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WHO IS AN EMPLOYEE UNDER ADA?

The Supreme Court recently issued a decision clarifying the question of who is an employee under the Americans with Disabilities Act ("ADA"). Clackamas Gastroenterology Associates v. Deborah Wells, 123 S. Ct. 1673 (2003). That statute covers employers whose workforce includes 15 or more "employees." In Clackamas, the answer to that question depended on whether four physicians actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as "employees." The case is both interesting and significant because the ADA definition of "employee" – "an individual employed by an employer" – explains nothing and is very similar to the definition of "employee" found in other federal statutes like ERISA. Therefore, the Court's opinion could have application beyond ADA.

The Court found that where a statute provides only a general definition of "employee," a common-law test would be applied to determine who qualifies as an "employee." According to the Court, that question cannot be resolved simply by asking whether the person is a "partner" because, in modern business, "partnership" can take many forms, and a nominal "partner" may, in fact, have the attributes of an employee and little real management

authority. The Court cited and relied on the EEOC regulations which address the question of when partners, officers, board members and shareholders are "employees." Under those regulations, the overriding question is "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." The Court noted that some factors in this case point toward management status for the disputed individuals, such as their control of the operation of their clinic, sharing of profits and their personal liability for malpractice insurance. However, noting that other factors might point toward "employee" status, the Court remanded the case for further proceedings under the criteria articulated in the opinion.

The case illustrates that the definition of "employee" in many statutes can't be resolved simply by labeling the person as a "manager" or "partner." Rather, the decision will turn on many factors which collectively will indicate whether the person is managing the organization or whether the organization controls the means and manner of the person's work performance.

WHEN IS OBESITY A DISABILITY?

Is obesity a disability protected by the Americans with Disabilities Act? A "disability" is defined as a physical or mental impairment that

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substantially limits a major life activity. Focusing on the word "physical," most courts hold that morbid obesity is a disability under ADA only if it relates to a physiological disorder.

A recent decision by the federal court in Connecticut illustrates the limits of this general rule. In Connor v. McDonald's Restaurant, 14 AD Cases 204 (D. Conn. 2003), the plaintiff was a morbidly obese individual who was rejected for employment at McDonald's. McDonald's moved to dismiss his complaint on the basis that it failed to allege that his obesity was the by-product of a physical condition, and, therefore, it was not a disability under the ADA.

The court denied McDonald's motion to dismiss. It noted that the ADA protects not only disabled individuals but also those who are "regarded as having such an impairment." According to the court, Connor could succeed in his lawsuit even if his obesity were not related to a physiological condition if he could show that MacDonald's perceived his condition as being related to a physical condition.

This case illustrates how the "regarded as" requirement can protect individuals under ADA who may not be in fact disabled.

KEEPING EMPLOYEE HANDBOOKS UP TO DATE: THE RISKS OF NOT INSERTING CHANGES

A federal court in Illinois has rendered an important decision which illustrates the risks faced by employers who have employee manuals and don't insert recent changes into the manual. In Dodaro v. Millage of Glendale

Heights, the employer adopted the "rolling twelve" method of calculating when FMLA leave may be taken. Under FMLA, qualified employees are entitled to 12 weeks of unpaid FMLA leave each year. The "rolling twelves" allows the year to be determined backward from the day the employee requests leave. Thus, if the employee has taken 90 days of leave in the year preceding the leave, the employer may deny the FMLA leave. As a practical matter, such a policy prevents employees from taking 90 days of FMLA leave in October-December and then again in January-March of the following year. Many employers have adopted the rolling twelve policy to prevent this from happening.

The problem for the employer in Dodaro was that it implemented the new policy by distributing memos to the employees, but it did not put the new policy into the employee handbook. The court held that until the policy was placed in the handbook, it was not lawfully in effect. The court relied on the FMLA regulations which provide that if an employer has an employee handbook, its FMLA policies must be in that handbook. The court emphasized the purpose of employee notification – that employees be advised of their rights – and noted that if a memo to employees were sufficient to provide notice, then all FMLA information could be dispersed into various documents, thereby frustrating the policy of providing clear guidance to employees.

It strikes us that the court's interpretation of the regulations was quite literal. The regulations simply say that if an employer has a manual, the FMLA policy should

be included in it. It does not mandate that policy changes are ineffective until they are placed in the manual.

It is unclear whether the rule adopted by the court would apply only to FMLA policies or to policies in general. Either way, the case illustrates that when employers are changing personnel policies, they would be well advised to do something more than simply distribute a memo announcing the change. The existing manuals should also be revised to incorporate the change and the employees should be given the revised language with instructions to insert that language in their copies of the manual.

SURVEILLANCE CAMERAS: WHEN MUST INSTALLATION BE BARGAINED WITH THE UNION?

In 1997, the NLRB held that the use of hidden surveillance cameras in the workplace was a mandatory subject of bargaining. Colgate-Palmolive Co., 323 N.L.R.B. 515 (1997). That means that an employer cannot install hidden cameras for surveillance of employees without first bargaining with the union over that subject. Since the obligation to bargain requires that the employer provide pertinent information to the union on request, employers are obligated under the Colgate decision to tell unions not only why they want to install cameras but where they plan to install them. Many questioned the Colgate-Palmolive decision, arguing that disclosure of the details of surveillance cameras would defeat their purpose by disclosing not only their existence but specific location.

