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LABOR RELATIONS NEWS

◆ WAS HIRING OF EMPLOYEE 8 YEARS YOUNGER THAN APPLICANT AGE DISCRIMINATION?

An employee who worked as the transportation secretary for a Louisiana school board for 16 years applied for the position of Coordinator of Transportation. She was 59 years old when she applied. According to her supervisor, she had already performed many of the coordinator's duties, including training of coordinators. She was not hired. Instead, the school board hired an employee who had last worked as a truancy interventionist for the district. At the time of his hiring, he was 50 years old, about eight years younger than the secretary.

The secretary sued the school board, asserting its failure to promote her amounted to age discrimination under the ADEA. She alleged that a week after being passed over for the promotion, an assistant superintendent, who was the highest-ranking member of the committee interviewing applicants, stated that "this was a position that [she] expected the person to work in for at least [ten] more years."

The school board asserted that in its view, the truancy interventionist was a "better fit" for the coordinator position because he allegedly had better qualifications, experience or skills for the job.

In a case brought under the ADEA, once an employer provides a legitimate nondiscriminatory basis for its action, it's up to the employee or job applicant to show that the employer's proffered reason was not sincere or was "false and unworthy of credence." To survive summary judgment in this case, the secretary had to present sufficient evidence that but for her age, she would have been promoted.

The U.S. District Court, Middle District of Louisiana denied the school board's motion for summary judgment. The District Court expressed its skepticism that the hired employee was a better fit for the coordinator position, stating "a hiring official's subjective belief that an individual would 'fit in' or was 'not sufficiently suited' for a job is at least as consistent with discriminatory intent as it is with nondiscriminatory intent." The Court noted the assistant superintendent's comment may have reflected an assumption that at the age of 59, the secretary was not expected to work ten additional years.

Because there was a genuine issue of material fact regarding whether the school board's proffered reason for not promoting the secretary was discrimination in disguise, the board was not entitled to have the ADEA lawsuit dismissed, the Court held.

The case is *Irvin v. Ascension Parish Sch. Bd.* (M.D. La. 2017).

-*School Law Briefings,* April 2017

LACK OF TEACHING CERTIFICATE, NOT AGE, EXPLAINS LITERACY COACH'S FURLOUGH

The 3rd Circuit Court of Appeals agreed with a lower court's ruling that a former literacy coach failed to establish that her Pennsylvania district subjected her to age discrimination. The 3rd Circuit affirmed a decision by the U.S. District Court, Eastern District of Pennsylvania granting summary judgment to the district on the employee's ADEA claim. The case is *Pocono Mountain Sch. Dist. V. Pennsylvania Dep't. of Educ*. (2016).

An employee can establish age discrimination by showing, in part, that she was not selected for a position that was offered to younger individuals who were otherwise similarly situation to her. A district can defend such a claim by establishing that the individuals hired had a specific credential required for the job that the plaintiff lacked. Here, the literacy coach lacked a state teaching certification, which was one of the requirements for the new position and which the successful candidates held.

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Lack of teaching certificate
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When funding issues caused the district to reorganize, the district eliminated its literacy coach jobs. It created a new "instructional specialist" position for the former coaches, but one of the requirements of the new job was that the employee have a state teaching certificate. The coach was certified as a reading specialist but lacked a teaching certificate. She sued the district for age discrimination, claiming that younger employees who were otherwise similarly situated to her were placed in the new position, while she was furloughed.

To establish an ADEA case, an employee must show that she: 1) is 40 years old or older; 2) is qualified for the position in question; and 3) was subjected to an adverse employment action under circumstances that raise an inference of discrimination.

Here, the district conceded that the furlough amounted to an adverse action. However, the Court pointed out, to establish that the furlough raised an inference of discrimination, the coach pointed solely to the better treatment of other employees, whom she viewed as comparable to herself. But in reality there was a stark difference between the coach and her coworkers, the Court found. Although the coach was the only literacy coach furloughed, she was also the only one who lacked a state teaching certification or any classroom teaching experience under that certification.

"All instructors who were retained – several of whom were older than [the coach] – possessed the certification and had teaching experience under the certification," a three judge panel of the 3rd Circuit wrote. Because the other employees were not similarly situated to the coach, the 3rd Circuit stated, the District Court had correctly concluded that the coach had failed to establish a prima facie ADEA case.

