Labor and Employment Law Newsletter

October 2013

Bryce Downey & Lenkov Case Results

- **Storrs Downey** obtained a favorable summary judgment ruling in a federal court case before the Northern District of Illinois on an alleged age discrimination and breach of contract case brought by a terminated, former executive of our client employer.

Less than 90 days into a Cook County filed transgender discrimination claim, we were able to successfully get the case dismissed without having to engage in any written discovery.

- **Cary Schwimmer** obtained dismissal of two union unfair labor practice charges before the NLRB. Cary also obtained dismissal of two Arkansas EEOC race discrimination charges.

Membership Updates

- **Maital Savin** has been appointed as a legislative liaison to the Chicago Labor & Employment section of the CBA Young Lawyers.

Court Decisions and Legislation

United States Supreme Court Defines "Supervisor" for the Purposes of Employment Discrimination and Harassment Litigation

For the first time the United States Supreme Court has defined the term "Supervisor" for the purposes of employment discrimination and harassment litigation. In *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), The Court's defines as supervisor management-level employees who "are empowered" to take "tangible employment actions" against lower-level employees, such as having the authority to hire and fire. This decision provides a definition that can be readily applied by courts and interested parties, with the

intent to provide an efficient and clarified position by which parties may resolve disputes.

The Supreme Court explained in its decision that prior to *Vance*, there was a divergence of decisions with Federal Circuit Courts defining the term differently. Various federal and circuit courts defined "Supervisor" as those to whom the employer vests with authority to direct and oversee an employee's daily work. Other federal and circuit courts defined "Supervisor" as those with the power to hire, fire, demote, promote, transfer, or discipline an employee.

The standard enunciated in *Vance* has been the standard previously adopted by the 7th Circuit on discrimination and harassment claims before it.

Practice Tip:

This decision ultimately clarifies and restricts the definition of "Supervisor". An employer's summary judgment motion on actions involving non-supervisors might be somewhat less difficult to succeed based on *Vance*. However, future court decisions will address whether a "non-supervisor" who exercises sufficient influence upon someone who makes tangible employment actions will be deemed a "supervisor" under the law. It is important that each employer have a clear and definite policy and procedure in place specifying which supervisor employees are empowered to discipline other employees.

Timing of Terminating Injured Worker Important in Retaliatory Discharge Cases

In Brooks v. *Pactiv Corp. and Prairie Packaging*, No. 12-1155 (7th Cir. Sept. 6, 2013), the 7th Circuit Court reversed the Northern District of Illinois Court's dismissal of Plaintiff's retaliatory discharge claim.

In 1999, Plaintiff was seriously injured at work, resulting in the loss of his left hand and forearm. Plaintiff filed a workers' compensation claim in 1999, which remains pending. The employer, Prairie Packaging kept Plaintiff employed, despite his inability to work, treating him as a disabled employee on a company-approved leave of absence, which allowed Plaintiff to receive healthcare coverage.

Subsequently, Pactiv Corporation acquired Prairie Packaging. Pactiv continued Prairie's arrangement with Plaintiff. However, in March 2010, Pactiv sent Plaintiff a letter, advising that he would be terminated if he did not submit documentation verifying his ability to work within 30 days. Plaintiff did not submit the requested documentation, was terminated and lost his healthcare coverage a month later.

Plaintiff asserted a claim for retaliatory discharge under Illinois law. The District court dismissed the complaint for failure to state a claim and Plaintiff appealed.

The 7th Circuit held that the issue of pretext could not be resolved on the pleadings. The Court found that accepting Plaintiff's allegations as true, the circumstances surrounding termination plausibly suggest that Plaintiff's pursuit of the workers' compensation claim

motivated Defendant to give him an ultimatum and then fire him: settlement negotiations in the workers' compensation had stalled; Defendant was paying substantial and ongoing medical bills; two months after the bills escalated, Defendant sent a letter requiring Plaintiff to verify his ability to return to work, which was not possible and would also undercut his position in the workers' compensation case, or face termination and the loss of health insurance. The Court found the allegations sufficient to support an inference that Defendant's goal was to break the impasse in the workers' compensation case by coercing Plaintiff into submitting documentation inconsistent with his position in the case. The Court also held that the significant passage of time between Plaintiff's filing of his workers' compensation claim and his termination, did not preclude a finding of causation.

