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A legal update from Dechert's Labor and Employment Group

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Court Finds that Sex Qualifies as a "Major Life Activity" in Disability Discrimination Case

By **Michael S. Macko**

A divided United States Court of Appeals for the District of Columbia Circuit has found that an employee with a history of sexual impairment from cancer treatment properly states a disability claim as a "record of" impairment under the Rehabilitation Act of 1974 and the Americans with Disability Act ("ADA"). *See Adams v. Rice*, 531 F.3d 936, 947 (D.C. Cir. 2008). Ruling on an issue of first impression, the *Adams* court held that sexual relations qualify as a "major life activity" under the relevant discrimination statutes, and therefore the employee could proceed to trial with a disability discrimination claim.

Kathy Adams applied for a job in 2004 with the United States Foreign Service. The job required her to be available to serve throughout the world. While her security clearance was pending, Adams learned she had breast cancer. Adams elected to undergo a mastectomy and reconstructive surgery and then had her ovaries and fallopian tubes removed. She received an excellent prognosis, but the treatment and medications affected her sex life: she developed a fear of romantic intimacy, suffered from a lack of libido, and lost physical sensation.

During her treatment, the State Department informed Adams that she would be receiving a Foreign Service appointment. Adams told the State Department about her diagnosis. The State Department, in response, decided that Adams was no longer eligible for worldwide service and ultimately denied her appointment. Adams brought suit alleging disability discrimination under the Rehabilitation Act and the trial court granted summary judgment in favor of the State Department.

On appeal, the court affirmed that Adams could not show that she was actually disabled or "regarded as" disabled. Her cancer was temporary in nature, and there was no evidence that the State Department believed she was unable to hold other positions. However, Adams produced evidence that the State Department discriminated based on her "record of" impairment that substantially limited her in a major life activity: sex. As the court noted, the law protects not only those with actual disabilities, but also those with a "record of" disabilities. *See* 29 U.S.C. § 705(20)(B)(ii).

The court found that Adams had a "record of" cancer that substantially limited her in the major life activity of engaging in sexual relations. "At the risk of stating the obvious," Judge Tatel wrote for the majority, "sex is unquestionably a significant human activity, one our species has been engaging in at least since the biblical injunction to 'be fruitful and multiply.'" The State Department did not challenge her assertion that she was substantially limited in that activity. Thus, Adams could proceed at trial with a "record of" disability claim.

In a dissenting opinion, Judge Henderson wrote that Adams did not claim she was substantially limited in any major life activity before the alleged discrimination, so she should not be able to pursue a "record of" disability claim.

Adams is significant because it demonstrates the broad reach of the disability statutes. Even when an underlying illness like breast cancer

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fails to qualify as an actual disability under the ADA, the effects of the illness may nonetheless establish a valid claim. For instance, in this case the effects of the cancer treatment on the employee's sex life resulted in a disability claim that survived the employer's motion for summary judgment. Employers should therefore be cautious when making employment decisions that affect employees who have battled serious illnesses.

Court Finds Employer Must Reasonably Accommodate ''Obvious Disability'' Without Request

By **Michael S. Macko**

The United States Court of Appeals for the Second Circuit recently departed from a general rule and held that the Americans with Disabilities Act ("ADA") imposes a duty on employers to offer reasonable accommodation to disabled employees who have an "obvious disability" without any request for accommodation by the employee. *See Brady v. Wal-Mart Stores, Inc*., 531 F.3d 127, 135 (2nd Cir. 2008). The court defined an "obvious disability" as one about which the employer "knew or reasonably should have known." In order to trigger this obligation, it is not even necessary for the employee to consider himself to be disabled.

Patrick Brady was a nineteen-year-old man with cerebral palsy. At trial, a witness testified that "[j]ust by looking at him, you could tell he had a disability." Brady's disability manifested itself in noticeably slower walking, walking with a shuffle and limp, recognizably slower and quieter speech, not looking directly at people when talking to them, weaker vision, and a poor sense of direction.

