

## Editor's Note

In addition to being mailed to all state managers and supervisors, *What's News* is on the DAS website – [www.das.state.ct.us](http://www.das.state.ct.us). (Click on "DAS News/Communications" and go to "Newsletters.") For readers' convenience, the web addresses given in the articles (which are printed in blue) are hyper linked directly to the site. Just click on the address and you'll immediately access the source site.

Some readers may have noticed that page 4/5 in the last issue was a "short" page. This was done in order to enable readers to three-hole punch the newsletter for placement in a binder without interfering with type placement or the ability to open the publication once in a binder. This issue of the newsletter includes a special supplement on the Family and Medical Leave Act (FMLA). Designed to serve as a separate reference to this complex law, it may be kept in the binder with the other newsletters or filed separately.

At the end of the year, an annual index of all articles – organized by topic – will be published.

## Employers' Legal Obligation to Investigate Sexual Harassment Claims

Last year the Court of Appeals for the 2<sup>nd</sup> Circuit (which covers Connecticut) ruled that an employer's legal obligation to investigate complaints of sexual harassment shields the employer from liability to the alleged harasser for inflicting emotional distress during, or as a result of, the investigation. [*Malik v. Carrier Corp.*, 202 F.3d 97] While this may sound obvious, the lower court had initially found for the employee. The 2<sup>nd</sup> Circuit overturned a jury verdict for \$400,000.

### Case Facts

The employee, Rajiv Malik, joined Carrier Corporation as an associate in its Leadership Associate Program, a rotation program designed to provide business school graduates with executive training. At the end of the program, participants were expected to earn an offer of an executive position within Carrier from one of the divisions in which they worked. Although Carrier assisted associates in this process, the ultimate responsibility to secure a final placement rested with the associate.

Malik's work at Carrier led to complaints about his conduct toward female workers. During an initial orientation program, a female associate complained about Malik's highly arrogant and disrespectful behavior towards her. This complaint was forwarded to the administrator of the program who was also Carrier's Manager of Professional Recruitment.

During a rotation in Chicago, a female administrative employee complained that Malik had made inappropriate sexual comments towards her on several occasions. This complaint eventually was reported to the program administrator, who decided to look into it. When the administrator contacted Malik's supervisor in Chicago, she found him reluctant to provide information regarding the complaint. He had already spoken to Malik about it and believed the issue to be resolved. The administrator testified that she told the supervisor that "the issue of [Malik's] working with women had come up once before" and that she needed to determine whether this incident was similar. Upon hearing that a second incident of some nature involving Malik had occurred, the supervisor described the employee's complaint to the administrator. Comments made to the employee included inquiries as to whether she was a virgin when she was married, whether she would go out with Malik if he was terminally ill, and whether her husband would "share" her with him. During the course of the investigation, it was discovered that another female employee in Carrier's Chicago office had complained to her supervisor about inappropriate sexually-oriented remarks by Malik, although those comments were not directed specifically at her.

When the administrator met with Malik, he admitted to making one sexual comment to the Chicago employee – about whether she was a virgin when she married – but denied the remaining allegations.

*See "Sexual Harassment Claims..." on page 2*

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## ***“Sexual Harassment...” Continued from page 1***

Based on the investigation and the conversation with Malik, the administrator and Carrier’s vice president of human resources decided not to discipline him, but informed him that a letter of record regarding the complaints would be placed in his personnel file. The letter stated: “After thorough investigation it is my conclusion that while it is clear that discussions of a sexual nature occurred between the two of you the content and intent of the discussions is disputed. As a result the issue will be closed for lack of substantiation. . . . While there is nothing to substantiate the claim of sexual harassment your behavior was unacceptable.” The letter was not shown to anyone other than Malik.

Malik was terminated after he failed to secure a final placement with Carrier, as required by the terms of the program. He then sued the administrator and Carrier under various claims regarding the investigation. Only his negligent infliction of emotional distress and negligent misrepresentation claims survived to trial.

The jury returned a verdict for Carrier on the negligent misrepresentation claim, but for Malik on the emotional distress claim, awarding him \$400,000 in damages. Carrier appealed the verdict.

### **The Decision**

Noting that under Connecticut law it is unclear whether a viable claim for emotional distress in the employment contest exists, the court held that Malik’s claim of negligent infliction of emotional distress failed. The court stated that employers are obligated by federal law to investigate claims of sexual harassment, and found that neither the administrator nor Carrier acted negligently in their actions.

According to the court, “Connecticut law does, as it must, conform to overriding federal law, and we view these state law issues as being dispositively resolved in these circumstances by federal law. . . . an employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer.”

