

AMERICANS WITH DISABILITIES ACT

NINTH CIRCUIT FURTHER DEFINES INTERACTIVE PROCESS REQUIREMENTS

On the heels of its decision last October in *Barnett v. U.S. Air*, the Ninth Circuit Court of Appeals has again taken the opportunity to remind employers of their obligations and responsibilities under the Americans with Disabilities Act (ADA) in the case of *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2/13/01).

Carolyn Humphrey began working as a medical transcriptionist for Memorial Hospitals Association in 1986. In general, Humphrey's performance was excellent, consistently surpassing her employer's standards for speed, accuracy and productivity. In 1989, however, Humphrey began demonstrating a significant absenteeism and tardiness problem. Specifically, she would engage in obsessive rituals at home by washing and re-washing her hair for up to three hours, checking and rechecking for papers, and pulling out individual strands of her hair to examine them closely. These obsessive thoughts and rituals made it very difficult for her to get to work on time. Because of her attendance problems, Humphrey received disciplinary warnings from her employer. In addition, the employer suggested counseling for Humphrey with the Employee Assistance Program, which was intended to give her "tips" as to how she could be on time to work by, for example, getting up earlier and laying out her clothes the night before.

Despite this counseling, Humphrey's attendance did not improve, and she sought professional help from a psychiatrist who diagnosed her with obsessive compulsive disorder. The doctor then wrote a letter to Humphrey's employer stating that her condition was directly contributing to her attendance problems and that she may need some time off work.

Upon receipt of the doctor's letter, the employer sat down with Humphrey to engage in an interactive process by which a reasonable accommodation could be found. Given that Humphrey wanted to continue working, the employer proposed a flexible start-time arrangement whereby she could commence work at any time within a 24-hour period on days

she was scheduled to work. Humphrey accepted this arrangement, and the employer asked her to submit any other requests for accommodation in writing.

It soon became apparent, however, that the flexible start-time accommodation was not working because Humphrey continued to miss work. She then asked for a different accommodation — the ability to work from her home. Even though the employer allowed other transcriptionists to work from home, it denied Humphrey's request because the discipline previously issued to her rendered her ineligible under the employer's rules. The employer proposed no further accommodations, and when Humphrey continued to be absent, she was terminated.

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AMERICANS WITH DISABILITIES ACT

ADA CLAIMS BARRED AGAINST STATE EMPLOYERS

On February 21, 2001, in a narrow 5-4 decision, the United States Supreme Court ruled that disability discrimination claims brought under the Americans with Disabilities Act are barred against state employers under the Eleventh Amendment to the United States Constitution.

Under the Eleventh Amendment, States are immune from being sued by private individuals in federal court. However, Congress may abrogate such immunity in order to enforce the guarantees contained in the Fourteenth Amendment that no State deprive any person of (1) life, liberty, or property without due process of law, and (2) the equal protection of the laws.

In finding that the States were immune from suits under the ADA, the Supreme Court held that the Fourteenth Amendment does not require the States to make special accommodations for the disabled, as long as the actions toward such individuals is rational. The Court also found that Congress had not identified any pattern or history of employment discrimination by the States against the disabled, further undermining its attempt to subject the States to ADA suits in federal court.

This case is a further extension of the Supreme Court's recognition of States' rights when measured against federal anti-discrimination legislation. Recall that in the Court's last term, it decided *Kimel v. Florida Board of Regents* which barred suits under the Age Discrimination in Employment Act (ADEA) against the States under the Eleventh Amendment. (*Bd. of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2/21/01)).

► INTERACTIVE PROCESS *CONTINUED FROM PAGE 1*

Humphrey then filed suit under the ADA, and the lower court granted summary judgment to the employer, finding that it had satisfied its duty to reasonably accommodate Humphrey's disability. Humphrey appealed to the Court of Appeals for the Ninth Circuit.

