BRYCE DOWNEY & LENKOV LLC

Labor & Employment Newsletter
January 2015

Bryce Downey & Lenkov Case Results

Storrs Downey and **Maital Savin** secured the dismissal of a NLRB action brought by a union employee based on an alleged interference with concerted activity less than two months after receiving the case.

Storrs Downey and **Jeff Kehl** obtained a dismissal of several counts of a discrimination claim brought in the United States District Court in the Northern District of Illinois, which helped facilitate a settlement for substatntialy less than the original demand.

Storrs Downey secured a dismissal by the Illinois Department of Human Rights of a pregnancy discrimination claim after filing a position statement.

Ready For Illinois' New Pregnancy Accommodation Law?

Beginning on January 1, 2015, an amendment to the Illinois Human Rights Act (IHRA) will require Illinois employers to provide reasonable accommodations to pregnant employees and applicants. Below are some key points and important take-aways for all Illinois employers:

Who does the amendment apply to? Unlike other laws such as the Family Medical Leave Act (FMLA), which only applies to certain employers, this new law will be more widespread as it applies to all Illinois employers. Additionally, the amendment applies to all full-time, part-time and probationary employees and applicants who are pregnant, recovering from childbirth or those employees or applicants who suffer from medical or common conditions related to pregnancy or childbirth. While not clearly defined, conditions related to pregnancy may potentially be interpreted broadly to include conditions associated with assistive reproductive technology (such as in vitro fertilization) and possibly even abortions.

Upcoming Labor & Employment Webinar!
1/22/15
Click Here to Register
Your Top Ten Tricky Employment Termination Questions Answered

What obligations to accommodate does the amendment create? The amendment requires employers to provide reasonable accommodations for medical or common conditions related to pregnancy and childbirth. A reasonable accommodation is any reasonable temporary change that allows the employee to do the essential functions of her job. Such accommodations may include, but are not limited to, more frequent restroom breaks, water breaks, periodic rest periods, a private space for expressing milk, seating, light duty, temporary transfers to less strenuous positions, modified work schedules and leave to recover from childbirth. Leave need not be paid. If leave is taken, an employer must reinstate the employee to an equivalent job.

This obligation to provide a reasonable accommodation is only triggered if an employee or applicant requests such an accommodation. When an employee requests an accommodation, the employer is required to have a timely, good faith and meaningful conversation with the employee or applicant regarding what accommodations would be reasonable, considering the essential functions of the job. However, employers cannot require employees or applicants to accept an accommodation.

Employers are not obligated to provide an accommodation or reinstate an employee if doing so would create an "undue hardship." In other words, an employer will not be required to provide a reasonable accommodation if doing so would be prohibitively expensive or disruptive. Employers bear the burden of proving that an accommodation would create an undue hardship.

Can Employers request medical documentation to support an employee's request for an accommodation? Yes, but only if the request relates to a medical condition (as opposed to a common condition.) Employers should be cautious to limit the information requested to the medical reason for the accommodation, the description of the needed accommodation and the applicable time period.

What other obligations does the amendment create for employers? The amendment requires employers to conspicuously post notice of employee rights under the amendment, including information regarding filing a charge with the Illinois Department of Human Rights. Additionally, employers that have employee handbooks must include such notice in their handbooks. Finally, employers are prohibited from retaliating against employees that request an accommodation.

Accommodation at the Federal Level: While this amendment requiring employers to provide reasonable accommodations only applies to Illinois employers, the EEOC, a federal agency, recently issued guidance indicating that employers should accommodate pregnant employees. Although the EEOC guidance is not binding, it may be persuasive in certain courts. In addition, the United States Supreme Court is currently deciding the case of *Young v. UPS*, which will make clear whether employers are required to accommodate pregnant employees. Young involves a former pregnant UPS employee whose request for a temporary light duty work accommodation was denied, although UPS provided such accommodations to non-pregnant employees. Young sued for gender discrimination, disability discrimination under the Americans with Disabilities Act (ADA) and discrimination under the Pregnancy Discrimination Act. We will be watching this case closely and will keep you posted.

> Practice Tip:
> In addition to posting the required notice and amending existing employment handbooks, employers should evaluate possible light duty accommodations once they learn an employee becomes pregnant.

First EEOC Transgender Suit

The EEOC recently filed its first lawsuits concerning alleged sex discrimination against transgendered employees. In one case, according to the EEOC, the employee advised her employer that she was undergoing a gender transition and would soon present for work in appropriate business attire consistent with her gender identity; two weeks later, she was terminated and told that what she was "proposing to do" was unacceptable. In another case, according to the EEOC, the employee had performed her duties satisfactorily throughout her employment; however, after she began to present as a woman and informed her employer that she was a woman, she was fired.

