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Employer hit hard in mental disability discrimination case

A federal jury in Massachusetts recently sent a tough message to employers about what not to do when an employee discloses a mental health disability.

The employer, PPD Development, a pharmaceutical company headquartered outside of Boston, hired Dr. Lisa Menninger in 2015 as a highly compensated director of its Kentucky-based laboratory services.

Menninger initially received highly positive reviews, but about a year into her tenure she started working remotely from the East Coast due to family circumstances.

About a year after that, Menninger's supervisor told her that her role would soon become more visible, with more client visits, social interactions and presentations intended to boost the bottom line.

Menninger, who had previously told her supervisor she was overwhelmed, claims this prospect triggered increased anxiety that resulted in physical distress.

In early 2018, Menninger made what she described as the "difficult decision" to disclose to her employer that she suffered from generalized anxiety disorder that included social anxiety disorder and panic attacks.

A back-and-forth ensued between Menninger and the employer about potential accommodations like pre-recording some of her presentations and having a surrogate perform some of her more interactive duties while she made herself available to respond to questions.

The company agreed to two of her requested accommodations but denied the other three, deeming those functions "central" to her role.

Two weeks later, a human resources official brought up the possibility of Menninger taking an exit package or transitioning to a consultant role.

Menninger said she wasn't interested in these options and requested additional detail regarding the rejected accommodations. When the company responded that her requests were unreasonable, Menninger suggested they "table" the discussion until a task arose that impacted her disability.

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‘Speak Out’ Act: What does it mean for employers?

Many employers have tried to protect themselves from the fallout from sexual harassment or sexual assault allegations by utilizing “nondisclosure” and “non-disparagement” clauses that bar an employee from talking about certain types of conduct that may have occurred or from making negative statements about an employer related to such conduct.

In many instances, employers have made employees sign these contracts preemptively, before any allegation of sexual misconduct had come to light.

Employee advocates say the effect of these provisions is to perpetuate harmful and illegal conduct by silencing survivors of sexual harassment, assault and retaliation.

However, in the wake of the Speak Out Act, which was signed by President Joe Biden late last year, employers need to understand that such provisions are no longer enforceable in court.

The law specifically renders non-disclosure and non-disparagement clauses related to allegations of sexual assault and/or harassment void if they’re entered into “before the dispute arises.”

Although there is some uncertainty about what that phrase means, the general understanding is that once someone makes an allegation of sexual assault or harassment, a dispute has arisen, even if the worker has not yet filed suit.

This means that employers can still seek to have an employee making such accusations sign a nondisclosure or non-disparagement clause as part of an agreement to resolve an existing dispute.

But an employer will be on much shakier ground trying to enforce blanket agreements that purport to cover potential disputes that might arise.

Though the new law doesn’t appear to impose penalties for non-compliance, no employer wants to be caught flat-footed thinking they can rely on agreements in place only to find out that those agreements aren’t enforceable. That’s why it’s a good idea to have an attorney review your employment agreements, handbooks and policies with the new law in mind.

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Recent case highlights importance of preserving business-related texts

A case out of Texas serves as a warning to employers about how crucial it is to preserve business-related texts between employees, even on their own personal devices, or risk sanctions in court.

Plaintiff Carlos Miramontes had been working for his employer for nearly 30 years when it was acquired by another company, Peraton, Inc.

Peraton quickly initiated a reduction in force that it referred to internally as “Project Falcon.” It claimed the RIF was motivated by “budgetary constraints.”

Miramontes was terminated in the first round of layoffs. During the termination meeting, his manager allegedly brought up Miramontes’ age, telling him twice without prompting that he was not being terminated for that reason. The manager allegedly did this on his own without Miramontes bringing up his age first.

Miramontes suspected that the company was really motivated by age and race and not budgetary concerns and hired a lawyer, who sent the company a letter seeking $500,000 to settle the dispute and demanding that all documents relevant to the claim be preserved, including texts.

The employer issued a letter instructing managers to preserve emails related to Miramontes’ claims but didn’t mention texts.

One of the managers who selected Miramontes for the RIF admitted under oath during a deposition that he read the demand letter, but not the part about text messages, and that he immediately sent “one or two” texts to the other manager involved in the selection process. But he couldn’t produce the texts because nobody at the company told him to save them.

Miramontes moved for sanctions.

The company argued in response that it didn’t control the text messages because they were on the managers’ personal devices and there was no company policy giving it the right to obtain them.

But a U.S. District Court judge ruled that because employees regularly conducted business over their cell phones, the company did have control over them. She also found that deletion of the messages was intentional and in bad faith, that the texts potentially could have supported Miramontes’ claims and that he suffered prejudice as a result.

