Health benefits

In *University of Alaska* v. *Tumeo*,[1] the Alaska supreme court ruled unanimously that the denial of health benefits to domestic partners by the University's employee health plan constitutes unlawful discrimination on the basis of marital status. Alaska's highest court affirmed a superior court decision of discrimination under Alaska's Human Rights Act of 1979, despite an amendment to the statute enacted by the State legislature.

The case arose from the subsidized health insurance plan the university provides to employees and their dependents. The university defines a dependent as an employee's spouse (husband or wife). In June 1993, Mark Tumeo requested that the university extend health insurance benefits to his domestic partner, Bruce Anders. With his request, Tumeo submitted an "Affidavit of Spousal Equivalency," signed by him and Anders, affirming the couple's intent to remain together indefinitely. Later the same month, Kate Wattum requested health insurance coverage for her domestic partner, Beverly McClendon. The university denied both Tumeo's and Wattum's requests for coverage on the grounds that its health care plan did not allow for coverage of domestic partners, nor was there any obligation under the plan to provide for such coverage. In accordance with established grievance procedures, Tumeo and Wattum filed multiple grievances contesting the denial of benefits. The university denied the grievances.

Tumeo and Wattum appealed to the Alaska superior court, arguing that the university health benefits plan discriminated on the basis of marital status, in violation of AS 18.80.220(a)(1) of Alaska's Constitution, commonly referred to as the Alaskan Human Rights Act. The superior court concluded that "the University, by providing added healthcare coverage for married employees but not for unmarried employees, is compensating married employees to a greater extent than it compensates unmarried employees" and that "using marital status as a classification for determining which of its employees will receive additional compensation in the form of third-party health coverage violates state laws prohibiting marital status discrimination." The court found the university's definition of "dependent" unlawful and presented the institution with several remedies. In response to the ruling, the university petitioned Alaska's supreme court. In the interim, it accepted the "Affidavit of Spousal Equivalency" and agreed to pay health benefits to Tumeo's and Wattum's domestic partners.

The university did not contest the superior court's finding that it discriminated on the basis of marital status. Instead, the university argued that this type of discrimination was not in violation of the Human Rights Act. Moreover, the University claimed that the legislature, in enacting the law, never intended to forbid discrimination on the basis of marital status for the purpose of determining recipients of health benefits. The university pointed to the fact that over the past 20 years, discrimination on the basis of marital status in the area of employer-provided health benefits has gone unchallenged.

Alaska Statute 18.80.220 addresses discriminatory employment practices. At the time the petition was filed, it was unlawful "for an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood." The legislature later amended the statute to include a provision that permits employers to provide "different retirement and health benefits to certain employees by differentiating between benefits provided to employees with spouses or children and to other employees."

In the opinion delivered by Alaska Chief Justice Allen T. Compton, the court ruled that *Tumeo* retains "its character as a present, live controversy," and therefore, the recent amendment does not render the court's review moot. Justice Compton addressed the university's claim of contrary legislative intent by noting that the plain-language interpretation of the Act clearly outlawed discrimination on the basis of marital status; hence, the university must demonstrate a heavy burden of contrary intent when arguing an interpretation at odds with the plain language of the Act.[2] In response to the university's contention that discrimination on the basis of marital status with respect to employer-provided health benefits had gone unchallenged for 20 years, the court noted that "silence can be evidence of intent; however, it is difficult to decipher what is meant when nothing has been said."[3] The ambiguity of the legislative intent, therefore, favors the plain-language interpretation of the statute, said the court. The Compton opinion cited a history of cases involving the Human Rights Act that ruled against limiting the scope of discrimination. In light of this judicial tendency, the Alaska Supreme Court refused to limit the Act's protection, upheld the lower court's decision notwithstanding the amendment, and remanded the case for further proceedings.

Gauging the long-term legal impact of *Tumeo* is problematic; however, the case raised the political profile of this issue. Increasingly, Federal, State, and local governments are becoming compelled to weigh in on the issue of requiring employers to extend this type of coverage.

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Workplace video surveillance

Justice Bruce M. Selya opened a recent first-circuit court opinion by proposing that "as employers gain access to increasingly sophisticated technology, new legal issues seem destined to suffuse the workplace."[4] Both the U.S. First Circuit Court of Appeals and the National Labor Relations Board (NLRB) recently addressed issues surrounding video surveillance in the workplace. The court of appeals held that *unconcealed* video surveillance in a worker's common area does not violate the worker's right to privacy, while the NLRB concluded that *hidden* cameras in the workplace fall into the gray area of privacy and should be considered a mandatory subject of bargaining in labor negotiations.

In *Vega-Rodriguez* v. *Puerto Rico Telephone Co.*,[5] the circuit court unanimously ruled that Puerto Rico Telephone Company did not violate the U.S. Constitution's fourth-amendment protection against unreasonable search and seizure. Installing surveillance cameras in the company's common workspace, the court held, did not infringe on the employees "reasonable expectation of privacy."[6]

The telephone company installed a video surveillance system at its center in 1990, but abandoned the project when employees complained. In June of 1994, the company reinstated video surveillance by installing three cameras surveying the workspace and a fourth to track all traffic passing through the main entrance. The surveillance was exclusively visual; the cameras had no microphones and operated continuously. Soon after the system was installed, the appellants and several fellow employees protested. Management maintained that the cameras were installed for security reasons only, while the appellants argued that the system had no purpose other than to pry into employees' behavior. When management did not respond to employee requests to remove the cameras, the appellants filed suit in Puerto Rico's Federal district court. They contended that the ongoing surveillance constituted an unreasonable search prohibited by the fourth amendment and therefore violated a constitutionally protected right to privacy.

