

Hot Topics for Tennessee cities and towns

December 11, 2000

#62

Personnel Issues in the News

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The following Hot Topic summarizes pertinent information, key legislation, and Supreme Court rulings that took place during 2000.

ADA and Disability Issues

Don't Rely on EEOC Guidelines to Defend ADA Decisions

The Equal Employment Opportunity Commission does a good job of interpreting the intentions of Congress relative to enforcing the Americans with Disabilities Act (ADA), but it is not infallible.

A decision handed down recently by a panel of the 5th U.S. Circuit Court of Appeals makes it clear that the EEOC's position — even if it has been expressed in its interpretive guidelines — will not be accepted as gospel by judges hearing ADA cases. The message comes in the case involving the Exxon Corporation. The case is significant because it broadens the ability of employers with the 5th Circuit's jurisdiction to justify safety-based qualification standards in the face of an ADA challenge.

The EEOC's position, as expressed in its interpretive guidance to the Title I regulation, was that an employer must always show the existence of a direct threat when it imposes a safety qualification standard. The appeals courts considered "whether an employer may defend the questioned personnel decision as based on a standard justified as a business necessity or must demonstrate a 'direct threat' in each circumstance."

In a panel decision, the court rejected the EEOC's guidance and held that employers need not establish the existence of a direct threat in individual cases in order to justify the application of a safety-based qualification standard. Determining whether a safety-based qualification standard is a business necessity, the court said, involves measuring the magnitude of potential harm and the likelihood of its occurrence. The appeals court reversed the District Court's decision and remanded the case for further proceedings.

(Reprinted from *HR Reporter*, May 2000, Vol. 17, No. 5)

ADA Protects Officer with HIV

The United States Court of Appeals for the 6th Circuit ruled that a police department could not refuse to hire an applicant with HIV. Neither the risk of contagion, nor reliance upon a doctor's report was sufficient reason for the city to reject the officer's application. Because the city's physician did not engage in an "individualized inquiry" as required by the law, the city was not entitled to rely on his recommendation. *Louis Holiday v. City of Chattanooga, TN*, Docket No. 98-5619, March 10, 2000.

Louis Holiday is currently a police officer with the Tennessee Capitol Police. Prior to obtaining this position in 1997, he had applied for and been conditionally offered a position as a police officer with the City of Chattanooga, TN. During the post-offer physical, Holiday voluntarily disclosed his HIV positive status to the physician, Dr. Steve Dowlen. However, he exhibited no symptoms of AIDS, and there was no evidence that Holiday experienced any HIV-related illnesses at all. In fact, Holiday had already passed rigorous physical tests. However, Dr. Dowlen reported that Holiday would be unable to perform the strenuous activity required in police work.

There was evidence in the record that Dr. Dowlen's office called the city's personnel director, Donna Kelley, and told her that Holiday had failed the exam due to AIDS-related health problems. The record also revealed that department officials withdrew the offer of employment, telling Holiday that the city could not put others at risk of contracting the disease. The city conceded that Holiday has a statutorily protected disability but argued that Holiday was not "otherwise qualified" to perform the job and that he failed to satisfy a prerequisite of the job by passing a pre-employment physical exam, not because of any discrimination.

The 6th Circuit disagreed. With respect to the "otherwise qualified" argument, the court found sufficient evidence that Holiday was qualified, he had passed a physical agility test, and in fact later became employed as a police officer for a different jurisdiction. In addition, the city was wrong to rely on the doctor's report because the court found that the physician did not conduct an individualized inquiry as required by the ADA. "Employers do not escape their legal obligation under the ADA by contracting out certain hiring and personnel functions to third parties. The ADA expressly prohibits employers from 'participating in a contractual or other arrangement that has the effect of subjecting a covered entity's qualified applicant or employee to ... discrimination'" quoting 42 U.S.C. Section 12112(b)(2).

The 6th Circuit also dismissed the city's contention that it refused to hire Holiday not because of his disability, but rather because of his failure to satisfy a prerequisite of the job. The court said Holiday should be allowed to proceed to trial with his case because a jury could conclude that the reason is merely a pretext for discrimination.

(Reprinted from *IPMA News*, May 2000)

ADA Trumps Voluntary Affirmative Action Plan

An EEOC opinion letter dated January 31, 2000, states that an employer must offer a vacant position to a qualified disabled employee over a minority employee who would normally receive the job as a result of a voluntary affirmative action policy.

