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#### Title VII's Retaliation Provision Broadens

Different circuit courts have applied different standards for what constitutes unlawful retaliation because of discrimination charges related to race, color, sex, religion, national origin, age, and disability, as well as gender wage differences for performing substantially equal work. On June 22, 2006, in *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court changed this. Specifically, the Court held that an employer's action is retaliatory if a reasonable employee would find the challenged action to be "materially adverse" in the sense that it would "dissuade a reasonable worker from making or supporting a charge of discrimination."

In *Burlington Northern*, a worker sued her employer alleging that she was retaliated against after making a sexual harassment complaint. She claimed that after she made her complaint she was transferred to a less desirable, more demanding job and was later suspended without pay for over a month pending an investigation for insubordination. Although Burlington Northern concluded its investigation and absolved the employee of wrongdoing and reinstated (and paid) her for the missed time, the Court agreed with the employee. The Court held that the suspension and assignment to the job with more physically demanding duties was sufficiently harmful such that the actions might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Now, in order to constitute retaliation, an action no longer has to negatively affect a material term and condition of employment, such as compensation, job privileges, or benefits. Unlawful retaliation now may include actions not directly related to the workplace. This differs from federal anti-discrimination laws that limit the scope of discriminatory conduct to actions that affect employment or alter the conditions of the workplace.

This decision broadens the scope of possible retaliation claims. Employers should have training programs that consider this recent change in the definition of retaliation.

#### Taming Workers' Comp Drug Costs

Not surprisingly, according to the industry publication, *Insurance Journal*, prescription drug costs for workers' compensation programs are out of control — prompting many state lawmakers to develop cost containment policies. This

comes years after private sector plans have begun to address those issues.

The Workers' Compensation Research Institute (WCRI) says that prescription costs for the workers' compensation system are as high as 12 percent more than average prescription costs for government or group health programs. The WCRI supports familiar cost control measures such as fee schedules and generic drug mandates. The multi-tier co-payment approach (which could be an effective way to reduce drug related medical costs) may be in the future for the system.

## Subrogation and Constructive Trusts

Through subrogation, group medical plans may recover their costs for medical treatment when a third party is at fault. A recent Supreme Court decision provides the opportunity to gain insight about subrogation power and how to further remedies available under ERISA.

### Background

In America's early days, judges had two primary avenues to remedy disputes: equity or legal. Just as these two theories of law are different, so are the types of awards available under each theory.

*Legal:* Generally relates to technical remedies such as contractual damages or reimbursement of an amount of money that are available because the rules of law exist to provide those remedies.

*Equity:* Generally relates to remedies such as injunctive relief, a constructive trust, or an equitable lien that evolved outside the technical rules to give courts an additional basis to come up with a "fair" or equitable result.

Long before ERISA, the federal judiciary virtually eliminated this antiquated system of distinguishing between appropriate remedies. Yet, for better or for worse, the body of ERISA law preserved this "law versus equity" distinction, and modern courts revisit these concepts when deciding a person's ERISA rights.

### Constructive Trusts

In general, a constructive trust requires the following key elements:

- *Possession* of identifiable property; and
- *Control* over that property.

Fundamentally, whether a constructive trust exists requires an ownership determination. The court will scrutinize the facts to establish who is holding the property. Additionally, although one person may hold or obtain property, a court may find that the individual has a duty to transfer that property to another person. As a result, a person with a "constructive trust" is legally considered to only have temporary custody of the property. He or she is legally regarded as holding the property "in trust" for the rightful owner.

### *Great-West v. Knudson*

The constructive trust issue was heavily debated in the Supreme Court's 2002 decision in *Great-West v. Knudson*. Here, an accident resulted in serious injuries that left one person in need of permanent nursing home care. The injured parties sued the entity at fault and obtained a settlement which was placed directly into a trust account (over which the Knudsons did *not* have control or possession) to pay for future nursing home bills. When the employee's group health plan later sought to recover medical ex-

penses that it had paid, the court considered whether the group health plan's claim was truly an equity claim.

