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# DISABILITY UPDATE – HOUSE EXPANDS ADA COVERAGE

*By George S. Crisci

Congress recently passed a bill by a wide margin (402-17) that, if passed, would overturn Supreme Court precedent and broadly expand workers' rights under the Americans with Disabilities Act ("ADA"). Supporters of the bill argue that the amendments to the ADA would provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

The amendments would operate to expand coverage under the ADA to include a greater amount of mental and physical impairments. First, the definition of disability would expand to prevent an employer from considering the impact of "mitigating measures" an employee might use to control his disability, e.g., (medication, prosthetics, or hearing aids, etc. that prior Supreme Court decisions allowed). Second, the definition would expand to include "episodic" disabilities or conditions that are in remission. Currently, disabilities include only those "physical or mental impairments that substantially limit one or more major life activities," such as performing manual tasks, seeing, hearing, walking, standing, and thinking.

The amendments further would instruct courts to consider "substantially limits" in a broad sense. Previously, the Supreme Court had narrowed the definition of this term to a strict and demanding standard. The ADA's potential amendments would render those decisions moot.

Finally, the amendments would allow for the Attorney General, the Equal Employment Opportunity Commission, and the Secretary of Transportation to issue regulations and guidance on how the amended definitions should be construed. Supporters of the amendments argue that this will provide for a nationwide mandate for the elimination of discrimination against individuals with disabilities by providing employers with guidance on how to follow and adhere to the ADA.

The potential amendments, if passed by the Senate and signed into law by the President, will go into effect on January 1, 2009. Practically, persons with conditions such as cancer, diabetes, and epilepsy – who before were not considered "disabled" – would be covered under the amended ADA. This expansion of coverage will likely open the door to more lawsuits against employers as the burden of proof for plaintiffs becomes more lax.

Employers should be aware of these possible changes to the ADA looming on the horizon and be prepared in the event the bill becomes law and they are required to provide additional employees with accommodations.

**George S. Crisci is an OSBA Certified Specialist in Labor and Employment Law. George represents employers in all facets of employment law, and both public and private sector management in actions before the NLRB. For more information concerning any labor or employment issue, please contact George at 216.696.4441 or gsc@zrlaw.com.*

**In this issue:**

# NO RETALIATION: VIOLATING PRIVACY POLICY IS NOT PROTECTED ACTIVITY

**By Michael V. Heffernan*

The Sixth Circuit Court of Appeals, in Niswander v. Cincinnati Insurance Company, recently held that a female claims adjuster, who was fired after she disclosed files containing customer names and other confidential company information to her attorneys pursuing an equal pay collective action, did not engage in "protected activity" under Title VII.

In 2003, Kathy Niswander opted into a collective action lawsuit against her employer, Cincinnati Insurance Company ("Cincinnati"), alleging that the company had discriminated against her on account of her sex in violation of the Equal Pay Act ("EPA"). After she joined the lawsuit, Niswander complained that she was being discriminated against in retaliation by her supervisors. Ultimately, in 2005, Niswander filed a separate Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that she had been retaliated against for engaging in protected activity; namely, joining the EPA lawsuit.

During the course of the EPA litigation, Niswander's attorneys sent her a letter requesting that she "look around [her] house and office for any documents [she thought] might be remotely helpful to our case and send them in right away." Her attorneys further requested documents from Niswander in response to Cincinnati's discovery requests and warned her of the potential consequences of her failure to cooperate in discovery. In this letter, her attorneys requested "any documents related to (Niswander's) employment" that she had not already submitted.

In response to the letters, Niswander provided many documents that she believed were relevant to Cincinnati's alleged acts of retaliation, but admittedly had no documents supporting an EPA claim. Some of the documents produced by Niswander were claim-file documents that contained confidential information about Cincinnati policyholders. According to Niswander, she believed that since Cincinnati had made the discovery requests, this disclosure was allowed. When Cincinnati received the documents, however, they asserted that she had violated the company's Privacy Policy, its Code of Conduct, and its Conflict of Interest Policy, all prohibiting the disclosure of policyholder information. In December 2005, Cincinnati terminated Niswander's employment and Niswander filed a separate lawsuit alleging that her termination was retaliation for filing her Charge with the EEOC.

