Employment and Labor Law Newsletter

February 2012

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Bryce Downey & Lenkov News

We are pleased to announce that **Terry Kiwala**, who specializes in commercial litigation and insurance coverage, and **William Seith**, who concentrates in environmental and commercial matters, have joined the firm as partners. Further, **Justin Nestor** has been promoted to contract partner in our Merrillville, Indiana office.

Bryce Downey & Lenkov is also pleased to announce that three of its attorneys have been recognized as 2012 Illinois Super Lawyers or Illinois Rising Stars, a designation given to the legal industry's best lawyers under the age of 40, as nominated by their peers. The firm congratulates **Rich Lenkov** as a 2012 Illinois Super Lawyer and **Noah Frank** and **Eva Imrem** as 2012 Illinois Rising Stars. Noah was also recognized in the labor and employment area.

Bryce Downey & Lenkov Case Results

- Storrs Downey and Noah Frank successfully settled a highly sensitive six figure wage and hour and race/national origin multi-action, unfiled claim by a not-for-profit organization's administrator for well under 30% of the original demand.

- In a race discrimination and job retaliation claim filed before the EEOC, Storrs Downey was able to settle the matter for 3% of the claimant's original demand.

- In a wage labor claim brought before the Illinois Department of Human Rights, Storrs Downey was able to settle the matter for less than 15% of the original demand.

- Storrs Downey and Noah Frank judiciously resolved an age discrimination and improper termination claim for 15% of the original demand in fewer than two months (we note opposing counsel was on safari for two weeks as well).

- Storrs Downey secured dismissal of a state and federal filed American with Disabilities Act case. The Plaintiff alleged he was disabled due to vertigo, but the Illinois Department of Human Rights concluded he was properly terminated.

Illinois Restrictive Covenants: Legitimate Business Interest Test

The Illinois Supreme Court recently held that the legitimate business interest test for restrictive employment covenants was alive and well. *Reliable Fire Equipment Co. v. Arredondo*, 2011 WL 6000743 (Ill. Dec. 1, 2011).

Reliable Fire Equipment Company ("RFEC") entered into a restrictive covenant with employees to not compete with RFEC or solicit during their employment with RFEC and for one year after in Illinois, Indiana, and Wisconsin. RFEC filed a breach of contract suit when it learned two employees were violating the restrictive covenant. The trial court held, and the appellate court affirmed, that RFEC failed to prove the existence of a legitimate business interest that justified enforcement of the restrictive covenant. The Illinois Supreme Court overturned the lower courts, and remanded for further case proceedings.

The Illinois Supreme Court observed that complete restraint of trade was void as injurious to the public, but that a reasonable restraint of trade was valid so long as supported by consideration. Reasonableness of a restrictive covenant is judged by the totality of the circumstances in a three prong test:

> (1) the restrictive covenant is no greater than necessary to protect the employer's legitimate business interest, as measured by (a) duration/time, (b) geographical area/range, and (c) type of activity/scope;
>
> (2) it does not impose an undue hardship on the employee; and
>
> (3) it is not injurious to the public.

The Court noted that the totality of circumstances needs to be evaluated to determine whether a restrictive covenant was reasonable, and no strict formula could be applied. Further, the legitimate business interest of each individual case should also be measured by additional factors of "near-permanence" of customer relationships, and the employee's acquisition of confidential information through employment. The Court held that merely "not wanting competition" did not state a legitimate business interest.

Practice Tip:

Restrictive covenants are enforceable in Illinois. Additional lawsuits are expected to define "legitimate business interest." Restrictive covenants should be utilized when protecting valuable proprietary information, including customer lists or trade secrets, and when employing high-level executive employees. Where the employee is low level (e.g., functionary and not strategic), restrictive covenants may not be enforced by a court, or worth enforcing. Any restrictive covenant should be drafted in such a manner as to provide a court with the ability to revise a void covenant to make it enforceable to the greatest extent possible.

Employment Policy Does Not Create Contract of Employment

The Illinois First District Appellate Court recently held that for an employment policy to modify the at-will relationship and confer contractual rights, it must contain a promise clear enough that an employee would reasonable believe that an offer had been made. *Janda v. U.S. Cellular Corp.*, 2011 WL 5903452 (Ill. App. 1st Dist. 2011).