Practice tip:

The mere existence of a valid reason for discharge does not insulate an employer from a retaliatory discharge claim. Employers should thoroughly consider all of the facts surrounding an employee's employment prior to terminating an employee. Making a new demand of an employee shortly before terminating that employee could be sufficient grounds for the court to deny an employer's summary judgment motion on a retaliatory discharge action. Consider whether the facts in your situation might allow the Plaintiff to argue that the actual motivation for termination was retaliatory.

Plaintiff must prove "but-for" cause adverse in retaliation claims under Title VII

In, *University of Texas Southwestern Medical Center v. Nassar,*133 S.Ct. 2517 (2013), the United States Supreme Court clarified that in a Title VII retaliation suit, a plaintiff must prove that their protected activity was a "but-for" cause of the adverse employment action, as opposed to only a "motivating factor." The Court ruled that in a retaliation suit, a plaintiff must demonstrate that he or she would not have suffered an adverse employment action but for his or her protected activity.

In *Nassar,* Plaintiff was of Middle Eastern background and worked for both Defendant Hospital and Defendant University. Ultimately, Plaintiff filed a complaint against his supervisor alleging the supervisor exhibited bias against his race and religion. Following the complaint, Plaintiff negotiated with the Defendant Hospital to continue working there while discontinuing his employment with the University. This change would have resulted in a change of supervisors. Defendant University objected to the change, as such action was "inconsistent with an existing affiliation agreement between the Hospital and University." As a result, the Defendant Hospital withdrew its offer to allow Plaintiff to be employed solely with the Hospital. Plaintiff then brought suit on two counts: 1) race and religious discrimination; and, 2) unlawful retaliation. The jury found in favor of Plaintiff, and the Fifth Circuit Appellate Court affirmed holding that Plaintiff had demonstrated that retaliation was a "motivating factor" behind the University's actions which had caused Plaintiff to lose his employment with the Hospital.

The United States Supreme Court reversed the Fifth Circuits decision, and held that Title VII retaliation claims must be proven using a "but for" standard of causation, rather than the less burdensome "motivating factor" standard. The Court found it important that the statute defining unlawful employment practices involving race, color, religion, sex, and national origin [42 U.S.C. §2000e-2(m)] could be based on the "motivating factor" standard, but that the plain language of the statue did not include retaliation. In so finding, the Court pointed out that Title VII prohibits anti-retaliation and "adverse employment action '*because of*' certain criteria." The Court reasoned that the "because of" language requires a "but-for" standard of proof in Title VII retaliation claims.

We most recently saw application of the "but-for" pre-*Vance* standard applied by the 7th Circuit in the case of *Fleishman v. Continental Casualty Company*, 698 F. 3d 598 (7th Cir. 2012). The court in *Fleishman* upheld the granting of a summary judgment to the employer in an ADA and age discrimination action.

Plaintiff had worked for defendant as a staff attorney for nearly twenty years, when he suffered a brain aneurism that required him to miss work intermittently from 2003 to 2005. Subsequently, he was assigned to a new group that handled high value cases. After a series of complaints were made regarding plaintiff's performance, plaintiff was terminated in 2007 at the age of 54.

The court found that statements by plaintiff's boss that he wanted to "get him to", a supervisor's offer of retirement and severance at the onset of his medical problems and the departure of other older lawyers at his company, did not rise to the level of establishing that defendant's motivation for terminating the plaintiff was based on his age.

