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New Mexico
EMPLOYMENT LAW LETTER

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WORKERS' COMP

New Mexico farm and ranch workers entitled to workers' comp benefits

by Barbara J. Koenig
Foster, Rieder & Jackson, P.C.

The New Mexico Supreme Court, in a 49-page decision with a 36-page dissent by Justice Judith Nakamura, recently upheld a June 2015 decision by the court of appeals. (See "Court extends workers' comp benefits to farm and ranch employees" in our August 2015 issue for a discussion of the court of appeals decision.) The supreme court voted 4-1 in agreement with the court of appeals that the statutory exclusion of farm and ranch laborers from the workers' compensation system violates the Equal Protection Clause of the New Mexico Constitution.

The supreme court's decision, issued June 30, 2016, extends workers' comp benefits to farm and ranch workers whose employers employ three or more persons. Although this ruling actually only affects approximately 13% of all farms and ranches in New Mexico (1,864 out of 24,721 farms and ranches in the state), it has generated much concern in the insurance, agriculture, and ranching industries. Estimates of the economic impact of this ruling vary widely, but it is expected to increase payroll costs for affected farmers and ranchers by 0.4% and 1.5%.

Background

Almost 100 years ago, New Mexico adopted, by statute, a limited workers' comp benefits program. Over time, the statute was expanded so that benefits are now offered to almost all employees in New Mexico, with the exception of domestic servants and, until now, farm and ranch workers. Despite numerous statutory amendments expanding workers' comp coverage over the years, the statute has never required that farm and ranch laborers be covered by workers' comp benefits. At least twice in the last decade, bills were introduced in the legislature to extend workers' comp to farm and ranch laborers, but they died in committee.

Not all workers who are employed on farms and ranches were left out of the workers' comp system before this recent supreme court decision. There were two significant exceptions. First, owners of farms and ranches were allowed to provide coverage to their workers if they chose to. Of course, the owners of these farms and ranches would have to pay the cost of workers' comp insurance, but voluntary coverage provides them with fiscal certainty in the case of injuries to their workers. At last count, 29% of the farms and ranches in New Mexico, including some of the largest operations in the state, had elected to voluntarily provide workers' comp coverage to their employees.

The second exception developed out of a series of decisions by the New Mexico Court of Appeals. These cases involved workers on farms, orchards,

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ranches, or beekeeping operations who had been injured in the course of performing their duties and made claims for workers' comp benefits. Over time, the court of appeals distinguished between laborers who are directly involved in the cultivation of crops or in animal husbandry and workers indirectly involved in such operations, extending coverage to those not directly engaged in agricultural activities.

In one case, an onion packing worker who was injured while working in a production shed adjacent to the fields where the onions were grown and harvested, was held to be covered by the Workers' Compensation Act for his injury because he was not directly involved in the cultivation of the crop. However, his fellow workers, who theoretically could have been injured cultivating or harvesting the onions, would not be covered for their workplace injuries.

Voluntary coverage provides fiscal certainty in the case of injuries.

In another decision, a beekeeper who harvested honey from hives was held not covered although his coworkers who put the harvested honey in jars in a nearby shed would be. The honey harvester was directly involved in the cultivation of a farming commodity, while the manufacturing and processing workers were not.

In a third decision, a heavy equipment operator who maintained a compost system for a pecan orchard was held not eligible for workers' comp benefits because the manufacture of compost was directly involved in the cultivation of the pecans.

These decisions often seemed to be arbitrary, and they were heavily dependent on the particular facts. However, until this latest decision, the courts continued to hold that if a ranch or farm laborer was directly involved in the production of crops or in animal husbandry, the Workers' Compensation Act excluded them from coverage. Noe Rodriguez and Maria Angelica Aguirre, the claimants in the consolidated cases heard by the supreme court, were among those farm and ranch laborers who had been excluded from workers' comp coverage for their workplace injuries.

Facts

Noe Rodriguez had worked as a dairy worker and herdsman for Brand West Dairy for four years when he was head-butted by a cow. Rodriguez fell on his face onto a cement floor, suffered a traumatic brain injury and a neck injury, and was in a coma for two days. At the time of his workers' comp hearing, he had not been cleared to return to work. He applied for benefits, but because his employer had elected not to provide workers' comp insurance, his application was denied. Instead, he received two checks from his employer for his injuries, amounting to less than three weeks of wages.