Employer U.S. Cellular's handbook contained a progressive discipline policy which would be "generally followed," but provided that each step could be used without the lower steps, and immediate termination on the first occurrence was possible. Janda was terminated for performance reasons. Plaintiff filed several claims, including one that the handbook modified the at-will relationship.

The Appellate Court found that an employment contract is presumed to be at-will unless there is a clear showing that the parties agreed otherwise. For an employment policy to confer contractual rights, (1) it must contain a promise clear enough that an employee would reasonable believe that an

offer had been made, (2) it must be disseminated so that the employee was reasonably aware of the contents, and (3) the employee must accept the offer by commencing or continuing to work. The Appellate Court held that the progressive discipline policy was not sufficiently clear to be considered a contract modifying the at-will relationship as steps could be skipped, and immediate termination was a possibility.

Practice Tip:

In Illinois, the default rule is Employment-At-Will. Employee handbooks may inadvertently modify this relationship, and therefore should be clear on what provisions are expectations of the worker, expand employees' rights, and specifically reinforce that one's employment remains at-will. Seek counsel prior to promulgating new or revised employee policies which may modify the at-will relationship.

EEOC Interpretation of "No Fault Attendance Policies" Under the ADA

I. Typical "No Fault Attendance Policy"

Employers expect employees to be physically present to work, and discipline employees for failing to meet attendance standards. To objectively measure attendance standards, employers have instituted "no fault attendance policies" ("NFAP") that are blind to the underlying cause of absence: employers do not ask for, and employees do not provide, excuses. NFAPs treat all employees equally as the only measure is attendance.

A typical NFAP assigns points for various amounts work absences, with discipline up to and including termination upon reaching certain markers. For example, a NFAP may provide that 12 points accrued in a rolling calendar year will result in automatic termination, where occurrence points are assigned as follows:

- 0.5 point for arriving after the start of the work shift, or leaving early;
- 1 point for up to two days of medical excused leave;
- 1 point for arriving greater than 60-minutes late, or leaving more than 60 minutes early;
- 2 points for less than 24-hours advance notice of sick/personal/vacation time off;
- 3 points per day for no-call-no-show absences;
- and 0 points for FMLA or workers' compensation excused leave of absence, or 24-hours advance notice of sick/vacation/personal time off.

II. The Americans With Disabilities Act

The Americans with Disabilities Act ("ADA") provides that an individual with a disability who can perform the essential functions of the job, with or without a reasonable accommodation, may not be discriminated against. The definition of disability is broadly construed, without considering mitigating measures (except ordinary eyeglasses and corrective lenses) in the threshold analysis. Episodic and resolving impairments may be a disability if a major life activity is substantially limited.

The ADA does not directly address NFAPs, but provides that adherence to standards, criteria, or methods of administration which have a disparate impact may be found discriminatory. An employer must provide a qualified individual with a reasonable accommodation, which could include job restructuring, and part-time or modified work schedules. However, the Seventh Circuit held that an employer may "treat regular job attendance as an essential job requirement, and does not need to accommodate erratic or unreliable attendance." Strict application of the absentee policy was a legitimate nondiscriminatory reason for an

employee's discharge. The ADA also provides an undue hardship safe harbor where accommodation would require significant expense or difficulty.

III. EEOC Finds NFAPs Discriminatory Under the ADA

The Equal Opportunity Employment Commission (EEOC) is the federal agency which enforces federal employment discrimination laws. Its statutory interpretation is applied to cases filed before it on a nationwide basis. The EEOC has aggressively challenged NFAPs, and sought increasing settlements. In circuits where there has been no prior court finding, it is likely a court will defer to the EEOC as subject matter expert. Recently, the EEOC determined that strict application of NFAPs may be discriminatory under the ADA. Inflexible leave policies applied across the board, the EEOC found, deny workers with disabilities reasonable accommodations to which they are entitled by law.

