



RIGHTS STUFF

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Investigating Suspected Fraud

Employers assume they have the right to investigate suspected fraud and to take appropriate action. A 2006 case confirmed that this assumption is accurate.

William Bratcher began working for Subaru as a temporary employee in 1994. Two years later, he became a full-time production assistant working on the production line. When he became a full-time employee, he received a copy of Subaru's personnel policy. The policy said, among other things, that an employee who intentionally misrepresented or falsified any information concerning employment could be fired immediately.

Bratcher often had migraine headaches and saw a doctor for treatment. During his time with Subaru, he frequently requested and received Family and Medical Leave Act (FMLA) time off for his migraines.

In the fall of 2003, Subaru fired Bratcher for failing to call into work to request FMLA leave. Bratcher said he had called in from his cell phone and offered to bring in records to substantiate his claim, and Subaru hired him back. Also that fall, Subaru made several accounting errors, overbilling Bratcher's actual use of FMLA. Bratcher pointed out these mistakes and Subaru corrected them.

In September, 2004, Subaru noticed that Bratcher had requested 37 FMLA leaves, for a total of 46 days, during the previous 12 months. They noticed that he had 11 unpaid absences

on Mondays and 11 on Fridays. He missed eight consecutive Fridays. Subaru contacted a doctor who said that migraine headaches were not limited to specific days of the week and did not normally last for several days. Coworkers told Subaru that they thought Bratcher's FMLA leaves might be fraudulent.

Subaru hired a private investigator to observe Bratcher on one of his FMLA days. On September 9, 2004, Bratcher called Subaru and said he would not be in the next day, a Friday, due to a migraine headache. On that Friday, the investigator observed Bratcher leave his home and go to a convenience store. The investigator then lost him in traffic and so went back to Bratcher's home. An hour later, when Bratcher still had not returned home, the investigator discontinued the surveillance.

Bratcher said he felt better over the weekend but got another migraine on Monday and called in sick that day as well. He returned to work on September 14, a Tuesday, and was called into the office on Wednesday. During the meeting, Bratcher said that his migraines had gotten worse as he got older and were aggravated by stress. His supervisor asked him if he was aware that if he took a sick day but got better during the day, he was obligated to work the remainder of his shift. He said he was aware of that, but said his migraines often lasted a couple of days at a time. His supervisor asked him about his most recent days off. Bratcher said that he

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had been incapacitated due to a migraine on Friday and remained so until Saturday. They asked him what he had done on Friday, and he said he was "pretty sure" that he "probably" stayed in bed all day. He said that he "just got up long enough to get something to eat."

After this meeting, Subaru decided that Bratcher had falsified a matter of company record because he said he was incapacitated the same day that an investigator saw him go to a convenience store and stay away from his home for at least an hour. They terminated him, and he sued, alleging a violation of the FMLA. He said that by conducting surveillance of him at home, Subaru had interfered with, restrained and/or denied him his right to exercise his rights under the FMLA. He lost.

The District Court said that to establish a *prima facie* case of employment discrimination, Bratcher had to show he was en-

gaged in a legally protected activity (taking FMLA leave), that he was performing his job satisfactorily, that he suffered an adverse employment action and that at least one similarly-situated employee, not in his protected category, was treated more favorably. The Court found that Subaru had established a legitimate, nondiscriminatory reason for firing him. Bratcher did not establish that the stated reason was a lie, or a pretext for discrimination/retaliation.

The Court said that Bratcher's attempts to prove pretext "essentially followed one of two tracts: (1) he did not really say what he has said he said to Subaru officials (it confuses us too) and (2) Subaru has been lying in wait for him and wanted to find a reason to terminate him because he takes too much FMLA leave." The Court said it was reasonable for Subaru to assume Bratcher had lied when he twice said that he was "pretty sure" he had spent the Friday in bed, and was not persuaded by Bratcher's

attempt to convert "pretty sure" into "uncertain." Nor was the Court persuaded by Bratcher's argument that his previous problems with Subaru's FMLA accounting showed malice on their part; rather, it showed the company's willingness to rescind adverse employment actions when it was aware that it had made a mistake.

Finally, the Court was not persuaded by Bratcher's argument that "if the 'entitlement' language in the FMLA is intended to prevent anything, it should prevent an employer like this one from harassing, video-taping and firing an employee for the sole and exclusive reason that he was eligible and took intermittent FMLA leave." He provided no case law suggesting that an employer cannot conduct investigations into suspected FMLA abuse.

The case is Bratcher v. Subaru of Indiana Automotive, Inc. 458 F. Supp. 753 (S.D. Ind. 2006). ♦

Fired Nurse Has "Association" Claim Under ADA

The Seventh Circuit Court of Appeals ruled recently that a nurse whose husband was undergoing expensive cancer treatments at the time she was terminated has an "association" claim under the Americans with Disabilities Act (ADA). The Court remanded the case back to the District Court to be heard by a jury.

Phillis Dewitt worked for several years for Proctor Hospital in Illinois. During her employment, her husband needed expensive cancer treatments which were covered under the hospital's health insurance plan. The treatments were

paid for by the hospital, which was partially self-insured. Because the hospital was self-insured, it frequently reviewed claims and identified any employees whose claims exceeded \$25,000. Dewitt was confronted twice by her supervisor about her claims, which were described as "unusually high." She was asked if she and her husband had considered cheaper alternatives to the treatments and was told that a committee was reviewing her claims.

