SEVENTH CIRCUIT: TITLE VII TRUMPS PATIENT AND CUSTOMER RACIAL PREFERENCES

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A recent Seventh Circuit Court of Appeals ruling makes clear that an employer's obligation under Title VII of the Civil Rights Act of 1964 to provide employees with a discrimination-free workplace takes precedence over patient or customer preferences regarding the race of employees from whom they receive services. The court held, in Chaney v. Plainfield Health Center, that by accommodating a patient's demand for white-only health-care providers, a nursing home maintained a racially hostile work environment in violation of Title VII. (The court also determined that issues of fact existed as to whether the defendant nursing home's discharge of the plaintiff, a black nursing assistant, was motivated by race).

In Chaney, the defendant nursing home had a policy of honoring the racial preferences of its residents when assigning them health-care providers in order to avoid violating federal and state laws the nursing home viewed as requiring it to grant residents certain related rights to privacy, bodily autonomy and choice of providers. The court noted that, while allowing patients to choose the gender of their health care providers is permissible under Title VII, the patient-privacy grounds justifying employee assignment based on gender-based preferences are inapplicable to race-based preferences. The court further dismissed arguments that state or federal health laws otherwise permitted a policy of permitting patients to choose providers on racial bases, reasoning that laws requiring access to chosen providers did not necessitate race-based work practices and any state law otherwise conflicting with Title VII would be preempted.

The court also rejected the defendant's contention that, as a practical matter, its race-based policy protected black employees from racial harassment from the residents, referencing several alternative means to accomplish such objectives. Calling the defendant's willingness to accede to a patient's racial preferences "the principal source of the racial hostility in the workplace" where the plaintiff allegedly experienced three specific incidents of racial harassment from co-workers, the court reasoned that barring such a policy was consistent with judicial precedence, which "now widely accept[s] that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race." The court concluded that the defendant nursing home's status as a medical provider and permanent home to its residents did not exempt it from Title VII's prohibitions of such race-based employment policies.

A full copy of the decision can be found here.

TEXAS BILLIONAIRE’S DEATH TRIGGERS RENEWED ESTATE TAX DEBATE

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For the first time in nearly 100 years, extremely wealthy individuals who pass away this year will leave enormous estates to friends and family tax-free. Since 1916, the estates of America’s wealthiest individuals have been subject to a federal estate tax. Over the years the minimum value has fluctuated, but the tax has remained in effect. In 2009, for example, the tax applied to the portion of individual estates valued over $3.5 million, or the portion of a couple’s estate valued over $7 million. However, because of a law passed by Congress in 2001, the estate tax has been entirely repealed for the year 2010.

In March of this year the first American since 1916 was able to pass a multi-billion dollar estate to his children and grandchildren without paying an estate tax. Dan L. Duncan, a Texas pipeline tycoon ranked 74th wealthiest individual in the world, passed away from a brain hemorrhage in late March, leaving billions of dollars in assets behind. Had Duncan passed away in 2009, his $9 billion estate would have been subject to at least a 45% federal estate tax.

Supporters of the estate tax argue that it is unconscionable to allow the wealthiest Americans a tax break at a time when income gaps between the wealthy and poor are so large and deficits so high. Opponents of the estate tax, however, argue that taxing an individual when income is earned and then again at death is unfair and it forces the liquidation of family owned businesses and farms. Read the full New York Times article for a more detailed look at the Duncan estate and the implications of the estate tax repeal.

This window of opportunity for tax savings may be short lived as the current law has the estate tax returning in 2011 with an exemption of only $1 million for individuals and a top marginal rate of 55%.

WILL CONTESTS

In Wisconsin, any person of sound mind who is at least eighteen years old is presumed capable of making a will. A will should be created voluntarily and express how the testator desires his or her property to be distributed upon death. However, when another person's influence over the testator becomes so strong it overpowers the testator's free will, such influence is "undue," and the resulting will may be invalid.

As the baby boomer generation ages, many people forecast an increase in challenges to wills or trusts based on undue influence. Generally, these legal challenges are brought when elderly or ill people make or change wills or trusts which are inconsistent with that person's character, and often involve generous bequests to non-family members. The unnatural beneficiary is often someone who holds a position of power and influence over the testator.

