Law Office of Edward E. Sharkey LLC

July 2013

BUSINESS LAW DEVELOPMENTS

Legal updates for entrepreneurs and business owners from the Law Office of Edward E. Sharkey LLC.

Dear Friends of the Firm,

This is the July issue of our firm's newsletter, featuring coverage of legal developments important to business owners and entrepreneurs. You are receiving it because you are a client or have previously solicited legal resources from the firm.

Please let us know what you think.

Very truly yours,

Ed

In This Issue

Jury Punishes Employer for Auto Accident Caused by Employee on Cell Phone

As the use of cell phones has become commonplace, so has knowledge that it is dangerous to use a cell phone while driving. In many states, including Maryland, it is illegal to use a hand-held cell phone while driving. Maryland, like most other states, also made it illegal for drivers to text message. Although laws regarding hands-free cell phone use by drivers are not as common, studies have shown that the use of hands-free cell phones while driving also creates danger.

Most employers have no policy against using cell phones while driving on the job. Others have policies that are not sufficient to safeguard their employees or others on the road. A verdict recently returned by a jury in Texas shows that this exposes employers to significant liability.

The Texas case arose out of an automobile accident involving a Coca-Cola marketing employee driving a company automobile. The driver incorrectly believed she had the right of way due to a green arrow, turned left, and collided with the plaintiff's car. At the time of the accident, the driver was on a business call using a hands-free device. Coca-Cola's cell phone use policy permitted this. So did Texas law.

At trial, the plaintiff's attorney presented evidence that hands-free cell phone use distracts drivers and creates danger. The results of one of the studies presented to the jury indicated that cell phone use of any sort takes more than one-third of the driver's attention. Another showed that cell phone use, even hands-free, is statistically as dangerous as driving while intoxicated.

The jury also heard evidence that, prior to the accident, Coca-Cola was aware of such studies. Despite this, Coca-Cola failed to share the information with its employees or amend its policy to preclude the use of hands-free devices while driving. The jury returned a $21.5 million verdict against Coca-Cola, including $10 million in punitive damages.

All businesses should consider the case a warning. It is easy and nearly cost-free to adopt and disseminate a policy precluding employee use of cell phones while driving. Failure to have and enforce a cell phone policy can expose a business to liability. Our firm monitors case law affecting the liability profile of businesses and employers. If you have a question about this or any related issue, please contact the office.

The ADA: Employers Must Reassign Disabled Employees to Different Jobs . . . Sometimes

The ADA requires employers to reasonably accommodate an employee with a disability if the employee is qualified and able to perform the essential functions of his job. It can be difficult for an employer to determine whether a requested accommodation is "reasonable." Employers often find themselves sued for discrimination after declining requested accommodations that the employers felt were unreasonable.

One type of request that has triggered litigation is a request for reassignment to a vacant position. Rather than issue rules that can be easily applied, courts handling such cases have instead taken a circular approach that gives employers little practical guidance. The courts first ask whether the employee has shown that the reassignment is ordinarily reasonable. If the employee is able to do this, the employer must prove special circumstances that demonstrate the reassignment would be unduly burdensome.

Although emphasizing that it was not a categorical rule, in a 2002 opinion [1], the United States Supreme Court held that, ordinarily, where a position would otherwise be filled pursuant to a seniority policy, a request for reassignment to the position is unreasonable. This provides at least some authority for employers who have a seniority policy.

Where a position would otherwise be filled by different means, such as by a competitive hiring

process, however, employers are bereft of clear guidance from the courts. For example, the U.S. Court of Appeals sitting in the 4th Circuit, which includes Maryland, has held [2] that reassignment might be a reasonable accommodation. The 8th Circuit, on the other hand, held [3] that an employer need not accommodate an employee by reassigning him or her to a new position.

Most recently, an employer asked the United States Supreme Court to hear a case concerning the reasonableness of a request for reassignment to a position that would otherwise be filled by a competitive hiring process. In the event that the Supreme Court agreed to hear the case and issue an opinion, it could have helped to guide employers. Unfortunately, the Supreme Court declined to hear the case, leaving employers without certainty. Employers must remain mindful that, at least in some cases, they may need to grant a request for reassignment to a position that would otherwise be filled by different means.

If you have questions about a request for accommodation or a related issue, please feel free to contact our office for assistance.

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[1] Available at http://www.law.cornell.edu/supct/html/00-1250.ZS.html
[2] *Williams v. Channel Master Satellite Systems, Inc., et al,* available at http://caselaw.findlaw.com/us-4th-circuit/1379941.html
[3] *Huber v. WalMart Stores Inc.*, available at http://caselaw.findlaw.com/us-8th-circuit/1289819.html

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Data Breach: Liability Without Resulting Harm?

