DechertOnPoint

May 2007 / Issue 17

A legal update from Dechert's Labor and Employment Group

In this issue

House Passes Genetic Discrimination Act, Senate Approval Expected

The Genetic Information Nondiscrimination Act is closer to becoming law than ever before, and if passed, would expand current anti-discrimination law to protect individuals with regard to their genetic information.

The House version of the Act was overwhelmingly passed on April 26, 2007, by a vote of 420-3. It had been introduced by Rep. Louise Slaughter (NY) for the seventh time in the last twelve years. The Senate version, sponsored by Sen. Olympia Snowe (ME), was overwhelmingly passed by the Senate in previous years. This year, it made it through committee and is waiting to be scheduled for consideration by the entire Senate. It is sponsored by 29 senators and is expected to pass this session. According to press reports, the Act is also supported by President Bush and the American Medical Association.

The Act would amend current civil rights law to prohibit employers, employment agencies, and labor organizations from hiring, firing, or otherwise discriminating on the basis of an employee's genetic information. In addition, it would amend ERISA, the Public Health Service Act, and Title XVIII (Medicare) of the Social Security Act to prohibit insurers from denying enrollment or charging higher premiums on the basis of genetic information The Act also prohibits employers and insurers from requiring genetic testing, or discriminating on the basis of information about a request for or the receipt of genetic information.

The Act imposes strict confidentiality requirements regarding an employee's genetic information, such as requiring that genetic information be kept in separate medical files and limiting disclosure of the genetic information. It also imposes financial penalties for violations, as well as incorporating other remedies available under current anti-discrimination laws, such as a cause of action for intentional discrimination. The Act does, however, specifically exclude a "disparate impact" cause of action based on genetic information.

If this Act is passed this year as expected and enacted into law, employers will have to review their current employment policies to ensure that genetic information is not considered when making employment decisions. Employers will also have to ensure that any genetic information they possess regarding their employees is properly maintained under the confidentiality provisions of the Act.■

Court Rejects Employer's Arbitration Agreement Distributed via E-mail

A federal judge in Philadelphia has declared unenforceable an arbitration agreement between Sunoco, Inc., and an employee that brought a discrimination claim, where Sunoco sent the arbitration agreement through e-mail and offered no evidence that the employee read or received the e-mail, and where the agreement was ambiguous. *Hudyka v. Sunoco, Inc.*, No. 06-2891, 2007 WL 208516 (E.D.Pa.2007) (Savage, J.). The ruling is an important one, because it underscores the importance of clear drafting and communication of arbitration agreements to employees, and it highlights the value of employee-signed acknowledgement forms.

The employee in *Hudyka* brought suit against Sunoco for race and age discrimination. Sunoco moved to compel arbitration pursuant to a newly-enacted dispute resolution policy which had several levels of mediation and which culminated in binding arbitration. Sunoco distributed the new policy by e-mail and posted a booklet about the policy on the company's intranet site. The policy provided that "if no resolution is reached through these [initial] phases, . . . an employee has the

Dechert LLP

option to proceed to phase three, mediation, and phase four, Binding Arbitration."

The court held that Sunoco offered no evidence to rebut the plaintiff's claim that he had no notice of the arbitration agreement. The plaintiff did not sign any arbitration agreement or acknowledgement, and Sunoco's e-mails regarding the new policy did not highlight their significance. "In short, employees were given no idea why this message among the company-wide e-mail traffic was significant." Thus, the employee did not accept employer's offer, and no contract was formed for binding arbitration.

The court further held that even if Sunoco had communicated the agreement to the plaintiff, the arbitration provision would be unenforceable because its terms were ambiguous and suggested that arbitration might be optional. The pertinent language stated that "an employee has the option to proceed to . . . Binding Arbitration," which the court found ambiguous. Thus, to be enforceable, the employer must use clear and unmistakable language to indicate that arbitration is compulsory.■

Employers May Be Represented by Non-lawyers at Unemployment Compensation Hearing

On April 17, 2007, the Pennsylvania Supreme Court ruled that employers may send non-lawyer representatives to hearings conducted by referees of the Unemployment Compensation Board of Review. The court reversed a 2005 Commonwealth Court decision which held that only claimants, and not employers, could be represented by non-lawyers in such hearings. The new decision, in *Harkness v. Unemployment Comp. Bd. of Review*, reestablishes the Board of Review's own interpretation of the applicable statute, that employers need not send lawyers to referee hearings.