While the court acknowledged the inherent difficulty of sexual harassment investigations, it concluded that not conducting such investigations would expose employers to civil liability, and holding employers liable for emotional distress would reduce their incentive to take reasonable corrective action as required by federal law – including, where appropriate, conducting an investigation:

“The issue here is not the proper balance between employee rights and employer authority under state law. The issue is how to ensure that

federal policies are not undermined by imposing on employers legal duties enforceable by damages that reduce their incentives to take reasonable corrective action as required by federal law. . . .

“Such investigations foreseeably produce emotional distress. . . . As with any investigation into potentially embarrassing personal interactions, confidentiality is difficult or impossible to maintain if all pertinent information is to be acquired from all possible sources. Denials by an accused cannot of themselves bring the matter to an end. Even if the charge proves demonstrably baseless, the very existence of the investigation may give the charge temporary or even permanent credibility among some persons. Moreover, investigators may have to overcome resistance because of a tendency in the immediate worksite—among victims as well as their on-site supervisors – to close the matter informally in the hope of preserving some measure of harmony. Upper-level management has a good reason to press the investigation. . . because once higher management has notice of the problem, it may later face civil liability if it fails to look into the problem and act to prevent recurrence or expansion.”

### **Bottom Line**

This case reinforces the employer’s duty to investigate sexual harassment complaints. The good news is that it reduces the employer’s risk of lawsuit from the alleged harasser. This does not mean, however, that an employer may never be held liable for conduct stemming from a sexual harassment investigation. “Intentional,” i.e., deliberate (as opposed to “negligent,” lacking due care) infliction of emotional distress would be actionable.

The case also makes clear that even if a victim does not wish to pursue an investigation, once management is on notice that sexual harassment may have occurred, it must investigate the complaint. If an employee reports an incident to you, but requests that it go no further – whether that employee is the victim of harassing behavior or has witnessed such behavior – do not agree. Do not promise absolute confidentiality. Explain that you are under obligation by federal and state law to investigate the incident and that while you will be discrete in your inquiries, you cannot promise that you will not talk to anyone about it.

Lastly, supervisors also have a duty to cooperate in an investigation and to report incidents of sexual harassment. Their knowledge of a sexual harassment situation will be imputed to the employer and can open the employer to potential liability.

## *You’re the Judge...*

The plaintiff was one of 500 applicants who underwent a written screening process, conducted by a consortium of 14 towns and cities, for a position as a police officer. The process included a standardized test that purported to measure cognitive ability. Several months after taking the test, the plaintiff learned that one of the cities was interviewing candidates. Upon further inquiry, however, he learned from the assistant city manager that he would not be interviewed because he “didn’t fit the profile.” The plaintiff, who was 46 years old, suspected age discrimination and filed an administrative complaint with the state’s human rights agency. The city responded that it removed the plaintiff because he scored too high on the standardized test. As a result, he was deemed overqualified for the position. According to the city, the manual accompanying the test listed recommended scores for various professions and cautioned that since overqualified candidates may soon become bored with unchallenging work and quit, “[s]imply hiring the highest scoring employee can be self-defeating.” The plaintiff had scored 33, above the median for any listed occupation, and well over the normative median of 21 suggested for a police patrol officer. The plaintiff filed an action in federal district court, claiming the city’s decision violated his constitutional rights. *You’re the judge. What do you decide?*

*See “You Decide...” on back page.*

## U.S. DOT Revises Drug and Alcohol Testing Rule

The U.S. Department of Transportation issued a revised drug and alcohol testing rule for transportation workers in safety-sensitive positions, which became effective August 1, 2001. Some of the most significant revisions include:

- n A Medical Review Officer (MRO) must review and verify adulterated or substituted specimens. In the past, such a review was not required.
- n The employee or applicant donor has the right to have his or her split sample tested at a different laboratory if the first lab reports the primary sample adulterated or substituted. This, too, is a departure from the past interpretation that split sample testing was not permitted in an adulteration/substitution situation. Also, split sample testing is required for all regulated transportation modes effective August 1<sup>st</sup>.
- n Regarding dilute specimens, the employer may, but is not required to, direct the employee to immediately take another test if the first test is reported as a negative dilute result. If the employer directs the employee to take another test and the employee declines, this is considered a refusal to test and a "positive" under the regulations. The employer may not require a third test if the second test was also "negative dilute."
- n All covered employers must obtain past drug and alcohol records on employees to be hired or transferred into safety-sensitive positions at the time of application or transfer. The applicant or employee seeking transfer must provide a signed release to obtain this information. There are some very specific steps, information to be requested, and time frames to which employers must adhere in order to meet this regulatory requirement.

- n No employee who tests positive will be returned to work without some type of intervention, assistance or treatment after a positive test. Applicants as well as employees must be given proper referral information after a positive drug or alcohol test.
- n Certain policy considerations must be addressed by an addendum to an employer's current policy. These considerations include adding a statement regarding the donor's right to have his/her split sample tested in the adulteration/substitution situation, an explanation of the past drug and alcohol record requirement for employees seeking transfer into a safety-sensitive position.

