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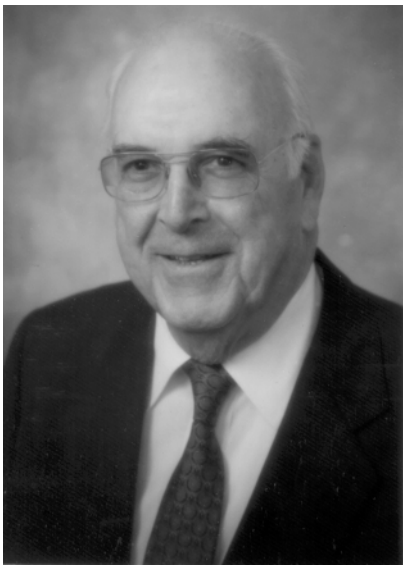
EMPLOYMENT LAW UPDATE

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C. WINTER 2003

In Memory of John W. Cummiskey Our Esteemed Colleague, Founding Member, and Dear Friend

■ John W. Cummiskey, the last surviving founder of Miller, Johnson, Snell & Cummiskey, P.L.C., passed away on November 11, 2002. John was a former President of the State Bar of Michigan, a nationally known pioneer and advocate for legal assistance for the poor, and an outstanding labor lawyer. "Throughout his life, John Cummiskey was a pillar of professionalism, good judgment, and collegiality. He was a giant of the legal profession. He was also a good friend," said Jon G. March, Managing Member. "On his death, we not only honor his lifetime accomplishments, we suffer the loss to the firm of his extraordinary talents, and we mourn the loss of his companionship."



John W. Cummiskey

In 1959, John Cummiskey joined with Bob Miller, Bob Johnson, and Art Snell to form Miller, Johnson, Snell & Cummiskey. Since then the firm has grown to over 95 lawyers, a total staff of over 200, with clients throughout the state of Michigan and the Midwest.

John Cummiskey was one of Michigan's premier employment and labor law lawyers and a skilled labor negotiator. While a vigorous advocate for his employer clients, he also earned the respect of the union leaders with whom he dealt, because they knew his word was always good. During the course of his career, John found himself on the other side of the bargaining table from some of America's best known union leaders, including Jimmy Hoffa, Frank Fitzsimmons, Walter Ruether, and Leonard Woodcock. He once said of Mr. Hoffa, "Jimmy was a tough negotiator, very straight, very honest. Blunt, but he and I got along pretty well together. When you made a deal, it was a deal."

John was also valued by his clients as a wise counselor who could step back from the immediate fray and view the big picture and the client's long-term interest. Even in his retirement, many a client, before reaching a final decision, would ask, "What does John think about this?"

Born in Detroit, John Cummiskey graduated from the University of Michigan with a Bachelor of Arts Degree in 1938 and a Juris Doctor Degree with Distinction in 1941. From 1941 to 1945 he served in the

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Miller, Johnson's Upcoming Workshops

FEBRUARY	Immigration Construction Disputes Record Keeping
MARCH	Workers Compensation Update
APRIL	Safety Training and Accident Investigation Discharge, Discipline and Documentation

For more details, refer to page 5 or visit our web site at **www.millerjohnson.com/resource/workshops.asp** or contact Jennifer Jenks at 616.831.1886 or jenksj@mjsc.com

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IN THIS ISSUE

Legal Clips

■ **FLSA lawsuits on the rise.** Employers are facing an increasing number of claims under the Fair Labor Standards Act, which requires not only paying minimum wage (currently $5.15 per hour) but also overtime compensation for "non-exempt" employees if they work over 40 hours in a week. Most of the upswing in wage-hour litigation is over the issues of "exempt" status and improper counting of work hours. FLSA exemptions (for certain employees typically paid on a salary basis) are governed by an old and complex set of DOL regulations. Employers are being sued by employees who claim that their job duties are not covered by an exemption or that they were not paid on a salary basis. Lawsuits over counting of work hours may involve pay for break times, working off the clock, and whether pre-shift and post-shift activities and travel time must be counted. The FLSA allows liquidated damages of twice the amount of the underpayment. Many of these lawsuits have been filed as class actions, for which the potential for back pay liability can be daunting. To avoid exposure, employers should audit their compliance with wage-hour laws. Your Miller, Johnson contact can assist in developing an audit plan.