The letter indicates that “as long as the employee with the disability is qualified for the position ... then [that employee] is entitled to it, even if the other candidate might be considered better qualified.” Also addressed in the statement were ADA confidentiality issues and, specifically, the amount of information managers need so that they can make accommodations for qualified disabled employees. “The extent of information released to the manager [or] supervisor, however, should be limited to what [he or she] needs to know in order to comply with the ADA.”

Although EEOC opinion letters are not “official opinions,” they do offer guidance to employers on the position the EEOC will take with regard to certain issues. The EEOC has not officially addressed this situation, but employers should take note, or they may find themselves in court as the “test case.”

(Reprinted from *Management Matters*, April 2000, Vol. 1, No. 1)

ADA Does Not Bar Difference in Coverage

Employers who think they should have the same coverage for mental disabilities as they receive for physical infirmities are increasingly unable to sue employers under the Americans with Disabilities Act. But that doesn't leave employers free from the risk of litigation.

With its March decision in *Equal Employment Opportunities Commission v. Staten Island Savings Bank*, the 2nd U.S. Circuit Court of Appeals joined six other circuits in holding that Title I employment provisions of the ADA do not bar covered entities from offering different long-term disability benefits for mental and physical conditions.

Although the ADA may apply to the sale of insurance, it does not bar benefits distinction for mental and physical disabilities. The court's ruling does not mean that employees can't sue for equal coverage. It merely means that the employees can't sue under the ADA. The Mental Health Parity Act of 1996 covers a number of equity issues, and Congress is still considering additional mental health parity legislation.

(Reprinted from *HR Reporter*, September 2000, Vol. 17, Issue 9)

Disability-Related Costs Increase Slightly

The increase in cumulative trauma disorders (CTD) and other work-related injuries caused the amount of money employers spent on workers' compensation and sick pay to rise in 1999. A survey carried out by the Washington Business Group on Health and Watson Wyatt Worldwide indicated that disability-related costs rose to 6.3 percent of payroll in 1999 – slightly up from 6.1 percent last year.

The results point to a recent trend in work-related injuries and illnesses, including CTDs that are coming under increasing governmental scrutiny. The study covered 178 major companies in the

United States; the average company employed 13,500 people and had annual revenues of nearly \$12.4 billion.

Some of the survey's most important results were: (1) Respondents said the indirect cost of disability also continued to rise, with average cost for overtime, replacement employees, and workstation/job accommodations at 8 percent of payroll, up from 6.7 percent the year before. This increase was due to the low unemployment rate. (2) The four most effective disability management activities were transitional and modified return-to-work programs, case management, behavioral health intervention and independent medical exams. (3) Twenty-five percent of companies with RTW programs saw declines in their LTD costs. No company without such a program reported a decline in these costs. (4) The chief concern for employers in the future was maintaining employee confidentiality. This was followed by apprehension about governmental regulations of health and disability plans.

(Reprinted from *HR Reporter*, September 2000, Vol. 17, Issue 9)

Safety Prevails Over Accommodation

Safety prevails over accommodation, a court ruled in a case concerning a railroad engineer who was taking a prescription drug. A male locomotive engineer was taking the prescription drug Xanax when he had three incidents of overshooting passenger platforms. The company required him to submit to a drug and alcohol screen.

Although the company doctor determined that the engineer was taking the drug for legitimate reasons, the company removed him from his job for safety reasons until he discontinued using Xanax. It also said that the engineer refused to provide a urine specimen showing that he had stopped taking the medication.

The engineer claimed that Amtrak violated the ADA by refusing to accommodate him because of a perceived disability. The engineer initially won a verdict of \$500,000, but upon appeal, the court vacated the judgement and ruled in favor of Amtrak. It said the engineer could not perform the essential functions of a locomotive engineer and posed a direct threat to the safety of others. *Shiplett v. National Railroad Passenger Corp.d/b/a Amtrak*, (6th Cr. June 17, 1999) A writ for petition of certiorari is pending.

(Reprinted from *HR Reporter*, March 2000, Vol. 17, No. 3)

Fair Labor Standards Act

Employers Control Use of Compensatory Time

In a 6-3 decision, the Supreme Court ruled that a public employer has the right to control the use of compensatory time. The opinion, delivered by Justice Clarence Thomas, was in favor of the Harris County, Texas, Sheriff's Department and their policy of scheduling deputies for time off when they approached the limit for banking compensatory time.