Some things have not changed. The types of drug and alcohol testing required by DOT remain, specifically, pre-employment, reasonable suspicion, post-accident, random, periodic drug testing (FAA only), return-to-duty and follow-up testing, although follow-up testing now literally may follow the employee from one job to another and continue despite breaks in service. Also, the substances to be tested will continue to be marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates.

These regulations affect over 1,900 state employees who have commercial driver's licenses. The National Safety Alliance (NSA), the state's contracted third party administrator, conducts testing. Agencies involved should have received materials relating to the revised rules from NSA by now. If you have not, contact NSA directly at (860) 298-5900 or by e-mail, <http://www.choicepointinc.com>. You may also contact Debby Hearl (Department of Administrative Services), the liaison for the State of Connecticut's Commercial Driver's License Drug and Alcohol Testing Program. Her e-mail address is: [debby.hearl@po.state.ct.us](mailto:debby.hearl@po.state.ct.us).

A copy of Revised 49 CRF part 40 and additional information related to the revised rules can be found at the U.S. DOT's website: <http://www.dot.gov/ost/dapc>.

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## Driver Who Failed Drug Tests Reinstated

In *Eastern Associated Coal Corp. v. United Mine Workers of America* (No. 99-1038), the U.S. Supreme Court unanimously upheld an arbitrator's award reinstating a truck driver who had twice tested positive for marijuana use.

### Case Facts

The employee, James Smith, had a job that required him to drive heavy, truck-like vehicles on public highways. His position was considered a "safety-sensitive" one, subject to the U.S. Department of Transportation's (DOT) drug testing regulations. Smith tested positive for marijuana use during a random drug test, for which he was suspended and subsequently fired. The employee's union pursued a grievance on behalf of the employee, and an arbitrator ordered his reinstatement, provided he (1) accept a 30-day, unpaid suspension and (2) undergo drug treatment.

Nearly a year and a half later, Smith failed a second drug test, and the employer again discharged him. Smith grieved this discharge also, and an arbitrator once again reinstated him. This time the conditions were more stringent; additionally Smith had to provide Eastern with a signed, undated letter of resignation, to take effect if he tested positive again within the next five years.

The union's collective bargaining agreement specified that, in arbitration, in order to discharge an employee, Eastern must prove it had "just cause." Otherwise the arbitrator will order the employee reinstated, and the arbitrator's decision is final. According to the arbitrator, Smith's positive drug test did not amount to "just cause" for discharge.

Eastern pursued the case in federal District Court, arguing that the order must be overturned because it violated a public policy against performing safety-sensitive jobs under the influence of illegal drugs. The court, while recognizing a strong regulation-based public policy against drug use by workers who perform safety-sensitive functions, held that the employee's conditional reinstatement did not violate that policy. The 4<sup>th</sup> Circuit Court of Appeals affirmed. The U.S. Supreme Court heard the case to settle a disagreement on this issue among the circuits.

### Court Decision

The question before the court "is not whether Smith's drug use itself violated public policy, but whether the agreement to reinstate him does so."

*See "Driver who failed..." on page 4*

### "Driver who failed..." continued from page 3

According to the court, because both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as "just cause," they have "bargained for" the "arbitrator's construction" of the agreement. Because Eastern didn't claim that the arbitrator acted outside the scope of his contractually delegated authority, the court treated the award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's words "just cause."

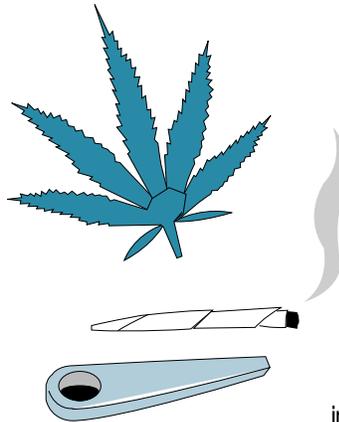
Once the court found the award equal to a contractual agreement, it then considered whether a contractual reinstatement requirement would fall within the legal exception that makes a collective bargaining agreement that is contrary to public policy unenforceable.

Prior case law had left open the question of whether the public policy exception could be used *only* in cases where an arbitration award violated an actual statute, regulation or other "positive law" – or also in cases where public policy was based on general considerations of public interest. The court in *Eastern* adopted the narrower view. Although the DOT's regulations embody a strong public policy against the performance of safety-sensitive duties by drug-abusing employees, the court found that because the regulations do not *specifically require* the employee's discharge in such a case, the reinstatement wouldn't come under the public policy exception.

The court also noted the law's focus on rehabilitation and the fact that labor law policy favors resolving disciplinary issues through arbitration if labor and management have agreed to do so.

