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'Misconduct' difficult to prove in unemployment appeals

by Douglas E. Lee

Little is more frustrating to employers than paying unemployment benefits to employees who were fired for good cause. As two recent appellate court decisions make clear, however, the "misconduct" necessary to deny unemployment benefits is considerably more severe than one might expect.

In *Oleszczuk v. Department of Employment Security*, for example, an employee was terminated for insubordination, which included yelling at her supervisor. Her claim for unemployment benefits was denied at every level until it reached the appellate court. There, the court held that no evidence existed that the employee had violated a specific, reasonable work rule. In the absence of such evidence, the court said, benefits must be awarded.

In the other case, *Wrobel v. Illinois Department of Employment Security*, the employee also was unsuccessful until he reached the appellate court. In its decision, the court awarded unemployment benefits because the employee's violation of the employer's attendance policy was not intentional and therefore not "misconduct" under the Unemployment Insurance Act.

In *Wrobel*, the employee violated his employer's attendance policy several times. After oversleeping and missing his shift in April 2001, his employer informed him that another infraction could cost him his job. When the employee overslept again in September 2001, the employer fired him.

At his unemployment hearing, the employee testified that his electronic clock-radio failed to sound because of a power outage. He also testified that his back-up, a wind-up clock, did not sound because he forgot to set it. The referee hearing the case concluded that, because the circumstances that caused the final attendance violation were solely within the employee's control, the employee's violation constituted "misconduct" under the Act.

The appellate court reversed, holding that an employee is guilty of "misconduct" only if

- the employee willfully and deliberately violates an employer's rule,

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U.S. Department of Labor issues new COBRA notice rules

by Douglas E. Lee

On May 26, 2004, the U.S. Department of Labor issued final rules implementing new COBRA notice requirements. Under COBRA, employers employing more than 20 people must give employees and their families the opportunity to temporarily continue group health care coverage when coverage otherwise would have been lost because of termination of employment, divorce, death or loss of dependent status.

The new rules set minimum standards for timing and content of COBRA notices and provide new model notices. The general notice, for example, now must be provided to qualified beneficiaries within 90 days after coverage

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- the employer's rule is reasonable and
- the violation either harms the employer or was committed after the employee received a warning or instruction not to violate the rule.

Focusing on the first element, the court ruled "misconduct" can exist only if the employee acts intentionally. Carelessness, negligence and poor performance, while grounds for termination, are not grounds for denying unemployment benefits. Unemployment benefits can be denied to employees who violate tardiness or absence rules, the court said, only if the employee consciously chooses to be late or absent.

The court in *Oleszczuk* focused on the lack (at least in the court record) of any employer rule prohibiting insubordination. Moreover, the court said, the employee had been employed for nine years without receiving a warning about her work behavior.

"A single flurry of temper between a worker and a supervisor may be enough to warrant discharge in an at-will relationship," the court said. "But it is not enough to deny unemployment benefits."

In light of these court decisions, employers that hope to avoid paying unemployment benefits must carefully document the rule the employee has violated, the employer's previous warning or instruction to the employee not to violate the rule and all evidence that exists that the employee intentionally violated the rule.

Background checks easier under new law

by Douglas E. Lee

Recent federal legislation has eased restrictions on employers that hire third parties to investigate employee misconduct.

Under the Fair and Accurate Credit Transactions Act (FACT), which amends the Fair Credit Reporting Act (FCRA), an employer no longer needs to disclose in writing to an employee that the employer is hiring a third party to investigate the employee's alleged misconduct, obtain the employee's consent to such hiring or notify the employee of the results of the third party's investigation before taking an adverse action against the employee. Instead, the employer is obligated only to provide the employee a summary of the "nature and substance of the communication" upon which any adverse action is based. As part of this summary, the employer need not disclose the source of the information.

The FACT also exempts from the FCRA all investigations regarding compliance with "any pre-existing written policies of the employer." While employer groups hope this exemption will be interpreted to include all background checks conducted pursuant to an employer's written policy, no such interpretation yet exists. Employers therefore should not assume that the FCRA no longer applies to background checks performed by third parties.

New Medicare rules affect retirees

by Douglas E. Lee

Under regulations issued in April by the Equal Employment Opportunities Commission, employers now can take into account an employee's eligibility for Medicare in determining the level of health benefits offered to retirees.