Brady applied for a job at a Wal-Mart pharmacy on Long Island, New York. Like all Sales Associates applicants, Wal-Mart required Brady to certify that he "ha[d] the ability to perform the essential functions of th[is] position either with or without a reasonable accommodation." On the application, Wal-Mart listed the essential functions of the pharmacy job for which Brady applied. Brady marked that he had the ability to perform those essential functions. Wal-Mart then hired Brady to work in the pharmacy.

Although Brady had worked in a pharmacy for two years without incident, Brady's Wal-Mart supervisor thought his performance was "absolutely awful" and "knew there was something wrong" with him when he appeared to have difficulty matching customers' names with prescriptions. Wal-Mart told Brady after his first pharmacy shift that the only available job was collecting shopping carts and garbage in the parking lot and transferred Brady to this position, which required a different uniform. After Brady complained about the perceived demotion, Wal-Mart reassigned him to the food department. In the end, Wal-Mart offered Brady a schedule in the food department that conflicted with the availability he listed on his job application, so he quit.

Brady sued Wal-Mart, alleging that the company failed to accommodate his disability as required by the ADA. A jury found in Brady's favor and awarded him over $7.5 million in damages. Wal-Mart filed an appeal and argued that it had no duty to accommodate because Brady never requested an accommodation and testified that he did not think he needed one.

The Second Circuit affirmed the jury verdict in favor of Brady, holding that "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled." In this case, Wal-Mart was obligated to engage Brady in the ADA's "interactive process" to assess whether the company could reasonably accommodate his disability. Wal-Mart failed to do so, the court held.

The holding in *Brady* represents a departure from the general rule that a request for accommodation is a prerequisite to liability for failure to accommodate. Indeed, when a disability is obvious, the employer has a duty to engage the employee in the interactive process. The rule requiring a request for accommodation does not apply under those circumstances. Thus, employers should be cognizant that they may face liability under the ADA if they fail to engage in the interactive process with an employee they "know or reasonably should know" is disabled, regardless of whether the employee asked for an accommodation.

Recent Decision Highlights Importance of Strict Compliance with Private Settlement Agreements

By **J. Ian Downes**

In *Matthews v. Wisconsin Energy Corp*., No. 07-1780 (July 7, 2008), the United States Court of Appeals for the

Seventh Circuit issued a decision that provides a clear reminder to employers of the importance of establishing and publicizing policies designed to ensure compliance with the terms of settlement agreements with former employees. *Matthews* arose following alleged comments by one of Wisconsin Energy's in-house attorneys to a job consultant representing a former employee. According to plaintiff Bernadine Matthews, the attorney, Lynne English, told a consultant working with Matthews that Matthews had sued Wisconsin Energy on one or more occasions. This statement, which English claimed was "light-hearted," allegedly breached the terms of a settlement agreement between Matthews and Wisconsin Energy that required that the company respond to inquiries regarding Matthews only by confirming the dates of her employment and her last position.

According to Matthews, in response to learning this information, the consultant removed Matthews' service with Wisconsin Energy from her resume, leaving a gap of nearly 20 years in the resume. This omission, Matthews claimed, caused her to become a less competitive candidate for employment and to be denied the "benefit of her bargain" when resolving her prior lawsuit. This allegation, the Court of Appeals concluded, was sufficient to establish the possibility that Matthews suffered compensable damages as a result of English's comment, and therefore to state a potentially viable breach of contract claim.

While claims that an employer has breached the terms of a settlement agreement with a former employee rarely result in published decisions, they do frequently arise. The decision of the Seventh Circuit in *Matthews* provides a clear illustration of the importance for employers of taking steps to ensure compliance with the terms of settlement agreements with former employees. As the decision indicates, even an offhand comment about a former employee can constitute the breach of a settlement agreement that requires confidentiality. To protect against such non-compliance, employers should consider implementing formal policies regarding employee references and reminding current employees of the importance of strict compliance with such policies.