> Practice Tip:
> While the law concerning transgendered individuals is still growing, employers should exercise caution when taking any employment action involving such individuals, being careful not to take actions that could be viewed as treating the employee differently than other employees.

Although Title VII of the Civil Rights Act of 1964 does not expressly prohibit employment discrimination on the basis of transgender status, the EEOC has taken the position that employment discrimination based on an individual's gender identity, change of sex and/or transgender status is a form of sex discrimination that violates Title VII. The EEOC noted that these lawsuits are part of the Strategic Enforcement Plan it adopted in 2012, which includes coverage of lesbian, gay and transgender individuals under Title VII's sex discrimination provisions a top enforcement priority.

Transgendered employees can present a number of concerns for employers, including which pronouns to use to refer to an employee, which bathroom to permit or require an employee to use and dress code issues. We recently presented a webinar on this topic. If you would like a copy of the webinar, please email Jason Klika at jklka@bdlfirm.com.

Get Smart About Your Smart Phone Policy

"Smart" phones and other electronic devices such as tablets have many advantages, including allowing employers and employees to stay more connected. However, electronic devices also create a perpetual workplace. The Fair Labor Standards Act (FLSA) and state overtime laws require that covered employees receive compensation for "all hours worked." When non-exempt employees respond to or even read work-related emails during rest or meal periods, after hours or during vacation, this creates exposure for employers for overtime claims under the FLSA and state overtime laws.

This issue is currently being litigated before the United States District Court in the Northern District of Illinois in *Allen v. City of Chicago* (No. 10 C 3183.) Allen, a Chicago police sergeant, filed suit on behalf of himself and a putative class of employees of the Chicago Police Department, alleging that the City violated the FLSA by failing to pay Plaintiff's overtime wages for work performed on their Blackberry devices outside of normal working hours. The Court previously denied Defendant's motion to dismiss and recently denied Defendant's motion to decertify the collective action. We will closely monitor this case and keep you posted.

Please feel free to contact us with any questions you have about tailoring your workplace policies to avoid such overtime claims.

Practice Tips:

- Avoid issuing company-owned electronic devices to non-exempt employees.
- Clearly designate hours that non-exempt employees may use electronic devices for work purposes.
- Discourage non-exempt employees from using electronic devices for work-related purposes after designated work hours.
- If you require non-exempt employees to use technology outside of working hours for work-related purposes, insist that they record their time and compensate them for such time worked.
- "Lock out" non-exempt employees during non-designated work hours.

Swift & Adequate Action by Employer Results in Successful Summary Judgment Award

In the recent case of *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694, 698 (7th Cir. 2014), the 7th Circuit Court, affirmed the District Court's decision granting Defendant-employer's Motion for Summary Judgment in a Title VII action. The suit alleged that Defendant failed to take sufficient steps to stop Plaintiff's co-workers from subjecting him to sexual and racial harassment and later retaliated against him by suspending him for complaining about the alleged harassment.

The Court held that Defendant reasonably responded to Plaintiff's complaints by counseling all three co-workers who made offensive statements and those co-workers either ceased making said comments or no further complaints were made by Plaintiff to Defendant after said counseling. Furthermore, the Court held that Defendant adequately addressed the issue of offensive graffiti in the workplace when it promptly removed the graffiti and threatened every co-worker with termination if he or she was caught graffiting the walls. The Court rejected Plaintiff's argument that Defendant could have done more to identify the co-worker responsible for the graffiti. Additionally, the Court held that Plaintiff failed to prove retaliation when it could only speculate that his suspension was related to his prior complaints and Defendant was able to explain Plaintiff's suspension.

Practice Tip:

Timing and responsiveness is vital. As seen in the *Muhammad* case, the Court recognized the employer's swift action to remedy potentially discriminatory aspects of the workplace. It is crucial that all employers act quickly upon their employees' complaints to avoid litigation and to be able to support that they have taken appropriate steps as a defense to any litigation that may arise.

A Look Back: Trending At The EEOC

Looking at comprehensive data that has been compiled by the Equal Employment Opportunity Commission (EEOC) for 2013 reveals some important trends. The total number of charges filed with the EEOC in 2013 was approximately 6000 fewer than the number filed per year from 2010 to 2012 and a 5.7% decrease from the charges received in 2012. Nevertheless, 2013 became one of the top 5 years for charges received since 1997. Retaliation charges made up 41.1% of the charges in 2013, followed by race (35.3%), sex (29.55%), disability (27.7%), age (22.8%), national origin (11.4%), religion (4.0%) and color (3.4%). Although race, national origin, religion and disability charges saw decreases in the raw number of charges filed in 2013, when compared to 2012 however, their percentage of overall claims increased. Charges based on sex decreased by 1%. Charges based on race increased by .7% and retaliation charges increased by 3%.

