

Employment Discrimination

Employee's Suspected Disability Fraud Is Legitimate Basis For Termination

An employer's good faith belief that an employee fraudulently claimed disability benefits is a legitimate, non-discriminatory basis to support that employee's termination and to rebut the employee's claim of age discrimination, says the Second Circuit Court of Appeals. *Roge v. NYP Holdings, Inc.*, No. 00-7773.

The plaintiff in the case, Robert Roge, worked in various capacities at NYP Holdings (the "New York Post") since 1952. In 1996, the Post launched its first-ever Sunday edition, which meant that Roge would have to work Saturday nights. Roge was noticeably upset by this change to his work schedule.

The day after Roge learned of his new Saturday night work obligation, he was admitted to the hospital for chest pains. Later, Roge and his wife met with Roge's cardiologist, Dr. Weinstock, and asked for a letter stating that Roge could not return to work because of his health problems. Dr. Weinstock agreed and sent the requested letter.

The Post's Human Resources Department then sent Roge the company's standard disability forms. Dr. Weinstock completed these forms, stating that Roge was "not able to return to work." Roge signed the forms and submitted them to the Post. Subsequently, a

member of the Post's Human Resources Department explained to Roge the disability benefits for which he was eligible. Roge was apparently dissatisfied with these benefits and immediately stated that he would return to work instead. He was told that he would need a physician's note certifying his fitness for duty before he could return. Roge then asked Dr. Weinstock to certify he was fit for duty. Dr. Weinstock refused—not surprisingly—since he had just a few days earlier certified that Roge was totally unable to work in any capacity. However, Roge was able to obtain a fitness for duty note from another physician.

Roge's sudden change in his disability status led the Post to conclude that Roge "had attempted to fraudulently obtain disability benefits, and that [he] changed his mind when he discovered the details of his benefits package." Around this time, the Post was also undergoing a restructuring—eliminating and consolidating certain positions. One of those positions was Roge's, and Roge was told that there was no longer any work available for him.

Roge sued, claiming that he was terminated because of his age (56). The district court and the Second Circuit disagreed. The Second Circuit concluded that:

It is common sense and entirely lawful for an employer to select for termination an employee

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"Inconvenient" And "Ineffective"

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who the employer in good faith believes recently engaged in fraud relating to the employment. Whether or not fraud actually occurred, questionable circumstances surrounding an employee's claim for benefits provide a non-discriminatory reason for choosing to terminate that employee over others when economic reasons force the employer to make such a choice.

Even though the employer said it based its decision to terminate Roge on the reduction in force rather than the disability fraud—in order to ensure that Roge would still be eligible for severance benefits—the court found this did not in any way prove that the Post's reasons for terminating Roge were inconsistent or pretextual.

As this case demonstrates, an employer sued for discriminatory termination need not prove conclusively that its termination decision was right or correct—it need only show that it had a good faith belief in the reason it gives for the termination (e.g. the employee's disability fraud). Nonetheless, employers that have clearly documented a legitimate, non-discriminatory reason for an employee's termination are in the best position to defend against discrimination claims.

"Inconvenient" And "Ineffective" Accommodations May Both Be Reasonable Under The ADA

Larry Skerski was hired by Time Warner's predecessor in 1983 as a cable service technician. In that position, he performed overhead work that required him to climb ladders, poles and towers, and to do underground work. In 1993, Skerski began experiencing dizziness, nausea and irregular heartbeats while working at heights. He was diagnosed as having a panic and anxiety disorder and had to stop doing overhead work. Skerski's supervisors modified his schedule so that he would only perform underground work. This arrangement continued until 1996, when Skerski's supervisor resigned.

In October 1996, Skerski's new supervisor gave him a below-standard performance review because of his inability to climb. The supervisor told Skerski that he could not continue to work his modified no-climbing schedule, and that he needed to be "100 percent." Skerski requested the use of a bucket truck, which does not require

climbing but allows the technician to get to significant heights. Skerski's supervisor said that Time Warner did not have any bucket trucks available. In addition, Skerski's treating physician expressed the opinion that Skerski would not be able to work in a bucket truck.

Skerski tried to retrain for the overhead work, but was unable to complete the program. He was ultimately reassigned to a warehouse position that paid \$7 an hour less than he was making as a technician. Skerski sustained a back injury in the new position and was unable to return to work following a workers' compensation leave.