The Sixth Circuit affirmed the trial court's grant of summary judgment on Niswander's retaliation claim. The court held that Niswander's delivery of the confidential documents was not reasonable as "participation" under Title VII because she admitted that the documents were not relevant to the claims in the lawsuit. The court applied the following six factors to determine whether Niswander's act was reasonable under the opposition clause: (1) how the documents were obtained; (2) to whom they were produced; (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claims; (4) why the documents were produced; (5) the scope of the employer's privacy policy; and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

The court held that Niswander knowingly violated the company's policies when she searched through policyholder files to obtain evidence of Cincinnati's alleged retaliation. The court held that most of the factors favored the policy and that Niswander could have made a record of the alleged retaliation without violating the policyholders' privacy. The court reasoned that, rather than invade client files, Niswander could have made notes of Cincinnati's conduct that she felt was retaliatory.

While this case is certainly a win for this employer, employers should take precaution when terminating any employee that is involved in a Title VII lawsuit and/or administrative proceeding against their company for an alleged violation of a company policy. Prior to taking an adverse employment action, employers should consider whether the employee's conduct passes the balancing test recently established by the Sixth Circuit.

**Michael V. Heffernan regularly defends employers involved in employment litigation and in administrative hearings before the Equal Employment Opportunity Commission and various state administrative civil rights agencies. For more information about retaliation and wrongful discharge litigation, please contact Mike at 216.696.4441 or mvh@zrlaw.com.*

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

# ESQUIRE BEWARE: ATTORNEY FOUND LIABLE FOR UNAUTHORIZED DISCLOSURE OF MEDICAL RECORDS

**By Lois A. Gruhin*

The Ohio Supreme Court recently affirmed a lower court decision in favor of a Plaintiff whose medical records were released to an unauthorized party by the Defendant, his former wife's divorce attorney. In Hageman v. Southwest General Health Center, the attorney – who gained access to the disputed medical records through discovery proceedings in the domestic relations matter involving the Plaintiff and his former wife – released a copy of the records to a County Prosecutor after the Plaintiff was charged with domestic violence. The Court held that the attorney could be found liable to the Plaintiff for her unauthorized disclosure.

In 2003, the Plaintiff began seeing a psychiatrist. Through the course of treatment, he admitted to having homicidal thoughts about his wife and was subsequently treated for bipolar disorder. When his wife filed for divorce, plaintiff filed a counterclaim seeking legal custody of the couple's minor son. The wife's attorney, thereafter, served subpoenas on the Plaintiff's psychiatrist requesting his medical records and psychotherapy notes. Ultimately, the wife's attorney received medical documentation from the Plaintiff's psychiatrist.

At some point later, the Plaintiff was accused of assaulting his wife at home and was charged with domestic violence. On the day of trial, the prosecutor met with the wife's attorney where the attorney shared the medical records containing the Plaintiff's nefarious thoughts about his wife. The records were never used or entered into evidence and the Plaintiff was acquitted of all charges.

After entering into a separation agreement with his former wife, the Plaintiff filed suit against his psychiatrist, the psychiatrist's hospital employer, his now ex-wife, and her attorney. The trial court granted summary judgment on behalf of every defendant, including the attorney. On appeal, the Court of Appeals affirmed for every defendant except the attorney on grounds that she had "overstepped her bounds … when she disseminated information regarding (the Plaintiff's) psychiatric condition to the prosecutor."

Affirming the lower court judgment, the Supreme Court held that while the Plaintiff had knowingly placed his medical condition into evidence during the custody proceeding, his implied authorization and waiver was limited to that matter and did not extend as a waiver to unauthorized disclosure to third parties, such as the prosecutor in the Plaintiff's criminal trial.

The Court held that the public policy surrounding medical records confidentiality trumped a purported expansive waiver of privacy obtained during litigation. Privacy is vital, according to the Court, since the mere possibility of disclosure of sensitive records could impede successful treatment, especially in terms of psychotherapy, due to the possibility of embarrassment or disgrace. In terms of Plaintiff's situation, the Court agreed that he might have been pressured into settling with his former wife due to the potential embarrassment of disclosure of his medical treatment.

