



## Terminated Employee Fails To Establish Employer Regarded Him As Disabled

The Seventh Circuit Court of Appeals (encompassing Illinois, Indiana and Wisconsin) recently affirmed the dismissal of a terminated employee's discrimination claim under the Americans with Disabilities Act ("ADA"). In *Tockes v. Air-Land Transport Svs, Inc.*, defendant Air-Land hired plaintiff Tockes in 1998 as a flatbed truck driver. Although Tockes permanently injured one of his hands 13 years prior to his hire, the injury did not limit his ability to drive the truck or fasten loads to it. Air-Land terminated Tockes one month after his hire because he failed to properly secure a load to the truck, in violation of the company's safety rules. Tockes sued Air-Land for disability discrimination under the ADA based on his allegation that, when he was fired, an Air-Land representative told him he was "crippled," "disabled" and "handicapped." Tockes conceded he was not disabled within the meaning of the ADA (specifically, that his hand injury did not cause him to be substantially limited in a major life activity), but he argued that Air-Land's statements upon termination established that the company terminated Tockes because of a false belief that he was disabled. The court disagreed.

Under the ADA, a plaintiff may establish disability discrimination by showing he is disabled within the meaning of the ADA and his employer took adverse action on the basis of that disability, or by showing the employer took adverse action against him based on a perceived disability. Both the trial court and the court of appeals rejected Tockes' claim because he failed to adduce evidence that Air-Land falsely believed he was disabled *within the meaning of the ADA*. The court of appeals held: "[u]nless the employer mistakenly believes that an employee has a disability grave enough to be so classified under the ADA, the employer's acting on the mistaken belief does not violate the statute." The court observed: if Air-Land believed Tockes was disabled within the meaning of the ADA, "it would have been unlikely to hire him to drive a flatbed truck, at least without altering the controls so that he would not have to operate the manual gear shift with his damaged right hand."

This decision illuminates the precise hurdles a plaintiff must overcome to establish a "perceived disability" claim under the ADA. Nevertheless, employers should be mindful that false perceptions about an employee's disabling condition may support a disability discrimination claim. Further, California employers must remember that California disability law is more favorable to employees than federal law.

## Employer's Interference With Employee's FMLA Leave Likely Doubles Employee's Damages

The Sixth Circuit Court of Appeals (encompassing Michigan, Ohio, Kentucky and Tennessee) recently clarified the kinds of damages an employee may recover when an employer violates the federal Family and Medical Leave Act ("FMLA"). In *Arban v. West Publishing Corp.*, the court affirmed a jury verdict in favor of the plaintiff Arban and sent the case back to the trial court to re-consider whether to award liquidated damages (*i.e.*, a doubling of the compensatory damages awarded plaintiff). Arban served as a field sales representative for West for three years. Shortly before his separation from the company, Arban commenced a three-week FMLA leave of absence based on his physician's diagnoses of "severe esophagitis and stress." However, during the leave, Arban's supervisor repeatedly called him at home requesting assistance on various matters, and Arban responded that he could not comply with the requests for assistance. Eventually, and while Arban was still on his protected leave, West threatened to terminate him based in part on his failure to assist the supervisors with certain accounts. Arban responded with a letter of resignation and later sued West under FMLA.

At trial, the jury concluded that West violated the FMLA provision which states "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided [under the FMLA]." In response to the jury verdict, the trial judge awarded Arban roughly \$130,000 in compensatory damages and interest, and roughly \$95,000 in attorneys' fees and costs. However, the judge declined to award liquidated damages, which are mandatory under the FMLA unless the employer proves that it acted in good faith and possessed reasonable grounds for believing that the act or omission was not an FMLA violation. The court of appeals concluded that the trial judge abused his discretion because his denial of liquidated damages was inconsistent with the jury's finding that West terminated Arban because he took a protected leave and refused to work during the leave. Therefore, the court remanded the case back to the trial court to reconsider the issuance of such damages in light of the jury's finding.

This case highlights the importance of not just granting an FMLA-protected leave of absence but also honoring the employee's right not to perform any work while on such leave. Indeed, given the court of appeals' holding, the trial court will likely double the \$130,000 compensatory damage award.

### **Court Clarifies When Employer May Conduct Medical Examination To Assess Disabilities**

A recent federal district court decision articulated the rules for employers regarding when and to what extent they may require employees to submit to medical examinations to confirm disabilities and/or identify reasonable accommodations. In *Jackson v. Lake County*, the plaintiff Jackson claimed his former employer, Lake County, violated the Americans with Disabilities Act (“ADA”) by, among other things, demanding that he submit to a “blanket mental examination.” The court denied both parties’ motions for summary judgment; however, its discussion of ADA medical examinations was instructive.

Jackson served as a utility worker for Lake County. Based in part on a serious car accident Jackson caused (rear-ending several passenger cars while driving a 25-ton sewer cleaning truck), Jackson’s supervisors asked him to take a psychological examination at the county’s expense. Lake County had no evidence (through comments by Jackson or otherwise) that Jackson suffered from some mental or physical impairment. Rather, Lake County ordered the examination to determine whether such an impairment existed and whether accommodations were necessary. Jackson refused to attend the examination, and the county terminated him.

The ADA provides that employers shall not require a medical examination and shall not make inquiries of an employee as to the existence, nature or severity of a disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. The court in *Jackson* addressed two issues. First, the court examined whether this limitation applied to Jackson, who admitted

that he did *not* suffer from a mental or physical impairment. The court concluded that a non-disabled employee may bring an ADA suit under the above provision based upon an improper medical inquiry and/or examination. “To hold otherwise . . . would afford Jackson, or any other employee, protections from prohibited examinations only if they prove that they are disabled.” Thus, Jackson could proceed to trial on a claim of an improper medical inquiry under the ADA even though he is clearly not disabled.

Second, Lake County argued that its proposed psychiatric examination was “job-related and consistent with business necessity,” and it urged the court to adopt a subjective, rather than objective, standard for evaluating whether the examination meets the ADA test. The court held as a matter of law that the trial court must apply an *objective* standard to the analysis. Thus, Lake County may not rely on its subjective belief that the examination was job-related and necessary from a business standpoint; it must establish that a “reasonable person” would have reached the same conclusion.

This case illustrates the need to carefully analyze the justification for an employee medical examination before asking the employee to submit to one. It further confirms that employers will not escape liability for improper medical examinations on the grounds the employee is not disabled.