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Employment Law Update

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Definition of "Disability" for WLAD

- July 6, 2006—*McClarty v. Totem Electric*—adopted same definition as ADA
- Legislative reaction
  - 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"

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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

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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"

When Does the Definition Apply?

- Effective date was July 22, 2007
- What about claims arising before *McClarty* (July 6, 2006) or between *McClarty* and effective date of new definition?
- It depends on the court….
- But generally the *McClarty*/ADA definition applies from July 6, 2006 to July 22, 2007

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Federal Regulatory Developments—"No-Match" Verification of Employment Eligibility

- On August 15, 2007, the U.S. Department of Homeland Security (DHS) issued final regulations relating to the unlawful hiring or continued employment of unauthorized aliens
- The amended regulations outline the legal obligations of an employer who receives a "no-match letter" from the Social Security Administration (SSA) or DHS. The regulations were scheduled to take effect September 14, 2007

"No-Match Letters"

- When earnings reports (W-2 forms) sent by employers to the SSA contain an employee name and Social Security number that do not match, the SSA sends an "Employer Correction Request" informing the employer of the mismatch
- Potential Reasons:
  - clerical errors, employees with different surnames, incomplete W-2s, name changes, or false documents

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Constructive Knowledge

- Immigration law makes it illegal for employers to knowingly hire an employee not authorized to work in the U.S., whether through actual or constructive knowledge
- An employer's failure to respond to no-match letters may now be used as constructive knowledge to prove violations of immigration law
- Previously, employers who received no-match letters were under no obligation to act

Safe Harbor Procedures

- The regulations set forth "safe harbor" procedures describing what steps an employer should take upon receiving a no-match letter from SSA or DHS to protect itself from civil and criminal liability

Within 30 Days

- Of receipt of a no-match letter, an Employer must:
  - Review records and correct error if it is internal
  - Verify with SSA and DHS that the number and name match
- If record check does not resolve no-match:
  - Contact the employee to confirm accuracy of internal records. If the employee finds the error, the employer must correct the error and notify SSA and DHS
  - If the employee confirms the records are accurate, the employer must ask the employee to pursue the matter directly with SSA

Within 90 Days

- If actions taken do not resolve the no-match within 90 days, the employer must:
  - Reverify within three days the employee's authorization and identity
  - If the employer cannot verify the employee's work eligibility, the employer must decide whether to discharge the employee or face civil and criminal liability

The Lawsuit

- Unions and business groups filed suit alleging that the new rules are inconsistent with existing immigration laws and will result in discrimination and the firing of lawful employees (255 million mismatched records—70% belong to U.S. citizens)
- On October 10, a preliminary injunction was granted halting the mailing of 140,000 no-match letters pertaining to 8 million employees
  - *American Federation of Labor v. Chertoff*

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When Does an Employee Have a Claim of Pay Discrimination?

- If employee gets paid every two weeks, does she have a new discrimination claim every pay day?
- Or does her claim arise at the point that her pay level is established?
- And, why does this matter?

Statutes of Limitations Determine Timeliness of Claims

- Generally a claim arises at the point of an adverse employment action
  - E.g., denial of promotion, firing
- Sometimes the adverse action continues over a period of time—constituting a "continuing violation"
  - E.g., sexual harassment
- Where does pay discrimination fit?

Ledbetter v. Goodyear Tire & Rubber

- Lily Ledbetter starts off at same pay as men
- Nearing retirement, Ledbetter learns she's been paid $500 to $1,500 per month less than men
- When did her pay discrimination claim arise, and what damages may she seek?

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Discrimination in Firing?

- African American employee fired for insubordination
- Decision maker in HR does not know employee's race
- Could the employer be liable for discrimination?
  - *BCI Coca-Cola Bottling Co. v. EEOC*

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Wage & Hour

- Washington minimum wage increase
  - Increase 14 cents to $8.07 per hour beginning January 1, 2008
- Federal minimum wage
  - Increase from $5.15 per hour to $5.85
  - 70 cent increases for next two years, capping the minimum wage at $7.25 in 2009

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Compensation for Drive Time

- Installation and service technicians filed suit for compensation for time spent driving company trucks from home to first jobsite and back from the last jobsite
- Washington Supreme Court:
  - Technicians are entitled to compensation because they were "on duty" at a "prescribed work place"
  - *Stevens v. Brink's Home Security, Inc.*

