EMPLOYMENT FLASH

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INSIDE

Second Circuit Says Complaining of Harassment to Harasser May Constitute Reasonable Availment of Reporting Procedures

The Second Circuit has ruled that an employee who is subject to sexual harassment by a supervisor may demonstrate that he or she reasonably availed himself or herself of the employer's harassment reporting procedures when the employee complains to the harassing supervisor alone yet does not also register a complaint with any other member of management. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2d. Cir. 2010). In the *Gorzynski* case, an employee brought a hostile work environment claim against her employer based on multiple sexual comments made by her supervisor. The court found that the employee provided sufficient evidence of harassment. Because the harassment was by a supervisor, JetBlue would be liable for the conduct unless it could establish the *Faragher/Ellerth* affirmative defense (named after a pair of landmark 1998 U.S. Supreme Court cases concerning hostile work environment sexual harassment). The *Faragher/Ellerth* defense consists of two principal elements: (1) that the employer exercised reasonable care to prevent and correct promptly any discriminatory harassing behavior, and (2) that plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

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EEOC Issues Final Rule on the Genetic Information Nondiscrimination Act of 2008

After numerous delays, the Equal Employment Opportunity Commission (EEOC) has issued its final rule implementing Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). As discussed in the May 2008 *Employment Flash*, GINA's purpose is to protect individuals against discrimination based on their genetic information with respect to obtaining and maintaining health insurance and terms and conditions of employment. Title II of GINA, which took effect in November 2009, prohibits employers from using genetic information in employment decision-making and restricts employers' ability to request, require, purchase or disclose such information.

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California Court of Appeal Sides with Employers on Meal Break Issue

In *Hernandez v. Chipotle Mexican Grill*, 2010 Cal. App. LEXIS 1853 (Sept. 30, 2010), a California Court of Appeal weighed in on an issue pending before the California Supreme Court—whether employers must merely *provide* employees with meal breaks rather than *ensure* that they are taken. The *Chipotle* court concluded that when the California Supreme Court decides *Brinker Restaurant v. Superior Court* and its companion case *Brinkley v. Public Storage*, it is likely to hold that employers must merely provide meal breaks. (*See Employment Flash*, July 2008.)

In *Chipotle*, the court upheld the dismissal of a class action of about 3,000 hourly employees at California Chipotle restaurants. The court agreed with the trial court's legal analysis that California law only requires employers to provide employees with meal and rest breaks, and that to require employees to "ensure" meal breaks would "create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws." The court noted that Chipotle had a uniform company policy that required meal and rest breaks in compliance with California law. Although the plaintiffs' expert claimed that 92 percent of employees missed at least one meal break, the court dismissed this statistic, noting that the expert counted employees who returned one minute early from break and employees who missed a single break, without regard for the reason that the employee missed the break (such as forgetting to clock out). As the court found that the plaintiffs did not prove that there was a uniform policy at Chipotle of not providing meal breaks, a class action was not appropriate.

While it is not yet known when the California Supreme Court will ultimately decide *Brinker*, at least for now, the *Chipotle* court has given California employers hope that they will be held to the more reasonable standard of providing meal breaks rather than ensuring that they are taken.

NLRB Issues Complaint Over Facebook Firing

On Oct. 27, 2010, the National Labor Relations Board (NLRB) issued a complaint alleging, among other things, that American Medical Response of Connecticut, Inc. (AMR) illegally terminated its union-represented employee Dawnmarie Souza for making derogatory remarks about her supervisor on her Facebook page.

Following a request by her supervisor to prepare a report concerning a customer complaint about her work, Ms. Souza posted a negative remark about the supervisor on her Facebook page from her home computer. Ms. Souza allegedly posted "love how the company allows a 17 to become a supervisor" ("17" reportedly being the company's colloquial term for a psychiatric patient). When other co-workers added their own responses supporting Ms. Souza, she allegedly posted additional derogatory comments. When AMR learned of the postings, the company suspended and later terminated Ms. Souza, citing a violation of the company's Internet policies.

The NLRB, however, determined after an investigation that the employee's postings constituted protected concerted activity and that AMR's policy prohibiting employees from making disparaging remarks about supervisors or the company violated the National Labor Relations Act (NLRA). The NLRB also claims that the company's policy prohibiting employees from depicting the company in any manner online without the permission of the company is an unlawful restriction on employees' rights to engage in protected concerted activity as provided by Section 7 of the NLRA.