Under Wisconsin law, undue influence can be shown in two ways. The first way to show undue influence is by proving four things. First, it must be proved that the testator is susceptible to undue influence. Factors include the testator's age, personality, physical and mental health, and his or her ability to handle business affairs. Second, it must be proved that the other person had the opportunity to exercise such influence and effect the wrongful purpose. Third, it must be proved that the other person had a disposition to influence unduly in order to gain an improper favor. This implies willingness to do something wrong or unfair, such as overreaching or taking advantage of the testator, not just a desire to benefit from the estate. Finally, it must be proved that a result occurred that was clearly the effect of the supposed influence. The fact that the other person benefits from a will does not prove undue influence. Instead, this requirement is met when a person benefits from a will against natural expectations under the circumstances.

The second test for proving undue influence has two requirements: (1) a confidential or fiduciary relationship between the testator and the favored beneficiary; and (2) suspicious circumstances surrounding the making of the will. However, a will is not set aside based on someone's suspicion alone.

Other states have established similar elements to prove a claim of undue influence. Undue influence challenges to wills or trusts can be difficult to prove because they depend almost entirely on the particular facts and circumstances in an individual case. These facts often must be proved by indirect evidence because often one who is attempting to unduly influence a testator acts subtly and in secret.

WISCONSIN REPEALS BULK TRANSFER LAW

Wisconsin has finally joined the vast majority of states who have repealed bulk transfer laws. The repeal of Wisconsin's bulk transfer law, Chapter 406 of the Wisconsin statutes, became effective February 5, 2010. Forty-five states have now dropped their bulk transfer requirements, according to the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Wisconsin was late to join the club. The NCCUSL and the American Law Institute initially recommended repeal or revision of the bulk transfers law in 1989.

Chapter 406 of the Wisconsin Statutes required a business to notify all creditors before transferring a major part of the business's inventory outside of the ordinary course of business. Chapter 406 applied only to sellers whose primary business was the sale of inventory, such as convenience store and liquor store retailers.

Wisconsin's bulk transfer law, initially enacted in 1901, had become obsolete. Bulk transfer laws were intended to address concerns near the end of the 19th century that merchants would frequently buy inventory on credit, sell the entire bulk of inventory and disappear with the proceeds of the sale, leaving creditors with little recourse. The NCCUSL, recommended that Wisconsin repeal its bulk transfer law because today creditors can better assess the creditworthiness of a buyer and can obtain a security interest in the assets of a buyer, which was not an option for creditors when Wisconsin's bulk transfer law was enacted. In addition, creditors are better positioned today to collect amounts owed to them, including through fraudulent transfer laws and state long-arm jurisdiction statutes.

Wisconsin's bulk transfer law was also impractical. Buyers and sellers of businesses often waived compliance with the bulk transfer law and relied upon the indemnification provisions in the purchase agreement. Neither party wanted notice of the proposed sale of the business to be sent to third parties weeks before the transaction had closed and been announced.

HOME OWNERS MAY SEE LOWER PROPERTY TAXES DUE TO POOR REAL ESTATE MARKET

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This past week, the City of Milwaukee completed its annual revaluation of all homes and business properties for real estate tax assessment purposes and reported a 2.4% cumulative drop in property values from 2009 to 2010. Other communities may be announcing annual revaluations for tax assessment purposes over the next few weeks or months.

Whether you own a property in Milwaukee or anywhere else in Wisconsin, your local assessor is required to determine the fair market value of your home as of January 1st, for purposes of your 2010 property tax bill, which won't be sent out until December. With the recent slump in the real estate market, most properties should now be valued at a lower amount in 2010 than in prior years. If your property tax assessment has not changed or has increased in the last few years, you have the right to object to the valuation and seek an adjustment, which could result in lower property taxes in December.

If you have any questions regarding the assessment process, feel free to contact Claude Krawczyk.

U.S. SUPREME COURT TO DECIDE WHETHER EMPLOYEES' VERBAL COMPLAINTS ARE PROTECTED UNDER FLSA

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The United States Supreme Court has decided to review a Fair Labor Standards Act ("FLSA") case in which the U.S Court of Appeals for the Seventh Circuit held that an employee could not maintain an action for retaliation under the FLSA for his termination based upon his verbal complaints to his employer that the time clock was improperly placed to provide for accurate punch-ins and punch-outs. The U.S. Court of Appeals for the Seventh Circuit oversees the federal district courts in Illinois, Indiana, and Wisconsin.

