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PRESERVING COMPUTERIZED DOCUMENTS

A recent decision in Massachusetts illustrates the consequences of destroying computerized documents in litigation. In that case, *Plasse v. Tyco Electronics Corp.*, 448 F. Supp. 2d 302 (D. Mass. 2006), a former employee of Tyco Electronics sued the company for wrongful discharge, claiming that he had been terminated because he raised questions within the company about its accounting practices. During discovery, Tyco found a resume in Plasse's personnel file which stated that he had a master's degree in business administration. Plasse had also made a similar representation in his written employment applications and in other disclosures after the lawsuit was filed. When asked about the master's degree during discovery, Plasse stated that he did not have an MBA; denied that he had ever claimed he had one; and blamed the personnel recruiter for the inaccurate reference. Tyco then obtained permission from the court to review all documents in Plasse's personal computer, and an expert retained by Tyco found evidence of documents labeled "resume" and "cover letter" that had been destroyed after Tyco began questioning Plasse's background.

The court found that Plasse had "demonstrated an unwillingness to proceed fairly and openly in this litigation, and has directly flouted this court's authority by destroying or modifying documents after the court specifically invited defendant to obtain an inspection of plaintiff's computer and disks." The issue then became what sanction the court would impose for Plasse's misconduct. Interestingly, the court found that because the litigation could not fairly and openly proceed as a consequence of Plasse's misconduct, the complaint had to be dismissed.

This case is interesting and significant because it illustrates the consequences of destroying electronic files by a person who knows that those files may bear on pending litigation. In this case, the company benefitted from the court's strict sanction. One must assume that similar misconduct committed by a defending company might lead to equally harsh sanctions.

NEW YORK STATE LAW: RECENT DEVELOPMENTS

Although many of our clients and readers are not governed by New York State law, we sometimes include recent state law developments because they make all readers aware of what states are doing and that similar laws may be in effect in other states.

1. Leave for Spouses of Military Personnel

New York is one of several states which has enacted legislation to protect the spouses of military personnel. The recently-enacted Military Spouse Leave Law, N.Y. Labor Law § 202-l-i, provides that employers (defined as 20 or more employees) must provide up to 10 days of unpaid leave to a spouse of a member of the armed forces (including National Guard and reserves) if the spouse is deployed during a period of military conflict to a combat zone. This right is conferred on all employees regardless of their length of service with the employer, and, not surprisingly, the law prohibits retaliation against any employee who requests leave under the statute.

2. Deductions from Payroll: When Are They Lawful?

Employers frequently consider and sometimes implement deductions from an employee's pay. Like many

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states, New York law restricts such deductions. Specifically, it prohibits payroll deductions unless they are required by law (for example, tax withholding) or “expressly authorized in writing” by and “for the benefit of the employee.” Labor Law § 193(1)(b). That section specifies the kinds of deductions that employees may authorize – namely, “payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.”

In *Angello v. Labor Ready, Inc.*, 825 N.Y.S.2d 674 (N.Y. 2006), the Court of Appeals interpreted the phrase “similar payments for the benefit of the employee”. The employer, Labor Ready, is a national temporary employment firm which pays employees at the end of each day. Upon completion of the job, each worker brings a work ticket to a supervisor and is offered the option of being paid by check or cash voucher. Those who opt for a check can cash it anywhere, including at Fleet Bank for no charge. Those who want cash sign a voucher for the money owed to them less a “transaction fee,” and the net amount (wages less transaction fee) can be redeemed at a cash machine on the work premises. The State Department of Labor took the position that the transaction fee violated the New York law on deductions and the court of appeals agreed.

The court found that the deduction for the transaction fee was not “similar” to the kind of payments authorized by the statute because those payments, unlike the transaction fee, were all for the benefit of the employee. According to the court, the “only benefit to the worker here is one of convenience. That, however, is not a ‘benefit’ covered by the statute.” The court concluded by saying that the history of the Labor Law was “to assure that

the unequal bargaining power between an employer and an employee does not result in coercive economic arrangements by which the employer can divert a worker’s wages for the employer’s benefit.”

We bring this law to your attention because, from our experience, employers in New York and other states sometimes unknowingly initiate deductions that are not legal under state law. Such deductions should not be initiated until the requirements, if any, of state law have been reviewed.

NEUTRALITY AGREEMENTS: WHEN ARE THEY UNLAWFUL?

One of the hot issues now pending at the NLRB is the enforceability of neutrality agreements. A neutrality agreement is one in which a company agrees with a union to recognize the union if it obtains authorization cards from a majority of the employees in a facility and to remain neutral during the union’s organizing process. Some neutrality agreements go further and stipulate conditions that will be contained in any future collective bargaining agreement. Others impose the neutrality restrictions not only on the signatory company but on companies owned or controlled by it.