Reasonable accommodation includes making exceptions to the NFAP where occurrence points were earned as a result of disability-related attendance issues. Employers should conduct an individualized, case-by-case determination of whether:

1. the employee has an impairment that substantially limits one or more major life activity;
2. the absence was caused by a disability;
3. the employee (or agent) requested time off due to the disability;
4. the absences have been, or are expected to be unreasonably unpredictable, repeated, frequent, or chronic;
5. a definite or reasonably certain period of time off is required due to the disability; and
6. the need for time off poses a significant difficulty or expense to the employer.

Once the individualized analysis has been performed, an employer may assign occurrence points with less risk of violating the ADA. For example, where an employee has already been accommodated with an alternate work schedule, and continues to be absent, occurrence points may be assigned.

IV. Best Practices

Litigation is expensive; be proactive and seek the advice of counsel prior to implementing a no fault attendance policy. Counsel should also be contacted as issues arise under this sensitive area of law.

Under the ADA, the safest course of action is to engage in the interactive process to consider whether a reasonable accommodation to a NFAP is required. A reasonable accommodation could include not assigning occurrence points where an absence is justified with a doctor's note relating to a diagnosed disability. Any accommodation should be documented so as to avoid claims by other employees of favoritism, or other discrimination (e.g., gender, race).

Employee Who Reports "Sexual Harassment" May Be Terminated

The Seventh Circuit Court of Appeals recently affirmed summary judgment to an employer, holding that an in a Title VII retaliation claim based on reporting alleged sexual harassment, a claimant must show that he engaged in a protected activity. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625 (7th Cir. 2011).

A former senior vice president ("Plaintiff") alleged he was terminated in retaliation for opposing what he believed to be sexually and racially discriminatory conduct by a white, female mid-level manager ("Manager") towards her subordinates. On one occasion, Manager told subordinates that she had prior sexual relations with another employee, and that she liked younger men (like "Subordinate") who were "her speed." Subordinate reported this to another supervisor as

an amusing anecdote, and reported that he did not feel sexually harassed. The company investigated the matter and determined that Manager used poor judgment, but did not violate any company policy. Plaintiff also reported that he felt that Manager, who was known as being a demanding boss, was "riding hard" a black employee, though he did not know of any racial overtones. Two months later, the company terminated Plaintiff for work performance issues.

The district court held that Plaintiff's opposition to Manager's conduct did not qualify as a protected activity. First, no one could reasonably believe that Manager's comments were severe or hostile enough to constitute sexual harassment. Second, there was no evidence that Manager treated any employee in a racially discriminatory fashion. Finally, Plaintiff's termination less than two months after reporting Manager made timing suspicious, but did not show that the legitimate, nondiscriminatory reason for the termination was pretextual.

The Appellate Court noted that it was not a super-personnel department, and that to be cognizable under Title VII, Manager's conduct must be both objectively and subjectively sexually offensive. The court held that Plaintiff could not reasonably have believed that Manager's behavior constituted sexual harassment prohibited by Title VII, and that Plaintiff therefore had not engaged in protected conduct when he reported the incident.

However, the Appellate Court found that the Plaintiff's version of events regarding Manager's treatment of a black employee constituted a cognizable expression of opposition to the sort of discriminatory practice prohibited by Title VII. Nonetheless, the Appellate Court held that Plaintiff failed to prove that the proffered performance-based termination was pretextual.

Practice Tip:

Employers should thoroughly investigate any report of discrimination or harassment. At the end of the investigation, appropriate action should be taken (e.g., disciplining the offending employee for poor judgment or termination for an actual offense). Where the reported conduct was not found to be even reasonably offensive, the reporting employee should be advised only that an investigation was conducted.

No FMLA Cause of Action for Exacerbation of Preexisting Condition

In a matter of first impression, the Seventh Circuit Court of Appeals recently held that an employer's exacerbation of a preexisting condition was not a cognizable cause of action under the Family and Medical Leave Act (FMLA). *Breneisen v. Motorola, Inc.*, 656 F.3d 701 (7th Cir. 2011).

Plaintiff returned from 12-weeks FMLA leave to a new position, with the same pay and benefits, as his old job had been eliminated. Plaintiff considered the new position a demotion. Shortly after returning, Plaintiff was granted second and third medical leaves of absence for stomach-related conditions and surgery. Plaintiff alleged the third leave of absence was necessary because a supervisor caused him stress, which exacerbated his condition.

