

English Only? Only When Necessary!

By: David Trevor

"I don't want people speaking Spanish out on the line. If something is going wrong I need to know about it right away – in English."

"We can't promote Xiao to manager; with his accent, his group would never understand him."

"Can't you make those Somalis speak English in the lunchroom? I think they're talking about me and don't want me to know what they're really saying."

Do you ever hear complaints like these from your employees? With America's population growing more diverse all the time – particularly with large influxes of immigrants for whom English is either a second language or no language at all – many employers are facing the issue of how to deal with employees who prefer to speak (or can only speak) languages other than English in the workplace. Many employers have responded with policies

requiring "English Only" in the workplace, at least under some circumstances, or making English fluency (including the lack of a heavy accent) a requirement for certain positions.

The decision to utilize such policies, however, should not be taken lightly. Needlessly restricting employees from speaking in the languages they use most comfortably can generate resentment and damage morale. Equally troubling, an arbitrary or overly broad rule may be seen as proof of discrimination. An employer who handles the situation sensitively and appropriately can foster effective communication and efficient functioning in the workplace. An employer who mishandles it can find itself on the losing end of a lawsuit for race or national origin discrimination.

[see English Only on page 2](#)

Contents

English Only? Only When Necessary!	1
Anti-Discrimination Laws and Employee Benefits Plans	1
Individual Arbitration Agreements No Bar to EEOC Actions	7
Supreme Court Limits Definition of Disability Under ADA	8
Court Rejects Public Policy Limitation on Whistleblower Claims.....	10
Immigration Alert: New Laws Impact Spousal Employment, Blanket Transfers	13
<i>Goins v. West Group</i> : The Minnesota Supreme Court Locks the Restroom Door	14
Guess Who is Suing You? Individual Supervisor Liability for Discrimination Under State Law	15
Playing It Safe: Utilizing Alaska's Drug Testing Statute	18
Upcoming Seminars	20
Dorsey News	21
Cases to Watch	22
Attorney Profile	23
Labor & Employment Law Practice Group	24

Anti-Discrimination Laws and Employee Benefits Plans

By: Stephen P. Lucke and Leslie J. Anderson

In the fall of 2000, the Equal Employment Opportunity Commission (EEOC) issued a compliance manual setting forth its position on the application of non-discrimination laws to employee benefit plans. Employers that run afoul of these laws potentially face liability in their capacity as benefit plan sponsors.

Employee Benefit Plans Generally

Nearly all companies sponsor employee benefit plans. The vast majority are governed by the Employment Retirement Income Security Act of 1974 (ERISA).

As its name suggests, ERISA governs retirement plans, which may be defined benefit plans (in which the employee is promised a certain retirement benefit in the future) or defined contribution plans (in which the employer, the employee or both make periodic contributions). ERISA also governs welfare benefits, such as health, life, disability and severance benefits. Such benefits may be self-funded by the employer, or acquired through the purchase of insurance.

[see Anti-Discrimination Laws on page 4](#)

English Only from page 1***Language Restrictions As National Origin Discrimination***

The risk that workplace rules about language will generate liability under federal or state anti-discrimination law may come as a surprise to unwary employers. After all, employers normally have considerable control over employees' self-expression in the workplace. Moreover, the list of characteristics expressly protected by federal (and most state) anti-discrimination laws includes such things as race, religion, gender, age and disability, but the laws do not specifically mention either the inability to speak English or a preference for some other language.

Nevertheless, most courts that have considered the subject have determined that needlessly penalizing those who cannot or prefer not to speak English is or may be a form of unlawful national origin discrimination under Title VII of the Civil Rights Act of 1964 (and, where applicable, under state statutes containing similar prohibitions). Languages are, of course, closely associated with national origin. Someone who speaks German as his or her first language probably either was born in a German-speaking country or had recent ancestors who were. Therefore, an employer who adopted a policy of never hiring German speakers might well be found to be discriminating against persons of German national origin.

