VEDDER PRICE

Labor Law

A newsletter designed to keep clients and other friends informed on labor and employment law matters

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In This Issue:

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EEOC ISSUES GUIDANCE ON PSYCHIATRIC DISABILITIES UNDER THE ADA

In response to the increasing number of questions relating to psychiatric disabilities raised under the American with Disabilities Act ("ADA"), the Equal Employment Opportunity Commission recently released an Enforcement Guidance entitled "EEOC Guidance On Psychiatric Disabilities And The Americans With Disabilities Act" ("the Guidance"). EEOC pronouncements are not binding on the courts but are generally considered to provide useful guidance.

Emphasizing that psychiatric disabilities may require creative methods of accommodation, the Guidance addresses the following significant issues:

- the broad range of psychiatric conditions covered by the ADA;
- the prohibitions on employer inquiry into, and disclosure of, a psychiatric disability;
- reasonable accommodations;
- disciplining an employee for misconduct caused by his/her psychiatric disability; and
- psychiatric disabilities that pose a direct threat to the safety of others.

Psychiatric disabilities are mental impairments that substantially limit one or more major life activities. The Guidance states that the term "mental impairments" is broad and includes many of the disorders identified in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM IV), such as major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. The term does *not* include current drug users, persons with personal family problems, or persons with traits such as stress, chronic lateness, or irritability, unless those traits are symptoms of a recognized mental impairment.

The Guidance expands the examples of "major life activities" provided by previous regulations, adding thinking, concentrating, sleeping and interacting with others. In order to substantially limit a major life activity, the Guidance states that the impairment must prevent or

restrict the activity and must not be temporary (*i.e.*, less than "several months"), although it may be chronic or episodic. Significantly, if a mental impairment is substantially limiting without medication, the EEOC continues to maintain that the impairment is substantially limiting even if it may be successfully controlled by medication. Recent rulings show that the courts are divided on this issue.

Disclosure of Disability

As with other disabilities, an employer may *not* ask pre-employment questions that are likely to require the employee to disclose a psychiatric disability, unless that employee first requests an accommodation. After hire, an employer may inquire into disabilities provided that such inquiry is made of all new hires. Once employment has begun, an employer may inquire into a psychiatric or other disability when the employer has a reasonable belief that an employee's condition may impair job performance or that it poses a direct threat to others.

The Guidance notes that employers must keep information relating to an employee's disability confidential, maintaining a disability file separate from the employee's personnel file. That information may only be revealed to supervisors, managers, first aid personnel, and government officials. According to the Guidance, an employer may *not* tell employees whether it is providing a reasonable accommodation for a particular individual. This prohibition poses special problems where the particular condition is not readily apparent and its accommodation may give rise to accusations of employee favoritism. The Guidance states that an employer may state only that the particular modification is being provided "for legitimate business reasons" or "in compliance with federal law."

Reasonable Accommodation

The Guidance states that requests for reasonable accommodations for psychiatric disabilities may come from the employee or his/her family and may be requested at any time. There is no "magic language" that will constitute a request for an accommodation. An employee with a *known* psychiatric disability may simply comment that he/she is "depressed and stressed" and needs time off. According to the EEOC, this statement is sufficient to put the employer on notice that the employee is requesting

reasonable accommodation. However, if the need for an accommodation is not obvious, an employer may ask for reasonable documentation from the employee's or employer's health professional. Where the employee does not link the request to a psychiatric disability, and the employer is unaware of the condition, no accommodation is required.

An employer is required to reasonably accommodate an individual with a disability unless and until the accommodation would create an undue hardship on the employer. According to the Guidance, psychiatric disabilities may warrant unique accommodations, including:

- Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a psychiatric disability;
- Allowing an employee to start work later in order to accommodate drowsiness caused by psychiatric medication;
- Making physical changes to the workplace, including the erection of barriers and soundproofing between work spaces, in order to accommodate individuals who have disability-related limitations in concentration;
- Modifying workplace policies, such as those that prohibit leaves of absence;
- Adjusting supervisory methods, including providing additional supervision and feedback; and
- Reassigning an employee if feasible.

