Baydin & Brandt NJ Employment Newsletter

TEMPORARY AND CONTRACT WORKERS
Suing for Discrimination Under Federal Law

In an important victory for temporary employees and a cautionary lesson to companies that hire them, the Third Circuit ruled that an individual could sue a company for discrimination even though he or she was employed through a temporary staffing agency. In Faush v Tuesday Morning, Inc. (decided 11/ 18/15), an African American male was assigned through a temp agency to work at Tuesday Morning for a period of ten days. After experiencing racial slurs and harassment during the assignment, he sued Tuesday Morning in federal district court for racial discrimination in violation of Title VII of the federal Civil Rights Act of 1964. The district court dismissed his claim, ruling that Tuesday Morning could not be liable since the company was not his employer. Faush appealed to the Third Circuit, which reversed the lower court decision. The Third Circuit ruled that the company could be liable as a "joint employer" since it retained a great degree of control over Faush, including direct supervision, control of assignments, verification of hours, and other factors. Even though the staffing agency was the employer of record for payroll purposes and Tuesday Morning had no contractual arrangement with Faush, the Third Circuit held that this did not extinguish Tuesday Morning's liability for discrimination under federal law.

TRENDING:
Employer Access to Medical History of Employees and their Spouses

The Genetic Information Nondiscrimination Act of 2008 (a law which many employees are unaware of) prohibits an employer from discriminating or taking adverse action against an employee because of his or her genetic information. "Genetic information" encompasses information about genetic tests of an employee or his or her family members and information about the manifestation of a disease or disorder of such employee or family member. Although enacted several years ago, the law has received a lot of attention lately due to a new proposed amendment to the law addressing the extent to which an employer may offer financial incentives to an employee when his or her spouse provides information about current or past health status as part of a "corporate wellness program". While employers are generally prohibited from requesting this medical information, one of the few exceptions is where the company has a wellness program, the employee provides "prior, knowing, voluntary, and written authorization", and certain confidentiality requirements are met. Once disclosed, however, there are many concerns about the risks of involuntary disclosure of this information resulting in discrimination based on disability or health status, as well as coercion of employees and their spouses to divulge this information due to the financial penalties. If your employer compels release of you or your family member's genetic information, or you experience differential treatment, you may have a legal claim against your employer.

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EMPLOYERS CANNOT FORCE ARBITRATION IN A HANDBOOK

In Morgan v. Raymours Furniture Co. (decided 1/7/16), the New Jersey Appellate Division recently sided with an employee of the furniture chain who wanted to file his age discrimination case in court instead of being forced into arbitration by the employer. The appellate panel ruled that the mandatory arbitration clause in the Company's employee handbook was not enforceable. Relying on the disclaimer that the company had inserted in the handbook which stated that the handbook was not a contract, the court held: "it is simply inequitable for an employer to assert that, during its dealings with its employee, its written rules and regulations were not contractual and then argue, through reference to the same materials, that the employee contracted away a particular right". The implications of mandatory arbitration of employment claims are huge. By accepting these terms, an employee gives up all rights to litigate his or her claims before a jury of his or her peers as well as the possibility of punitive and other damages not usually awarded in arbitrations. This important issue will undoubtedly be addressed by many employers who will ask employees to sign separate "contractual" documents requiring them to accept mandatory arbitration as a condition of employment.

QUITTING AN UNSAFE JOB:
Qualifying for Unemployment

To qualify for unemployment, it can be very difficult for an employee who quits. This is because the burden of proof in a voluntary leave case is on the employee to demonstrate "good cause" for leaving. In Washington v. Board of Review (decided 2/3/16) the Appellate Division reversed the employee's disqualification for unemployment benefits where she left her job as a property manager six months after she experienced a sexual assault at the premises and her employer had not improved safety conditions, including installing a panic button as promised. Relying on the statutory regulation exempting an employee whose working conditions are "unsafe, unhealthful or dangerous" (NJAC 12:17-9.4), the court held that the employee qualified for unemployment because she left "with good cause". While common sense would seem to support an employee in this situation, the Department of Labor's Appeal Tribunal and Board of Review both denied the claimant her benefits, and it was not until she appealed to the state Appellate Court that the decision was ultimately reversed. Employees facing potential disqualification should seek legal assistance early in the process when the claim is still pending before the Department of Labor.

"BORGATABABES"
Weight Requirements for Casino Employees not Considered Gender Discrimination

On January 19, 2016, the New Jersey Supreme Court declined to review (and let stand) the controversial holding of the Appellate Division in Schiavo v Marina Development Co. which held that requiring certain employees not gain too much weight did not violate the New Jersey Law Against Discrimination (LAD). The Borgata Casino Hotel & Spa has a program called "BorgataBabes" which requires male and female cocktail servers to meet certain appearance standards at work, including a prohibition on increasing their weight by more than 7%. Employees who exceed the percentage are subject to suspension, and if they fail to lose weight in a certain period of time, they can be terminated. Twenty-one females sued the Casino, claiming that the weight policy was disproportionately applied to women and also relied on illegal gender stereotyping (eg, women were to have "natural hourglass figures"). Despite the women alleging that they were targeted for weigh-ins and disciplined about weight gain, the court found that the policy was not discriminatory as it applied to both men and women. Significantly, the appellate court did permit the women to sue for hostile work environment based on their gender.

PAY DATA AND WAGE DISCRIMINATION:
New Employer Reporting Requirements

On February 1, 2016 the US Equal Employment Opportunity Commission (EEOC) unveiled a proposed revision to the Employer Information Report (EEO-1), which would require large employers (over 100 employees) to provide detailed pay data identifying race, gender and ethnicity of their employees by pay band category. The EEOC indicated that these changes should help employers self-evaluate pay disparities and hopefully engage in corrective actions. In addition, the data is expected to assist the EEOC in its enforcement actions against employers suspected of wage discrimination. If passed, employers can expect more targeted investigations by the EEOC as well as private lawsuits by employees relying on this information obtained by their lawyers. The changes are set to go into effect September 2017.

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