

Spring 2007
Employment Law Update
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Federal Legislation

Genetic Non- Discrimination

- Employer cannot discharge, refuse to hire, or discriminate against employees based on *genetic information*.
- Genetic information includes:
 - Genetic tests
 - Family members' genetic tests
 - The occurrence of a disease or disorder among one's family members

Congress Proposes Mandatory Paid Sick Leave

- Applies to employers of 15 or more
- Employers must provide seven sick days per year to workers who work more than 30 hours per week and prorated leave for part-time workers
- Employers can require certification by employees who request three or more consecutive days off

New Development In Washington Family & Medical Leave . . . Paid Family Leave

- A family leave insurance program
- Joint legislative task force is established to recommend its funding and administration— report back by 1/1/08
- Benefits
 - To begin 10/1/09
 - Family leave – following the birth or adoption of a child
 - Up to five weeks/year and \$250/week
 - Pro-rated if employees works less than 35 hours /week
 - Must be taken *concurrently* with FMLA leave
- Employee's job is protected during leave if employer employs more than 25 individuals

A Disaster Avoided . . .

Legal Redress for Workplace Bullying

- The bill would have created a cause of action for harassment regardless of protected status
- The bill made it unlawful to subject an employee to an “abusive work environment”
- “Abusive conduct” was defined as conduct of an employer or employee with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests

What's a "Disability" under Washington Law?

- Pre-July 2006 definition
 - More expansive than ADA
 - Covered conditions that did not "substantially limit a major life function"
 - Included temporary conditions
- July 2006—*McClarty v. Totem Electric*
 - Adopted ADA disability definition for claims under Chapter 49.60 RCW

The Legislature Reacts

- Disability = any impairment that is "medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it exists in fact"

The New "Disability Definition"

- Expressly covers physiological conditions affecting any part of the body, and includes "cosmetic disfigurement"
- Expressly covers mental conditions including
 - Cognitive limitation
 - Emotional illness
 - Learning disabilities

The Really Scary Part...

- A disability exists whether it is *temporary* or permanent, *common* or uncommon, *mitigated* or unmitigated, or *whether or not it limits the ability to work generally* or *work at a particular job* or whether or not it limits any other activity within the scope of this chapter

For Purposes of Reasonable Accommodation in Employment...

- Must be known or shown through interactive process to exist in fact
- Must have substantially limiting effect on individual's ability to perform job, OR
- Employer must be on notice and medical documentation must establish likelihood of aggravation without accommodation
- Not substantial if only "trivial"

What Does This Mean for You?

- What conditions must you accommodate?
- What performance standards may you enforce?
- What standards of conduct may you require?
- And what about situations that come up before legislation goes into effect?

And now another scary note from the 9th Circuit....

- Clerical employee has issues
 - Emotional breakdown at work
 - Increasing irritability, "short fuse" with coworkers
 - Lack of concentration affects work
- Employee diagnosed as bipolar
- What can employer do?

Coaching session with employee

- Written Performance Improvement Plan (PIP) prepared
- Two supervisors in attendance at meeting to discuss performance issues

Employee reacts...

- Began to cry
- Grabbed PIP and threw it across the desk
- Used string of obscenities
- Threatened that supervisors "will regret this"
- Stomped out, slammed the door, went to her cubicle where she kicked and threw things

Now what can employer do?

Employee loses at jury trial

- On appeal—argued for instruction that "Conduct resulting from a disability is part of the disability and not a separate basis for termination"
- If mental disability a "substantial factor" in decision to terminate employment, that's a violation of the WLAD
 - *Gambini v. Total Renal Care, Inc.*

What "conduct resulting from a disability" might include...

- Excessive absences
- Failure to meet productivity standards
- Failure to comply with rules of conduct

Gambini II

- Misconduct by employee with disability does not have "*absolute* protection"
- Employee must be able to perform essential functions of position
- Under ADA, employer has "business necessity" and "direct threat" defenses
- Employer may demonstrate "undue burden"

A couple of more enlightening ADA decisions...

- Disqualification based on failure to meet hearing standards does not mean that employee was "regarded as" having disability
- Class action allowed to proceed based on imposition of hearing standard not required by DOT regulations

On the Horizon . . .

Immigration Issues

- Immigration Reform and Control Act of 1986 (“IRCA”)
- Employers must verify each employee's identity and eligibility to work
- Prohibits knowingly employing or continuing to employ unauthorized workers

Does the IRCA Give Employers Permission to Discharge Employees with Immigration Issues?