The decision ended, "We recognize that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here. But both employer and union have agreed to entrust this remedial decision to an arbitrator. We cannot find in the Act, the regulations, or any other law or legal precedent an 'explicit,' 'well defined,' 'dominant' public policy to which the arbitrator's decision 'runs contrary.'"

The decision can be found at <http://supct.law.cornell.edu/supct/pdf/99-1038PZO> (pdf version, requires Acrobat Reader) or the text version at <http://supct.law.cornell.edu/supct/html/99-1038.ZO.html>.



### Ramifications

Remember that the focus in *Eastern* is on the remedy ordered (reinstatement of a two-time drug abuser), not on the employee's conduct (drug use).

For drug testing cases, the rule is clear. If you want to fire drug abusers permanently and preclude an arbitrator from reinstating them, an organization's substance abuse policies (and collective bargaining agreements) must specify immediate discharge following one, two or more positive tests.

Although *Eastern* deals with drug testing, it is not simply a drug testing case. According to legal authorities, the same rules will apply to other public policy exception cases, particularly arbitration awards reinstating sexual harassers. Employers cannot rely on any general public policy against sexual harassment because even the EEOC does not require immediate discharge for the first or subsequent harassment offense under all circumstances. The answer again is to make anti-harassment policies (and labor contract provisions) specific in order to avoid an arbitrator's reinstatement award.

## In Brief

**OSHA Accepts Worker Complaints On-Line** – Employees can now use the Internet to file complaints about safety and health hazards at their workplaces, a move prompted by the growing number of Americans who have Internet access and their willingness to conduct business electronically. The "Workers' Page" is an on-line resource that gives employees an electronic option for filing formal complaints. Previously, employees had to call or write OSHA when alleging workplace hazards. The "Workers' Page" also contains important background information about employee rights and employer responsibilities. To view the "Workers' Page," click on <http://www.osha.gov/as/opa/worker/index.html>; a copy of the complaint form can be found at <http://www.osha.gov/oshforms/osha7.pdf>. . . . **Free Video** – The Department of Administrative Services (DAS) has been the recipient of an ample supply of videotapes developed by Microsoft Corporation, which demonstrate how individuals with disabilities can utilize computers to work, create, communicate and juggle the activities of everyday life. Entitled, "Enable: People with Disabilities and Computers," it runs 45 minutes and contains two versions. Both versions are closed captioned. The second version, which immediately follows the first, contains descriptive narration. Agencies wishing to obtain a single copy or multiple copies should contact either:

Suzanne.Liquerman@po.state.ct.us or (860) 713-5057, OR  
Kathleen.M.Sullivan@po.state.ct.us or (860) 713-5231.

## HR Learning Center Goes On-Line!

Go paperless with the HR Learning Center for the Fall/Winter Semester! Now you can:

- n Register on-line
- n Obtain instant on-line confirmations
- n Review class lists & class availability
- n Get directions and view maps to class locations
- n Check out trainer biographies
- n Obtain up-to-date information about new classes and other HR Learning Center announcements

The HR Learning Center offers several courses relating to the ADA. The newest addition to the roster is **"Work Incentives and Programs for Employees with disabilities,"** offered October 25, 2001 and February 7, 2002. Register on line at [www.das.state.ct.us/HR/LC\\_home.htm](http://www.das.state.ct.us/HR/LC_home.htm).

Questions may be directed to Kathleen Sullivan at (860) 713-5231 or Carl Passanisi at (860) 713-5151.



## Disability-based Harassment Claims Valid under ADA

In a pair of landmark rulings, two federal appellate courts have said that employees with disabilities can sue for workplace harassment under the Americans with Disabilities Act. The rulings came from two of the most conservative federal circuits—the 4<sup>th</sup> and the 5<sup>th</sup>.

### Case Facts

In the first case, *Flowers v. Southern Regional Physicians Services* [5<sup>th</sup> Circuit, No. 99-31354], Sandra Flowers, a medical assistant at Southern Regional Physician Services, claimed that her working environment dramatically changed for the worse after her supervisor learned that she was HIV-positive. Prior to that time, Flowers and her supervisor were close friends, often going to lunch, for drinks, and to the movies together. Almost immediately after discovering Flowers's condition, the supervisor would no longer go to lunch with her and stopped socializing with her. She began intercepting Flowers's telephone calls, eavesdropping on her conversations, and hovering around her desk. The company president, with whom Flowers had also gotten along well, later became distant, refused to shake Flowers's hand and went out of his way to avoid her office.

Additionally, before Flower's condition became known, she had been required to submit to only one random drug test, but afterwards, she had to undergo four drug tests in a one-week period. In 1994 she scored very high on her performance appraisal, which earned her a 10 percent raise. After revealing her status, she was "written up" twice, put on 90 days' probation and eventually discharged.

