



## Employee Overcomes Dismissal Of Disability-Based Claims When Court Holds That Eating Constitutes Major Life Activity

The Ninth Circuit Court of Appeals recently held that an employee suffering from type I insulin-dependent diabetes was disabled under the Americans with Disabilities Act (“ADA”) because she was significantly limited in the major life activity of eating. In *Rebecca Ann Fraser v. Carol Goodale, et al.*, Fraser, a Senior Account Specialist, sued her former employer, United States Bancorp (USB), contending USB discriminated against her because of her diabetes. Fraser’s diabetes was so severe that she was forced to test her blood sugar four times each day, administer multiple injections of insulin and/or glucagons, carefully monitor her diet, and eat frequently. One day, Fraser’s supervisor notified her that she could not eat at her desk. When Fraser’s blood sugar dropped to dangerously low levels, she first sought her supervisor’s permission before eating at her desk but the supervisor told her to “come back when she had an intelligent question to ask.” Fraser became disoriented and eventually fainted. She later complained, but to her knowledge, USB never disciplined the supervisor.

Four months after the incident, USB terminated Fraser. She responded with a lawsuit alleging retaliation, discriminatory discharge, and failure to implement reasonable accommodations for her disability. The district court dismissed Fraser’s claims on the basis that she failed to present a genuine issue of material fact as to whether she was disabled under the ADA. However, the Ninth Circuit reversed, holding that Fraser’s diabetes met the ADA definition of disability – “a physical or mental impairment that substantially limits one or more of the major life activities of [the plaintiff].” The Court noted that the inquiry of whether an impairment substantially limits a major life activity is an individualized inquiry that must take into account the nature, severity, duration and impact of the impairment, together with mitigating measures (such as insulin injections) and the side effects and burdens thereof. The Court held that: (1) eating constitutes a major life activity, and (2) Fraser presented sufficient evidence that her burdensome diabetes treatment regimen substantially limited her ability to eat.

Although this decision addressed federal law, a similar result would likely occur under California’s disability statute, which defines a disability as an impairment that merely limits (not substantially limits) a major life activity.

## Sleep Disorder Sufferer Who Requires Flexible Schedule Able To Overcome Summary Judgment On Retaliation and Disability Discrimination

A New York federal district court recently held that an employee with a sleep disorder who needed a flexible work schedule presented enough evidence to survive a motion to dismiss and take his retaliation and disability discrimination claims to trial. In *Martin Varone v. City of New York et al.*, Varone suffered from Delayed Sleep Phase Syndrome, an affliction characterized by difficulty initiating sleep and consequent difficulty rising in the morning. Varone spent twenty-two years as a mainframe computer programmer with the New York Human Resources Administration (“HRA”). Varone advised HRA about his sleep disorder when he was hired, and the company responded by implementing a flexible work schedule which it permitted Varone to follow for 15 years. During that time, he performed his duties well and received good evaluations. In 1988, Varone asked HRA to reduce to writing his flexible schedule arrangement. HRA refused, but continued to permit Varone to work the flexible schedule. Varone later filed a charge with the New York Human Rights Department, alleging that HRA discriminated against him on the basis of his disability through its refusal to formalize his work schedule, and its failure to promote him or give him merit raises. Within weeks of his filing the charge, HRA forced Varone to work a fixed schedule for the first time, instituted disciplinary charges against him when he allegedly failed to follow proper procedures when he took sick leave, and later terminated him. It later reinstated him when the Civil Service Commission deemed that termination “excessive,” but not to the same position. When Varone returned to work, his supervisor told him, “You are not welcome here;” and the company scaled back his flexible schedule substantially. Varone made numerous requests over seven months to discuss his schedule with his superiors, to no avail. Varone eventually resigned and filed suit.

The Court held that Varone had presented enough evidence for a jury to find a constructive discharge, retaliation, and failure to engage in any interactive process of negotiation with regard to his reasonable accommodation claim. HRA argued that no reasonable accommodation existed that would have enabled Varone to perform the essential functions of his job and that the only accommodation Varone indicated he would accept was a fully flexible schedule, which HRA said would be ineffective and unreasonable as a matter of law. The Court disagreed, pointing to the fact that Varone had operated under such a schedule for 15 years, and that Varone had introduced evidence showing he was willing to consider other, less flexible alternatives.

Although not from a California court, this case demonstrates the broad scope of disabilities protected by the ADA, as well as the importance of carefully discussing and implementing reasonable accommodations for disabled employees.

### **Employee Fired After Reporting Sexual Harassment Of Co-Worker May Proceed To Trial On Retaliation Claim**

The Ninth Circuit Court of Appeals recently held that an employee who was terminated following his complaint of sexual harassment on behalf of another employee had sufficient evidence to avoid dismissal of his retaliation claim and proceed to trial. In *Hernandez v. Spacelabs Medical Inc.*, the plaintiff, Freddy Hernandez, believed that his supervisor, Rob Pray, was sexually harassing Hernandez' female co-worker, Salita Sam (also supervised by Pray). Pray allegedly approached Sam during a night shift when she was working alone and asked her to take him home so they could have sex, and made other inappropriate remarks. Sam was afraid to report the harassment because she feared retaliation. When Pray saw Hernandez and Sam talking, he directed Hernandez to go elsewhere. Thereafter, an HR representative informed Hernandez that Pray was unhappy with his performance, and Hernandez responded by complaining about Pray's harassing behavior, which triggered an investigation by the company. But before the investigation concluded, Spacelabs terminated Hernandez on the grounds that he engaged in "extremely serious violations of corporate procedures" (some of the alleged violations occurred before Hernandez complained). Hernandez claimed he did not engage in the alleged violations, and even if he had, Spacelabs would never have terminated him. Spacelabs convinced a trial court that Hernandez' alleged performance deficiencies were a legitimate, nondiscriminatory reason for its decision to terminate him. However, the Ninth Circuit reversed, and held that there was a genuine issue of material fact as to whether Spacelabs' proffered reason for his termination were pretextual.

### **Jury Finds Muslim Executive Not Discriminated Against By Questions Regarding National Origin and Religion.**

On September 11, 2003, a California federal district court jury concluded that a Lebanese-American vice president was not pressured to quit because of alleged national origin discrimination by his superiors. During his tenure as a vice president for Advanced Micro Devices (AMD), Walid Maghribi attended a dinner party with several AMD executives. During the dinner, the 9/11 tragedy was a prominent topic of discussion, and eventually, AMD's chairman asked Maghribi whether he was a Muslim Arab. Maghribi acknowledged that he was. Maghribi claimed that, after the dinner, his superiors retaliated against him, primarily by ordering him to take steps that would sabotage an important business deal he was working on. Maghribi resigned and thereafter sued, alleging that he was forced to resign because AMD discriminated against him because of his national origin and religion and thereby created an intolerable work environment.

At trial, AMD presented substantial evidence that Maghribi left the company because he was discouraged about being unable to structure the multi-billion dollar business deal in question for his personal gain, and not because the company allegedly created an intolerable work environment. The jury deliberated for only two hours, rendered a verdict for AMD (ironically, on the second anniversary of the 9/11 tragedy), and later said they viewed the situation as a management dispute over a business deal, not discrimination.

This case, *Maghribi v. AMD*, was originally reported in the May 15, 2003 edition of the **W.E.B. Update**.