- What happens when an employee has visa problems?
- Is it an excuse to fire the employee?

Incalza v. Fendi North America, Inc.

- Italian citizen moved to Italian designer's New York office on a visa secured with the employer's assistance
- After a change in ownership, employee's visa was no longer valid
- Employer refused to help employee get a different visa or to put him on unpaid leave pending his marriage to a U.S. Citizen

What happened?

- Employee sued for discrimination based on national origin and breach of an implied contract to discharge him only for cause
- Jury found for employee on contract claim
- On appeal, employer claimed California employment laws did not apply because the IRCA *required* it to fire the plaintiff and trumped state law
- The Ninth Circuit disagreed – the IRCA did not protect the employer because it could have taken other actions besides termination and complied with the statute

Taxes on Damage Awards

- Union worker sued for gender discrimination and a jury awarded her:
 - \$ 112,903 - back pay
 - \$ 450,861 - front pay
 - \$ 75,000 - for pain, suffering, and emotional distress
- Plaintiff sought \$244,753 in increased taxes she incurred due to the lump sum payment method
 - *Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. No. 160*

The Washington Supreme Court Said . . .

- The WLAD's remedy provision allowing for “any other appropriate remedy authorized by . . . the United States Civil Rights Act of 1964” supported requiring employer defendants to pay the additional federal income tax liability caused by the lump sum nature of the award

What Did *Blaney* Do?

- After *Blaney*, in addition to:
 - back pay
 - front pay
 - lost benefits
 - emotional distress
 - interest on the judgment
 - and attorneys' fees . . .
- Employers also had to consider the increased tax consequences of an award for lost wages

Does *Blaney* Go Even Farther? . . .

- Two plaintiffs sued Seattle City Light for employment discrimination on the basis of race and national origin
 - *Chuong Van Pham v. City of Seattle*
- Jury awarded \$550,000 (\$120,000 in emotional distress)
- Plaintiffs sought damages for the entire tax liability of their emotional distress award
- But the Court drew the line
 - Emotional distress damages are different than lost wages
 - Congress made non-economic damages taxable when they are attributable to nonphysical injury

Another Cost of Litigation . . .

- Attorneys' fees are a factor to consider in evaluating potential litigation anytime a statute provides for attorneys' fees to a prevailing plaintiff
- Fee awards are also increasingly large – they often come close to, and sometimes exceed, the size of damage awards

Entitlement to Attorneys' Fees

- RCW 49.48.030 authorizes attorneys' fees for recovery of wages owed
- One may be entitled to attorneys' fees even where her or she has no employment contract
 - *Fraser v. Edmonds Community College*

The Amount of Attorneys' Fees

- The party requesting fees bears the burden of establishing:
 - (1) the reasonable hours worked, and
 - (2) the prevailing market rate in the community.
- Will the court just accept counsel's claim?
- Prevailing plaintiff sought \$122,857.12 in fees and costs, and was awarded \$85,992.94.
 - *Carson v. Billings Police Department*

Unemployment Benefits

- Denied for "misconduct connected with ... work"—RCW 50.20.06
- What is disqualifying misconduct?
 - Harassment of coworkers?
 - Failure to disclose conflict?
- What if employee quits due to family member's illness and death?

Wage-Hour Cases: A Growth Industry

- Deference to DOL regulations in insurance adjustors case
 - *In re Farmers Insurance Exchange*
- Focus on actual job duties determines correctness of exemption
 - *Miller v. Farmer Bros. Co.*

Workplace Safety

- Potential for L&I ergonomics citations resurrected
 - *SuperValu, Inc. v. Department of Labor & Industries*
- Just giving employees safety equipment may not be enough to escape liability
 - *Washington Cedar & Supply Co. v. Department of Labor & Industries*

Worker's Compensation—Exclusive Remedy?

- Worker's comp provides exclusive remedy for workplace injuries unless the result of employer's deliberate intention, RCW 51.24.02
- Did Western State *intend* the injuries of workers repeatedly assaulted by mental patients?
 - *Brame v. Western State Hospital*

Story of Employees Who Complained to Board about Executive Director

- Managers of non-profit agency for disabled go to board to complain about executive director (despite rule forbidding this)
- Board investigates
- Executive director fires managers for insubordination and disloyalty
- How does the story end?

Story of the Little Kid Left by the Side of the Road

- School bus driver mistakenly lets 10-year-old off bus in unfamiliar area 2 miles from home
- No previous offenses by driver in 7 years
- School district fires bus driver
- How does the story end?