In *Fox v. General Motors Corp.* [4<sup>th</sup> Circuit, No. 00-1589], Robert Fox had worked for General Motors for 12 years when he severely injured his back. After an extended disability leave of 11 years, followed by two more periods of disability leave, Fox returned to work in October 1994 with light duty restrictions. From that time until August 1995, when he again went on disability leave, Fox claimed that he was subjected to a barrage of harassment from his supervisors and co-workers and was ordered to perform jobs that went beyond his medical restrictions. When Fox's doctor restricted him to tasks at the light-duty table, the supervisor assigned him to a small individual table and chair directly in front of his office. Not only were the table and chair located in a hazardous area, but they were also too low for the 6'7" Fox. As a result, he reaggravated his back injury.

Because of his supervisor's harassment, Fox decided to apply for a truck driver position, a job which met his medical restrictions and for which he was otherwise qualified. The supervisor, however, refused to allow him to take the physical examination that was a prerequisite for obtaining the truck driver position. Fox also testified that his supervisor referred to the disabled workers as "handicapped people," "hospital people," "handicapped MFs" and "911 hospital people."

### Title VII Analysis

Both reviewing courts adopted the harassment reasoning developed under Title VII, which allows claims for harassment on the basis of race, sex, religion and national origin.

According to the 5<sup>th</sup> Circuit Court in *Flowers*, "The ADA provides that no employer covered by the Act 'shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment.' . . . In almost identical fashion, Title VII provides that it is unlawful for an employer 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' race, color, religion, sex, or national origin.'"

In *Fox*, the 4<sup>th</sup> Circuit Court stated, "Appropriately modifying the parallel Title VII methodology, an ADA plaintiff must prove the following to establish a hostile work environment claim: (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer."

### Bottom Line

Although a number of federal trial courts have recognized disability harassment claims, and several circuits had assumed such claims without deciding that they were viable, these two cases are notable because they are the first circuit-level decisions in which the issue was squarely before the court. When circuits first rule definitively on an issue, it usually spawns more litigation. Plaintiff's attorneys and employees who feel wronged on the basis

of their disability will take note of the decisions. Employers can expect to see another claim added to ADA suits—hostile work environment—on top of the two traditional claims of discrimination on the basis of disability and retaliation for exercising ADA rights. With no decisive split among the circuit courts, there is no issue to be resolved by the U.S. Supreme Court. Employers should assume that this will become the standard in any jurisdiction.

Readers of the last issue of *What's News* (Spring 2001, page 1) will remember the U.S. Supreme Court decision in *Board of Trustees of the University of Alabama v. Patricia Garrett* [531 U.S. 356], which held that states are immune from suits for monetary damages brought by individual in federal courts.

Remember, however, that individuals can still sue for injunctive relief and can sue a state in state court under state disability laws. Additionally, the Equal Employment Opportunity Commission (EEOC) can sue states on behalf of an individual. So agencies still need to be mindful of the law. They should be sure that their anti-harassment policy covers disability harassment and that procedures are in place for reporting harassment. The policy and procedures should be disseminated so that all employees are aware of them. All managers and supervisors should receive training in this area.

Readers interested in reading the full text of the cases, can find the *Flowers* case at <http://www.ca5.uscourts.gov/opinions/pub/99/99-31354-cv0.HTM> and the *Fox* case at <http://laws.lp.findlaw.com/4th/001589p.html>.

### The HR Learning Center offers the following courses relating to the ADA.

- Work Incentives and Programs for Employees with Disabilities (NEW)
- ADA: The Next Generation
- Reasonable Accommodations under the ADA
- Disability in the Workplace
- Awareness and Sensitivity
- Hidden Disabilities in the Work place

Register on line at

[www.das.state.ct.us/HR/LC\\_home.htm](http://www.das.state.ct.us/HR/LC_home.htm)

## Who's Counting: Trends and Statistics

**OSHA**—Since the Occupational Safety and Health Administration's (OSHA) establishment in 1971, workplace fatalities have been cut by 60 percent, and occupational injury and illness rates, by 40 percent. At the same time, U.S. employment has nearly doubled from 56 million workers at 3.5 million worksites to 105 million workers at nearly 6.9 million sites. [<http://www.osha.gov/as/opa/osha-at-30.html>.] In spite of improved percentages, every day 16 workers lose their lives in this country. And every hour 650 workers experience an injury or illness on the job. [<http://www.osha.gov/media/oshnews/apr01/national-20010427.html>.]

