Northwest Ohio Human Resource Association

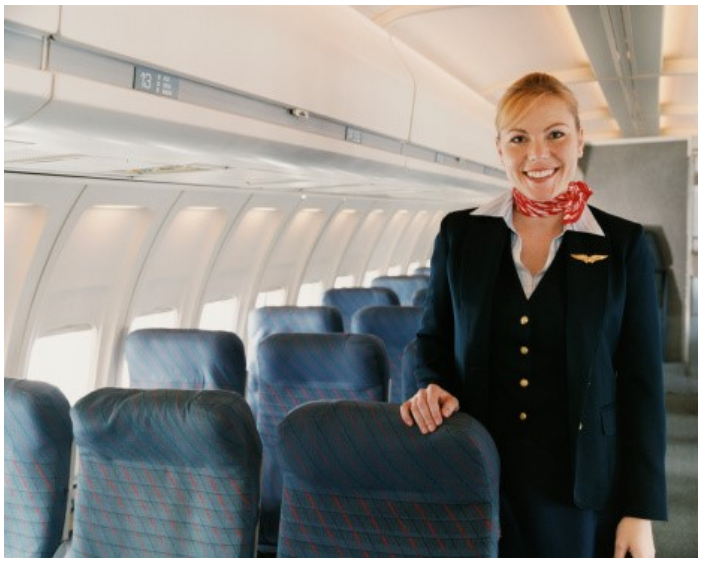
AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

February 2017

10th Circuit provides opening for tougher FMLA notice obligations on employees

On February 3, 2017, the Tenth Circuit Court of Appeals, which hears federal appeals from courts in six western states from Oklahoma to Utah, issued an opinion requiring enhanced notice from employees who seek to use FMLA protections. In that case, *Branham v. Delta Airlines*, Case No. 16-4092, a flight attendant was terminated after improperly calling off work without expressly stating she was requesting FMLA leave.



The plaintiff had a rocky history with Delta. She was previously terminated for reporting to work under the influence of alcohol, but reinstated in 2010 under a last chance agreement. The agreement advised that she would be immediately terminated if she ever violated any employment rule or policy at any time in the future.

On the night at issue in June 2012, the plaintiff was on call. She received a call at 11:30 p.m. to staff a flight at 6:00 a.m. the next morning. She accepted that position, but called back just before 2:00 a.m. to report she was unable to make the flight because she was taking care of her sick mother. Calling off less than 5 hours before a flight is a violation Delta policy and subject to discipline. Based upon the above, and several absences in the prior 12 month period, the plaintiff was terminated.

At the trial court, plaintiff argued she was improperly terminated for exercising her FMLA rights and was injured by Delta's failure to notify her of her FMLA rights. The trial court, however, found the plaintiff was terminated for failing to follow proper call-off procedure. The trial court further found the plaintiff failed to request FMLA leave, nor was she prejudiced by Delta's "failure" to advise her of her right to FMLA leave because she had requested and received FMLA leave several times before.

On appeal, the 10th Circuit affirmed the trial court's findings. The 10th Circuit reiterated the long-standing rule that FMLA leave does not bar an employer from disciplining an employee for improperly calling off — even if they cannot discipline the employee for the absence itself. Despite the plaintiff's assertion that her FMLA rights arose when she told her employer her mother was ill, the court of appeals found the statements of a generalized illness too vague to alert Delta the plaintiff might be requesting FMLA leave. Moreover, the court of appeals also noted the employee's several successful prior request for FMLA during her tenure at Delta, both to care for herself and for family members, as evidence the plaintiff knew how to request FMLA leave if needed.

The full opinion from the 10th Circuit may be found here: http://www.ca10.uscourts.gov/opinions/16/16-4092.pdf

A federal court weighs in on morbid obesity and ADA protection

On February 3, 2017, the federal court in Arizona held that morbid obesity, and complications that flow therefrom, are not protected under the ADA or its 2008 expansion.

In *Valtierra v. Medtronic, Inc.*, Case No. CV-15-865-PHX (D. Ariz.), the plaintiff argued his employer violated the ADA for terminating him due to his morbid obesity, and for denying him a reasonable accommodation. The plaintiff was morbidly obese at hire (approximately 300 pounds). At some later point, he requested and was granted FMLA leave for joint pain and problems related to his obesity. Several months later, and a day before a scheduled week long vacation, plaintiff signed off as having completed intensive inspections on 12 different machines. Plaintiff's supervisor believed it would have been impossible for anyone to complete all of the inspections in the time frames provided. Upon return from vacation, plaintiff was questioned and ultimately terminated for falsification of the inspection reports.

Plaintiff then filed a lawsuit claiming the falsified reports were mere pretext and the real reason for his termination was his obesity, arguing it was a protected condition under the ADA. The Nevada court, agreeing with other courts, including the Sixth Circuit, found that obesity alone is not a disability under the protection of the ADA, unless the obesity is itself the result of an underlying physiological condition or its treatment. The court also found that the conditions caused secondarily by obesity (here the plaintiff's joint pain) were also not a disability under the ADA. Because there was no "disability" there was also no right to a reasonable accommodation.

Finally, the court also struck down plaintiff's argument that even if his obesity was not a disability, his employer still regarded him as disabled because of it. The court found plaintiff failed to state or prove any physiological condition the employer perceived he had. Again, mere obesity was insufficient.

While the *Valtierra* case does not break new ground here in Ohio, it reiterates and approves standing law in this jurisdiction on the status of obesity and morbid obesity in the context of the ADA.

The full text of the opinion may be found here:

https://casetext.com/case/valtierra-v-medtronic-inc

DOL Overtime Regulations Update

As we previously reported, in November 2016 a lawsuit was filed in Eastern District of Texas, in which several states and business groups have sued to block implementation of the Department of Labor's new overtime rules scheduled to go into effect December 1, 2016. Just days before the effective date, the Texas court entered an injunction, preventing the new overtime exempt salary rate from taking effect.

The injunction has been appealed to the 5th Circuit Court of Appeals. An expedited briefing schedule was due to have been completed by February 5th. However, lawyers for the Department of Labor recently asked for an extension to file their brief, though March 2, 2017, so the case remains open and pending.

There has been no announcement either by the Department of Labor, or by the Trump administration about whether the government will continue to defend the regulation in the Texas lawsuit or in the 5th Circuit appeal.

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