Because an individual must be encouraged to seek such treatment, the Court held that any medical waiver is strictly limited to the particular litigation. Accordingly, an attorney who obtains medical records lawfully through the discovery process could be liable for later disclosure unrelated to the specific matter in which they were procured.

Before releasing any confidential or proprietary information about an employee, employers should carefully examine the potential use – and misuse – of that information and take adequate precaution to ensure that the records are kept confidential and used only for the limited stated purpose for which they were procured.

**Lois 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. For more information about medical records and confidentiality or other employment-related issues, please contact Lois at (614) 224-4411 or lag@zrlaw.com.*

# TIMELINESS: RETALIATION CAN ACCRUE PAST TERMINATION

*By Patrick J. Hoban

A New Jersey appellate court recently held that an employer can be found liable for retaliation for conduct that occurs after the employee's separation from his or her employment. In Roa v. LAFE ("Roa"), Fernando Roa and his wife, Lilliana Roa, alleged that they were discriminated and retaliated against by their former employer, LAFE, a distributor of "Hispanic Food Products," and its Vice-President, Marino Roa.

Fernando and Lilliana alleged that Marino was engaged in a number of extramarital relationships with several female employees of LAFE. In February, 2003, when Marino's wife discovered the relationships, in an attempt to shift blame for his conduct, Marino told his wife that Fernando was the one involved in the relationships. Initially, according to Fernando, he went along with the ruse in order to protect Marino, his superior, in an effort to save his job. Ultimately, however, Fernando came clean to Marino's wife and confirmed Marino's involvement in the affairs.

Following Fernando's confession to Marino's wife, Fernando and Lilliana allege that Marino engaged in a campaign of harassment against them. At one point, Fernando complained to upper-level management that Marino engaged in the sexual harassment of employees. Fernando's complaint was rebuffed and Fernando (on October 12, 2003) and Lilliana (on August 24, 2003) were ultimately terminated, allegedly in retaliation for making the complaint about Marino's conduct. The Roa's filed their Complaint against LAFE and Marino Roa, under New Jersey's Law Against Discrimination ("L.A.D."), more than two years later, on November 5, 2005.

The Defendants argued that the Plaintiffs' claims could not have accrued past the dates of their terminations. Thus, they argued, given the L.A.D.'s two-year limitations period, both Fernando and Lilliana's claims were untimely. In response, Fernando and Lilliana alleged that LAFE improperly interfered with Lilliana's unemployment benefits by indicating to the state unemployment commission that she had been fired for "misconduct," resulting in Lilliana not receiving unemployment benefits until February 2004. The Roa's further argued that LAFE improperly denied a medical insurance claim by terminating Fernando's coverage on September 30, 2003, ahead of his discharge. They alleged that an early October 2003 claim that accrued during Fernando's employment was not denied by the health insurer until November 11, 2003. Accordingly, they claimed that the limitations period accrued on November 11, 2003 for Fernando and February 2004 for Lilliana, within the two-year limitations period, as LAFE's conduct in denying the medical claim and the unemployment claim was in retaliation for Fernando's harassment complaint.

In their Reply brief, the Defendants countered that Fernando had to have known of his potential claim, at the latest in October 2003, because he had a lawyer negotiating the terms of his severance at the time of his discharge. With respect to Lilliana, they argued that she knew of the denial of her unemployment benefits not when she began to receive them (in February 2004), but rather on October 21, 2003, when the state unemployment commission issued a finding denying her claim. Accordingly, the Defendants maintained that Fernando and Lilliana's claims were time-barred.

Although the trial court agreed with the Defendants, the appellate court reversed in part, finding that the Supreme Court decision of Burlington N. v. Sante Fe Ry. Co. ("Burlington"), which separated a substantive violation under Title VII from independent acts of retaliation that need not be related to the workplace, controlled. The court held that allegations of retaliation under the L.A.D. likewise were not confined to a plaintiff's dates of employment. Rather, both Title VII and state law employment discrimination laws' anti-retaliation provisions create separate and distinct causes of action and an employer's continuing violation of these statutes could accrue after the employee's termination. The Court found that the denial of Lilliana's unemployment claim and the denial of Fernando's medical insurance claim could be construed as continuing violations of Title VII and the

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# Z & R SHORTS

## Zashin & Rich Co., L.P.A. Named As Approved Counsel by Cincinnati Insurance.

Cincinnati Insurance recently named Zashin & Rich Co., L.P.A. as "approved counsel" for employment practices liability insurance claims. In the event that your company has a claim under a Cincinnati Insurance policy (e.g., a demand letter, charge of discrimination or a lawsuit), simply ask your insurance broker to request Zashin & Rich Co., L.P.A. as defense counsel in the matter.

