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Employment Law Outlook

Winter 2013

VIRGINIA SUPREME COURT RULES THAT MANAGERS CAN BE SUED INDIVIDUALLY FOR WRONGFUL DISCHARGE

William M. Furr

On November 1, 2012, the Supreme Court of Virginia held, for the first time, that an employee alleging common law wrongful discharge may sue her manager individually. The Virginia Supreme Court held: "Virginia recognizes a common law tort claim of wrongful discharge in violation of established public policy against an individual who is not the plaintiff's actual employer but who was the actor in violation of public policy and who participated in the wrongful firing of the plaintiff, such as a supervisor or manager." In a 4-3 decision, the Supreme Court disagreed with the manager's position that common law wrongful discharge claims can only be asserted against actual employers and not individual managers or supervisors.

The plaintiff, Angela VanBuren, worked as a nurse for Virginia Highlands Orthopedic Spine Center which was owned by Dr. Stephen Grubb. She asserted that Dr. Grubb sexually harassed her and then discharged her when she refused his sexual advances. After her discharge, she sued both Virginia Highlands and Dr. Grubb for wrongful discharge in violation of Virginia's public policy. The trial court dismissed Ms. VanBuren's case against Dr. Grubb asserting that only an employer can be liable for wrongful discharge.

The United States Court of Appeals for the Fourth Circuit then certified the case to the Supreme Court of Virginia which disagreed with the trial court and found that Dr. Grubb was an appropriate party to the lawsuit. The Supreme Court noted that VanBuren was fired because she would not give in to his unlawful sexual advances. Because Grubb was her supervisor and the owner of the company, the Supreme Court concluded that if her allegations were proven, Dr. Grubb should also be subject to liability, just as he would be if he had engaged in any other tortious conduct.

Three of the Supreme Court Justices disagreed with the four-Justice majority. The dissenting Justices argued that a claim for wrongful discharge can only be asserted against employers. The dissenters wrote: "Only an employer can breach that duty because only an employer has ability to hire and fire . . . An individual

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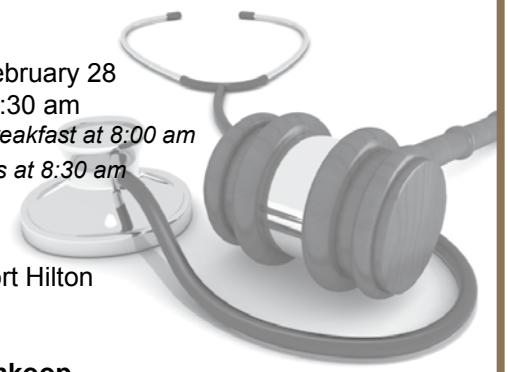
2013 Roadmap for Employer Compliance & Health Plan Design



Date/Time
Thursday, February 28
8:00 am - 10:30 am
Continental breakfast at 8:00 am
Program starts at 8:30 am

Location
Norfolk Airport Hilton

Speakers
Cher E. Wynkoop
Employee Benefits Practice Group Leader
Willcox Savage

Frasier Ives
Employee Benefits Compliance National Practice Co-Leader
Wells Fargo Insurance Services

Register
www.willcoxsavage.com
(Seating is limited)

The session has been submitted for 2 continuing education credits through HRCI.

In This Issue...

REFUSAL OF VOCATIONAL REHABILITATION JUST GOT BROADER

Stephen R. Jackson

Employees receiving workers' compensation benefits may still be compelled to perform work within their residual capacity. Their failure to do so may result in a suspension of their benefits under Virginia Code §65.2-603(B) until their unjustified refusal is cured. Until recently, it was always assumed that a valid refusal of vocational rehabilitation had to stem from the work-related condition for which an award had been granted. Recently, however, the interpretation of that has changed.

In *Ilg v. United Parcel Service, Inc.*, the Supreme Court of Virginia gave employees a broader basis for refusal. In *Ilg*, the employee, a delivery driver for UPS, was injured when he fell from his truck at work. His application for benefits asserted an "injury to his right hand and right knee;" however, in the settlement agreements, approved by the Virginia Workers' Compensation Commission, the only injury cited was "pain in the right knee." There was no mention of the hand injury.