Federal Courts Split with Respect to Rights of Employees to Pursue Title VII Claims Based on "Association" with a Member of a Protected Class

By **J. Ian Downes**

Three recent decisions have highlighted the split among the federal courts with respect to the rights of employees to assert claims of discrimination or retaliation based on their familial or personal relationships. In two of these cases, *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. April 1, 2008), and *Thompson v. North American Stainless*, 520 F.3d 644 (6th Cir. March 31, 2008), courts expanded the rights of employees who claim such discrimination or retaliation, while in the third, *E.E.O.C. v. Wal-Mart Stores*, No. 07-0300 JAP/LFG (D.N.M. July 17, 2008), the United States District Court for the District of New Mexico concluded that Title VII of the Civil Rights Act of 1964 does not permit employees to claim retaliation based on the protected activity of family members.

The decision of the Second Circuit in *Holcomb* was not a surprising one. At issue in the case was the firing of Craig Holcomb, an assistant coach of the Iona College men's basketball team. Holcomb, who is white, alleged that the termination of his employment was motivated by the fact that he was married to an African-American woman. Rejecting Iona's contention that discrimination based upon the race of an individual's spouse is not actionable under Title VII because it is not motivated by "such individual's race," the Court of Appeals held that "where an employee is subjected to an adverse action because an employer disapproves of an interracial association, the employee suffers discrimination because of the employee's *own* race." 521 F.3d at 139 (emphasis in original). In so holding, the Second Circuit joined the Fifth, Sixth, and Eleventh Circuits, which had reached similar conclusions. The court then went on to hold, contrary to the district court, that the plaintiff had adduced sufficient evidence—including that the one white assistant on Iona's coaching staff who was not in an interracial relationship was not terminated, despite having an arguably equal role in the failures of the basketball program that the college contended led to the plaintiff's discharge, and that two of the administrators involved in the termination decision had made racist comments—that the justification offered for the college's decision was pretextual.

While the court in *Holcomb* purported to ground its decision in the plain language of Title VII, the majority of

the panel of the Sixth Circuit in *Thompson*, by its own admission, made little attempt to do so. Rather, the court focused on the underlying purposes of Title VII's anti-retaliation provisions in holding that an employer unlawfully retaliates against an employee when it takes an adverse action in response to the protected activity of the employee's spouse. *Thompson* arose out of the termination of the employment of Eric Thompson, who worked as a metallurgical engineer for North American Stainless, a manufacturer of stainless steel. At the time of his termination, Thompson was engaged to Miriam Regalado, who was also employed by North American. Thompson's employment was terminated, allegedly for poor performance, approximately 3 weeks after his employer was notified that Regalado had filed a charge of gender discrimination with the EEOC. Thompson claimed that his termination violated Title VII's anti-retaliation provision, a contention that the district court rejected on the basis that "under its plain language, the statute does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity." 520 F.3d 644, 652.

A divided panel of the Sixth Circuit reversed the district court, holding that Thompson did state a valid claim of retaliation. In reaching this conclusion, the majority recognized that the language of Title VII's anti-retaliation provision, 42 USC § 2000e-3, which states that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . under this subchapter," suggests that "the only individual protected . . . is the one who conducted the protected activity." 520 F.3d at 646. However, the majority relied on the "well-established" principle that "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute," to conclude that retaliation against a complaining employee's family member is prohibited by Title VII because such retaliation "would dissuade reasonable workers" from engaging in protected activity. *Id*. at 647 (relying on *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)).

Judge Richard Allen Griffin dissented from the court's decision in *Thompson*, stating that "the majority has rewritten the Civil Rights Act of 1964 to confirm it to their notion of desirable public policy . . . " *Id*. at 650. In so doing, he noted that all other circuit courts that have considered the plaintiff's construction of Title VII, namely the Third, Fifth, and Eighth Circuits, have rejected it and criticized the majority's willingness to defer to the positions taken by the EEOC in its Compliance Manual. In conclusion, Judge Griffin chided that "[b]y rewriting the Civil Rights Act to conform it to their preference for public policy, the majority has assumed the role of the legislature and usurped the authority granted to Congress by the Constitution." *Id*. at 655-56.

