

August 2007

HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

◆ FROM PERSONNEL LEGAL ALERT ◆

“We couldn’t make this up if we tried”

A TV photographer claimed he was “leaned on” to get a shot, so he felt he couldn’t take a bathroom break for fear of missing the event. The event was the funeral procession for a soldier who was killed in Iraq. So when nature called the photographer, he answered in the cemetery. Another journalist snapped a shot of him urinating near a monument and sent the picture to the photographer’s managers. He was fired and denied unemployment benefits for what the administrative law judge deemed a disrespectful, unprofessional, and offensive act.

◆ FROM THE HR SPECIALIST ◆

“Can porn surfing be an ADA protected disability?”

James Pacenza was a model IBM employee until a co-worker reported that he was downloading porn on his office computer. Pacenza admitted he had a ‘problem’ with pornography. His boss offered help, but Pacenza refused.

The supervisor warned Pacenza that he could be terminated if he did it again. Four months later, Pacenza was caught and terminated. He sued IBM for \$5million, claiming the company violated the ADA because his porn surfing was caused by a disability. What disability? Pacenza claimed he suffered post-traumatic stress disorder from his military service in Vietnam. That disorder, he claimed, manifested itself in addictive behaviors, specifically visiting chat rooms and porn sites.

(Editor’s note – classic example of a frivolous lawsuit. Additionally, make sure you have ‘no accessing porn sites’ as part of your internet use policy, that way the employee would have been fired the first time. Oh, and by the way, no; viewing porn is not a disability!)

◆ FROM SHRM ◆

“Survey report highlights problems with FMLA”

Findings in a Society for Human Resource Management (SHRM) survey report, *FMLA and Its Impact on Organizations*, released in July 2007, appear to mirror results in a recent report on the Family and Medical Leave Act published by the U.S. Labor Department.

According to respondents to the SHRM survey, the three biggest challenges the FMLA rules pose to their organizations are tracking and administering intermittent leave, measuring costs related to complying with the regulations, and determining if a serious health condition qualifies for FMLA-related leave. These responses were very similar to the Labor

Department’s report, which found that problems with the rules governing intermittent leave were “a central defining theme” of the comments received from employers.

◆ FROM EEOC WEBSITE ◆

“Phoenix jury awards \$287,640 to fired Muslim woman”

A Phoenix jury has awarded more than \$287,000 in a religious discrimination suit against Alamo Car Rental brought by U.S. Equal Employment Opportunity Commission (EEOC). The EEOC had charged Alamo committed post-9/11 backlash discrimination based on religion when it fired a Somali customer sales representative in December 2001 for refusing to remove her head scarf during the Muslim holy month of Ramadan.

Alamo will pay \$21,640 in back pay, \$16,000 in compensatory damages, and \$250,000 in punitive damages to Bilan Nur. According to the EEOC’s lawsuit (CIV 02-1908-PHX-ROS in U.S. District Court for the District of Arizona), Alamo refused to permit Nur to continue to cover her head, as she had done in previous years, even if she wore an approved Alamo-logo scarf. The jury also heard evidence that, although wearing a head scarf did not violate the company’s dress policy, Alamo fired Nur in December, 2001, only eight days before Ramadan was over, and declared her ineligible for rehire. The jury reached its verdict after also hearing testimony about the damages Nur, who was 22 years old at the time, suffered as a result of being fired...

◆ FROM CCH ◆

“Negligence claim based on rape not within scope of arbitration agreements”

A 17-year old employee did not agree to arbitrate her claim that she was assaulted and raped by her manager in a restroom during working hours, the Mississippi Supreme Court ruled. The employee had entered into a valid arbitration agreement with her employer; however, the rape allegation was not within the scope of the arbitration agreement, as it was not connected to her employment. The state high court revived the employee’s lawsuit against her employer for negligent hiring, supervision, and retention (*Smith v Captain D’s LLC*, MissSCT).