When a company electronically stores its customers' personally identifiable information ("PII"), such as name, address, phone number, Social Security Number, or other information by which an individual may be identified or contacted, the company has a duty to guard that information with reasonable care. Breach of this duty can constitute negligence, and businesses have been sued when the dissemination of customers' PII has led to identity theft. In a lawsuit, however, plaintiffs typically must prove causation and damages. That is, the data breach must be proven to be the cause of some harm suffered by the plaintiff. Courts have dismissed data breach lawsuits when the plaintiff can allege no more than that an identity theft occurred shortly after a data breach.

A new case in the 11th Circuit [1] has given plaintiffs a novel way to pursue data breach lawsuits, even if they cannot prove damages. In addition to typical negligence claims, the plaintiffs in the case sued the defendant – a health plan provider – for unjust enrichment, a claim that does not require proof of damages. Their theory was that part of the premium paid for the health plan is the cost to secure confidential data. If the company fails to secure the data, it has received payment for a service that it did not deliver. The court ruled this was a viable theory of recovery, and it declined to dismiss the case.

The case also cast doubt upon whether the more common negligence claims will continue to be dismissed with regularity in the future. In the case, the PII was breached when two laptops belonging to the health plan provider were stolen from the company's corporate office and sold to an identity thief. The thief proceeded to open banking and stock-trading accounts using the plaintiffs' information.

The court held that the plaintiffs' allegations were enough to survive the company's motion to dismiss.

In addition to alleging that the identity theft occurred shortly after the data breach, the plaintiffs alleged that they took "substantial precautions" to guard their PII, that they had never been victimized by identity theft before the data breach, and that the information that was used to open the unauthorized accounts was the same as the information stored on the stolen laptops.

Data breach occurs more frequently as a result of computer hacking than as a result of information on stolen physical goods being accessed. In any event, it is imperative for businesses to take precautions to ensure the safety of customers' PII. Any breach of confidential data could create a risk of time-consuming and costly litigation.

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[1] Available online at http://tinyurl.com/bvr6n4p

Federal Case Reinforces ADA Rule: Employee Must be Able to Perform "Essential Functions" of Job

In a recent case brought under the ADA, a federal court reminded employers of an important protection they enjoy under the Act: in order to succeed on a discrimination claim, an employee must prove – among other things – that she can perform the "essential functions" of the job.

In this case [1], the employee was a Resource Coordinator ("RC") for an energy company. In order to handle emergency situations and provide its clients with round-the-clock service, the employer required all RCs to work a rotating schedule, which included shifts of different lengths as well as day and night shifts.

The employee, a diabetic, found it difficult to manage her disease while working a rotating schedule. Her doctor recommended that she only work day shifts in order to better manage her condition, and she requested this of the energy company. The employer denied her request. Instead, it offered her a choice of other job assignments, all of which the employee rejected.

Due to complications resulting from a surgery, the plaintiff took leave under the Family and Medical Leave Act ("FMLA"). When she returned, she was placed on a temporary light-duty assignment – which included 8-hour day shifts – based on a doctor's release. However, after the temporary light-duty assignment expired, the employee's doctor recommended that she remain on a similar schedule.

The employer again denied the employee's request. It did, however, allow the employee to take paid leave while they attempted to work out a solution. When no solution could be reached, the employee filed charges with the Equal Employment Opportunity Commission, and eventually brought her case to court.

The trial court granted summary judgment for the employer. On appeal, the appellate court affirmed that decision, also ruling for the employer. The court held that "an employee must (1) possess the requisite skill, education, experience, and training for [her] position; and (2) be able to perform the essential job functions, with or without reasonable accommodation" in order to state a claim for discrimination under the ADA. If either factor is not present, the employer has not discriminated as a matter of law.

The court accepted the employer's argument that, for purposes of its RC position, working a rotating shift was an essential job function. The court laid out several factors used to determine whether a job function is "essential." In this case, the court was persuaded that the ability to work a rotating schedule was essential because (1) it was listed on the employer's written job description for the RC position, and (2) the employer testified that the requirement helps train RCs on the job and spreads out the less desirable shifts evenly among RCs.

As this case illustrates, discrimination claims under the ADA often involve complicated analysis and fact-specific determinations by the court. Businesses can take away two important things from this case: carefully written job descriptions may help employers defend against discrimination suits brought under the ADA, and employers are not required to change those job descriptions to accommodate disabled workers.

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[1] Available online at http://tinyurl.com/bugxshh

ABOUT US

The Law Office of Edward E. Sharkey LLC is a firm of dedicated business and trial lawyers in Bethesda, Maryland, concentrating on business law and commercial litigation. Other areas of practice include pension, securities, negligence/professional liability, and construction law.

In This Issue

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