Maria Angelica Aguirre was working as a chili picker for M.A. & Sons Chili Products when she slipped in a field and broke her wrist. She required surgery on her wrist and rehabilitative therapy and, at the time of her workers' comp hearing, remained limited in her ability to do farm work. Her employer had workers' comp insurance at the time of her injury but denied her claim on the basis that she was a farm laborer.

Court's decision

The supreme court held that the exclusion of farm and ranch laborers from workers' comp coverage was unconstitutional because it violates Article II, Section 18, of the New Mexico Constitution, which states that no person shall be denied equal protection of the law. The court held that the discrimination against this class of workers embodied in the Workers' Compensation Act bears no rational relationship to a legitimate government purpose.

The employers, insurance companies, and agencies involved in this lawsuit offered five arguments why farm and ranch laborers should be excluded from workers' comp coverage:

(1) Cost savings for farm and ranch owners;

(2) Administrative convenience;

(3) Unique economic aspects of agriculture;

(4) Protection of New Mexico farming and ranching traditions; and

(5) Application of tort (personal injury) law to farm and ranch laborers.

The supreme court reviewed each of these arguments, concluding that none of them bore a rational relationship to the exclusion of a specific class of workers.

For example, to support the argument of administrative convenience, the employers presented evidence that many farm and ranch laborers are seasonal, transient, and sometimes undocumented. This makes the workers difficult to locate after an injury and would make paying their workers' comp benefits administratively challenging. But the court noted that other industries, such as construction, service, and roofing, hire essentially the same types of workers and those workers have not been historically excluded from workers' comp benefits. The exclusion of farm and ranch laborers based upon this argument was, the court found, overinclusive and bore no rational relationship to the proffered reason for treating similar employees differently.

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QUESTION CORNER

Employment at will? Don't count on it!

by Robert P. Tinnin, Jr.
Tinnin Law Firm, A Professional Corporation

Q *My company maintains a strictly observed policy requiring that all new employees sign an acknowledgment that employment with our company is "at will," so any employee can be terminated or is free to terminate his own employment at any time, for any or no reason (except for an unlawful reason), without any liability. We recently terminated an employee who was underperforming, but rather than giving him a reason, we simply told him he was being terminated under the "at-will" rule. Today I received a letter from an attorney on his behalf charging us with having terminated the employee in breach of an "implied employment contract" requiring that he not be terminated from employment except for "cause." What is this? I thought New Mexico was an "at-will" state.*

A Although I don't know the particular facts in your case, it is quite possible that you are facing a serious uphill battle.

Misconceptions of 'at-will' doctrine

It is true that almost any source you consult will tell you New Mexico is a jurisdiction that continues to observe the at-will employment rule. However, you must bear in mind that the rule has never been absolute. For example, for decades the rule has been subject to certain limited exceptions for things such as union contracts, federal and state antidiscrimination statutes, and other statutory provisions granting employees certain rights under particular circumstances.

Also, for many years a number of judicially created common-law exceptions to the employment-at-will rule have been recognized by courts in New Mexico, including "public policy wrongful discharge." In order to recover under a claim for public policy wrongful discharge, an employee must show that he was discharged because he did something that public policy authorized or would encourage or because he refused to do something that public policy would discourage or condemn.

'Implied employment contract' exception

Perhaps the most all-encompassing exception to at-will employment recognized in New Mexico, however, is the doctrine of "implied employment contract," under which an employment contract may be formed through either oral or written expressions that establish that the parties intended to limit the employer's right to discharge the employee either substantively (by imposing a "good cause" standard for discharge) or procedurally (requiring progressive discipline steps to be followed). Through the development of case law in recent years, at-will employment has been largely subsumed by the implied employment contract doctrine, because almost any representation (oral or written) made by an individual with some authority in personnel matters can modify at-will status, even if it directly contradicts an employee handbook provision or a written employment contract.

An implied employment contract can be created in spite of an at-will disclaimer in an employee handbook when the "totality of the employer's conduct" reasonably leads an employee to believe that he will not be terminated without just cause or a fair procedure. For example, if an employee handbook contains detailed disciplinary procedures and the employer's actual practices and representations to employees create an expectation that an employee will not be fired without these procedures being followed, an implied contract term limiting the employer's right to terminate "at will" may be found to have been created. Representations made by supervisors or managers can be found to modify at-will status, even if they directly contradict an explicit employee handbook provision or a written employment contract.

New Mexico appellate decisions make it clear that whether an implied employment contract modifying at-will status has been formed is to be determined by the jury, not the judge, thus assuring that these cases cannot be dismissed by the court before trial.