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, an employee alleged that his employer violated the FLSA's anti-retaliation provisions when it terminated his employment following verbal complaints to his supervisors that the location of the time clock was illegal because it did not allow workers to be paid for time spent putting on and removing protective clothing needed for duties of their jobs. The employer, on the other hand, maintained that the employee's termination was based upon the employee's repeated failure to comply with the company's time clock policies.

The U.S. Court of Appeals for the Seventh Circuit agreed with the lower federal district court that the FLSA does not protect against retaliation for employees' verbal complaints. The district court ruled that an employee's oral complaint is not protected activity under the FLSA's anti-retaliation provision as the FLSA only protects an employee who has "filed any complaint or instituted or caused to be instituted any proceeding." Given the specific language of the statute, the federal district court held that a verbal complaint does not fall within the FLSA's anti-retaliation protections. While the federal district court noted that a complaint need not necessarily be filed with a labor agency or court in order to fall under the FLSA's "protected activity" purview, it concluded that the FLSA still requires that a complaint be "committed to document form" in order to garner such FLSA protections.

If the U.S. Court of Appeals for the Seventh Circuit's decision is upheld, it affords employers some protections against retaliatory discharge claims under the FLSA based solely on verbal complaints. However, if the Supreme Court reverses this decision, it will signal a need for employers to train their supervisors to be very sensitive to all complaints levied by their employees in any form. Employers must always be mindful of an employee's recent complaints that might qualify as "protected activity" when making any disciplinary or discharge decision and make sure that any such decision is based upon legitimate and articulable business interests.

COBRA PREMIUM SUBSIDY EXTENDED TO MAY 31, 2010

On April 15, 2010, President Obama signed into law the Continuing Extension Act of 2010, which has once again extended the COBRA premium subsidy as provided for in the American Recovery and Reinvestment Act of 2009 ("ARRA"); this time the subsidy has been extended from March 31, 2010 to May 31, 2010. This new law provides retroactive eligibility for individuals who involuntarily lost their employment after the prior COBRA subsidy extension expired on March 31, 2010. Under the ARRA, "assistance eligible individuals" pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider through a payroll tax credit. An "assistance eligible individual" is the employee or a member of his/her family who timely elects COBRA coverage following a qualifying event related to an involuntary termination of employment that occurs at any point in time from September 1, 2008 through May 31, 2010. In addition, an involuntary termination of employment that occurs on or after March 2, 2010 but by May 31, 2010 and follows a qualifying event that was a reduction of hours that occurred at anytime from September 1, 2008 through May 31, 2010 is also a qualifying event for purposes of the ARRA.

UNMARRIED COUPLES TAKING ADVANTAGE OF THE HOMEBUYER TAX CREDIT SHOULD UNDERSTAND THEIR RIGHTS

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The Homebuyer Tax Credit is scheduled to expire soon. To take advantage of the tax credit, homebuyers must enter into a binding contract to purchase a home before May 1, 2010, and they must close on the home before July 1, 2010.

Not surprisingly, many unmarried couples have sought to take advantage of the tax credit by purchasing a home together. Those unmarried couples doing so should consider the following issues:

- Will each person pay an equal amount for the down payment and closing costs?
- If not, will each person own an equal share of the home?
- Will each person be responsible for an equal share of the monthly mortgage payment?
- What happens if one person is unable to make a timely monthly mortgage payment? If the other person makes up the difference, is this treated as a loan, a gift, or does it affect the ownership percentage in the home?

- Who gets to decide on necessary repairs/maintenance for the house, and who must pay for them? Similarly, who gets to decide on unnecessary repairs/maintenance for the house, and who must pay for them?
- Will anyone else be permitted to live in the house? For example, a friend, sibling, or parent in need of a place to stay? If so, will they pay rent?
- Will either person be compensated for labor expended on or around the home (e.g. lawn work, painting, cooking, laundry, etc.)?
- What happens if one person can no longer afford the home and wants to sell? If one person dies?

While the blissful couple may believe that a spoken agreement will suffice, they should be mindful of the potential pitfalls of such an arrangement, especially if the relationship falters. For this reason, it can be very beneficial to obtain a Home Purchase and Co-Tenancy Agreement to ensure each party is aware of their rights and responsibilities, both during and after the relationship.

