



California Supreme Court To Decide Whether Protection Against Age Discrimination Includes Worker Benefits

In a case that could have significant implications for older employees, the California Supreme Court recently heard oral arguments on whether the Fair Employment and Housing Act prevents employers from denying certain benefits to employees over age 40. In *Esberg v. Union Oil*, a 57-year-old employee challenged his employer's refusal to sponsor his pursuit of a master's degree under a company education program. The company previously had reimbursed the employee for education costs associated with getting his bachelor's degree, but told him he was too old "to invest in" further. While the law prevents employers from firing an employee because of his age, the tenor of the Court's questioning suggests that it will likely rule that employers may deny certain benefits based on age. Unlike the California statute prohibiting discrimination on other bases, the California age discrimination statute does not expressly prohibit discrimination through denial of benefits. Employers should pay close attention to the outcome of this case, which could have significant ramifications for the administration of company benefits. When the Court issues its decision, it will be included in a future **W.E.B. update**.

Hearing-Impaired Driver May Pursue ADA Suit for Failure to Accommodate

The U.S. Supreme Court recently declined to review, and thereby let stand, a Ninth Circuit Court of Appeals decision that permits a severely hearing-impaired employee to proceed with her claims under the Americans with Disabilities Act. The Ninth Circuit case, *Morton v. United Parcel Service Inc.*, revolved around UPS's refusal to promote the employee to a "package car driver" position. Her hearing impairment prevented her from receiving the Department of Transportation certification that was necessary to drive 90% of UPS's fleet. UPS claimed the ability to drive all UPS vehicles was an "essential function" of the package car driver position. The employee claimed, however, that UPS could have accommodated her disability by providing her with a swing driver position, driving only smaller vehicles that did not require DOT certification. Reversing summary judgment in favor of UPS, the Ninth Circuit held that a reasonable jury could find that driving DOT-certified vehicles was not an essential function of the job of package car driver. The court also found a triable issue of fact on UPS's defense of business necessity, which required the company to show that substantially all drivers with similar hearing impairments present a higher risk of accidents than non-impaired drivers. This case demonstrates the importance of engaging in the interactive process with disabled employees to attempt to find a reasonable accommodation, and of evaluating each case on an individualized basis.

Federal Court Strictly Enforces FMLA Eligibility Requirements

A federal district court in the U.S. Virgin Islands recently held that the employment qualifications of the Family and Medical Leave Act must be met exactly before an employee is eligible for statutory benefits. In *Corcino v. Banco Popular de Puerto Rico*, the employee had a history of excessive absenteeism and had been warned that continued absences were grounds for dismissal. When she missed additional work due to illness, the bank terminated her. The employee sued under the FMLA, which requires reinstatement of eligible employees following their return from FMLA leave. Employees are not eligible for FMLA leave, however, unless they have worked 1250 hours during the 12-month period preceding the leave. The district court found that the employee failed to meet the statutory requirement by 53 hours and thus was precluded from claiming FMLA protection. This case serves as a reminder that, not only should employers be aware of leave law requirements, but they also should make it clear to employees that the law has eligibility requirements that must be met.

Ninth Circuit Rules That FMLA Covers Leave to Care For a Parent's Psychological Needs

Broadly interpreting the Family and Medical Leave Act, the Ninth Circuit Court of Appeals recently held that employees are entitled to take FMLA leave to "care for" the psychological conditions of family members, even if those family members are not physically incapacitated. In *Scamihorn v. General Truck Drivers*, an employee took unpaid leave, following the murder of his sister, to care for his severely depressed and elderly father, pursuant to the recommendation of his father's treating physician. When the employee returned from the leave of absence, he was first denied reinstatement and then hired as a probationary employee with none of his prior seniority. In reversing the lower court's grant of summary judgment in favor of the employer, the Ninth Circuit held that the employee's aid to his father's psychological well-being qualified him for FMLA leave even though the father could care for his own physical needs. The court also held that the employee could be entitled to FMLA protection even though he exceeded the FMLA's twelve-week leave limit because the employer failed to advise him of his FMLA rights. This case highlights the importance of properly advising employees of their rights and duties under the FMLA and of working with counsel to navigate the complexities of the FMLA.