



In The Trenches

By Lisa Bonham

Practical Answers to Your HR Questions

Q *I've heard that in some states employees can sue their employers for injuries caused by stress. Can employees in Utah do the same?*

A Strictly speaking, an employee in Utah cannot directly "sue" an employer in state court for stress-related injuries. However, the Utah legislature made it possible for an employee to recover compensation for injuries caused by stressful employment through a provision in the Utah Occupational Disease Act. As with other workplace-related injuries, an employee seeking recovery for such an injury must make a claim for compensation with the Utah Division of Industrial Accidents under a procedure similar to workers' compensation. Such a claim provides the exclusive remedy for any stress-related injury.

In addition, although the Utah Occupational Disease Act allows an employee to recover compensation for physical, mental, or emotional injuries related to mental stress arising out of employment, employees making such a claim must meet a rather high standard.

To successfully recover for a stress-related injury, an employee must show a legal and medical causation. In other words, the employee must provide evidence of a connection between his employment and his injury. To prove legal causation, an employee must show extraordinary stress that arises directly from his or her employment. To meet the medical requirement, the employee must demonstrate that the stress caused the physical, mental, or emotional injury.

Fortunately for human resource professionals, the Utah Occupational Disease Act provides exceptions for good-faith actions that cause the average employee stress. These exceptions include good-faith disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirement. In addition, neither discrimination nor harassment can form the basis of a stress-related claim. These exceptions prevent the statute's application in most circumstances.

As a result, while Utah does recognize a claim for injuries caused by mental stress, the statute is extremely employer friendly.

To date, outside of the administrative context, Utah appellate courts have not been particularly friendly to such claims.

Nonetheless, trends in other countries suggest that courts may be growing more receptive to stress-related claims. For example, a New Zealand probation officer was awarded fourteen years of lost wages, as well as compensatory damages and reimbursement for his medical costs, after his employer made him carry an unreasonable workload for an extended length of time and he was forced to retire after developing a stress-related injury.

Q *Smokers have much higher health-related claims than non-smokers, and they impact health care costs for my entire company. In an effort to control health care costs, may I refuse to hire smokers without violating a law?*

A Yes. In Utah, an employer can refuse to hire a smoker. Across the country, employers are increasingly making hiring decisions based on a prospective employee's "lifestyle" choices, such as smoking, even if the activity occurs away from work. Not only have several well-known companies recently adopted policies that prohibit hiring smokers, but many have approved policies allowing for the dismissal of smokers who are currently employed if the employee was hired with the understanding that he or she would not smoke.

The key is that smoking is not a protected activity and smokers are not a protected class – at least under federal and Utah state law. Although many laws exist to protect employees, there is no federal law prohibiting an employer from making employment decisions based on an employee's smoking habits. For example, the ADA, which expanded the concept of disability to include those suffering from alcoholism and drug abuse, did not extend its protection to smokers. Utah law provides no additional protection to smokers.

Nonetheless, a note of caution is in order for companies with employees in other states. Although Utah does not offer smokers, as such, any special protection from adverse employment

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decisions, other states have taken measures to protect smokers. Indeed, several states have enacted legislation prohibiting discrimination specifically against smokers while others have passed laws prohibiting discrimination against employees for engaging in any legal activity. Approximately thirty states have adopted some type of statute that prohibits lifestyle discrimination. Thus, employers with a multi-state workforce should be aware of the differences in state law on this issue.

Separately, even as to companies with employees located solely in Utah, it may make sense to consider less draconian means to encourage a healthy workforce. While some companies rely on the proverbial stick as a means to motivate employees to maintain healthy lifestyles, others utilize incentives and rewards to promote a healthier workforce and reduce healthcare costs. Employers should consider that prohibitions on smokers might reduce the talent pool from which an employer may draw and could result in ill will among both employees and potential employees. ■

In the Trenches is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Lisa Bonham, a litigation attorney and a member of Van Cott's Labor and Employment Law Group. You can reach Ms. Bonham at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to pamgunnell@pipelinewireless.net

■ Legal and legislative update

privileges of employment, such as the ability to take advantage of training and other opportunities for advancement; and (4) how employers should handle safety concerns they may have about applicants or employees with vision impairments.

REGULATIONS ON CALIFORNIA HARASSMENT TRAINING

California recently enacted a law requiring all employers with a total of 50 or more employees and with any employees in that state to provide sexual harassment training and retraining for supervisors. Thus, if you have 50 or more total employees, and one employee in California, this law likely impacts you. Covered employers must comply with the law by December 31, 2005, and repeat the training every two years. The California Department of Fair Employment and Housing is poised to release regulations that will outline the type of training needed, how it can be accomplished and how it must be documented. An article outlining what the proposed regulations likely will require can be found at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=859>. ■

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