The majority of charges (66%) resulted in the EEOC concluding that there was no reasonable cause to believe that any discrimination had

occurred and 14.8% of the charges were closed for administrative reasons. The EEOC filed 148 enforcement suits in the federal district courts in 2013. Of the remaining charges, the majority will resolve by settlement, with the remaining claims either being withdrawn by the charging party after receiving benefits or being resolved by conciliation. Notably the average time it took the EEOC to investigate and resolve charges was reduced by 21 days in 2013 to 267 days.

Overall, it is apparent that the EEOC is handling a significant amount of employment discrimination charges in litigation with less staff and financial support. Looking forward, we can expect the agency to focus on efficiency and effectiveness by pursuing more systemic cases and increasing its presence on social media. We will continue to monitor these trends and keep you posted.

Medical Marijuana Update

In our April 2014 newsletter, we provided you with an update on Illinois' Compassionate Use of Medical Cannabis Pilot Program Act, which went into effect on January 1, 2014. In September 2014, the Illinois Department of Public Health (IDPH) began accepting applications from individuals seeking to legally obtain marijuana. The IDPH has issued approximately 600 approval letters. Additionally, the Illinois Department of Financial and Professional Regulation and Department of Agriculture accepted applications for dispensaries and cultivation centers in September 2014. However, there are still no dispensaries in operation. Therefore, individuals are still unable to legally obtain medical marijuana in Illinois.

Accordingly, we have yet to see any litigation in Illinois on this issue. However, we will be closely monitoring the case of *Coats v. Dish Network, L.L.C.*, 2013 COA 62, 303 P.3d 147 cert. granted, 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014). There, the Colorado Appellate Court upheld the termination of an employee who tested positive for marijuana, but was not impaired at work. The Colorado Supreme Court granted certiorari and its decision is currently pending. While the Colorado Supreme Court's ruling will not be binding on Illinois, it will be the first time that the courts will address this issue. We will keep you posted.

Until then, it is important that employers avoid basing any employment decisions on drug test results alone, but instead, also base their decisions on articulable factors that support a good faith belief of impairment.

To learn more about the impact of marijuana laws on the workplace, Click Here to view **Maital Savin's** article entitled "Weed In The Workplace," which was published in Litigation Management Magazine.

Importance Of Properly Identifying Essential Job Functions And Reasonably Accommodating Restrictions

In *Kauffman v. Petersen Health Care* VII, LLC, 769 F.3d 958 (7th Cir. 2014), the 7th Circuit reversed the District Court's grant of summary judgment in favor of Defendant-employer in an ADA action, and remanded the case for further proceedings where Defendant presented a policy of never accommodating an employee with restrictions and failed to evaluate the Plaintiff's request for a reasonable accommodation.

Plaintiff worked as a hairdresser for a nursing home and was required, two days per week, to transport residents to and from their rooms to the facility's salon by pushing the residents in their wheelchairs. Plaintiff also occasionally cleaned small areas of the facility, assisted in the laundry room and carried food to residents.

Following surgery for a non-work related illness, Plaintiff's physician instructed Plaintiff to return to work with a permanent restriction that eliminated Plaintiff's ability to transport patients in wheelchairs. Plaintiff advised Defendant that she could no longer push patients in wheelchairs, but was informed that Defendant did not accommodate employees with restrictions. As a result, Plaintiff resigned from her position with Defendant since it was made clear that no effort would be made to accommodate her restriction.

> Practice Tip:
> An employer must correctly define the essential job functions of an employee to determine whether a request for an accommodation would impose an undue burden. Further, a policy that refuses to ever consider or accommodate an employee's restriction will increase the likelihood that an employer will face liability under the ADA.

The 7th Circuit emphasized that Defendant failed to consider the essential job tasks required of Plaintiff as a hairdresser and whether a reasonable accommodation could be made to accommodate her restriction. Instead, Defendant ascribed the pushing of residents in wheelchairs to a much greater proportion of Plaintiff's job duties than was supported by the record. The Defendant refused to accommodate Plaintiff's restriction because it claimed that the transporting of patients in wheelchairs was an essential job function of Plaintiff's role

as a hairdresser and therefore, could not reasonably accommodate Plaintiff without enduring the undue hardship of hiring a new employee to take over this essential function. However, the Court noted that after Plaintiff resigned, the Defendant simply reassigned other employees to take over the "essential" hairdresser function of pushing wheelchair-bound residents to and from the salon.

