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College Football, Alcoholism, and the Americans with Disabilities Act

By Stephen S. Zashin*

In December 2015, Steve Sarkisian, former University of Southern California ("USC") head football coach, sued USC for wrongful termination. Sarkisian alleged that USC discharged him based on a disability in violation of the law. In particular, Sarkisian claimed: he suffered from alcoholism; he sought professional help; he requested time off from USC to get help; USC placed him on indefinite leave; and USC fired him while he traveled to a rehabilitation program. According to Sarkisian, instead of supporting his disability, USC "kicked him to the curb."

Under federal law, the Americans with Disabilities Act ("ADA") prohibits employers from discriminating against qualified employees on the basis of a disability. Qualified employees are those who, with or without reasonable accommodation, can perform the essential functions of the job.

Alcoholics are not automatically excluded from the ADA's coverage, as alcoholism can constitute a disability. However, current alcohol abuse does not give employees license to act with impunity. Rather, employers may hold alcoholics to the same performance and behavior standards as other employees. An employer may still discharge alcoholic employees based on misconduct (e.g., drinking on the job, driving a company vehicle drunk, etc.).

Sarkisian may struggle to establish his status as a qualified employee on two grounds. Reports suggest that Sarkisian was intoxicated during football games, practices, and while on team flights. Sarkisian attempted to explain away these incidents in his complaint. For example, he claims that during the Salute to Troy (pep rally), two light beers and anxiety medication (not inebriation) caused him to slur his words and use an expletive during his speech.

Sarkisian also may struggle to establish whether he could perform the essential functions of the head coach job with or without a reasonable accommodation. Under the ADA, an employee bears the initial burden of proposing an accommodation and showing that the accommodation is objectively reasonable. An employer does not have to provide accommodations where the employer can demonstrate the accommodation would impose an undue burden on its business operations.

In his complaint, Sarkisian alleged that he requested a reasonable accommodation which would not unduly burden USC - time off to get the help he needed. Sarkisian claimed his request for leave did not place an undue burden on USC because the University already appointed an interim head coach, the interim head coach called plays the entire season, and the interim head coach successfully led USC to a PAC-12 South Championship and bowl game. In contrast, USC likely will argue substantial time off would have been unreasonable and prevented Sarkisian from performing his essential job functions. For example, while on leave Sarkisian could not recruit coveted high school football players or spend time with boosters and alums to fundraise.

This high profile litigation provides useful lessons for employers. Employers may maintain their performance and behavior standards for current abusers of alcohol. This case demonstrates the difference between current alcohol abuse and those who seek treatment for alcoholism. Current alcohol abusers are not protected by the ADA relative to their

Continues on page 2

Continued from page 1

conduct. However, those who seek treatment for alcohol abuse are entitled to reasonable accommodation by their employers. Any employer faced with a similar situation to Sarkisian should contact legal counsel to better understand their rights.

*__Stephen S. Zashin__, an OSBA Certified Specialist in Labor and Employment law and the head of the firm's Labor, Employment and Sports Law Groups, has extensive experience counseling employers on the Americans with Disabilities Act, reasonable accommodations, and sports related issues. For more information about the ADA or your labor, employment or sports law needs, please contact Stephen (ssz@zrlaw.com) at 216.696.4441.

Myths and Stereotypes – HIV and the Workplace By Ami J. Patel*

The Equal Employment Opportunity Commission ("EEOC") recently released guidance concerning the Americans with Disabilities Act's ("ADA") protections of HIV-positive employees. The EEOC plays a self-proclaimed "critical role in eradicating employment discrimination against those living with HIV/AIDS." In 2014, the EEOC settled 197 HIV-related Charges of Discrimination against employers for $825,674.

Employers should address employee-related HIV issues with care. Employers may only inquire about the HIV status of an employee under limited circumstances. Generally, employers cannot ask HIV-related questions before making a job offer. However, an employer may ask medical questions in the following circumstances:

- The employer asks the question(s) for affirmative action purposes and any employee response is voluntary;
- An employee requests a reasonable accommodation;
- The question occurs post-job offer and pre-employment, and the employer asks the same question of everyone entering the same job category; or
- On the job, where the employer has objective evidence that the employee may be unable to do the job or may pose a significant safety risk because of his/her medical condition.