Discipline for Misconduct

The Guidance provides that an employer may discipline an individual with a disability for violating a workplace conduct standard, even if the misconduct resulted from the disability, *provided* the standard is "job-related for the position in question and is consistent with business necessity." Thus, a employee who steals or tampers with company equipment may be disciplined regardless of whether the misconduct resulted from a psychiatric disability, as standards prohibiting this conduct are related

to nearly every job. However, in a controversial example, the Guidance states that an employee who works independently and has no customer interaction may not be disciplined for repeatedly coming to work disheveled and being rude to his fellow employees, if that conduct results from a psychiatric disability. The agency reasons that rules governing this particular employee's dress code and courtesy are not job-related because his contact with co-workers and customers is limited.

As with other disabilities, employers may discipline employees where they have no reason to know of the employee's psychiatric disability. If an employer is informed *after* an employee's misconduct that the misconduct resulted from a psychiatric disability, the employer may discipline the employee for the *past* conduct but might be restricted from disciplining the employee for the same misconduct in the future. Additionally, having been informed, the employer may have a duty to accommodate that employee's disability. As an example, the Guidance states that an employer may discipline an employee for being tardy, but once informed that the tardiness arises from drowsiness caused by psychiatric medication, the employer may be obligated to accommodate the employee in the future by adjusting his/her working hours.

Safety Threats

Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that the individual would pose a direct threat to himself/herself or others. The Guidance states that, for purposes of psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat. Taking medication that may diminish coordination or concentration is *not* a direct threat in all cases. The employer has an obligation to determine the nature and severity of the side effects, whether the side effects could hinder the use of machinery, and whether the side effects have affected the employee in the past. If there is a direct threat, the employer must examine whether reasonable accommodations will alleviate that threat.

An individual with a history of violent behavior may be refused employment, according to the Guidance, if the employer identifies specific behavior by the individual that would pose a direct threat. Many employers may find

themselves in a dilemma in this situation, as they must weigh their obligations under the ADA against their obligations under state tort law to provide employees with a safe workplace environment.

Conclusion

The EEOC's Guidance provides some useful examples that illustrate how the agency would apply the ADA in various, real-life circumstances. It remains to be seen, however, whether the courts' application of the law will be as protective of employees as the EEOC's.

If you have any questions about the EEOC Guidance on Psychiatric Disabilities, or about the ADA in general, call Vedder Price (312/609-7500).

Return to Top of Document

EMPLOYER-FRIENDLY CHANGES MADE TO IMMIGRATION ACT

The Illegal Immigration Reform and Immigration Responsibility Act of 1996 (the "Immigration Reform Act") is intended to simplify employer obligations to verify the employment eligibility of new hires. This article summarizes a few of the key provisions.

> ***Caution:***
> *The Attorney General has until September 30, 1997 to enact regulations to implement most of the changes discussed below. Those regulations have not issued yet, so many of the changes, such as a reduction in the types of documents employers may use to verify employment eligibility, have not taken effect. We have been informed by the INS that employers should continue to use current forms and procedures until September 30, 1997 or until they receive notice of changes from either the Attorney General's office or the INS, whichever is sooner.*

Summary of the New Provisions

The Immigration Reform Act amends Section 1324a of the

Immigration and Nationality Act, which prohibits the knowing employment of aliens not authorized to work in the United States and requires that employers confirm the identity and employment authorization of new workers. Under the amendments, an employer's liability for paperwork violations related to the employment verification process has been limited and, for certain employers, a streamlined process for employment verification has been created. The amendments also reduce the types of documents an employer may accept for employment verification, and limit the treatment of certain employer documentary practices as "unfair employment practices" to those situations where the practice is used for the explicit purpose of discriminating against an employee.