Practice Tip:

The "but for" standard of proof is considerably more difficult, however, to prove and will aid employers in defending against Title VII retaliation claims. Keep in mind, however, that the "motivating factor" standard is still applicable to Title VII claims based on race, color, religion, sex, and national origin.

Guns At Work: What Illinois Employers Need to Know

On July 9, 2013, Illinois passed the Firearm Concealed Carry Act (FCCA), allowing individuals to carry concealed firearms.* This article provides a step-by-step guide to applying the new legislation to your workplace.

1. **Is your workspace a "prohibited area"?**

Prohibited areas include hospitals, schools, colleges, government buildings, parks, public transportation, gaming facilities and most bars and many restaurants, as well as other specified types of facilities.

If your workspace is considered a prohibited area, you do not need to do anything, as firearms are barred from prohibited areas.

If your workspace is *not* a "prohibited area," consider whether you want to prohibit firearms from your workplace. Although it will be several months before the first concealed-carry license is issued, in a number of counties, prosecutors have announced that they will not prosecute

individuals for concealed-carry if they have valid state firearm owner's cards. Thus, you should consider whether you want to ban guns from your workplace *immediately*.

Some important considerations include employee safety, liability for injuries or crimes, changes to insurance coverage and the difficulty of enforcing a prohibition on concealed-carry. Given the increased liability that stems from allowing firearms in the workplace, many employers will decide to prohibit concealed-carry. On the other hand, consider your client base – will taking an anti-gun stance cause you to lose clients?

2. **DO YOU OWN OR LEASE YOUR WORKSPACE?**

If you own your workspace, you may prohibit firearms by conspicuously posting official signs at the entrances to your buildings, premises or properties. Signs must indicate that firearms are prohibited on the property. Signs must be of a uniform design as established by the Police Department and must be four inches by six inches in size. The Police Department has not yet published regulations interpreting the new law, nor has the official sign banning concealed-carry on private property been made publicly available.

The FCCA is not clear about the rights of employers that lease their workspace to prohibit firearms. This uncertainty will likely be resolved once the Police Department issues the regulations interpreting the new law. Until then, you should review your lease agreement and discuss your policy regarding firearms with the property owner to ensure that your policy is consistent with the property owner's policy.

Note, you may not ban firearms from private vehicles brought into employer parking lots, provided the firearms are secured in a locked vehicle or a locked compartment within the vehicle. A firearm may also be carried near a vehicle for the purpose of storing or retrieving the firearm from the vehicle's trunk.

3. **REVIEW AND UPDATE YOUR EMPLOYMENT HANDBOOK TO ENSURE THAT IT CLEARLY PROHIBITS EMPLOYEES AND *ANY GUESTS* FROM BRINGING FIREARMS INTO THE WORKPLACE.**

Some important considerations:

a) Ensure that your policy does not conflict with the FCAA;
b) Address whether you will prohibit employees from keeping firearms in company vehicles;
c) Your policy should clearly state what type of workplace searches employees can expect and under what circumstances;
d) Your policy should address how you will deal with threats of workplace violence;
e) Your policy should clearly state the consequences for bringing a gun into the workplace. Consider whether termination will be a consequence. The FCAA is silent on whether it creates a private right of action, but an employee may have a cause of action for wrongful termination if terminated for concealed-carry, although this is not clear;

4. **DISTRIBUTE YOUR UPDATED POLICY REGARDING HANDGUNS AND HAVE EACH EMPLOYEE SIGN A FORM ACKNOWLEDGING RECEIPT.**

Please contact us with any questions you may have regarding implementing the new gun legislation in your workplace.

Indiana previously passed similar legislation. See our November 2010 Newsletter for more information.

The complete version of this article written by Maital Savin was originally published in the Women's Bar Association of Illinois' Fall 2013 Newsletter, which can be found at www.wbaillinois.org.