The modern workplace, of course, often presents more complex situations, and, not surprisingly, the legal analysis of English Only and English fluency requirements is similarly complicated, both in the types of theories a plaintiff might assert, and in the degree of scrutiny courts use in evaluating such policies.

Two Kinds of Discrimination

Broadly speaking, anti-discrimination law breaks down into two theories, disparate treatment and disparate impact, and English restrictions can implicate either theory. "Disparate treatment" refers to intentional acts of discrimination, typically based on bigotry and prejudice, and often concealed by pretextual explanations for employment rules or actions. Thus, an employee might claim that the employer has adopted an English Only policy not because of a desire to improve communication in the workplace, but rather because the employer is biased against foreigners and wants to exclude them from his business.

"Disparate impact," by contrast, deals with neutral employment policies which have an unequal impact on different protected groups, even though the employer has no discriminatory intent. An employee might claim that an English fluency rule is far more likely to exclude employees born in other countries than those born in

America. A disparate impact case is fairly difficult to prove, often requiring statistical evidence, and the employer's business justification for the policy can be a valid defense. But the theory does exist as a potential claim.

Two Views of the Law

The legality of English Only and English fluency requirements is further clouded by a division of opinion among the authorities. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing anti-discrimination laws, has issued a guideline broadly condemning English Only rules that apply "at all times in the workplace" and indicating that it "will presume that such a rule violates Title VII." A few courts have agreed.

Most courts, however, take a more balanced approach. The majority view is that English Only rules are not *per se* violations of Title VII, although they may be evidence of discrimination, particularly if they are overbroad or arbitrary. Two key factors courts have focused on when upholding English Only policies are limited scope, (*i.e.*, the policy only applies to work-related conversations, not break room chats) and application only to bilingual employees. An employee who can speak English, along with another language, has the ability to comply with the policy, while one who has no English is simply unable to comply. This harsher consequence invokes greater judicial suspicion when evaluating the policies.

The Key Issue: Work-Related Justifications

Given the EEOC's hostility to such policies and the willingness of courts to scrutinize them closely, the employer must have solid justification for an English Only rule or English fluency requirement. For many employers, there will be strong reasons for such policies. Employers have justified English Only rules for the following reasons:

- Improving interpersonal relations among employees;
- Preventing alienation of other employees;
- Preventing harassment of employees in languages they do not understand;
- Preventing distractions that might threaten workplace safety;
- Enhancing product quality;
- Making customers feel more comfortable;
- Improving workers' English skills; and
- Facilitating supervisors' oversight of employees.

Similarly, English fluency job requirements have been based on:

see English Only on page 3

English Only from page 2

- The need for public contact in the job;
- The need to understand instructions from superiors;
- The need to give instructions to subordinates;
- The need to generate written reports; and
- The need to be able to testify in court.

Obviously, communication is vital in many jobs, and the employer is entitled to require the ability to communicate well in English where the job legitimately demands it.

None of these justifications, however, should be used unless they truly apply. Certainly the EEOC will not simply accept an employer's unsupported assertion that these considerations justify a language requirement, and many courts will scrutinize the situation closely as well. An employer should be prepared to demonstrate how these potential justifications actually exist in the particular workplace or, in the case of an English fluency requirement, really are important to the particular job involved.

Thus, a blanket requirement that English be the only language spoken – everywhere and at all times – may well be found to be illegal, because in most workplaces there is no legitimate need for employees to always speak English. An employee on break may be more comfortable speaking in his native tongue to a co-worker and should be allowed to do so. On an assembly line, however, where significant safety or quality concerns may require instant communication and understanding, an English Only rule will probably be upheld. If a large object is about to fall on someone, he should be warned instantly in a language he can understand.

English fluency requirements present similar issues. An employer cannot simply declare, without an adequate business reason, that certain positions only be filled by those fluent in English. Some positions, including some manual labor and production jobs, can be performed satisfactorily with little or no knowledge of English. On the other hand, a manager whose subordinate employees spoke only English presumably would have to communicate with them, and would thus need to do so in English. Similarly, if that manager was required to communicate with superiors who spoke only English, or to write reports for English-only readers, fluency would be a practical necessity.

