Pacific Employers
Management Advisor
50 Years of Excellence!
April 2014

What's News!

Temporary Impairments Covered by the ADA

The Americans with Disabilities Act ("ADA") defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities."

However, in passing the ADA Amendments Act of 2008 ("ADAAA"), Congress stated that its intention was to "reinstat[e] a broad scope of protection to be available under the ADA" and directed the EEOC to revise its regulations defining "substantially limits" to broaden its scope. The EEOC responded by enacting regulations providing that "effects of impairments lasting or expected to last fewer than six months can be substantially limiting."

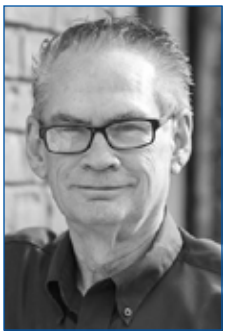
In the first case by a Court of Appeals to consider this change, the Fourth Circuit found that "temporary impairments" can now fall within the ADA's definition of disability. Summers v. Altarum Institute, No. 13-1645 (4th Cir. Jan. 23, 2014). The appellant in Summers alleged he had suffered bone fractures and ruptures of tendons in both of his legs following an accident exiting a train. His injuries required multiple surgeries and it was estimated that he would not be able to walk normally for at least seven months. After he was granted short term disability, the appellant was terminated by his employer, allegedly because of his disability.

Despite the fact that there was no claim that the appellant's injuries were permanent, the Fourth Circuit found that nevertheless the plaintiff had alleged that he was disabled under the ADA and reinstated his wrongful discharge claim under the Act. The Court found that the EEOC's regulations implementing the ADAAA made clear that temporary impairments may be sufficient to "substantially limit one or more major life activities" such that they could be considered disabilities under the ADA. The Court found that the appellant's injuries were sufficient to survive a motion to dismiss.

It remains to be seen to what extent other federal courts will find that temporary impairments are protected by the ADA as disabilities. In the interim, rather than focus on coverage, employers would be well advised to look into reasonable accommodations and begin the interactive process that the ADA requires. [PE]

Updated Hiring Checklist Enclosed!

President's Report
~Dave Miller~



White Color Overtime?

President Barack Obama recently signed a Presidential Memorandum directing the Secretary of Labor to update the Fair Labor Standards Act (FLSA) regulations governing which "white collar" employees qualify for overtime exemptions.

The stated goal of the initiative is to "modernize" and "streamline" the existing regulations to address the "changing nature of the workplace." According to the President, the revision of overtime regulations will allow more workers the chance to get ahead by simplifying overtime rules to make them easier for both workers and businesses to understand and apply.

The FLSA requires that covered nonexempt employees must receive overtime pay for hours worked over 40 per workweek at a rate not less than one and one-half times their regular rate of pay. However, the FLSA provides certain executive, administrative and learned professional employees an exemption from overtime pay. The President's initiative is expected to revise the regulations to focus on tightening the qualifications for workers classified as bona fide exempt executive, administrative, professional and outside sales employees. Specifically, the updates are expected to raise the minimum salary requirement level and significantly tighten the job-duties requirement tests. As a result, the updates may lead to millions of currently exempt, white collar employees being reclassified as nonexempt and eligible for overtime pay.

Unlike the federal minimum wage law, which necessitates legislative action before change, the FLSA statutorily empowers the United States Department of Labor (DOL) to implement regulations that determine which employees are exempted from overtime requirements. However, despite the well-publicized representations of the White House, any revisions of the regulations will require DOL to undergo a standard rulemaking process that will necessitate the promulgation of proposed regulations, publishing them and inviting comment from interested groups including business groups and organized labor. Given this rulemaking process, it is doubtful that new regulations tightening the qualifications of white collar employees will take effect any time in 2014. Further, any regulatory changes will only apply prospectively. Consequently, employers should have ample time to prepare for the expected changes in federal overtime eligibility regulations. [PE]

"The issue today is the same as it has been throughout all history, whether man shall be allowed to govern himself or be ruled by a small elite."
-- Thomas Jefferson (1743-1826)

Recent Developments

Facebook Free Speach?

The interplay between an employee's postings on Facebook and the impact of those postings on his or her employment status is an evolving area of the law. Recently the U.S. District Court for the Northern District of California dismissed a lawsuit brought by a former employee who was fired over content posted to her Facebook account (*Guevarra v. Seton Medical Center*. The plaintiff, a nurse previously employed by the defendant, a private hospital, posted an obscene rant to her Facebook page.

"... POLICE WERE IMMEDIATELY NOTIFIED AND THE NURSE WAS FIRED LATER THAT DAY."

When co-workers reported the post to the hospital, the police were immediately notified and the nurse was fired later that day. The nurse then filed for unemployment benefits, but her claim was denied on the basis that she violated hospital policy, which bans threatening or abusive language, and was therefore disqualified from receiving benefits.