Employer Can't Condone Beer Over Candy

In the recent decision issued in *Perez v. Thortons, Inc.*., the 7th Circuit overturned the trial judge's granting of summary judgment to an employer on a gender and national origin discrimination claim. No.12-3669 (7th Cir., 9/30/13). The plaintiff was a female, Hispanic store manager who was reportedly terminated because she sold large quantities of candy to herself at an unwarranted discount price. Conversely, the same employer did not terminate a male, non-Hispanic supervisor who made a dummy purchase on his personal credit card for beer because some libations were missing from the store. The court held that a jury could conclude that the infractions were reasonably similar and defendant store gave unwarranted preferential treatment to the male supervisor and his conduct.

Practice Tip:

Besides being careful to not favor suds over candy, an employer needs consistency with its employment practices and policies.

Bad Behavior at Mediation Justified Employee's firing

In a case of first impression, the Seventh Circuit Court affirmed the trial court's dismissal of a Title VII retaliation claim brought by an employee who had previously filed a sex discrimination action versus his employer. *Benes v. A.B. Data, Ltd.*, No. 13-1166 (7th Cir. 7/26/13). During the course of an EEOC conducted mediation proceeding, the complainant burst into the room occupied by the employer representatives and stated "you can take your proposal and shove it up your ass and fire me and I'll see you in court." The employer responded by following complainant's suggestion and fired him. Complainant proceeded to amend his original claim and add a count for retaliatory discharge.
In affirming the final court's dismissal of this court, the Seventh Circuit held that employee behavior or misconduct that reasonably should not have to be tolerated by an employer on the job similarly did not have to be accepted or excused by an employer at a mediation or other form of litigated case proceeding.

Practice Tip*:*

Unacceptable behavior by an employee, even for one who has a pending employment lawsuit or even workers' compensation claim against an employer, does not have to be tolerated by an employer and this might include terminating the employee under such circumstances like we had in *Benes.*

Bryce Downey & Lenkov Employment Law Department

Everyone's heard the expression "a good defense is a good offense." Bryce Downey & Lenkov offers affirmative employment services before there is an employment nightmare. This includes preparation of employee handbooks, company policies, and procedures.

Bryce Downey & Lenkov handles all forms of employment matters including defense of discrimination, harassment, and wrongful discharge or treatment matters, enforcement and defense of noncompetition and nonsolicitation agreements, and union grievance and collective bargaining.

Bryce Downey & Lenkov Is Growing!

Bryce Downey & Lenkov is pleased to welcome two new associate attorneys.

Maital Savin focuses her practice in workers' compensation defense. She has represented all types of employers, obtaining favorable results in numerous high-exposure claims and was recognized for successfully obtaining a "take nothing" arbitration decision in her client's favor.

Kunal Ganti also concentrates his practice in workers' compensation. He has successfully tried and argued cases before the Illinois Workers' Compensation Commission and has substantial experience practicing before the Illinois Circuit and Appellate Courts.

Daniel Zlatic focuses his practice on the defense of insurers and their insureds in workers' compensation and personal injury matters. Mr. Zlatic has successfully completed in excess of twenty first-chair jury trials.

Recent Awards & Accolades

Rich Lenkov:
2013 NIU Alumnus of the year

The Alumni Council of the Northern Illinois University College of Law Alumni Association annually bestows its Alumnus/a of the Year Award to graduates who have made outstanding achievements in their career and for their dedication to the College of Law. The honor is given to the Alumnus for demonstrating service to their community or profession, outstanding professional accomplishments and consistent professional integrity.

Alec J. Miller
2013 Telly Award Recipient

Alec Miller won 2013 Telly Award for his children's show, Butterscotch's Playground. The show stars Greg Page, the original, yellow Wiggle, from the children's phenomenon The Wiggles. Butterscotch's

Playground is produced by Alec, Greg, and Vera Nackovic, another Chicago lawyer.

Alec is an entertainment lawyer with Bryce, Downey & Lenkov, LLC and a creator of branded children's entertainment.