Practical Tips

While this area presents some technical complexity, a few practical guidelines will help steer employers in the right direction:

- Focus on specific workplace issues. Don't blindly impose blanket prohibitions or requirements. Figure

out where English restrictions make sense because of real concerns, and confine the policy to where it is needed.

- Ask yourself whether a policy is really necessary. Understandably, English Only policies can be hot-button issues for persons fluent in or exclusively speaking other languages. Imposing restrictions on people's use of their native tongue, or limits on how high they can rise in your company based on their language, may be necessary, but it is likely to be resented if imposed arbitrarily or with little reason.
- Craft a policy thoughtfully. If you do decide that either an English Only rule or an English fluency requirement is necessary, make sure the policy is crafted with some care. Consulting an attorney to evaluate the law in your jurisdiction would be wise, and tailoring a policy to the specific needs of your workplace is essential. Make sure the limitations are only as broad as needed to accomplish your legitimate objectives.
- Communicate the policy to everyone. Once you have determined a policy is necessary and developed an appropriate one, make sure everyone knows what it is, and what it isn't. Educate your managers and supervisors so that they can enforce the policy without going beyond its bounds. Once the company has established the limits of an English Only policy, an overzealous supervisor who imposes greater restrictions on employees can get the company into a lot of trouble.

Think about creative alternatives. There are a lot of talented people out there with limited English or no English at all. If your company is cutting itself off from that talent pool without good reasons, it is placing itself at a needless disadvantage. Rather than trying to restrict the speaking of other languages, consider ways in which they can be accommodated in your workplace: by making work directions and policies available in other languages, by permitting bi-lingual employees to translate for those who speak only a foreign language, by encouraging (but not requiring) employees to learn English as a second language and other creative methods.

America as a nation of immigrants is more than just a cliché, it is a practical and economic reality. While business necessity still permits limited English Only rules and English fluency requirements, employers need to deal flexibly and carefully with the demands of a multi-lingual workplace.

David Trevor, a Senior Attorney in Dorsey's Minneapolis office, practices in the firm's Trial Department.

Anti-Discrimination Laws from page 1***Employer as Sponsor and
Fiduciary of Employee Benefit Plans***

When an employer establishes or maintains benefit plans, it is the “plan sponsor.” In sponsoring employee benefit plans, employers are said to wear two hats. When they offer, design, or terminate retirement or welfare benefits, they wear their “sponsor hat” or “settler hat.” See *Anderson v. Resolution Trust Corp.*, 66 F.3d 956 (8th Cir. 1995). When employers exercise “discretionary responsibility in the administration of the Plan,” such as by investing plan assets, communicating with employees about benefits, or evaluating benefit claims, they are said to be wearing their “fiduciary hat.” See 29 U.S.C. § 1002(21)(A). *Olson v. E. F. Hutton & Co., Inc.*, 957 F.2d 622, 625 (8th Cir. 1992).

In recent years, courts and regulators have imposed increasingly strict obligations on employers acting in their fiduciary capacity. For example, courts have held that employers have obligations to communicate candidly with employees about benefits, *Varity Corporation v. Howe*, 516 U.S. 489 (1996); provide information about early retirement or severance packages that are under “serious consideration,” *McAuley v. IBM Corp.*, 165 F.3d 1038 (6th Cir. 1999); and adhere to certain standards when deciding claims for benefits, *Richardson v. Central States Southeast and Southwest Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981). These holdings respond to ERISA’s mandate that a fiduciary act “solely in the interest” of plan participants and for their “exclusive purpose.”

As employers’ fiduciary responsibilities have increased, relatively little attention has been paid to their obligations as benefit plan sponsors. It is often said that when wearing their “sponsor hat,” employers may act in their own interests, not necessarily in the interests of the employees, so long as they follow the terms of the plan, ERISA, and any other legal obligations. See *Lockheed Corp. v. Spink*, 517 U.S. 883 (1996).

