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EMPLOYMENT LAW QUARTERLY

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In this issue:

DON'T PUT THE CART IN FRONT OF THE HORSE

ADA Places Medical Exams Last

*By Christina M. Janice**

The Americans with Disabilities Act ("ADA") bars employers from discriminating against individuals in their hiring and employment practices. The ADA also prescribes the sequence of events that employers must follow in the hiring process. The statute prohibits medical examinations and inquiries until *after* the employer has made a "real" job offer to an applicant.

In *Leonel v. American Airlines, Inc.*, the employer recently learned what a "real" job offer is. In *Leonel*, three individuals applied for flight attendant positions. The application process included a telephone survey, written application, and an in-person interview at the employer's headquarters. The employer made employment offers contingent upon "successful completion of a drug test, a medical examination, and a satisfactory background check." The three applicants were all HIV positive. After completing the interview process, the employer extended the three individuals conditional offers of employment.

After making the offers, the employer directed the applicants to go immediately to the company's medical department for medical examinations. They completed a series of forms, including a drug testing notice that asked them to provide a urine specimen for drug testing and identify all medications they were taking. The employer also required the applicants to complete medical history forms. After completing the

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FIRM NEWS

Z&R's Growth Spurt Continues

Zashin & Rich Co., L.P.A. recently welcomed two new faces to its Employment and Labor Group and expanded its client services to include workers' compensation defense.

Attorney Christina M. Janice brings more than fourteen years of experience in trial advocacy and appellate practice in Ohio and federal courts. Christina practices in employment discrimination defense with an emphasis on multidistrict litigation ("MDL"), complex federal litigation and class actions. Christina has served in strategic leadership positions in nationwide cases, involving both litigation and litigation management. She defends employers in all actions involving alleged violations of state and federal discrimination laws and all other employment related torts. Christina is admitted to practice law in Ohio, the U.S. District courts for the Northern and Southern Districts of Ohio, and the U.S. District Court for the Eastern District of Texas.

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DISCRIMINATING TASTES:

Sixth Circuit Finds no Pretext in Firing Based on Employee's Derogatory Comment

*By Lois A. Gruhin**

Sometimes things are exactly as they seem—no mystery, no mishap, no cover-up. That was essentially the Sixth Circuit Court of Appeals' determination in the case of *Hagedorn v. Veritas Software Corp.* The employer in that case fired an employee for making a racially derogatory comment about a customer. The employee tried to prove that the employer's reason for the termination was really pretext for firing him because of his age. The Sixth Circuit did not see it that way.

At his time of hire, the employee was sixty years old. The employer, a software company, hired the employee to work as a sales representative in a newly formed division. The company hired the employee in part based on the employee's previous work experience with one of its key customers. The key customer was the employee's only account during his employment.

About four months into his employment, the employee had a telephone conversation with his supervisor that was inadvertently recorded on the key customer's voice mail. During this telephone conversation, the employee made a racially offensive comment and his supervisor laughed in response.

The key customer later heard the comment on his voicemail, found it offensive and forwarded the voice mail to the key customer's Human Resources Director. The Human Resources Director, in turn, forwarded the voice mail to the employer's Chief Administrative Officer. The key customer wanted both the employee and his supervisor off of its account.

In response, the employer fired the employee for making the remark. The employer reassigned the account to another employee who was forty-four years old at the time. The employer issued the supervisor a written warning and temporarily removed him from the account.

The employee filed a Complaint in federal court in Ohio alleging that his employer fired him based on his age in violation of the Age Discrimination in Employment Act ("ADEA"). The trial court found in favor of the employer, finding that the employee failed to establish a *prima facie* case of age discrimination.

On appeal, the Sixth Circuit held that the employee met his initial *prima facie* burden by showing that he was over forty, was qualified for his job, was terminated, and was replaced by a substantially younger individual. The employee still had to overcome the employer's legitimate reason for termination–the offensive comment on the client's voice mail. The employee, caught on tape, obviously could not refute that he made the remark. Nonetheless, he attempted to prove that his termination was pretext for age discrimination in other ways.

First, he claimed that his termination had no factual basis. The employee argued that the employer terminated him because he failed to appreciate the gravity of the situation and failed to acknowledge that his conduct had been inappropriate and in violation of Company policy. The employee claimed that he *did* appreciate and acknowledge the gravity of his conduct and the violation because he offered to apologize. The court gave this argument short shrift. Regardless of the employee's remorse, he did not dispute making the comment–the legitimate, non-discriminatory reason for his termination.

Second, the employee claimed that his age motivated his termination because other employees at the company made derogatory comments. The court also rejected this argument. The employee presented no proof that the employees who allegedly made derogatory comments wielded any influence over the decision-makers who terminated the employee.

Finally, the employee argued that the derogatory comment was not a sufficient reason to terminate his employment because his supervisor was involved in the incident but not fired. The court rejected this argument because their positions were too different to be "similarly situated."

