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Weekly Employment Brief

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Injured Employee May Sue Employer for Failure to Accommodate

A California Court of Appeal recently held that an employee, injured on the job because of the employer's failure to accommodate a known disability, can maintain an action for damages under California's Fair Employment and Housing Act (FEHA). In *Bagatti v. Department of Rehabilitation,* an employee who suffered from polio had requested motorized transportation to accommodate her inability to move around the worksite. After the employer denied the accommodation, the employee fell at work and seriously injured herself. The Court ruled that FEHA prohibits both disability discrimination and failure to reasonably accommodate a disability — either of which will support an action for damages arising from such unlawful practices. Additionally, the court held that work-related injuries arising from a failure to accommodate fall outside the scope of the Workers Compensation Act. Employers should be aware that failing to accommodate a disabled employee, even absent a discriminatory motive, risks exposure under FEHA.

Third Circuit Expands ADA to Cover Retaliation Claims by Third Parties

In a case that broadened the scope of the Americans with Disabilities Act (ADA), the Third Circuit Court of Appeals recently held that non-disabled individuals can maintain a suit under the ADA if their employer terminates them because a friend or relative filed an ADA suit against the same employer. In *Fogelman v. Mercy Hospital, Inc.,* a son sued his former employer for terminating him because his father—who had also worked for the employer—sued the employer for disability discrimination. While recognizing that the text of the ADA did not clearly authorize third-party suits, the Court determined that permitting such suits would further the policy objectives of the ADA. The ADA prohibits coercing or interfering with an individual on account of exercising rights under the ADA, and the Court found that an employer's termination of friends or relatives of employees who file discrimination suits could have a coercive effect on the employees who are engaging in the protected activity. The Court noted that, alternatively, the employer could be liable for terminating the son because it thought he was assisting his father with his father's lawsuit, even if that was not the case. This case highlights the importance of carefully evaluating the "big picture" before disciplining someone related to an employee in a protected class and making all employment decisions based on legitimate reasons.

Employer's Failure to Object to Employee's Unilateral Modification of Offer Letter May Constitute Acceptance of the Change

In a case that highlights the potential perils of not reading employment agreements that a prospective employee signs and returns, the First Circuit Court of Appeals held that silence may constitute acceptance of an employee's modification to an offer letter. In *McGurn v. Bell Microproducts, Inc.,* the employer sent an offer letter to an individual stating that she would receive a large severance package if she was terminated in the first twelve months of employment. The individual crossed out the twelve-month term and replaced it with a twenty-four month term, and then signed and returned the letter to the employer and began work. The employer fired the employee thirteen months later and refused to pay the severance amount in the offer letter. The trial court granted summary judgment in favor of the employee, holding that the employer's silence after receiving the modification constituted acceptance of the modified offer. The appellate court noted that modification of an offer letter constituted a rejection of the offer and a proposed counter-offer. The court held that the employer's silence could constitute acceptance of the counter-offer, if the employer knew or should have known about the modification and permitted the employee to work. The court reversed the district court's grant of summary judgment, however, because there was a factual question whether the employer noticed or should have noticed the modification. This case underscores the need for employers to carefully review all documentation from employees and applicants and to ensure that the documents are both signed and unmodified.

Employer Wins Summary Judgment on FMLA Retaliation Claim Because of Well-Documented Evidence of Performance Problems

A federal district court in Maine recently granted a rare summary judgment victory to an employer in a retaliation claim under the Family and Medical Leave Act (FMLA). In *Pierce v. Alice Peck Day Memorial Hospital,* the employee claimed she was demoted and ultimately forced to resign because she took two weeks off to care for her terminally ill father. Even though the employee was demoted the day she began the leave and was forced to resign less than two months after she returned, the court found that serious and well-documented performance problems—both before the employee took the leave and continuing after she returned—justified the employer's actions. The court concluded that no reasonable jury could find that the employer's actions were in retaliation for the employee's taking leave—particularly since "a one time leave of only two weeks to attend to a terminally-ill father is not the type of absence generally thought to evoke hostile retaliatory action." This case underscores the value of carefully and contemporaneously documenting employee performance problems.