***Employer Liability for Discrimination
in Employee Benefit Plans***

This focus on an employer’s fiduciary responsibilities, as opposed to its contractual and legal obligations as plan sponsor, is changing. Just as employers’ practices in hiring, promotion, and termination have been scrutinized for illegal discrimination, so now are their practices in offering and designing of employee benefit plans. Some courts have held that employers have violated anti-discrimination laws by the way in which they offer and design employee benefits. Two years ago, the EEOC, which has primary jurisdiction for enforcing the nation’s anti-discrimination laws, issued Enforcement Guidelines Regarding Discrimination in Employee Benefits (Guidance).

The Guidance is intended for EEOC enforcement personnel to use in investigating employers’ alleged violations of anti-discrimination laws. It also provides a useful reference for employers to understand the EEOC’s (and plaintiffs’ likely) positions on issues involving discrimination with respect to employee benefit plans. The Guidance is not a regulation and is not controlling on courts. In some cases, in fact, it is arguably at odds with current case law. Nevertheless, similar guidelines from the EEOC have been viewed as “a body of experience and informed judgment,” *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and may receive judicial deference.

The Guidance analyzes employee benefit plan discrimination issues with respect to the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964.

ADEA

The ADEA provides that:

It shall be unlawful for an employer –

- (i) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.

29 U.S.C. § 623(a).

Notwithstanding this general prohibition, the ADEA does allow employers to either (a) provide equal benefits to older and younger workers (the equal-benefit rule) or (b) spend equal amounts on such benefits (the equal-cost rule). The Guidance states that benefits are “equal” only if older and younger workers receive the same payment options, the same types of benefits and the same amount of benefits. It also provides detailed guidelines for applying the equal-cost rule. For example, the Guidance provides that the rule only applies to benefits where the cost increases with age (*e.g.*, life, health and disability insurance), the benefit is part of a bona fide employee benefit plan which requires lower benefits, and the payment made or cost incurred on behalf of an older worker is no less than what is paid or incurred for a younger worker. Finally, the benefit levels for older workers must be reduced no more than necessary.

The Guidance applies the equal-benefit and equal-cost rules to life, health, and disability employee benefit plans. Notably, the Guidance specifies that the employer has the burden of documenting and supporting its practices to satisfy the equal-cost defense.

see Anti-Discrimination Laws on page 5

Anti-Discrimination Laws from page 4

In the retiree health insurance context, the Guidance initially adopted the Third Circuit's recent holding in *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3rd Cir. 2000), and stated that employers may not reduce or eliminate such benefits when retirees reach the age of Medicare eligibility. The Guidance took the position that the ADEA governs retirees, that Medicare status is a proxy for age and that if retiree health benefits are reduced because an employee has become eligible for Medicare, the equal-cost or equal-benefit standards must be satisfied. The EEOC Guidance did allow "Medicare carve-out" plans that enable employers to take advantage of the benefits Medicare offers, "as long as the *total* health coverage available to older retirees is at least equal, in type and value, to that offered by the employer for younger retirees." Guidance, page 21.

Employers criticized *Erie County* and the Guidance on the grounds that the ADEA does not apply to retirees, Medicare coverage is not a proxy for age (*e.g.*, disabled employees are eligible for Medicare), and that constraining employers on this issue will discourage them from offering health benefits to retirees. Subsequently, the EEOC rescinded that portion of the Guidance relating to *Erie County*, but its prior position offers some insight to how it analyzes these issues.

The Guidance also provides notice that early retirement plans (ERIPs) may be subject to scrutiny under the ADEA. While ERIPs in general are not unlawful, it is unlawful for an employer to condition or reduce early retirement benefits because of the employee's age. Thus, an ERIP that withholds or reduces benefits to older retirees, while continuing to make them available to younger retirees to encourage earlier departure from employment, will be found in violation of the ADEA. Unless, that is, the employer can demonstrate that the reason for the difference in benefits is due to non-age-related factors, such as cost.