Before the new regulations were announced, anti-age discrimination laws required employers to offer all retirees the same benefits, regardless of whether a retiree was eligible for benefits under Medicare. As a result, many employers either eliminated retiree health benefits entirely or offered all retirees only those benefits that would be needed by persons covered by Medicare. Under the new regulations, employers can offer non-covered employees a full set of benefits while offering covered employees Medicare "wrap plans" that reduce benefits by the amount of benefits payable by Medicare.

Employers, however, should note two important limits in the new rules. First, the rules apply only to retiree health benefit plans that coordinate with Medicare or a comparable state health benefit program. Second, the regulations apply only to retirees and not to current employees. In fact, the rules specifically require employers to offer current employees who are at or over the age of Medicare eligibility the same health benefits as those benefits offered to employees under the age of Medicare eligibility.

Judicial web sites ease retrieval of court information

by Rolfe Ehrmann

In former times-say four years ago-a person wanting information about someone's criminal record or a court case needed to go to the courthouse and look up that information in the Circuit Clerk's office. Thanks to technology, that no longer is true.

Today, much information about past and pending court cases is available over the Internet, at www.judici.com. Through the leadership of Lee County Circuit Clerk Denise McCaffrey (disclaimer - she is my wife) and many of the Circuit Clerks in northwest Illinois, all proper public information concerning the court systems in these circuits is now available online.

At judici.com, you will first find a welcome page. Clicking on "participating courts" will take you to a list of 15 area counties. Clicking Lee County then will take you to another welcome page, where you can click on "cases" to find a general explanation page. Once on the general explanation page, you can access the search function by clicking "search."

Information about court cases is valuable for many reasons. Information about a criminal record, for example, could be important to someone verifying a resume or for a charity utilizing a volunteer for child care. Frankly, in a *caveat emptor* world it is smart for anyone planning to place trust in another, whether of their home, family, money or business, to investigate the trustworthiness of the other. As Ronald Reagan said, "Trust but verify."

Similarly, business people and litigants often need to obtain information about a pending or closed case. Those in business often need to know the status of a case that might affect them or the truth of representations made to them about the outcome of a legal matter. Litigants frequently need to know what happened at a hearing or to determine the next scheduled date.

Of course, as is true of most things, care must be taken to understand the records. A single accident can cause multiple traffic tickets, so if a careless viewer does not check the date, he might gain the erroneous impression that a driver has a bad traffic record. Similarly, a civil lawsuit filed against someone might later be dismissed, and if a careless viewer does not check the disposition file, he will be misinformed. The need for such care applies whether the search is conducted physically at the courthouse or on the Internet.

Also important in the virtual world is the need to protect personal privacy. Although the law has required courthouse information to be public since the founding of this country, the law does not require proceedings to be published on the Web. Information such as addresses, telephone numbers and social security numbers is best kept off the Internet, and the Circuit Clerks accordingly do not post that type of information. Proper public information, however is now easily accessible to the public. Try judici.com – it likely will change some of your business habits to better allow you to trust but verify.

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begins, in the form prescribed in the new rules. If the health plan's summary plan description is provided to qualified beneficiaries (as opposed to only covered employees) within 90 days, the COBRA notice may be included in the summary plan description.

Under COBRA, qualified beneficiaries must notify plan administrators of any divorce or legal separation or the loss of dependent status under the plan. The new rules clarify the timing of these notices and require plans to establish "reasonable procedures" for qualified beneficiaries to follow when furnishing these notices. At a minimum, these procedures must identify who is to receive the notice, how the notice must be provided and what information is required in the notice.

The new rules also describe two additional instances in which a plan must provide a notice. First, if a plan administrator receives notice of a qualifying event and determines an individual is not entitled to continuation coverage, the administrator must notify the individual as to why continuation coverage is not available. Second, if an individual's COBRA coverage is terminated earlier than the full time period for which COBRA must be available (if, for example, the employer no longer sponsors a group health plan), the plan must notify the individual.

The final rules are effective for notice obligations that arise on or after the first day of the plan year that begins on or after Nov. 26, 2004. Employers with calendar year plans therefore will have to comply with the new rules beginning Jan. 1, 2005. The model notices and other information about the new rules can be found at www.dol.gov/esba.