**EEOC**—Last year there were 79,896 total charges of discrimination filed with the U.S. Equal Employment Opportunity Commission (EEOC)—an increase of 3.2 percent over 1999 figures (77,444). Although administrative closures and findings of No Reasonable Cause accounted for 78.8% of the case resolutions, employers still paid \$245.7 million to settle these claims—\$35.2 million more than in 1999— which represents an increase of 16.7%. These payments were based on settlements (8.5%), withdrawals with benefits (4.0%) and reasonable cause findings (8.8%).

The breakdown of discrimination claims according to type is as follows: race, 36.2%; sex, 31.5%; retaliation, 27.1%; age, 20%; disability, 19.9%; national origin, 9.8%, religion, 2.4%; Equal Pay Act, 1.6%. (The figures add up to more than 100 percent because charges often involve more than one kind of discrimination.)

The EEOC breaks down claim information under the Americans with Disabilities Act (ADA) into impairments cited. On a cumulative basis, after "other disability (19.5%), the claims most often made were: back impairments, 12.3%; HIV, 11%; regarded as disabled, 9.2%; and non-paralytic orthopedic impairment, 5.2%

For more information and the full charts, please refer to <http://www.eeoc.gov/stats/charges.html> and <http://www.eeoc.gov/stats/all.html>.

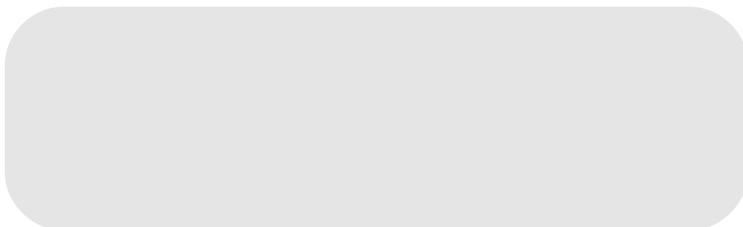
**CHRO**—The annual report of the Connecticut Commission on Human Rights and Opportunities (CHRO) shows a 6.4 percent reduction in the number of complaints filed in FY '00 compared to the previous fiscal year – in FY '00, there were 2,222 complaints; in FY '99, 2,373. The majority of cases alleged employment discrimination (89.2 percent in FY '00, 88.9 percent in FY '99).

The most common protected class basis named in all of the complaints filed was sex. FY '99 was the first year that sex complaints (18.4%) outpaced race complaints (16.9%). In FY '00, sex-based complaints (excluding sexual orientation at 1.0%) were 17.4%, compared to 16.6% for race, 13.1% for color, 13.1% for age and 12.8% for physical disability-based complaints.

The fastest growing issue in employment complaints was retaliation, which as more than doubled since 1994, going from 7.3% to 15.6% in FY '00.

CHRO closed 2,257 cases in FY '00. The average processing time for closed complaints in that time period was 286 days. Of those cases, 43.9 percent were dismissed following the merit assessment process and took an average of 143.2 days to complete. [*To request a copy of CHRO's annual report, call: 860-541-3400, (TDD) 860-541-3459 or (toll free in CT) 1-800-477-5737.*]

## ADDRESS TO:



## You decide...

...for the town. This is an actual Connecticut case, tried before the U.S. District Court for the District of Connecticut [*Jordan v. City of New London*, 225 F.3d 645]. The court concluded that a public employer's decision not to hire the applicant for a police officer's position because he scored higher than average on a standardized written test did not violate his right to equal protection guaranteed by the U.S. and Connecticut constitutions. The court found that the employer had a legitimate purpose in trying to reduce job dissatisfaction and turnover, and a rational basis for believing that it could achieve that purpose by screening out overqualified applicants. The city had rationally relied upon the guide to interpreting test results.

The 2<sup>nd</sup> Circuit Court of Appeals upheld the lower court decision, concluding "that even absent a strong proven statistical correlation between high scores on the test and turnover resulting from lack of job satisfaction, it is enough that the city believed – on the basis of material prepared by the test maker and a letter along similar lines sent by the [coalition] – that there was such a connection." Although the plaintiff presented some evidence that high scorers do not actually experience more job dissatisfaction, the court said that "does not create a factual issue, because it matters not whether the city's decision was correct so long as it was rational. ... Even if unwise, the upper cut was a rational policy instituted to reduce job turnover and thereby lessen the economic cost involved in hiring and training police officers who do not remain long enough to justify the expense."

*What's New(s)* is published quarterly by the Department of Administrative Services Business Advisory Group. Its purpose is to give basic information to state managers, HR personnel and affirmative action professionals on legal issues that affect employment. It is not intended to be a substitute for individual professional legal advice on a specific case. Individual problems should be reviewed by the agency's staff attorney or the Attorney General's office.

Governor John G. Rowland  
Commissioner Barbara A. Waters  
Editor Sandra A. Sharr, Esq.

