ROBINSON & COLE LLP
Labor, Employment & Benefits

Eating May Be a Major Life Activity under the ADA

Rebecca Fraser worked as a Senior Account Specialist for United States Bancorp. Fraser suffered from a very onerous and life-threatening form of diabetes. However, Fraser's supervisor notified her that she could not eat at her desk. Sometime later, Fraser, who was required to test her blood sugar four or more times daily, recorded that her blood sugar was dangerously below her normal range. Minutes later, Fraser became disoriented as her blood sugar dropped further. She had food in her desk, but because of her supervisor's earlier admonition, she attempted to explain her immediate situation and to seek his permission before eating. Fraser claimed that her supervisor told her to come back when she had an intelligent question to ask. Fraser became even more disoriented and her memory was so impaired that she could not remember how to use the telephone. She again sought her supervisor's permission, but to no avail. Fraser eventually passed out in the lobby of the bank. Her blood sugar levels returned to normal after being taken home and injected with glucagon.

Fraser complained to her supervisor's manager. Although the manager indicated that he would investigate the complaint, the supervisor was never disciplined. Approximately four months later, Fraser's employment was terminated. Fraser sued, alleging retaliation for filing her complaint and failure to make a reasonable accommodation under the American with Disabilities Act.

In Fraser v. Goodale (9/8/03), the U.S. Court of Appeals for the Ninth Circuit in a 3-2 split decision denied Bancorp's motion for summary judgment, clearing the way to a trial. The court ruled that eating may constitute a major life activity under the ADA, particularly where, as with Fraser, an individual may not eat certain foods, and must carefully assess her blood sugar before eating anything. Although the court allowed Fraser to proceed to trial on her claims, it nevertheless cautioned that she still must prove that her diabetes actually substantially limits her major life activity of eating.

Senate Blocks Proposed Overtime Rules

On September 10, 2003, the United States Senate approved an amendment to block the U.S. Department of Labor from implementing new proposed overtime regulations. By a 54-45 vote, the Senate voted to withhold funding from the DOL to finalize the proposed regulations to the Fair Labor Standards Act.

As we reported in our April 7, 2003 issue of e-News, the new regulations would change the criteria used to determine who is eligible for overtime. There is significant disagreement about the number of employees who would be impacted by the proposed FLSA overtime rules: the Department of Labor maintains that the proposal would cause 644,000 "white collar" employees to lose their overtime eligibility; Democrats opposing the proposal claim it would negatively impact about 8 million workers.

In response to the Senate's vote, Labor Secretary Elaine Chao issued a statement saying that the Department of Labor would continue to work on its proposed rules. Chao indicated that the DOL's intention is to clarify the regulations to "put the protection of overtime back into the law for white-collar workers." Chao further indicated that "unclear regulations hurt workers because the Department's investigators find it difficult to fully enforce the current regulations."

Intention Not to Return from Leave Does Not Bar FMLA Claim

Paula Mendoza was a supervisor for Micro Electronics, Inc. She became pregnant and, after experiencing premature contractions, was placed on modified bed rest for the remainder of her pregnancy. Micro Electronics approved her request for leave under the federal Family and Medical Leave Act. However, it miscalculated the duration of the leave and incorrectly advised Mendoza that her leave would expire on December 31, 2001. The 12-week period actually expired on January 5, 2002. Mendoza gave birth January 1. Micro Electronics claimed that Mendoza called her supervisor the next day and said that she would be able to return in six weeks. On January 4, Micro Electronics informed Mendoza that she had been terminated, effective December 31, for exceeding her FMLA leave. Mendoza sued Micro Electronics, alleging that her termination violated the FMLA and constituted discrimination on the basis of her sex.

Micro Electronics asked the court to dismiss the case, relying on the fact that Mendoza indicated that she would not be able to return to work within the statutorily protected time and, thus, her termination did not violate the FMLA. In Mendoza v. Micro Electronics, Inc. (9/2/03), the U.S. District Court for Illinois ruled that whether Mendoza told Micro Electronics that she did not intend to return to work prior to the conclusion of the 12 week period was irrelevant to its analysis. The court found that, "while the fact that [Mendoza] may have told Micro Electronics that she did not intend to return to work for six weeks may very well affect what damages she is entitled to, it does not change the fact that Micro Electronics miscalculated the 12 week period and terminated [Mendoza] during her leave period." The court further noted that Micro Electronics provided no authority for the argument that an employer may legally fire an employee during FMLA leave if the employee indicates that she plans to return to work after the leave expires.

Employers May Be Liable For Employees Downloading Music

The recent crackdown by the Recording Industry Association of America on file sharing and illegal downloading of music may impact employers. As reported by The Business JournalEmployees Downloading Music Put Firms At Risk (8/4/03), an employer may be liable for civil penalties if its employees are illegally downloading music at work. For example, civil penalties of up to a $150,000 can be levied for each instance of illegal downloading, resulting in a potential $1.7 million liability for an employer if an employee unlawfully downloads a typical 11-song album. Many employers are responding to this issue by modifying their employment policies to specify that unlawful downloads or file sharing may result in discipline, up to and including termination of employment.

