

## Fall 2008 Employment Law Update

Jeff Hollingsworth  
Ben Stafford

Puget Sound Locations

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## **New Federal Statutes and Regulations**

- ADA Amendments Act
- Genetic Information Nondiscrimination Act
- Fair Pay Act and Employee Free Choice Act Postponed

## **ADA Amendments Act**

- Becomes Effective January 1, 2009
- Overturns two U.S. Supreme Court cases
- Expands Scope of What a "Disability" is

## ADA Refresher

- 15 or more employees
- Must provide reasonable accommodation for disabled employees, unless it would cause undue hardship
- An employee is disabled if he or she:
  - Has a physical or mental impairment that substantially limits one or more major life activities;
  - Has a record of such an impairment; or
  - Is regarded as having such an impairment.

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## Expanded Definition of Disability

- Definition of disability "shall be construed in favor of broad coverage of individuals under this Act."
- "Substantially limited" no longer a "demanding standard" on plaintiffs seeking to establish that a condition is a disability that substantially limited a major life activity.
  - *Overtures Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*
- EEOC to revise definition of "substantially limited"

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## Expanded Definition of Disability

- "Disability" includes some impairments that are episodic or in remission.
- Determination of whether an individual is disabled is generally made without consideration given to assistive devices.
  - Overturns *Sutton v. United Air Lines, Inc*
  - Eyeglasses and contact lenses don't count

## Expanded Definition of Disability

- "Regarded as" disability
  - Does not require employer belief that employee is substantially limited
- "Major Life Activity"
  - Illustrative List now included in ADA
    - caring for oneself; bending; performing manual tasks; speaking; seeing; breathing; hearing; learning; eating; reading; sleeping; concentrating; walking; thinking; standing; lifting; communicating; and working
  - Includes operation of a major bodily function
    - No requirement that functions have any relation to the ability to perform a job.

## Takeaway

- Number of individuals covered by the ADA will be greatly expanded
  - Conditions corrected by medication (diabetes, epilepsy)
  - Conditions currently in remission
  - Conditions that are episodic
- Focus will shift to "reasonable accommodation" and interactive process
  - Make sure job descriptions are up-to-date
- Harder to dismiss cases before trial

## Retroactivity of *McClarty*

- What rule applies to cases decided between July 2006 and May 2007?
- *McClarty v. Totem Electric* adopts ADA definition of disability on July 6, 2006
- Legislature overturns *McClarty* on May 4, 2007
  - *Moore v. King County Fire Dist. No. 26*

## Effect of ADA Amendments Act in Washington

- ADA Amendments Act may have little effect in Washington
- Under WLAD, disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated
- Focus under both ADA and WLAD will be on whether accommodation is reasonable and employee can still do the job

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## Genetic Information Nondiscrimination Act (GINA)

- Bars employers (with fifteen or more employees) from making hiring or other employment decisions based on genetic information
- Bars insurers from increasing premiums or denying coverage based on genetic info
- Insurer provisions effective May 21, 2009
- Employer provisions effective on Nov. 2009.

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## Rules Governing Employers

- Employers cannot discriminate against employees on the basis of "genetic information"
  - information about a person's genetic tests and genetic tests of the person's family members as well as any *actual* diseases or disorders suffered by the person's family members.
- Employers cannot acquire genetic information for most purposes
- Employers must keep genetic information private and confidential
- No disparate impact claims

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## Takeaway

- Addresses a largely theoretical concern
- No exception for business necessity
- Employers *will* collect genetic information in some situations
  - FMLA
- EEOC regulations should answer many questions

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## Fair Pay Act and Employee Choice Act

- Congress fails to pass Fair Pay Act
  - Would overturn *Ledbetter v. Goodyear Tire & Rubber Co.*
  - Passed House, needed four more votes in Senate
- Congress fails to pass Employee Choice Act
  - Would do away with secret ballot elections
  - Passed House, had 51 votes in Senate