Comments are welcome and should be addressed to the editor at:  
[sandra.sharr@po.state.ct.us](mailto:sandra.sharr@po.state.ct.us)

**DAS**

# Special Supplement

## FMLA OVERVIEW (Part 1)

The federal Family and Medical Leave Act (FMLA) was a well-intentioned law. Its goal was to help meet employees' needs to balance their work and family lives by allowing them to take unpaid, job-protected leave for a medical reason—the employee's own or that of a child, spouse or parent—and for the birth/adoption of a child. Congress believed this law would also help employers to develop high-performance organizations. FMLA became effective August 5, 1993 with final regulations taking effect on April 6, 1995. (Connecticut's law governing family and medical leave for employees in state service [C.G.S. 5-248a] was enacted prior to the federal law and took effect July 1, 1988.)

Much has happened since FMLA was enacted. The law in this area is evolving. Many of its standards are being defined by the courts and the decisions in many courts are contradictory. In some cases, courts have found that Congress exceeded its authority in promulgating certain sections of the regulations. It has become a nightmare for employers to administer. The interaction of FMLA's requirements with state law, the terms of collective bargaining agreements, ADA (Americans with Disabilities Act) mandates and Workers' Compensation provisions make compliance no easy matter.

This is the first in a periodic series of articles on FMLA. It will form a basis for future articles that will provide more in-depth looks at particular provisions, including recent case law. While most HR managers have received training on FMLA, it is helpful for all managers and supervisors to have a working knowledge of, and appreciation for, this complex law.

### Three Main Principles

There are three overriding principles that all state agencies must keep in mind:

- # 1 – The state is ONE employer. Each agency is *not* an individual employer. Therefore, all agencies must administer FMLA in the same way.
- # 2 – Every employee's request must be analyzed on an individual basis. There is no cookie-cutter approach. There are no short cuts.
- # 3 – Employees are *not* required to designate whether the leave they are taking is federal FMLA leave. It is the *employer's responsibility* at all times to designate leave and to give proper notice of such designation to the employee.

**"Of all the laws enforced by the Department of Labor, the FMLA is the easiest for employers to administer."**

**U.S. Labor Secretary Alexis Herman**

### Most Generous Provision – FMLA, State Law or CBA

FMLA regulations state that nothing in the federal FMLA supersedes any provision of state law that provides greater family or medical leave rights. For this reason, the determination of which law applies (state versus federal) in a particular situation must be examined on a provision-by-provision basis. Where an employee meets the required applicability standards of both laws and the laws contain differing provisions, an analysis must be made of both laws, provision-by-provision, to determine which standard(s) from each law will apply. The standard providing the greater right or more generous benefit to the employee from each law (provision-by-provision) will apply. In many cases, this will mean that the provisions of the state law will govern. This is because state law, regulations and policies are generally less restrictive.

Just as nothing in the federal FMLA supersedes any provision of state law providing greater benefits, nothing in the federal FMLA removes an employer's obligation under a collective bargaining agreement (CBA) to provide greater family or medical leave rights to employees than the rights established under federal FMLA. (Conversely, the rights established under FMLA may not be diminished by any such CBA.) Once a determination has been made as to which law(s) applies – federal, state or both – if there is an applicable CBA provision, the determination needs to be made as to whether it provides greater benefits than the law.

**"If the FMLA is the easiest to administer, then we never want to see the hardest."**

**Deanna Gelak, Society for Human Resource Management**

### Who qualifies?

As mentioned above, state employees may be eligible for:

- federal FMLA only,
- C.G.S. 5-248a only, *or*
- both federal FMLA and C.G.S. 5-248a.

If the leave qualifies for *both* federal FMLA leave and state family/medical leave, the leave may be simultaneously counted against the employee's entitlement under both laws. Whether or not the leave will count towards both entitlements is dependent upon several factors. [A discussion on this point is beyond the scope of this article. Please note that the HR Learning Center offers HR professionals, managers, supervisors separate courses—both on- and off-site—on administration of this law. Interested individuals may contact Kathleen Sullivan at 860-713-5231 or at [kathleen.sullivan@po.state.ct.us](mailto:kathleen.sullivan@po.state.ct.us).]

**Federal** – To qualify for federal FMLA, employees must have at least 12 months of total service (in the aggregate) and have worked at least 1,250 hours in the 12 months immediately preceding the commencement of leave. ("Hours worked" does *not* include time spent on paid or unpaid leave. Paid leave includes sick time, vacation, administrative leave, personal leave.) Federal FMLA also covers

temporary and durational employees as long as they meet the hours worked and time requirements.

**State** – Unless otherwise specified by labor contract, C.G.S. 5-248a only covers employees who have permanent status with the State of Connecticut. Classified employees attain permanent status once they have completed a working test period (WTP). WTPs are normally six months, but can be longer; they can also be extended. Unclassified employees become eligible after they have worked more than six months. Part-time employees become eligible once they have worked the equivalent number of hours to equal six months of full-time employment or, if their WTP is longer than six months, the equivalent number of hours to equal their WTP.