Employers also should determine whether an employee's HIV-positive status qualifies as a disability. The ADA defines disability as a physical or mental impairment that substantially limits one or more major activities. The EEOC contends HIV-positive employees "easily" qualify under the ADA's definition, since HIV substantially limits the immune system's functions in the absence of medical treatment. However, at least one court found that a former employee's HIV-positive status did not limit any major life activities where: HIV did not impact his job performance; he was "super energetic;" he had "well controlled" and "well treated" HIV; and he did not take HIV medication. *Rodriguez v. HSBC Bank USA, N.A.*, No. 8:14-cv-945-T-30TGW, 2015 U.S. Dist. LEXIS 157883 (M.D. Fla. Nov. 23, 2015). Therefore, HIV-positive status alone may not qualify an employee as disabled under the ADA.

Assuming an employee's HIV renders the employee "disabled," the employee receives certain ADA protections. Employers may not discriminate against or harass an employee simply because the employee is HIV positive. In addition, the employee may be entitled to a reasonable accommodation if HIV negatively affects the employee's job performance. This could occur from the HIV infection, side effects of HIV medication, or other medical conditions caused by HIV. Examples of reasonable accommodations include altered break or work schedules, changes in supervisory methods, and time off. Once an employee requests an accommodation, the employer should engage in an interactive process to determine what, if any, accommodation will enable the employee to perform the essential functions of the job. The employer does not have to remove the job's fundamental duties (i.e., essential functions), let the employee do less work for the same pay, or tolerate lower-quality work through an accommodation.

Under limited circumstances, an employer may consider health or safety when deciding whether to hire or retain an HIV-positive employee. Employers do not have to retain employees who are unable to perform their job or who pose a direct threat (significant risk of substantial harm) to the health or safety of the employee or others. However, the employer must first establish it cannot reduce or eliminate that harm through a reasonable accommodation. In addition, the employer must have objective evidence (typically a medical expert) that the employee cannot perform the job or that the employer cannot eliminate the safety risk.

Ultimately, given the EEOC's focus on the treatment of employees infected with HIV, employers should address HIV-related concerns carefully and contact counsel with questions.

*__Ami J. Patel__ practices in all areas of labor and employment law. If you have questions about the ADA and HIV in your workplace, please contact Ami at (ajp@zrlaw.com) or 216.696.4441.

Ohio Supreme Court Finds Ohio's Minimum-Wage Law Constitutional

By Brad E. Bennett*

On March 17, 2016, the Ohio Supreme Court issued its much anticipated ruling in *Haight v. Minchak*, 2016-Ohio-1053. *Haight* involved a challenge to Ohio's minimum wage statute by two outside sales representatives of the Cheap Escape Company. The two alleged that outside sales representatives were "employees," as defined under the 2006 Fair Minimum Wage Amendment to Ohio's Constitution ("Amendment"), and, as a result, were entitled to minimum wage. The employees argued that Ohio's minimum wage statute, which was enacted after passage of the Amendment, was unconstitutional since it adopted the exemptions to the definition of "employee" under federal law.

In November 2006, Ohio voters approved the Amendment, which established the Ohio minimum wage and provided for annual adjustments. The Amendment defines an "employee" as having the same meanings as under the federal Fair Labor Standards Act ("FLSA") and states that the Ohio General Assembly shall pass no laws that "restrict any provision of the law." The employees focused on this language of the Amendment to attack the later enacted minimum wage statute.

After voter approval of the Amendment, the Ohio General Assembly immediately enacted the minimum wage statute clarifying that "employee," as defined under Ohio law, "does not mean individuals who are excluded from the definition of 'employee' under [the FLSA]." Cheap Escape argued that since the FLSA specifically exempts outside salespeople (and others) from the minimum wage requirements, the same exclusions should apply under Ohio law.

The employees, on the other hand, argued that the definition of "employee" as contained in the Amendment did not expressly exclude employees who are exempt from minimum wage requirements under the FLSA. They argued that Ohio's statute, by excluding outside sales representatives from minimum wage protection, was unconstitutional since it impermissibly restricted the definition of employee as laid out in the Amendment.

