

# LABOR & EMPLOYMENT REPORT

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## DWI Not OK Under ADA

One issue that crops up frequently is the employer's ability to act in response to an employee's off-duty drug use. Typically, the issue arises when an employee's off-duty drug or alcohol use has affected their work or behavior enough to lead to discipline or even termination. The employee then asks for another chance if they attend a rehabilitation program and/or agree never to use drugs or alcohol again. Both parties then sign a "last chance agreement" whereby the employer gives up its right to terminate for previous misconduct in return for the employee's promise to refrain from using drugs or alcohol.

In many such cases, the agreement remains in place until the employee returns to using chemicals. Often, the return to using is strictly during

off-duty hours but the employer somehow becomes aware of the relapse from treatment, such as when they are notified of the employee's arrest for driving while intoxicated (DWI). The employee will say that this has no effect on the work and they cannot be fired, while the employer responds that the employee violated the agreement and can be terminated for that reason alone. What is the answer Minnesota? Read on!

### The Cocaine Blues

Ira Longen had worked for the Company since July 1974, and all went well for nearly twenty years. But in 1994, Longen acknowledged to his employer that he had been abusing cocaine, and that he would need treatment for his problem. The company readily agreed, choosing to forgo disciplinary action as long as Longen successfully completed a treatment program.

Each of the parties kept to their end of the bargain for a time, but Longen eventually succumbed to the lure of his former habit. In fact, he sought treatment and relapsed on five separate occasions, and in each case, the company agreed to forego discipline as long as Longen completed a series of inpatient and outpatient treatment programs, and agreed to refrain from further use of chemicals.

The company finally lost patience after the fifth relapse (can you blame them?), yet even then, they opted not to terminate. Instead, they demanded that Longen sign a "last chance agreement." Under the terms of the agreement, Longen agreed to complete a two and one-half month treatment program and to refrain forever from using any mood-altering chemicals, including alcohol.

### The Employer Sees Red

The agreement seemed to hold for a period of time but eventually Longen was arrested for driving under the influence of alcohol, pleaded guilty, and was discharged. Longen sued, claiming that his employer discriminated against him on the basis of a disability—alcoholism—in violation of the American with Disabilities Act, because the DWI had no impact on his work.

The trial court was not at all sympathetic to Longen, commenting that far from being an unlawful discriminator, the employer had actually provided Longen with a reasonable accommodation to his disability since they could have discharged Longen before entering into the agreement but chose not to. The Eighth Circuit Court of Appeals (which

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covers Minnesota) tempered this view a little, but did decide the case for the company since Longen had voluntarily placed restrictions on his own conduct. The judges reasoned that there was nothing in the ADA that prevented employees from placing conditions on themselves, and they expressed concern that a contrary holding would render all return-to-work agreements invalid. *Longen v. Waterous Co., F.3d (No. 02-3297 Oct. 20, 2003).*

### Put Agreement In Black and White

This decision is a positive affirmation for patient employers who try to help their employees overcome the debilitating and destructive effects of drug and alcohol abuse. Be careful in using these agreements, however, so as to avoid

application of this author's first maxim of employment law – "No good deed goes unpunished." When considering last chance agreements, be sure to do the following:

- Don't jump the gun by assuming that any employee with performance or behavior issues is using drugs or alcohol. Wait for that information to come to you.
- By the same token, don't assume that any employee using drugs or alcohol off duty has a dependency problem. You could be stepping into the quagmire of creating a "perceived disability" for the employee.
- Last chance agreements are just what they sound like – do not use them any time you believe that an employee is

drinking or using drugs outside of work. These agreements only have value if the employer has agreed to give up the right to discipline or discharge if the employee agrees to impose personal restrictions on off-duty behavior. Then, if they violate those restrictions, your right to terminate is restored, and the courts should evaluate the action strictly as the exercise of rights under a private contract.

- Always put these agreements in writing and get the employee's signature on it!



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## Welcome Our New Attorneys

Felhaber, Larson, Fenlon and Vogt, P.A. is pleased to announce that **Wendy M. Brekken** and **Pomy Ketema** have joined our firm. Please join us in welcoming them to Felhaber.

### WENDY M. BREKKEN

Ms. Brekken practices in the areas of real estate, estate planning, and business law. Prior to joining Felhaber, she was employed as a credit analyst for an automobile finance company.

Ms. Brekken graduated with a Bachelor of Arts, magna cum laude, from St. Olaf College in 1997. She received her J.D. from William Mitchell College of Law in 2003. Ms. Brekken graduated magna cum laude, in the top 10 percent of her class.



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### POMY KETEMA

Ms. Ketema practices in the areas of business law, general tax and estate planning, and real estate. She is a certified and licensed public accountant, and brings to the practice several years of experience in the areas of corporate transactions and restructurings, audit defense and general federal and state tax planning.

Ms. Ketema received her Bachelor of Arts degree from the University of St. Thomas in 1994, and her Master of Business Taxation degree from the Carlson School of Management (University of Minnesota) in 2001. She received her J.D. cum laude from the University of Minnesota Law School in 1999, graduating in the top 15 percent of her class. She served as a full editor of the Minnesota Law Review.