She then filed suit alleging that her termination violated her right to free speech under the state constitution. The court disagreed, noting that state and federal courts alike require a showing of a state actor to support a claim under the state constitutional provision.

Several factors can affect whether an online posting is protected speech. Employers who are made aware of questionable postings by employees should seek counsel to determine whether the posting is free speech or whether it is conduct subject to reprimand or dismissal of the employee. [PE]

Employee May Pursue Constructive Discharge

Reversing the dismissal of an employee's complaint for constructive discharge in violation of public policy under California law, the California Court of Appeal has ruled that the employee stated a claim where he alleged he was forced to resign because his employer required him to use his own vehicle extensively for work without reimbursement. *Vasquez v. Franklin Management Real Estate Fund, Inc.*

Stating the employer "effectively passed on a portion of its normal operating expenses to a low wage worker," the Court noted that the allegations, if proven, would establish the employer caused the employee to be paid less than the minimum wage and created intolerable working conditions in contravention of California public policy..

"..FORCED VASQUEZ INTO AN "UNTENABLE POSITION."

To establish a constructive discharge under California law, an employee must prove the employer either "intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." Moreover, "[t]he conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." Further, the public policy basis must be "firmly established," "fundamental," and "substantial."

Vasquez argued that Franklin Management's failure to reimburse him for mileage and maintenance of his vehicle created intolerable working conditions and violated California's well-established public policy embodied in its minimum wage law, Section 1194 of the California Labor Code.

The appellate court noted that, in a "typical case," an "employer's failure to reimburse an employee for expenses that should have been borne by the employer would not create such intolerable working conditions that the employee would have no option but to resign."

However, Vasquez's claim was not typical, the Court determined. Vasquez alleged not only that Franklin Management failed to reimburse him for mileage, but also that this failure caused him to be paid less than the required minimum wage. The Court explained that this violated California's well-defined public policy favoring a minimum wage and forced Vasquez into an "untenable position," unable to pay basic living expenses because he spent so much of his wages on gasoline and vehicle maintenance. It also noted that Vasquez was "wearing out the very vehicle he needed to maintain his livelihood . . . . Had he continued, he would soon have found himself with no job and no vehicle." Based on these allegations, the Court concluded that Vasquez adequately pled a constructive discharge claim and reversed the dismissal of his complaint. [PE]

Higher Standards Affirmed

In *Mendoza v. Western Medical Center Santa Ana*, the Court of Appeal held the trial court failed to properly instruct the jury that the unlawful conduct alleged by the plaintiff must be **a substantial motivating reason** for his discharge.

Plaintiff worked as a nurse at the defendant hospital. He alleged sexual harassment by a supervisor. After several alleged incidents, the plaintiff reported the harassment to defendant. The subsequent investigation of the plaintiff's allegations resulted in termination of the plaintiff and his supervisor. Plaintiff filed a lawsuit against the defendant alleging, among other things, wrongful termination in violation of public policy.

"... THE TRIAL COURT'S ERROR WAS PREJUDICIAL, ..."

At trial, the jury was instructed, over the defendant's objection, in accordance with the express language of the 2012 version of California Civil Jury Instructions (CACI), which provided that plaintiff need only show the defendant's conduct was **"a motivating reason"** for his discharge to establish the causation element supporting his wrongful termination claim. The jury ultimately found the defendant liable and awarded damages. Defendant appealed the judgment.

On appeal, the defendant argued that the jury should have been instructed in accordance with *Harris v. City of Santa Monica (2013)*, which held that the causation element in discrimination lawsuits requires a finding that the alleged conduct was "a substantial motivating factor" for discharge or an adverse employment action. The court held that the holding in Harris applied in the context of plaintiff's wrongful termination claim, noting that the revised 2013 version of CACI provided a "substantial motivating reason" standard. Concluding the trial court's error was prejudicial, the court vacated the judgment and remanded for a new trial.

Mendoza is a welcome decision for employers because it confirms that plaintiffs must prove a direct and substantial relationship between the alleged conduct and the ultimate decision to terminate an employee. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Responding to A Record Request

Q: "We have just received a request for payroll and personnel files. What Kind of Records Must I Provide?"

A: Don't voluntarily give employee time records, schedules and time punch edit reports when a current or former employee requests personnel and pay records. Instead provide pay stubs and the personnel file, and wait and see if anything else is requested.

There is nothing like a little bit of litigation to remind you of some best practices. When you get a request for payroll and personnel files, it pays to be thoughtful before you produce the records.

First, even if the former employee or her attorney asks for time records, time & attendance reports, schedules or time punch records, you do not have to provide them. The statute only requires pay records which are essentially copies of the employee's paystubs. Why give more information than necessary? Especially if it can raise questions about your rounding practices or methods for editing time.

Second, if the employee was terminated for some policy violation (perhaps for violating the harassment policy), you do not need to provide the entire investigation file. Indeed, in most circumstances you should not. The investigation file should be separate from the personnel file, with only the ultimate discipline in the personnel file. But there may be occasions when the investigation file is helpful to persuade a plaintiff's attorney not to pursue a particular matter, and if so, you may want to consider providing it.

