

New Jersey Law Journal

VOL. CLIX – NO. 13 – INDEX 1368

MARCH 27, 2000

ESTABLISHED 1878

Employment Law

What's in Store for Employment Law Practitioners

Predictions for the emerging
trends and hot practice areas
of the 21st century

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The number of employment cases filed in the United States during the 1990s nearly tripled compared with the previous decade. What will employment law practitioners see in the 21st century? The predictions are in and it looks like the emerging trends that attorneys should expect are an increase in age discrimination lawsuits, retaliation claims and suits based on mental disabilities.

So beware and be prepared to limit your client's exposure. This article will highlight some of these emerging issues and provide suggestions on how to help

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your clients avoid costly litigation.

Age Discrimination

Age discrimination claims will likely increase in the 21st century. That's because baby boomers have started to reach their 50s and make up a significant portion of the American work force. Workers over age 40 are protected under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633(a). The New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5- 1 et seq., prohibits age discrimination beginning at age 18. See *Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999).

Because the American work force is getting older, as companies downsize to cut costs they will undoubtedly face having to terminate some older employees. Similarly, a larger percentage of employees with performance problems will also be older. Attorneys, therefore, must be sensitive to the age discrimination laws when counseling clients.

To avoid age discrimination claims, employers need consistent policies and practices. Employment decisions should be based on quantifiable, objective factors that are applied consistently to all employ-

ees. An employer should analyze all the reasons underlying a termination or disciplinary action and be able to defend any inconsistent decision with legitimate reasons for why it treated an older employee or job applicant dissimilarly from a similarly situated younger employee.

In addition to consistent policies, employers should communicate any issues they have with employees' performance and document these performance problems. Failure to do so will make it more difficult for an employer to justify a termination decision when an employee later argues that the employer's reasons are a pretext for age discrimination. A well-documented record evidencing a company's concerns, as well as the history of disciplinary action taken, will help prevent, or at least defend against, an age discrimination claim.

Employers need to be equally careful when implementing reductions in force (RIF). Employers must remember that, subject to certain exceptions, mandatory retirement is prohibited by the LAD. Each employer should analyze whether a RIF will have an adverse impact on older employees and should ensure that it has a factual, nondiscriminatory basis for its selection of each employee.

Obtaining a general release before paying any severance to a terminated employee is extremely important in this area. Any attorney even attempting to dabble in age discrimination law must be aware that any release executed by an employee over 40 must be in accordance with the Older Workers Benefits Protection Act (OWBPA), 9 U.S.C. 621 et seq.

The OWBPA requires that releases

comply with notice requirements and provide (1) language comprehensible to a lay person; (2) a 21-day review period (or 45 days if part of a RIF); (3) a seven-day revocation period after signing; and (4) an opportunity to consult with an attorney.

Retaliation Claims

Retaliation claims are also on the rise as the legal profession heads into the 21st century. It seems that almost every employment discrimination complaint brought these days includes some charge of retaliation. According to Equal Employment Opportunity Commission (EEOC) statistics, retaliation claims filed as a percentage of total discrimination charges filed increased from 15.3 percent to 24 percent between 1992 to 1998. The number of verdicts in favor of plaintiffs on these claims has also increased.

This rise may be attributable to several factors: employees becoming increasingly aware of their rights under the discrimination laws, and retaliation claims often being easier to prove than the underlying discrimination claim. Moreover, retaliation claims can be brought under a number of statutes, including Title VII, the ADEA, the American with Disabilities Act (ADA) and the LAD.

Under New Jersey law, it is an unlawful employment practice to take reprisals against any person because: (1) he has opposed any practices or acts outlawed by the LAD; or (2) he intends to file a complaint, testify, or assist in any proceeding under the LAD. N.J.S.A. 10:5-12(d); N.J.A.C. 13:4-15.2(a).

To establish that an employer is guilty of unlawful retaliation, an individual must show: (1) participation by the employee in a protected activity which is known by the employer; (2) an adverse employment action taken against the employee; and (3) a causal connection between the protected activity and the adverse employment action. *Jamison v. Rockaway Township Board of Education*, 242 N.J. Super. 436 (App. Div. 1990).

Unfortunately for employers, almost any negative action taken against an employee can constitute an adverse employment decision, according to EEOC guidelines issued in 1998. Most courts, however, have not embraced the EEOC's approach. Nonetheless, many courts have interpreted the term "retaliation" very

broadly and have ruled that adverse employment actions need not rise to the level of discharge or demotion to constitute retaliation. The negative action must only impair or potentially impair a plaintiff's current or future employment in some cognizable manner.

Recent decisions have made it clear that employer reprisals less flagrant than job termination or demotion may be considered violations of civil rights laws. For example, the Third Circuit recently held that an employee's transfer to a job that an employer knows he can't perform may constitute an adverse employment action. See *Dilenno v. Goodwill Ind. of Mid. Eastern Penn.*, 162 F.3d 235 (3d Cir. 1998).

Due to the broad definition of retaliation, attorneys should advise employers to exercise extreme caution before taking any adverse action against current, and even former employees who complain about discriminatory treatment or assist others in pursuing claims. Once a claim of discrimination or harassment has been made by an employee, the employer should monitor the manner in which the complaining employee is treated going forward to avoid compounding the problem with a retaliation claim.