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# Sometimes It's Nice To Know We Know What We Know

In the age of information overload, we are constantly confronted with new ideas, new developments and new facts. We use the written media, the internet, our professional contacts and our friends, among others, to update us as to what is true, what is no longer true and what might be true tomorrow but not yet today.

Some people are afraid to take a step without contacting three different consultants (no doubt using the e-mail feature on their internet-ready mobile communication system). In a world such as ours, isn't it nice to know that some things have not changed, and that what we learned a while ago still serves us today? The three summaries of cases that follow are designed to do just that.

## **A subpoena is still a subpoena**

While preparing for his unemployment compensation hearing, "John Doe" arranged for the state to issue a subpoena to compel one of his former co-workers to attend the hearing to testify. He also arranged for the State to subpoena the former and current employee handbooks.

Despite the issuance of these subpoenas, the witness never showed up for the hearing and the employer refused to submit the handbooks, claiming that "John Doe" already had copies. "John Doe" objected to going ahead with the hearing since he did not have the critical evidence he felt was needed to prove his entitlement to benefits, but the Unemployment Judge insisted on proceeding with the hearing because there was no reason to "stretch things out."

"John Doe" lost his case and appealed to the Minnesota Court of Appeals, who sided with him and reversed the decision. The judges took a very practical approach, noting that since the law permits the issuance of subpoenas for witnesses or documents, parties are required to comply with those subpoenas. In addition, they ruled that the unemployment judge must either enforce the subpoenas or state on the record "legally sufficient reasons" for declining to do so.

Now we know that when a subpoena is issued in an unemployment case, we need to take it seriously and do our best to comply.

## **A settlement is still a settlement**

Elijah Clark was fired from his job as a firefighter with the Riverview Fire Protection District in Missouri, for sleeping through a fire call, among other allegations. He appealed the termination in accordance

with the employer's procedures and was scheduled to appear before the Board of Directors to present his case. He was to be accompanied by the President and Vice President of his labor union.

Five days before the hearing, the employer submitted a proposed settlement agreement calling for the termination to be turned into a one-year suspension, after which Clark would return to his job. In return, Clark would waive his right to sue the District for anything relating to his employment, including all discrimination claims.

Clark discussed the agreement with the union officials and was told that if he did not sign, he would remain terminated but could sue the District. They told him their goal was to reduce the termination to a suspension and eventually get him back to work. Then, at the hearing, Board members told Clark that he needed to sign the agreement or remain terminated, and that he needed to make a decision that day. The hearing was recessed so he could consider the matter further, at which time Clark reviewed the matter again with the union officials and then signed the settlement agreement.

Despite signing the agreement, Clark never reported for work at the end of his suspension and was terminated. He then sought to sue, claiming that the agreement (and release of claims contained in it) were invalid because he was under duress when he signed the document. He argued that the members of the Board were "rude" and "hostile" in telling him to sign, that he did not fully understand the agreement and felt pressured to sign it.

The 8th Circuit Court of Appeals (which covers Minnesota) upheld a lower court's dismissal of Clark's lawsuit on the grounds that he did not prove actual duress. The Court sympathized that Clark may have felt pressured and stressed by the circumstances, but that being in a situation where a difficult choice was necessary did not mean that he lacked the free will to make the decision. The court also noted that Clark received the agreement five days before signing it and discussed it with his union officials. He also had a chance for a final consideration during the recess in the hearing. As such, the judges ruled that the agreement was valid and that Clark had therefore waived his right to sue the District. *Clark v. Riverview Fire Protection District, No. 03-1823 (8th Circuit 2004).*

Now we know that a settlement of an employment claim will remain valid even if the employee felt pressured to sign because they needed the money or otherwise faced an uncertain future. As long as the employee had an opportunity to review the proposed agreement and discuss it with appropriate advisors, the fact that he had to make a difficult decision that he might later regret is not enough to invalidate the agreement.

## 24 hours is still 72 hours...huh???

Susan Veeder alleged that she was terminated from Cargill after a lengthy period in which she and the company looked at possible jobs for her and also discussed execution of a formal severance agreement. On Friday, November 3, 2000, believing that all options had been exhausted, she submitted a demand for her final wages and vacation pay under the Minnesota law that requires employers to pay such amounts within 24 hours of the written demand.

Cargill responded by sending a courier to Veeder's home on Monday, November 6, with a check for the entire amount owed. Veeder contended that this did not comply with the statute since the delivery was 72 hours, not 24 hours, after the company's receipt of the written demand. Naturally, Cargill argued that the statute actually meant "work-week hours" such that their submission of payment on the next working day was sufficient to meet the purpose of the law.

Score one for the company, according to Judge Paul Magnuson of the United States District Court in Minnesota. The judge ruled that the company's view that only work week hours counted was the only reasonable way to read the law. Otherwise, employers would never be able to comply if the demand was received on a Saturday. *Veeder v. Cargill, Incorporated, Civil No. 02-1711 (Minnesota. District Court 2003).*

Now we know that 24 can equal 72 if we are talking about hours, weekends and complying with legal obligations.