ADA

The Americans with Disabilities Act generally provides that employers may not discriminate against qualified individuals on the basis of a disability, including with respect to benefits. *See* 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.4(f). However, as the Guidance recognizes, Congress acknowledged "that some types of benefit plans rest on an assessment of the risks and costs associated with various health conditions in accordance with accepted principles of risk assessment." Under the ADA, an employer must provide equal benefits to employees with disabilities and those without disabilities, unless a "disability-based distinction" can be justified by showing that the benefits are provided pursuant to a bona fide employee benefit plan that is not a subterfuge to evade the purpose of the ADA.

The Guidance provides that if benefits for disabled and non-disabled workers are equal (*i.e.*, same with regard to premiums, deductibles, coverage caps and waiting periods), there is no violation. If a benefit plan singles out a particular disability, a discrete group of disabilities or disabilities in general, however, then the EEOC considers this a disability-based distinction. For example, plans that exclude depression, or place a cap on cancer that is lower than other conditions, could run afoul of the Guidance. Generally, health-related distinctions will not be a violation if they apply to "a multitude of dissimilar conditions" and "constrain both individuals with and individuals without disabilities."

The Guidance's treatment of distinctions based on mental and physical impairments is noteworthy. The EEOC recognizes that such distinctions are permitted in health plans because "mental conditions" apply broadly to such things as grief counseling, self-esteem and marital counseling, which are not disabilities under the ADA. However, footnotes to the Guidance reflect the EEOC's position that such distinctions are disability-based in the context of long-term disability plans. Given the multitude of long-term disability plans providing for only 24 months of coverage for mental impairments, the EEOC's position – if adopted – would have a significant effect on such coverage.

To date, several courts have rejected the EEOC's position on this issue, and have indicated that such distinctions do not violate the ADA. *See e.g., EEOC v. Staten Island Savings Bank*, 207 F.3d 144 (2nd Cir. 2000) (the legislative history of the ADA indicates that Congress did not intend to restrict the insurance industry's long-term practice of offering different benefits for mental and physical disabilities). Generally, the reasoning of these decisions has been that policies with 24-month limitations for mental health coverage are offered to all employees on an equal basis (*i.e.*, at the time of issuance no distinction is made between employees who have mental disabilities and those who do not), and are not, therefore, discriminatory.

While the federal courts have generally rejected the EEOC's position in interpreting the ADA, a three-judge panel of the Eleventh Circuit recently adopted the EEOC's approach, finding that a 24-month mental/ nervous limitation violated the ADA. *Johnson v. Kmart Corp.*, 273 F.3d 1035 (11th Cir. 2001), rehearing en banc granted, opinion vacated Dec. 19, 2001. The Eleventh Circuit, however, subsequently vacated the decision and will rehear the case *en banc* (although the matter has currently been stayed because of Kmart's bankruptcy filing).

In *Kolton v. County of Anoka*, the Minnesota Court of Appeals held that a public employer discriminated against

[see Anti-Discrimination Laws on page 6](#)

Anti-Discrimination Laws from page 5

a mentally disabled employee, in violation of the Minnesota Human Rights Act, by providing a shorter period of long-term disability insurance benefits for the mentally disabled than the physically disabled – even though all employees were offered the same policy, with the same limitations, regardless of their physical or mental health. The court's holding does not apply to ERISA plans sponsored by private employers. The Minnesota Supreme Court has granted review in *Kolton*.

Another area in which the EEOC and the courts have disagreed deals with the exclusion of infertility treatment from health plans. In 1998, the U.S. Supreme Court, in *Bragdon v. Abbott*, 524 U.S. 624 (1998), ruled that reproduction qualifies as a “major life activity” under the ADA. Shortly after the Supreme Court's ruling, the EEOC charged that an employer, the Franklin Covey Company, violated the ADA by offering inadequate infertility treatment under its employer-sponsored group medical plan. *Saks v. Franklin Covey Co.*, No 99 CV 9588 (SDNY May 12, 1999). Franklin Covey's self-insured plan offered an oral drug regime for infertility treatment but excluded injectable drugs and surgical impregnation procedures. In a subsequent suit, an infertile employee claimed that Franklin Covey discriminated against her because of her disability – infertility – and therefore violated the ADA.

