

Workplace “Mooning” Not Gross Misconduct Under COBRA

Jennifer Reavis, a nurse, was terminated from employment for “mooning” a male nurse. Her employer advised that, because of her “gross misconduct,” she did not qualify for COBRA continuation of health care coverage and the COBRA subsidy available under the American Recovery and Reinvestment Act of 2009 (ARRA). Ms. Reavis appealed the decision to the Department of Labor (“DOL”), which determined in an administrative proceeding that she was entitled to subsidized COBRA coverage under the ARRA. The DOL issued a determination letter stating that her conduct did not amount to “gross misconduct” that would disqualify her from COBRA continuation coverage.

Reavis’ employer took the case to Federal court, seeking an injunction staying the DOL determination letter. The injunction was denied in an opinion which described the episode as follows:

Reavis, while working in a patient area, “moonied” a male nurse. The male nurse has stated that Reavis told him to answer some patient call lights, that he assertively [and perhaps with a “provocative finger gesture”] told her “no, I’m busy,” and that in response Reavis bent over with her scrub pants pulled down, exposing her rear end.

The court went on to characterize Reavis’ conduct as “a single, insolated, impulsive incident which harmed only work place protocol.” Further, the court found that the DOL administrative decision was entitled to deference from the courts, and that the DOL’s jurisdiction necessarily extended to denials of COBRA continuation coverage, not just denials of the ARRA subsidy of COBRA continuation coverage available to employees who incur an “involuntary” termination of employment (see “The COBRA Subsidy Lives On” link <http://www.benefitslawgroupofchicago.com/HTML/2010/COBRA-subsidy.htm>).

Recommendations: Employers need to document the basis for any “gross misconduct” denial of COBRA coverage. Consider defining gross misconduct for this purpose in group health plan documents, but bear in mind that conduct must rise almost to the criminal level to constitute “gross misconduct” under COBRA. Employers also must recognize that a DOL determination that a former employee is entitled to COBRA coverage is unlikely to be overturned by a Federal court.

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