Based on several fitness evaluations, the employee was cleared for medium level work and UPS directed him to participate in a vocational rehabilitation program. The employee declined based on his hand injury. Although the employer's application for suspension of benefits was denied by the Commission, the Virginia Court of Appeals reversed, finding that "a medical condition not causally related to the work-related accident" could not serve as a basis for refusing vocational rehabilitation. In its opinion, the Court of Appeals relied upon the 1985 decision by the Supreme Court of Virginia in *American Furniture Co. v. Doane*. Essentially the *Doane* case stood for the proposition that an employer is not liable for conditions not causally related to its employee's work and it was, therefore, absolved of liability for compensation, where the employee refused selective employment based on a physical condition unrelated to the original accident. Based upon *Doane*, it appeared that the decision of the Court of Appeals was correct.

However, the final chapter had not yet been written. Interpreting its opinion in *Doane*, the Supreme Court of Virginia ruled that even though the employee's hand injury had not been the subject of the awards approved by the Commission, it did not prevent the employee from relying upon it for purposes of refusing vocation rehabilitation. Indeed, the Court reasoned that the hand injury had been part of the original claim for benefits and was, therefore, causally related to the accident, even though it was not the subject of an award. The decision in *Ilg* now clearly broadens the basis upon which an employee may refuse vocational rehabilitation, without imperiling his benefits under the Virginia Workers' Compensation Act.■

NEW GUIDANCE REGARDING WELLNESS PROGRAMS

Cher E. Wynkoop and Corina V. San-Marina

This article briefly describes the changes made by recent proposed regulations to wellness programs. Consistent with previous guidance, the proposed regulations continue to divide wellness programs into two categories: "participatory wellness programs" and "health-contingent wellness programs."

The regulations continue to define a "participatory" wellness program as one that does not condition any monetary reward on an individual satisfying a standard related to a health factor, such as fitness club memberships, diagnostic testing programs (that do not condition a reward on the outcome of those tests) and educational programs.

A "health-contingent" wellness program is one that does condition a reward on an individual satisfying a health-related standard or require an individual to do more than a similarly situated individual based on a health factor in order to obtain the same reward. A reasonable alternative standard (or waiver of the applicable standard) must be provided for any individual for whom it is either unreasonably difficult due to medical condition to satisfy the standard or medically inadvisable to attempt to satisfy the standard. Consistent with the previous guidance, the proposed regulations maintain the five requirements for a health-contingent wellness program with the following changes and/or clarifications:

1. Maximum reward/penalty is increased from 20% to 30% of the total cost of employee-only coverage, further increased to 50% for tobacco related wellness programs. Any reward provided under a participatory program may be disregarded. Grandfathered plans can opt to provide the increased rewards.

2. Specific guidance is provided regarding reasonable alternative standards in the following three contexts: (i) if the reasonable alternative is the completion of an educational program, the plan must make the program available to eligible participants (rather than forcing participants to find a program), and it must pay the full cost of the program; (ii) if the reasonable alternative is a diet program, the plan must pay any membership or participation fee for that program (although an individual may be required to purchase any food); and (iii) if the reasonable alternative involves compliance with the recommendations of a medical professional retained by the plan, and an individual's personal physician states that the plan professional's recommendations are not medically appropriate for that individual, the

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WORKPLACE BULLYING

Monica A. Stahly

"Workplace bullying" is a somewhat novel and undeveloped employment law issue. However, it's gaining traction, and attorneys and employers alike are taking note of emerging trial strategies, proposed legislation to regulate workplace behavior, and ways they can proactively promote a professional culture of civility.

Workplace bullying is not illegal—usually. Managers and employees can "legally" insult, intimidate, humiliate, threaten, deliberately ignore, and gossip about other coworkers, and they can engage in a whole slew of other offensive behaviors as long as the intended victim is not a member of a protected class. That means any employee who is not targeted based on race, ethnicity, religion, sex, disability, or age is hard pressed to find a legal remedy for workplace mistreatment. However, some relatively recent cases highlight how employees are starting to carve out a legal niche for workplace bullying claims.

Take, for example, the case of *Doescher v. Raess*, which involved claims for intentional infliction of emotional distress and assault. In that case, Joseph Doescher, a hospital operating room perfusionist, accused Dr. Daniel Raess, a cardiovascular surgeon, of charging at him, screaming, swearing, and raising his fist in a fighting posture. At trial, Mr. Doescher's counsel painted Dr. Raess as the quintessential "workplace bully." The court even allowed expert testimony from a social psychologist who offered the opinion that Dr. Raess was a workplace bully.