■ **Severance pay may be exempt from employment taxes.** A recent decision of the Court of Federal Claims, *CSX Corp. v. U.S.*, held that traditional severance pay can be "supplemental unemployment benefits" not subject to FICA and FUTA taxes. An employer who in prior tax years paid severance on which significant amounts of FICA/FUTA taxes were incurred should consider filing a refund claim before the applicable statute of limitations expires. For current and future tax years, employers have some options. After evaluating whether existing severance pay plans meet the standards for FICA/FUTA tax excludability established in *CSX*, an employer could stop subjecting future severance payments to employment taxes - but this could expose the employer to additional liability for the employee share of FICA if *CSX* is overturned on appeal. A second option is to subject severance pay to FICA/FUTA taxes as paid and then file refund claims before each year's statute of limitations closes, until the issue is resolved. A third option is to modify existing severance pay plans to more closely resemble plans that the IRS has ruled are excludable supplemental unemployment benefits. Employers anticipating significant layoffs may prefer

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(*IN MEMORY* cont'd from page 1)

United States Army, achieving the rank of major. He was charged with oversight of all nonmechanical production interruptions in the United States.

John's professional accomplishments were many, and he received numerous honors in the legal profession. He served in the House of Delegates and on the Board of Governors of the American Bar Association. In 1956-57 he served as the youngest ever President of the State Bar of Michigan. In 1991, he received the Roberts P. Hudson Award, the highest honor conferred by the state bar. The state bar honored him again in 1997, with a special presidential honor for his long time leadership in the cause of equal access to justice for those in need.

That cause was John's great passion. He was always a strong voice in national, state, and local efforts to provide legal services for the poor. He defined equal justice under the law in this way: "Justice means that everybody must have access to legal services. If the concept of the rule of law is to exist, it has to be available to everybody who needs it." John saw himself and all lawyers as gatekeepers to the doors of justice, a responsibility he took very seriously.

Beginning in 1967, John served on the Board of Trustees for the Michigan State Bar Foundation, and in 1990 he became its Legal Services Grants Committee Chairman. In that role he led the Foundation's process for awarding more than $7 million dollars in annual grants to support legal assistance to the poor. John was a founding member of the State Bar's Access to Justice for All Task Force. He was also a former Chairman of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants.

In May, 2002 the Kent County Legal Assistance Center in the new Kent County Courthouse was dedicated to John in recognition of his lifetime work on behalf of legal aid to the poor.

John's dedication to the community was not limited to the legal profession. He served from 1987 until his death as a member of the Kent County Aeronautics Board, was a Trustee of Aquinas College in Grand Rapids, and was a member of the Board of Trustees for the Killgoar Foundation, a donor-supported organization providing tuition assistance to needy students at Immaculate Heart of Mary School in Grand Rapids. In 1994, Aquinas College honored him with its Reflection Award, recognizing his integrity, commitment, service, and loyalty to his community.

He will be sorely missed.

Court Briefs

■ **Employee regarded as "able-bodied malingerer" has no disability claim.** To be covered by the Persons with Disabilities Civil Rights Act, an employee must have a physical or mental impairment that substantially limits a major life activity, have a history of such an impairment, or be regarded as having one. An employee who was regarded by her employer as an "able-bodied malingerer" is not covered, according to a recent unpublished decision from the Michigan Court of Appeals. Although no real impairment is needed to be "regarded as" disabled under the law, the employer must consider the employee to be impaired. Being regarded by the employer as a malingerer who is not impaired is not sufficient for coverage.

■ **Workers not entitled to overtime pay for training class required as precondition to employment.** The Sixth Circuit recently ruled that an employer is not required to pay overtime under the FLSA to its workers for the time they spend completing a company-sponsored training course required as a condition of employment. Under DOL regulations, time spent attending employer-sponsored training programs is not compensable if it meets four criteria, one of which is whether it is "voluntary." The district court agreed with the DOL that the workers' attendance at a 10-hour job safety training course was involuntary because the workers knew their jobs were on the line if they did not attend. The appeals court disagreed. "Because the training class was a fully disclosed precondition to permanent employment ... fulfillment of the requirement strikes us as being 'voluntary.'"

