ROBINSON & COLE LLP
Labor, Employment & Benefits

ADA Retaliation Claims Do Not Allow for Compensatory or Punitive Damages or Jury Trial

The U.S. Court of Appeals for the Seventh Circuit ruled that an employee claiming retaliation under the Americans with Disabilities Act is not entitled to compensatory or punitive damages. Without those remedies, the appeals court ruled that an employee does not have a statutory right to a jury trial. The opinion, Kramer v. Banc of America Securities, LLC (1/20/04), upheld a trial court decision ruling on the unavailability of those remedies and striking a jury demand.

Colleen Kramer, an employee of Banc of America Securities, was issued a performance document and demoted from a team leader position, while retaining her salary and managing director title. A week later, her attorney challenged the demotion and, for the first time, notified BoAS that Kramer suffered from multiple sclerosis. Three months later, Kramer was issued another disciplinary notice with a warning that, if her performance did not improve within thirty days, she would be discharged. Kramer filed a charge of discrimination and retaliation with the U.S. Equal Employment Opportunity Commission and sent an e-mail to her supervisor and his superior to let them know of her EEOC charge. Within two weeks, Kramer was fired. She then sued BoAS claiming disability discrimination and retaliation under the ADA. The trial court dismissed the discrimination claim, but allowed the retaliation claim to go forward. Two weeks before trial, the trial court ruled that the retaliation provision of the ADA does not allow for compensatory or punitive damages, and that Kramer was not entitled to a jury trial. The case was tried before a judge. After the trial court ruled against her, Kramer appealed.

The appeals court opinion recognized that trial courts are split as to whether an employee claiming ADA retaliation may recover compensatory and punitive damages and notes that the U.S. District Courts for the Western District of New York, the District of Maryland, and the Eastern District of California decided those damages were available, while the U.S. District Courts for the Districts of Kansas and Missouri decided they were not available. The appeals court concluded that the lower court decisions in favor of the availability of remedies did not engage in any meaningful statutory construction and, therefore, were not persuasive.

First Amendment Protects Police Officer from Discharge for Selling Sexually-Explicit Videos on e-Bay

Officials from the San Diego Police Department learned that one of its officers was selling sexually-explicit videotapes on the adults-only section of e-Bay. The videotapes showed the officer stripping off a generic police uniform and masturbating. His e-Bay profile identified him as being in law enforcement. When interviewed by his supervisors, the officer admitted to making and selling the videos. He was issued a warning for violation of Departmental policies, including unbecoming conduct, immoral conduct, and outside employment. The officer was directed to refrain from manufacturing, displaying or selling any sexually-explicit materials by mail, internet or any other media. He removed the videos from e-Bay's sale list, but did not delete his profile which described his first two videos, listed their prices and offered custom tapes. He was then discharged from the Department for violating another policy: obedience to a lawful order. The officer sued, claiming his discharge for off-duty, non-work related activities was a violation of free speech provisions of the First Amendment of the U.S. Constitution. The trial court dismissed the claim. On appeal, the U.S. Court of Appeals for the Ninth Circuit, in Roe v. City of San Diego (1/29/04), ruled that the officer's expressive conduct constituted "speech on a matter of public concern," and was thus deserving of First Amendment protection. On remand, the trial court was instructed to analyze the claim applying the First Amendment balancing-test, a test not applied in the first instance when the case was summarily dismissed.

Corporate Officer and Sole Shareholder Was an Employee and Company is Liable for Employment Taxes

Ronald Stark was the President and sole shareholder of Nu-Look Design, Inc., a carpentry and home improvement services company. Stark managed the company, actively solicited business, handled the finances and hired and fired workers. Nu-Look was organized as an S-corporation. For two years, Nu-Look did not pay Stark a salary; instead, the company distributed to him its net income for those years. Stark reported that income in his tax returns. The IRS notified Nu-Look that Stark had been classified as an employee and that the company owed employment taxes under the Federal Insurance Contribution Act and Federal Unemployment Tax Act.

In Nu-Look Design, Inc. v. Commissioner of Internal Revenue (1/26/04), the U.S. Court of Appeals for the Third Circuit agreed with the IRS. The court ruled that both FICA and FUTA impose taxes on employers for wages paid to individuals in their employ. Both FICA and FUTA define employee as either an officer of a corporation or an individual who has the status of an employee under the common law. While IRS regulations exempt corporate officers who do not perform services or perform only minor services and do not receive any remuneration from the definition of "employee" under these Acts, Stark did not meet the exemption. The appeals court ruled that Stark performed substantial services for Nu-Look and that he was remunerated by his receipt of distribution of net income. Nu-Look was thus liable for FICA and FUTA contributions for Stark's wages.

