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Computer Policy

In LVRC Holdings LLC v Brekka, the Ninth Circuit disagreed with the Seventh Circuit’s holding in International Airport Centers LLC v Citrin. The Ninth Circuit held that an employee who e-mailed the company’s valuable financial records to himself at his home e-mail and refused to delete the records after he was terminated and was discovered by his former employer of using the financial records for “improper purposes” was not in violation of the Computer Fraud and Abuse Act (CFAA). The employer alleged in its lawsuit that the former employee was using the records “without authorization” and was therefore in violation of the CFAA. The Ninth Circuit held that it is not a violation of the CFAA for an employee who has been granted access to computer records during his or her employment to subsequently use the information for personal or even wrongful purposes. The Seventh Circuit ruled that any use by the employee after his employment was terminated was without authorization and was therefore a violation of the CFAA. The Ninth Circuit noted in its decision that the outcome of the case may have been different if the employer had a policy that prohibited the transfer of company records to home computer accounts or computers and provided that the employee was obligated to delete all such information after he or she was terminated. **Note:** Does your company have such a policy?

Privacy

A U.S. District Court in Zungoli v United Parcel Service dismissed the employer’s motion for summary judgment and allowed a case of retaliation to go to trial. In this case, UPS operated a portal for human resources management which required employees to use the computer portal to record his or her personal information. The terms of the use of the portal stated that employees had no expectation of privacy for their personal information. The portal lacked user authentication, security protection and allowed more than one user to be simultaneously logged onto the computer using the same user name and password. This employee refused to use the portal because his privacy might be compromised. After the employee took extended medical leave for medical reasons and returned to work, he was demoted, assigned to report to a former subordinate and placed on a list of persons first in line to be laid off and finally terminated. The employee sued and the case was remanded for trial.

Ledbetter

Employees filed a class action lawsuit alleging that when their employer converted a defined benefit pension plan to a cash benefit plan, it was guilty of age discrimination because the effects of the change was that for older employees, benefits did not grow until the cash benefit caught up to and exceeded the “frozen” benefit. The lawsuit was dismissed by a Federal District Court judge because it was filed three years after the conversion of the plan. Following the signing of the Lily Ledbetter Fair Pay Act, the plaintiffs filed a motion to alter or amend the lawsuit which was granted by the District Court. The District Court held that the Ledbetter Act applies to all discriminatory acts, including the accrual of pension benefits. The plan in this case accrued a pay credit which did not result in an increase within 300 days of

the filing of the lawsuit and that was sufficient to avoid dismissal because of the statute of limitations. Tomlinson v El Paso Corp.

Age

The Second Circuit held in Halpert v Manhattan Apartments Inc. that an employer may be held liable for discriminatory acts committed by an independent contractor authorized to make decisions on the employer's behalf. In this case, an independent real estate broker retained by the employer to rent apartments in a building the employer owned, told an applicant for a job as a salesman that at age 52 he was "too old" to work in that job. The independent contractor then called the placement center, which referred all applicants for interviews, and told them that the applicant was too old and to send younger candidates for the position. The District Court granted the employer's motion for summary judgment holding that Manhattan Apartments Inc. was not an employer as defined in the age discrimination law. The Second Circuit reversed and remanded the case for trial. The court held that the ADEA's prohibition against age discrimination in hiring applies to the entire hiring process whether the company uses its own employees to interview applicants or whether it assigns an independent contractor to do the interviewing.

In Geiger v Tower Automotive Co the Sixth Circuit held that a plaintiff may establish a violation of the ADEA by either direct or circumstantial evidence. The court considered the impact of the U.S. Supreme Court's decision in Gross v FBL Financial Services, reviewed in an earlier issue of *Employee Briefs*. In the FBL decision, the Supreme Court held that a plaintiff in an age discrimination case has the burden of proving that age was the "but for" cause of the termination, i.e., the plaintiff must show that the employer would not have fired the employee but for the employee's age. The Sixth Circuit applied the burden shifting test which requires at the outset that an employee must be able to show he or she has a prima facie case. One of the criteria in a prima facie age discrimination case is to show that the plaintiff was replaced by a younger employee. In this case, the employee was not replaced and instead was part of a large reduction in force (RIF) and therefore could not demonstrate a prima facie case.

Enforcement

The Obama Administration will be more stringent in enforcing employment laws. The EEOC has included an additional \$13 million in its budget to hire an additional 224 employees to enforce civil rights laws. The Attorney General has announced plans to hire as many as 50 additional attorneys to add to the existing 350 attorneys in the Civil Rights division of the Justice Department. The Wage and Hour Division of the Department of Labor has asked for a budget increase of \$30 million to add 288 employees to enforce the Wage and Hour Act.

Employee Background Checks

In September 2009, the EEOC filed a lawsuit in Federal Court accusing a corporation of discrimination based on sex, race and national origin. EEOC v Freeman. The EEOC contends that the use by the corporation of credit history checks and criminal background checks resulted in discrimination against black, Hispanic and male job applicants. EEOC guidelines state that a company must have a business necessity to deny an applicant employment based on a criminal record. The guidelines require that companies must consider the nature and gravity of the offense or offenses for which the applicant was convicted, the time that has passed since the conviction and/or completion of the sentence and the nature of the job held or sought. Conviction records may be considered in the employment decision as evidence that makes an individual unsuitable for a particular position. However, when there is a disproportionate impact based on race or national origin, the employer must demonstrate that it considers the relationship of the crime to the position sought. Essentially the same approach is taken by the EEOC concerning an employer's use of credit checks of applicants.

Psychiatric Exams

In Coffman v Indianapolis Fire Department, the Seventh Circuit affirmed the granting of an employer's motion for summary judgment by a Federal District Court. In this case, several firefighters voiced concerns about the behavior of a fellow firefighter, who happened to be female inasmuch in the opinion of the firefighters who voiced concerns the female firefighter was withdrawn and defensive for no legitimate reason, often alone and not herself. As a result of the expressed concerns, the fire department required the firefighter to undergo a series of psychological fitness for duty evaluations. During the months that these evaluations took place, the firefighter was transferred to limited duty status. These evaluations concluded that the firefighter was fit for duty. She was then transferred to active duty. The firefighter sued the fire department claiming that the department had violated the ADA by requiring multiple mental evaluations that were neither job related nor based on business necessity. In affirming the District Court's granting of the department's motion for summary judgment, the Seventh Circuit held that the department's requirement of multiple medical exams was not a violation of the ADA because it was job related and consistent with business necessity because two firefighters had recently committed suicide. The court opined that while in most occupations the complained of behavior would not justify multiple mental examinations and would be a violation of ADA, in the context of the facts of this case and this occupation it was permissible under the ADA. Employers are cautioned that ordering a mental examination must be job related and consistent with business necessity. The standards for mental examinations are higher than the standards justifying physical examinations.

SEASONS GREETINGS!

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