While agreeing that infertility was a disability under the ADA, the *Saks* court held that the Franklin Covey plan did not discriminate against infertile women in violation of the ADA. Using the same reasoning as the court decisions allowing different benefits for mental and physical disabilities, the court held that Franklin Covey's plan offered the same insurance coverage to all its employees – it did not offer infertile people less pregnancy- and fertility-related coverage than it offered to fertile people – and thus, it was not discriminatory under the ADA.

Title VII

Generally, under Title VII of the Civil Rights Act of 1964, employers may not consider a person's race, color, sex (including pregnancy), national origin or religion in determining eligibility for, amount of, or charges for, employee benefits. An employer may, however, refuse to provide coverage for a condition that only (or disproportionately) affects a protected class, provided the employer uses a neutral standard based on medically-accepted medical criteria.

The Guidance provides several examples of discrimination the EEOC believes would violate Title VII. For example, a health plan that provides supplemental coverage for a heart condition disproportionately affecting men and requires them to pay for it would be considered discriminatory on

its face. The Guidance also suggests that exclusions applied to particular sicknesses that have a “disparate impact” on one gender (*e.g.*, excluding as an experimental treatment the use of bone marrow transplants for breast cancer) are a violation. Employers may argue that any disparate-impact analysis should, at a minimum, consider all conditions for which experimental treatment is sought.

On a related point, in December 2000 the EEOC ruled that health plans that exclude contraceptives, but cover other routine preventative care, violate the Pregnancy Discrimination Act (PDA). Prescription Contraceptive Drugs and Devices, EEOC Decision (Dec. 14, 2000), <http://www.eeoc.gov/docs/decision-contraception.html>. The PDA applies to contraceptives, the EEOC reasoned, because the statute relates to a woman's ability to become pregnant, and contraceptives are a means by which women control pregnancy. Contraceptives must be covered then, the EEOC concluded, if other treatments to prevent medical conditions are covered (*e.g.* vaccinations, blood-pressure drugs and preventative examinations).

In a recent case, *Erickson v. Bartell Drug Co.*, a court agreed with the EEOC on this issue. 141 F. Supp. 2d 1266 (W.D. Wash. 2001)(an employer's comprehensive prescription drug plan that excluded prescription contraceptives discriminated against female employees on the basis of sex, and violated Title VII). The *Erickson* court noted that “Title VII does not require employers to offer any particular type or category of benefit. However, when an employer decides to offer a prescription plan covering everything except a few specially excluded drugs and devices, it has an obligation to make sure the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage to both sexes.” *Erickson*, 141 F. Supp. 2d at 1272.

While most issues under Title VII (and the Equal Pay Act) arise in the context of gender discrimination, employers should be mindful of all protected classes under the statute.

Conclusion

In recent years, employers increasingly have paid attention to their conduct as fiduciaries, with respect to employee benefit plans they sponsor. The EEOC's Guidance document underscores their additional obligations as plan “sponsor” or “settler,” including their legal duty to provide benefit plans that comply with anti-discrimination laws.

Steve Lucke and Leslie Anderson are Partners in Dorsey's Minneapolis office. Steve practices in the firm's Trial Department and Leslie practices in the firm's Employee Benefits Practice Group.

Individual Arbitration Agreements No Bar to EEOC Actions

By: Ruon Sawyer

On January 15, 2002, by a 6-3 vote, the U.S. Supreme Court ruled that an agreement between an employer and employee to arbitrate employment-related disputes does not bar the Equal Employment Opportunity Commission (EEOC) from filing a court action in its own name and pursuing monetary damages on behalf of the employee.

Prior to the Court's decision in *EEOC v. Waffle House*, there was disagreement among the circuit courts as to whether the EEOC had the authority to pursue victim-specific relief (*i.e.*, reinstatement, backpay and compensatory damages) if an employee had a contractual agreement with his employer to arbitrate employment-related claims. In a 1999 decision, *EEOC v. Frank's Nursery & Crafts, Inc.*, the Sixth Circuit held that an employee's agreement to arbitrate does not affect the EEOC's independent statutory authority to pursue injunctive relief, backpay, and damages in federal court. On the other hand, decisions in the Second, Fourth, and Eighth Circuits, while permitting the EEOC to pursue injunctive relief in federal court, prevented the agency from recovering monetary damages for the individual.