The 7th Circuit also took issue with Defendant's blanket refusal to consider accommodating any restrictions whatsoever. The Court made clear that once a request for a reasonable accommodation is made, it is incumbent on the employer to engage in an interactive process with the employee to determine what a reasonable accommodation may be in the specific situation.

Bryce Downey & Lenkov Is Growing

We are pleased to announce the addition of **Jorge F. Rovelo** to our Labor & Employment and Workers' Compensation Departments.

Before joining the firm, Jorge gained considerable labor relations experience by representing Chicago Transit Authority management in labor relations matters. Prior to working for the Chicago Transit Authority, Jorge was an associate at a Chicago law firm specializing in representing employees in workers' compensation matters.

Jorge also gained considerable litigation experience clerking for the Cleveland Metropolitan Bar Association, assisting in the prosecution of attorneys for alleged ethical misconduct and clerking for an Administrative Judge of the Equal Employment Opportunity Commission (EEOC) and the Ohio Bureau of Workers' Compensation.

Jorge is a member of the Chicago Bar Association and also serves on the Young Professionals Board for Have Dreams, an organization dedicated to enhancing the lives of individuals with autism spectrum disorder. During his free time, Jorge enjoys traveling, spending time with friends and family and exploring Chicago.

Giving Back

Suits for Success

On **11/22/14**, **Maital Savin** volunteered for "Suits for Success," a program through the Chicago Bar Association seeking to prepare high school students for their first job interviews. The program provides students with resume review, mock interviews and a gently used suit. In preparation for the event, Maital reviewed the students' resumes and solicited suit donations. Maital also conducted mock interviews to help prepare students for the real thing.

BDL Donates To The Chicago Food Depository

This year in lieu of sending holiday cards, Bryce Downey & Lenkov has made a donation to the Greater Chicago Food Depository. This non-profit organization provides training and food to those in need as an effort to end hunger.

Click Here to learn more about the Greater Chicago Food Depository.

It's Time For Team BDL To Hustle!

On 2/22/15, we will join more than 4,000 people climbing to the top of John Hancock Center to raise funds for lung disease research, advocacy and education. Last year we had a team of 25 climbers and raised $6,000! For more info or to donate, Click Here.

Team BDL Plunges

On **3/1/15**, Team BDL will plunge into frigid Lake Michigan to raise funds and awareness for the Special Olympics Chicago. This will be our third year braving frigid temperatures to do the Polar Plunge at North Avenue beach. Special Olympics is the world's largest program for sports training and athletic competition for children and adults with intellectual disabilities. Last year we had 7 Polar Plunger and raised over $3,000 for the Chicago Special Olympics. Click Here to donate.

Contributors to the January 2015 Labor & Employment Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were Storrs Downey , Maital Savin and Jorge Rovelo.

Free Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics

Here is what attendees had to say about our November webinar

"Very informative and moved quickly."
"Very Informative, useful information."
"Great slides and true/false multiple choice keeping it interactive, informative and funny. I liked the animation."
"Clear examples from case law about snow/slip/fall liability."

Upcoming

1/22/15 – Click Here to Register
Your Top Ten Tricky Employment Termination Questions Answered
Storrs Downey and Maital Savin

Recent

Spills, Thrills & Bills: The True Story Behind Illinois & Indiana Premises Liability Law
Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace
If you would like a copy of any of our prior webinars, please email Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Workers' Compensation

- Statute Of Limitation Doesn't Bar Evidence
- Injury In A Restricted Work Area Restricts Benefits

General Liability

- Illinois Court of Appeals Broadens Distraction Exception to Open And Obvious Doctrine
- Two Illinois Appellate Courts Reach Different Conclusions In Accumulation Of Ice Cases

Corporate & Construction

- Trade Secrets: If It's Not A "Trade Secret," How Do I Protect It?
- Federal, State And Local Incentives Available For Businesses

Free Seminars & Webinars!

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Some of the topics we presented are:

- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace The Top Ten Employer Mistakes
- An Overview of Employment Law Claims: Investigation and Defense
- Top 10 Employer Mistakes
- Insights Into Employment Law
- An Overview of Employers Liability
- Employment Landmines in Workers' Compensation

If you would like us to come in for a free seminar, Click Here Now
or email Storrs Downey at sdowney@bdlfirm.com or Maital Savin at msavin@bdlfirm.com
We can teach you a lot in as little as 60 minutes.

Bryce Downey & Lenkov 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, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

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

Disclaimer: