment unsafe. The direct threat exception, however, presupposes an individualized medical assessment which supports a finding of health or safety risks to the employee. Further, employers are required to make reasonable accommodations, if feasible, to reduce or eliminate the threat. The direct threat exception will therefore be applicable in very limited circumstances.

SUPREME COURT CLARIFIES TIME LIMITS FOR FILING CHARGES OF DISCRIMINATION

In a recent decision, *National Railroad Passenger Corporation v. Morgan* (June 10, 2002), the United States Supreme Court clarified when an employee can bring a claim under Title VII of the Civil Rights Act for acts of discrimination that occurred outside the statutory filing period.

Under Title VII, an employee must file a charge of discrimination within 180 or 300 days “after the alleged unlawful employment practice occurred.” (In states like Michigan, which have their own agencies to enforce civil rights claims, the filing period is 300 days.) Courts, however, have allowed employees to bring Title VII claims based on incidents that occurred longer than 180 or 300 days before the charge was filed, provided an incident occurred within the 180 or 300 day filing period, on the theory that all of the incidents constituted a “continuing violation.”

Rather than apply the “continuing violation” theory, the court in *Morgan* explained that the critical questions are: what constitutes an “unlawful employment practice” and when has that practice “occurred.” In answering the question, the court distinguished between discrete retaliatory or discriminatory actions, such as refusal to hire, failure to promote or discharge, and hostile environment claims.

With respect to discrete acts, they occur on the day they happened. Consequently, the court concluded, a party must file a charge of discrimination within the 180 or 300 days of the discrete act or lose the ability to recover for it. Thus, if a party is demoted outside the filing period and subsequently discharged within the filing period, the party cannot file a charge over the demotion, notwithstanding its alleged connection to the discharge.

With respect to hostile environment claims, they consist of a series of separate acts. Thus, the court noted, the “unlawful employment practice” does not occur on a particular day. Rather, the “unlawful employment practice” occurs over a series of days or even years, so it does not matter that some of the acts of harassment fall outside the filing period. Consequently, the court ruled that in hostile environment cases, an employer may be held liable for discrimination occurring before the filing period, provided one of the acts comprising the hostile environment occurred within the filing period.

The ruling is both good and bad news for employers. The good news is that employees must bring claims based on discrete acts of discrimination within the filing period. The bad news is that employees can potentially bring hostile environment claims involving conduct that occurred over a long time period. The court’s decision reinforces the importance of having an effective harassment policy and taking prompt, remedial measures to address claims of unlawful harassment.

MARITAL STATUS DISCRIMINATION EXPLAINED

The Michigan Supreme Court has clarified that while an employer may not discriminate against an employee on the basis of his marital status,

the law does not protect an employee against discrimination on the basis of an employee's adulterous activity. *Veenstra v. Washtenaw Country Club* (May 29, 2002).

The Elliott-Larsen Act protects employees against adverse action based on marital status. The court observed that marital status means "whether a person is married." The Act does not protect against adverse action based on the employee's conduct.

In this case, a golf pro separated from his wife, then moved in with another woman whom he brought to club events. His wife filed for divorce which became final just before his annual contract expired. The club voted not to renew his contract and he sued, claiming discrimination on the basis of his marital status (divorced). The club argued that it declined to renew his contract because of the employee's adulterous behavior, not his marital status.

After clarifying the difference between discrimination based on status vs. conduct, the case was returned to the lower court for further determination whether the non-renewal was based on status or conduct.

CHANGES TO MICHIGAN'S UNEMPLOYMENT LAW WILL AFFECT BOTH WORKERS AND EMPLOYERS

On April 26, 2002, several changes to Michigan's Employment Security Act became effective which affect jobless workers claiming unemployment benefits as well as employers. These changes include:

- Beginning in calendar year 2003, the taxable wage base for employers for unemployment insurance will decrease from \$9,500 to \$9,000, while the minimum tax rate employers may be

charged for unemployment insurance taxes will decrease from 0.1% to 0.06%.

- Employers who pay \$200 or less in wages to an employee in the benefit year will have benefit charges attributable to those wages charged to the employer's Non-chargeable Benefits account.
- When workers voluntarily leave their jobs, employers can notify the Bureau of Workers' and Unemployment Compensation within 30 days that their accounts should not be charged. The charges to the Non-Chargeable Benefits account will be retroactive to the date of the Bureau's monetary determination.
- For those workers currently receiving the maximum benefit amount of \$300 per week, the new benefit will be capped at \$362. The higher benefit amount only applies to current and new claims as of April 26, 2002.
- Severance pay, salary continuation and other remuneration intended as continuing wages resulting from separation from the employer will offset unemployment benefit payments. Supplemental Unemployment Benefits payments are not used to offset benefits.
- Workers claiming benefits must prove they left their jobs involuntarily or for good cause attributable to the employer to qualify for benefits. Workers who are disqualified for voluntarily leaving their jobs must earn at least twelve times their weekly benefit amount to requalify for benefits.
- Workers discharged or *suspended* for misconduct in connection with their work

are disqualified from receiving benefits. These workers must earn at least 17 times their weekly benefit amount to requalify for benefits.

The number of weeks of benefits some unemployed workers will receive will change as the formula rate increased from 40% to 43% of base period wages. The maximum number of weeks remains at 26 and minimum remains at 14.

**EXECUTIVE BRIEFING SERIES
PART ONE A SUCCESS
PART TWO SCHEDULED FOR
SEPTEMBER 17**

Thanks to all of our faithful readers who helped make part one of Bodman, Longley & Dahling LLP's new Executive Briefing Series a success. Nearly 80 Firm clients and friends attended our seminar, which was held Thursday, May 23, at the Hotel Baronette in Novi. We especially appreciate those in attendance who took the time to provide us with detailed evaluations. We review each evaluation and consider your comments carefully when planning future seminars.

Part Two of the Executive Briefing Series will focus on dealing with problem employees. We will examine employee selection, discipline and discharge, and dealing with the disabled employee.

Part Two will be held at the Troy Marriott on Tuesday, September 17, from 8:00 a.m. to 10:00 a.m.

Invitations will be mailed soon. Please contact Kristen Miller at (313) 392-1041 for more information.

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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.

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