The recent supreme court ruling involved Waffle House, Inc., a company that requires all prospective employees to sign an application containing a mandatory arbitration agreement as a condition of employment. Thus, there was no doubt regarding whether former employee Eric Baker (who subsequently filed a charge with the EEOC) had agreed to arbitrate his claim. There also was no doubt that the EEOC was not a party to the arbitration agreement between Mr. Baker and Waffle House, Inc. Given this set of facts, the Fourth Circuit held that the EEOC was free to pursue the charge in a judicial forum, but its remedy was limited to injunctive relief. That is, the court prevented the EEOC from pursuing monetary damages on behalf of Mr. Baker. According to the Fourth Circuit, "When the EEOC seeks 'make-whole' relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests."

On review, the Supreme Court rejected the Fourth Circuit's attempt to limit the EEOC's statutory right to pursue victim-specific relief. Key to the Court's decision was the fact that the EEOC was not a party to the arbitration agreement between the employee and employer. The Court also stressed that the EEOC was not merely a proxy for the employee under the EEOC's charge-

handling scheme. Therefore, while the employee had agreed to arbitrate the employment-related dispute, the agreement did not waive the EEOC's statutory remedies including the ability to seek victim-specific relief.

Throughout its decision the Court stressed that under Title VII the EEOC has exclusive authority to choose the forum in which to proceed and the remedy sought once a charge has been filed. The majority was wholly unpersuaded by the Fourth Circuit's compromise solution: "[I]t is the public agency's (EEOC's) province – not that of the court – to determine whether public resources should be committed to the recovery of victim-specific relief. And if the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum."

While the Court in *Waffle House* focused on clarifying the EEOC's independent role in enforcing federal discrimination statutes, the practical consequence of the decision is that it permits an employee who has consented to a valid arbitration agreement to recover victim-specific relief in a judicial forum. As such, the Court's ruling calls into question the efficacy of individual employment arbitration agreements in cases involving claims within the jurisdiction of the EEOC.

An open question remains following the *Waffle House* ruling regarding whether a settlement agreement or arbitration judgment would also leave the EEOC free to pursue victim-specific relief on behalf of the employee. Justice Thomas, writing for the dissent, stated that an employer who enters into an arbitration agreement may now be worse off because "it will face the prospect of defending itself in two different forums against two different parties seeking precisely the same relief. It could face the EEOC in court and the employee in an arbitral forum."

The practical impact of the *Waffle House* decision remains to be seen. Its potential affect is tempered by the fact that the EEOC generally pursues directly only a small percentage of the charges filed with the agency. With tens of thousands of charges filed each year (79,896 in fiscal year 2000), the EEOC simply does not have the time or resources to prosecute the claims of every charging party. In those cases it does pursue, however, the EEOC need no longer be concerned about constraints on its authority and discretion arising from any individual arbitration agreement.

Ruon Sawyer is an Associate in the Labor and Employment Law Practice Group. Ruon works in the firm's Minneapolis office.

Supreme Court Limits Definition of Disability Under ADA

By: Erik Nelson

Reversing the Sixth Circuit Court of Appeals, the U.S. Supreme Court recently issued a new and important (not to mention unanimous) decision addressing the scope of the definition of “disability” under the Americans with Disabilities Act (ADA). Like its other recent decisions on the ADA, the Court’s decision in *Toyota Motor Mfg. of Kentucky, Inc. v. Williams*, 122 S. Ct. 681 (2002), which limits the type and nature of impairments which qualify as disabilities under the ADA, likely will have a lasting and noticeable effect on federal disability discrimination litigation. The decision also likely will fuel the recent trend toward increasingly employer-friendly case law in this area.

