EMPLOYEE MUST NEGOTIATE REASONABLE ACCOMMODATIONS IN GOOD FAITH UNDER ADA

In Romanello v. Intesa Sanpaolo S.P.A., 97 A.D.3d 449, --- N.Y.S.2d ----, 2012 WL 2891113 (N.Y.A.D. 1 Dept., 2012), the court determined that an employer made the requisite good-faith attempt to open an interactive process with a disabled employee for purpose of reaching mutually acceptable accommodation. But the employee, in spurning that good-faith attempt, in advance and through counsel, by making demand for indefinite leave that was coupled with a threat of litigation, discharged the employer of its obligation to continue its efforts to initiate such process. The court held that this precluded the employee's employment discrimination claims under state and local disability laws.

NO WHISTLEBLOWER RETALIATION WHERE EMPLOYEE’S STATEMENTS DID NOT AMOUNT TO THREATS OF WHISTLEBLOWING

In McBride v. Peak Wellness Center, Inc., --- F.3d ----, 2012 WL 3156325 (10th Cir. Wyo. 2012), a terminated plaintiff could not make out a claim for termination in violation of the Whistleblower provisions of the False Claims Act (FCA). The only evidence was one email regarding the employee, wherein the company's information technology director told management that, based on conversations she had with others, that it “appears [the plaintiff] is preparing a presentation for the auditors on how terrible [the company] is…..,” and “[the plaintiff] was checking [company] Policies to see where [it was] out of compliance.” The Court determined that the email was insufficient to put the company on notice that the plaintiff might pursue a Whistleblower complaint because the statements did not amount to an accusation of illegal, let alone fraudulent, conduct, because communicating with auditors was part of the plaintiff's job, and the company's auditor was a private entity, not a government entity, which undercut the inference that the company could have believed the plaintiff was going to report alleged improprieties to the government.

NO CLAIM FOR PREGNANCY DISCRIMINATION UNDER FLORIDA’S CIVIL RIGHTS ACT

In Delva v. Continental Group, Inc., --- So.3d ----, 2012 WL 3022986 (Fla. App 2012), a female employee brought an action against her employer under the Florida Civil Rights Act (FCRA),
alleging employment discrimination based on pregnancy. The Florida Civil Rights Act (FCRA), which makes it an unlawful employment practice for an employer to discriminate because of an individual’s sex, does not prohibit discrimination in employment on the basis of pregnancy. Accordingly, her state claim was dismissed. The federal Pregnancy Discrimination Act (PDA), however, does forbid discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.

FEDERAL STANDARDS FOR CONSIDERING CRIMINAL BACKGROUNDS WHEN MAKING HIRING DECISIONS

In April of 2012, the United States EEOC published updated guidelines concerning the ability of employers to consider an applicant’s criminal background when making hiring related decisions. While it appears to codify existing statutes and case law, hiring personnel should familiarize themselves with the following standards. First, arrests without convictions generally cannot be considered, but an employer can look to the underlying facts of the arrest where it directly relates to the position for which the applicant is applying. Second, criminal convictions should only exclude applicants where the convictions either relate to the position in question or are consistent with the employer’s business needs. The employer can make this showing if, in screening applicants for criminal conduct, it (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) gives an applicant who is excluded by the screen the opportunity to show why he should not be excluded.

NO ACCOMMODATION NEEDED WHERE EMPLOYEE DOES NOT HAVE THE DISABILITY

In Magnus v. St. Mark United Methodist Church, No. 11-3767, Seventh Circuit, August 8, 2012, the Court entered judgment for the employer in an ADA action where one of the reasons for the employee’s termination was the employee would not work weekends due to the needs of the employee’s disabled daughter. The Court held that the ADA does not require employers to reasonably accommodate employees who do not themselves have a disability. The association provisions of the ADA do not obligate employers to reasonably accommodate the schedule of an employee with a disabled relative.

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