ESTATE PLANNING FOR MARRIED INDIVIDUALS WITH CHILDREN FROM A PRIOR MARRIAGE

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Effectively drafting estate plans for married individuals with children from a prior marriage can be a challenge. Failure to properly plan can cause divisive family disputes. There are many variables to be considered and competing interests that need to be balanced when preparing an appropriate plan. A common concern is that the spouses want to take care of each other during their lives, but also want their children from a prior marriage to receive some inheritance. There are generally two techniques to address this concern: 1) an immediate division of assets between the surviving spouse and the children from the prior marriage, or 2) the creation of a trust upon death where the surviving spouse has an interest in the trust for his or her lifetime, and the children receive the remainder upon the death of the surviving spouse. Often a combination of these two techniques is employed.

The advantage to an immediate division of assets is simplicity and certainty. The client identifies which assets are to be distributed to the surviving spouse and which assets are to be distributed to their children. The assets may be divided equally or on some percentage basis among the children and the surviving spouse. Most often, certain assets may be distributed to the spouse and certain assets may be distributed to the children. For example, the surviving spouse may receive the residence and a 401(k) retirement account, and the children from the prior marriage may receive the proceeds of a life insurance policy and an investment account. A drawback to this technique is that there may not be enough assets to provide a lifetime benefit for the surviving spouse. Also, it is important to monitor the basket of assets that is to go to the spouse and children as the asset values will change. The residence may increase in value where the investment account may be used and have a reduced value.

The use of a trust provides more flexibility, allows for the maximum assets for the surviving spouse, and allows for the assets to be divided over time. The surviving spouse receives distributions from the trust assets (either a fixed amount, all of the income, or based upon his or her need) for his or her lifetime. The children from the prior marriage then receive the assets remaining upon the death of the surviving spouse. A key to trust planning such as this is to effectively manage the investment to make the asset last for the life of the surviving spouse, and still provide some assets for the children. Also, a trustee needs to be selected that manages the trust for the benefit of all beneficiaries. A drawback to this technique is that the children from the prior marriage would not receive an inheritance until the death of the surviving spouse.

There are many, many other legal and tax issues that must be considered in this planning. Certain assets have significant tax advantages if given to the surviving spouse, and other assets cannot be given to anyone but the surviving spouse without consent. Also, in Wisconsin, the rules of Marital Property need to be considered in all estate plans for married people. Estate planning for married couples with children from a prior marriage requires careful, thoughtful planning. The two general techniques summarized in this article are often used in tandem to provide an effective comprehensive plan. The key is to establish a comprehensive plan to avoid significant divisive disputes upon the death of a spouse.

ATTORNEY DEAN LAING AND LAURA NOW CONTRIBUTE ARTICLE TO THE ABA HEALTH LAW LITIGATION NEWSLETTER

The article, published in the American Bar Association, Section of Litigation, Committee on Health Law Litigation's Winter 2010 Health Law Litigation Newsletter, discusses the common law development of a radiologist's duty to directly communicate his or her findings to a treating physician, and how the American College of Radiology's attempt to provide guidance to radiologists by establishing communication guidelines may not have had the effect that the ACR intended.

While the duty to directly communicate radiological findings has been firmly recognized by the courts for a number of years, courts have not been as consistent in articulating when that duty is triggered. The ACR originally set forth its recommendations to radiologists by creating its Standard for Communication-Diagnostic Radiology in September of 1991 which required radiologists to directly communicate their findings to treating physicians under certain circumstances. Since that time, this standard has undergone a number of revisions and is currently recognized as the ACR Practice Guideline for Communication of Diagnostic Imaging Findings. This Practice Guideline continues to provide guidance to radiologists regarding when direct communication with a treating physician may be necessary. More importantly, however, this Practice Guideline has increasingly been recognized and relied on by medical journal articles and the courts as evidence of a standard of care for the communication of radiological findings, despite the ACR's explicit statement that its standards are not to be used to establish a legal standard of care.

Keeping this trend in mind, whether relying on established case law or the guidelines established by the ACR, radiologists should be especially diligent in communicating directly with a treating physician when the circumstances surrounding the radiologist's findings mandate immediate communication.

A full copy of the A Radiologist's Duty to Communicate with the Treating Physician can be found here.