As a preliminary matter, the Ninth Circuit found that there were two possible accommodations which may have allowed Humphrey to remain employed: (1) a leave of absence, or (2) her ability to work from home. Because the employer had others in similar positions who were allowed to be home-based, the court found that physical presence in the employer's offices was not an essential function of the transcriptionist job.

Furthermore, the court stated that the articulated basis for the denial of the work-at-home request — namely the disciplinary warnings given for Humphrey's absences — was inappropriate. The court reasoned that the ADA's mandate would be frustrated if employers could deny otherwise reasonable accommodations on the basis of discipline which resulted from the very disability sought to be accommodated.

Next, the court held that the employer failed to meet its obligation to engage in the interactive process with Humphrey. Relying upon its prior decision in *Barnett*, the Ninth Circuit stated that the employer had a continuing duty to work with Humphrey to find an effective accommodation, particularly when it became evident that the flexible start-time option was not working. As the court ruled, the employer "had a duty to explore further arrangements to reasonably accommodate Humphrey's disability." Because the employer shut down the process, the court found that it had violated the ADA's reasonable accommodation requirement. As a result, the Ninth Circuit reversed the grant of summary judgment and remanded Humphrey's case.

Relying upon its prior decision in *Barnett*, the Ninth Circuit stated that the employer had a continuing duty to work with Humphrey to find an effective accommodation, particularly when it became evident that the flexible start-time option was not working.

The Humphrey case provides guidance to employers in two important areas when considering ADA issues. First, the duty to accommodate is one that is continuing, and

employers must be willing to work toward solutions even if previous accommodations have proven unsuccessful. Second, an employee's disciplinary record may not be a valid basis for denying an accommodation, especially where, as in this case, the discipline stems from the condition itself.

SEXUAL HARASSMENT**COMPANY LIABLE FOR DEFICIENCIES IN COMPLAINT PROCEDURE**

The Seventh Circuit Court of Appeals recently held that an employer's failure to inform its employees of the proper individual to whom sexual harassment complaints could be reported subjected it to liability. While the court found that the employer did have a clear policy against sexual harassment and that its managers and supervisors knew that harassment was illegal, no individual was clearly identified as the person to whom complaints could be reported. Surprisingly, the employer's Human Resources department took the position that it was not the proper avenue for employees to make complaints. Even though the employee did speak to

Human Resources about her concerns regarding her supervisor's behavior, no responsive action was taken. In addition, the employee was not directed to anyone else within the organization in order to report her complaint.

While most employers realize that it is crucial for them to maintain an effective written policy prohibiting workplace harassment, they also must understand that a clearly-identified complaint-reporting procedure should be included with the policy. Employees should not be left to guess as to who they should contact in the event of a complaint. KZ&A's recommendation has been to include a specific complaint-reporting procedure within the anti-harassment policy, spelling out the individuals to whom harassment complaints can be made. (*Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 1/25/01)).

DEFAMATION**E-MAIL RESULTS IN \$1.25 MILLION VERDICT**

Phyllis Meloff was fired in 1992 by her employer, New York Life Insurance Company, in connection with accusations regarding misuse of her corporate credit card for personal travel expenses. Following Meloff's termination, New York Life sent an e-mail to seven of its managers outlining her termination for using the credit card "in a way in which the company was defrauded." The e-mail was subsequently forwarded to other managers, and eventually to other employees.

Meloff sued for defamation, and won a jury verdict in her favor. The jury awarded her \$250,000 in compensatory damages and \$1 million in punitive damages. While the trial judge reversed the verdict, the Second Circuit Court of Appeals found such reversal to be erroneous. Accordingly, it ordered a new trial on Meloff's defamation claim.

With the growth of internal communication systems like e-mail in the workplace, employers must be mindful of the potential for widespread dissemination of its messages, similar to what happened in Meloff's case. For that reason, employers should be very cautious about internally sharing derogatory employee information with others and should impose strict controls upon the release of such information both within and outside the company. Meloff's case serves as yet another reminder of just how expensive defamation lawsuits can be for employers. (*Meloff v. New York Life Insurance Co.*, 240 F.3d 138 (2d Cir. 2/14/01)).