Bottom line

Don't count on the at-will doctrine to provide significant protection against wrongful termination actions. Develop clearly articulated and communicated procedures for disciplining employees and for terminating them after they have been alerted to perceived deficiencies and, where appropriate, afford them an opportunity to correct their actions.

"Question Corner" is a regular monthly feature of New Mexico Employment Law Letter. Submit questions you want addressed by the editor to rtinnin@tinninlawfirm.com. ✤

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Having ruled that the exclusion was unconstitutional, the court examined whether the stricken portion of the Workers' Compensation Act should be applied prospectively only or retroactively to those ranch and farm laborers who had made claims or had been injured in the last several years. The court decided to apply the expanded coverage only to workers who have compensable injuries that become reasonably apparent to the workers after final disposition of these cases by the supreme court. An exception was also made for Rodriguez and Aguirre, whose workers' comp claims would be allowed to proceed as though they had coverage at the time of their injuries. *Rodriguez v. Brand West Dairy and Uninsured Employers' Fund*, No. S-1-SC35426, consolidated with *Aguirre v. M.A. & Sons Chili Products and Food Industry Self Insurance Fund of New Mexico*, No. S-1-SC-35438 (June 30, 2016); 2016 NMSC ___; ___ P.3d. ___ (2016).

Bottom line

Agriculture production was the third largest contributor to New Mexico's gross domestic product in 2012, the most recent year for which data were discussed in the decision. Of the approximately 26,000 direct agricultural workers in New Mexico, this ruling will affect less than half, not including workers who were previously covered through their employers' voluntary participation in the workers' comp system. The Workers' Compensation Administration has estimated that the expanded coverage will increase its workload about 1% and may require the hiring of additional employees.

This ruling greatly impacts farm and ranch laborers working for larger establishments, who had previously been without any viable recourse when it came to workplace injuries, but the ruling will also economically and administratively impact some of the state's larger farms and ranches, affecting their bottom lines.

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REASONABLE ACCOMMODATIONS

EEOC to employers: Leave time an important ADA accommodation

Employees with conditions that cause them to take time away from work sometimes exhaust available leave before they're able to return to the job. When that happens, employers may think they have no choice but to replace the workers and bring on others who can do the job. But the Equal Employment Opportunity Commission (EEOC) wants employers to understand that the law may require them to offer more time off to workers with conditions that put them under the protection of the Americans with Disabilities Act (ADA). In such cases, employers need to keep in mind that extra leave time is often an accommodation that enables employees with disabilities to eventually return to work.

New guidance spells out requirements

In May 2016, the EEOC issued new guidance to clarify employer responsibilities under the ADA. The guidance creates no new agency policy but was issued because of the number of ADA charges the EEOC receives showing that employers often deny or unlawfully restrict the use of leave as a reasonable accommodation.

The ADA requires employers to grant accommodations to employees with disabilities up to the point of undue hardship. A reasonable accommodation generally is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."

The introduction to the new EEOC guidance points out that "some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation."

The guidance brings up several points, including:

- **The importance the EEOC places on leave as an accommodation.** The fact that the agency issued a guidance even though it hasn't created a new policy indicates that it places high importance on leave as an accommodation. In announcing the guidance, the agency labeled the prevalence of employer policies restricting leave as an accommodation for disability a "troubling trend." The EEOC's announcement said overly restrictive policies "often serve as systemic barriers to the employment of workers with disabilities," barriers that may cause the termination of workers who could have returned to work.
- **The need for employers to sometimes change how they customarily do things.** The guidance makes clear that employers can't rely on their normal

policies as reasons to deny leave if an employee's condition constitutes a disability as defined in the ADA. If an employee with a disabling condition requests leave as a reasonable accommodation, the leave may need to be granted as long as it doesn't present an undue hardship for the employer. So even if an employer doesn't normally offer leave as a benefit, the employee is ineligible for leave, or the employee has used up all available leave, the employer must still consider leave as a way to accommodate the employee's disability. You aren't obligated to offer paid leave, and the ADA doesn't require you to allow accommodations that create an undue hardship for you.

- **The importance of the interactive process.** The guidance points out that an employee's need for leave related to a medical condition often can be addressed through an employer's leave program, the federal Family and Medical Leave Act (FMLA) or a similar state or local law, or through the workers' compensation program. But if no leave is available through those or any other program, the employer "should promptly engage in an 'interactive process' with the employee—a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship," the guidance states.

