FENWICK & WEST LLP

Weekly Employment Brief

August 12, 2002

Trey Wichmann Contributor 650.858.7813
Victor Schachter Editor 650.858.7905

Sales Manager Fails to Establish "Disability" Due to Workplace Stress

A federal appellate court recently held that an employee who experienced high stress levels from increased job responsibilities was not disabled under the ADA. In *Carroll v. Xerox Corp.,* a Boston sales manager began experiencing chest pains, which his doctor connected to his increased workload, following corporate downsizing efforts. Carroll complained about his workload to his manager and also requested early retirement, but his position did not qualify for Xerox's early retirement program. After a three-month disability leave, Carroll successfully applied for a transfer to a sales representative position in the Houston office, a position with less responsibility but also a lower salary. Carroll worked in Houston for two years before retiring, and did not request any accommodation while in that position. Carroll nonetheless sued Xerox for failing to accommodate his disability by either reducing his workload in Boston or maintaining his salary after the transfer to Houston, and for discriminating against him by denying his request for early retirement. The First Circuit Court of Appeals affirmed the district court's grant of summary judgment to Xerox, holding that Carroll's condition did not "substantially limit" the major life activity of working, because it did not significantly restrict his ability to perform a broad range of jobs as required by the ADA. Rather, his condition only limited his ability to handle the workload in the Boston sales manager position. While this case was a victory for the employer, California employers should be cautious, because the California disability statute requires only that an impairment "limit" (rather than "substantially limit") a major life activity, and a person is considered disabled even if the limitation affects only a single job rather than a class of jobs.

Labor Department Seeks Back Pay for Undocumented Workers

The United States Department of Labor (DOL) recently issued a statement indicating it would continue to seek back pay for undocumented workers under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA). The issue of back pay to undocumented workers became a hot topic when the U.S. Supreme Court held that the National Labor Relations Board could not award back pay to an undocumented alien who was terminated for engaging in legally-protected union organizing activities. See *Hoffman Plastic Compounds, Inc. v. NLRB* (reported in the April 8, 2002 edition of the W.E.B. Update). In Hoffman Plastics, illegal aliens sought back pay for time they would have worked had they not been illegally fired. The Court held that aliens could not recover wages for hours which were not worked and which could not lawfully have been earned. The DOL statement distinguished that result, noting that under FLSA and MSAWPA employees are seeking wages for hours they have actually worked. Although it remains to be seen whether the Supreme Court will agree with the DOL position, at least one California federal district court recently relied on similar reasoning to deny a company's request for discovery about employees' immigration status. See Flores v. Albertson's, Inc. Significant future developments will be reported in upcoming editions of the **W.E.B. Update.**

FMLA Claim Fails Because Company Decided to Replace Employee Before He Requested Leave

A federal district court in Maryland has dismissed an employee's FMLA claim after the employer demonstrated it had already taken affirmative steps to replace him prior to his request for FMLA leave. In *Ahmarani v. Sieling & Jones, Inc.,* the plaintiff was fired upon his return from a leave of absence for surgery related to prostate cancer. Ahmarani sued the company under the FMLA for failing to restore him to his position or an equivalent position upon his return from a qualified leave. The court granted the company's summary judgment motion based on the uncontroverted evidence that the company had decided to terminate Ahmarani and had, in fact, interviewed his ultimate replacement prior to Ahmarani's request for leave. This case illustrates how the FMLA does not entitle an employee to any right or position other than what they would have been entitled to had they not taken the leave. Nonetheless, employers should be careful that they do not allow an employee's request for leave to be the catalyst for adverse employment action.

FMLA Leave Can Be a Reasonable Accommodation Under the ADA

The federal Tenth Circuit Court of Appeals has held that FMLA leave may be a reasonable accommodation of a disability under the ADA. In *Smith v. Diffee Ford-Lincoln-Mercury, Inc.,* the plaintiff warranty clerk was terminated while she was on leave for breast cancer treatment. Smith's supervisor had previously reprimanded her for failing to train several junior employees on how to perform the warranty claims submission process, but had not given her a deadline to complete that training. While Smith was still on medical leave, her supervisor determined that she had not adequately trained anyone to perform the job in her absence, which resulted in a backup in the processing of the warranty claims, and he terminated Smith. Smith sued the company under the FMLA and ADA. The district court granted the company's summary judgment motion on the ADA claim, finding that Smith had not presented evidence that the company had discriminated against her because of her disability. Smith prevailed at jury trial on her FMLA claim, however, because the jury found that she would have remained employed had she not gone on leave. The appellate court reversed the lower court's ruling on the ADA claim, holding that Smith's limited leave request may qualify as a reasonable accommodation for her disability, and that the company's failure to let her complete her leave could constitute discrimination. This case demonstrates the interplay between the ADA and the FMLA, and demonstrates the risks an employer can face when it fails to set a clear deadline for an employee to improve her performance.