The court ultimately found that, because the Knudsons did not have actual possession of the settlement funds, there could be no constructive trust action against them. Consequently, the group health plan's litigation effort to recover the settlement funds was deemed to be of a contractual nature — converting the judicial review from an equity analysis to a review of the matter “at-law.” The at-law analysis is appropriate because, without the existence of a constructive trust, the group health plan would merely be seeking reimbursement under its contract.

Unfortunately for the group health plan in *Knudson*, although actions at law would ordinarily authorize cash reimbursement, they are not permitted under ERISA. The fact that the Knudsons were not found to be in possession of the settlement funds allowed the Knudsons to keep the money — despite the group health plan's subrogation attempt.

#### More Case Law

The issue of determining whether a party has “possession” of funds resurfaced in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (May 15, 2006).

In *Sereboff*, a husband and wife were injured in an automobile accident. The Sereboffs' group health plan paid the couple's medical expenses, and the couple also received an award for damages against the at-fault party — allowing the couple to effectively realize a double recovery. When Mid Atlantic filed suit to recover the medical expenses that it had paid, the Sereboffs agreed to take that amount and put it in a special investment account until the case was resolved.

The court ultimately found that Mid Atlantic was seeking an equitable remedy against the Sereboffs and that Mid Atlantic sought “identifiable” funds that were within the possession and control of the Sereboffs. Consequently, Mid Atlantic was allowed to collect the money at issue under the theory that they were, legally “holding” the money — in a constructive trust — for the rightful owner (Mid Atlantic).

It appears that if the money being sought is mixed with a person's general assets, then the money would not be considered sufficiently identifiable. So, it could not be reached through the subrogation process — even if the settlement or award could be traced to the person's general assets. Case law also suggests that money held in trust and under the control of someone other than the injured party cannot be reached because, although it may be identifiable, it is not directly under the control of the injured party.

When reviewing subrogation claims courts will scrutinize other factors. For example, the courts tend to require that group health plans seeking recovery through subrogation must actively participate with plaintiffs through the litigation process by, among other things, absorbing some of the legal costs. Plan sponsors are generally not allowed to reap the benefits of a legal award that a participant worked hard to secure.

Perhaps the most important lesson to draw from this string of subrogation cases, is recognizing that the courts tend to ultimately decide cases based on the particular facts — which makes predicting the likelihood one party will prevail (or not) extremely difficult.

#### **Generics Pushing Down Prescription Drug Costs**

*Forbes* magazine reports that drug purchasers (including consumers and group health plan sponsors) may soon see significant reductions in price because of generic versions of several popular prescription

drugs. For example, this summer Zocor (generally measured as the second-best selling drug in the country) loses patent protection, opening the way for cheaper generic versions. Zoloft, a Pfizer antidepressant with U.S. sales exceeding \$2.5 billion, will also lose patent protection. By the end of the year, the patents will have expired on more than a dozen other popular medications — including Allegra, Flonase and Biaxin.

Pharmacy benefit manager Express Scripts estimates that using generics instead of brand-name pills for common diseases whenever possible could save plan sponsors up to \$25 billion this year alone. On average, generic versions of pills are generally between 30 and 80 percent cheaper than brand names. By 2011, up to a quarter of the drug sales realized this year will have been eroded by generics. Pfizer's cholesterol pill, Lipitor, the world's best-selling drug (worldwide sales: \$12 billion), and the antipsychotic Zyprexa, Eli Lilly's top seller, are among the nearly two dozen drugs that could face patent expiration that year. The percentage of prescriptions that are generic is expected to increase to 75 percent in 2011 from about 50 percent today.

The *Forbes* article notes that drug manufacturers receive a 20-year monopoly on new chemicals they invent — but at least half that time is exhausted by tests to establish safety and effectiveness. To try to extend a medication's patent protection, a company may patent it multiple times: protecting not only a chemical compound but also manufacturing methods or uses for the drug.