Fewer Documents to Confirm Employment Eligibility on I-9 Form

On September 30, 1997 or upon written designation of the Attorney General, whichever occurs first, there will be changes in the types of documents upon which an employer may rely to confirm employment eligibility.

Column A

Under the new rules, individuals will no longer be able to present a certificate of U.S. citizenship, a certificate of naturalization, or a foreign passport to satisfy Column A of the I-9 form (documents which establish both identity and employment eligibility). For that purpose, an employer may accept only the following:

1. a United States passport;
2. an alien registration receipt card (INS Form I-151 or I-551);
3. an unexpired temporary resident card (INS Form I-688);
4. an unexpired employment authorization card (INS Form I-688A);
5. an unexpired reentry permit (INS Form I-327);
6. an unexpired refugee travel document (INS Form I-571);

7. an unexpired employment authorization document issued by the INS which contains a photograph (INS Form I-688);

8. an employment authorization document (INS Form I-766); or

9. other documents as designated by the Attorney General, all of which must meet certain security standards.

Column B

There are no changes in existing Column B documents.

Column C

Birth certificates no longer will be accepted to establish employment eligibility under Column C on the I-9 form. (Documents from Column C must always be paired with a document from Column B of the I-9 form.) The Attorney General may designate other types of permissible verification documents and may place conditions on the use of any documents if they are found not to "reliably establish employment authorization or identity or are being used fraudulently to an unacceptable degree."

As noted, employers should continue to use the existing I-9 form until the INS develops a new form, even though, as of September 30, 1997 (or the date new regulations are issued, if sooner), employers may not rely on all the documents listed under Column A and Column C of the I-9 form.

New "Good Faith Compliance" Defense

The Immigration Reform Act establishes a "good faith compliance" defense, giving employers 10 days to correct technical or procedural errors made in good faith when complying with the employment verification rules. Along the same lines, the INS is in the process of formalizing a policy of issuing warnings instead of fines to employers who have committed minor violations when the INS anticipates future compliance by the employer.

New Option for Members of Multi-Employer

Bargaining Associations

The Immigration Reform Act provides a streamlined (or "piggyback") employment verification process for employers belonging to multi-employer associations subject to a common collective bargaining agreement. If the employee has, within three years (or for the period the individual has been authorized to work in the United States if less than three years), worked for another member of the employer association which has complied with the employment verification requirements, the current employer is deemed to have complied with the verification requirements, without having actually performed the verification process. The process applies to individuals hired on or after November 29, 1996.

Employers who use this "piggyback" option should note, however, that if an employee is ultimately found to be an unauthorized alien, the current employer is presumed to have known at the time of the hiring that the person was unauthorized. This presumption may be rebutted only by clear and convincing evidence that the employer did not know of the individual's status. For this reason, the streamlined process does not guarantee freedom from liability.

Limited Liability for Discrimination

The amendments limit the circumstances under which employers may be liable for an unfair immigration-related employment practice. An employer who requests a new employee to produce more or different documents than are required under the law, or refuses to honor documents that reasonably appear to be genuine, is liable only if the employer's action was intended to unlawfully discriminate against an employee on the basis of citizenship status or national origin.

Conclusion

For the most part, the Immigration Reform Act makes employer-friendly changes to current law. It remains to be seen whether the process will become any more manageable and whether errant employers will be treated any more generously.

If you have any questions about the Immigration Reform Act, call Kelly Starr (312/609-7768) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

NEW OBLIGATIONS ON EMPLOYERS WHO USE CREDIT REPORTS FOR EMPLOYMENT PURPOSES

Employers who use credit reports to evaluate applicants and/or incumbent employees for employment purposes will face new restrictions starting no later than this fall.

Amendments to The Fair Credit Reporting Act give employers additional obligations both to the applicant/employee and to the credit reporting agency when procuring and using credit reports. The amendments are effective September 30, 1997, "unless any person or entity complies with any provision before that date, in which case, each of the corresponding provisions shall be fully applicable to such person or entity."

