

Employment Law Update

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JUDICIAL UPDATE

Employee Who Went on Leave for Anxiety and Depression Failed to Establish Claims of Disability Discrimination and Failure to Accommodate

The case of *Williams v. Genentech, Inc.*, recently decided by the California Court of Appeal, is a good example of how an employer handled the situation involving an employee who took a medical leave and later sought disability accommodation. Rochelle Williams ("Employee") worked for Genentech, Inc. ("Employer") as a receptionist, where her job duties included greeting visitors, answering phones, directing calls, and distributing security badges. The receptionists had a certain protocol to follow when particular people entered the building. On one occasion in October 2000, Employee's supervisors met with her about a complaint by security personnel that Employee failed to follow the required protocol. After the meeting, Employee began to cry uncontrollably and hyperventilated. She was transported to a hospital, where she was diagnosed as suffering an exacerbation of asthma. Employee began a medical leave at that time, and the leave was extended several times until she was fully released to work on May 15, 2001. During this seven-month period, she was diagnosed with depression and anxiety.

Under its policies, Employer provided six months of paid medical leave. The company's policy also stated that employees who qualified for leave under the California Family Rights Act would be placed in the same or equivalent position upon return to work if the leave did not exceed 12 weeks in a 12-month period. Moreover, if an employee's position was filled during leave, the employee would be given 60 days following return to work to locate a position for which the employee was qualified.

Soon after beginning leave, Employee told the senior human resources manager that she felt harassed and unfairly treated by her supervisor, and that she did not want to return to work in a position under that supervisor's management. The HR manager investigated the complaint and found that the supervisor had not engaged in any improper conduct.

During the medical leave, Employee's position was covered by three floater receptionists. This system, however, resulted in a number of problems for the business, including inadequate coverage for illnesses, vacations and planned sabbatical; receptionists' lunch breaks were shortened; and poor morale.

In mid-January 2001, the HR manager sent a memo to the management team with suggestions

WHAT'S INSIDE THIS ISSUE:

Employee Who Went on Leave for Anxiety and Depression Failed to Establish Claims of Disability Discrimination and Failure to Accommodate

Employee Deserved Opportunity to Prove "Regarded As" Disability Claim

Team-Building Exercises: Be Careful What You Wish For

about Employee's expected return to work on January 22. They planned a follow-up meeting for January 29 to discuss strategy for addressing with Employee some of the issues that took place before she went on leave, and related issues. Employee's medical leave was extended beyond January 22. On January 29, the HR manager met with the management team to discuss the need for a regular, full-time employee in Employee's position, because of the adverse impact of continually using floaters. Because of Employee's previous extensions of her medical leave, the management team had doubts about whether she would actually return to work in March, as was scheduled at the time. At the January 29 meeting, the team agreed to fill Employee's position with a regular, full-time employee.

On January 31, the HR manager wrote to Employee to advise that her 12-week "position guarantee" status had been exhausted, and that the company was going to hire a replacement for her. Employer filled the position on February 26.

After her return to work in mid-May 2001, Employee received from Employer information about internal job search services. She was also informed that if she could not secure a position in the company within 60 days, her employment would be terminated. Between May and July, there were no vacant receptionist positions. Employee had no scientific education and limited work experience, so she was not qualified for any vacant non-receptionist position at the company. Employee was discharged effective July 16, 2001. Afterwards, she sued for disability discrimination (as well as race discrimination, failure to accommodate under the Fair Employment Housing Act, and failure to engage in the interactive process required by FEHA).

The Court of Appeal affirmed the trial court's grant of summary judgment in favor of Employer on all claims. As to the discrimination claim, the court found that Employee had failed to establish that she was a qualified individual with a dis-

ability who could perform the essential functions of her job at the time that Employer made the decision to fill her position. Employee provided no medical evidence to establish that she could have returned to her position with a reasonable accommodation. Moreover, the court observed that Employer had legitimate, non-discriminatory reasons for failing to hire Employee for one of the non-receptionist positions for which she expressed interest.

As to the claim of failure to accommodate her disability, the court rejected Employee's argument that the seven months of leave that she received was insufficient as an accommodation. The court held that the leave in fact was a reasonable accommodation. Furthermore, the law did not require Employer to hold Employee's position open indefinitely.

On the claim of failure to engage in the interactive process, the court noted that Employee provided no evidence suggesting that the accommodation that Employer was providing -- the leave of absence -- was ineffective. Moreover, Employee's request for a new supervisor did not trigger a new duty to initiate another interactive process.

This case illustrates the importance of good communication with an employee both before and during a medical leave of absence, including a thorough explanation of the leave policy and other benefits available to an employee. Also, a company should be sure to document the business reasons for a decision to fill the position of an employee who is on leave.