"Bryce goes from paralegal to firm management"

Geoff Bryce was featured on the cover of the Chicago Daily Law Bulletin discussing his leadership and management style:


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TUESDAY, MAY 14, 2013

Chicago Daily Law Bulletin

$1

Bryce goes from paralegal to firm management

To read the full article, visit Bryce Downey & Lenkov on Facebook and be sure to "like" us to stay up-to-date on BDL news.

Women in Commercial Real Estate

Jeanne Hoffmann, Ioana Salajanu and **Tina Paries** were featured in the annual **Women in Commercial Real Estate** magazine:

Giving Back

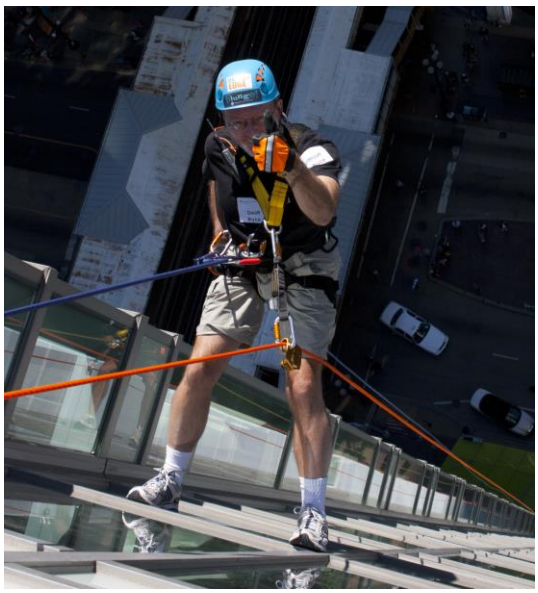
Race Judicata 2013 5k!

Every year, Bryce Downey & Lenkov employees participate in Race Judicata in support of Chicago Volunteer Legal Services Foundation. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago.

Parent vs. Teachers Dodgeball Duel

Rich Lenkov captained the parents' team in the 1st Annual Agassiz Elementary School Parent vs. Teachers Dodgeball Duel. While the parent's team was defeated 7-4, the event raised a significant amount of money for the public school and was enjoyed by all.

Skyline Plunge



Every year the Respiratory Health Association of Metropolitan Chicago offers the "Skyline Plunge" to those who are daring (or crazy) enough to rappel down a 27 story building. On September 8, 2013, Geoff rappelled 27 stories to help raise awareness and funds for lung disease research, education and advocacy.

Contributors to the October 2013 Employment and Labor Law Newsletter

Bryce Downey and Lenkov attorneys who contributed to this Newsletter were Storrs W. Downey, Richard W. Warner and Maital B. Savin.

Seminars

Our attorneys regularly provide free seminars on a wide range of employment topics. We speak to a few people or dozens, to companies of all sizes and large national organizations

Seminars:

We have spoken this year at several national and regional conferences before such organizations as Counsel on Litigation Management and the Telework Summit on a variety of labor and employment topics. These have included presentations on employment landmines in workers' compensation and legal considerations for teleworkers.

We are happy to conduct seminars for individual clients upon request. If you would like us to come in for a free seminar, please email Storrs Downey at sdowney@bdlfirm.com.

Bryce Downey & Lenkov LLC is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Crown Point, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov LLC is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

- Business Litigation
- Business Transactions /Counseling
- Corporate/LLC/Partnership Organization and Governance
- Construction
- Employment and Labor
- Insurance Coverage
- Insurance Litigation
- Intellectual Property
- Medical Malpractice
- Professional Liability
- Real Estate
- Workers' Compensation

The attorneys at Bryce Downey & Lenkov LLC are committed to keeping you updated regarding the latest developments in workers' compensation law in Illinois and Indiana. If you would like more information on any of the topics discussed above, or have any questions regarding these issues or any aspect of Illinois and Indiana employment law, please contact Storrs Downey at 312.377.1501 or sdowney@bdlfirm.com.

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