-*School Law Briefings*, March 2017

◆ Employees and Mental Health: EEOC releases guidance on mental health conditions

The Equal Employment Opportunity Commission (EEOC) recently released informal guidance for advising employees of their legal rights in the workplace with regard to depression, post-traumatic stress disorder (PTSD), and other mental health conditions. Although the guidance is geared to employees, it provides insight for employers as to the EEOC's position on employee protection under the Americans with Disabilities Act (ADA).

The guidance is provided in a question-and-answer format and covers the following areas:

Discrimination—The EEOC advises that it's illegal for employers to discriminate against an individual because he or she has a mental health condition. The guidance explains the exceptions for individuals who pose a safety risk and for those who are unable to perform their job duties. It notes that an employer can't rely on myths or stereotypes about a mental health condition. The guidance explains the exceptions for individuals who pose a safety risk and for those who are unable to perform their job duties. It notes that an employer can't rely on myths or stereotypes about a mental health condition when making its decision, but instead must base its decision on objective evidence.

Privacy/Confidentiality—The guidance explains that employees and applicants are entitled to keep their condition private and that employers are permitted to ask medical questions in four situations only:

- When an individual asks for a reasonable accommodation
- After a conditional job offer has been extended, but before employment begins (as long as all applicants in the same job category are asked the same questions)
- For affirmative action purposes—and a response must be voluntary
- When there is objective evidence that an employee may be unable to do his or her job (or may pose a safety risk) because of a medical condition

When medical information is disclosed, the guidance points out that employers must keep the information confidential—even from coworkers.

Job performance—Reasonable accommodation is the focus of the EEOC's guidance in this area. It describes a reasonable accommodation as a type of change in the way things are normally done at work and gives some examples, including:

- Altered break and work schedules (e.g., scheduling work around therapy appointments)
- Quiet office space or devices that create a quiet work environment
- Changes in supervisory methods (e.g., written instructions from a supervisor who does not usually provide them)

"Substantially limiting" condition—The guidance points out that a condition does not need to be permanent or severe to be substantially limiting under the ADA. A condition that makes activities more difficult, uncomfortable, or time-consuming to perform (when compared to the general population) may be substantially limiting, according to the EEOC.

And even if symptoms come and go, the guidance notes that "what matters is how limiting they would be when the symptoms are present." It also notes that mental health conditions like major depression, PTSD, bipolar disorder, and obsessive compulsive disorder "should easily qualify."

The guidance advises that an employer should not conduct an extensive analysis of whether a condition qualifies as a disability, but should instead focus on complying with the ADA's antidiscrimination and reasonable accommodation requirements.

Reasonable accommodation—The guidance advises employees that they may ask for a reasonable accommodation at any time, but that it's generally better to ask before any workplace problems occur because employers are not required to excuse poor job performance—even if it's caused by a medical condition or the side effects of medication.

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Employees and Mental Health
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The guidance notes that an employer may ask an employee to put an accommodation request in writing and may ask for documentation from the employee's healthcare provider about the condition and the need for accommodation.

The guidance adds that an unpaid leave may be a reasonable accommodation if the leave will help the employee get to a point where he or she can perform a job's essential functions. And if an employee is permanently unable to do his or her regular job, the guidance explains that the employee can request reassignment to another job, if one is available.

Harassment—The EEOC advises employees to tell their employer about any harassment if they want the employer to stop the problem. The guidance recommends that employees follow the employer's reporting procedures, and explains an employer's legal obligation to take action to prevent future harassment.

What are the "take aways" for school units as employers?

1) Rely on objective evidence in making employment decisions, not stereotypes;

2) Respect confidentiality – have in place a process guaranteeing the appropriate treatment of employees' mental health conditions;

3) Be attentive to your procedural obligations once an accommodation request is received;

4) Be aware that healthcare provider documentation is vital in evaluating accommodation requests as it serves as a catalyst for the ADA-required interactive dialogue between employer and employee;

The guidance is available online at https://www.eeoc.gov/eeoc/publications/mental_health.cfm .