Finally, the court in *E.E.O.C. v. Wal-Mart* agreed with Judge Griffin and refused to adopt the rationale of the *Thompson* majority. In that case, Robin and John Bradford claimed that Wal-Mart refused to hire them in retaliation for protected activity engaged in by their mother, Ramona Kay Bradford, a Wal-Mart employee. After noting the varying decisions of the federal circuit courts with respect to the legitimacy of the claims asserted by the Bradfords, including the Sixth Circuit's decision in *Thompson*, the district court ultimately held that "the clear wording of [Title VII's retaliation provision] limits its causes of action to persons who engage in opposition [to prohibited actions] or who participate in some way, even if minimally, in the protected activity" and that "expanding the scope of persons by whom an action can be brought beyond the clear language of the statute is not within the purview of the courts, but is the responsibility of Congress." Accordingly, the court granted Wal-Mart's motion to dismiss the Bradfords' claims.

Interestingly, however, the court held that a claim on behalf of Ramona Kay Bradford based on Wal-Mart's failure to hire her children was "analytically distinct" from the claims of her children and could proceed. The court concluded that the claim was cognizable based on the allegation that Wal-Mart's actions "adversely affected [Ramona Bradford's] status as an employee . . . effectively deterring Mrs. Bradford . . . from opposing and/or participating in proceedings under Title VII."

Because a clear circuit split exists with respect to the permissibility of claims of retaliation by individuals who did not themselves engage in activity protected by federal non-discrimination laws, clarification of the issue by the Supreme Court or Congress is a distinct possibility. Until such clarification is provided, however, employers must be cognizant of the risks that familial and other relationships among employees may in some circumstances provide the basis for valid claims of retaliation.

New Jersey Courts Clarify and Expand LAD Protections Relating to Retaliation and Hostile Work Environment Claims

By **Jeffrey W. Rubin**

This summer, the New Jersey courts have issued three important decisions that employers need to be aware of when trying to avoid running afoul of the New Jersey Law Against Discrimination ("LAD"). On July 7, 2008, the New Jersey Appellate Division, in *Roa v. LAFE*, 2008 WL 2627625 (N.J. Super. Ct. App. Div. July 7, 2008), decided that LAD's retaliation provision prohibits not only retaliatory actions that affect the terms and conditions of employment but also retaliatory actions not related to the workplace. Just a few weeks later, the New Jersey Supreme Court, in *Cutler v. Dorn*, 2008 WL 2916431 (N.J. July 31, 2008), clarified that the standard for evaluating religion-based hostile work environment claims is the same as in race- or sex-based hostile work environment claims. On August 13, 2008, less than a month after the *Cutler* decision, the New Jersey Appellate Division, in *Kwiatkowski v. Merrill Lynch et al*, 2008 WL 3875417 (N.J.Super. Ct. App. Div. August 13, 2008), issued another important opinion, this time holding that the allegation of a single offensive comment is sufficient to state a triable hostile work environment claim under LAD.

First, in *Roa*, the Appellate Division addressed the scope of LAD's retaliation provision. Fernando Roa and his wife, Liliana Roa, both former employees of LAFE, a distributor of Hispanic food products, were discharged after Mr. Roa complained about an executive's sexual harassment of LAFE employees. Mr. Roa alleged that the retaliation included not only his termination but also the wrongful termination of his medical insurance. The trial court concluded that the post-termination actions of an employer could not serve as independent violations of the LAD's retaliation provisions because the actions were not related to current or prospective employment. The appellate court disagreed and reversed the lower court's decision. The New Jersey appellate court found that the U.S. Supreme Court's holding in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which announced that Title VII's retaliation provision is not limited to actions that affect the terms and conditions of employment, applied equally to the LAD. The appellate court reasoned that this construction of the LAD, like Title VII, "is consistent with both the express language of the LAD, as well as its broad remedial purposes."