Written Disclosure and Consent of Employee

Under the amendments, an employer who intends to obtain a credit report must first make a clear and conspicuous written disclosure to the applicant/employee that a credit report may be obtained for employment purposes. The disclosure cannot be included in an employment application or other document that contains additional information; it must be on a separate, self-contained page. The employer also must obtain the applicant/employee's written authorization for the employer to obtain the report.

Obligations Before Taking Adverse Action

Before taking adverse action based on information contained in a credit report, an employer must provide a copy of the report to the applicant/employee and describe in writing the person's rights under the Fair Credit Reporting Act. This description will be in the form of a notice prepared by the Federal Trade Commission ("FTC") and provided to employers by reporting agencies. The FTC has not yet finalized the notices.

Certification to Reporting Agency

Finally, an employer must provide a certification to the credit reporting agency that the employer:

- has provided the necessary disclosure to the consumer;
- has obtained the consumer's written consent to obtain the report;
- will comply with the requirements regarding adverse action if any is taken; and
- will not use information from the report in violation of any applicable federal or state equal opportunity law or regulation.

Penalties for Noncompliance

The Fair Credit Reporting Act provides that any person who "is negligent in failing to comply" with the requirements of the Act is liable to a consumer for actual damages, costs of suit, and attorneys' fees. Willful noncompliance can result in punitive damages and persons who obtain credit reports under false pretenses are subject to criminal liability.

If you have questions about The Fair Credit Reporting Act, contact Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

RIGHT TO MODIFY EMPLOYEE HANDBOOKS MAY BE LIMITED

For years, employers have been inserting contract disclaimers in their employee handbooks to avoid creating contractual obligations. Employers have been concerned that their policies not restrict them from terminating employees at will. With several recent court decisions, including one in Illinois, the efficacy of these disclaimers has been questioned.

In *Doyle v. Holy Cross Hospital* (March 26, 1997), an Illinois Appellate Court held that an employer cannot unilaterally disclaim handbook provisions which already give an employee protection against at-will termination. In this case the hospital had distributed a handbook to the plaintiffs describing certain procedures to be followed in the event of an economic reduction in force (RIF), including criteria for making selection decisions and assurances that employees would be terminated only if their positions were permanently eliminated, there were no other positions available, and there was no reasonable expectation of recall for a year. Ten years later the hospital inserted a contract disclaimer in the handbook purporting to negate any limitations on the right to terminate at will. The plaintiffs later sued, claiming they were discharged in violation of the RIF policy. The hospital relied on the disclaimer, citing another Illinois appellate case permitting an employer to unilaterally disclaim its contract handbook, *Condon v. American Telephone & Telegraph Co.* (1991).

The *Doyle* court disagreed and held that an employer may not unilaterally eliminate employee rights contained in a handbook. The court stated there was no consideration provided by the employer to take away those rights. The employees' continued employment after the disclaimer was added was not consideration for the elimination of their RIF rights because the employees did not receive, and the employer did not lose or give, anything.

Courts in other states also differ on this issue. For example, the Michigan Supreme Court has allowed employers to modify handbooks unilaterally without providing additional consideration, while the Wyoming Supreme Court recently reached just the opposite conclusion.

Depending on whether and how this issue is finally resolved in Illinois and elsewhere, employees who were hired when their employee handbooks contained just cause or other policies inconsistent with at-will employment may be able to rely on those provisions to assert handbook claims even if the handbooks later were revised to contain disclaimers. In the meantime, employers should continue to include language in handbooks and other policy documents maintaining discretion in applying their policies, reserving the right to revise or discontinue those policies, and disclaiming contractual obligations. But most important of all, employers should not publish

employment policies they are not prepared to follow.