The Appellate Court held that once Plaintiff exhausted his 12-weeks of FMLA job protected leave, the employer's grant of subsequent leave of absence was a courtesy to a long-standing employee and not due to any legal obligation. Therefore, the alleged retaliation occurred when Plaintiff was no longer protected by the FMLA. The Appellate Court held that, unlike tort law, there was no FMLA cause of action for an employer's exacerbation of a preexisting condition.

Practice Tip:

This case reinforces the FMLA's stance that an employee subject to the protections of the FMLA is entitled to only 12-weeks of job-protected leave. Any eligible time (including workers' compensation leave) should be counted as FMLA leave.

Ministerial Exception Permits Religious Institutions Exclusive Control Over Minister-Employees

In the most significant religion-employment case in two decades, the U.S. Supreme Court recognized the so-called "ministerial exception" to employment discrimination laws. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, --- S.Ct. ----, 2012 WL 75047 (Jan. 11, 2012).

Hosanna-Tabor Evangelical Lutheran Church and School ("HTELCS") employed "called" teachers, and when none were available, "lay" teachers. Called teachers were called to their vocation by God, were required to be Lutheran, had to have completed certain academic requirements, and received the formal title of "Minister of Religion, Commissioned." They were appointed by the HTELCS school board with the congregation's approval. Lay teachers, appointed by the school board, did not need to be trained in any manner, be Lutheran, or approved by the congregation.

In 1999, lay teacher Cheryl Perich completed her academic requirements, and was asked to become a called teacher. After she was designated as a minister, she continued to perform the same tasks as the secular lay teachers, but also taught a religion class, led students in daily prayer and devotional exercises, and took students to weekly school-wide chapel services (which she also led about 2 times per year).

In June 2004, Perich became ill, and went on disability leave. In January 2005, Perich notified the school she would be able to report the following month. The principal advised that the school had already contracted with a lay teacher for the remainder of the year, and the principal was concerned with Perich's ability to return to work. Nonetheless, Perich reported for work, and refused to leave school grounds until she received written documentation that she had appeared for work.

Eventually, Perich was terminated for "insubordination and disruptive behavior" and damage to her "working relationship" with the school by "threatening to take legal action."

Perich filed a charge with the EEOC alleging that her employment had been terminated in violation of the Americans with Disability Act (ADA). The trial court (E.D. Mich.) granted HTELCS's motion for summary judgment based on the ministerial exception. The Sixth Circuit Court of Appeals reversed, finding that Perich was not a minister as her duties were identical to those of a "lay teacher."

The U.S. Supreme Court reversed, finding that the ministerial exception maintains First Amendment freedoms, and prohibits the government from legislating over the employment relationship of a religious institution (e.g., a church) and its minister-employees. The ministerial exception ensures that the authority to select and control who ministers to the religious organization's faithful remains with the church alone.

The Court found that time spent performing secular and religious duties is one, but not the only, factor in determining whether a religious institution's employee was covered under the minister exception. Here, the Court identified the significant and formal religious training, the formal process of being commissioned as a minister, HTELCS's and Perich both holding Perich out as a minister, and HTELCS preference for hiring lay teachers only when called teachers were unavailable.

The Court's ruling was limited to employment discrimination claims by a minister against her religious institution. The Court expressly declined to extend the exception to breach of contract, tortious conduct, and other allegations by employees of religious employers.

Practice Tip:

This case confirms that there is a narrow exception for religious organizations to higher, fire, and otherwise control which employees will minister its faith. It is likely that other employment claims (e.g., age and gender) available to secular-based

employees would also be subject to this narrow exception as well.

Distinguished from the narrow ministerial exception is a teacher who teaches religious courses in a secular-based school. Employment discrimination claims by such teachers would survive summary judgment based on the ministerial exemption. It is also likely that a teacher teaching a secular class (e.g., gym) would be entitled to bring an employment discrimination claim against a religious institution.

Prior to invoking the exception to an employment decision, an employer should ensure that the employee in question is a minister in fact and function, and not merely in a title. While the Court did not enumerate exhaustive factors for the ministerial exception, a trial court would likely examine the totality of circumstances.