Second, in *Cutler*, the New Jersey Supreme Court addressed a situation involving Jason Cutler, a Haddonfield, New Jersey police officer who alleged that he was subjected to a hostile work environment based on his Jewish religion and ancestry in violation of the LAD. The conduct complained of included numerous remarks about "Jews" and incidents that caused Cutler to feel that he was being harassed. On one occasion, an officer made a comment about "dirty Jews." On another occasion, someone placed a German flag above an Israeli flag on Cutler's locker, an action Cutler took to reference the Holocaust. Haddonfield presented evidence that these comments and incidents were not harassing when viewed in the context of the Haddonfield police department environment, where similar comments were regularly made as jokes, including by Cutler. At trial, a jury found for Cutler but awarded him no damages. The New Jersey appellate division reversed the jury's conclusion, and Cutler appealed to the New Jersey Supreme Court, providing the Supreme Court its opportunity to clarify the standard to be applied to a religion-based hostile work environment claim under the LAD and its first opportunity to assess the plaintiff's evidence in such a case.

The court applied the same standard used in race- or sex-based hostile work environment claims, articulating that "the inquiry is whether a reasonable person of plaintiff's religion or ancestry would consider the workplace acts and comments made to, or in the presence of, the plaintiff to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment." The court stressed that an objective standard is to be used in making this determination based on the totality of the circumstances and concluded that there was sufficient evidence to support the jury's verdict in favor of Cutler. Perhaps irked at what it perceived to be the application of a more stringent standard for religion-based hostile work environment claims, the court emphasized that the "threshold for demonstrating a religion-based, discriminatory hostile work environment cannot be any higher or more stringent than the threshold that applies to sexually or racially hostile workplace environment claims" and announced that "it is necessary that our courts recognize that the religion-based harassing conduct that took place for Cutler in this 'workplace culture' is as offensive as other forms of discriminatory, harassing conduct outlawed in this state."

Third, the Appellate Division addressed the standard for a hostile work environment in *Kwiatkowski*. In *Kwiatowski v. Merrill Lynch & Co.*, the plaintiff worked as a customer service representative. He was disciplined for excessive

absences but generally received favorable evaluations. After two years, he was assigned to a new supervisor in September 2003. In November, the new supervisor issued a final warning to him related to his attendance problem. He alleged that the new supervisor also took away some of his job responsibilities and screamed at him. In December 2003, his supervisor gave him a "Joke-a-Day" calendar as a holiday gift because she thought that he liked jokes. The calendar contained offensive subject matter, but was not targeted at a particular group. Later the same month, after disciplining the plaintiff for insubordination for leaving his desk in spite of an instruction not to do so, his supervisor reported his behavior to the higher level supervisor, who then decided to terminate plaintiff's employment. Two days later, his supervisor passed him in the hallway and allegedly called him a "stupid fag" under her breath. The plaintiff did not report this incident to anyone and there were no witnesses to support his allegation. However, one coworker saw him after the comment was allegedly made and observed that the plaintiff seemed to be shocked. The plaintiff was gay. However, although he claimed that many people in the office knew that he was gay, the plaintiff admitted that he told very few people and that his supervisor was not aware that he was gay. The plaintiff complained to Human Resources about his supervisor's treatment of him including the calendar, but never mentioned the alleged slur. Citing his insubordination, the higher level supervisor terminated the plaintiff's employment four days later. The facts concerning the plaintiff's insubordination were not in dispute.