Skerski filed suit against Time Warner alleging that the company failed to reasonably accommodate his disability in violation of the ADA. The lower court found that Skerski could not establish a claim under the ADA because climbing was an essential function of the job that he could not perform, and the transfer to the warehouse position was a reasonable accommodation.

On appeal, the Third Circuit found a factual question as to whether climbing really was an essential job function for a technician, and whether eliminating that responsibility constituted a reasonable accommodation. The court acknowledged Time Warner's contention that Skerski's inability to climb caused it considerable administrative difficulties because approximately 75% of the cable system was located overhead. However, it also noted that Skerski had performed the job for three and a half years without doing overhead work. According to the court:

Time Warner's defense in this case has been, in essence, that it would have been "inconvenient" for it to make the adjustments needed to retain Skerski in the position that he previously had.

This was not sufficient "undue hardship" to justify failing to make the accommodation. *Skerski v. Time Warner Cable Co.*, No. 00-3199.

The court also questioned whether reassigning Skerski to the warehouse position, as opposed to providing him with a bucket truck, was a reasonable accommodation. Time Warner argued that this accommodation would have been "clearly

ineffective" because Skerski's own physician stated that this would not prevent the panic attacks. The court stated that while this argument "may ultimately carry the day," it was for a jury to decide the appropriate weight to give the physician's evaluation.

It is perhaps no surprise that an accommodation that is merely "inconvenient" may still be "reasonable" for purposes of the ADA. What is more troubling is this court's suggestion that an accommodation rejected by an employee's own physician may also be reasonable. This is a good illustration of the problem in deciding what constitutes reasonable accommodation, and it highlights the need for employers to be very careful in evaluating each and every request for accommodation.

Seventh Circuit Holds Contingent Fee Is Part of Employee's Taxable Income

When employers settle discrimination cases, how to deal with attorneys' fees is frequently an issue of some concern. The employee wants the attorneys' fees totally excluded from the income reported, so that he or she will not have to pay any taxes on it. On the other hand, the U.S. Tax Court has long held that attorneys' fees paid in discrimination cases must be reported as income. Although the employee may be able to get a tax deduction for the attorneys' fees, current tax laws mean that the deduction is usually less than 100% of the fees paid.

While the U. S. Tax Court has long held that both hourly fees and contingent fees must be included as income, the Circuit Courts of Appeal have not been as uniform with respect to contingent fees. The Fifth, Sixth and Eleventh Circuits have held that contingent fees are excludable, while the Fourth, Ninth and Federal Circuits have held that they are not. Now, the Court of Appeals for the Seventh Circuit (which covers Illinois, Wisconsin, and Indiana) has weighed in on this issue – and it has weighed in on the side of the Tax Court.

Kenseth v. Commissioner, Case No. 00-3705.

In this case, the employee's contingent-fee contract with his lawyers provided that the lawyers would get 40% of any settlement. That meant the lawyers received \$91,800 – which the employee did not list on his tax return. According to the IRS, he should not have excluded the attorneys' fees, and, under the alternative minimum tax, he owed

an additional \$17,000 in taxes. The Seventh Circuit had no sympathy, concluding that there was no reason why an employee paying his attorneys on an hourly basis should pay more in taxes than an employee who pays his attorneys on a contingent basis. The upshot of this decision is that many plaintiffs will pocket even less of the gross settlement amount than before – which may make them even less inclined to lower their settlement demands. In other words, while plaintiffs may end up paying more in taxes, many defendants may really be the ones to bear the brunt of this extra cost.

Study Finds That EEOC Offices Vary Widely In Their Handling Of ADA Charges

A study scheduled for publication in the fall edition of the *Kansas Law Review* finds "enormous variation" in the way EEOC field offices handle discrimination charges under the Americans with Disabilities Act ("ADA").

According to the empirical study, co-authored by a social scientist and a law professor, EEOC policy-makers and agency-wide policy directives have little influence over day-to-day charge processing decisions. Instead, these decisions appear to depend on the whim of local field office personnel. The study's authors based their conclusion on the wide variances in the outcomes of ADA charges across the agency's 50 field offices. For example, after reviewing nearly 150,000 ADA charge resolutions between 1992 and 2000, the study's authors found that cause determinations (where the EEOC finds evidence of discrimination) varied from 1.9% to 19% of all charges, depending on the office investigating the charges. Similarly, EEOC's success in settling cases involving cause determinations ranged from 13.5% to 67.6%, depending on the EEOC office.