Employee Deserved Opportunity to Prove "Regarded As" Disability Claim

In another disability discrimination case, *Gelfo v. Lockheed Martin Corp.*, the Court of Appeal addressed the "regarded as" type of discrimination claim.

Missed a previous issue of the Employment Law Update?

The Klinedinst website features back-issues of the Employment Law Update, dating back to 2001.

Charles Gelfo (“Employer”) worked for Lockheed Martin Corporation (“Employer”) as a metal fitter beginning in 1980. In September 2000, he injured his lower back at work and filed a worker’s compensation claim. He was laid off in October 2000. Under the terms of a collective bargaining agreement, an employee was placed on a recall list that made him automatically eligible for rehire as a metal fitter or in a related job classification, for up to five years.

By May 2001, Employee had become permanent and stationary, and was released to his position with a lifting restriction. There were no metal fitter positions available at the time, so employee was not recalled. Over the next four to five months, Employee underwent several evaluations and examinations; the doctors, including his own, concluded that Employee would not be able to return to his position as a metal fitter. In late 2001, and going into early the next year, Employee was able to participate in a number of rigorous physical activities that left him feeling fine and were not impeded by his back injury. These included bike rides, long walks and yard work. Employee’s worker’s compensation claim was settled in January 2002; he received a permanent disability rating and an award.

Meanwhile, in mid-September 2001, Employer had invited Employee to participate in a composite training class that was designed to train each participant to be a plastic parts fabricator and assembler. Employee completed the training, performed all of the required physical tasks without any adverse consequences to his back. He received a job offer as a fabricator, contingent upon a medical examination and security clearance. Employer revoked the offer, however, after reviewing his file and noting the medical restrictions that had been imposed by his physician earlier. The restrictions were considered to be incompatible with the physical demands of the fabricator position. After Employee objected and indicated that his back was fine, Employer

submitted the matter to its special committee for reviewing situations of employees with disabilities. After reviewing all the available information, the committee determined that Employer could accommodate Employee’s lifting restriction, but could not accommodate his other restrictions so as to allow him to perform all of the essential functions of a fabricator, including bending, stooping, pushing, pulling and climbing.

Employee sued for violations of the FEHA: disability discrimination, failure to accommodate, and failure to engage in a timely, good faith interactive process. The court found that Employee was not “actually” disabled. Employee’s own testimony established that he regularly rode a bike, took long walks, and performed yard work without irritating his back. He failed to establish that his physical condition made difficult the achievement of work or some other major life activity.

However, the court agreed with Employee that the jury should have been asked to consider his claim that Employer “regarded” him as disabled. Under FEHA, a person is “physically disabled” if he is “regarded or treated by” the employer as having, or having had, any condition that makes achievement of a major life activity difficult, or as having a physiological condition that is not presently disabling, but may become so. It was undisputed that Employer’s decision not to hire Employee as a fabricator was based only on its belief that the medical restrictions imposed on him as a result of his lower back injury made him unable to perform the essential functions of the fabricator position. This consistent position was the equivalent of an admission that the company withdrew its offer because it “regarded him” as limited in his ability to work within the meaning of FEHA.

Employers must use caution when evaluating the ability to work of a person who had medical restrictions in the past, but may presently be

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perfectly capable of performing the essential functions of the position at issue. Although “regarded as” claims are not as common as traditional disability claims, they do exist and must be treated seriously.

**Team-Building Exercises: Be Careful
of What You Wish For**

Morale and camaraderie are important features of any successful business. But, as a home security company recently learned, poor judgment in selecting the exercises to build morale and camaraderie can have an expensive price tag. A jury in Fresno Superior Court recently awarded \$1.7 million to a saleswoman with Alarm One for sexual harassment and sexual battery. Her claims arose from a series of team-building exercises in which employees were spanked for arriving late or talking out of turn. The employee was paddled on her buttocks for being late to work. This occurred on three separate occasions. She did not complain initially because she needed the money from her job to support her family. However, within one year after starting her

position, she quit her job and sued for discrimination, assault, battery and intentional infliction of emotional distress.

At first, the company claimed that the spankings were not part of company policy and that it had no knowledge of the inappropriate behavior, blaming a few “rogue” supervisors for implementing the exercises. However, the evidence revealed that a company vice president who worked in the same branch as the employee had encouraged the spankings. The company then tried to defend its practice as part of a voluntary program to build camaraderie and motivate employees to increase sales. The jury rejected that justification, awarding the employee \$500,000 in compensatory damages, \$1 million in punitive, and \$200,000 to be paid by three co-workers out of their own pockets.

Team-building exercises have laudable goals, but must be carefully crafted. An employer should avoid any exercises that involve humiliation or physical touching that would otherwise be inappropriate.

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