  The guidance also says that the interaction between the employer and employee should focus on the specific reasons the employee needs leave, whether the leave will be a block of time or intermittent, and when the need for leave will end.

Employer cautions

The new guidance addresses how employers with maximum leave and "100 percent healed" policies can run afoul of the ADA. The guidance stresses that the ADA requires employers to sometimes make exceptions to leave policies. Often, employers have maximum leave policies that place a flat limit on the amount of leave an employee can take. When that time is exhausted, too often employers think they can terminate the employee, but that's not necessarily the case, according to the EEOC.

"Employees with disabilities are not exempt from these policies as a general rule," the guidance states. "However, such policies may have to be modified as a reasonable accommodation for absences related to a disability, unless the employer can show that doing so would cause undue hardship."

Some employers require employees to be 100 percent healed before returning to work, but the guidance points out that an employer will violate the ADA if it requires an employee whose condition constitutes a disability to have no medical restrictions if the employee can perform the job with a reasonable accommodation, unless the employer can show that accommodating the employee would cause an undue hardship.

The new guidance, titled "Employer-Provided Leave and the Americans with Disabilities Act," is available at www.eeoc.gov/eeoc/publications/ada-leave.cfm. ✤

PRIVACY RIGHTS

Are you being nosy or burying your head in the sand?

With the myriad requirements that employers consider employees' need for accommodations for religious, disability, or family leave reasons, it's necessary to know some personal information about your employees. On the other hand, simply asking for information can be considered a violation of certain employment laws. What's an employer to do?

Damned if you do . . .

For example, an employer has a duty to offer reasonable accommodations for an employee's religious beliefs. In 2015, the U.S. Supreme Court held in *EEOC v. Abercrombie & Fitch Stores, Inc.*, that failing to accommodate a job applicant's religious beliefs—despite not actually knowing the religion she practices—is a violation of Title VII of the Civil Rights Act of 1964. So you may need to ask applicants or employees if their religion requires an accommodation of their job duties. But eliciting such information may itself lead to a religious discrimination claim if the applicant doesn't get the job or an adverse action is later taken against the employee.

Similarly, you may have good reason to want to know if an employee is taking medication that will affect his job performance. But the Americans with Disabilities Act (ADA) prohibits covered employers from making inquiries about whether employees have disabilities unless the inquiry is shown to be both job-related and consistent with business necessity.

Asking about an employee's family medical history, either as part of a physical examination or in casual conversation, may be a violation of the Genetic Information Nondiscrimination Act of 2008 (GINA). Yet GINA allows you to inquire about this information under certain circumstances, such as when you're accommodating a request under the Family and Medical Leave Act (FMLA) or similar state laws, or as part of a wellness program. There are limitations and exceptions to the exceptions, however.

Or suppose you are doing some organizational planning, and you're aware than an employee has made a casual comment about retiring in the coming year. You may want to ask the employee if he is seriously contemplating retirement so you can plan ahead on filling his position. But if you ask about his age, it may be

AGENCY ACTION

Task force urges "reboot" of harassment prevention. A task force headed by two commissioners of the Equal Employment Opportunity Commission (EEOC) is calling for a "reboot" of workplace harassment prevention efforts after 14 months of studying workplace harassment. In reviewing the findings for their fellow commissioners, EEOC commissioners Chai R. Feldblum and Victoria A. Lipnic said that too much of the effort to prevent workplace harassment has been ineffective and focused on simply avoiding legal liability. It also says almost one-third of the roughly 90,000 charges filed with the EEOC in fiscal year 2015 included an allegation of harassment. The report urges employers to explore new types of training to prevent harassment, including workplace civility and bystander intervention training. The report also includes a chart of risk factors that may permit harassment to occur, effective policies and procedures to reduce and eliminate harassment, recommendations for future research and funding, and targeted outreach. It also offers a toolkit of compliance assistance measures for employers and other stakeholders.

EEOC offers sample notice on wellness programs. The EEOC has posted a sample notice to help employers that have wellness programs comply with their obligations under a recently issued Americans with Disabilities Act (ADA) rule. The notice is available at www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm. The rule says that employer wellness programs that ask employees about their medical conditions or that ask employees to take medical examinations (such as tests to detect high blood pressure, high cholesterol, or diabetes) must ensure that the programs are reasonably designed to promote health and prevent disease, that they are voluntary, and that employee medical information is kept confidential. A question-and-answer document describing the notice requirement and how to use the sample notice is available at www.eeoc.gov/laws/regulations/qanda-ada-wellness-notice.cfm.