Federal laws offer a lucrative six-month exclusivity to any generic firm that successfully challenges a patent on a branded drug. That has resulted in a tidal wave of lawsuits from generic drug firms trying to gain the right to produce a generic substitute. The author observed that many drug firms are starting to compete in ways that will make the six-month exclusivity less lucrative. For example, Merck is selling Zocor to some health plans at such a deep discount that plan sponsors are opting to use it instead of the generic, cutting into the generic's producer's profits. Pfizer has found success using an in-house generics firm to sell copies of its own drugs after they lose patent protection.

### **Tempting Ways to Save More**

The *New York Times* recently reported on a slew of efforts underway to revise the tax code to help promote greater worker savings. The article notes that a team of economists, lawmakers, financial advisors, and others are working on such strategies.

The Bush administration has touted the benefits of tax-deferred savings accounts (like IRAs), but many studies indicate that encouraging lower-income workers to save is often more difficult than encouraging those that already save to increase their savings. Some economists have suggested the development of automatic enrollment policies (through employers) that would automatically enroll workers in age-appropriate retirement savings plans unless workers change the allocations or investment amounts themselves. In order to encourage retirements saving among low-income workers, some economists have also suggested the development of matching grants through various IRA programs.

A recent H&R Block study finds only eight percent of those receiving a 20 percent match contributed to an IRA, three percent of those with no match contributed to the IRA, but 14 percent of those with a 50 percent match contributed.

### **Paid-Leave Proposals Gain Steam**

The *Christian Science Monitor* reports that, in light of same-sex marriage, universal health care, and similar reform initiatives, the Massachusetts legislature is now gearing up to approve paid-leave policies for workers. The latest proposal would offer workers their full salaries, up to \$750 weekly, for up to 12

weeks so that workers can care for newborns or ill family members.

Last year, about half the states considered similar legislation, and in 2004 California actually enacted a version of the bill Massachusetts is now considering. The United States is just one of five countries that does not offer some government form of paid leave to women workers who give birth to children. However, many U.S. employers voluntarily continue offering paid leave through a variety of employee benefit programs. When states enact mandates, private sector employers often respond by scaling programs back to meet the minimum level of benefit as required by law.

A University of Massachusetts study revealed that 440,000 employees take some form of leave annually, costing employers \$370 million per year. If paid leave were instituted, the study suggests that employers could save \$100 million annually in turnover and fewer sick day losses. The federal Family & Medical Leave Act (FMLA) allows workers to take up to 12 weeks of unpaid leave per year, but 60 percent of workers interested in the benefit are ineligible for it because it only applies to companies with 50 or more workers.

### **Since You Asked: Proof of Domestic Partner Status**

Over the years the states have enacted a variety of insurance mandates. Although ERISA allows self-funded plans to avoid these mandates through ERISA preemption of state law, the same cannot be said for those who have fully-insured plans. One insurance mandate that has generated a lot of questions is the *California Insurance Equality Act* (AB 2208).

#### **AB 2208 Protections**

This law generally provides domestic partners with the same access to insurance as provided to spouses by requiring insurance policies for sale in California that offer coverage to spouses to also provide equal coverage to domestic partners. AB 2208 specifically forbids an insurer from asking for “proof” of the relationship unless it also asks for similar proof from married couples. Recently, a *FOCUS on Benefits* reader asked about the legality of requiring proof of an employee’s domestic partnership status if similar proof is not required of an employee’s marital status.

AB 2208 is an insurance mandate and is only applicable to insurers. So, it does not address whether or not an employer is prohibited from *only* requesting proof from employees in domestic partnerships. Looking only at AB 2208, it would appear that such a request from an employer would be permissible. However, one must also consider AB 205. AB 205, also known as the *California Domestic Partner Rights and Responsibilities Act*, provides that registered domestic partners shall be afforded “the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law... as are granted to and imposed upon spouses.”