The plaintiff sued Merrill Lynch for wrongful termination, harassment, and intentional infliction of emotional distress. In 2006, the Court granted Merrill Lynch's motion for summary judgment. The plaintiff appealed and, in August 2008, the Appellate Division reversed the lower court decision. The court addressed two important issues. First, the court addressed the "severe or pervasive" standard applied to hostile work environment claims. The court, citing the NJ Supreme Court's opinion in *Taylor v. Metzger* that held that a single race-related comment could support a claim for a hostile work environment, held that the "stupid fag" comment was so patently offensive that it also was sufficient to support a claim. Second, the court considered the so-called "cat's paw" theory and Merrill Lynch's defense that there was no evidence that the decisionmaker was biased and so the claim must fail. The court found that because the supervisor's role in the termination process was substantial, even though she was not the decisionmaker, the single comment had to be considered carefully. The court found that Merrill Lynch could not avoid liability by relying on the higher level supervisor who was not involved in the discrimination when that supervisor did not conduct an independent investigation and relied on information from the plaintiff's immediate supervisor that may have been tainted by bias.

Employers need to be mindful of the implications of the *Roa*, *Cutler* and *Kwiatkowski* cases. Following *Roa*, New Jersey employers must be vigilant to ensure that employees take no action to retaliate against an employee alleging a violation of federal and state discrimination law, whether or not the retaliatory actions are aimed at the terms or conditions of employment or actually occur in the workplace, since such actions can result in liability under federal and now state law. After *Cutler* and *Kwiatkowski*, employers operating in New Jersey need to be mindful of any patently offensive language used in the workplace whether related to religion, sex, or race. It is clear that New Jersey courts believe that even one such comment can support a hostile work environment claim. Employers should be careful not to tolerate comments or acts in the workplace that can be seen as degrading or derogatory based on characteristics such as race, sex, or religion, even if employees do not complain.

California Supreme Court Rejects ''Narrow Restraint'' Exception for Employee Non-Competes

By **Betina Miranda**

In its recent ruling in *Edwards v. Arthur Andersen LLP*, No. S147190, the California Supreme Court unequivocally rejected the Ninth's Circuit's "narrow restraint" exception to California's prohibition on non-compete agreements and confirmed that, under California law, all restrictive covenants in the employment context are unlawful.

Pursuant to California's statutory prohibition on employee non-compete agreements (Cal. Bus. & Prof. Code § 16600, or "Section 16600"), "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." The statutory exceptions, found in Section 16601, are limited to non-competes executed in the sale-of-business context.

Over the past decade, the Ninth Circuit has interpreted Section 16600 as prohibiting only those non-competes which completely prevent an individual from pursuing his or her livelihood, thereby permitting non-competes which impose only a "narrow restraint" on an employee's ability to engage in his or her profession. For example, in one early case, the Ninth Circuit found that a provision barring an employee from soliciting one specific named customer was not an illegal restraint of trade prohibited by Section 16600 because it did not entirely preclude the employee from pursuing his trade. *See General Commercial Packaging v. TPS Package*, 126 F.3d 1131 (9th Cir. 1997); *see also Int'l Business Machines Corp. v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999).

These federal cases raised employers' hopes that California might be softening its approach to restrictive covenants; however, any such hope has now been dashed by the *Edwards* decision. In *Edwards*, the non-compete at issue prohibited the employee from: (1) providing services for 18 months after his termination to any client on whose account he had worked during the 18 months prior to his termination; and (2) soliciting any client of the Los Angeles office for 12 months after his termination. The California Supreme Court held each of these covenants to be unlawful under Section 16600. The court reasoned that, because the legislature enacted statutory exceptions to Section 16600, as set forth in Section 16601, by implication the legislature did not intend to authorize other exceptions to Section 16600, including exceptions for reasonable, partial, or narrow restraints. In addition, the court expressly noted its disagreement with the Ninth Circuit's rulings in *TPS Package and Bajorek*.

After *Edwards*, the law in California is clear: restrictive covenants in the employment context, no matter how reasonable or narrow, are unenforceable in California.

