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Employment Litigation in Review #5

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Ninth Circuit Rules that Attendance is Essential Job Function For NICU Nurse Under ADA

Samper v. Providence St. Vincent Medical Center, Case No. 10-35811___ F.3d ___ (9th Cir., April 11, 2012)

On April 11, 2012, the U.S. Court of Appeals for the Ninth Circuit upheld summary judgment for the defendant when it ruled that a hospital did not need to grant a broad exemption from its attendance policy as a reasonable accommodation for a neo-natal intensive care unit ("NICU") nurse with a disability.

In *Samper v. Providence St. Vincent Medical Center,* the defendant maintained an attendance policy that allowed for five unplanned absences per year. The plaintiff, a NICU nurse with fibromyalgia, exceeded the policy limits for almost eight years before being discharged. During the Plaintiff's tenure, the employer made multiple attempts to address her absences and granted several accommodations. Ultimately, however, Samper could not adhere to the policy and was discharged. Samper then sued, alleging a violation of the Americans with Disabilities Act ("ADA") due to a failure to accommodate, and the trial court granted summary judgment in favor of the hospital on the grounds that Samper's inability to follow the attendance policy rendered her unqualified for the job.

The appellate court affirmed the lower court's decision holding that "regular attendance is an essential function of a neo-natal nursing position at the hospital." More specifically, the Plaintiff's "performance is predicated on her attendance; reliable, dependable performance requires reliable and dependable attendance. An employer need not provide accommodations that compromise performance quality—to require a hospital to do so could, quite literally, be fatal."

Facebook Makes More Information Available Via its "Download Your Information" Feature

We have talked about social networking in the past and how it may be used in employment claims. Well, Facebook has recently made more information available to be downloaded and used by litigants. The new data provides even greater historical information about Facebook users. According to the Facebook Privacy Blog,

> *"Starting today, you will be able to download an expanded archive of your Facebook account history. First introduced in 2010, Download Your Information lets you get a copy of what you've shared on*

> *Facebook, such as photos, posts, messages, a list of friends and chat conversations. Now you can access additional categories of information, including previous names, friend requests you've made and IP addresses you logged in from. This feature will be rolling out gradually to all users and more categories of information will be available for download in the future. Download Your Information is available from your Facebook Account Settings."*

It seems that Facebook is looking for ways to step back from dealing with all the information subpoenas it receives, and rather looking into that will allow litigants to obtain the data without their help.

NLRB Administrative Law Judge Rules on Social Networking Policy

G4S Secure Solutions (USA) Inc., Case No. 28-CA-23380 (March 29, 2012)

In *G4S Secure Solutions (USA) Inc.,* the respondent maintained a Social Networking Policy, which contained two contested provisions:

- *Photographs, images and videos of G4S employees in uniform, (whether yourself or colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.*
- *Do not comment on work-related legal matters without express permission of the Legal Department.*

The Administrative Law Judge ("ALJ") determined that the first provision did not violate Section 7 of the NLRA; however, the second provision did. In ruling on the provision in regards to the photographs, the ALJ wrote, "regarding the prohibition on placing photographs on social networking sites, this rule does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights." More specifically,

> *Respondent clearly has legitimate reasons for not having pictures of uniformed employees or employees who are at work posted on Facebook and similar sites. Starting with the worksite, Respondent does have patient privacy concerns for the EMT services it provides. Moreover, Respondent serves a variety of clients on a national basis. The various businesses and government agencies where its employees work can be presumed to have their own rules centered on privacy and legal concerns. I find the rule at issue here is reasonably construed as protecting Respondent's clients. To read it as a prohibition on Section 7 activity strikes me a stretch, particularly considering the rule does not ban photographs but merely prohibits employees from posting them on social networking sites.*

Conversely, in regard to the "not comment[ing] on work-related legal matters" the ALJ held that this provision was overly restrictive of employees' rights to engage in protected concerted activity. Citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007), *enfd. sub nom Nevada Service Employees Union, Local 1107 v. NLRB,* 358 Fed. App'x 783 (9th Cir. 2009), the ALJ determined,

> *[T]he rule is reasonably interpreted to prevent employees from discussing working conditions and other terms and conditions of employment, particularly where the discussions concern potential legal action or complaints employees may have filed. Social network discussions can vary from postings everyone in the public can see, to messages between specific individuals only. The rule at issue here would reasonably be read to prohibit two employees, such as Sterling and Banuelos, from sending messages to each other about their issues at work and their EEOC and hotline complaints via a social networking site. Likewise, it would reasonably prohibit a discussion group among concerned employees on a social*

> *networking site. Because this part of the Policy is reasonably interpreted to thwart protected discussions, I find it violates the Act.*

As you can see, social media policies continue to be a highly debated topic and are still being analyzed on a case-by-case basis. As such, you should review your current policy to be sure that it complies with this new ruling.

A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law. You can reach him by email at sean [at] sgajewski [dot] com. Bio: www.sgajewski.com.