## New Washington Developments

- Heat Stress Rule
- Minimum Wage Increase



## Heat Stress Rule

- Applies to employees who work in an outdoor environment between May and September
- Only when temperature exceeds certain levels based on employee clothing
- Employers must provide water, relieve heat-stressed employees, and train supervisors

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## Immigration Developments

- E-Verify System Extended
- Legal Arizona Workers Act Upheld

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## Case Law Developments

- Evidence necessary to support claim
- Wrongful termination claims
- U.S. Supreme Court active in employment arena

## U.S. Supreme Court Employment Cases

- *Crawford v. Metropolitan Gov't of Nashville & Davidson County*
- Question: Employees who report sexual harassment in an internal investigation protected from retaliation under Title VII, even if no harassment charge has been filed?

## ***Crawford v. Metropolitan Gov't of Nashville & Davidson County***

- Sixth Circuit held:
  - employee must engage in active, consistent opposition, and that "cooperating" in an internal investigation did not suffice
  - employee's participation in an employer's internal investigation is not covered unless it relates to a pending EEOC charge,

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## ***Hulteen v. AT&T Corp.,***

- Will answer a narrow question
- AT&T treated pregnancy leave prior to passage of 1978 Pregnancy Discrimination Act as personal leave
- Question: Does present receipt of less favorable retirement benefits violate Pregnancy Discrimination Act?

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## ***Meacham v. Knolls Atomic Power Lab.***

- ADEA Case: 30 of 31 laid off workers are over the age of 40.
  - Workers picked based on supervisors' rankings of all workers by performance, flexibility, and critical skills
- Question: Did employer rely on "reasonable factors other than age?"
  - Who has burden of showing factors are (un)reasonable?
- Held: employer bears the burden of proof

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## **Takeaway**

- Employee must point to specific employment practices that he or she claims causes a disparate impact on older employees.
- Employer raising an RFOA defense must offer proof of the facts used and that they were reasonable.
- Employers do *not* have to prove business necessity
  - A factor used must be rationally related to some legitimate business objective.

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## ***Kentucky Retirement Sys. v. EEOC***

- Unearned years of service added for workers who become disabled before reaching retirement age.
- No extra years of service to workers who become disabled after having already reached the plan's minimum retirement age.
- Result: some older disabled workers receive lesser benefits than younger disabled workers.
- Held: plan not actually motivated by age bias.

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## **Discrimination**

### ***Gribben v. United Parcel Service, Inc.,***

- Gribben claims he cannot work in hot conditions.
  - Doctor tells him not to perform activities for more than 20 minutes in temperatures over 90 degrees.
- UPS argues that many average people have difficulty walking and breathing during hot Arizona weather.
- Trial court agrees that Gribben failed to prove he was impaired when compared with the general populace
- Ninth Circuit reverses
- Held that employee's testimony about his limitations can suffice to prove he was disabled

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## Takeaway

- Pay attention to what employee says about their own condition
- Work closely with employees to determine what they, at least, believe their limitations to be

## Discrimination E.E.O.C. v. Starlight, LLC

- Owner of business makes derogatory (or ill-informed) comments about waitress' headscarf
- Refuses to let her work lucrative shifts
  - thinks clientele won't like being served by woman in headscarf
- Employee confronts owner
- Although owner offers lucrative shift schedule, employee refuses and quits

## E.E.O.C. v. Starlight, LLC

- Trial court denies summary judgment
- Owner's statements are direct evidence of discrimination
  - No need to use *McDonnell Douglas* test
- Employee presented sufficient proof to go to trial on constructive discharge claim
  - Could have found work environment "intolerable"

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## Employee Privacy *Quon v. Arch Wireless*

- City of Ontario contracts with Arch Wireless to support two-way pagers
- City has no policy governing pagers—does have general computer use policy
- Tells employees that general policy governs pagers BUT
  - Tells employees they won't be audited for overages if they simply pay the overage fee
- Audit shows Quon was using pager for personal use and explicit messages

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## ***Quon v. Arch Wireless***

- Two Questions
- (1) Did the City of Ontario violate the Fourth Amendment?
  - Only applies to public employers
- (2) Did Arch Wireless violate the Stored Communications Act?