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Release of Wage Claims

- Employee released wage claims under a settlement supervised by the Department of Labor
- Employee filed suit for unpaid wages five months later
- Ninth Circuit:
  - The settlement agreement was for wage claims arising during a specified period
  - *Dent v. Cox Communications Las Vegas*

Refresher Class—Sexual Harassment

- Company president makes repeated overtures to female branch manager
- Branch manager resists
- Company president apologizes but says he can't work with branch manager anymore
- Three weeks later—branch manager complains

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Company's Response

- Outside attorney investigates
- Branch manager temporarily reassigned
- Reprimand and sensitivity training recommended for president
- Branch manager once again assigned to report to president
- Branch manager quits

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Is the Company Liable?

- Was there *quid pro quo* harassment?
- Was there a hostile work environment?
- Did branch manager take steps to correct the situation?
- What about the three week delay?
  - *Craig v. M&O Agencies, Inc.*

Refresher Class—Religious Discrimination

- Employee laid off after denial of promotion
- Promotion went to employee who attended the same church (Fellowship of Friends) as promoting manager
- Employee sued for denial of promotion?
- Is church membership of promoting manager and promoted employee enough for claim to proceed?

Some Additional Facts…

- Promotion decision made by 3-person panel, only one of whom was church member
- 13 out of 35 full-time employees were Fellowship of Friends members
- 5 out of 11 full-time hires in three year period were Fellowship of Friends members

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Is This Enough to Get to Trial?

- Per 9th Circuit, yes
- Key reasons:
  - Perceived favoritism toward Fellowship of Friends members
  - Claimant's allegedly superior qualifications for promotion
    - *Noyes v. Kelly Services*

New Restriction on Use of Credit Reports

- On July 22, a new Washington law went into effect that imposes additional restrictions on employers that want to obtain credit reports on employees or job applicants
- Unless required by law, an employer can only request a credit report for employment purposes if it is "substantially job related" and the employer's reasons for using the information are disclosed in writing
- "Investigative Consumer Reports": contain information about an individual's character, general reputation, and personal characteristics

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Employee Privacy

- Employee waived all claims arising out of the police department's background investigation
- Employee filed suit alleging violation of the ADA and Title VII
- Ninth Circuit:
  - Enforced waiver
  - Employee failed to present evidence that the police department's reason for revoking her job offer was false
  - *Nilsson v. City of Mesa*

Refresher Class—Race Discrimination, Retaliation

- Can an employer be liable for discrimination or retaliation when employee is fired for misappropriating funds?
- What if employee who controlled grant funds had improper payments made to husband and two other employees?

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The Other Side of the Story

- Comments from employee's managers:
  - "…[B]lack people like to party and eat and don't do their work"; "They ought to be glad they have a job"; "All of these people are lazy and malingerers. Is that something special with African-Americans that they have to socialize all the time and they are never happy? They should be glad to have this job."

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The Other Side of the Story

- Employee complained that employer was filing a false EEO-1 report
- Employee presented concerns of other employees of color
- Manager warned employee that a person of color should not "talk back"

The Lesson—Bad Facts Present Evidence of "Mixed Motives"

- Even if employee engaged in misconduct, still entitled to bring complaint based on discrimination, retaliation
- Misconduct might bar reinstatement and front pay, but not other damages and costs
  - *Metoyer v. Chassman*

Trade Secrets

- Employer filed suit against former employee and future employer for trade secret misappropriation
- Employee found personally liable for willful and malicious misappropriation and future employer found vicariously liable
- Washington Court of Appeals:
  - Employer vicariously liable if it knowingly benefits from future employee's tortious conduct
  - Affirmed the double damages award
  - *Thola v. Henschell*

First Amendment

- A police officer who was fired for running a sexually explicit website filed suit claiming his website was protected by the First Amendment
- Ninth Circuit:
  - Public employees' interests in free speech are balanced against the interests of the mission of the employer
  - Employee's activities did not provide the public with any information of public concern and undermined the police department's interest in having officers who behave with a high level of propriety
  - *Dible v. City of Chandler*

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