PLAINTIFF AWARDED \$2.49 MILLION IN LOCAL WRONGFUL DISCHARGE CASE

Further proof that employment cases are a costly proposition for Nevada employers came last month when a local jury awarded a former Las Vegas Hilton employee \$2.49 million in a wrongful discharge lawsuit. The employee, Mui Chong, claimed that the Hilton violated the terms of her employment contract at a time when she working in the company's Singapore office. Chong also claimed that the Hilton refused to pay her expenses to enable her to return to the United States unless she signed a release promising not to sue the Hilton. In addition to lost wages, the jury awarded Chong damages for bad faith discharge, intentional infliction of emotional distress, and punitive damages.

BUSH SET TO REVIEW ERGONOMICS STANDARD

The much-hyped ergonomics rules unveiled by the Occupational Safety and Health Administration in January 2001 look destined for a quick demise. On March 7, 2001, Congress voted to repeal the rules, calling them burdensome and costly for employers. The matter has now been sent to President George W. Bush, who is expected to sign the measure to scrap the rules.

HOSTILE WORK ENVIRONMENT

RESPONSE TO HARASSMENT COMPLAINT EFFECTIVE EVEN WITHOUT “DISCIPLINE”

Hattie Star was employed as a housekeeper by the West Los Angeles Veterans Affairs Medical Center. According to Star, a male coworker, Oliver Watson, sexually harassed her on two (2) occasions by grabbing her and putting his arms around her. Star promptly complained to her supervisor about these incidents. The supervisor confronted Watson with Star’s allegations, told him they were serious allegations, and directed Watson to stay away from Star. Approximately two weeks later, Star again complained to her supervisor about Watson, claiming that she was afraid of him. When asked whether Watson had engaged in any further behavior to bother or frighten her, Star replied that he had not. Star, however, believed that her employer had not done enough in response to her allegations, and she filed an internal EEO complaint. In response, Watson was transferred to a different shift, as a precautionary measure.

Star later filed suit against her employer, claiming a hostile work environment under Title VII of the Civil Rights Act of 1964. At the conclusion of the trial, judgment was entered in favor of the employer. The court specifically found that the employer’s response to Star’s allegations was proper, even though it was not disciplinary in nature. Star appealed, claiming the employer’s response, short of disciplining Watson, was insufficient.

The Ninth Circuit Court of Appeals disagreed with Star’s argument, and held that an employer need not “officially” discipline an alleged harasser in order to avoid liability. Instead, the court held that counseling an employee may be an effective means to curtail the harassing conduct, as it was in Star’s case. The court stressed that the employer’s actions in first admonishing Watson to leave Star alone and then transferring him to a different shift were adequate to remedy the situation, despite the fact that these actions were not labeled “discipline.”

The case reinforces the need for employers to take reasonable steps to remedy harassing behavior in the workplace. Although the court stated that an adequate employer response need not involve the issuance of “formal” discipline, it did highlight that informal counseling may be sufficient only as a first resort. To the extent that harassing behavior continues, disciplinary action must be proportionately increased. (*Star v. West*, 237 F.3d 1036 (9th Cir. 1/18/01)).

ON THE HOMEFRONT

HOTEL SAN REMO VICTORIOUS IN SEXUAL HARASSMENT CASE

In a case recently handled by KZ&A, the Ninth Circuit Court of Appeals recently ruled in favor of the Hotel San Remo on the issue of alleged sexual harassment by a supervisor. In affirming summary judgment for the Hotel San Remo, the court stated that posting a reasonable sexual harassment policy in multiple locations where employees could access it, coupled with the employee’s failure to report the harassment despite her complaints about other employment-related issues, satisfied both elements of the affirmative defense articulated by the U.S. Supreme Court. (*Zelaya v. Eastern & Western Hotel Corporation*, No. 99-16179 (9th Cir. 3/5/01)).

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