Neutrality agreements are viewed by unions as an essential organizing tool, and many unions make the neutrality agreement a *de facto* condition for agreement in negotiations. Several cases are now pending in which the NLRB is expected to decide the various issues which arise from neutrality agreements. *Heartland Industrial Partners*, 348 N.L.R.B. No. 72 (NLRB Nov. 7, 2006) is the first of these decisions.

The issue in *Heartland* is whether it is lawful for a company which signs a neutrality agreement to agree that the neutrality commitment will apply not only to it but to companies controlled by it. The General Counsel alleged that such an agreement violated Section 8(e) of the NLRA, which prohibits a union and a company from agreeing to a clause which requires the company to “cease doing business” with another company. By

court interpretation, that section does not prohibit every agreement that requires the company to “cease doing business” with another company. For example, it is lawful for an employer to agree not to subcontract bargaining unit work even though that agreement prevents the employer from doing business with would-be contractors, because the purpose of the agreement is to protect the work and jobs of bargaining unit employees. When the agreement does have that objective, it is not prohibited by Section 8(e).

The specific issue in *Heartland* is whether the employer’s agreement, that companies controlled by it will be bound by its neutrality agreement with the union, is, in effect, an agreement by that employer to “cease doing business” with the controlled company. There are several NLRB decisions holding that an agreement by an employer that its collective bargaining agreement will also apply to companies that it owns is unlawful because the agreement does not protect the work of bargaining unit employees and because the owned company operates independently and, therefore, is treated as a separate and neutral employer. In *Heartland*, the Board found that those cases were inapplicable and that the agreement to impose neutrality on related companies was lawful because that agreement did not require the signatory company to “cease doing business” with anyone. According to the Board, whether or not the controlled company was obligated to neutrality did not affect the right of the signatory company to “do business,” *i.e.*, make an investment in the controlled company.

This decision does not come as a surprise to us. In a 2004 newsletter, we questioned how a company was agreeing to “cease doing business” with a company that it controlled when the company simply agreed that the controlled company, like the parent company, would be neutral in any union organizing drive. The

more interesting decisions on the legal limits of neutrality agreements are yet to come.

DEVELOPMENTS IN DISABILITY LAW

1. Is Morbid Obesity a Disability?

The case of *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006), addresses the question of whether morbid obesity is an “impairment” under the Americans with Disabilities Act (“ADA”).

Under the ADA, employers are prohibited from discriminating against any qualified “individual with a disability,” which is defined as a “physical or mental impairment that substantially limits one or more of the major life activities of the individual.” Individuals who do not actually have a substantially limiting impairment are also covered by the ADA if their employer “regards” them as being disabled. According to the Supreme Court, there are two ways in which an individual may assert a claim that the employer “regards” her as being disabled: (1) the employer mistakenly believes that a person has a physical impairment that substantially limits a major life activity; or (2) an employee has an impairment which does not substantially limit a major life activity but his employer believes that it does. In this case, EEOC advanced its case under the second argument and claimed that the plaintiff had an actual impairment – morbid obesity – that was regarded, albeit erroneously, as affecting his ability to do his job. That claim required the court to decide whether non-physiologically-caused obesity is an ADA “impairment.”

EEOC argued that an “impairment” could be established either by showing weight problems caused by a physiological condition or morbid obesity (defined as body weight more than 100% over the norm) even if the morbid obesity had no physiological cause. The court rejected that argument. Citing with

approval a court of appeals decision from New York, the court held that abnormal physical characteristics – such as obesity – do not constitute an “impairment” under ADA unless they have a physiological cause. The court specifically declined to extend “ADA protection to all ‘abnormal’ (whatever that term may mean) physical characteristics.” In sum, under this decision, obesity will not be regarded as an ADA disability unless it has a physiological cause. The decision also suggests, however, that a person may be disabled and have an “impairment” for purposes of ADA if the morbid obesity produces side effects which themselves would constitute a physical “impairment,” such as respiratory or cardiovascular impairments.

2. Is a Zero Tolerance Policy Unlawful?

After being employed as a truck driver and after driving a million miles without accident, Jerome Hoefner had a fainting spell and was diagnosed with “neurocardiogenic syncope,” a disorder that can produce a sudden drop in blood pressure and cause fainting. The Schneider trucking company policy prevented Hoefner from continuing to work because of his condition, even though it was treatable by medication and did not prevent Hoefner from satisfying the safety standards of federal law. When Hoefner was terminated, the EEOC sued on Hoefner’s behalf, contending that the company fired him because it mistakenly believed that his condition was a disabling condition under the ADA. The court of appeals in Chicago ruled in favor of the company. *EEOC v. Schneider National, Inc.*, No. 06-3108, 2007 WL 841035, at *3 (7th Cir. Mar. 21, 2007) Daily Labor Report, March 22, 2007.