More often than not, however, workplace bullying claims arise in the context of discrimination suits. For example, in *Bashir v. AT&T*, Susann Bashir accused AT&T of fostering a work environment in which Ms. Bashir's manager and coworkers humiliated and intimidated her during her religious conversion to Islam. The taunts got so bad that Ms. Bashir reported the behavior and asked to be transferred. When she did not receive any company support, she eventually stopped coming to work. Interestingly, AT&T had an excellent written policy against harassment that should have protected Ms. Bashir. However, the employees didn't respect it and the company didn't enforce it.

Both Mr. Doescher and Ms. Bashir won jury awards, although Mr. Doescher only succeeded on his assault claim, and Ms. Bashir's success was in large part due to her Title VII protection. Their cases, although crafted as workplace bullying incidents, largely succeeded because of the actionable underlying claims—assault and discrimination. Even so, they demonstrate some wiggle room for future claims. With a greater limelight on the issue of workplace bullying, and proposed anti-bullying legislation in 21 states, more claims are sure to be on the horizon, and employers may soon face a broader class of potential claimants.

More important than the rising threat of litigation, however, employers should be alarmed by the potential impact that workplace bullies have on overall business operations. By fostering an environment where workplace bullying is accepted behavior, employers risk low employee morale, reduced productivity, increased FMLA requests for associated medical conditions, growing disability diagnoses and related requests for accommodation, and higher healthcare and workers' compensation claims.

Employers should proactively implement policies and procedures that address workplace bullying and promote a productive work culture. This means developing a workplace anti-harassment policy that addresses *all* types of harassment and includes the following: a definition of "workplace bullying," examples of prohibited behavior, complaint procedures, disciplinary measures, managerial responsibilities, anti-retaliation provisions, and counseling resources.

Below are some important points to consider when developing or revising your anti-harassment policy.

- Because bullying behavior can be somewhat ambiguous, in addition to a definition, provide detailed examples and differentiate "bullies" from tough managers who are performance-focused and fair.

- Spell out the consequences for employees who fail to observe the company's expectations.

- Develop a response system that facilitates employee communication with HR. Respond to all harassment complaints whether or not they are based on protected characteristics and whether or not they are technically "illegal." Initiate investigations, thoroughly examine the allegations, and implement disciplinary procedures if bullying behavior is discovered.

- Assuage fears of retaliation by demonstrating management's commitment on all levels, taking a top down approach. An employee who feels that he or she has the company's support at the top will be more likely to report incidents of workplace bullying from the bottom.

- Consider implementing a 360 degree review process that allows for performance feedback from supervisors, peers, and subordinate employees.

- Refer employees to an Employment Assistance Program where they can address their issues outside of their immediate work environment.

- Above all, ensure that your written policy is consistently enforced. Having an unenforced policy is as helpful to an employer's defense as no policy at all. Fair enforcement demonstrates an employer's commitment to and respect for its employees.■

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manager or supervisor who carries out the wrongful discharge acts solely in a representative capacity for the employer, not in a personal capacity . . . ." The view of the three-Justice minority has been the position espoused by employers across Virginia.

Supervisors and managers should be aware that Virginia courts will now allow employees to sue them individually under state law if the employee was wrongfully discharged in violation of public policy and the supervisor or manager himself or herself violated the relevant public policy. Employers should be vigilant in making sure that when they discharge employees, they ensure that they have legitimate and well-documented reasons for the termination. ■

NEW GUIDANCE REGARDING WELLNESS PROGRAMS

(CONTINUED FROM PAGE 2)

plan must provide a reasonable alternative standard that accommodates the recommendations made by the individual's physician.

3. The recent regulations provide that it would not be reasonable for a plan to seek verification of an individual's entitlement to an alternative standard if that claim is obviously valid, based on the nature of the individual's medical condition that is already known to the plan.

4. A plan must disclose the availability of alternative means of qualifying for a wellness program reward only in plan materials describing the terms of a health-contingent wellness program. The recent regulations include entirely new model language that plan sponsors could include in communication materials as a way of satisfying their obligation to disclose the availability of alternative standards for obtaining a reward or avoiding a penalty. This is designed to be easier for individuals to understand, thereby increasing the likelihood that those who qualify for an alternative standard will actually contact the plan to request it. ■