■ **Michigan Court of Appeals finds FMLA violation where employer followed union contract.** Employees may pursue FMLA claims in state court, and the employee in *Woodman v. Miesel Sysco Food Service* did just that, receiving an award of back pay plus reinstatement. The case involved typical issues of whether the employee gave sufficient notice and whether he had a serious health condition (SHC). The employee felt chest pains and went to his doctor, who told him to stay off work until he had a stress test, scheduled for over a week later. The employee called the HR office to describe his circumstance but failed to present timely documentation as required by the union contract, even though he was told to do so by the HR rep. After the HR office's attempts to reach him were unsuccessful, he was terminated under the contract provisions for absence of three successive days without written medical notification. Only after he had the stress test (which was negative) did he bring in the doctor's slip and ask to go back to work. The court found that he gave sufficient notice of need for FMLA leave, that the union contract notice provision could not be applied to affect his FMLA leave, and that he had a serious heart condition even though the stress test was negative and he was immediately cleared to work without restrictions. This is a bad case for employers, and *Employment Law Update* will report on whether it is appealed to the Michigan Supreme Court.

■ **Can sexual harassment be protected free speech?** The U.S. and Michigan Constitutions guarantee freedom of speech and prohibit the government from interfering with that right. As the law of sexual harassment has developed, an employer may be liable for "hostile environment" sexual harassment for harassing speech. Can such speech be constitutionally protected? The Michigan Court of Appeals said no, in a case of first impression that involved hostile environment harassment by two coworkers who directed very crude and sexually demeaning remarks toward the plaintiff while she worked. The court ruled that these remarks are like "fighting words" and are thus not protected free speech under either the state or federal Constitution. Look for this issue to be raised again, especially in cases where the facts are not as egregious as those in this case.

■ **Be careful what you tell the EEOC.** In many discriminatory discharge cases, the issue is whether the employer's stated reason for termination was a pretext for discrimination. Different employer explanations of the reason may be evidence of pretext. A recent federal district court case in Wisconsin allowed an employee to use the employer's position statement to the EEOC during its investigation to show pretext, where the reason given to the EEOC at the investigation stage differed from what the employer's witness testified was the reason when the case was tried. The employer sought to have the court ignore its earlier position statement on the ground that Title VII prohibits use of

(*COURT BRIEFS* cont'd on page 6)

LAW FIRMS WORLDWIDE MERITAS

Miller, Johnson is a member of Meritas, an association of independent law firms worldwide.

Employer's Immigration Law Update: Part II - Immigration After September 11

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■ Criticism of U.S. immigration law and admission procedures has not waned since the September 11 terrorist attacks. As a result, significant legal and procedural reforms have continued. Although most of the changes do not directly affect U.S. employers, some have presented unintended difficulties for employers of foreign nationals, while others create new opportunities to retain or recruit talent from abroad. Today, we cannot even speculate as to what changes lie ahead with the planned reorganization of the INS into the newly created Department of Homeland Security. But we can inform you of the changes that affect employers the most. As noted below, the news is not all bad.

U.S. ALIEN REGISTRATION EXPANDS

New rules from the Department of Justice require thousands of men who are from five countries identified as high risk for terrorism and who arrived in the United States on or before September 10, 2002 to be fingerprinted and photographed.

The rules affect citizens of Iraq, Iran, Lybia, Sudan, and Syria, at least 16 years old, who arrived in the United States before the government began registering such foreigners. They also apply to all nonresident aliens, including students, people on long-term travel visas, family members, and others. The requirements do not apply to permanent residents or to naturalized citizens from those countries.

Affected foreign nationals were required to report to a designated INS office to be registered between November 15 and December 16, 2002. If the person remains in the U.S. for more than one additional year, he or she must report back to the office within 10 days of the anniversary of the date on which he or she first registered. People affected must also report to a designated port of exit when leaving the United States.

Individuals who do not comply with these requirements are subject to arrest, detention, fine, and deportation. Despite such risks, late registration is generally advised for those who have missed the December 16, 2002 deadline.