Third, if you have a signed arbitration agreement, be sure to produce it! And if one should be in the personnel file, but is missing, make every effort to find it before the production is due.

And finally, the Form I-9 is not supposed to be part of the personnel file. Rather, it should be filed separately by purge date. The purge date is three years after hire or one year after termination, whichever is later.

California already makes it easy for disgruntled former employees to sue employers; there is no reason to make it any easier. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on April 23rd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast

Future 2014 Training dates: 7-23-14, 10-22-14

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

- Our Next Three 2014 Seminars -

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 17th, 2014, 10 - 11:30am

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 15th, 2014, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 19th, 2014, 10 - 11:30am

These mid-morning seminars include refreshments and handouts.

Seminar Topic Talk with Dawn

Safety With GHS Haz Com Compliance

The new Globally Harmonized System of Classification and Labelling of Chemicals (GHS) has deadlines that affect all employers.

The deadline for training employees on the SDS and GHS labels was December 1, 2013, *so you should already have done that.* We will talk about that at this month's Seminar.

The next deadline is June 1, 2015, when chemical manufacturers, importers, distributors must comply with all the requirements of the GHS rule (e.g., hazard classification, SDS format).

Then, by December 1, 2015, all shipments of chemical containers must include the GHS-compliant label (signal word, pictogram, hazard statement, and precautionary statement).

By June 1, 2016 all employers that use, handle, store chemicals must update alternative workplace labeling and hazard communication program as necessary and provide additional employee training for newly identified physical or health hazards.

Also by June 1, 2016, you must also update your written HazCom plan as necessary to reflect the new chemical label design and SDS format. The revised plan must also describe any changes to employee training requirements related to hazard classification and make chemical labels and SDSs.

See you at the Safety Program Seminar on Thursday, April 17th.

[PE]

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New Ladder Safety Book

OSHA is hoping that its new 16-page booklet, Falling Off Ladders Can Kill: Use Them Safely, will make it into the smartphones and tablets of the younger generation of workers—and that they will use the information to help keep themselves safe.

According to OSHA, young people, Latinos, and other workers at high risk of fall injuries are more likely than other groups to go online for information, including safety and health resources.

The new ladder safety ebook is modeled on a publication from the Singapore Workplace Safety and Health Council. It is bilingual (English and Spanish) and uses clear illustrations and plain language, together with electronic format, to put needed information into the hands of workers at the time and place where they need it most—while working on the jobsite.

Falls are a major cause of work-related injuries and fatalities. Now OSHA is proposing new rules for fall protection in general industry workplaces. You can download it in several formats for free !

< https://www.osha.gov/stopfalls/edresources.html >

Although the book is not an exhaustive primer on ladder safety, it provides portable safety information that workers can access quickly when they need it. Because it is bilingual and illustrated with line drawings, a broad cross section of workers should be able to understand the information. [PE]

Viva [FMLA Family Care Leave In] Las Vegas

The Seventh Circuit recently decided that a former employee's travel with her terminally ill mother to Las Vegas could be considered protected "family care" leave under the Family and Medical Leave Act (FMLA). In Ballard v. Chicago Park District, the Seventh Circuit affirmed the district court's denial of the Chicago Park District's (CPD) motion for summary judgment, reasoning that the FMLA does not limit the provision of protected family care to a particular geographic location.

The former employee and her mother did not travel to Las Vegas to receive any medical treatment, but were instead fulfilling the mother's end-of-life wish to take a family trip to Las Vegas. On this issue, the Seventh Circuit admittedly split from the First and Ninth Circuits to hold that the FMLA does not require an employee's active participation in his or her family member's medical treatment to qualify for FMLA. [PE]

NLRB Reach Continues to Grow

A few months after creating a stir by holding that certain employer social media policies violated the National Labor Relations Act ("NLRA"), the National Labor Relations Board ("NLRB") has struck again by finding that the NLRA protects an employee's right to gossip in the workplace provided the gossip pertains to the working environment.

The holding in *Laurus Technical Institute v. Henderson,* is yet another example of the NLRB operating in new areas and follows the trend it started when it dove headfirst into the world of social media policies 2012-13.

The employer argued that even if Henderson was engaging in protected activity as defined by the NLRA that her behavior was so disruptive that she waived the protections of the Act. The NLRB summarily dismissed this defense on the grounds that Henderson was merely discussing terms and conditions of work and thus was protected and not disruptive. Laurus was ordered to reinstate Henderson, pay all back wages and strip her personnel file of references to the suspension/termination.

The Laurus decision further demonstrates the NRLB's seemingly increasing reach into places of employment well beyond the traditional union setting. It is a reminder to all employers to be careful about regulating employee conduct when it concerns terms or conditions of the workplace. It is still possible to have a valid no gossip policy but it must be narrowly tailored. [PE]