To further safeguard against such claims, it is also important for employers to provide training to managers concerning what constitutes retaliation.

Mental Disabilities Under the ADA and the LAD

Claims involving mental disabilities are also on the rise and should continue to increase. This category encompasses a wide variety of conditions and illnesses, and they pose some of the most difficult issues for human resource professionals. There is little guidance from often conflicting laws and regulations and the explosion of case law and many of the court's rulings point in different directions. Some of the most common issues involve accommodations, including leave, reassignment and medical documentation.

In addition, there is a new breed of claims emerging — hostile work environment based upon disability. A New Jersey federal jury recently awarded more than \$200,000 to a dyslexic radio dispatcher on his claim that his employer, the Department of Environmental Protection,

maintained a hostile work environment for employees with learning disabilities. *Lanni v. DEP*, 177 F.R.D. 295 (D.N.J. 1998). See also, *Leonard v. Metropolitan Life Insurance Co.*, 318 N.J. Super. 337 (App. Div. 1999) (hostile work environment claim based on a diabetic condition).

This jury verdict is the first to support a hostile work environment claim on the basis of a mental disability under New Jersey law since the New Jersey Supreme Court recognized the sexually hostile work environment theory in *Lehmann v. Toys 'R' Us*, 132 N.J. 587 (1993). The *Lanni* verdict takes *Lehmann* a step further by holding that disabled persons are also entitled to protection from a hostile work environment.

In cases where an individual suffers from a mental illness and takes medication for the condition, courts have been divided whether the individual should be considered in his or her unmedicated or unassisted condition for purposes of determining whether the individual is disabled. The EEOC says the disability should be evaluated without considering the effects of medication or assisted devices.

The U.S. Supreme Court, however, has decided that the EEOC's interpretation is an impermissible interpretation of the ADA, and recently held in companion cases that the analysis of whether an individual is disabled should include consideration of measures that mitigate the impairment, such as eyeglasses or medication. *Sutton v. United Air Lines Inc.*, 119 S.Ct. 2139 (1999); *Murphy v. U.P.S.*, 119 S.Ct. 2133 (1999). In this circuit, see *Taylor v. Phoenixville School*, 184 F.3d 296, vacating 174 F.3d 142 (3d Cir. 1999).

Assuming that an individual has a mental impairment that substantially limits a major life activity, the ADA and LAD require employers, if it is not an undue hardship, to provide a reasonable accommodation if it permits performance of the essential functions of the job. However, the definitions of "reasonable accommodation" and "undue hardship" are fuzzy and constantly changing.

One of the most requested accommodations by employees with psychiatric disabilities is leave from employment. Although a number of courts have recognized that medical leave can be considered a reasonable accommodation under the ADA, the courts and the EEOC are divid-

ed as to how much leave is reasonable.

According to the EEOC, an employer may not penalize an employee for lack of productivity if low productivity stems from leave taken as a reasonable accommodation. Nor can an employer refuse leave as a reasonable accommodation simply because the employee cannot say when he or she will return.

However, this may penalize equally performing nondisabled employees in situations such as layoffs if an employer can not take into consideration an employee's extended absence. Moreover, if the employer does terminate the disabled employee in that situation, the employer risks being held liable for retaliation under the ADA.

New Jersey courts disagree with the EEOC's position and have held that excessive leave that may impose an undue burden upon the employer may be unreasonable. See *Svarnas v. AT&T Communications*, 326 N.J. Super. 59 (App. Div. 1999); *Walton v. Mental Health Ass'n Southeastern Pennsylvania*, 168 F.3d 661 (3d Cir. 1999).

In *Svarnas*, the Appellate Division

affirmed the trial court's decision holding that, even though plaintiff was handicapped due to her asthma and the injuries she had sustained in a motorcycle accident, the employer was not required to accommodate her under the LAD even though her chronic, sporadic and excessive absenteeism was due to her disability. According to the Court, reasonably regular, reliable and predictable attendance is an essential element of most jobs and if the employee cannot perform because the employee is not there, then the employee is not qualified and no accommodation is necessary.

The EEOC has recently issued lengthy and detailed policy guidance on reasonable accommodations and undue hardship under the ADA. According to the EEOC, accommodations must be provided to job applicants and to qualified employees, whether they work full or part time. And the possible reasonable accommodations run the gamut from making existing facilities accessible to modifying or restructuring a job, to changing policies and reassignment to a vacant job.

The challenge in the employment

context with mental illnesses is significant, especially in the area of accommodation. It raises some controversial and unanswered questions, such as whether employers may mandate for continued employment that an employee remain on certain medication prescribed for controlling or abating a condition or whether employers may monitor medications. In addition, employers will grapple over whether reassignment is a reasonable accommodation when the employee is not necessarily the best qualified for the position. These questions are just among the few that will plague practitioners in the early part of the 21st century.

Conclusion

Our crystal ball tells us that, for the foreseeable future, the employment law field will remain hot. Restrictive covenant litigation and wage and hour claims will flourish. Sexual harassment suits will be filed in every county and we expect a dramatic increase in age discrimination and retaliation lawsuits, as well as claims asserting mental disabilities. ■