The NLRB has set a hearing on the case for Jan. 25, 2011. As reported by the *New York Times*, this is the first case in which the NLRB has asserted that employees' criticisms of their employers on a social networking site are generally protected and that companies are violating the law by disciplining employees for such activities.

Governor Paterson Signs New York Domestic Workers' Bill of Rights

On Aug. 31, 2010, Governor Paterson signed into law the New York Domestic Workers' Bill of Rights, amending New York State's labor law, the executive law and the workers' compensation law. This law reconciles the New York State Senate legislation discussed in the June 2010 issue of *Employment Flash* and the New York State Assembly version of the law, which was passed in June 2009.

The New York Domestic Workers' Bill of Rights establishes rules for certain terms and conditions of employment and protects domestic employees against unwelcome sexual advances, hostile work environments and harassment based on gender, race, religion or national origin. Specifically, the Domestic Workers' Bill of Rights provides for overtime pay at the rate of 1½ times the regular rate of pay after 40 hours per week for live-out domestic workers and 44 hours per week for live-in domestic workers, a minimum of one day off every seven days, and three days off with pay per year after the first year of employment. Whenever possible, the day of rest should coincide with the domestic worker's traditional day of religious worship. A domestic worker may voluntarily agree to work on his or her day of rest. If such an agreement is made, the employee must be paid at the overtime rate for all hours worked on the day of rest.

The law also mandates that the Department of Labor (DOL) report to the governor, the assembly speaker and the temporary president of the Senate on the feasibility and practicality of domestic workers organizing for the purpose of collective bargaining no later than Nov. 1, 2010. The New York State DOL has issued such report, which lays out potential paths for domestic workers to unionize, though it acknowledges the process will be difficult because of the industry's special circumstances. As Colleen Gardner, the state's labor commissioner, explained, "This is an industry where people lack a lot of rights and are not aware of their rights." Moreover, as the report notes, because domestic work is highly decentralized, with employees working at different worksites for different employers, it is not apparent how bargaining units would be formed and with whom those units would bargain.

This law, which becomes effective on Nov. 29, 2010, applies to all "domestic employees," which is defined to include housekeepers, nannies, companions to the sick or elderly or any person employed in a home or residence for any other domestic purpose. The law specifically excludes (i) individuals working on a "casual basis" such as part-time babysitters, (ii) individuals providing companionship services for individuals who (because of age or infirmity) are unable to care for themselves, and who are employed by an employer or agency other than the family using such services and (iii) relatives (through blood, marriage or adoption) of the employer.

California Passes Law for Bone Marrow and Organ Donation Paid Leave

California has passed a new law that requires employers with more than 15 employees to grant certain *paid* leaves of absence to employees for organ and bone marrow donation.

The law requires a paid leave of absence of up to 30 days for an organ donation, although employers may require that an employee apply to this leave up to two weeks of earned but unused sick or vacation leave. Similarly, the law requires a paid leave of absence of up to five days for a bone marrow donation, but an employer may require the employee to apply earned but unused sick or vacation leave for those five days.

Leave provided under this law does not run concurrently with leave under the Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA). The law takes effect on Jan. 1, 2011.

Employees Suing Over Drug Testing Must be Disabled to Pursue a Claim Under Section 12112(b)(6) of the ADA

On Nov. 3, 2010, the U.S. Court of Appeals for the Sixth Circuit held that an individual must be disabled to pursue a claim under section 12112(b)(6) of the Americans with Disabilities Act (ADA), which addresses employment qualification screening. *Bates v. Dura Automotive Systems, Inc.*, 2010 WL 4321575, No. 09-6351 (Nov. 3, 2010). The case arose following Dura Automotive Systems' (Dura) implementation of

an enhanced drug testing policy at one of its facilities. The drug testing policy prohibited employees from taking legal drugs that contained any of 12 substances, including those found in the prescription drugs Xanax and Oxycodone. It was implemented following Dura's determination that the facility had a higher rate of workplace accidents, which Dura believed might be caused by drug use. Under the policy, employees who tested positive for legal drugs had the opportunity to transition to drugs that did not contain the prohibited substances or be terminated from employment. Seven terminated employees sued, claiming the policy violated the ADA.