DOL, Virginia sign agreement on misclassification. The U.S. Department of Labor (DOL) announced in June that it has signed an agreement with the Virginia Employment Commission aimed at preventing misclassification of workers as independent contractors or other nonemployee statuses. The three-year memorandum of understanding says that the two agencies will provide outreach to employers and employees, share resources, and enhance enforcement by conducting coordinated investigations and sharing information. The DOL and the IRS are working with Virginia and 30 states as part of an initiative to combat employee misclassification. ✤

perceived as an attempt to compel him to retire, in violation of the Age Discrimination in Employment Act (ADEA).

But sometimes you have to

How should you handle this conflict? First, if in doubt, call your lawyer. Employment law is constantly changing, and what may have been permissible a few years ago may not be now. If you have any doubts about whether you may lawfully ask for particular information, a quick phone call or e-mail ahead of time may save you thousands of dollars and many headaches by preventing an employment discrimination lawsuit.

Second, keep the discussion focused on job requirements. If the inquiry cannot be directly tied to an employee's job duties, you're probably better off not asking. So in the previous example of a religious accommodation for a job applicant, describe the essential functions of the job, and ask the applicant if she can perform them. If she says she cannot for religious reasons, you may then ask about her religious beliefs so you can discuss a reasonable accommodation.

Or suppose an employee asks for time off based on his religious beliefs. If you have an objective basis for questioning either the religious nature or sincerity of his belief or practice, you may question the employee about it. The extent of the inquiry is limited, but you may gather enough information to determine whether the belief is actually religious, whether it is sincerely held, or whether it gives rise to the need for the requested accommodation. Be aware, though, that if you unreasonably request unnecessary or excessive corroborating evidence, you may be held liable for denying a reasonable accommodation or for retaliation or harassment based on the employee's religion.

Along the same lines, asking about medications an employee takes may be permissible, but only if the inquiry is shown to be both job-related and consistent with business necessity. This situation typically involves employees in positions affecting public safety, such as commercial truck drivers, airline pilots, and police officers.

If you must inquire into issues that are protected by antidiscrimination laws, be certain that you can explain the business necessity of requesting the information. For example, you can ask an employee about a family member's health to the extent that it relates to the employee's request for family medical leave under the FMLA. But if you go further—for example, asking about heart problems when the relative is suffering from a back injury—you could violate GINA.

Likewise, in the retirement situation described above, it would be reasonable to ask about the employee's retirement plans so that you can do your organizational planning. But a question out of the blue like "Hey, Bob. You're getting pretty close to 65. Any plans to retire soon?" could be seen as age discrimination.

Bottom line

As you can see, employers must walk a fine line between making necessary inquiries for business purposes, especially so

you aren't accused of "burying your head in the sand" about the need for an accommodation, and not inquiring into sensitive matters unrelated to business necessity. ✤

EMPLOYER RETALIATION

Documentation, consistency protect employer from FMLA retaliation claim

Taking action against an employee after she returns from a Family and Medical Leave Act (FMLA) absence can expose an employer to claims of FMLA retaliation. But sometimes it takes an employee's absence to learn about her performance issues. So how should an employer handle disciplining someone who is returning from protected leave when the misconduct was discovered during her absence?

Montoya's 2009 leave and warning

Cynthia Montoya worked as a fabrication supervisor for Hunter Douglas Window Fashions, where she supervised 55 employees. In 2009, while she was on FMLA leave, a number of her employees complained that she wasn't available to assist them because of personal Internet use. When Jeff Geist, Montoya's supervisor, looked into her workers' complaints, he discovered her personal Internet usage totaled 24.5 hours during a six-week time period.

When Montoya returned from FMLA leave, Geist issued her a "Final Warning and Improvement Plan," which directed her to make herself available to members of her team and established performance requirements. Geist specifically addressed her excessive personal Internet usage and warned her that she would be subject to additional discipline, including termination, if the problems recurred.

Although not without a few speed bumps, Montoya's general performance during 2010 and 2011 was satisfactory. In 2010, Geist evaluated her positively, noting her personal Internet use had declined. In 2011, he counseled her about "going through the motions, and not showing much engagement in her job." He also was critical of her complaining about having to cover overtime shifts. Nevertheless, Montoya received another satisfactory review.

Montoya's 2012 leave and firing

In August 2012, a couple of circumstances caused Montoya to miss work. First, she took FMLA leave to care for her terminally ill mother. Soon thereafter, her fiancé broke their engagement, and she received treatment from a psychologist for "stress and relationship complications." Montoya left a voicemail message with the company's HR representative stating that her doctor was taking her off work for the following week.