## ***Quon v. Arch Wireless* Ninth Circuit Opinion**

- City of Ontario violated Fourth Amendment
  - City created expectation of privacy
  - Search was "unreasonable"
- Arch Wireless violated SCA
  - Company was an Electronic Communication Service
  - Gave access to City without employee's permission



## Takeaway

- Clear policies informing employees that they have no privacy in company-provided electronics
- Route all communications through company network
- If an outside provider is used, ensure that employees have given consent for employer to view stored communications

## Wrongful Discharge Handbook Claims

- Employment is generally "at will"
- Employer may alter at will relationship by making written promises of "specific treatment in specific situations"
  - (1) a written statement in an employee handbook or similar document constituted a promise, of specific treatment in specific situations,
  - (2) the employee justifiably relied on the promise and
  - (3) the employer breached the promise.

## ***Rosen v. AT&T***

- Rosen hired as at-will employee
- Points to "promises" after she is laid off
- Use of Performance Plan & Review process for all significant employment decisions.
- Completion of performance improvement plan before terminating employment for deficient performance.
- Transfer to another position within the company after identification for layoff.
- PowerPoint presentation contained promises regarding who would be assessed in a skill assessment review and the method by which the assessment would be conducted.

## **Court Rejects Claims**

- Rosen pointed to general AT&T policies
- Rosen admits she knew she was at will
- Progressive discipline procedures don't modify at will relationship unless employer has no discretion to choose discipline
- PowerPoint presentations can't constitute "written" promises

## Takeaway

- Have employee sign acknowledgment of at will status at hiring
- Ensure that handbook has at will disclaimer
- Ensure that progressive discipline policies note that employer retains discretion

## Wrongful Termination in Violation of Public Policy

- Public policy exception protects employees in limited instances
- (1) Existence of clear public policy
- (2) Discouraging employee's conduct would jeopardize public policy
- (3) Employee's public-policy-related conduct caused the dismissal
- (4) No overriding justification for dismissal

## ***Danny v. Laidlaw Transit Servs., Inc.***

- Danny requested and was granted time off to move and to seek assistance in prosecuting her abusive husband
- Fired for falsifying payroll records and claimed the real reason was the leave
- Prior to enactment of Washington's new domestic violence leave

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## **Washington Supreme Court Finds Clear Public Policy**

- Washington Supreme Court finds clear public policy protecting domestic violence survivors and their families and holding their abusers accountable
  - No requirement of nexus with employment
  - Policy protects employee fired for *absenteeism*

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## Takeaway

- Narrow exception to at will employment
- Be wary of firing employees who have requested leave for some important personal reason
- Remember that Washington has passed domestic violence leave

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## Procedural Bars to Suit *Lukovsky v. City and County of San Francisco*

- Applicants who were not hired learn of alleged discriminatory motive years later
- Question: When does statute of limitations begin to run for discrimination claims?
- Held: Statute of limitations runs from actual adverse employment action

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## Benefits

- Employee who has "good cause" to quit a job is eligible for unemployment benefits
  - Statute contains eleven specific circumstances that constitute good cause
  - Courts held this list was exclusive
  - Employment Security Department thought it had no power to recognize more

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## *Spain v. Employment Security Department*

- Washington Supreme Court reverses this position
- Eleven specifically enumerated good cause reasons do not "do double duty"

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## Takeaway

- Court provides little guidance as to what other circumstances may provide an employee with good cause for voluntarily quitting his or her employment.
- New amorphous category of "good cause" undefined by statute and subject to the interpretation of the ESD.

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## Retirement Benefits *Navlet v. Port of Seattle*

- Collective bargaining agreement provides for retiree health benefits
- Port of Seattle agrees to pay into union Welfare Trust Fund
- At termination of agreement, Port tries to end future payment of benefits

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## *Navlet v. Port of Seattle*

- Group of employees eligible for benefits sue, claim rights have vested
- Rights were "compensatory"
- Employees would reasonably expect that negotiated retirement benefits would continue beyond the current agreement
- Port must pay "benefits for life."