Counsel should be consulted prior to terminating religious employees who share duties similar to lay employees or who do not perform a purely ministerial function.

Non-Decisionmaker's Comments Admissible as Evidence of Discrimination

The Seventh Circuit overturned summary judgment in favor of the employer, finding that comments by a non-decisionmaker involved in an employee's termination were an exception to the hearsay rule as a statement against interest and could be used as evidence of discrimination. *Makowski v. SmithAmundsen LLC*, 662 F. 3d 818 (7th Cir. 2011).

While SmithAmundsen ("SA")'s marketing director Laura Makowski was on pregnancy leave under the Family and Medical Leave Act ("FMLA"), the Executive Committee determined that Makowski's subordinate was more enjoyable to work with and a stronger lead person. The Executive Committee delegated to human resources director Molly O'Gara the task of conferring with outside counsel regarding Makowski's termination. By telephone, two members of the Executive Committee terminated Makowski, and explained her position was eliminated. O'Gara had no role in the decision-making process or termination of Makowski other than checking with outside counsel. O'Gara's general job responsibilities, however, did include terminating employees. When Makowski returned to pick up her personal items, O'Gara alone met Makowski in the elevator lobby, and told Makowski that she was terminated because she was pregnant and on medical leave, and that there were other women similarly situated.

Makowski filed discrimination claims under Title VII, as amended by the Pregnancy Discrimination Act, and FMLA interference and retaliation. The trial court held that because O'Gara's job responsibilities were not related to the decision to terminate Makowski, O'Gara's statements were not admissible as an admission by a party opponent. Therefore, without any evidence, summary judgment was appropriate.

The Seventh Circuit reversed, finding that for an employee's statement to be an admission, her duties must encompass some responsibility related to the decision-making process affecting the employment action. The court noted that there would have been no reason for O'Gara to consult with outside counsel if the decision to terminate Makowski was already final. The court found that O'Gara had an integral role in the decision-making process, and that the alleged discriminatory action was Makowski's termination, and not the decision to terminate. The court held that O'Gara's statements therefore constituted a party admission and were admissible nonhearsay.

Practice Tip:

Employers should limit the number of individuals involved in tangible employment actions (e.g., hiring, firing, promotion, transferring), including who may make recommendations for these actions. Further, employees involved in these processes should be trained to not make any comments which could be deemed an admission against the

company including "off the cuff" remarks. Any comments regarding employment performance should be made with another witness present.

We further note that employees who make comments like O'Gara's would likely be protected under Title VII and FMLA for assisting another with his or her discrimination claims. Employers should not retaliate against employees who make a good faith report.

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.

Did You Know…?

"Use it or lose it" paid time off policies are not valid in Illinois. This is one of the most common (e.g. vacation & sick time) legal errors in employment handbooks, resulting in untold accrued liabilities, and leading to potential wage and hour law suits.

Seminars and Publications

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. Among the national conferences at which we've presented:

Seminars:

- On September 6, 2011, Noah Frank presented to the Chicago Ophthalmology Administrator Seminar on Legal Employment Nightmares: Terminating Chronically Absent Employees.
- On March 7, 2012, Noah Frank will present on workers' compensation and ADA issues at the Spectrum Eye institute Optometrist seminar.
- Also planned for mid-2012 is a webinar on the interplay of the ADA, FMLA, and workers' compensation.

Publications:

- Noah Frank's article "Returning to the Course of Employment" was published in the Illinois State Bar Association's November 2011 Workers' Compensation Law newsletter.
- John O'Grady was published in the November 2011 ISBA Workers' Compensation newsletter on the practical ramifications of a workers' compensation settlement on other areas of employment law.
- Storrs Downey has published articles and regularly presented seminars on terminating injured or disabled workers.

Please contact us for copies of any of these articles.

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@brycedowney.com or Noah Frank at nfrank@brycedowney.com.

Bryce Downey & Lenkov 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, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov 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 are committed to keeping you updated regarding the latest developments in workers' compensation 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@brycedowney.com, or Noah Frank at nfrank@brycedowney.com.

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