The trial court sided with Cheap Escape. However, the Court of Appeals reversed course determining that even if individuals such as outside salespeople are exempt from the FLSA's minimum wage provisions, they still remain "employees" as that term is defined by the FLSA. According to the Court of Appeals, since the definition of "employee" includes outside salespeople, the Ohio legislature impermissibly narrowed the definition of employee in the statute when it excluded outside salespeople. The employer promptly appealed to the Ohio Supreme Court.

The Ohio Supreme Court reversed the Court of Appeals. In doing so, it focused on the fact that the Amendment states that "employee" shall have the same "meanings" as in the FLSA. The Supreme Court rationalized that the Amendment's use of the plural indicated that "more than one definition applies, which then necessarily includes both exclusions and exemptions." Based upon this interpretation, the Ohio Supreme Court concluded that Ohio's minimum wage statute simply captured all of the "meanings" of employee under the FLSA and was constitutional.

THIS IS A WELCOME DECISION FOR OHIO EMPLOYERS AS IT MAINTAINS THE STATUS-QUO.

This is a welcome decision for Ohio Employers as it maintains the status-quo. Had the Supreme Court allowed the Court of Appeals' decision to stand, Ohio employers would have faced serious exposure to minimum wage claims, as they would have been unable to rely upon the federal minimum wage exclusions. Employers also would have been required to apply competing federal and state standards with varying levels of recordkeeping and reporting requirements.

***Brad E. Bennett**, an OSBA Certified Specialist in Labor and Employment law, regularly counsels public and private employers on wage and hours issues. For more information about this recent ruling or your wage and hour law needs, please contact Brad (beb@zrlaw.com) at 614.224.4411.

Joint Employers: Dealing with Marijuana Legalization

By Patrick M. Watts*

Last November, many Ohio employers exhaled a sigh of relief after voters just said no to Issue 3, which would have amended the State Constitution to legalize recreational and medical marijuana. Although the prospect of recreational marijuana legalization no longer seems imminent, medical marijuana is a different story. In the wake of Issue 3, there has been an increased focus in Ohio on medical marijuana by proponents and politicians alike. The Ohio House of Representatives created a bipartisan taskforce to explore the possibility of legalizing medical marijuana. The Ohio Senate recently held a string of public hearings regarding medical marijuana. During an appearance on the Late Show, Governor John Kasich voiced an openness to the idea stating, "when it comes to medical marijuana, if the experts come back and say we need this for people who have seizures, I'm for that." Ohio employers should be prepared for the possibility of dealing with the implications of medical marijuana in the not-too-distant future.

Currently, 23 states and Washington D.C. have legalized medical or recreational marijuana. Under the federal Controlled Substances Act, however, marijuana remains classified as a Schedule I illegal substance. A recent SHRM survey of employers in states that have legalized marijuana found 94% of respondents maintained written substance abuse policies. Employer drug policies in these states have led to litigation, including claims under the Americans with Disabilities Act and similar state laws by employees with medical marijuana prescriptions for disabilities. Fortunately for employers, the federal prohibition on marijuana has been a successful defense to such claims.

For example, a federal district court in Washington dismissed disability discrimination and retaliation claims brought by an employee who was terminated after he tested positive for marijuana, despite having a valid state medical marijuana prescription. *See Swaw v. Safeway, Inc.*, No. C15-939 MJP, 2015 U.S. Dist. LEXIS 159761 (W.D. Wash. Nov. 20, 2015). In *Swaw*, the employer's drug-free workplace policy prohibited testing positive for any drugs or substances "listed in any controlled substances acts or regulations applicable under federal, state, or local law." The plaintiff tested positive for marijuana after an on-the-job injury, resulting in his termination. Subsequently, he brought a lawsuit alleging disability discrimination claiming: (1) he had a valid prescription to use marijuana outside of work to treat his disabilities; and (2) his employer disciplined him more harshly than other employees that were found to be intoxicated with alcohol at work.