D.C. Circuit Court Imposes Restraints on EEOC's Disclosure Without Notice Policy

By **Betina Miranda**

Employers providing documents to the Equal Employment Opportunity Commission ("EEOC") in response to a charge of discrimination are often concerned about the confidentiality of those documents, and rightly so. As the D.C. Circuit Court recently found, the EEOC has a policy of disclosing without notice to the submitting party confidential or proprietary documents received in connection with investigations under the Age Discrimination in Employment Act ("ADEA"). *See Venetian Casino Resort, L.L.C.*, v. EEOC, No. 06-5361 (D.C. Cir. June 27, 2008).

In this case, in its second trip to the D.C. Circuit Court, the Venetian Casino challenged a subpoena issued by the EEOC on the basis that the EEOC's policy permitting disclosure of confidential information without notice was arbitrary, capricious, and inconsistent with Freedom of Information Act ("FOIA") regulations.

The court found that the EEOC's compliance manual allowed the EEOC to release information either under its FOIA-related regulations or its Privacy Act-related regulations. The FOIA-related regulations require prior notice to the party whose confidential information will be released, while the Privacy Act-related regulations do not. According to the court, these two rules created a "loophole" situation in which the EEOC had to notify an employer before releasing confidential information if there was a formal FOIA request, but did not have to if the EEOC simply decided on its own to release the information. According to the court, this inconsistency, without justification from the EEOC, is arbitrary and capricious under the Administrative Procedure Act ("APA"). The court ordered that the EEOC be enjoined from disclosing the Venetian Casino's confidential information. The court did not, however, strike down the EEOC's policy. Instead, the court held that the injunction could be dissolved if the EEOC could articulate an explanation of the inconsistent disclosure policy which was not arbitrary or capricious.

The court's opinion is a welcome affirmation of an employer's need for the protection of its confidential information; however, the lesson from *Venetian Casino* for employers is one of continued caution. Any document submitted to the EEOC may be disclosed to third parties. In addition, because the EEOC still may have an opportunity to justify its policy permitting disclosure without notice, it is unclear whether the EEOC will have to provide prior notice for all disclosures in the future.

Undergoing Fertility Treatment is Covered by the Pregnancy Discrimination Act

By **Leora F. Eisenstadt**

The Seventh Circuit recently considered whether an employee's claim that she was terminated for

undergoing in vitro fertilization ("IVF") states a cognizable sex discrimination claim under Title VII and, more particularly, under the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e-3(a), which is an amendment to Title VII. In *Hall v. Nalco Co.*, No. 06-3684, 2008 WL 2746510 (7th Cir. July 16, 2008), the Seventh Circuit reversed the district court, which had granted summary judgment to the employer.

Upcoming Events

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Employment policies and procedures must continually be reviewed to ensure that they meet company objectives and fulfill the obligations of the ever-shifting landscape of employment relations law. Join us for an informative program that will cover the following topics:

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- Secrets and Supervision: Employee privacy in the workplace in the U.S. and Europe
- FLSA Preventive Medicine: How to conduct a wage and hour audit of your business
- Non-competes and Trade Secrets: Surprising recent case law (plus other developments and drafting tips)

This seminar satisfies CLE requirements in Pennsylvania and New York, including the opportunity for 1.0 hour of ethics credit, as well as HRCI requirements (application pending). For more information or to register for this event, please contact Robyn Ross at robyn.ross@dechert.com or +1 215 994 6751 or visit www.dechert.com/seminars.

The plaintiff, a sales secretary, had requested and taken a leave of absence for one month to undergo IVF treatments, which involve administration of fertility drugs to the woman, surgical extraction of her eggs, fertilization in a laboratory, and surgical implantation of the resulting embryos into the woman's womb. The initial procedure was not successful, and the plaintiff requested a second leave of absence to undergo IVF again. Several weeks after filing for her second leave of absence, the plaintiff was informed that two sales offices were being consolidated, that only one sales secretary would be retained, and that termination "was in [her] best interest due to [her] health condition." *Hall*, 2008 WL 2746510, at *1.