The FLSA suit was brought by 127 deputy sheriffs employed by Harris County, Texas, against the county, and the sheriff, Tommy B. Thomas. The FLSA requires non-exempt employees to be paid a premium for the hours worked over 40 in a week and an amendment permitted public employers to use compensatory time in lieu of overtime payment.

The problem began when the sheriff's department required employees to use their compensatory time as a way of reducing its potential liability. Significantly, the county had written to the Department of Labor's Wage and Hour Division to ask for its opinion on the policy. The Department issued an opinion letter stating that the county would have to reach an agreement with the deputies prior to implementing the policy.

The opinion letter, notwithstanding, the department went ahead and implemented the policy where the deputies were asked to take leave if they approached the 480 hour cap. If the deputy did not do so, a supervisor would order the employee to take leave at specified times. The deputies sued arguing that the policy violated Section 207(o)(5), which requires employers to accommodate employee's requests for compensatory time off unless to do so would unduly disrupt the employer's operations.

Finding that the above provision does not address the forced use of compensatory time, and that both the law and regulations are silent on the matter, the court upheld Harris County's policy. The court also found the Department of Labor's opinion letter unpersuasive. Although the department's opinion letters are entitled to 'respect', said Justice Thomas, they are not afforded the same deference that is given to regulations. Opinion letters, unlike agency regulations, are not considered during a notice and comment period and are not exercises of the Secretary of Labor's delegated lawmaking powers.

(Reprinted from *IPMA News*, June 2000)

Picking Up Paycheck Considered 'Working'

When the worker asked for workers' compensation to cover injuries she incurred on her day off while picking up her paycheck, the workers' comp board denied benefits — but the state Supreme Court later overturned the decision.

The board ruled she was not eligible for compensation because she was not required to come in for her check. The board also stated that the worker was not furthering the business of the employer by coming to the premises to pick up the pay.

The board's decision did not stand. The worker appealed to the state Supreme Court, which ruled that despite other options available, the employee's presence at the workplace to get her check was pursuant to an employer-approved practice necessary for the affairs of the employer. *Hoffman v. WCAB (Westmoreland Hospital)*, PA. Supreme Court, Dec. 23, 1999.

(Reprinted from *HR Reporter*, March 2000, Vol. 17, No. 3)

Health Care Issues

Health Care Costs Rise

Employers say their health-care cost will rise 9.7 percent in 2000, up from 7.5 percent in both 1999 and 1998, according to a study from Watson Wyatt Worldwide, Bethesda, Maryland, and two other groups. But the study adds that health-care providers like hospitals say their fees will rise only 3 percent. Why the disparity? Watson Wyatt says it is due to more use of services; high cost of drugs,

which are accounted for separately; and a move by insurers to improve their bottom lines by passing on costs, rather than absorbing them to gain market share.

Guess who will pay? The study says 70 percent of employers plan to pass some of the cost on to employees. Companies also plan to negotiate more with insurers and to help workers better match plan needs. The study, done with the Washington Business Group on Health and the Healthcare Financial Management Association, Westchester, Ill., covered 503 employers, 953 providers and 69 big health plans.

(Reprinted from *Risk Line*, 1st Quarter, 2000)

One Notice Can Satisfy COBRA Rules

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), qualified beneficiaries must receive a written election notice when a qualifying event occurs, informing them of their right to elect COBRA continuation coverage. Since COBRA regulations do not specifically address whether or not one notice can be sent to all qualified beneficiaries living at the same residence, many employers and group health plans have questioned that fact.

Now, the Department of Labor, (DOL) has come up with the answer. In Advisory Opinion 99-14A, the DOL states that health plans can meet their election notice requirements under COBRA by mailing just one election notice when more than one qualified beneficiary resides at the same address. Certain criteria that must be met, however, for a plan to be considered to be in good faith compliance with COBRA's notification requirement.

- The last known address of the covered employee, spouse, and dependent children must be the same.
- The notice must be sent via first-class mail and be addressed to the employee and his/her dependents.
- The notice must clearly identify the covered qualified beneficiaries and explain the separate and independent right of each qualified beneficiary to elect COBRA coverage.

(Note: Plans can also choose to send separate notices to each qualified beneficiary in a single mailing.)

(Reprinted from *Personnel Legal Alert* , February 2000, Vol. 11, No. 17)

Issues in the Court

Casual Comments Viewed as Contract

Casually mentioning that he was looking for a "mature man" put a corporate banking president in hot water. His defense that the comments were only generalizations and not meant to be discriminatory failed to impress a jury, who awarded the plaintiff \$390,000.