The court noted that the Schneider company had an incident two years earlier in which a driver fainted at the wheel and drove off a bridge. That incident precipitated the “zero tolerance” policy that led to Hoefner’s termination. The court noted that, even with medication, Hoefner was not risk free, either because he might forget to take his medication or because the medication was not totally effective. It found that the company was entitled to “determine how much risk is too great for *it* to be willing to

take” (court’s emphasis). The fact that other employers and the worker himself were willing to assume that risk did not compel Schneider to assume a risk that it deemed unacceptable. That Schneider might have been “excessively risk averse,” as some airlines are when they refuse to hire pilots who do not have at least 20-100 uncorrected vision, did not prevent Schneider from adopting a zero risk policy.

The court also rejected EEOC’s position for another reason. The ADA definition of “disability” only protects employees who have conditions that impair “major life activities.” According to the court, the only activity that was impaired by Schneider’s condition was driving a truck for companies like Schneider which had zero tolerance safety policies. The court stated:

That is too esoteric a capability to be judged a ‘major’ life activity. If being able to drive a huge truck or a truck filled with hazardous chemicals safely, or being able to fly a plane or guide climbers to the summit of Mt. Everest, is a major life activity, then virtually the entire population of the United States is disabled, which would be a ridiculous construction to place on the Americans with Disabilities Act.

It should not be assumed that every court would accept zero tolerance safety policies as a defense against disability claims. EEOC certainly does not agree with that position – as evidenced by its suit on Hoefner’s behalf – and other courts might well agree with EEOC and conclude that it would be too easy to circumvent the protections of the disability laws if companies could restrict employment of disabled employees simply by establishing zero tolerance standards. Nonetheless, the court’s view is an interesting interpretation and might be a relied upon by other employers depending on the federal circuit in which they do business.

FMLA: HOW IS 75 MILES DETERMINED?

The Family Medical Leave Act applies to companies which have 50 or more employees located within 75 miles of each other. *Hackworth v. Progressive Causality Insurance*, 468 F.3d 772 (10th Cir. 2006) addresses the question of how the 75 mile limit should be determined – by surface or airline distance. The court upheld the Department of Labor’s regulation which specified that 75 miles should be determined based on surface distance, *i.e.*, how the crow flies.

The court first noted that in reviewing an interpretation of a statute by the administering agency, the courts must defer to the agency’s interpretation as long as it is reasonable and not arbitrary. The court then found that measuring 50 miles by surface distance was reasonable because: (i) such an interpretation is plausible and reasonable; (ii) that interpretation furthers the purpose of the statute in that a surface measurement is a reasonable proxy for judging an employer’s ability to relocate an employee from one worksite to another in order to cover for the employee who is on FMLA leave; and (iii) such an interpretation was adopted by another circuit court.

The court’s decision is hardly surprising. Now that its regulation has been upheld by two circuit courts, employers have solid grounds for relying on the Department of Labor’s interpretation.

THE EMPLOYEE DUTY OF LOYALTY: WHAT ARE THE LIMITS?

In 1953, the Supreme Court issued a decision which set out the standard for determining when an employee’s actions are protected by the NLRA and when they are unprotected as disloyal. In that case, *NLRB v. IBEW (Jefferson Standard Broadcasting Co.)*, 364

U.S. 464 (1953), the Supreme Court upheld a Board determination that a television broadcasting company in Charlotte, North Carolina did not violate the Act when it discharged a group of nine technicians who had distributed a handbill criticizing the quality of the station’s programming and suggesting that the station considered Charlotte a “second-class” city. The Court explained that while the NLRA safeguards the right of employees to engage in concerted activities for collective bargaining or other mutual aid and protection, it does not override the employer’s authority to discharge “for cause.” The fact that the employees were engaged in a labor dispute did not, according to the Court, insulate their activity from accusations of disloyalty.

Following the *Jefferson Standard* case, the Board formulated a two-part test to determine whether an employee’s communication was protected by the statute. The Board’s test considers two factors: (1) was the statement related to an ongoing labor dispute; and (2) was it “so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” In a recent case, *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006), the Court of Appeals for the District of Columbia concluded that the Board misapplied the second criteria, finding that the discharged employee’s communications “were unquestionably detrimentally disloyal” to the employer. Specifically, the employee, White, had stated to a newspaper reporter that, following the transfer of an IBM business to *Endicott*, “there were ‘gaping holes’ in [Endicott’s] business” and that “development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.” The Court concluded that the “damaging effect of [this] disloyal statement, made by an experienced insider at a time when [Endicott] was struggling to get up and running under new management, is obvious.” According to the Court, the company would have been within its rights to immediately discharge White for this statement. Nonetheless, the company gave White a second chance and, yet, two weeks later White posted a message on the internet

stating that Endicott management “was causing the business to be ‘tanked’ and was going to ‘put it into the dirt’.” The Court concluded that White had demonstrated manifest disloyalty to his employer and, therefore, that his statements were not protected by the NLRA and, for that reason, White’s discharge by Endicott was lawful.

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