LABOR AND EMPLOYMENT LAW UPDATE

ASSOCIATION DISCRIMINATION: THE NEW FRONTIER OF EMPLOYMENT LITIGATION?

On October 17, 2005, the Equal Employment Opportunity Commission ("EEOC") published guidelines regarding association discrimination under the Americans with Disabilities Act ("ADA"). The guidelines follow a rise in lawsuits alleging association bias under the ADA and other laws. These developments provide an opportunity to educate employers of a little known, yet increasingly significant aspect of employment discrimination law.

RACE ASSOCIATION: Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 have been construed to prohibit discrimination against a person based upon the following:

* Marriage or association with a person of a different race.
* Membership in or association with ethnic-based organizations or groups.
* Attendance or participation in schools or places of worship generally associated with certain minority groups.

NATIONAL ORIGIN ASSOCIATION: Title VII likewise prohibits discrimination against a person based upon his or her association with a person of a different national origin.

DISABILITY ASSOCIATION: The ADA prohibits employment discrimination against a qualified applicant or employee because of the known disability of an individual with whom he or she is known to have a relationship or association.

In 2004, the Seventh Circuit Court of Appeals in *Larimer v. IBM* set forth four examples of the types of motives which will make an adverse personnel action by an employer unlawful under the ADA:

> *EXPENSE:* An employee's spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan.
>
> *DISABILITY BY ASSOCIATION #1*: An employee's homosexual companion is infected with HIV and the employer fears that the employee may have become infected through sexual contact with the companion.
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> *DISABILITY BY ASSOCIATION #2*: An employee's blood relative has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well.
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> *DISTRACTION:* An employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.

The EEOC Guidelines clarify by the following example that the association provision of the ADA is very broad in scope:

> *EXAMPLE A:* An employer overhears an employee mention to a co-worker that he tutors children at a local homeless shelter. The employer, recalling that the shelter in question is well-known for providing job placement assistance for people living with HIV/AIDS, terminates the employee because it believes that its image will be tarnished if its employees associate with the "kind of person" who contracts HIV/AIDS. The employer has violated the ADA's association provisions . . .

WHAT IS COMPENSABLE TIME?

On November 8, 2005, the U.S. Supreme Court revisited in *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods* the question of what is compensable work time under the minimum and overtime wage requirements of the Fair Labor Standards ("FLSA").

THE PORTAL TO PORTAL ACT: In 1947, Congress amended the FLSA to exclude the following activities from the definition of compensable time:

* walking, riding, or traveling to and from the place of actual performance of the principal activity or activities which such employee is employed to perform; and

* activities which are preliminary and postliminary to said principal activity or activities.

STEINER V. MITCHELL: In 1955, however, the Supreme Court explained that "the term 'principal activity or activities' embraces all activities which are an integral and indispensable part of the principal activities including the donning and doffing of protective gear before or after the regular work shift, on or off the production line."

IBP, INC. AND BARBER FOODS: Fifty years after *Steiner*, the Supreme Court addressed six sequential time periods in two meat processing plants where employees were required to wear protective clothing and walk to and from employee locker rooms and their work stations. The Supreme Court made the following determinations regarding the six time periods.

* Pre-donning period: Not compensable.
* Donning of protective gear: Compensable.
* Walking from employee locker room to work station: Compensable.
* Walking from work station to employee locker room: Compensable.
* Doffing of protective gear: Compensable.
* Post-donning period: Not compensable.

NOVEMBER SEMINAR

On Monday, November 7, 2005, Campbell & LeBoeuf co-sponsored and presented at a seminar entitled "Emerging Liability Issues for Lawyers in the 21st Century" at the Belo Mansion in Dallas, Texas. If you are interested in obtaining copies of the firm's written materials from the seminar, please contact Dale Howe at 972.277.8585.

DISCLAIMER

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