Accordingly, the judge denied the company’s motion to dismiss the case, set a quick trial date and ruled that a jury could infer that the texts were deleted because they would be damaging to the company’s case.

If your own employees use their personal devices to communicate about business-related matters, it’s critical to ensure your policies address the issue of preserving such communications. A local employment attorney can help.

Employers must prepare to accommodate new protections for pregnant workers

In December 2022, President Joe Biden signed into law the Consolidated Appropriations Act of 2023, a $1.7 trillion spending bill that includes funding for a wide range of foreign and domestic priorities.

Among the many provisions in the bill are two that employers need to be aware of: the Pregnant Workers Fairness Act (PWFA), which increases workplace accommodations for pregnant employees, and the PUMP for Nursing Mothers Act, which requires covered employers to provide time and space for breastfeeding mothers.

Here are some basics to help you familiarize yourself with their requirements.

First, the PWFA, which is modeled on the Americans with Disabilities Act, requires any employer with at least 15 employees to make "reasonable accommodations" for "known limitations" related to pregnancy, childbirth or a related medical condition.

A limitation that an employer might need to accommodate under the PWFA does not need to qualify as a disability under the ADA.

Accommodations might include things like flexible work hours, modified seating, extra break/restroom/eating time, closer parking spaces, being excused from strenuous activities or exposure to materials that are unsafe during pregnancy.

Employers need not make accommodations under the PWFA that would impose an "undue hardship." But like under the ADA, they must engage in an interactive process with the employee to figure out together the kinds of accommodations that might work best.

An employer that violates the PWFA may be ordered to pay lost wages, compensatory damages (to "make the employee whole" for the harm they suffered), punitive damages and attorney's fees.

Meanwhile, the PUMP Act expands already existing protections that guarantee break time for breastfeeding employees to express milk in the workplace. Such protections previously applied primarily to wage workers. Now they apply to all employees except certain transportation workers and employees of small companies that would suffer "undue hardship" from the new law.

Employers should be aware that they cannot deny pump breaks to remote workers, and that they need to provide pumping space that is blocked from view of other employees, is available when needed, and is not a bathroom.

To ensure that your company is prepared to comply with these new laws, call an employment attorney in your area.

Employer hit hard in mental disability discrimination case

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She ultimately reported to HR that she felt her supervisor was starting to target her over her disability, though the employer concluded otherwise. Menninger subsequently told the company that her doctor advised her to take immediate medical leave. After spending the next several months on leave, she was terminated.

She filed a disability bias claim in federal court alleging failure to reasonably accommodate a disability, wrongful termination and retaliation. Following a trial, a jury found in her favor, handing down an eight-figure damages award. A significant portion of the award was for "punitive" damages meant to punish the employer for its behavior.

This case provides an important lesson to employers that they must tread carefully when confronted with an employee's mental disability, educate themselves about the disability and comply with the law. It also highlights the importance of having a good employment attorney to advise you in these instances.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

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Companies should beware of 'salary basis' requirements

A lot of employers assume that if an employee is highly compensated, they're "exempt" under the federal Fair Labor Standards Act and thus not subject to overtime requirements.

If you're one of those employers, you should meet with a labor and employment attorney to review your pay structure. Because as a recent U.S. Supreme Court decision indicates, you could be setting yourself up for a big overtime payment you weren't expecting.

In that case, Michael Hewitt managed other workers on an offshore oil rig. His employer, Helix Energy Solutions, paid him solely on a daily rate and often required him to work more than 40 hours a week without paying him overtime.

Hewitt sued under the FLSA. Helix argued that it didn't have to pay overtime to the plaintiff, who was earning more than $200,000 a year, because he was a "highly compensated employee" exempt from such a benefit.

Hewitt argued that because he was paid a daily rate, he was not paid on a "salary basis" and thus was entitled to overtime no matter how much he made. While a trial judge ruled in Hewitt's favor, the 5th U.S. Circuit Court of Appeals reversed on appeal.

But the Supreme Court reversed the 5th Circuit, finding that Hewitt was entitled to overtime. Specifically, it found that daily rate workers, regardless of income level, are deemed to be paid on a "salary basis" only if they receive a predetermined, fixed salary that doesn't depend on time worked; the preset salary exceeds a certain amount; and they have responsibility for managing the business, directing other workers and hiring and firing them.

While Hewitt satisfied the latter two criteria, the fact that he was paid a daily rate rendered him "non-exempt" and entitled to overtime.

This is a particularly important decision for employers to be aware of because of how costly FLSA cases can be. If a worker wins their claim, not only are they entitled to damages, but the court can award attorney's fees and court costs.