

# Employment Law Update

AUGUST, 2006

## JUDICIAL UPDATE

### **Employer Fails to Consider Epileptic Employee's Ability to Perform Essential Functions of Job and Reasonable Accommodations**

In the recent June Employment Law Update, we extensively detailed the case of *Williams v. Genentech, Inc.*, a California appellate case in which the employer's good communication with the employee defeated the employee's lawsuits of disability discrimination, failure to accommodate, and failure to engage in the interactive process. This month we have a case from the Ninth Circuit Court of Appeals (*Dark v. Curry County, etc.*, Ninth Circuit Court of Appeals, Case No. 04-36087) in which an employee was allowed to proceed to a jury trial with his ADA claims because the evidence established the possibility that the employer's real reason for terminating the employee was due to its belief that the employee's epilepsy made him unable to perform the essential functions of his job.

#### *Facts*

Robert Dark (the "Employee") was a maintenance and construction worker for the road department of a county in Oregon (the "Employer"). The Employee suffers from epilepsy. Despite taking medication to control the condi-

tion, the Employee occasionally has a seizure, which is preceded by an "aura." An aura is similar to a nervous jerk, and it sometimes means that he will have a seizure later in the day. The Employee would suffer a seizure on approximately half of the occasions on which he experienced an aura.

One morning, before leaving for work, the employee experienced an aura. Nevertheless, he reported for work and did not inform anyone of the possibility that he could suffer an epileptic seizure later in the day. He in fact suffered such a seizure while driving a pickup truck that day. He was driving slowly at the time, and his passenger, a co-worker, was able to get control of the vehicle and bring it to a safe stop. The Employer sent the Employee for a medical examination by a neurologist, who concluded that Employee should not work in high places, or around moving machinery where sudden loss of consciousness would endanger himself or others. After receiving the doctor's report, the county placed the Employee on administrative leave. At a disciplinary hearing, the Employee admitted that he experienced an aura on the morning of the incident. The county then terminated the Employee's employment, providing a termination letter in which the leader of the road department concluded that the Employee could not perform the essential functions and duties of his position, and that his

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continued employment posed a threat to the safety of others.

### *The Court's Ruling*

After the termination decision was upheld in an appeal to the County Board of Commissioners, and after the Employee exhausted his administrative remedies with the EEOC, he sued the county in federal court under the ADA.<sup>1</sup> After the Employer obtained summary judgment, the Employee appealed. The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment on several grounds. The court concluded that there was a genuine issue about whether the county established a legitimate, non-discriminatory reason for the termination. The termination letter was replete with language that reflected the Employee's disability as a factor in its decision to discharge him. The letter from the head of the road department indicated that the Employee could not perform the essential functions and duties of his job; that after the seizure incident the county had sufficient concerns about his medical condition to request an independent medical examination; and that the Employee's condition prevented him from performing his duties and imposed a threat to the safety of co-workers and the public. The county attempted to rely on statements in the decision of the Board of Commissioners – indicating that the Employee's termination was justified because of his misconduct by acting irresponsibly and recklessly in driving heavy machinery with knowledge that he could have a seizure while doing so – to support its argument that its reason for the adverse employment action was legitimate and nondiscriminatory. However, the appellate court concluded that the Employee's disability was a motivating factor in the termination decision, and that is enough to support the claim of discrimination.

The court of appeals also concluded that there was a triable issue of fact regarding whether the Employee was qualified to do his job with or without reasonable accommodation. The Employee requested accommodation in three ways (1) a temporary change in his duties; (2) reassignment to a new position; or (3) the use of accumulated sick leave or medical leave without pay. The court rejected the request for job restructuring, noting that the ADA did not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to another employee. On the possibility of job reassignment, the county pointed out that there were no other available positions for which the Employee was qualified at the time of termination. However, after reviewing cases in another federal circuit, the Ninth Circuit Court of Appeals adopted the rule that, in considering reassignment as a reasonable accommodation, an employer must consider not only positions that are available at the time of termination, but also those that will become available within a reasonable period of time.

On the question of using unpaid medical leave, the court observed that the county should have considered that option as a possible reasonable accommodation.

### *The Lesson to Be Learned*

In responding to the seizure incident, the Employer was not wrong in attempting to learn more about the Employee's condition. However, the Employer failed to initiate an interactive process for the purpose of determining possible reasonable accommodations. In this case, it seemed as though the Employer wanted to create a record on which to base a decision to discharge the Employee based on his medical condition, without

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<sup>1</sup> Though ADA claims in California courts occur less frequently than claims involving violations of California's Fair Employment & Housing Act, the principles discussed in this decision are still quite helpful in understanding the proper handling of a claim of disability discrimination. Therefore, we believe the case is still very instructive.

regard to how that condition actually affected his ability to do his job. Surprisingly, the county's termination letter was brutally candid about why the Employee was being discharged. Having made that decision without really exploring the possibility of reasonable accommodation, the Employer doomed its ability to defeat the ADA claims before trial.

