FENWICK & WEST LLP

Weekly Employment Brief

July 23, 2001

Michael Weil Contributor
Thomas Moyer Co-Editor
Allen Kato Co-Editor 415.875.2464

Employers Must Be Creative When Accommodating Disabled Employees

Employers must think "creatively" when accommodating disabled employees. A recent Third Circuit opinion held that the ADA compels employers to look deeper and more creatively into the various possibilities suggested by an employee with a disability, and cannot justifiably reject a proposal merely because the accommodation may be "inconvenient." In *Skerski v. Time Warner Cable, Co.*, a cable service technician, diagnosed with a panic disorder, experienced anxiety symptoms when installing cable at heights, and could no longer perform that function of his job. He informed his employer that he could resume climbing if he was allowed to use a "bucket truck" when climbing, but his employer rejected the idea because it would have been inconvenient to make those adjustments to retain him. The Court criticized the employer's reasons for failing to accommodate, and allowed the employee's suit to proceed.

Misclassifying Employees Under Wage and Hour Laws Proves Costly

Classifying employees for purposes of wage and hour laws should not be taken lightly. In one of the state's largest class-action awards for overtime pay, a northern California jury recently awarded 2,400 current and former Farmers Insurance Exchange adjusters more than $90 million on claims that Farmers improperly denied overtime pay. According to a California Appellate Court, Farmers misclassified the claims representatives as "administrative employees" and thus exempt from overtime. Employers should remember that employees must be classified according to their particular responsibilities and not by their job title.

Employers May be Liable for Sexual Harassment Based on Acts of Nonemployees

Employers must make the work environment safe from *all* potential harassers. In a recent opinion, the Tenth Circuit ruled that a psychologist who was sexually assaulted by a patient can sue her former employer, a mental health center, for violating Title VII of the 1964 Civil Rights Act by failing to take reasonable measures to protect her from a hostile environment. The court said that an employer can be held liable for sexual harassment based on acts of nonemployees if it failed to remedy or prevent a known hostile environment. The court commented that the focus is not on the conduct itself, but on the employer's behavior in response. Employers are well advised to remember that while they cannot control an individual's actions, they are entirely responsible for the Company's response thereto.

Anti-White Slurs Also Create a Hostile Environment

Use of any racial epithets can create a racially hostile environment. A U.S. District Court in Maryland ruled that a prison employee of Filipino and Native American descent whose co-worker repeatedly called him "white boy" and "cracker," can sue his employer for failing to address a racially hostile environment. If the employee shows that he was subjected to unwelcome harassment based on his race and the harassment created an abusive working environment, his employer could be liable. The court commented that it was not relevant that the harasser was not technically accurate in describing the employee's race.

Employers May Discover the Identities of Their Employees Who Anonymously Post Confidential Information

Employers can identify employees who anonymously post damaging information on the Internet. A New Jersey state court recently ruled in *Imunomedics Inc. v. Jean Doe* that an Internet service provider must disclose to a New Jersey biopharmaceutical company the name of an anonymous Internet user who, describing herself as a "worried employee," posted confidential information about the company on an ISP's finance message board. While anonymous Internet speech is ordinarily protected, an employee's identity can be identified if the employer proves that the employee's message breaches the company's employee confidentiality agreement or otherwise harms the company.