IN ANTICIPATION OF THE POSSIBLE LEGALIZATION OF MEDICAL MARIJUANA, EMPLOYERS SHOULD CONSIDER REVISING OR INSTITUTING DRUG-FREE WORKPLACE POLICIES

In rejecting the plaintiff's discrimination claim, the court first noted that Washington's marijuana law "does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee's disabilities, and the use of marijuana for medical purposes remains unlawful under federal law." With respect to the plaintiff's disparate discipline argument, the court stated "[m]arijuana is a Schedule I controlled substance and is illegal under federal law; alcohol is not." Therefore, employers have no obligation to treat medical marijuana users the same as employees intoxicated with alcohol.

The *Swaw* decision lines up with other court decisions that refuse to find actionable claims based upon medical marijuana use. *See, e.g., Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. Sup. Ct. 2015) ("[E]mployees who engage in an activity such as medical marijuana use that is permitted by state law but unlawful under federal law are not protected."). Accordingly, as long as marijuana remains illegal under federal law, employers will have a strong defense to employee claims premised upon marijuana use. In anticipation of the possible legalization of medical marijuana, employers should consider revising or instituting drug-free workplace policies to ensure that they have clearly communicated prohibitions and expectations regarding the use of marijuana and other drugs in the workplace.

***Patrick M. Watts**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions about the implications of marijuana legalization in your workplace, please contact Patrick at (pmw@zrlaw.com) or 216.696.4441.

Z&R SHORTS

Please Join Z&R In Welcoming Two New Attorneys to Its Employment and Labor Groups

Jeffrey J. Wedel has extensive trial experience, having tried more than 100 cases to verdict. Jeff regularly defends employers and insurers in all forms of employment discrimination, retaliation, wrongful discharge, whistleblower, and ADA public accommodation cases. He has defended employers throughout the country and has tried cases in Ohio, Michigan, Illinois, Georgia, Mississippi, Tennessee, North and South Carolina, Virginia, and Connecticut. Jeff also defends employers and manufacturers involving intentional torts, chemical exposure, and other toxic tort claims. He represents employers in ERISA and employee benefits litigation, enforcement and defense of confidentiality agreements, covenants not to compete, and trade secret cases. Jeff is a member of the Ohio State Bar Association Labor and Employment Law Section Council. He also is recognized as a leading lawyer in his field, having been listed in Ohio Super Lawyers since 2010 and in The Best Lawyers in America each year since 2006.

Emilie M. Carver has experience in all aspects of defending private and public sector employers in employment law cases. Emilie has defended clients against claims involving the ADA, Title VII of the Civil Rights Act, covenants not to compete, contract issues, and other related claims. Emilie also has represented employers before the Equal Employment Opportunity Commission. Prior to entering private practice, Emilie served as a law clerk for the Honorable Judge John R. Adams at the U.S. District Court for the Northern District of Ohio. There, Emilie managed and advised Judge Adams on a variety of civil cases from the complaint to completion of the case, including issues involving the FLSA, ERISA, ADA, Fair Debt Collection Practices Act, Title VII of the Civil Rights Act, labor disputes, civil rights claims, and personal injury lawsuits. Emilie also clerked for the Honorable Carla Moore at the Ohio Ninth District Court of Appeals. At the Ninth District, she assisted in drafting more than 200 appellate opinions on topics including evidentiary issues, public policy, and administrative appeals from local administrative agencies.

Congratulations
to Attorneys in Z&R's Columbus, Ohio Office

Zashin & Rich is pleased to announce that **Jonathan J. Downes** received the Ohio Public Employers Labor Relations Association's ("OHPELRA") 2015 Award of Excellence. The OHPELRA Award of Excellence represents the highest acknowledgment OHPELRA can bestow on an individual for their dedication and achievement in the development of labor-management relations. This award is a testament to Jonathan's outstanding contributions to management in the field of public sector labor relations.

Zashin & Rich also is pleased to announce that the Ohio State Bar Association has certified **Drew C. Piersall** as a specialist in Labor and Employment Law. The rigorous OSBA certification process requires attorneys to take and pass a written examination in their specialty field, demonstrate a high level of substantial involvement in their specialty area, fulfill ongoing education requirements, and be favorably evaluated by other attorneys or judges familiar with their work.

Congratulations to Jonathan and Drew on their outstanding achievements!