If you have any questions about employee handbooks or exceptions to the doctrine of employment at will, call Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

NLRB ORDERS BARGAINING OVER HIDDEN WORKPLACE CAMERAS

Concerned about workplace theft and suspected sleeping on the job, Colgate-Palmolive Company installed hidden cameras at various locations inside one of its facilities, including in a restroom and fitness center. Employees caught by the cameras engaging in misconduct would be subject to discipline, including discharge.

The NLRB recently held that such installation and use of hidden surveillance cameras is a mandatory subject of bargaining analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing. "They are all investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct," the Board found.

Because there was no bargaining with the union in this case, the Board's decision is unclear on how much of the surveillance must be bargained, *e.g.*, whether the location of hidden cameras must be disclosed (which would seem counterproductive). The Board said only that "the placing of cameras, and the extent to which they will be secret or hidden, if at all, is a proper subject of negotiation," and that "as to location, mutual accommodations can and should be negotiated."

If you have any questions about the *Colgate-Palmolive* decision or other NLRB issues, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

RETALIATION AGAINST EX-EMPLOYEES PROHIBITED BY TITLE VII, SAYS HIGH COURT

Former employees are protected by the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, according to a unanimous decision by the Unites States Supreme Court. In *Robinson v. Shell Oil Co.*, the plaintiff sued his former employer for allegedly giving him a negative job reference in retaliation for his filing a charge of race discrimination with the Equal Employment Opportunity Commission. The trial court and appellate court both barred the case, holding that the anti-retaliation provisions of Title VII apply only to current employees. The Supreme Court reversed, concluding unanimously that former employees are also protected.

Section 704(a) of Title VII makes it unlawful "for an employer to retaliate against any of his employees or applicants for employment…because [the employee] has opposed any practice made unlawful [under Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation [pursuant to Title VII]… ." *See* 42 U.S.C. § 2000e-3(a). Before this decision by the Supreme Court, while most circuits had allowed former employees to bring suit under this section and many other sections of Title VII, the Fourth and the Seventh Circuits had barred such suits.

In its analysis, the Court found that the statutory definition of "employee" did not exclude former employees, and that a number of Title VII's provisions applied to more than current employees, specifically focusing on remedial affirmative action and reinstatement provisions. Further, the Court noted that where a Title VII suit involved an allegedly discriminatory discharge, any use of the term "employee" would necessarily include a former employee.

The running theme and, most likely, the motivating influence in the Court's opinion was the observation that to exclude former employees from the anti-retaliation protections would "contradict the goals" and "undermine the effectiveness" of Title VII, and would "provide perverse incentive for employers to fire employees who might bring Title VII claims." The broad nature of this language suggests that all provisions of Title VII that do not specifically or practically exclude former employees will now be deemed to include them.

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Illinois employers should note that as of June 13, 1996, employers and their agents are presumed to be acting in good faith and immune from common law tort liability for the disclosure of written or verbal information about a current or former employee's job performance, unless the presumption is overcome by a preponderance of the evidence. Employment Records Disclosure Act. As Shell Oil *shows, however, employers will not be protected from statutory violations arising out of a job reference.*

If you have any questions about the *Shell Oil* case, or discrimination litigation in general, call Vedder Price (312/609-7500).

Return to Top of Document

ARBITRATION OF DISCRIMINATION CLAIMS UNDER COLLECTIVE BARGAINING AGREEMENTS: AN UPDATE

Employers named in Title VII or other statutory discrimination lawsuits have often sought to avoid the litigation by arguing that the dispute is subject to mandatory grievance and arbitration procedures in a collective bargaining agreement ("CBA"), which is the proper forum for resolving the claim. The majority of appellate courts addressing the issue have rejected that defense. The Supreme Court has not ruled definitively on the issue, however, and several Circuits remain undecided. Thus, the arbitration defense remains viable in some jurisdictions, as this update explains.

