Fenwick Employment Brief

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NINTH CIRCUIT CLARIFIES STANDARD FOR "REGARDED AS" DISABILITY CLAIMS

In *Walton v. U.S. Marshall Service*, the Ninth Circuit clarified the legal standard for establishing a "regarded as" disability discrimination claim. Naomi Walton, a court security guard, was terminated from her employment after failing to meet her employer's hearing standard. Medical tests revealed Walton had difficulty localizing the direction of sound because she had only one functioning ear. Walton's employer concluded that her medical condition posed a significant risk to the health and safety of herself and others, and it terminated her employment. Walton sued for disability discrimination under the federal Rehabilitation Act ("the Act") claiming that her employer "regarded" her as being disabled. The court dismissed her claim, and the Ninth Circuit affirmed.

In its affirmance, the Ninth Circuit articulated a two-part test to establish a "regarded as" disability discrimination claim. The employee must prove that: (1) the employer believes that the plaintiff has some impairment, and (2) the employer subjectively believes that the plaintiff is substantially limited in a major life activity. If the employee lacks direct evidence of the employer's subjective belief that the employee is substantially limited in a major life activity, the employee may nevertheless establish the second part of the test with evidence that the imputed impairment is objectively substantially limiting.

Applying this rule, the Ninth Circuit found that Walton could demonstrate only that her employer regarded her as having an "impairment" (*i.e.* the inability to localize sound), and she presented no evidence that her employer considered the impairment to be "substantially limiting" in one or more major life activities. The court found that standing alone, Walton's failure to meet her employer's hearing standards did not support a finding that her employer regarded her as disabled.

Employers should be aware that, under California's Fair Employment and Housing Act, a plaintiff need only show that she has a physical or mental condition that merely "limits" a major life activity (not "substantially limits," as required under ADA and the Rehabilitation Act claims) to establish that she is disabled or regarded as disabled by her employer.

COURT STRIKES DOWN ANTI-FRATERNIZATION PROVISION IN EMPLOYEE HANDBOOK

Where workplace policies are found to interfere with employees' protected rights to engage in a union or other concerted activity, including the right to discuss terms and conditions of employment, they may be deemed unlawful under the National Labor Relations Act (NLRA).

In *Guardsmark, LLC v. NLRB*, the federal D.C. Court of Appeal recently held that an employer's anti-fraternization policy violated the NLRA. Guardsmark, a nationwide company providing security guard services, included in its employee handbook a section stating that employees must not "fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees." The NLRB had ruled that the anti-fraternization provision was lawful because employees would reasonably understand the rule to prohibit only romantic personal relationships rather than any activity protected by the NLRA. See July 12, 2005 article. http://www.fenwick.com/docstore/Publications/Employment/EB_07-12-05.pdf

However, the D.C. Court of Appeal disagreed, and held that the policy was unlawful. After consulting numerous dictionaries on the meaning of "fraternize," the court concluded that each source listed fraternal association as the primary meaning, with social and intimate associations as a secondary meaning. Therefore, the court held that Guardsmark's fraternization provision would have a chilling effect on employees' rights because they would reasonably interpret the rule to prohibit discussion about terms and conditions of employment within their union – a fraternal association as found in the definitions.

The court also noted that Guardsmark's alleged business justification for the rule - that it was intended to provide safeguards so that security will not be compromised by interpersonal relationships between guards - could still be served without violating the NLRA. For example, Guardsmark's goal still could have been achieved either by removing the word "fraternize" altogether and defining personal or romantic relationships, or by adding an exception for protected activity. The court also held that two other Guardsmark restrictions—one

forbidding workers in uniform from solicitation and distribution of literature, and the other forbidding workers from voicing work-related complaints outside the chain of command—were also unlawful under the NLRA.

This decision is instructive of the care with which employers must draft workplace policies to ensure they do not directly or indirectly interfere with an employee's right to discuss work conditions. Furthermore, anti-fraternization policies are subject to great scrutiny, especially under California law, and should be carefully drafted to avoid interference with employees' lawful conduct during non-working hours.

NEWS BITES

Labor Unions Lack Standing To Bring Representative Actions Under California Law For Wage and Meal Break Penalties

A California Court of Appeals held that labor unions lack standing to bring representative actions for wage penalties under California's Private Attorney General Act ("PAGA"). In *Amalgamated Transit Union Local 1756 v. Superior Court*, two labor unions brought claims under the PAGA and California's Unfair Competition law for unpaid meal and rest breaks on behalf of 150 employees against various transit companies, seeking more than $12 million in unpaid wages and penalties. The court held that while unions may represent employees for purposes of obtaining back pay, unions lack standing to bring claims on behalf of employees for penalties under the PAGA or the Unfair Competition law.

Wage-Hour Class Action Brought By Loan Consultants Settles for $13.6 Million

E-Loan has agreed to pay $13.6 million to settle a wage and hour class action brought on behalf of approximately 500 current and former mortgage loan consultants employed in the company's Pleasanton and Dublin, California offices. The named plaintiffs claimed that E-Loan misclassified its loan consultants as exempt, and thereby unlawfully failed to pay overtime and provide meal periods, and failed to provide accurate itemized wage statements. E-Loan contended that the loan consultants fell within the Administrative exemption from overtime.

Employee Receiving Disability Pay During FMLA Leave Not Required to Substitute PTO For Unpaid FMLA Leave

The Seventh Circuit Court of Appeal confirmed that employers cannot require employees to substitute accrued paid leave for unpaid leave under the Family and Medical Leave Act ("FMLA") when the employee is receiving paid benefits during the FMLA leave, such as benefits under state disability, the Paid Family Leave, or workers' compensation programs.

In *Repa v. Roadway Express*, Alice Repa took a six-week FMLA leave for an injury not related to work. Under her employer's policy, Repa was required to exhaust her accrued vacation and sick time during her FMLA leave. However, Repa also received $300 per week from her union's disability insurance plan. Repa sued, claiming that her employer's requirement that she use paid sick time and vacation benefits while she was receiving disability benefits under a separate plan violated the FMLA. The Seventh circuit Court of Appeal agreed.

While the FMLA generally provides employers with the right to require employees to use vacation and sick leave (or other paid leave) during FMLA-covered leave, employers may not mandate such use when the leave is not "*unpaid*." The court held that when an employee receives benefits under a temporary disability leave benefit plan, the leave is not "unpaid" and thus the employer cannot require the employee to use vacation or sick pay in lieu of unpaid FMLA leave.

Federal Judge Scolds Company For Requiring Employee to Use Vacation Time For Jury Duty

A federal judge admonished an Oklahoma-based company for requiring an employee to use vacation leave while on jury duty, calling the company's actions "contemptuous." (*In re Heritage Propane, E.D. Tenn.*, No., 07-01, 2/6/07.) The judge ultimately declined to hold the company in contempt because the company guaranteed the judge that it had changed its policies.

Although the court applied Tennessee law, the decision is a helpful reminder regarding jury duty laws applicable to California employees. The California Labor Code requires that employers must permit employees to use vacation and other accrued leave for jury duty, but employers may not mandate such use.