NEW ZERO TOLERANCE POLICY BY THE INS

In March 2002, INS granted visa waivers to four Pakistani crewmen from a tanker in Norfolk, Virginia. The visa waivers were granted without supervisory approval, and all four crewman disappeared before obtaining their visa waivers. On April 9, 2002 the INS Commissioner testified before Congress and stated that he has instituted a "zero tolerance policy" on INS inspectors' failure to follow policy from head-quarters. The term "zero tolerance" found its way from there into other aspects of INS statements. In fact, the INS indicated that it has begun to institute a general zero tolerance policy. It explained that this means that if people are out of status, adjudicators will not be exercising discretion to consider the status violation *de minimus* and approve the benefit being sought. The INS indicated that it is receiving a tremendous amount of pressure from Congress and will ensure that the present state of the law is being followed precisely.

Though the INS has recently backed off from this strict stance, employers can no longer expect it to exercise favorable discretion to excuse an employee's arguably technical immigration law violation. The INS has obviously recognized the pressure and embarrassment that it faced since September 11. This makes it even more important for employers and foreign nationals to pay close attention to filing deadlines and expiration dates on visas and make sure there are no inadvertent unauthorized periods of stay.

HIRING LAID-OFF H-1B HOLDERS

The rules for hiring laid off H-1B workers have recently been clarified, with new statutory requirements for such a worker to obtain authorization to work for a new employer. There are four conditions:

- The individual must have previously been accorded H-1B status.
- If currently in the U.S., the individual must have been lawfully admitted to the U.S.
- The individual must file a nonfrivolous petition for new employment *before the end of his or her period of authorized stay.*
- The individual must not have been employed without authorization between the time of lawful admission to the U.S. and the filing of the current H-1B visa petition.

If all these conditions are met, employers can feel free to immediately employ the foreign national while waiting on INS approval of the change of H-1B employment. The INS has stated that the employer can obtain adequate proof of interim work authorization and I-9 compliance by documenting that the four conditions have been met and by retaining proof of INS receipt of the petition, such as UPS or Federal Express confirmation of delivery.

Of course, the recurring problem is that laid-off workers

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(*IMMIGRATION LAW* cont'd from page 4)

immediately fall out of status upon termination of employment. The INS has taken the position that even in the event of an unforeseen layoff, the last day of actual employment will be considered the last day of the authorized period of stay, regardless of the actual date stated on the I-94 card or I-797 Approval Notice. Thus, in most cases the petition cannot be filed before the end of the authorized period of stay, as required by the third listed condition. Until this past spring the INS has afforded some leeway in complying with the timely filing requirement and could only grant the change of employers and extension of stay when the new petition was filed within a "reasonable period of time," such as within 60 days of the loss of initial H-1B employment. But in an apparent response to new security directives, the INS has reduced the window of opportunity for timely filing down to 30 days from the date of layoff and has denied an extension of the current H-1B status and change of employers when more than 30 days has elapsed - thus mandating a return trip to the U.S. Consulate in the individual's home country to have the H-1B Visa reissued. Further, if the layoff has lasted more than 180 days and the individual has not changed to another visa status while remaining in the U.S., he or she will be subject to a three-year bar from any immigration benefits.

EXTENSION OF H STATUS DUE TO LENGTHY ADJUCATIONS

A new provision allows foreign nationals who have labor certification applications caught in lengthy agency backlogs to extend their H-1B status beyond the six-year limitation. Previously, H visa holders extended their visa status in one-year increments beyond the normal six-year limitation period if the foreign national had an application for adjustment of status pending for a year or longer. The new regulations recognize that lengthy processing times for labor certification applications by the Department of Labor precluded some H visa holders from being eligible to apply for the one-year extension. Thus, the new provision allows all foreign nationals who are stuck in any stage of the permanent resident process to extend their H visa status in one-year increments. This will be true even if the foreign national has since changed status or left the country. If the application for labor certification or adjustment of status or a petition for an immigrant visa petition is denied, the extended H status ends at that point.

WORK AUTHORIZATION FOR THE SPOUSE OF AN INTERNATIONAL TRANSFER

Over the past year a new law was passed and filing procedures implemented that afford work authorization to the spouse of an L (intra-company transfer) or E (treaty trader and investor) visa holder. An I-765 Application for Employment Authorization, along with proper supporting documentation to establish eligibility, must be filed with the appropriate INS Service Center. If approved, an Employment Authorization Document (EAD card) will be issued for an initial two-year period of employment. Extensions of the work authorization can be obtained to coincide with the maximum valid stay of the principal visa holder. The EAD Card authorizes work for any U.S. employer without any restrictions or additional requirements.