-*Maine Employment Law Letter*, March 2017

◆ Teachers Fight State for the Right to Get Sick

SANTA FE, N.M.— In a class action resounding in politics, a veteran teacher sued New Mexico, claiming it punishes teachers for taking more than three sick days per year, though they earn nine sick days a year under their contracts.

New Mexico bases as much as 10 percent of a teacher's annual evaluation upon attendance, with the ultimate sanction of firing for poor evaluations.

But Angela Medrow's class action is not just about employment — politics is involved.

On March 9, Governor Susana Martinez vetoed House Bill 241, the "Teachers are Human Too Act," which would have let teachers use their year's full allotment of sick leave before it would affect their evaluations.

In her veto message, Martinez said the bill would lead to more teacher absences, and more expenses for substitute teachers.

"We need our teachers in our classrooms," the governor wrote, "and House Bill 241 would lead to more teacher absences."

Five days later, the New Mexico Senate overrode the veto — the first time either house has overridden one of Martinez's vetoes.

A Martinez spokesman called the override a "petty action of a bitter Senate." The state House fell 9 votes short of overriding the veto.

On Sunday, three days after Medrow sued, Martinez said a revised evaluation policy which would let teachers take up to 6 sick days per year before it affects their evaluations.

Neither party in the lawsuit could be reached for comment Monday, but Medrow's attorney has filed for class certification and a preliminary injunction against the New Mexico Public Education Department.

Medrow seeks to represent "teachers in school districts and charter schools throughout the state of New Mexico who are subject to having their evaluation scores reduced for the use of contractually granted leave time."

She has 12 years of experience at Logan Municipal Schools, and a master's degree in education. During that time, she earned one day of paid sick leave per month, plus two days of paid personal leave each year. New Mexico teachers can accumulate 90 days of sick leave but no more, unless they use accrued sick leave and reduce their accumulated time to below 90 days.

The defendant New Mexico Public Education Department evaluates teachers each year on a point system, with a maximum score of 200. Based on a sliding point scale rising from "ineffective" to "exemplary," teachers who are rated as ineffective or minimally effective can be fired if their scores do not rise in subsequent years.

One section of the point system is "Teacher Attendance," docks points if a teacher takes off more than three days off in a school year. Teachers can earn up to 20 attendance points — 10 percent of their total annual evaluation.

Medrow used three sick days in the 2016-2017 school year, during which she learned she will need nonoptional surgery. Even scheduling her surgery for the last week of the school year, she will need to use four sick days, costing her points on her annual evaluation, even though she will not exceed her annual leave and complies with the school district's sick leave policy.

She seeks class certification and a permanent injunction against the state using earned leave as a factor in judging teacher performance, and damages equal to the value of the leave that New Mexico teachers earned but could not take under the evaluation policies.

-*Courthouse News Service*, April 4, 2017, by Victoria Prieskop

◆ By the Numbers: Union Membership down in 2016

The U.S. Bureau of Labor Statistics (BLS) has reported that the union membership rate – the percent of wage and salary workers who were members of unions – was 10.7% in 2016, down four-tenths of a percentage point from 2015. The number of wage and salary workers belonging to unions – at 14.6 million in 2016 – declined by 240,000 from 2015. In 1983, the first year for which comparable union data is available, the union membership was 20.1%, and there were 17.7 million union workers. Highlights from the 2016 data show that public-sector workers had a union membership rate (34.4%), more than five times higher than that of private-sector workers (6.4%). Workers in education, training and library occupations and in protective service occupations had the highest unionization rates (34.6% and 34.5%, respectively). New York continued to have the highest union membership rate (23.6%), while South Carolina continued to have the lowest.

-*Maine Employment Law Letter*, March 2017

◆ Specialist's ADA claim slips on lack of essential functions evidence

The U.S. District Court, District of Columbia spurned a special education specialist's push for summary judgment on her ADA failure to accommodate claim. According to the Court, the specialist did not offer up enough evidence to decide what functions were and were not essential to her job. The case is *Bradley v. District of Columbia Pub. Schs*., (D.D.C. 2016).

Failure to accommodate claims under ADA Title I require an employee to show that she could perform the essential functions of her job with a reasonable accommodation. This means that districts should be prepared to explain what functions are essential to the job to make the case that the employee could not perform them even with accommodations. In this case, a terminated specialist's argument that certain functions of her job were not essential because they appeared low in the list on her job description failed to carry the day without evidence on how the job description applied in practice.