## Zashin & Rich Co., L.P.A. Welcomes Mike Heffernan to its Growing Employment and Labor Group!

Zashin & Rich recently welcomed Mike Heffernan to the firm and its expanding Employment and Labor Group. Mike defends employers in a wide variety of labor and employment matters, including harassment, discrimination, and federal and state civil rights. Mike received his undergraduate degree, *cum laude*, in Urban Affairs from Cleveland State University in 1998 and graduated from the Cleveland-Marshall School of Law in 2001, where he was Articles Editor for the Cleveland-Marshall Law Review. Prior to joining Zashin & Rich, Mike served as the Chief Judicial Staff Attorney of the Cuyahoga County Court of Common Pleas.

Please join us in welcoming Michael to Z&R!

## Upcoming Seminars

**September 8, 2008**

Steve Dlott and Patrick Watts will present the "Ten Biggest Leave of Absence/Return-To-Work Mistakes Aging Services Providers Make" to the Advocate of Not-For-Profit Services For Older Ohioans ("AOPHA") 2008 Annual Conference and Trade Show, which will be held at the Greater Columbus Convention Center. Steve and Patrick will provide protocols and decision trees to assist health care organizations in the resolution of these complicated issues. For more information and/or to register, call (614) 444-2882.

**September 24, 2008**

Jon Dileno will be a panelist at the AMS Conference on Labor Arbitration at the Crowne Plaza, Celveland City Centre Hotel on the subject of "Just Cause for Discipline and Discharge, the Basics. The Perspective of the Employer and Union Representatives."

**September 25, 2008**

Steve Dlott will present "Defending Workers' Compensation Claims" to the Lake/Geauga Chapter of the Society for Human Resource Management ("SHRM") as part of the "Effective HR – It's All About People!" workshop on September 25, 2008 at the Radisson Hotel/Eastlake. For more information or to register, call (440) 392-2168 or email: info@lgashrm.org.

**September 10-13, 2008**

George Crisci will be part of a panel discussion at the Labor & Employment Law Section of the American Bar Association's 2nd Annual CLE Conference in Denver, Colorado from September 10-13, 2008. George will serve as a panelist for the "Negotiating Skills in Collective Bargaining" discussion that will focus on what works and what does not work in the context of labor negotiations and useful tools for working in the thicket of public sector bargaining.

**October 16 and 17, 2008**

George Crisci and Stephen Zashin will speak at the 45th Annual Midwest Labor and Employment Law Seminar presented by the Ohio State Bar Association October 16 and 17, 2008 in Columbus. George will present "Public Collective Bargaining Developments" to the conference and Stephen will present an update on FMLA and other leave law.

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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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## TIMELINESS: RETALIATION CAN ACCRUE PAST TERMINATION

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L.A.D.'s anti-retaliation provisions.

The court ultimately upheld the dismissal of Lilliana's claims, however, finding that she knew, at the latest, on October 21, 2003, that her claim for unemployment benefits had been denied. With respect to Fernando, conversely, the court held that he did not learn of the denial of his medical insurance claim until November 11, 2003, less than two years before he filed his Complaint, on November 5, 2005. Thus, the court allowed his claims to survive.

The Roa decision illustrates how courts likely will apply Burlington, finding that violations of Title VII or a state's civil rights statutes' anti-retaliation provisions can accrue after an employee's termination date. When dealing with post-employment benefits such as health care coverage and/or unemployment claims, employers should carefully consider whether their conduct could be construed as a "continuing violation" of either the applicable state law against discrimination and/or Title VII, and extend the relevant limitations period.

**Patrick J. Hoban practices in all areas of labor and employment law, including employment discrimination and wrongful discharge. For more information on Title VII claims or any labor or employment issue, contact Pat at 216.696.4441 or pjh@zrlaw.com.*

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