Although acknowledging there is inconsistency between offices and that EEOC would like to do a better job of monitoring, EEOC tried to explain away the results of the study. One point made by an EEOC spokesman that appears to have some validity is that controlling court rulings in various parts of the country can affect the strength of a charge. However, that factor is clearly not sufficient to explain why some EEOC offices find merit in less than 2% of the charges

it investigates while other offices find merit ten times as often.

LABOR-MANAGEMENT

Employee's Gripes Protected by the National Labor Relations Act

Holding informational meetings with employees is a good thing, right? Well, not always. As one employer recently learned, it is easy to run afoul of the National Labor Relations Act if you take action against an employee for what they say at these meetings. *National Labor Relations Board v. Caval Tool Division, Chromalloy Gas Turbine Corporation*, No. 00-4203.

In this case, the employer's President held a series of informational meetings for employees. At one of the meetings, the President announced a change in the company's break policy. He said there would now be two breaks per day, during which employees would be required to take care of all personal business. Previously, the company had provided employees with one break, but allowed them to leave their work areas throughout the day to get coffee or take care of personal business.

One of the employees, Diane Baldessari, questioned the President about the new break policy. When Baldessari asked if the new break policy applied to office workers, the President asked her if she would like it to apply to office workers. Baldessari replied, "[I]t would be nice if things were fair for a change." The President responded that the policy would be applied to office workers.

Baldessari then asked if the new break policy was intended to punish workers for production problems, indicating that she felt the problems were not the fault of the workers. Instead, Baldessari blamed management for the problems. The President asked if she would like him to fire all the managers; Baldessari said yes, except for one. The President then "expressed displeasure with Baldessari's continued complaints about management" and suggested that Human Resources "come up with a package" so Baldessari could leave the company.

That afternoon, Baldessari was suspended. She was given a letter admonishing her for challenging the company's right to set and enforce policies

and warned not to engage in any disruptive behavior, including openly criticizing management decisions or challenging the company's right to set policy. About three weeks later, she was allowed to return to work; but she was placed on probation for an indefinite term. About a year later, the company lifted Baldessari's probation.

Baldessari alleged that the company violated the National Labor Relations Act because it interfered with her right to engage in "protected, concerted activity." The Act provides that employees – whether or not they are in a union – are protected if they engage in group activity designed to affect their terms and conditions of employment. The company denied that Baldessari's conduct was protected or concerted. Rather, it claimed that she was disciplined solely for engaging in disruptive conduct. The Labor Board and the U. S. Court of Appeals for the Second Circuit disagreed with the company.

As the court noted, the speech of an individual employee is "concerted as long as it is engaged in with the object of initiating or inducing . . . group action." The intent to initiate or induce group action can be inferred in the context of a group meeting held to discuss the terms and conditions of employment. Accordingly, the Board and the reviewing court concluded that Baldessari's conduct was concerted. Also, while Baldessari's conduct was not "the model of diplomacy," the court said that it did not exceed the bounds of protected conduct. Citing a decision of the Seventh Circuit, it noted that courts will "permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect."

This case presents another reason why employers must be very careful when employees complain in the workplace. A number of different laws prohibit retaliation against employees for complaining about workplace conditions, discrimination or "whistleblowing." Attend our October 19 seminar to learn more!

OCCUPATIONAL SAFETY AND HEALTH New OSHA Head Confirmed

On August 3, 2001, the Senate confirmed John Lester Henshaw as the new Assistant Secretary of Labor for Occupational Safety and Health.

Henshaw has over 26 years experience as a safety/health professional, principally in small to medium-sized businesses. Most recently, he has been Director of Environment, Safety and Health for Astaris, LLC, a St. Louis chemical company emphasizing employee participation in workplace safety. Henshaw, who also served as President of the American Industrial Hygiene Association from 1990 to 1991, received bi-partisan support for his nomination. Not only did Secretary of Labor Elaine Chao state that "American workers win with John Henshaw," during the confirmation hearings Senator Edward Kennedy had high praise for him.

