

EMPLOYMENT LAW BRIEFING

May 31, 2006

Accommodating Medical Marijuana: A narrowly focused ruling in *Washburn v. Columbia Forest Products, Inc.*, decided this month by the Oregon Supreme Court, clarified the legal definition of a disability under state discrimination law, but provided little guidance on the issue of accommodating medical marijuana. The case involved an employee authorized to use medical marijuana to control leg spasms that kept him awake. He had also used a prescription medication, but felt the marijuana was more effective. After testing positive for marijuana on a workplace drug screen, he was discharged. Washburn challenged the discharge. Claiming that his condition was an "impairment" which significantly restricted the "major life activity" of sleeping, he alleged that the failure to accommodate his medical use of marijuana constituted unlawful discrimination on the basis of disability. The Court ruled that Oregon law requires a disability to be considered in the context of "mitigating measures that counteract or ameliorate an individual's impairment." Since the leg spasms and corresponding sleep difficulties had been counteracted by prescription medication, the Court concluded that the employee was *not* a "disabled person" legally entitled to reasonable accommodation. But are there circumstances under which an Oregon employer is required to accommodate the authorized use of medical marijuana? That question was not answered by the Court.

Check Your Handbook: Does your organization have a policy prohibiting employees from discussing their compensation rates with their co-workers? Regardless of whether or not you have employees represented by a union, under the National Labor Relations Act, such rules have been held to unlawfully restrict the right to engage in "concerted activity" for "mutual aid or protection." Employees discharged for violating such a policy may be able to obtain reinstatement and backpay. Employers should avoid attempts to restrict discussion of terms and conditions of employment, including rates of compensation, among employees.

Challenged Layoffs: Claims are on the rise alleging that employees have been included in layoffs, or reductions in force, for unlawfully discriminatory reasons. The procedure typically recommended to Employers, for workforce reductions, is to adopt and apply objective selection criteria. Applying the same standards to similarly-situated employees promotes objectivity and provides a framework for defending against discrimination claims. A recent federal appeals court decision, on an age discrimination claim in a layoff context, however, sounded a cautionary note for Employers. The case involved a protected class member (older worker) who suffered an adverse employment action (layoff). The Company responded with a description of its nondiscriminatory selection process. In order to go forward, the former employee had to cast sufficient doubt on the legitimacy of the explanation offered by the Company. The Court ruled that the jury could consider the timing of, and circumstances surrounding, the adoption of the overall layoff procedure in determining if it was a pretext for age discrimination.

Posting Requirements: Several clients have called with questions about mail solicitations from a vendor selling laminated copies of workplace posters. All required posters are available, at no cost, from the agencies that publish them. Please call us, or check our website, for contact information.

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