Upcoming Workshops

Miller, Johnson is offering a series of workshops on various legal topics throughout 2003. If any of the following topics interest you, please visit our web site at www.millerjohnson.com/resource/workshops.asp for a registration form or contact Jennifer Jenks at 616.831.1886 or jenksj@mjsc.com

Immigration Issues In An Ever Changing Global Economy

February 6	Kalamazoo
February 11	Grand Rapids

Construction Disputes: Getting Finished, Getting Paid, Avoiding and Obtaining Liens

February 6	Grand Rapids
February 12	Kalamazoo

The Myth of the "Paperless Office:" Employment Record Keeping and Retention

February 20	Grand Rapids
February 26	Kalamazoo

Workers Compensation Update Including Disability Definition Change

March 6	Grand Rapids
March 11	Kalamazoo

Safety Training and Accident Investigation

April 17	Kalamazoo
April 22	Grand Rapids

Discharge, Discipline and Documentation

April 24	Grand Rapids
April 29	Kalamazoo

- $300 for first attendee and $250 for each additional attendee from the same organization.

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this more conservative approach with an eye toward a more certain FICA/FUTA tax savings.

For more information or assistance with filing refund claims, contact Robert B. Bettendorf at 616.831.1722 or bettendorfr@mjsc.com.

■ **New OSHA / MIOSHA record-keeping summary posting requirements take effect in 2003.** The new OSHA / MIOSHA record-keeping regulation that took effect January 1, 2002, required new forms for recording work-related injuries and illnesses. One of them is the Form 300A, the annual summary of Form 300 Log. A new requirement for this Form 300A Summary is that a "company executive" sign the summary. To do so, the executive must examine the records before signing the certification. You should identify the proper executive for each facility and give that person a heads-up on this issue soon. Like the old form, the Form 300A Summary must be posted by February 1. The old rule required you to post the summary for only a month, but the Form 300A Summary must remain posted for three months (until April 30).

■ **NLRB to review employee right to use company e-mail.** Expect the NLRB to make some new law this year on "discriminatory use" of company e-mail for both unionized and union-free employers. Two cases on e-mail use are pending before the NLRB. In the *Guard Publishing* case, the issue is whether it is unlawful discrimination for a unionized employer to prohibit employees from using its e-mail system for union purposes. The employer proposed to include the prohibition in the union contract. In *Prudential Insurance,* an employer faced with a union organizing drive used its e-mail system to communicate with employees about the upcoming NLRB election but prohibited employees from using it to communicate about the union organizing drive. The outcome of the *Prudential Insurance* case is likely to affect all future union organizing drives where employees have access to the employer's e-mail system.

■ **DOL to address FMLA and FLSA regs.** The U.S. Department of Labor recently announced its regulatory agenda, stating that FMLA and FLSA regulations are to be addressed. Possible changes in the current FMLA regs could include more specific notice requirements from employees desiring FMLA leave and a tighter definition of "serious health condition." Both would be welcome relief for employers (For a recent example of how these regs can be used against an employer, see the recent Michigan Court of Appeals decision in *Woodman v. Miesel Sysco Food Service,* described on page 3 in "Court Briefs"). Revision of the current FLSA rules on exempt status for executive, administrative, and professional employees is also on the agenda and could also provide guidance that would help reverse the trend of increasing litigation over exempt status.

■ **Governor Granholm orders debarment of labor law violators.** In her first executive order, Governor Jennifer Granholm ordered the state not to do business with vendors who have violated various Michigan laws, including state labor laws such as MIOSHA and the Michigan Payment of Wages statute. This action makes it more important for employers who do business with the state to take action to avoid this additional effect of MIOSHA citations, and to contest these citations when possible.

■ **Backlog at BW&UC causes delays.** The Bureau of Workers' and Unemployment Compensation, the new name of the state agency that handles unemployment claims, has been hit with a hiring freeze due to budget constraints. This has created a crisis in handling claims, with most branch offices closed to the public (meaning employers cannot reach anyone to assist with questions). Governor Granholm has taken action in an attempt to alleviate these delays.

(*COURT BRIEFS* cont'd from page 3)

statements made during informal conciliation. The court rejected this, stating that the Title VII prohibition against use of such statements is limited to the conciliation stage, not to the investigation stage, of EEOC proceedings. The lesson for employers is clear: don't be too casual in responding to EEOC charges; get all the facts before you provide information.