When her bank branch became part of a corporate banking acquisition, a woman who had successfully worked as a branch bank president for seven years found herself competing for the job. The corporate banking president, however, refused to consider her for her old position, allegedly stating that he was seeking a "mature man" for the job. Although several associates recommended the former branch president, he continued to interview only male candidates, one of whom he hired.

The woman declined an offer of a branch vice presidency and subsequently resigned. As a result of the discriminatory practices, she claimed she suffered extreme emotional distress and depression.

The jury awarded a total of \$440,000, including punitive damages of \$390,000. The district court reduced the total award to \$330,000 pursuant to Title VII punitive damage limits. The bank's appeal failed. *Vance v. Union Planters Corp.* (5th Circuit, April 25, 2000).

(Reprinted from *HR Reporter*, September 2000, Vol. 17, Issue 9)

Same-Sex Harassment Cost City \$415,000

A California city thought it didn't have to act on allegations of same-sex harassment. Its inaction resulted in a \$415,000 jury verdict.

A male park ranger claimed that the senior park ranger repeatedly followed him, watched him in the locker room while he was undressing, phoned him 20 or 30 times, bought him an expensive Christmas gift, and took unusual steps to be near him. The ranger said he complained to his supervisor that the conduct was unwanted. Other employees confirmed his allegations. The city took no action, and the ranger felt compelled to resign because of the hostile work environment.

The city defended its inaction by claiming that same-sex harassment was not sexual harassment under the statute and believed it acted in good faith. The jury favored the park ranger. The city appealed, but the 9th U.S. Circuit Court of Appeals ruled in favor of the ranger. *Kelly v. City of Oakland, et al.*, No. 98-16482 (9th Cir. Nov. 23, 1999).

(Reprinted from *HR Reporter*, May 2000, Vol. 17, Issue 6)

Labor Relations Issues

Tennessee Fire Fighters Lose Mandated Dues Check Off

A flaw in the manner in which a Tennessee statute is constructed has resulted in the loss of mandatory dues deductions for the state's fire fighters. Unless new legislation is passed, municipal collection of fire fighter union dues will be voluntary.

In a ruling this past May, U.S. District Judge Bernice Donald found that the 1987 statute violated the Equal Protection Clause of the Constitution as well as the state constitution. Fatal to the statute was the exclusion of five of the state's 95 counties from its coverage.

The case arose in 1998 when Local 3858 of the International Association of Fire Fighters, AFL-CIO, requested recognition and mandatory dues collection from the City of Germantown, a Memphis suburb. The city administrator refused both requests. The union sued claiming that the city was violating a state law that says "any municipal corporation ... which maintains a regular fire department with regular full-time employees shall ... make monthly deductions of membership dues for an employee association ..."

City lawyers countered that the union was not “an employee association” within the meaning of the statute and that the statute was unconstitutional anyway. As to the first question, the court found that the union was indeed “an employee association” as defined by the common meaning of the term. However, the judge agreed with the city on the second question.

Both the federal and state constitutions require laws to apply equally to all unless some compelling reason exists. Judge Donald observed that a section of the statute exempts counties within certain population ranges from coverage of the law. There is no rational basis for this exemption, the judge ruled. The sole reason for exclusion of certain counties appears to have been a preference by legislators representing those communities. That ground is insufficient to pass strict judicial scrutiny. Finding that the statute violates equal protection guarantees “is not even a close call,” she said.

An appeal is expected. Until a higher court overturns the ruling or the legislature changes the law, Tennessee municipalities apparently will be under no statutory obligation to deduct fire fighters union dues as part of the payroll process.

(Reprinted from *Fire Service Labor Monthly*, June 2000, Vol. 14, No. 6.)