A second court of appeals has now affirmed the Colgate-Palmolive doctrine. National Steel Corp. v. NLRB, 172 LRRM 2154 (7th Cir. 2003). The court began by noting the deference owed to the Labor Board on matters of labor policy. It agreed with the Board that “mandatory” subjects of bargaining included matters germane to the working environment and excluded “managerial decisions, which lie at the core of entrepreneurial control.” Since surveillance cameras are used to expose employee misconduct and violations of law, the court agreed that their installation was more related to the work environment than to core managerial prerogatives and, therefore, that it was a mandatory subject of bargaining.

The court rejected Colgate-Palmolive’s argument that bargaining over surveillance cameras would be contrary to public policy. It agreed that Colgate-Palmolive had a legitimate interest in preserving the secrecy of the camera locations but concluded that the accommodation of that interest was itself a matter for collective bargaining. Thus, according to the court, Colgate’s concern for secrecy might have been accommodated by a protective order or a confidentiality agreement reached during collective bargaining and did not justify Colgate-Palmolive’s outright refusal to bargain over the installation of surveillance cameras.

This case illustrates the general rule that employers cannot refuse to discuss “mandatory” issues because they involve confidential or secret information; rather the employer must bargain with the union (and provide relevant information) after bargaining with the union about how to protect the employer’s legitimate interests.

This approach sounds reasonable but often generates practical problems. For example, if the company requires the union to maintain confidentiality about the specific location of cameras, employees will still know that surveillance cameras have been installed, and the ability to apprehend employees engaged in theft or drug dealing, for example, will be compromised. If the employer demands that the union not mention that cameras are being installed, the union will likely refuse such an agreement based on its concern that it will be sued for making a deal behind its members’ backs that could result in terminations of members, thereby violating the union’s duty to fairly represent its constituents.

These reservations notwithstanding, two courts of appeals have agreed with the NLRB’s Colgate-Palmolive decision, and employers are left with little choice but to comply. The National Steel decision does, however, allow the employer to bargain with the union about how to protect its legitimate concerns regarding secrecy.

GOOD FAITH DOUBT: WHEN CAN AN EMPLOYER STOP BARGAINING WITH A UNION?

Through the years, the NLRB has changed its position about when an employer can stop bargaining with an incumbent union. The traditional rule was that an employer can stop bargaining with an incumbent union when there is no contract in effect and the employer has a good faith doubt based on objective circumstances about whether the union continues to represent a majority of employees. For years, the Board

held that when a company is sold, and the new owner becomes obligated to recognize the union as a “successor” employer, that new owner can also cease recognizing the union if it has the required good faith doubt. In one of its last bursts of liberalism, the Clinton Board ruled in 1999 that a successor employer could not withdraw recognition based on a good faith doubt of the union’s continuing majority status until the union had a reasonable period of time to demonstrate its worth to the employees. That decision was short-lived, leaving open the issue of what constitutes sufficient evidence of good faith doubt.

That issue was addressed again in Torch Operating Co., 338 N.L.R.B. No. 143 (2003). The Board began by referring to a recent Supreme Court decision, Allentown Mack Sales and Service v. NLRB, 522 U.S. 359 (1998), which held that employers may withdraw recognition when there is a “reasonable uncertainty” (rather than disbelief) about the union’s continuing majority status. In Torch, 15 of the 36 employees had made statements demonstrating their opposition to the union. The case turned on other statements and whether those statements could be used to establish a belief of reasonable uncertainty about the union’s majority status. Prior to Allentown, the Board would not accept as evidence of good faith doubt a statement by an employee describing how other employees feel. In Torch, however, the Board held that a statement that “there was not a whole lot of support for the union” was sufficient to satisfy the new standard—“reasonable uncertainty.” That statement, coupled with the statements of the 15 employees opposing the union, privileged the employer to withdraw recognition.

This decision, by a new Labor Board, reflects a different attitude toward employer withdrawals of recognition and opens the door somewhat to such actions by employers. Before Allentown, the Board required objective evidence (such as a petition signed by a majority of the employees disavowing interest in the union) as a basis for withdrawing recognition. A statement like, "the union's not doing a great job" would have been regarded as ambiguous and not indicative that an employee did not want union representation. It remains to be seen whether this case is an aberration or a real liberalization for employers.

DO EEO LAWS APPLY TO U.S.-BASED EMPLOYEES WORKING ABROAD?

The Chairperson of EEOC recently addressed the issue of whether U.S. nationals are protected by federal discrimination laws when they work abroad. According to Chairperson Cari Dominguez, EEO coverage generally follows a U.S. citizen when s/he works abroad. Chairperson Dominguez acknowledged the need for clear standards so that employees and companies understand their respective rights and obligations. Toward that end, EEOC has issued a "Fact Sheet" addressing these issues, which can be accessed at EEOC's website, for those with questions. Essentially, the rule is that employees working for US companies abroad are covered by EEO laws with the proviso that the company is not obligated to violate the law of the country where the workplace is located. Thus, if a foreign country requires that its citizens be given priority in hiring, a US company would not be engaged in national origin discrimination if it hired nationals of the foreign country.

A PERSONAL NOTE

We are pleased to announce that Khristan Heagle will be joining the Firm as an associate on July 7, 2003. Khristan worked for over two years in the labor-employment department of Pepper, Hamilton, a prominent firm in Philadelphia. It is our good fortune that she has relocated to New York. We hope that you will soon have an opportunity to work with Khristan, and we are confident that she will make a strong contribution to our practice.

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