Based on this set of facts, the district court granted the employer's motion for summary judgment, finding that the plaintiff had not stated a claim for sex discrimination under the PDA because she alleged that she was terminated for infertility. The district court focused on the fact that infertility is a medical condition that affects both men and women, and that the PDA only protects women from pregnancy discrimination "where the discriminatory condition is 'unique to women.'" *Hall v. Nalco Co.*, No. 04 C 7294, 2006 WL 2699337, at *2 (N.D. Ill. Sept. 12, 2006). In reversing the district court, the Seventh Circuit emphasized the fact that the PDA prohibits discrimination based on a woman's pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. The Court of Appeals then noted that, contrary to the district court's conclusion, the plaintiff was terminated for taking leave to have IVF treatments, a surgical impregnation procedure that only women, as child-bearers, can have. In essence, then, the plaintiff was terminated "not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity." *Hall*, 2008 WL 2746510, at *4. The Court of Appeals buttressed its argument by analogizing the case to the Supreme Court's decision in *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). In *Johnson Controls*, the Court concluded that the employer's policy of barring fertile women from jobs involving lead exposure violated the PDA because the policy did not classify based on the gender-neutral characteristic of fertility but instead based on the gender-specific characteristic of childbearing capacity. The Seventh Circuit found the same problem in the *Hall* case, in which fertility was not the essential issue, but rather the choice to undergo gender-specific procedures related to childbearing capacity.

The Court of Appeals concluded that while the employer may be able to argue that it had a legitimate business

reason for terminating the plaintiff—namely the consolidation of the two offices—the comments made to the plaintiff at her termination along with other suggestive comments in notes documenting the termination decision presented sufficient evidence to overcome summary judgment and allow a jury to decide.

This Seventh Circuit case provides employers with an important reminder when dealing with employee leaves of absence. While employers are likely concerned primarily with the Family Medical Leave Act and its requirements when employees request leave for medical reasons, this case serves as a reminder that issues of sex discrimination, and more particularly pregnancy discrimination, may also be at-issue depending on the reason for the leave and the employee involved.

Newspaper Loses Its Bid to Unseal Docket in *Doe v. C.A.R.S. Protection Plus, Inc.*

By **Leora F. Eisenstadt**

There has been a new development in the *Doe v. C.A.R.S. Protection Plus, Inc*. case since it was covered in our previous issue ("Appeals Court Extends the Protection of the Pregnancy Discrimination Act," *Dechert OnPoint*, Issue 22, http://www.dechert.com/library/Labor_Employment_22_07-08.pdf). The Third Circuit issued a new ruling in the case on June 19, 2008, addressing *The Legal Intelligencer's* motion to unseal the docket and court documents. On May 30, 2008, the Court of Appeals issued its decision that the Pregnancy Discrimination Act bars discrimination against an employee who has an abortion. *See Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358 (3d Cir. 2008). In addition to permitting the plaintiff in that case to sue under a pseudonym to protect her anonymity, the district court took the unusual step of sealing all court documents including the court's docket. In its May 30 opinion, the Third Circuit, while reversing the lower court's grant of summary judgment to the employer, upheld the district court's sealing of the entire case with little explanation. The Circuit's opinion stated only that there was no abuse of discretion and that the record fully supported the district court's order. *The Legal Intelligencer* sought to intervene in the case, asking the Third Circuit to reconsider its approval of the sealing of all documents and the court docket and filing a separate motion that asked the Circuit to unseal the case at the appellate level. The newspaper argued that court proceedings should be transparent and that the public and press should be given an opportunity to object when they are not. The newspaper contended that the Court of Appeals' ruling on the sealing issue conflicted with Supreme Court and Third Circuit precedent on the rights of the public and press to have access to court documents and proceedings. On June 19, the Third Circuit rejected the newspaper's arguments in a one-page order, denying the motion to intervene and indicating that the newspaper must pursue its objections with the district court on remand.

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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.

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