The district court analyzed the employees' claim under section 12112(b)(6) of the ADA, as it existed prior to the 2008 amendments. Section 12112(a) of the ADA provided, "[n]o covered entity shall discriminate against a covered individual with a disability because of the disability of such individual." Section 12112(b)(6) defined the term "discriminate" to include "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity..." In analyzing Dura's motion for clarification, the district court affirmed that individuals do not need to be "disabled" under the ADA to make a section 12112(b)(6) claim.

The Sixth Circuit, however, granted petition for leave to appeal to consider "whether an individual must be disabled to pursue a claim under section 12112(b)(6) of the [ADA]." Reversing the district court and joining the Fifth Circuit, the Sixth Circuit noted that the plain language of subsection (b)(6) only addresses individuals with disabilities. The court held that subsection (b)(6)'s "plain meaning controls" and was not available as a means for recourse for the nondisabled employees subject to Dura's drug testing policy. As the 2008 amendments to the ADA significantly expanded the definition of "disabled," it seems less likely that future challenges to employers' drug testing policies will hinge on whether an employee challenging the policy is "disabled" for purposes of the ADA. *See* October 2008 *Employment Flash*.

New York Court Holds Social Network Accounts Discoverable

New York's Suffolk County Supreme Court has held that a personal injury plaintiff must provide copies of her Facebook and MySpace profiles. The profile information subject to inspection included all deleted pages and even those portions of those profiles that were marked "private" through the respective sites' privacy settings.

In *Romano v. Steelcase Inc.*, 2010 N.Y. Misc. LEXIS 4538 (N.Y. Sup. Ct. Sept. 21, 2010), the plaintiff alleged that she sustained permanent personal injuries to her neck and back when she fell from her office chair. Due to these injuries, the plaintiff claimed that she was mostly confined to her home and bed. The public portion of Romano's MySpace and Facebook profiles, however, showed her recent travels to Florida and Pennsylvania. Because of this information, the defendant believed that the private postings on the plaintiff's Facebook and MySpace sites would show inconsistencies with the plaintiff's claims, specifically the extent and nature of her injuries and her loss of enjoyment of life. The defendant subpoenaed the social networking sites but the subpoena was rebuffed by Facebook as contrary to the Stored Communications Act, which precludes disclosure from such sites absent the consent of the individual. Romano did not consent to this disclosure and filed her own motion to quash the subpoena on privacy-related grounds, arguing that she had a reasonable expectation of privacy in her home computer and that the release of her accounts would provide the defendant with irrelevant and private information.

The court agreed with the defendant and ordered Romano to provide an authorization to review the Facebook and MySpace accounts. The court reasoned that one could infer – based on the publicly available portions of Romano's profile – that the disclosure of the private and deleted portions was both material and necessary to the action or could lead to admissible evidence, specifically to the issue of damages and extent of injury. In light of the liberal discovery policies in New York, preventing such disclosure "would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings." The court further rejected Romano's Fourth Amendment privacy objection,

holding that she had no expectation of privacy because she consented to the possibility that her personal information would be shared with others when she joined the sites, notwithstanding her privacy settings.

While this was a case of first impression in New York, the court relied on recent District of Colorado and Canadian decisions that had similar underlying discovery issues. The court also relied on Second Circuit, District of New Jersey, California and Ohio decisions in assessing the underlying privacy claim and determining that privacy rights are not absolute.

Ninth Circuit Allows Fitness for Duty Exam for "Emotionally Volatile" Employee

In *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010), the Ninth Circuit Court of Appeals recently held that an employer can require a fitness for duty exam without violating the ADA for an employee who exhibits "emotionally volatile behavior." In *Brownfield*, the plaintiff, a police officer in the city of Yakima, was asked to submit to a fitness for duty exam because he "exhibited highly emotional responses on numerous occasions in 2005, four occurring in a single month immediately prior to his referral."