Labor Day 2000: 10 Workforce Facts

- (1) In 1999, a higher proportion of both men and women [16 years and over] were employed than ever before — 71.6 and 57.4 percent respectively.
- (2) The workforce expanded nearly five-fold during the 20th century, from 28 million people in 1900 to 139 million in 1999.
- (3) Women’s participation in the labor force more than tripled over the past century. In 1900, less than 20 percent of women were in the labor force; by 1999, women’s participation had increased to 60 percent.
- (4) Baby boomers (ages 36 to 54 in 2000) make up nearly 50 percent of the workforce with 84 percent of baby boomers participating in the labor market.
- (5) The average person in the U.S. holds 9.2 jobs from age 18 to age 34. More than half of these jobs were held between the ages of 18 and 24.
- (6) Welfare recipients make up 2.3 percent of the US population, the lowest rate since 1965.
- (7) Education is directly tied to unemployment rates; college graduates experience half the unemployment rate of high school graduates (1.8 percent versus 3.5 percent in 1999) or a fraction of the unemployment of high school dropouts (1.8 percent vs 6.7 percent in 1999). The proportion of prime working-age Americans with college degrees quadrupled during the second half of the century.
- (8) In 1950, 60 percent of Americans age 25-54 years lacked a high school diploma; by 1999, that percentage had declined to just under 12 percent. In 1950, only 7 percent of 25-54 years old were college graduates; by 1999, that proportion had grown to 29 percent.
- (9) Average weekly hours in manufacturing fell from 59.0 hours in 1900 to 40.5 hours in 1950, and has changed little since.
- (10) The workplace injury and illness incidence rate is the lowest reported since federal data collection began in the early 1970s.

(From the U.S. Department of Labor)

Safety Issues

Worker Killed in LOTO Violation

Disregarding lock out/tag out procedures cost an employee his life and may cost the employer more than \$250,000 in proposed fines for safety violations. An OSHA inspection following the worker's death at the production facility of Columbia Forest Products, Indiana Head Division, in Presque Isle, Maine, uncovered a number of alleged willful, serious, repeat, and other than serious violations. At the time of the accident that ended in death, an employee was cleaning scrap wood from beneath the machinery, when a second employee activated the trash gate.

The first employee became caught between the rotating gate and the machinery's steel beam framework. According to OSHA, the accident could have been avoided if proper procedures had been followed.

(Reprinted from *HR Reporter*, March 2000, Vol. 17, No. 3)

Workplace Violence Issues

Violence in the Workplace

The Occupational Safety and Health Administration has developed guidelines and recommendations to reduce worker exposure to violence in the workplace, and also makes available non-OSHA material. Although some of the guidelines address a specific type of occupation, they can be adapted to fit others.

The full text of the documents can be accessed from OSHA's Workplace Violence page at <http://www.osha-slc.gov/SLTC/workplaceviolence/index.html> or by contacting the U.S. Department of Labor/OSHA, OSHA Publications, P.O. Box 37535, Washington, D.C. 20013-7353 or by calling (202) 693-1888.

(Reprinted from *Risk Watch*, June 2000, Vol. X, No. 7)

Addressing Workplace Violence Can Lead to ADA Violation

When taking measures to prevent workplace violence, companies must be careful how they handle employees who show violent warning signs. If a person is suffering from a mental disability and you fire him or her for the threatening behavior, you may be violating regulations set by the Americans with Disabilities Act.

If an employee has engaged in threatening behavior directed toward a co-worker, and if there is evidence that the employee has a disability, the possibility of making reasonable accommodations under the ADA must be explored. In these cases, employers must decide whether the worker should be:

- referred for medical assessment
- given a second chance and provided counseling
- placed on leave pending a "fitness for duty" release
- offered a "last chance" work agreement
- terminated

Threatening behavior, even if precipitated by mental illness, is not necessarily protected by the ADA. The ADA doesn't protect employees who pose "direct threats." Courts, moreover, have held that misconduct – even when related to a disability – is not itself a disability, and an employer is free to fire an employee on that basis. If you are thinking of terminating an employee for threatening behavior, it is best to discuss the situation with legal counsel first.

(Reprint from *HR Reporter*, May 2000, Vol 17, No. 1)

Web Sites of Interest

Disability Web Site: <http://www.disability.gov>

The Department of Labor has established a web site devoted to the issues of disabled workers. Employers may want to visit the site for resources. The page provides information to employers on accommodations and civil rights laws. For the disabled worker, there is a wealth of information on job searching, assistive technology, and assistance with housing, transportation, recreation, and health insurance.

New York Safety Resource Center Web Site: <http://www.nysafety.org/>

"ELECTRONIC ACCESS" to more than 700 titles FREE on-line. The New York Safety Resource Center offers workplace safety and health training tools including course materials, informative brochures, topical outlines, reports, checklists, and more. Most of the documents in the original collection were developed through grants from the Hazard Abatement Board administered by the New York State Department of Labor."

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