

Workplace Watch

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Keeping an Eye on Developments in Employment Law for Employers and Employees

Courts Consider Age Discrimination Cases

AGE DISCRIMINATION

The 8th Circuit recently reversed the dismissal of two age discrimination cases by federal judges in Minnesota.

In the first, the appellate court overturned the dismissal of a claim under the Age Discrimination and Employment Act (ADEA) by an older laid-off employee who signed a release to receive a severance payment. The release did not satisfy the requirements of the Older Workers Benefit Protection Act because it was ambiguous and not written in a way that could be reasonably understood by the "average" person. The documentation was also defective and seemed to be "contradictory" under the ADEA. *Thomforde v. IBM*, 406 F.3d 500 (8th Cir. 2005)

In the second case, a qualified 51-year old woman applicant who was hired for a temporary position, rather than on a full-time basis, when three younger men were hired for the full-time spots, was entitled to pursue a claim of age and sex discrimination. Reversing a determination of the U.S. District Court of Minnesota, the 8th Circuit held that the woman, who was seeking a position as a corrections officer, stated a viable claim for age and sex discrimination, even though she was offered and accepted a part-time position. The claimant could also assert a

retaliation claim because she was fired two weeks after complaining about discrimination. *Peterson v. Scott County*, 406 F.3d 515 (8th Cir. 2005).

PUBLIC EMPLOYMENT

A government unit may establish a random drug-testing policy for safety-sensitive employees without bargaining with the labor union representing its employees. The Minnesota Court of Appeals held that creating the policy was an "inherent managerial right." But the employer must "meet and confer" with the union on implementation of the testing program. *Law Enforcement Labor Services, Inc. v. Sherburne County*, 695 N.W.2d 630 (Minn. App. 2005).

A state correctional employee who received disability benefits was not entitled to later revoke the disability claim and receive a retirement annuity. The Court of Appeals held that a teacher at the correctional facility in St. Cloud who made a disability claim after incurring a work-related injury could not later convert to an ordinary retirement annuity available to state employees upon reaching age 55 "as long as he continues to receive disability benefits." *Ruter v. State*, 695 N.W.2d 389 (Minn. App. 2005).

A government unit is required to pay health care benefits for dependents of a

disabled public safety officer until the officer's 65th birthday, even if the officer is no longer alive. The appellate court held that Minn. Stat. §299A.465, Subd.1 imposes a continuing obligation upon the governing body to provide insurance coverage for dependents of a disabled police officer or firefighter, and that obligation continues if that disabled employee dies before reaching age 65, in which case coverage must be continued until the 65th birth date of the deceased employee. *Schmidt v. City of Columbia Heights*, A04-2321 (Minn. App. 05/24/05). www.lawlibrary.state.mn.us/archive/ctap-pub/0505/opa042321-0524.htm



New developments in Employment Law are occurring regularly. To help you keep pace with these changes, we are pleased to furnish you with this complimentary copy of *Workplace Watch*, which is based on materials written by Marshall H. Tanick that appears monthly in the *Bench & Bar* magazine of the Minnesota Bar Association. Mr. Tanick is a contributing Editor for Employment and Labor Law subjects, and he has put these materials together to help you keep current with recent developments in Employment Law.

A public employee must pay health insurance benefits to retirees after the end of the collective bargaining agreement with the employees union. The Minnesota Court of Appeals ruled that under Minn. Stat. §471.61, Subd. 2, public sector employers are contractually obligated to continue such payments indefinitely after expiration of a bargaining agreement. *HRA of Chisholm v. Norman*, 2005 WL 1175920 (Minn. App. 2005).

FAMILY LEAVE

In a case of first impression, the 8th Circuit held that an employer who violates family leave by terminating the employee during the leave is not liable under the federal Family and Medical Leave Act (FMLA) if the employer shows that it would have made the same decision in the absence of the exercise of FMLA rights. The appellate court rejected a “strict liability” theory for an employer who fired an employee one month into her leave of absence under the act, which allows an unpaid 12-week leave period. The employee had “disturbed the workplace” before she took the leave, and during the leave, she came back to the workplace and “caused additional workplace disturbance.” Because the employer established that it would have fired her,

regardless of her leave, it is not liable for interfering with her FMLA rights. This precedent probably will make it harder for employees to prevail in cases in which they are terminated while they are on FMLA leave, if the employer raises performance problems which the employee then must refute. *Throneberry v. McGehee Desha County Hospital*, 403 F.3d 972 (8th Cir. 2005).

EMPLOYMENT CONTRACT

An ambiguous employment contract calling for incentive compensation that failed to spell out the basis for the calculations was deemed unenforceable. The employer and employee testified that they had different notations of what constituted the components of the compensation plan, which made the arrangement too ambiguous to sustain a jury verdict for the employee. *Outdoor Environments, Inc. v. Maro*, 2005 WL 1020898 (Minn. App. 2005) (unpublished).

UNEMPLOYMENT COMPENSATION

An employee who was subjected to repeated unwelcome physical contact by the employer who owned the company was entitled to unemployment compensation benefits without having to complain or await

any timely or appropriate corrective action prior to quitting. The employer’s conduct was sexual harassment within the meaning of Minn. Stat. §268.095 subd. 3(e)(3) which constituted a “good reason” for the employee to quit and be entitled to compensation benefits. Because the perpetrator was also the owner of the company, it was unnecessary to formally complain to him. The company failed to take corrective action before the employee resigned. *Munro Holding, LLC v. Cook*, 695 N.W. 2d. 379 (Minn. App. 2005).

A pair of inappropriate remarks made by a manager to her subordinate were not sufficiently “offensive or egregious” to justify an employee quitting and receiving unemployment compensation benefits. The manager made a sexual comment about the employee’s appearance and about a pair of shoes she was wearing, which caused the employee to quit. Affirming the decision of the Department of Employment & Economic Development, the Court of Appeals held that the remarks, while inappropriate, were not so “offensive or egregious” to justify the employee’s quitting without “allowing management to take corrective action.” *Andrews v. Shervey Agency, Inc.*, 2005 WL 1021261 (Minn. App. 2005) (unpublished).

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