The issue was first raised in *Alexander v. Gardner-Denver Co.*, a case decided by the Supreme Court in 1974. A union-represented employee terminated for producing defective parts filed a grievance under the nondiscrimination clause in the CBA claiming his termination was racially motivated. The arbitrator denied the grievance without addressing the discrimination claim. Plaintiff then filed a Title VII action in federal court based upon the same facts alleged in his grievance. The Supreme Court concluded that plaintiff's statutory right to trial under Title VII was not foreclosed by his earlier

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submission of a discrimination grievance to arbitration. In a subsequent decision the Supreme Court made clear its view that Title VII grants individual employees a nonwaivable right to equal employment opportunities that is separate and distinct from the rights created through the collective bargaining process.

Seventeen years later, the Supreme Court revisited the issue in *Gilmer v. Interstate/Johnson Lane Corp*. Gilmer, a financial services manager, had been required to register with the New York Stock Exchange, and his registration application contained an agreement to arbitrate any claims against his employer arising out of his employment. After his termination at age 62, Gilmer filed suit in federal court alleging violations of the Age Discrimination in Employment Act ("ADEA"). The employer moved to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and the agreement in Gilmer's registration application with the NYSE. The case reached the Supreme Court, which held that Gilmer was required to arbitrate his ADEA claims. The Court rejected his arguments that compulsory arbitration was inconsistent with the purposes of the ADEA and inadequate to protect his rights.

Rather than overrule *Gardner-Denver*, however, the Supreme Court took pains to distinguish it. The Court noted that the plaintiff in *Gardner-Denver* had not agreed to arbitrate his statutory claim; he had proceeded to arbitration with union representation on his contract-based claim, and this did not preclude subsequent judicial resolution of his statutory claim. Gilmer, on the other hand, was an individual asserting individual rights; thus, "the tension between collective representation and individual statutory rights" did not arise. The Court also noted that *Gilmer*, unlike *Gardner-Denver*, was decided under the FAA, "which reflects a liberal policy favoring arbitration agreements."

Since *Gilmer*, employers have argued that the Supreme Court effectively overruled *Gardner-Denver* and that employees can be required to arbitrate statutory employment claims regardless of whether the agreement to arbitrate is contained in an individual contract or in a CBA. To date only the Fourth Circuit (and the Third Circuit, in limited contexts) has accepted this argument. In *Austin v. Owens-Brockway Glass Container* (1996), the Fourth Circuit concluded: "Whether the dispute arises under a contract of employment growing out of a

securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced." In *Martin v. Dana Corporation*, the Third Circuit recently held that where the "collective bargaining agreement…provides that both the employee and the union retain the individual right to demand arbitration…[this employee] is required to arbitrate his discrimination claim pursuant to the grievance procedure set forth in that agreement." The Second, Seventh, Eighth, Tenth and D.C. Circuits have come down the other way. Meanwhile, district courts in undecided circuits continue to grapple with employer requests for arbitration. The Sixth Circuit (Tennessee, Kentucky, Ohio and Michigan) in particular has been a battleground for litigating motions to compel arbitration.

Arguments that have met with success in compelling arbitration are generally those which address directly the distinctions the *Gilmer* Court drew in deciding not to follow *Gardner-Denver*. The most persuasive centers on the applicability of the FAA; the *Gilmer* court distinguished *Gardner-Denver*, in part, because it was not decided under the FAA, which manifests a liberal policy toward the enforcement of arbitration agreements. However, a majority of the Circuits addressing the issue now hold that the FAA, with limited exceptions, governs arbitration agreements contained in CBAs. Based on this substantial line of authority, Vedder Price recently persuaded a federal district court in Michigan to compel arbitration of the Title VII claims of four union employees subject to a CBA.

Invoking the FAA as the statutory predicate for compelling arbitration addresses another of the *Gilmer* Court's bases for distinguishing *Gardner-Denver*, namely, that the employee in *Gardner-Denver* had not agreed to arbitrate his statutory claims, only his contract claims. Most CBAs today contain broad antidiscrimination provisions. The Supreme Court has consistently held that when a court interprets provisions in an agreement covered by the FAA, it must give due regard to the federal policy favoring arbitration and resolve doubts concerning the scope of arbitrable issues in favor of arbitration.