Interracial Association Title VII Claim Properly Dismissed in the Absence of Evidence of Workplace Demographics

Seven African-American employees of Occidental Chemical filed a lawsuit against their employer claiming that the company's racially discriminatory hiring policies deprived them of the benefits of interracial association in the workplace in violation of Title VII. In Palmer v. Occidental Chemical Corporation (1/23/04), the U.S. Court of Appeals for the Second Circuit rejected the claim. Without deciding whether Title VII conferred such a right, the court decided that the employees had not produced any evidence about the number of minority workers in the company's workforce or in their immediate work areas. Without such evidence, there was no basis to determine if the employees had been deprived of any opportunity for interracial association.

Testimony of Human Resources Expert was Improper and Prejudicial, Reversing Jury Verdict

Dee Kotla, a computer support technician, worked for the Lawrence Livermore Laboratory, a government lab. Kotla was deposed in the sexual harassment claim of another lab employee. Kotla brought with her to the deposition three printed pages of what she claimed were contemporaneous notes supporting the employee's allegations of harassment. Kotla claimed the notes were stored in the lab's computer file server. During the deposition, the attorney for the lab learned that Kotla occasionally did work for a consulting company. Kotla returned to the lab after hours and deleted some personal files as well as files related to the consulting company. Kotla later admitted to using the Lab's computers for the consulting company's projects, and claimed that she had deleted those files because she was concerned about retaliation for her testimony in her co-workers' sexual harassment claim. Kotla was eventually fired for "misuse of government property" and breach of ethical standards. She sued the lab, alleging that her discharge was retaliatory.

At trial, Kotla offered the expert testimony of Jay Finkelman, who held Ph.D. in industrial psychology. Finkelman testified that certain actions by the lab were "indicators" of retaliation, among them, not interviewing Kotla before the deposition, using the information learned at the deposition against Kotla, and the excessive nature of the dismissal for a low-level infraction. After seven days of deliberation, the jury found in favor of Kotla and awarded her $1 million. On appeal, the California Court of Appeal reversed the jury verdict. In Kotla v. The Regents of the University of California (1/28/04), the appeals court held that Finkelman's testimony was improper and prejudicial. As an expert, Finkelman was expected to testify about matters "sufficiently beyond common experience" so that his opinion would assist the jury. Instead, his testimony improperly "invaded the providence of the jury to draw conclusions from the evidence," creating an

unacceptable risk that the jury would defer to the expertise of the witness.

To Be Actionable, CFEPA Requires a Chronic Disability at the Time of Termination

Frank Caruso, a customer engineer for Siemens Business Communications, injured his ankle and knee while at a customer site. He filed for workers' compensation benefits and was out of work for about three weeks. When he returned to work, Caruso resumed his regular schedule, did not request any accommodation, and worked significant overtime. During a medical examination, Caruso injured his back (a sprain according to his doctor) and missed a few days of work over the ensuing weeks. In the meantime, Siemens began conducting a comprehensive evaluation of employees for an upcoming reduction-in-force. Siemens selected the four customer engineers with the lowest scores -- Caruso among them -- for the layoff. At the time the layoff was to be announced, Caruso was hospitalized for a hernia flare-up. Not wanting to be inconsiderate, Caruso was told of his separation when he reported back to work. After his termination, Caruso underwent knee surgery to repair a torn meniscus, and eventually was deemed to have a 7% degree of permanent impairment. Caruso claimed that Siemens discriminated against him on the basis of his physical condition in violation of the Connecticut Fair Employment Practices Act. The CFEPA prohibits, among other things, the termination of employment because of a physical disability.

In Caruso v. Siemens Business Communications, Inc. (2/5/04), the U.S. District Court for Connecticut dismissed Caruso's claim of disability discrimination. The court explained that, while Caruso may have developed a chronic injury on and after his termination, the relevant date under CFEPA is not the date of the actual termination, but the date when Caruso was selected for the layoff. As of that date, neither Caruso's knee, back, or ankle injuries, nor his hernia constituted a "chronic physical handicap, infirmity or impairment" as required by CFEPA. The court rejected Caruso's argument that his physical condition after he had been selected for the layoff was relevant to his disability claim, noting that "a Plaintiff cannot establish … a case of disability discrimination based on a condition unknown to [the employer] at the time of the Plaintiff's selection for lay-off."