## Reasons for Leave

What constitutes a qualifying event for the purposes of leave is similar under the federal and state laws, but there are some differences. Both laws cover the birth or adoption of a child by the employee. Leave under state law, however, must be taken “upon the birth” of the child, which has been interpreted to mean immediately following the birth (father) or the end of the pregnancy disability period (mother). While federal FMLA leave need not immediately follow the birth/placement, it must conclude within 12 months after the birth or placement. Additionally federal FMLA covers foster care placement; C.G.S. 5-248a does not.

Both federal and state law covers leave for the employee’s own “serious health condition” (federal) or “serious illness” (state) or when the employee is needed to care for a seriously ill parent, child or spouse. (Please note: Parents-in-law are not covered under either law, although they are covered under a separate state family/medical leave law that applies to private sector employees only.)

## Amount of Leave

**Federal** – Federal FMLA provides employees with 12 work weeks of leave in a 12-month period. This time can either be paid or unpaid, i.e., the employee may use any accrued time he or she has or if the employee has no accrued time, may take unpaid time. Federal law also allows employees to take leave on an intermittent basis or reduced leave basis if need be.

Agencies, as well as employers everywhere, are finding intermittent leave – leave taken in separate blocks of time due to a single qualifying reason – one of the most problematic aspects this law. According to the federal regulations, intermittent leave may be taken in the smallest size increment that the employer’s payroll system uses to account for absences (provided it is one hour or less). Since the state payroll system keeps track of time in ¼ hour increments, this means that employees may take leave in increments as short as 15 minutes! The difficulties around intermittent leave arise because employers are not allowed to ask for medical proof of each absence. Once an employee has substantiated his/her reason for leave through proper medical documentation, the employer may not ask for additional documentation any more frequently than 30 days.

**State** - C.G.S. 5-248a provides employees with 24 weeks of family or medical leave in a 24-month period. Leave under state law is *unpaid* and in addition to any benefit provided under a separate entitlement to pregnancy disability leave. Although an employee may not be eligible for federal FMLA or state family leave, under C.G.S. 46a-60(a)(7) an employer cannot “refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy.” The period of leave can vary in length, but is usually from six

to eight weeks. “Disability” is defined as the hospital stay and any period of time prior to and subsequent to delivery that has been certified by the attending physician as that period of time when the employee is unable to perform the requirements of her job.

## How to Measure Leave

**Federal** – While the federal government allows employers to choose any one of four methods for determining the 12-month period, the state has selected to “measure forward” from the first day of leave. *Ex:* Employee takes three weeks of leave beginning September 1. On February 1 employee needs an additional four weeks of leave. Employee has now used seven weeks of the 12-week entitlement. Therefore, from March 1 to September 1, employee will have five weeks available, should he/she need additional leave for family or medical reasons.

**State** – Leave is measured forward from the first day of leave.

## What is a “serious health condition”?

Is the flu a “serious health condition”? Are migraine headaches? Is an earache? What about substance abuse? The answer: It all depends.

Determining exactly what is a serious health condition has proven to be another problematic area for employers and there are numerous trade and professional organizations lobbying in Washington, D.C. to tighten the regulations.

Both federal and state law similarly define a “serious health condition” (federal term) or “serious illness” (state term) as an illness, injury, impairment, or physical or mental condition that involves a period of incapacity or treatment related to inpatient care or continuing treatment by a health care provider. Federal FMLA goes on to further define “continuing treatment” (which the state law does not):

1. Absence plus treatment – a period of incapacity of more than three *calendar* days (not *work* days) and any subsequent treatment that involves treatment two or more times by a health care provider or one treatment by a health care provider which results in a regimen of continuing treatment under the supervision of the health care provider.
2. Pregnancy (including prenatal care);
3. Chronic conditions requiring treatment (*Ex: asthma, diabetes, epilepsy*);
4. Permanent/long-term conditions (*Ex: Alzheimer’s severe stroke, terminal sates of disease*);
5. Multiple treatments (non-chronic conditions) (*Ex: cancer, kidney disease*).

To answer the questions posed above, the flu could qualify under #1 above if the employee were incapacitated more than three calendar days, was treated by a doctor who prescribed medication. Migraines could fall under #3. A minor earache would not qualify, but if it caused the employee to be incapacitated more than three calendar days and the employee was treated by a doctor it would be covered under #1. An employee who is abusing a substance is not covered, but any treatment for substance abuse is.

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The next issue of *What’s News* will cover: **Medical Certification, Notice, Designation of Leave, Substitution of Paid Leave for Unpaid Leave, Health Insurance Continuation, Return to Work, Fitness-for Duty Report, Enforcement.**  
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