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DON'T PUT THE CART...

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forms, they met with nurses to discuss their medical histories. None of the applicants disclosed their HIV-positive status or relevant medications at any point during the medical examination process, despite warnings about falsifications and omissions.

During the medical examinations, nurses drew blood samples. The employer ran a blood test to determine whether each applicant had "sufficient oxygen-carrying capacity to perform his duties in a high-altitude environment." The results showed that the three applicants had an elevated level of certain cells generally only associated with alcoholism, certain medication regimens, and certain blood disorders like sickle-cell disease. Because nothing in any of the applicants' medical histories indicated a cause, the employer requested explanations for the results. Not until this time did the applicants, acting through their personal physicians, disclose their HIV-positive status and medications. As a result, the employer rescinded the conditional offers of employment.

The applicants filed a lawsuit alleging that the employer's hiring practices violated the ADA and California law. Although the trial court granted the employer summary judgment, the Ninth Circuit Court of Appeals reversed. The court explained that the ADA requires that employers conduct medical examinations as a separate, second step of the selection process (i.e., after an individual has met *all other job prerequisites*).

To issue a "real" job offer, an employer must have completed all non-medical components of its application process prior to issuing an offer. The court explained that this two-step process allows applicants to isolate medical considerations and "to determine whether they were rejected because of a disability, or because of insufficient skills or experience or a bad report from a reference."

In the instant case, the court held that the employer's offer was not "real." The employer did not complete all non-medical components of its application process—namely, the background check, including employment verification and criminal history checks—before administering the medical components of the application process. The court held, therefore, that the medical examination process was premature, and that the employer could not penalize the applicants for failing to disclose their HIV-positive status.

Although this is a Ninth Circuit case (which includes California, Nevada, Arizona, Washington, Oregon, Idaho, Wyoming, and Alaska), it is a (surprisingly) clear interpretation of the ADA. Hiring procedures must strictly follow the sequence prescribed by the ADA. Don't put the cart before the horse—complete all non-medical portions of your hiring process before administering any medical examinations to applicants.

**Christina M. Janice defends employers in class action litigation and all aspects of employment related torts and alleged violations of state and federal employment law. For more information about ADA-compliant hiring practices, please contact Christina at cmj@zrlaw.com or (216) 696-4441.*

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Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

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Christina earned her Bachelor of Arts, *cum laude*, from John Carroll University and her law degree from the Cleveland-Marshall College of Law. She is a candidate for master's degrees at both Concordia University, St. Paul and Trinity Evangelical Divinity School. In addition to her legal practice, Christina serves on the ministry staff at Our Redeemer Lutheran Church in Solon, Ohio and works toward the revitalization of urban and suburban neighborhoods in Greater Cleveland. She is a published author, and her work includes contributions to *The Encyclopedia of Cleveland History* and various continuing legal education publications.

Attorney Steven P. Dlott has also joined Z&R's Employment and Labor Group, bringing with him extensive experience in litigating workers' compensation matters before the Industrial Commission and in the courtroom. Steve's expertise also includes advising employers on preventative claims administration and aggressive claims management, as well as defending employers before the Industrial Commission and at trial.

Steve's legal career includes eleven years as an Assistant Attorney General, five of which was spent defending the Ohio Bureau of Workers' Compensation, where he developed close working relationships with Bureau officials and department heads. For the past five years, Steve has defended employers at a prominent workers' compensation defense firm. During that time, Steve defended employers at all levels before the Industrial Commission and at trial and appellate courts throughout the State of Ohio. Steve has also successfully litigated cases before the Ohio Supreme Court.

Steve earned his Bachelor of Arts from New York University. He obtained his law degree at Case Western Reserve University, where he was a member of Case Western Reserve Law Review.

In addition to his legal practice, Steve serves on the Cleveland Bar Association's Unauthorized Practice of Law Committee and the Association's Workers' Compensation Subcommittee. Steve is also active in University Heights city government, serving as a member of the Citizens Advisory Lay Financial Committee.

Zashin & Rich extends a warm welcome to Christina and Steve.

AFL-CIO DEFECTORS SHAKE IT UP:

Resurgence in Union Organizing Likely To Follow

*by Robert W. Hartman**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the largest federation of North American labor unions, saw quite a shake-up in membership recently.

Within a week's time, three large unions left the federation: the Service Employees International Union ("SEIU") and International Brotherhood of Teamsters ("Teamsters") defected on July 25, followed by the United Food and Commercial Workers ("UFCW") on July 29. Another major affiliate, UNITE HERE, boycotted the federation's convention this year and also may defect.

The SEIU, Teamsters, and UFCW (as well as UNITE HERE) are members of the Change to Win Coalition, which describes itself as a "growing coalition…focused on rebuilding the labor movement through a commitment to growth and organizing." Other Change to Win members include the Laborers' International Union of North America (LIUNA), United Brotherhood of Carpenters and Joiners of America, and the United Farm Workers.