## **Employer's Obligation to Pay Wages upon "Discharge" Includes Situations Where an Employee is Released After Completing a Specific Job Assignment for a Limited Time**

In *Smith v. Superior Court* (California Supreme Court, Case No. S129476) the California Supreme Court clarified the scope of employers' obligation under Labor Code section 201. That section states that if an employer "discharges" an employee, any wages earned and unpaid at the time of discharge are due and payable immediately. An employer who fails to meet that obligation could incur waiting-time penalties under section 203. In *Smith*, the Employee was asked to be a "hair model" by L'Oréal USA, Inc. (the "Employer") at an upcoming show featuring L'Oréal products. The Employer agreed to pay the Employee \$500 for one day of work at the show. At the show, the Employee sat on a stage in front of an audience as her hair was colored and styled. She remained at the show until she was told that she could leave. The Employer waited over two months before paying the Employee the \$500 in wages.

The Employee sued on behalf of herself and all other similarly situated models who worked for the Employer. The primary claim was the contention that the Employer violated section 201 by failing to pay the Employee, and other models, immediately upon the completion of

their job. The Employee sought \$15,000 in penalties under section 203 (maximum of 30 days at \$500 per day).

After the trial court and the California Court of Appeal issued decisions in favor of the Employer, the Supreme Court granted the Employee's petition for review. L'Oréal contended that the "discharge" language of section 201 meant that an Employer must affirmatively dismiss an employee from an ongoing employment relationship, such as by firing or laying off the employee. However, the Supreme Court agreed with the position of the Employee: An employer causes a "discharge" within the meaning of sections 201 and 203 not only when it fires an employee, but also when it releases an employee upon completion of the particular job assignment or completion of the time duration for which the employee was hired. After reviewing the language of pertinent statutes and relevant legislative history, the unanimous court concluded that released employees are just as deserving or in need of immediate wage payment than employees who are fired.

If your company hires employees for limited job assignments, be sure that you pay those employees' final wages promptly, just as if the employees were being discharged from regular employment. As seen in the *Smith* case, the amount of waiting-time penalties that can result from failing to make prompt payment can be substantially greater than the wages that were due.

## **Attorney May Sign DFEH Complaint on Behalf of Employee**

In *Blum v. Superior Court* (California Court of Appeal, 2nd Appellate District Case No. B189560), the trial court dismissed an employee's



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lawsuit based on violations of the Fair Employment & Housing Act on the ground that the employee's attorney, not the employee, had verified the discrimination complaints with the Department of Fair Employment & Housing. The trial court concluded that this meant that the employee had not exhausted his administrative remedy of a proper DFEH complaint. On appeal, however, the Court of Appeal found no prohibition in the relevant statute against an attorney's signing such a complaint on behalf of the employee. Accordingly, an attorney may verify a DFEH complaint for his or her client by signing his or her own name to the complaint, but the attorney may not verify the complaint by signing the client's name. The court stated in its decision that attorneys should not sign a complaint unless they believe that the allegations made in it are true, and the attorneys are acting in good faith.

Usually, an employee filing a DFEH complaint has not yet retained an attorney. However, if your company receives a DFEH complaint that is signed by an attorney, not the employee, the complaint cannot be stricken simply because of the attorney's signature.

## Fired Employee Fails to Overcome At-will Language of Employment Contract

In *Dore v. Arnold Worldwide, Inc.* (California Supreme Court Case No. S124494) the California Supreme Court rejected the claim of an employee who contended that the alleged "at-will" language in his written employment contract

was unclear and ambiguous about whether he could be terminated without cause. During the interview process, Brooke Dore ("Employee") was never told by anyone at Arnold Worldwide ("Employer") that his employment would be terminable without cause or "at-will." Also, representatives of Employer told Employee that they wanted to hire someone for the long-term, and that company employees were treated like family. Later, Employee received a lengthy letter from a senior vice president of Employer confirming a job offer. The letter contained a paragraph stating that, like with all other Employees, Employee's employment is at-will, meaning that the company has the right to terminate employment at any time, just as he, the employee, has the right to terminate at any time. Employee signed and returned the letter to signify his acceptance of these employment terms.

After the company terminated Employee's employment, he sued for breach of contract and related causes of action. The Supreme Court upheld the trial court's grant of summary judgment in favor of Employer. The court found that the at-will language was not ambiguous or susceptible to other interpretations. It specifically rejected Employee's claim that the use of the phrase "at any time" in the at-will provision of the employment contract was ambiguous simply because there was no mention of whether cause was required for termination.

This decision reinforces the need for employers to include strong "at-will" language in job applications, offer letters, employment contracts, and employee handbooks.

**ELU**