However, the FAA does nothing to resolve a central concern of many courts recently discussed by the Seventh

Circuit (Illinois, Wisconsin and Indiana) in *Pryner v. Tractor Supply Co*. (1997). That concern is the apparent conflict between majority and minority rights. In *Pryner*, the Seventh Circuit observed that a CBA is the "symbol and reality of a majoritarian conception of workers' rights." Antidiscrimination laws, on the other hand, give rights to members of minority groups "because of concern about the mistreatment…of minorities by majorities." Echoing the sentiments of the majority of courts refusing to compel arbitration, the Seventh Circuit remarked that although a union, charged with negotiating the CBA and enforcing the collective rights of workers, may not actively discriminate against minority employees, "we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor."

The Third Circuit, however, recently observed that where the collective bargaining agreement provides that either the union or the employee can demand arbitration, the employee "does not need to persuade the union to prosecute his grievance and…subject [his] grievance to arbitration…thus, there is not a concern about a potential disparity in interests between [the] union and [the] employee."

As we see it, the Seventh Circuit in *Pryner* accurately summarizes the state of the law governing the enforceability of agreements under CBAs to arbitrate statutory employment disputes. Considering carefully the distinctions the *Gilmer* Court drew, the Seventh Circuit recognizes that the "Court may have so distinguished [*Gardner-Denver*] as to deprive it of any authoritative force.…" The Court notes, however, that only the Supreme Court can say whether enough remains of *Gardner-Denver* to continue to deny arbitration of statutory employment claims arising under CBAs. The Supreme Court may elect to do so. On May 16, 1997, a petition for certiorari was filed in *Pryner* and remains pending.

If you have any questions about arbitration defenses in a discrimination suit, or discrimination litigation in general, call Jim Petrie (312/609-7660), Jim Bayles (312/609-7785), or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

RIGHT TO FILE CHARGE CANNOT BE WAIVED, EEOC WARNS

A guidance statement recently issued by EEOC Chairman Gilbert F. Cassellas reaffirms the Commission's position that certain employee rights under statutes enforced by the EEOC cannot be waived. Nonwaivable are an employee's rights to file a charge, testify, assist, and participate in a proceeding under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act. Employer efforts to limit these rights by language in waiver agreements, alternative dispute resolution procedures, employee handbooks, or noncompete agreements are "null and void as a matter of public policy," says Chairman Cassellas, and also may violate the anti-retaliation provisions in the statutes.

However, the Commission's statement distinguishes the protected right to file charges or otherwise participate in EEOC proceedings from permissible waiver of the right to personal recovery on a claim. Thus, if an employee waives recovery or settles a claim and subsequently files a charge with the Commission on the same claim, "the employer will be shielded against any further recovery by the charging party provided the waiver agreement is valid under applicable law." EEOC Enforcement Guidance No. 915.002, April 10, 1997.

If you have any questions about waiver of employee EEOC rights, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

INDEFINITE LEAVE OF ABSENCE NOT A REASONABLE ACCOMMODATION

The Seventh Circuit Court of Appeals recently held that an employer need not give an indefinite leave of absence as a "reasonable accommodation" under the ADA.

In *Johnson v. Foulds, Inc.*, an executive secretary submitted a doctor's note stating that she should be placed on an indefinite leave of absence due to depression. After one month of leave, the company terminated her because she had not worked during that month. The secretary sued, claiming that the company had failed to reasonably accommodate her in violation of the ADA. The district court dismissed the lawsuit, finding that the secretary was incapable of performing the essential functions of her job and that an indefinite leave of absence was not a reasonable accommodation.