◆ FROM WORKFORCE MANAGEMENT ◆

“Employer to fine unhealthy workers”

The punitive approach taken by Indianapolis-based Clarian Health is a departure from the methods used by most employers, but it is permitted under the final rules the federal

government issued in December 2006. Other employers are expected to follow suit.

While many employers have been using financial incentives to encourage participation in wellness programs, one company will begin charging employees more for their health insurance in 2009 if they allow health risks such as tobacco use, obesity, or high cholesterol to go unchecked.

Although this punitive approach by Indianapolis-based Clarian Health is a departure from the methods used by most employers, it is permitted under the final rules the federal government issued in December 2006 to ensure that wellness programs comply with the nondiscrimination provisions of the Health Insurance Portability and Accountability Act of 1996, benefit experts say. The rules became effective July 1, 2007.

... "We believe that by using this premium charge approach, where it shows up in employees' paychecks every two weeks, it will keep [costs] in front of the person, and we think it will be more effective at creating behavior change," (the President) says. "It seems that a charge gets people's attention more readily than an incentive."

... The program will assess \$5 per-paycheck fees on employees who do not meet minimum standards for body mass index (anything over 29.9), cholesterol (anything over 130), blood glucose (anything over 120), blood pressure (anything over 140/90), and nonuse of tobacco. (A maximum of \$25 per paycheck)

(Editor's note – Ouch! This will get their attention.)

◆ **A REAL LIFE SITUATION** ◆

Situation: A manager with over 25 years with the organization became hostile, condescending, and degraded others, all within the last 9 months. The President has talked to him on several occasions, and on the last conversation, told the manager that one more outburst of disrespect toward anyone will be cause for termination. At that moment, the manager handed the President a physician statement that he was diagnosed with bi-polar disorder. The President doesn't care, he wants him fired.

Observation: Since this organization falls under FMLA and ADA, firing the manager may be problematic. The first thing the President needs to do is see if the physician statement is thorough in explaining the prognosis, diagnosis, and whether there are any limitations or accommodations necessary.

Under FMLA, the physician statement would have to confirm a serious health condition, namely, is it an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider? (There are other conditions.)

Also, under ADA, is this a physical or mental impairment that substantially limits one or more of the major life activities of

such individual such as walking, seeing, hearing, speaking and working? (There are other conditions.)

Although there are too many options to discuss in this newsletter, it appears that FMLA would probably apply. But under ADA, once a reasonable accommodation is completely discussed, the question needs to be "Will the manager be able to function with medication? And if so, we can probably accommodate. But if not, can we have a manager continue to disrupt, yell, belittle, and be hostile toward others? Would it be reasonable to expect and work with that type of behavior?"

In most organizations, it would not be reasonable to expect to be subjected to that type of behavior.

FEATURED SERVICE **FMLA AND ADA Consultation**

Failure to notify employees that leave counted toward the 12-week FMLA entitlement; failure to grant leave to provide physical or psychological comfort to a seriously ill patient; and failure to grant FMLA leave because of a misunderstanding of what qualifies as a "serious health condition" are but three of the many common violations found by the DOL as stated on their web site.

In addition, ADA does not prevent the organization from conducting business. So in some instances, a very difficult decision to terminate an employee because of a health condition can still be viewed as lawful, as long as all of the proper steps leading to that decision were taken. In the above situation, given the few facts, the manager would be eligible for FMLA, but beyond that, his job may still be in jeopardy.

HR&M is knowledgeable in these and all other areas of compliance to help organizations be fair, yet still maintain its business objective.

◆ **REMEMBER! WE CAN HELP!!** ◆

Consulting on performance, attendance, FMLA, Wage & Hour, management accountability, and other unique issues is just one of the areas of our expertise.

We also provide:

- supervisory/management training, ranging from brown bag luncheon training to ½ or full day sessions
- employee handbook development
- responses to discrimination charges and unemployment claims
- on-line performance review forms and processes
- guidance and consultation on coaching, counseling, and disciplining in employee relations matters
- succession and strategic planning programs
- consultation on issues regarding attendance and performance and guidance on terminations
- development of OFCCP compliant Affirmative Action Plans