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Fenwick Employment Brief

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FEATURED CASE NOTES

ADA INTERACTIVE PROCESS MAY REQUIRE COMMUNICATING WITH EMPLOYEE'S ATTORNEY

The California Court of Appeal recently ruled that, although an employer may ordinarily refuse to communicate through an employee's attorney during the interactive process to reasonably accommodate an employee's disability, in some limited circumstances the employer may need to communicate with an employee's attorney. *Claudio v. Regents of the University of California* was just such a case. There, Michael Claudio worked as a technician for the School of Veterinary Medicine at the University of California Davis ("UCD"). He contracted a disease which foreclosed him from working around animals. While on medical leave, UCD informed Claudio that he had been terminated. A vocational rehabilitation specialist with UCD contacted Claudio and attempted to engage in an interactive process with him to determine if there were alternate positions that he could perform. While Claudio referred UCD to his attorney, UCD never communicated with counsel. The appellate court concluded that because UCD had previously terminated Claudio, his legal status was uncertain and it was reasonable that he required UCD to communicate with him through his attorney. Employers should be aware of these unique circumstances that might require dealing with an employee's attorney.

EMPLOYER PROPERLY HIRED INVESTIGATOR WHEN SUSPICIOUS OF LEAVE ABUSE

A federal court in Boston recently concluded that an employer properly hired an investigator to determine the validity of an employee's FMLA leave. In *Colburn v. Parker Hannifin/Nichols Portland Division*, Brian Colburn periodically took FMLA leave for migraines. The employer hired an investigator because it was suspicious of Colburn after the company was unable to reach him at home on work days. The investigator followed Colburn to the gym, as he rented videos, went shopping at different stores, and drove himself to other locations when he was supposedly too sick to work. The company then terminated Colburn. Colburn urged that hiring the investigator was evidence of pretext and that the employer retaliated against him for exercising his FMLA rights. Rejecting the argument, the court observed that the employer had hired investigators on other occasions, and that it had reasonable grounds to be suspicious of Colburn.

NEWS BITES

REPORT SUGGESTS THAT EMPLOYEES FROM COUNTRIES WITH HIGH TUBERCULOSIS RATE SHOULD BE SCREENED FOR TB

The Journal of Occupational and Environmental Medicine recently conducted a study of the workplace environment and risk factors for transmission of tuberculosis. The study recommended pre-employment testing of employees who are recent immigrants from a country with a high tuberculosis rate such as El Salvador. Employers are cautioned that such selective testing of minority immigrant applicants or employees may create liability for discrimination and should only be conducted after consulting with counsel.

APPLICANT/OFFEREE WHO DOES NOT START WORK MAY SUE FOR "WHISTLEBLOWER" WRONGFUL TERMINATION

The Alaska Supreme Court ruled that an applicant who accepted employment but never commenced work could nonetheless sue for wrongful termination as a whistleblower after the employer allegedly withdrew the offer of employment because he testified as a witness against the company. *Reust v. Alaska Petroleum Contractors, Inc*. The court affirmed an award of $800,000 in compensatory and punitive damages.

CALIFORNIA SUPREME COURT GRANTS REVIEW OF DISABILITY CASE

In a positive development for employers, the California Supreme Court granted review of *Green v. State of California*, reported in our September 26, 2005 FEB. Earlier disability discrimination cases placed the burden of proof on the employee-plaintiff to prove that he could perform the essential functions of the job with or without reasonable accommodation. In *Green*, the lower court ruled that the employer must prove an employee-plaintiff could **not** perform his duties with or without reasonable accommodation. The Supreme Court will decide who bears the burden of proof on this important issue.

EEOC GIVES FINAL APPROVAL TO REVISED EEO-1

The EEOC approved revisions to the EEO-1 form, including the addition of a "two or more race" category for reporting the ethnicity of employees. If these changes are approved by the Office of Management and Budget they will go into effect in 2007.