The specialist, while substitute teaching, experienced injuries when a student violently elbowed her in the chest. These injuries forced her to miss work for several months. Later, while substitute teaching, she experienced "extreme anxiety" due to the previous incident and, afterward, the specialist was diagnosed with adjustment disorder, depressed mood, and post -traumatic stress disorder. The specialist sought disability compensation and sick leave. After having these requests go unanswered, she later failed to appear for required fingerprinting and the district terminated her employment. She sued, claiming failure to accommodate under ADA Title I based on the district's decision not to permit her to take leave.

To establish a failure to accommodate claim, an employee must show: 1) she had a disability under the ADA; 2) her employer had notice of the disability; 3) she was able to perform the essential functions of her job with or without accommodation; and 4) her employer denied the request for accommodation. In this case, the third element was at issue.

The specialist contended that her essential job functions were to "create programs, instructions, prepare reports, conduct research, etc." The district countered that leave would not be reasonable because the specialist needed to be in the classroom. The only evidence regarding her classroom duties was their appearance in the job description at item 16 in the list of requirements. The Court explained that determining classroom functions were not essential based on where they appeared in the job description would require guesswork. Without evidence on how the specialist's job description operated in real life, the Court found a dispute of fact on whether classroom work was an essential part of the job. Because of this, the claims would have to be decided by a jury.

-*School Law Briefings*, March 2017

◆ Bullying at Work

Bullies may graduate from high school – but they don't always shake their manipulative, power-seeking-ways. In fact, nearly a third of U.S. workers say they've experienced some form of bullying on the job.

On its own, "bullying" is not unlawful under federal or state discrimination laws. In fact, the EEOC has said federal laws "do not prohibit simple teasing, offhand comments or isolated incidents that are not very serious."

However, employees who feel bullied due to their race, sex (and in Maine, sexual orientation), religion, national origin, disability, age or as retaliation for a previous legal complaint are able to file federal or state discrimination or harassment lawsuits.

In addition, while physical threats and touching could constitute assault, other forms of malicious conduct can lead to allegations of emotional distress.

Even when rough treatment by supervisors and co-workers isn't illegal, it spikes the stress level in the workplace and increases absenteeism, turnover and health costs.

How to manage bullying in the workplace?

1) Know what it looks like

The easiest way for employers to manage workplace bullying is to create an environment that discourages it from the beginning. Some bullying is obvious – yelling, using profanity name-calling or even physical contact. Other bullying is more opaque, including behavior aimed at making it hard for another person to succeed at work, e.g., refusing to give a co-worker the attention or support needed to complete a task. Likewise, employee cliques that make a worker feel excluded or intimidated could qualify as bullying.

2) Look out for the targets

Some types of co-workers tend to be targeted for bullying more frequently than others. Workers who are particularly skilled in their jobs, favorites of management, or who are ethical and not particularly aggressive are common targets.

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Bullying at Work

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3) Observe interactions

Bullies are only as powerful as the sense of fear, coercion and intimidation they cultivate. The more alert that managers are to such behavior, the better employers can gauge the tone of employees' relationships with one another. Note who doesn't seem to interact with the group and where there seems to be unusual animosity. Employees who feel bullied may not be comfortable reporting this behavior, but managers can gain a sense for the nature of the interactions simply through observation.

4) Stress a "zero tolerance" environment

The attitude by HR and managers toward workplace bullying is the key to preventing and dealing with such incidents. Let all employees know – during orientation and through regular reminders of your harassment policy—that your organization takes seriously bullying in any form and will actively police and prevent it. If workers overhear a person who is speaking inappropriately to another co-worker, let them know they have the responsibility to speak up. Make it clear that they're not "tattling," but rather, maintaining the culture that will allow them all to succeed professionally. Finally remind workers about the procedures for bringing complaints and assure them that such complaints will be handled confidentially.

-*HR Specialist*, March 2017, by Carson Burnham and Bonnie Puckett

CPI–March

CPI– W This index, which is commonly used to adjust wage contracts increased 0.1% from February 2017 to March 2017 and is 2.3% higher than in March 2016.

CPI– U This index for all urban consumers increased 0.1% from February 2017 to March 2017 and is 2.4% higher since March 2016.