■ **Double damages under Sales Rep. Act allowed despite no employer bad faith.** A Michigan statute protects commission representatives who are not paid their commissions. It allows double damages for "intentionally fail[ing] to pay the commission when due." A recent case involved failure to pay commissions due to the employer's cash flow problems and as a way to get the salesperson to return certain property. The Michigan Court of Appeals held that where the failure to pay was not accidental or unintended, double damages are due even though there was no showing of bad faith.

■ **Employment agreement providing six months to sue for employment claims upheld.** Two recent cases reaffirmed that an employer and an employee may agree to a shorter limitation period than would

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Miller, Johnson in the News

- Craig H. Lubben and Jennifer L. Jordan have been invited to serve on the faculty for the Hillman Trial Advocacy Program in January 2003.
- John F. Koryto spoke at the "Pre-Employment Background Screening & Law Update" on October 17, 2002, at a seminar co-sponsored by the Society for Industrial Security, West Michigan Chapter and the Kalamazoo Regional Chamber of Commerce. On February 11, 2003, in Kalamazoo, John will speak on immigration law reforms and homeland security initiatives to the Society for Industrial Security, West Michigan Chapter.
- Bert J. Fortuna, David J. Gass, Peter J. Kok, Kristen L. Kroger, Nathan D. Plantinga, Brent D. Rector, and Susan H. Sherman will be presenting on various topics at the Lorman Education Services Seminar "Human Resources Audits in Michigan" in Grand Rapids on February 18, 2003.
- Gary A. Chamberlin received the Gerald E. Fessell Memorial Distinguished Service Award from the Wyoming-Kentwood Area Chamber of Commerce on January 10, 2003. On February 20, Gary will conduct a training seminar on child labor law issues for the Hospitality, Financial and Technology Professionals Association of West Michigan in Grand Rapids. On March 26, he will present "Developing and Implementing the Affirmative Action Plan" in East Lansing to the Michigan State University Human Resources Education and Training Center.
- Jack C. Clary will present "Family and Medical Leave Act in Michigan" on April 1, 2003 in Traverse City for Lorman Education Services.
- Brent D. Rector will present "Workplace Safety and Health: Best Practices for Compliance and Minimizing Liability" on March 12 and 18 to the Michigan Manufacturers Association. Brent will also conduct a half-day seminar in Lansing on May 20, 2003 for the Michigan Chamber of Commerce on "How to Develop and Maintain an Effective Safety Program."

(*COURT BRIEFS* cont'd from page 6)

otherwise apply. (Limitation periods for bringing a claim in court vary depending on the statute involved; for example, the period in the Michigan Civil Rights Act is three years.) In a Michigan Court of Appeals case, a six-month limitation period was specified in a written employment agreement. The employee claimed this should not be enforced, but the court disagreed, stating that the language was not buried in a long document or confusing to a layperson. Therefore, his claims for race discrimination and retaliation were dismissed because he didn't sue soon enough. In a similar federal case from the Eastern District of Michigan, the employment application provided for six months to sue, and the employee's lawsuit filed later was dismissed. The employee complained that a shortened period violated public policy by preventing access to the courts. The court disagreed, stating that the shortened period encourages immediate access to the court. Employers should consider adding such a provision to their employment application, but to be effective, the provision must be very carefully drafted.

■ **Employer violated ADA by refusing to rehire ex-employee fired for illegal drug use!** This astounding decision by a federal appeals court has received a fair amount of press. The ADA prohibits an employer from refusing to hire an applicant based on a history of a disability. Drug abuse that rises to the level of addiction is a disability. Although the ADA does not protect current drug users, it does protect those with a history or record of drug addiction. Based on these principles, the Ninth Circuit recently held that a policy that prohibited applicants from consideration if they had been terminated for misconduct violated the ADA.

In the case, the employee was fired after testing positive for cocaine. Two years later he reapplied with the same employer. The court held that he could not be refused rehire based on the employer's policy of not rehiring terminated employees. This decision has been roundly criticized by employers and so far has not been accepted by other courts.

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Have a question about a specific employment-related legal area? If so, please contact us. We would welcome the opportunity to assist you.

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