THE ADA MAY APPLY TO DOMESTIC VIOLENCE VICTIMS

An EEOC FAQ indicates that the EEOC believes protections under the ADA may apply to applicants and employees who experience domestic or dating violence, sexual assault, or stalking. The ADA prohibits different treatment or harassment at work based on an actual or perceived impairment, which could, the EEOC feels, include impairments resulting from domestic violence. This could be information that the applicant received counseling for depression because of a rape prosecution and the employer deciding not to hire the applicant based on further treatment of depression. The EEOC also gives the example of scarring after an attack by a former domestic partner resulting in frequent abusive comments from coworkers and the employer’s failure to take any action to stop the harassment. The ADA also prohibits disclosure of confidential medical information in retaliation for or interference with an employee’s exercise of his or her rights under the ADA.

One of the things an employer can do is to update its training materials to tell employees they cannot discriminate against the victims of domestic or dating violence, sexual assault or stalking.

TIME LAG BETWEEN COMPLAINT AND ADVERSE ACTION STOPS RETALIATION CLAIM

In Harper v. C.R. England, Inc., No. 11-2975, June 8, 2012, the employee alleged that the employer terminated the employee from his truck driver instructor’s position in retaliation for having complained of racial harassment from the employee’s co-worker. However, there was a several-month time lag between the complaint of harassment and the termination. The plaintiff had failed to present any other circumstantial evidence to support a prima facie case of retaliation. Further, the plaintiff failed to present any evidence to counter the employer’s explanation that the employee was terminated due to attendance problems. The employee also failed to produce evidence that any co-worker with similar attendance problems was treated more favorably. Therefore, the Court in Harper affirmed judgment in favor of the employer.

TIME LAG BETWEEN CRITICISM AND FIRING PREVENTS RETALIATION CLAIM

In Kidwell v. Eisenhauer, No. 11-1929, May 22, 2012, Seventh Circuit, the employee alleged that the employer retaliated against him by suspending him and imposing other discipline in retaliation for making critical statements about the employee’s supervisors during two separate union meetings. But, there was a delay of two-months and five-weeks between the employee’s critical statements and the discipline imposed against the employee. The Court found this was
too long a time to establish an inference of causation based on timing alone. Further, the record showed that the employee’s violation of various work rules constituted intervening circumstances that broke any causal claim between the employee’s criticism of his supervisors and the imposition of discipline. Once again, the Seventh Circuit affirmed judgment for the employer.

AN EMPLOYEE IS ENTITLED TO FMLA LEAVE TO MAKE DECISIONS REGARDING A PARENT’S HEALTHCARE

In Sisk v. Picture People, Inc., 669 F.3d 896 (8th Cir 2012), the employee left his shift to visit his mother, but had already sought FMLA leave with respect to his mother’s illness. The employee was suspended for one day because he left his shift to visit his mother in the hospital. The employee went to his mother because he was told decisions needed to be made about her care, including whether to keep her on life support. An internal investigation was made and the decision was made to terminate the employee. The Court found that under FMLA regulations an employee needed to care for the family member would be entitled to FMLA leave, which encompasses both psychological comfort and physical care. Thus, the Court held that the employee suffered harm as a result of his one-day suspension for taking the entitled FMLA leave.

EMPLOYERS SHOULD PROTECT SOCIAL MEDIA ACCOUNTS FROM DEPARTING EMPLOYEES

If you and your employees use social media to market your company’s product or services, you may need to protect your accounts when an employee leaves. In the case of PhoneDog v. Kravitz, 2012 WL 273323 (N.D. Cal. 2012), an employee created a Twitter account and over the course of the employment amassed 17,000 followers. When the employee left the employer for a competitor, he took the account with him and changed the handle to his own name. The employer sued the former employee for misappropriation of trade secrets, conversion, and interfering with the employer’s relations with the followers of the Twitter account. The Court in PhoneDog must decide whether Twitter or other social media followers are the property of the company or are they personal followers of the employee. There may be no clear answer. Things that employers can do to protect their social media accounts include creating policy language for their handbooks stating that the accounts remain the property of the employer at all times and shall remain the intellectual property of the employer. The employer can also update its nonsolicitation agreements with its employees, manage its social media accounts by requiring use of the company name and by requiring employees to share their passwords so if the employees leave the employer can access the account and change the password.