#### **AB 205 Considerations**

AB 205 essentially amends references to “spouse” under California law to include “domestic partner.” Generally, this means that those rights provided to spouses must now be extended to domestic partners. Unlike AB 2208, AB 205 is not an insurance mandate, and it would apply to any employer conducting business in California. It is also intended to be construed rather broadly. Following the enactment of AB 205, employers in California had to review and revise their HR policies to ensure that any benefits offered to spouses (e.g. bereavement leave, discounts, etc.) were also provided to domestic partners.

Although only *registered* domestic partners are entitled to the protections and benefits of AB 205, the issue of an employer asking for proof of the domestic partnership was not specifically addressed. While

this law may not explicitly make it illegal under California law to ask for proof of someone's registered domestic partnership status and not marriage, doing so would appear to run counter to the objective of AB 205.

Moreover, though ERISA preemption would protect an employer who requested proof of an employee's domestic partnership status solely for purposes of administering its employee benefit plans (even if such benefits are provided because of the AB 2208 insurance mandate), it would not likely extend protections to an employer who asks for and uses such proof to address other HR issues (e.g. leave policies). If the proof is used for anything other than the administration of the plan, then such use will fall under the control of AB 205.

Because the law in California promotes the equal treatment of spouses and domestic partners, and given its broad interpretation we recommend to request proof from *both* married and domestic partner couples. Such an approach is better for the plan in that it helps to ensure that only eligible individuals are provided coverage, and it certainly complies with California's domestic partnership laws. Given the complexity of the issues involved, it is probable that the courts will ultimately emerge as the source for definitive answers.

### **Employee Disclosure: SPD Distribution**

ERISA requires employers to report plan activity to the government annually and to distribute plan materials to employees. For purposes of this rule, plan materials include Summary Plan Descriptions (SPDs) for the benefit options that the plan sponsor offers. A recent case explored the question of what happens when an employer does not distribute an SPD to participants. The result is somewhat surprising.

In *Weinreb v. Hospital for Joint Diseases Orthopaedic Institute*, 2005 U.S. App. LEXIS 5701, Dr. Herman Weinreb served as Neurology Department Chief for the hospital. When he was hired he received an employment packet with enrollment forms, insurance information and some SPDs.

Dr. Weinreb completed and returned most of the paperwork soon after his date of hire. However, he neglected to complete both the life insurance and the dental insurance enrollment forms. After repeated reminders from the human resources office, including a written memo and several phone calls, Dr. Weinreb completed the dental insurance enrollment form. He promised to complete the life insurance paperwork but he never did. Dr. Weinreb died two years after being hired, and at that point his wife learned that her husband did not have any life insurance through the hospital.

Angered by the lack of life insurance, Weinreb's widow argued that the hospital's failure to provide a life insurance SPD was the cause of her husband not enrolling. She claimed that, because he did not have an SPD, he was not put on notice that he must enroll in the life insurance benefit in order to have coverage. Weinreb's widow was correct in pointing out that her husband never received a life insurance SPD. In fact, the hospital never even created a life insurance SPD.

The court reviewed an employer's duties under ERISA and stated that a plan administrator must make reasonable efforts to ensure each plan participant's actual receipt of the plan documents. Although this was an admitted failure on the part of the employer, the court looked past this requirement. Ultimately, the court decided that Dr. Weinreb "suffered no prejudice from the absence of an SPD...." instead, "the hospital's repeated efforts to prompt Dr. Weinreb to fill out the enrollment form were sufficient to place Dr. Weinreb on actual notice of the plan's enrollment requirement."

The court appears to have been most persuaded by the facts and circumstances that attested to the indecisiveness of the participant. The well documented HR office reminders were used to prove that, although the plan failed its technical duties, it had still attempted to alert the participant about his specific duties and obligations.

This decision represents applicable law inside the Second Circuit, but outside that jurisdiction, the decision's value diminishes. When a case is examined outside its own circuit, such cases are generally used for "reference purposes" — but they are not necessarily considered "binding law." The Second Circuit includes: Connecticut, New York, and Vermont.

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