FENWICK & WEST LLP

Fenwick Employment Brief

July 20, 2005

Victor Schachter Co-editor 415.875.2487
Saundra L. M. Riley Co-editor 650.335.7897
Mary Wang Contributor 650.335.7154

EMPLOYEE'S VERTIGO NOT A DISABILITY UNDER THE ADA

A federal district court in Illinois recently rejected an employee's claim that vertigo is a protected disability under the Americans with Disabilities Act ("ADA"). In *Yindee v. Commerce Clearing House*, plaintiff Malinee Yindee sued her former employer, Commerce Clearing House ("Commerce"), for unlawful discrimination under the ADA. In 2000, Yindee was diagnosed with cancer, which she overcame through medical treatment. In 2002, Yindee suffered from periodic, unexplained bouts of dizziness and was diagnosed with vertigo. Commerce attempted to accommodate the vertigo by permitting Yindee to telecommute, but the arrangement failed due to performance issues. After a leave of absence and a probation period under a performance improvement plan, Commerce terminated Yindee for poor performance. Malinee sued Commerce, alleging discrimination based on her cancer and vertigo.

To invoke the protections afforded by the ADA, an employee must first show she suffers from a "disability" – an impairment that substantially limits one or more of the employee's major life activities. Acknowledging that cancer can be a disability for ADA purposes, the Court held that Yindee failed to provide evidence that she still had the cancer or was disabled by the cancer in 2002. Turning to the dizzy spells, the court held that vertigo did not substantially limit Yindee in a major life activity. The only activity limited by Yindee's dizzy spells was her ability to drive, which "in and of itself is not of central importance to daily life, on par with activities such as seeing, hearing, or working in a broad class of jobs." Thus, Yindee's vertigo was not a disability under the ADA.

While the court's decision was favorable for Commerce, employers should remember that determinations of whether an employee is disabled are fact-specific and should ensure that proper measures are undertaken to evaluate an employee's request for accommodation. Further, California employers should be aware even impairments that fall short of the ADA requirements may be covered by the broader protections afforded by the California Fair Employment and Housing Act.

SAME-ACTOR INFERENCE DEFEATS NATIONAL ORIGIN DISCRIMINATION CLAIM

In a favorable decision for employers, the Ninth Circuit Court of Appeals applied the same-actor inference to an employee's national origin discrimination claim, dismissing it on summary judgment. In *Coghlan v. American Seafoods Co.*, plaintiff James Coghlan sued his former employer, American Seafoods, for national origin discrimination under Title VII. Coghlan was initially hired by Inge Andreassen, who later also transferred Coghlan to a higher paying position. Coghlan claimed that Andreassen thereafter passed him up for promotions and assigned him to undesirable positions. The district court granted summary judgment in favor of the employer, and the Ninth Circuit affirmed.

Previously, the Ninth Circuit ruled in discriminatory terminations: "where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period

of time, a strong inference arises that there was no discrimination action." The *Coghlan* court recognized that the logic of the same-actor rule also applies where a plaintiff is offered a less desirable job assignment. Accordingly, the court applied the same-actor inference to Coghlan's claims because Andreassen, the person responsible for the challenged employment decisions, also hired Coghlan. The court found that Coghlan failed to present sufficient evidence of unlawful discrimination.

While the same-actor inference is helpful to employers faced with a discrimination claim, employers still need to carefully screen the termination or discipline of employees within a protected group.

EMPLOYEE'S FMLA CLAIM DEFEATED BY LACK OF NOTICE

In a favorable ruling for employers, the Eighth Circuit Court of Appeals (covering Missouri and other mid-western states) granted summary judgment for an employer where the employee failed to provide adequate notice of and documentation to support his leave under the Family and Medical Leave Act ("FMLA"). In *Woods v. DaimlerChrysler Corp*., plaintiff Michael Woods sued his former employer, DaimlerChrysler ("Daimler"), when it discharged him for two unauthorized absences within a five-week period. Woods claimed he left work on the second occasion (and remained off work for two weeks) because his work-induced stress threatened his health and well-being. During that time, Woods visited his doctor and mailed Daimler doctor's notes indicating he should remain off of work. During the same period, Daimler sent Woods a letter notifying him it believed the absence to be unauthorized and requiring Woods to contact a human resources representative. Upon his return, Daimler suspended Woods, informing him that it considered his absence to be unsubstantiated. Woods made no further attempt to substantiate his absences or request FMLA leave. Daimler fired Woods and he sued. The court granted summary judgment for Daimler, concluding that Woods had failed to give Daimler adequate notice of a need for FMLA leave. Woods appealed, and the Eighth Circuit upheld the ruling.

An employee must provide his employer with adequate and timely notice of the need for FMLA leave, and the employer has the right to request supporting information from the employee. Such information must show that the health condition could be serious and provide an anticipated return date. The court held that Woods failed to provide such information. The court recognized that, if Woods wanted to take FMLA leave, it was his responsibility to give notice "as soon as both possible and practical" that a serious health condition caused his absence.

While this case reminds employers that they have a right to request their employees provide timely and adequate notice of the need to take FMLA leave, it also underscores the importance of providing employees with the opportunity to timely substantiate their absences or request FMLA leave. In this case, because Woods failed to provide such information, he was precluded from later invoking the protections of the FMLA.

INDEPENDENT CONTRACTOR MAY STATE DISCRIMINATION CLAIM UNDER UNRUH ACT

A California appellate court permitted a physician to proceed on his discrimination claim against a hospital under California's Unruh Act. In *Payne v. Anaheim Memorial Medical Center, Inc.*, plaintiff David Payne sued Anaheim Memorial Medical Center ("Anaheim") for race discrimination, alleging it failed to redress racial discrimination against minorities thereby providing lesser services to minority physicians and patients. Payne had physician's benefits with Anaheim, but he did not work for Anaheim. Anaheim did not compensate Payne for his medical services or directly control the manner in which Payne practiced medicine. In essence, plaintiff was an independent contractor of the hospital.

The Unruh Act prohibits business establishments from denying "full and equal accommodations, advantages, facilities, privileges, or services" on the basis of "sex, race, color, religion, ancestry, national origin, disability, or medical condition." Anaheim claimed

that Payne could not state a claim under the Unruh Act because it offered its facilities only to physicians, not to all members of the public. The court rejected Anaheim's argument, holding that the Unruh Act's prohibition applies to businesses and public facilities, even if they did not offer their services to all members of the public. The court found that the Act may be applied to the relationship of plaintiff to the hospital as an independent contractor. Thus, companies must exercise care in their relationships with independent contractors, just as they would with employees.

LABOR COMMISSIONER CLARIFIED PENALTY FOR MEAL OR REST PERIOD VIOLATIONS

Under California Labor Code Section 226.7, an employer who fails to provide meal or rest breaks for applicable non-exempt employees must pay the employee one additional hour for each day the breaks were not provided. In *Hartwig v. Orchard Commercial, Inc.*, the Labor Commissioner issued a "Precedent Decision" that the additional hour of pay is a "penalty" rather than a "wage" owed to the employee.

The *Hartwig* decision is good news for employers for two reasons. First, the "penalty" designation means that employers are not subject to additional waiting time penalties for failing to pay their terminated employees the additional hour penalty. Second, violations enforced by penalties are subject to a one-year statute of limitations, compared to the three-year statute of limitations for a wage violation.

Although the "Precedent Decision" does not carry the authority of a formal regulation or court approval, the Labor Commissioner has adopted a reasonable interpretation of the statute, which will likely be upheld even if challenged in court. Employers may reasonably rely on this interpretation, and should take appropriate steps to ensure compliance.