While the plaintiff alleged that the city violated the ADA by requiring him to submit to the exam, the court disagreed explaining that, under the ADA, an employer may require a medical examination to determine whether an employee is disabled if such examination or inquiry is shown to be "job-related and consistent with business necessity." The court acknowledged that this is a high standard and "mere expediency" is not enough. The plaintiff argued that the "business necessity standard" cannot be met without a showing of diminished job performance as a result of health problems – which he alleged was not the case. The court countered the plaintiff's argument by holding that "prophylactic psychological examinations" can satisfy the business necessity standard, even before an employee's work performance declines, if the employer is faced with significant evidence that reasonably could raise questions as to whether an employee is still capable of performing his or her job.

The court found that the city of Yakima had reasonable cause to question Brownfield's ability to work as a police officer due to his erratic behavior. The court explained: "Although a minor argument with a coworker or isolated instances of lost temper would likely fall short of establishing business necessity, Brownfield's repeated volatile responses are of a different character. Moreover, our consideration of the [exam's] legitimacy is heavily colored by the nature of Brownfield's employment. ...When a police department has good reason to doubt an officer's ability to respond to these situations in an appropriate manner, an [exam] is consistent with the ADA."

Second Circuit Says Complaining of Harassment to Harasser May Constitute Reasonable Availment of Reporting Procedures *(continued from page 1)*

In the *Gorzynski* case, JetBlue attempted to prove the *Faragher/Ellerth* defense by providing evidence that it maintained a formal written sexual harassment policy in its employee manual, which stated that, "any Crewmember who believes that he or she is the victim of any type of discriminatory conduct, including sexual harassment, should bring that conduct to the immediate attention of his or her supervisor, the People [Human Resources] Department or any other member of management." The manual also described a prompt investigation process and non-retaliation policies and provided that a supervisor who failed to take appropriate action in response to a complaint brought to his or her attention would be disciplined. JetBlue argued that it was shielded from liability because Gorzynski only complained of sexual harassment to her supervisor, who was also the harasser, rather than pursuing the alternative options listed in the employee manual such as complaining to other managers or to the company's human resources department.

The Second Circuit court rejected JetBlue's argument that it was unreasonable as a matter of law for Gorzynski to complain of sexual harassment to her harasser because he was designated as one of several persons with whom to lodge complaints. The court reasoned that it is not "intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will

Second Circuit Says Complaining of Harassment to Harasser May Constitute Reasonable Availment of Reporting Procedures *(continued from page 5)*

address their complaints." The court stated, "There is no requirement that a plaintiff exhaust all possible avenues made available where circumstances warrant the belief that some or all of those avenues will be ineffective or antagonistic." The court found that the facts and circumstances of each case must be examined to determine whether, by not pursuing other avenues provided in the employer's sexual harassment policy, the plaintiff unreasonably failed to take advantage of the employer's preventative measures. The court explained, "in some instances, it may be unreasonable for a victim of harassment to complain only to the harasser because, as a realistic and practical matter, there are other channels that are adequately indicated and are accessible and open. But, in other cases, there may be reasons why the plaintiff failed to complain to those other than the harasser, who are listed as available." In examining the facts of the *Gorzynski* case, the court found evidence that other JetBlue managers were not receptive to receiving complaints from employees and Gorzynski could have reasonably perceived these reporting channels to be ineffective or threatening. Thus, the court concluded that whether Gorzynski acted reasonably in complaining only to the harassing supervisor was a factual question for the jury to decide.

EEOC Issues Final Rule on the Genetic Information Nondiscrimination Act of 2008 *(continued from page 1)*

According to the EEOC, the final rule implements the provisions of Title II of GINA consistent with Congress's intent and provides some additional clarification of those provisions. Highlights of the final rule include the EEOC's removal of the word "deliberate" from the proposed regulations, noting that employers can violate GINA without a specific intent to do so when they engage in conduct that presents a "heightened risk" of acquiring genetic information – such as failing to properly warn an employee not to provide genetic information when submitting medical documentation. The final rule provides, however, that an employer's inadvertent receipt of such information, for instance, through casual conversation (the "water cooler exception"), would not result in liability under GINA. The final rule also establishes a "safe harbor" for employers who appropriately warn anyone from whom they are seeking health-related information not to provide genetic information. Employers who give the appropriate warning (a sample of which is contained in the final rule) will not be liable if genetic information is nonetheless disclosed in response to their request.

The final rule becomes effective 60 days after its publication in the *Federal Register*, which occurred on Nov. 9, 2010. The complete text of the final rule can be found here.

Employment Flash provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:

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