The RIAA has successfully sued businesses that knowingly allow employees to download copyrighted materials. Last year, RIAA won a $1 million settlement from an Arizona employer, after RIAA found the company was knowingly allowing employees to trade music files on a dedicated server.

Court Holds Discharge For Eyebrow Ring Not Unlawful

Tanya Maier worked for Sam's Club as a cashier. Sam's Club discharged her because she wore a ring through her eyebrow at work in violation of its dress code, which provides that nose rings or other facial jewelry are not allowed. In response, Maier filed a complaint with the Madison, Wisconsin Equal Opportunities Commission alleging that Sam's Club discriminated against her in violation of a City of Madison Equal Opportunities ordinance prohibiting discrimination on the basis of an individual's physical appearance. Physical appearance is defined under the ordinance as the outward appearance of any person, irrespective of sex, with regard to hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance. The ordinance makes an exception, however, for the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied to employees in a business establishment for reasonable business purpose. After a hearing, the MEOC decided that Sam's Club's prohibition on facial piercings violated the ordinance. Sam's Club appealed.

On appeal, Sam's Club defended its dress code as part of its overall objective to promote an image of a "traditional" or "conservative" style of retail, which it claimed was a reasonable business purpose. The general manager explained how Sam's Club tried to convey this image through a very spartan, warehouse type building and through its dress code for employees, which required employees to be neat and clean and not "flashy." InSam's Club v. Madison Equal Opportunities

Commission (7/24/03) the Wisconsin Court of Appeals agreed, finding that the ordinance's exception for employment practices made for reasonable business purposes includes practices to project a particular image. Applied to the prohibition against eyebrow rings, the court concluded that the evidence established that the prohibition was for a reasonable business purpose and that the discharge did not constitute an unlawful employment practice.

Termination of Library Worker for Wearing Cross Unconstitutional, Court Decides

When Kimberly Draper was hired to work in the Logan County Public Library in Kentucky, she was notified that she would have to comply with its dress code. The dress code policy provides: "No clothing depicting religious, political, or potentially offensive decoration is permitted." The policy was later amended to prohibit religious, political, or potentially offensive "ornaments." Several years into her employment, Draper reported to work wearing a cross necklace. Her boss told her to remove it or wear it under her clothing. Draper complied. About a week later, Draper again reported to work wearing the necklace. She was again told to remove it or go home. Draper went home. A few days later, the library terminated Draper based on her insubordination in refusing to remove the necklace. Draper sued alleging, among other things, violations of the Free Exercise and Free Speech Protections of the First Amendment of the U.S. Constitution.

In Draper v. Logan County Public Library (8/29/03), the U.S. District Court for Kentucky ruled that Draper's display of a cross was protected by the First Amendment as expressive conduct because the "Christian cross cannot seriously be considered to ever be devoid of message." Further, the court found that the issue touched on the matter of public concern based both on Draper's public display of her religious convictions and the library's stated motivation for enacting a dress code, fear of offending members of the public. The court rejected the library's argument that the dress code was needed to protect the appearance of librarian impartiality and to avoid the appearance of religious favoritism or a violation of the establishment clause. The court concluded that "it is simply beyond credibility that an employee's personal display of a cross pendant, a Star of David, or some other minor, unobtrusive religious symbol on her person would interfere with the library's purpose." The court further ruled that the library's act in terminating Draper violated the Free Exercise clause, by discriminating against Draper because of her religious conduct.

Diversity Immigration Visa Lottery Program Registration to Begin November 1, 2003

It is time again for the Diversity Immigrant visa lottery program known as "DV-2005." DV-2005 provides 50,000 immigrant visas (green cards) each fiscal year to natives of countries from which immigration has been low over the preceding five years. Applicants for the DV-2005 program are chosen through a computer-generated random lottery. However, the Bureau of Citizenship and Immigration Services determines the distribution of visas and allocates visas among six geographic regions with a greater number of visas going to regions with lower rates of immigration. Within each region, no one country may receive more than seven percent of the available visas. To be eligible, an applicant must apply, be a native of one of the designated countries, and satisfy certain other requirements with regards to education and training. The most significant change for this year's lottery is that the Department of State will only accept completed Electronic Diversity Visa Entry Forms submitted electronically. For a list of the designated countries, other eligibility requirements, an Electronic Diversity Visa Entry Form, and the complete address to electronically submit the application click here. The registration period for this year's lottery begins November 1, 2003 and ends on December 30, 2003.

This is an archive of past issues. As a result, it may contain information that is not current.

ROBINSON & COLE LLP