



## Supreme Court Provides Input As to the Meaning of 'Employee' Under the ADA

The United States Supreme Court recently identified the factors to use in determining whether an individual is an 'employee' under the Americans With Disabilities Act. The Americans With Disabilities Act applies to an 'employer' if its workforce includes '15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.' In *Clackamas Gastroenterology Associates v. Wells*, a bookkeeper named Deborah Wells sued her former employer, a medical clinic, for disability discrimination. The clinic had four physician-shareholders who, if considered employees, would push it over the 15-employee ADA threshold. The Supreme Court did not decide the issue of whether the clinic met the threshold, but remanded the matter back to the district court for a renewed analysis using factors found in Equal Employment Opportunity Commission guidelines. Noting that no single factor is determinative, the Supreme Court held that the following factors should be used to determine whether an individual is an 'employee' under the ADA: whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to someone higher in the organization; whether and to what extent the individual influences the organization; whether the parties intended that the individual be an employee; and whether the individual shares in the profits, losses, and liabilities of the organization. The Supreme Court's interpretation of this definition is particularly important for small employers who may have numerous directors and partners on their rosters.

## Constructive Discharge Bars Employer's Affirmative Defense to Harassment Claim

A federal appellate court recently held that a constructive discharge constitutes a 'tangible employment action.' This means that with a finding of a constructive discharge, an employer cannot claim as an affirmative defense to an employee's harassment claim that the employer exercised reasonable care to prevent and correct any sexually harassing behavior and the employee unreasonably failed to take advantage of the employer's corrective opportunities. In *Suders v. Easton*, Nancy Suders worked for the Pennsylvania State Police as a police communications operator. Suders endured repeated instances of name-calling, explicit sexual gesturing, offensive sexual conversations, and the posting of vulgar images. She complained to the Department's Equal Employment Opportunity Officer, but did not receive help to file a complaint. Towards the end of her employment, Suders' co-workers and supervisors falsely accused her of theft, handcuffing her and treating her as they would an accused suspect. Immediately after this incident, Suders resigned. She then filed a lawsuit alleging Title VII violations, including harassment and constructive discharge. The Court found that a constructive discharge

may have occurred due to the intolerable harassment that Suders endured. The Court further found that a constructive discharge would constitute a tangible employment action, depriving the Pennsylvania State Police of its affirmative defense to a harassment claim, even though Suders never made a formal complaint. By providing an avenue by which employees can bring a harassment suit under Title VII even where they do not utilize an employer's complaint procedure, this case reminds employers of the importance of taking sexual harassment and discrimination complaints seriously, investigating the allegations and making sure that the complaining employee is aware of his or her rights. Although federal law provides an affirmative defense to Title VII harassment claims, California employers should be mindful that under FEHA, a company is automatically liable for sexual harassment perpetrated by a supervisor or agent of the employer, even if it has taken reasonable steps to prevent and remedy harassment.

## Daily Breathalyzer Test Is Reasonable Demand of Alcoholic Employee

Terminating an admittedly alcoholic employee for failing a daily breathalyzer test is permitted by the Americans With Disabilities Act, a federal court in Illinois has held. In *Nauseda v. Tootsie Roll Industries*, Alex Nauseda worked as a Supervisor in the Company's maintenance department. As a Supervisor, Nauseda was responsible for using heavy machinery and for ensuring the safety of his crewmembers. During his employment, Nauseda unexpectedly checked himself into a hospital to undergo treatment for alcohol dependency. Upon discharge, the Company informed Nauseda that he needed to remain alcohol-free and that he would have to submit to a daily breathalyzer test to ensure he was doing so. When Nauseda failed the breathalyzer test one day, and then lied about how much he had had to drink, the Company terminated his employment. Nauseda filed a lawsuit for discriminatory discharge under the ADA, alleging that the Company improperly forced him to submit to the breathalyzer tests in order to terminate his employment. The Court rejected Nauseda's suit, finding that the daily breathalyzer test was a generous accommodation, above and beyond what the Company had to provide. The Court noted that it likely would have been proper to terminate Nauseda even without providing this accommodation, as an employer may hold an alcoholic employee to the same standards for employment as it holds other employees. While an employer should consult with counsel regarding the accommodation of alcoholic employees, this case reinforces that an employer is not required to 'accommodate' alcoholic workers by lowering their performance or safety standards.