Good vs. Bad – The Tale of Automatic Termination Policies

Many employers have adopted policies that provide any employee who is continuously absent for a specific amount of time (usually six to twelve months) is automatically terminated. In Texas, these policies were encouraged by a Texas Supreme Court decision - *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312 (Tex. 1994) - that held uniform enforcement of an automatic termination policy essentially precludes workers’ compensation retaliatory termination claims if the termination was based on the policy. In essence, everyone is treated the same under these policies, so the terminated employee can’t complain. That was good news for employers.

Now comes the bad news - the Equal Employment Opportunity Commission (“EEOC”) has begun filing lawsuits claiming that inflexible automatic termination policies violate the Americans with Disabilities Act (“ADA”). For instance, the EEOC has filed an action against UPS based on enforcement of an automatic termination policy. There, a UPS administrative assistant took a 12-month leave during which time she was diagnosed with multiple sclerosis. The employee returned to work for a few weeks, but she subsequently needed two-weeks of additional leave. UPS terminated the employee for exceeding its strict 12-month leave policy.

UPS seemed to be following the cardinal rule of employment law: To avoid discrimination/retaliation lawsuits, uniformly enforce employment policies. The problem is that employment statutes that require accommodations – like the ADA – essentially hold that employers should not treat everyone the same; rather, disabled workers may be entitled to special – but reasonable – accommodations. So, according to the EEOC, UPS violated the ADA by being inflexible and not even considering a reasonable accommodation – namely two more weeks of leave. See also EEOC, The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, at Question 21, Example 37 (an employer with an absence-control policy should not automatically terminate an employee with a disability but should determine whether the employee can provide a reasonable, definite return date) available at http://www.eeoc.gov/facts/performance-conduct.html (last visited October 1, 2009).

The bottom line is, you don’t need to scrap your automatic termination policy; just create one with some wiggle-room. To do that, every employee handbook – and particularly those with an automatic termination policy – should contain a policy that notifies disabled employees of their right to request reasonable accommodation(s), including a suggested accommodation that may modify or amend any employment policy. With inclusion of a reasonable accommodation policy, if an employee reaches the limits of available leave but does not request a reasonable accommodation – such as a reasonable extension of leave – then the employee may be terminated pursuant to the automatic termination policy. However, if the employee does request additional leave, the employer should consider whether the request is reasonable under the circumstances applicable to that employee or whether the request creates an undue hardship. Although there are few hard-and-fast rules concerning what is “reasonable,” even the EEOC agrees that a request for indefinite leave is not reasonable. See id. at Example 38 (“The employer may terminate this worker because the ADA does not require the employer to provide indefinite leave.”).

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