On appeal, the Seventh Circuit disagreed with the district's court conclusion that the plaintiff could not perform the essential functions of her job based merely on her submission of a doctor's note requiring an indefinite leave of absence. The court remarked that the doctor may have viewed an indefinite leave as the best or most desirable option, not the only option. Because a less disruptive accommodation might have existed that would have enabled the plaintiff to perform her secretarial work, the Seventh Circuit ruled that it was inappropriate to find that the plaintiff could not perform the essential functions of her job.

The Seventh Circuit did, however, affirm the district court's decision that an indefinite leave of absence is not a reasonable accommodation. The court found that a reasonable accommodation is "an adaptation of work requirements designed to enable the employee to do her job and do it at reasonable cost," and that an indefinite leave of absence failed to meet this standard. The court reasoned that an indefinite leave does not enable one to work and that the cost of holding a position open for an indefinite period of time is disproportionate to the benefit of the indefinite leave.

If you have any questions about the *Foulds* case, or the ADA in general, call Vedder Price (312/609-7500).

Return to Top of Document

ODDs & Ends

Three Snakes in the Grasp

Dewey Evans, a mine worker in Virginia, belonged to a religious sect that handles poisonous snakes in its church services. The sect also apparently frowns on medical treatment for snake bites, teaching that God will protect the believer. When Evans was bitten by a snake during services in July 1993, he obtained a one-week leave of absence from work. However, his supervisor told him he would be fired if he got another snake bite. Accordingly, when Evans got a second snake bite in February 1994, he just called in sick for one day without giving the reason.

When he got a third snake bite in March 1994, he truthfully reported that fact to the company, missing several days of work. However, citing his religious beliefs, Evans refused to provide a certification that he was under a doctor's care during his absence, as required by the employer's absentee policy. As a result, Evans was fired, and the EEOC filed suit on his behalf. The EEOC argued that the employer failed to accommodate Evans' religious beliefs, and that it discriminated against him by treating him more severely than other employees who had violated the attendance policies. A federal jury recently found that the discharge violated the religious discrimination provisions of Title VII and awarded Evans $20,475 in back pay. (The company had voluntarily reinstated Evans seven months after his discharge.)

No Fowl Play by Employer

After being fired for failing to remove "cock fighting chickens" from his yard, a small-town Louisiana mayor's assistant filed an unsuccessful lawsuit against the town and the mayor claiming they had violated his due process rights under the United States Constitution. The assistant claimed he was stigmatized because the mayor said he had received complaints that the chickens were "stinky, unsightly [and] noisy." The United States Court of Appeals for the Fifth Circuit, in *Carbol v. Town of Youngsville*, rejected the assistant's claim because he did not show that the comment was false and he continued to associate with fighting chickens.

The Fifth Circuit also rejected the assistant's claim that the town and mayor violated his free speech rights by retaliating against him for engaging in "symbolic speech." The court found that merely continuing to raise chickens would not be perceived as a "message" by viewers who had no knowledge of the dispute. (A special cluck of

appreciation to Janet Hedrick and Paula DeAngelo for contributing this item.)

Did Roy Rogers Have Bad Hair Days?

When a Battle Creek, Michigan nightclub refused to admit Lonnie Perry unless he took off his baseball cap, Perry sued in state court for gender and handicap discrimination. Perry's gender claim was based on the fact that, while the nightclub's dress code barred men with hats (except cowboy hats), there was no restriction on women customers wearing hats. The handicap claim stemmed from Perry's assertion that he wore a hat to conceal an unsightly hair replacement weave. The Michigan Court of Appeals recently upheld a trial court's dismissal of Mr. Perry's suit, fining Perry $500 for pursuing a vexatious appeal. The Court of Appeals held that the nightclub's restriction on men wearing certain hats did not prevent men from entering the club, and that even if Perry's baldness and/or hair weave were deemed handicaps, he could have gotten into the club merely by taking off his cap. (A tip of the hat to Sally Beauford for this contribution.)

- Return to: Labor Law
- Return to the Vedder Price: Publications Page.
- Return to: Top of Page.