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## Join Us For A Complimentary Client Seminar

Workers' Compensation	Friday, April 2
Estate Planning	Tuesday, April 27
Association Management	Thursday, May 6
Multiemployer Benefits	May 2004
Health Law	September 24
Builder/Developer Issues	October 6
Labor & Employment Law	October 29

Please contact Karen Dyck, Marketing Director, at [kdyck@felhaber.com](mailto:kdyck@felhaber.com) for a seminar invitation. Please state your name and address with the name of the seminar you would like to attend. Online seminar registration available at [www.felhaber.com](http://www.felhaber.com).

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# Big & Costly Changes Proposed For State Human Rights Act

Minnesota already “enjoys” the privilege of having perhaps the most extensive state discrimination law, as well as the most expensive. Not only do we list 12 protected classifications but we also lay out a menu of potential damages and penalties that is unrivaled anywhere else in the country. Well... guess what? This apparently is not enough for our Human Rights Department – they want to change the law to make it more difficult for employers to win those cases, and more expensive for them when they lose.

## Jury Trials

The Minnesota Department of Human Rights (“Department”) has recently announced their intent to propose a number of amendments to the Minnesota Human Rights Act (“Act”) during the 2004 Legislative Session. In addition to some minor “house-keeping” changes, their proposed amendments include some very significant and controversial alterations. For one thing, the Department wants to change the current law to permit discrimination claims in court to be decided by a jury. Although they may claim that they are just trying to follow the lead of the federal laws, which require juries, there is no doubt that jury trials in discrimination cases will mean less predictable decision-making and higher verdict awards for successful claimants. The number of bad cases brought to court (which is already too high) will soar if ex-employees feel they will get a sympathetic ear from juries – how does this help the administration of justice??

A second, and potentially more troublesome proposed amendment, is the change in how punitive damages are awarded. Currently, punitive damages are capped at \$8,500 to dissuade people from filing frivolous cases (or refusing to settle more legitimate but low dollar-value cases) in the hope of receiving a big punitive damages award. The

proposed changes include an increase in punitive damages to “an amount equal to or greater than \$50,000.” This means that instead of an \$8,500 maximum on punitive damages, there will now be a \$50,000 minimum assessment! Just think of how many employees will be tempted to file claims about differential bathroom facilities, discriminatory lunch breaks or other similar low-priority issues just in the hope of scoring a big punitive damages award. At least a little sanity reigns at the Department – the \$50,000 amount for punitive damages is indeed a cap if the defendant is a political subdivision.

## Other minor changes may include:

1. Allowing the commissioner to disclose information from closed files as he or she deems necessary for public health or safety;
2. Tolling the statute of limitations while another enforcement agency (such as the EEOC) investigates a case brought under the Act;
3. Allowing the Minnesota Department of Human Rights to seek sanctions against employers or charging parties for intentional and frivolous delay during any proceeding under the Act;
4. Repealing the seldom-used Day Hearings provision;
5. Technical changes to eliminate obsolete language and to provide clarifications.

The Minnesota Department of Human Rights has sought input from persons and groups that may be interested in, or affected by, the changes, and has also held a public meeting for comments. We will keep you posted as these proposals move through the legislative process.

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## Government Contractors - Do you know who you are?

If you are an employer with over fifty employees with a contract or agreement with any governmental agency, either state or federal, in excess of \$50,000, you may be required to file an **affirmative action plan**. This requirement also applies to companies with fifty or more employees that subcontract for an entity that holds a government contract. Affirmative action

plans must be updated for each year there is a contract.

Every year the requirements and regulations increase in complexity, and Felhaber is up on all the latest developments. Felhaber has been putting its expertise to work drafting clients' plans for years, and would like to help you! Contact **Janet Ampe** at (612) 373-8431 for further information.

## Labor & Employment Updates

In our Fall 2003 edition, we reported on a decision of the National Labor Relations Board (NLRB) that upheld the 1999 termination of 22 nurses from the Alexandria Clinic in Minnesota, who participated in a strike that was commenced four hours later than the time set forth in their union's 10-day strike notice. Notwithstanding that termination, the union, AFSCME Council 65, the successor to Minnesota Licensed Practical Nurses Association - continued to represent the remaining nurses at the clinic, and those who were hired after the strike. However, we can now report that on December 9, 2003, the nurses at the clinic voted to decertify the union. In fact, all 39 nurses who cast ballots in the election voted in favor of decertification - not even one single voter wanted to continue having the union as a representative!

This story may not be over, though. The Union's appeal of the dismissal is pending before the 8th Circuit court of Appeals. Watch here for more details.

As mentioned in the Fall 2003 issue of Labor & Employment Report, the sweeping reform of the Department of Labor's overtime regulations has been stalled in Congress. At this time, the matter remains with the conference committee with some members of Congress hoping to begin hearings very soon. We'll keep watching these developments, wondering whether this might become another issue at play in the upcoming presidential campaign.

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## LABOR & EMPLOYMENT REPORT

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The *Labor & Employment Report* is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

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