New Illinois law to recognize trusts for pets

by Dana M. Considine

While you still can't take it with you, you now can leave it for your pets.

Under a new Illinois law, which takes effect Jan. 1, 2005, trusts established for the care of pets or other domestic animals will be recognized as valid. In a will or otherwise, a pet owner therefore now can provide for the care of his or her animals after the owner's death.

Ideally, the owner will designate in the trust the person who is to serve as trustee. If no trustee is named, however, or if the named trustee cannot or will not serve, a court must name a trustee and may order the transfer of property as necessary to fulfill the owner's intent.

Unless ordered by the court or required by the trust, a trustee is not required to file periodic accountings with the court. The trustee, however, may not use any of the trust's funds for his or her own benefit unless such use is permitted by the trust.

The trust terminates when no living animal is covered by the trust. Upon termination, the trustee shall dispose of any remaining funds as directed in the trust. If the trust lacks such directions and if the trust was created as part of the owner's will, the funds shall be disbursed in accordance with the residuary clause in the owner's will. If the trust was created outside a will, the remaining fund must be distributed to the owner's heirs.

Under the new law, a court may reduce the amount of property that was transferred into the pet trust, if the amount substantially exceeds the amount that is needed for its intended use. The amount of the reduction will be distributed as though the trust had terminated.

In Print and At the Podium

Reporters from the *Star Ledger* (Newark, N.J.), *Daily Orange* (Syracuse, N.Y.) and *Daily Herald* (Provo, Utah) have in recent months interviewed **Mr. Lee** for articles dealing with First Amendment issues . . . As president of the Lee County Bar Association, **Mr. Ehrmann** continues to work with members of the Lee County Board and other officials to protect court services from budget reductions . . . **Mr. Gehlbach** has been reappointed to the Real Estate Law Section Council of the Illinois State Bar Association. He is completing his 19th year as the editor or as an associate editor of the Council's *Real Property* newsletter and has published dozens of articles over the years. He has also recently received an appointment to the Illinois Bar Journal editorial board . . . **Mr. Lee** authored a column for Sauk Valley Newspapers about the legal and practical implications of Illinois' new law allowing electioneering near polling places . . . In May, **Mrs. Heeg**, a member of the board of directors of Forreston Mutual Insurance Company, joined with other farm mutual company representatives who traveled to Washington, D.C., to brief Illinois legislators on issues affecting the state property/casualty insurance industry . . . **Mr. Ehrmann** recently addressed the Dixon Rotary Club about his family relationship with Albert Einstein. **Mr. Lee**, as president of the Dixon school board, was the Club's guest speaker when the Club awarded its scholarships to high school seniors . . . **Mr. Lee**'s most recent commentary for the web site of the First Amendment Center, www.firstamendmentcenter.org, concerned a libel case being heard by the Washington Supreme Court . . . **Mr. Lee** recently was re-elected president of the board of directors of Open Sesame Child Care Center.

Deals and Decisions

Mr. Ehrmann, despite Illinois Supreme Court precedent suggesting grandparents do not have visitation rights, recently won visitation rights for grandparents he was representing . . . **Mr. Lee** successfully represented clients accused of failing to disclose material defects in a home they had sold. After a two-day trial, the judge ruled the sellers had not concealed any defects . . . **Mrs. Heeg** was reappointed to the panel of private trustees maintained by the United States Trustee for the Northern District of Illinois, Western Division. As a member of the panel, Mrs. Heeg administers Chapter 7 bankruptcy cases in Lee and Whiteside Counties . . . **Mr. Lee** recently assisted a client in recovering much of her investment from an investment adviser. In the proceeding before the National Futures Association, the client alleged the adviser had negligently counseled her to invest in the futures market . . . **Mr. Ehrmann**, as City Attorney for the City of Amboy, has represented the City in its development of infrastructure to substantially improve water, roads and other services for industrial and residential citizens . . . **Mrs. Heeg** is assisting clients in maximizing recovery of unpaid debt, including the filing of mechanic's liens, judgment liens and non-wage garnishments . . . **Mr. Lee** successfully represented an employer charged with pregnancy discrimination. After the fact-finding conference conducted by the Illinois Department of Human Rights, the former employee withdrew her charge.