Shortly thereafter, the hospital fired Dewitt, claiming it was part of an overall "creative effort" to cut

costs. Dewitt paid for COBRA coverage for her husband up until his death a year later. She then sued, alleging disability discrimination under the ADA's "association" prong. The district granted summary judgment for the employer, but the Court of Appeals found it "obvious" that the hospital was specifically interested in the high cost of her husband's medical treatments. The Court found that the evidence as a whole indicated that her husband's cancer treatment was a factor in the hospital's decision.

The case is Dewitt v. Proctor Hospital, 2008 WL 509194 (7th Cir.). ♦



Dealing With Substance Abuse In The Workplace

Under certain circumstances, alcoholism and past drug abuse are considered protected disabilities under the ADA. However, each of these disabilities is treated somewhat differently.

Both alcoholism and past drug abuse by an addict generally are covered under the ADA; current illegal drug use is not. (The term "illegal drug" includes the unauthorized use of a prescription drug.) "Current" does not mean only catching someone in the act of using drugs, but is not specifically defined. The EEOC says "current" must be determined on a case-by-case basis. The use must have occurred recently enough to justify the employer's belief that it is an ongoing problem. If an employee is in a rehabilitation program or has successfully completed such a program, and is no longer using illegal drugs, he or she is entitled to ADA

protections. Past casual drug use is not considered a disability.

These disabilities may be treated differently from others protected by the ADA. The law explicitly allows an employer to hold an alcoholic to the same standards as any other employee, even if unsatisfactory performance is the direct result of the alcoholism.

An employer may respond to the act of drinking in the workplace or being under the influence at work without regard to whether the employee is an alcoholic, as long as all employees are treated in the same manner.

Not all courts have recognized alcoholism as a disability, especially when the major life activity an individual claims to be limited is "working." The 11th Circuit Court

of Appeals noted that alcoholism is not a *per se* disability. It held that, as with any disability, employees must show that they are substantially limited in a major life activity. To show that one is limited in the major life activity, an employee must prove that he or she is limited in the ability to perform either an entire class of jobs or a broad range of jobs in various classes. Roberts v. Rayonier Inc., 135 Fed. Appx. 351 11th Cir. 2005.

An employer needs to take care when firing or refusing to hire individuals with a past history of illegal drug use. It is important to remember that the showing of significant risk of substantial harm must be based on an assessment of the individual involved, not solely on statistics. ♦

Interviewing Tips

At the BHRC, we often get calls from people who are having trouble finding a job and believe that they are being discriminated against. Of course, that may or may not be the case, depending upon the circumstances. It's best for any applicant to be well-prepared for the interview to give the company strong reasons to want to hire the applicant. Here are some tips for successful interviewing, based on a brochure from Indiana Workforce One:

Be Prepared. Before the interview, learn something about the company. Review your qualifications for the job. Be prepared to

answer both broad and specific questions about yourself and your qualifications. If you need any reasonable accommodations for a disability, let the company know before the interview.

Look The Part. Be well-groomed and suitably dressed. Low-income women who need interview clothes may want to contact My Sister's Closet, 355-6842.

The Interview. Be prompt. Be well-mannered. Shake hands firmly. Answer questions directly, succinctly and truthfully. Use proper grammar and good diction. Relax, but don't slouch. Don't chew gum or smoke. Be enthusiastic and co-

operative. Don't be afraid to ask questions yourself. Say thank you when you leave.

Taking Tests. If you have to take a test as part of the application process, listen carefully to instructions. Read each question carefully before answering it. Write legibly; don't dwell too long on one question; go on to the next one and come back to it if you have time.

After The Interview. Within 24 hours, write the interviewer a short note, thanking him or her for the interview and re-affirming your interest in the job. A handwritten note is better than an e-mail. ♦



Hoosier Hills Food Bank Launches Capital Campaign

After 25 years of service to the community, the need for what Hoosier Hills Food Bank (HHFB) and their partner emergency food providers do is greater and more important than ever. There's just no logic to the reality that thousands of children, families, seniors, and hard-working people are hungry. And they are living *right here* in Southern Indiana. HHFB stands ready and committed to ensuring that everyone's basic right of having enough to eat is met.

Food banks are an indispensable component of a community's food system and social safety net. The need for emergency food providers is high and not expected to diminish soon. In 2007, HHFB distributed an organizational-record of 2.3 million

pounds of food to more than 80 member agency partners, 42% more than the prior year and 255% more than in 1995 when they moved into their current 6000-square foot facility.

"Our ability to meet the growing regional demand for emergency food assistance is limited by a lack of space at our current facility. There are times when we actually must refuse donated food due to our inability to store it. We simply don't have the space to do more. In order to keep up with the demand for what we do, we must move to a larger facility. Put simply, we need more space to distribute more food to more people," said HHFB Executive Director Julio Alonso.

HHFB has launched a capital campaign so that they can do exactly that: get more food to more people. "This campaign is not about a building, it's about people. However, a larger distribution center is essential if we are to be able to carry out our mission of providing food to people in need," Alonso said.

If you would like to take part in this campaign, visit www.hhfoodbank.org to give on-line or send your contribution to PO Box 697, Bloomington, IN 47402. ♦

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