The root of labor's current shakeup is a fundamental disagreement over how to strengthen union influence: politics versus membership. Union membership rates among private-sector workers have steadily fallen from 33% in the 1950s to less than 8% today. In contrast to the AFL-CIO, Change to Win vows to focus more on recruiting and less on political activism.

Employers, for their part, can expect an increase in grassroots labor-organizing activities. Employers susceptible to unionizing may observe increased union campaigning in the near future, especially from Change to Win affiliates no longer paying dues to the AFL-CIO. Those unions are now free to budget that money for organizing activities aimed at increasing union membership.

Employers can manage union pressures with preparation and education. As a proactive measure, smart employers will have an understanding

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Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

PICK YOUR POISON:

Your Employee is either Exempt or Non-Exempt: But NOT Both

*By: Michele L. Jakubs**

According to the Department of Labor ("DOL"), the Fair Labor Standards Act ("FLSA") bars employers from classifying one employee as both exempt and nonexempt.

Nonexempt employees are entitled to overtime pay. Hours that an employee works over 40 hours in a work week are generally considered overtime. Nonexempt employees are entitled to overtime pay at a rate of one and a half times their regular rate. On the other hand, exempt employees are not entitled to overtime pay; regardless of the number of hours they work.

In today's complex corporate world, employers are faced with the following enigma - can an employee work for the same employer in two separate jobs, one exempt and one nonexempt, and be classified as both exempt and nonexempt? In an opinion letter, the DOL answered the question with a resounding – No!

Under the FLSA, in order for a position to be exempt, the employee's *primary duty* must be exempt work. "Primary duty" means the "principle, main, major or most important duty that the employee performs." Factors to consider include the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. The amount of time an employee spends doing exempt work is a useful guide, but not necessarily determinative of an employee's status. Employees who spend more than 50% of their time performing exempt work generally satisfy the "primary duty" requirement.

What is the impact to employers with an employee holding two positions? If an employee performs primarily exempt work, employers do not have to pay for overtime. If the employee performs primarily nonexempt work, employers *must* pay time and a half the regular rate for all overtime hours worked.

If an employer must pay overtime, an employer must determine the employee's overtime rate. If the two positions have the same rate, an employer must pay the employee one and a half times the regular hourly rate. If the employer pays two different rates for the positions, an employer must compute the overtime pay rate by using either of two methods.

The first method uses the weighted average of the two hourly rates. Here, the earnings from both rates are added together and divided by the total number of hours worked in both positions. The employer must pay the employee one and a half times this weighted average rate for overtime. The second method

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of what competing employers in their industry–both unionized *and* non-unionized–offer their employees. All employers should understand how they stack up against their competition. This sort of analysis can at least prepare and educate an employer as to the types of issues that they could face by virtue of a union organizing campaign.

For employers not currently facing an organizing campaign, it is imperative to develop a communication strategy to build employee loyalty and to counteract any potential unionizing efforts. To do so, employers should determine how to convey effectively the company's message to the entire organization.

Identifying the early signs of labor organizing efforts can affect how well an employer can manage an organizing campaign. It is imperative for employers to identify immediately that a union is attempting to organize their facility even before the union files an election petition with the National Labor Relations Board.

Finally, employers in the midst of a union campaign must train and monitor supervisors to ensure that they properly manage employees within the confines of the law.

**Robert W. Hartman practices in all areas of employment and labor law. For more advice on staying union-free, managing a union organizing campaign at your company, or other labor law inquiries, please contact Rob at rwh@zrlaw.com or (216) 696-4441.*

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Moreover, the employee and his supervisor did not engage in comparable conduct. The employee actually made the comment. His supervisor laughed in response. The court held, therefore, that the employee failed to show that his "discriminating taste" in commentary was not the real reason for his termination.

This case demonstrates a tough lesson–virtually any employee termination can result in litigation. It also demonstrates, however, that an employer that can clearly establish a legitimate, non-discriminatory reason for an employee termination can defeat such a claim. The employer in this case prevailed by proving that it has discriminating taste, too–in employing people who do not offend its customers.

**Lois A. Gruhin, a member of the firm's Columbus office, is a former General Counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment discrimination matters. If you have questions or need assistance with employee terminations, the ADEA, or other non-discrimination laws please contact Lois at lag@zrlaw.com or (614) 224-4411.*

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requires an employer to pay the employee one and a half times the rate of the work being performed during the overtime hours. The employer and employee must agree in advance to utilize the second method. Clearly, employers must ensure that they pay employees who occupy two different positions the appropriate rate as set forth by the DOL.

**Michele L. Jakubs practices in areas of employment litigation and wage and hour compliance and administration. For more information concerning the FLSA, please contact Michele at (216) 696-4441 or mlj@zrlaw.com*

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