In *Smith* v. *Maryland*,[7] the court observed that intrusions of personal privacy cross the constitutional line only if the conduct infringes upon some "reasonable expectation of privacy." To gauge whether the company's actions met this criterion, the court examined the expectation of privacy in the affected work area at the telephone company. Given that workers perform their tasks in an open, undifferentiated area, the court concluded that there was no reasonable expectation of privacy of workers from management supervision. The court noted that the surveillance cameras could record only what was plainly observable to the naked eye.

Once the court rejected the appellants' argument that there was something "constitutionally sinister" about electronic surveillance, their claim to an infringement of privacy vanished. The court then brushed aside the appellants' other claim asserting that company video surveillance violated the first amendment's protection of free speech. The court noted that the cameras did not record sound, and as long as there is no fourth-amendment violation of privacy, video-only surveillance does not constitute a claim against the first amendment.

However, in writing for the court, Judge Selya clearly did not close the door on all privacy concerns relating to video surveillance. The judge cautioned that "cases involving covert use of clandestine cameras, or cases involving electronically assisted eavesdropping, may be quite another story." Invoking the image of cameras installed in rest rooms, the appellants argued that the risk of future abuse justifies curtailing the telephone company's use of video surveillance. But Selya dismissed the claim by noting that *People* v. *Dezek*[8] already held that operating cameras in rest-room stalls constitutes a breach of privacy.

In its April 23, 1997, decision, the NLRB ruled that the installation of surveillance cameras in the workplace should be considered "a mandatory subject of bargaining" and ordered Colgate-Palmolive to negotiate with the chemical workers' union. The Board's ruling affirmed the decision of administrative law judge Richard H. Beddow, who ruled that *hidden* surveillance cameras raise privacy concerns and should be considered beyond the scope of management's unilateral "entrepreneurial control."

The inciting incident occurred on July 11, 1994. Allan Engle was performing cleaning duties in Colgate-Palmolive Building No. 2. While he was in one of the second-floor rest rooms, he looked up and observed a camera about 6 to 8 feet away in the air vent, angled toward him. Engle, who testified that he had never seen any surveillance camera inside the plant prior to that day, brought it to the attention of three other unit employees, including union steward Luther Hall. After confirming the report, the union made a request to bargain over the installation of hidden surveillance cameras.

Colgate-Palmolive argued that the union had waived its right to bargain, because it had not requested to bargain over numerous other cameras at the site. In support of this contention, the company disclosed that it had as many as 19 cameras (unconcealed and monitoring company property) installed to guard against theft. The NLRB rejected this and other company arguments.

Judge Beddow's opinion cited *Ford Motor Company* v. *NLRB*,[9] mandating bargaining over issues "germane to the working environment."[10] Beddow determined that hidden surveillance cameras are part of a class of investigatory tools (sometimes required by compa-

nies), such as physical examinations, drug and alcohol testing, and polygraph testing, all of which the Board has found to be mandatory subjects of bargaining. Furthermore, the judge held that the determination to install hidden surveillance cameras should not be considered a "managerial decision that lies at the core of entrepreneurial control."[11] Both the Board and Judge Beddow rejected Colgate-Palmolive's argument that hidden cameras, by virtue of being hidden, are not subject to bargaining, or else their purpose of stopping crime and misconduct becomes moot. The judge pointed out that a variety of other issues surrounding the installation of hidden cameras exist other than mere location.

Colgate-Palmolive and *Vega-Rodriguez* etch lines that are helpful in identifying workplace privacy issues, particularly breaches of privacy. The relevant facts in these two cases were concealment and placement. Also noteworthy was the fact that the cameras used for surveillance did not record sound. In *Vega-Rodriguez*, the courts ruled that unconcealed cameras in open areas do not violate a worker's right to privacy. In *Colgate-Palmolive*, the Board found that a hidden camera raises privacy concerns, especially with regard to where it is located. □

Footnotes

[1] 933 P.2d 1147; 1997 Alas.

[2] *Lagos* v. *City and Borough of Sitka*, 823 P. 2d 641, 643 Alaska 1991.

[3] *Brecht* v. *Abrahamson*, 507 U.S. 619, 113S.Ct. 1710, 1719, 123 L. Ed. 2d 353 (1993).

[4] 110 F.3d 174; 1997 U.S. App.

[5] *Id.*

[6] 442 U.S. 735, 740 (1970).

[7] *Id.*

[8] 308 N.W. 2d 652, 654–55 (Mich. Ct. App. 1981).

[9] 441 U.S. 488, 498 (1979), quoting from *Fireboard Corp.* v. *NLRB*, 379 U.S. 203, 222–223 (1964) (Stewart, J., concurring).

[10] *Id.*

[11] *Id.*