OTHER

Cook County Set Aside Program Is Set Aside

Cook County, Illinois has an ordinance that requires that at least 30% of the total value of any public construction project be set aside for firms owned by racial minorities and at least 10% be set aside for firms owned by women. The ordinance was adopted in 1988. For a number of years, the ordinance was enforced without any challenge. But in 1996, the Builders Association of Greater Chicago filed a complaint alleging that the ordinance violates the Fourteenth Amendment's equal protection clause. The district court ultimately agreed with the Builders Association, and the Seventh Circuit Court of Appeals has now affirmed that decision. *Builders Association of Greater Chicago v. Cook County*, Case No. 00-4161.

According to the appeals court, the county failed to produce any evidence that it had discriminated against either minority or female-owned construction firms in the past. Furthermore, even if the county had proved past intentional discrimination, the court said that set asides would "flunk the constitutional test by not being carefully designed to achieve the ostensible remedial aim and no more." As Judge Posner wrote, there must be "a close match between the evil against which the remedy is directed and the terms of the remedy" in order to meet constitutional muster. Although there is a possibility that the county will seek to have the issue heard by the Supreme Court, the Seventh Circuit's decision seeing aside the set aside is unlikely to be set aside.

All Retirement Plans Must Be Amended – Again

I. GUST

The deadline is fast approaching for amending qualified retirement plans to comply with GUST, an acronym for a number of laws, including the following:

- GATT – Retirement Protection Act of 1994, part of the Uruguay Round Agreements Act
- USERRA – Uniformed Services Employment and Reemployment Rights Act of 1994
- SBJPA – Small Business Job Protection Act of 1996
- TRA97 – Taxpayer Relief Act of 1997

The deadline for the GUST changes varies depending upon whether a plan is an individually designed plan or a prototype plan.

For an individually designed plan, the deadline is the last day of the plan year beginning in 2001. Thus, a calendar year plan must be amended by December 31, 2001.

If you have a prototype plan, the prototype plan sponsor should be contacting you about adopting the necessary GUST amendments. Prototype plans have one year longer than individually designed plans to adopt the necessary amendments. However, this additional one year applies only if the adopting employer timely certifies its intent to amend or restate its plan for the GUST changes by the last day of the plan year beginning in 2001 (December 31, 2001, for a calendar year plan). The certification must be signed and dated by both the employer and the prototype plan sponsor by the due date. Contact the sponsor of your prototype plan if you haven't received such a certification.

II. EGTRRA

Even before the deadline for making the GUST changes had passed, Congress passed another piece of legislation, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), which amended many sections of the Internal Revenue Code governing qualified retirement plans. The vast majority of these changes go into effect for plan years beginning in 2002. Plan sponsors must make a good faith attempt to comply with EGTRRA by the end of the plan

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Labor and Employment Law

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year beginning in 2002. If "good faith" amendments are adopted by the end of the plan year beginning in 2002, then the plan will have until the end of the plan year beginning in 2005 to actually make the more detailed amendments necessary to comply with the new law. Undoubtedly, the IRS will issue further guidance in future years on the changes made by EGTRRA, which will be reflected in the final amendments.

The IRS recently issued sample language for plan amendments that will comply with EGTRRA's "good faith" standard. The IRS's model amendments cover both required and optional amendments under EGTRRA.

Required Amendments Include:

- Faster vesting of employer matching contributions.
- Modification of top-heavy rules.
- Modification of provisions regarding direct rollovers from a plan.
- Revision of the suspension period following a hardship distribution from a 401(k) plan.
- Elimination of the "multiple use" test in nondiscrimination testing of 401(k) and matching employer contributions.

Optional Amendments Include:

- Increase in maximum benefits for defined benefit plans and maximum annual additions in defined contribution plans.
- Increase in maximum annual compensation taken into account.
- Increase in maximum permitted 401(k) contributions.
- Availability of "catch-up" contributions for employees aged 50 and older.
- Disregarding of rollovers in the determination of involuntary cash-outs of less than \$5,000.

Plan sponsors should decide before the 2002 plan year which optional EGTRRA provisions to incorporate. Ideally, these decisions should be coordinated with the GUST amendment process to the extent possible. Good-faith amendments for EGTRRA may be made at the same time as the GUST amendments, although the IRS currently will rule only on the GUST amendments. For the vast majority of plan sponsors, adopting the IRS's model language will be administratively more expedient than drafting original language. For additional information regarding compliance, you may contact Larry Hansen (312.443.0456) or Linda Simon (312.443.0672).