The employer in *Harkness* was Federated Logistics, the owner of Macy's Department Stores. Harkness, a Macy's beauty advisor, was fired for telling a customer to "get your fat a-- out of here," and then claimed unemployment compensation. Macy's sent to the referee hearing an employee of TALK UC EXPRESS, an outside vendor that was in the business of representing companies in unemployment compensation matters. The claimant attended with her attorney. Both the referee and the Board of Review denied compensation and overruled the claimant's objection to a non-attorney representing Macy's. The Commonwealth Court *en banc* ruled that the non-lawyer from TALK UC EXPRESS had engaged in the unauthorized practice of law and that the Unemployment Compensation law only permits claimants to be represented by non-attorneys.

The Supreme Court rejected both of the Commonwealth Court's points. First, it is not the practice of law to appear before an Unemployment Compensation referee, as the hearings are primarily factual and the employer's representative is not doing legal analysis or advising employers on their legal rights or preparing legal documents. Second, the Commonwealth Court had erroneously looked to an unrelated section of the Unemployment Compensation law, devoted to permissible fees representatives may charge to claimants, when it said that the law did not permit employers to be represented by non-lawyer advisors.

The Supreme Court emphasized that unemployment compensation hearings are supposed to be brief and informal in nature, and most importantly, there are minimal amounts of money involved. Requiring employers to send lawyers would undermine the purposes of the law, and may dissuade employers from contesting claims for benefits, leading to an unwarranted drain on the entire system.

The Supreme Court's commonsense decision is welcome news to employers throughout Pennsylvania.■

Third Circuit Agrees Employee with Seizure Disorder Not "Disabled" Under ADA

A former Lockheed Martin employee diagnosed with a seizure disorder who was terminated by the company cannot recover under his claims of disability discrimination. In *Robinson v. Lockheed Martin Corp.*, No. 06-1704 (3d Cir. Jan. 8, 2007), the United States Court of Appeals for the Third Circuit—affirming the dismissal by the lower court—ruled that the employee's seizure disorder did not render him "disabled" under the Americans With Disabilities Act ("ADA"), or the equivalent state law, the Pennsylvania Human Relations Act. In addition, the employee was not able to show that Lockheed perceived him as disabled or that such a perception of disability led to his termination. In fact, the employee was allowed to return to the same job that he held before suffering seizures.

In March 2000, Mark Robinson suffered a seizure while at work at Lockheed. He spent four weeks out of work on

approved disability leave. He resumed the same position after his leave ended. Following his return, however, Mr. Robinson's performance was rated as "needing improvement" (a number of his annual reviews *before* Mr. Robinson's disability leave included ratings that ranged from "excellent" to "satisfactory" to "needing improvement"). In early 2002, his supervisor sought to put him on a performance improvement plan, but when Mr. Robinson questioned whether his medical condition had been taken into account, the company changed course and decided not to go forward with the performance improvement plan.

However, Mr. Robinson's supervisor mentioned that he should file for FMLA leave so that when he felt unable to come to work because of his seizure disorder, he could charge his absence under the approved FMLA leave instead of as a generalized (and perhaps unapproved) absence. Mr. Robinson took his supervisor's advice and began the submission process under FMLA, but before the process was completed, Lockheed terminated Mr. Robinson, together with three other co-workers. Lockheed explained that the firings were the result of budgetary cutbacks and that it applied neutral criteria in determining which employees were terminated.

Mr. Robinson then sued Lockheed, claiming disability discrimination under both federal and state law. He alleged that he had a "disability" under the ADA because his disorder affected his ability to perform "major life activities" (one of the ways an employee can show he or she is "disabled" under the ADA). "Major life activities" include caring for oneself, walking, seeing, hearing, speaking, breathing, learning, or working. For each activity that Mr. Robinson alleged was affected by his disorder, the court carefully compared his pre-diagnosis involvement in those activities with his ability to continue those activities post-diagnosis.

The court determined that there was not a sufficient impact on any of the alleged activities to qualify under the ADA. One activity in particular—driving—did not even qualify as a "major life activity" under the ADA, and the court noted that Mr. Robinson's driver's license had been reinstated in October 2000 in any event. Equally ineffective was Mr. Robinson's claim that he qualified under the ADA because Lockheed *regarded* him as having a disability (a second way to qualify for protection under the ADA). Mr. Robinson argued that he qualified because Lockheed was aware of his disorder, he had previously been approved for short-term disability leave, and his supervisor suggested he apply for FMLA leave. However, the court explained that Mr. Robinson was required to show that Lockheed believed that he was limited in his ability to work in a broad range of jobs and that he was precluded from more than a particular job. The evidence showed otherwise because Mr. Robinson was allowed to return to the same position after his disability leave. There was also no proof that the company's perception of Mr. Robinson's abilities caused the termination. And, the fact that a supervisor suggested he apply for FMLA leave, showed that Lockheed did not regard Mr. Robinson as significantly restricted in his ability to work.

Proactively, a company which may have a physically or mentally disabled employee may be able to control whether or not that employee is regarded or treated as disabled. Avoiding different treatment will help reduce exposure under the ADA. And, although this case focused on whether Mr. Robinson was "disabled" under the ADA, the court's decision underlines the need for a connection between an employee's disability and an adverse action such as a termination. The mere fact that an employee is disabled in some way and is later fired does not necessarily establish a disability discrimination claim.■

NLRB Hears Argument on Use of Company System for Union E-mails

In a case that could force significant changes for many businesses' electronic mail policies, the National Labor Relations Board (NLRB) heard oral arguments in March over whether a newspaper company could discipline a staff member for using workplace computers to send union-related e-mails. At stake is whether, and in what circumstances, a company may prohibit its employees use of company e-mail accounts and equipment to disseminate union-related information.

The Eugene Publishing Company maintained a communications policy which provided that its equipment was "not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." The administrative law judge, whose decision the NLRB reviewed at the hearing, ruled that this policy was facially lawful as "a valid limit on the use of [the company's] communications equipment."

However, the publishing company never disciplined its employees for using their work e-mail for personal, non-union business. The judge therefore ruled that it could not discipline an employee for repeatedly using her com-

pany e-mail account for union-related business. By disciplining this employee, the publishing company violated Section 8(a)(3) of the National Labor Relations Act, which prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." Similarly, the company violated Section 8(a)(3) during collective bargaining with the union by proposing a contract provision to explicitly prohibit use of company e-mail for union-related business.

In addition, the judge also found the company violated the Act by maintaining a rule prohibiting employees from wearing union insignia on their clothing. Under Section 7 of the Act, an employee's right to wear union insignia can only be limited under "special circumstances," which include employee safety, product, or image protection, and ensuring harmonious employee relations. The judge found that the company did not show any special circumstances.

It is noteworthy that the General Counsel for the NLRB, who files a notice of exceptions—i.e., objections—in each case before the board, only objected to the ruling that the communications policy was facially valid and not overly broad.

A ruling by the board is expected in the next several months.■

U.S. Court of Appeals to Reconsider Taxation of Compensatory Damages

A panel of the United States Court of Appeals for the District of Columbia Circuit will reconsider its controversial decision that emotional distress and loss-of-reputation damages are not taxable income under the Sixteenth Amendment. *See Murphy v. I.R.S.*, 460 F.3d 79 (D.C. Cir. 2006), *vacated*, 99 A.F.T.R.2d 2007-396 (D.C. Cir. Dec. 22, 2006) (No. 05-5139).

Compensatory damages for physical injuries are not considered income. However, the Internal Revenue Code does not specifically exclude compensatory emotional distress or loss-of-reputation damages from income. I.R.C. § 104(a)(2) (2007); *Murphy*, 460 F.3d at 84. In *Murphy*, the D.C. Circuit held that Internal Revenue Code Section 104(a)(2) is unconstitutional to the extent that it permits the taxation of these damages. The court reasoned that the damages are unrelated to wages or other accessions to income; instead, the damage award makes a plaintiff "emotionally and reputationally whole." *Murphy*, 460 F.3d at 88. The court also concluded, based on its examination of the legislative history of the Sixteenth Amendment and early tax cases, that compensation for loss of a personal attribute, whether physical or non-physical, is not within the meaning of "income" under the Sixteenth Amendment. *Id.* at 91–92.

Murphy was vacated by the D.C. Circuit panel that rendered the decision, and a rehearing was scheduled for April 23, 2007. The D.C. Circuit's resolution of this issue will have a significant effect on the verdict and settlement values of any cases in which a plaintiff seeks damages for emotion distress, loss of reputation, or similar types of damages.■

Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment.

Alan D. Berkowitz
Philadelphia
+1 215 994 2170
alan.berkowitz@dechert.com

Brian H. Brick
New York
+1 212 649 8714
brian.brick@dechert.com

Thomas K. Johnson
Philadelphia
+1 215 994 2756
thomas.johnson@dechert.com

Eric C. Kirsch
New York
+1 212 649 8719
eric.kirsch@dechert.com

Michael S. Macko
Philadelphia
+1 215 994 2234
michael.macko@dechert.com

Betina Miranda
Philadelphia
+1 215 994 2233
betina.miranda@dechert.com

M. Frances Ryan
Philadelphia
+1 215 994 2438
mfrances.ryan@dechert.com

Joseph L. Sulman
Boston
+1 617 654 8621
joseph.sulman@dechert.com

Dechert LLP

www.dechert.com

U.S.

Austin
Boston
Charlotte
Hartford
New York
Newport Beach
Palo Alto
Philadelphia
Princeton
San Francisco
Washington, D.C.

UK/Europe

Brussels
London
Luxembourg
Munich
Paris