Hunter Douglas' insurance company sent Montoya the necessary FMLA notifications and requests for information from her healthcare provider. She didn't return the forms, and she didn't follow up with her employer about FMLA leave.

WORKPLACE TRENDS

Survey shows employer love-hate relationship with smartphones. A new survey from CareerBuilder shows that smartphones help workers stay connected to work, but they're also blamed for lost productivity. The survey shows that 19% of employers think workers are productive less than five hours a day, and 55% say that workers' mobile phones/texting are to blame. The national survey conducted online by Harris Poll on behalf of CareerBuilder included 2,186 hiring managers and HR professionals and 3,031 full-time U.S. workers in the private sector across industries and company sizes. The survey found 83% of the workers have smartphones, and 82% keep them within eye contact at work. While just 10% of those with smartphones say their phones decrease their productivity at work, 66% say they use their phones at least several times a day while working.

Playing politics at work seen as necessary to get ahead. Eighty percent of professionals participating in a survey by staffing firm Accountemps say office politics play a major role in the workplace. Just 14% said participating in office politics isn't necessary to get ahead, compared to 42% in a 2012 survey. Twenty-eight percent said "politicking" is very necessary for career advancement, up from 15% in 2012. Fifty-five percent said they take part in office politics, with 16% describing themselves as "active campaigners" and 39% self-identifying as "occasional voters." Respondents said the most common forms of office politics are gossip (46%) and gaining favor by flattering the boss (28%).

Casual dress gaining ground for office attire. Research from staffing firm OfficeTeam shows that half of senior managers participating in the study said employees wear less formal clothing than they did five years ago. Also, 31% of office workers stated they would prefer to be at a company with a business casual dress code, and 27% favor a casual dress code or no dress code at all. When asked about the most common dress code violation, 47% of senior managers said dressing too casually, 32% said showing too much skin, 6% said having visible tattoos or piercings, 5% said having ungroomed facial hair, 4% said wearing excessive accessories, 3% said having extreme hair colors/styles, and 3% said they didn't know or had no answer. "Employees should take their cues from company guidelines and what others in the office are wearing," Brandi Britton, a district president for OfficeTeam said. "Some industries, for example, are more formal than others. A casual dress code doesn't mean that anything goes." ✤

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8-30 EEO-1 Reporting Deadline: HR's Step-by-Step Guide to Ensuring Compliance - Webinar Series ✤

Accordingly, FMLA leave was denied, and Hunter Douglas charged Montoya vacation time for her absence.

Once again, Montoya's 2012 absence triggered employee complaints. Coworkers reported to Geist that Montoya had been leaving work early and was frequently missing for hours. According to her employees, she spent an inordinate amount of time on her cell phone and spent significant time on the Internet planning her wedding rather than working. When Geist investigated Montoya's Internet usage, he discovered more than 11,825 nonwork Internet hits, including a significant number on Facebook, macys.com, and menswearhouse.com. Geist also determined Montoya was six to eight months late in completing performance reviews for eight of her subordinates.

On August 20, Montoya returned to work, and Geist met with her about the employee complaints and his discoveries. Montoya admitted her increased personal Internet use but explained she was excited about her wedding. According to Montoya, she had failed to complete the performance reviews because "things had been very busy."

Hunter Douglas fired Montoya based on her conduct and violation of the 2009 final warning. She sued her former employer and accused Hunter Douglas of gender discrimination and of retaliating against her on the basis of using or requesting FMLA leave. The U.S. 10th Circuit Court of Appeals (the federal appeals court that covers New Mexico and five other Mountain West states) ultimately found in favor of the employer and rejected Montoya's discrimination and retaliation claims. *Montoya v. Hunter Douglas Window Fashions, Inc.*, No. 14-1491 (10th Cir., Jan. 25, 2016).

Why the employer could make its firing stick

The points made by the court are instructive for any employer facing the possibility of taking action against an employee who has recently returned from a legally protected leave:

- **Previous documented warnings of performance problems.** The 2009 final warning demonstrated Montoya's issues were recurring, and she had been put on notice that termination was the next step.
- **Strong proof of the misconduct.** In 2009 and 2012, coworkers had reported Montoya's problems to her supervisor, and resulting investigations established that the misconduct had occurred.
- **Consistency of disciplinary action taken.** Montoya was unable to show that any employees with similar conduct received more favorable treatment. ✤

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