The plaintiff began working for Toyota in 1990, where she soon developed carpal tunnel syndrome and resultant work-related restrictions. Toyota accommodated her restrictions for a couple of years through various modified-duty jobs. Following settlement of an earlier lawsuit against Toyota in which the plaintiff alleged failure to accommodate (once litigious, always litigious), she was placed in a position in Quality Control Inspection Operations (QCIO). The plaintiff initially was limited to less physically demanding duties, but, in the fall of 1996, Toyota decided to require all QCIO employees, including the plaintiff, to perform all of the functions of the position. Soon thereafter, the plaintiff began experiencing pain in her neck and shoulders and was subsequently diagnosed with a number of carpal tunnel-type injuries. The plaintiff requested that she return to doing only the less physically demanding duties in QCIO.

As the Supreme Court eloquently observed, “[t]he parties disagree about what happened next.” The plaintiff contends that Toyota refused her request and forced her to continue performing all functions of the job, causing her to incur even greater injury. Toyota maintains that the plaintiff simply began missing work. In either case, on December 6, 1996, the plaintiff received a “no-work-of-any-kind restriction” from her doctors and did not work after that. Toyota terminated her the following month, due to her poor attendance.

The plaintiff thereafter filed suit in federal court, alleging that Toyota violated the ADA by failing to reasonably accommodate her disability and by terminating her employment. The district court dismissed all of her claims. In dismissing the reasonable accommodation claim, the district court held that, although the plaintiff

suffered from an impairment, the impairment did not substantially limit her in a “major life activity.” Thus, she was not disabled at the time she requested accommodation. The court dismissed the wrongful termination claim because, even assuming she was disabled at the time of her termination, the plaintiff could not demonstrate that she was “qualified” to hold the position in light of the “no-work-of-any-kind” restriction from her physicians.

On appeal, the Sixth Circuit Court of Appeals affirmed the district court as to all issues except as to whether the plaintiff was disabled when she sought accommodation. The Sixth Circuit’s review of that disability determination ultimately came down to whether the plaintiff was substantially limited in the major life activity of performing manual tasks.

The Sixth Circuit reviewed the Supreme Court’s decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which established the “substantial class of jobs” standard for evaluating limitations upon the major life activity of working. The Sixth Circuit decided that, to demonstrate a substantial limitation on the major life activity of performing manual tasks, the plaintiff “must show that her manual disability involves a ‘class’ of manual activities affecting the ability to perform tasks at work.” Applying this standard, the court concluded that the plaintiff was disabled, as her injuries prevented “her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.” The court disregarded the plaintiff’s ability to tend to her own personal hygiene and carry out personal and household chores, because that did not impact her inability to “perform the range of manual tasks associated with an assembly line job.” Accordingly, the Sixth Circuit granted partial summary judgment to the plaintiff on the issue of disability and remanded the reasonable accommodation claim.

The Supreme Court, granting *certiorari* “to consider the proper standard for assessing whether an individual is substantially limited in performing manual tasks,” reversed the Sixth Circuit’s grant of summary judgment to plaintiff. The Court first observed that the term “substan-

[see Definition of Disability Under ADA on page 9](#)

Definition of Disability Under ADA from page 8

tially” suggests that, to be disabling, limitations must do more than interfere in a minor way with the performance of manual tasks. Rather, the limitation must be “considerable” or “to a large degree.” To constitute a “major life activity,” an activity must be one that is “of central importance to daily life.” Thus, to be substantially limited in the major life activity of performing manual tasks, a plaintiff must demonstrate that a permanent or long-term impairment prevents or severely restricts her ability to perform “activities that are of central importance to most people’s daily lives.”

Turning to the facts, the Supreme Court rejected the Sixth Circuit’s use of a “class” analysis to determine whether the plaintiff was substantially limited in performing manual tasks, finding no support for the use of a “class-based framework” outside of the context of the major life activity of working. The Court further found that the Court of Appeals’ reasoning “circumvented *Sutton* by focusing on [the plaintiff’s] inability to perform manual tasks associated only with her job.” Under the Sixth Circuit’s analysis, the Court held, “*Sutton*’s restrictions on claims of disability based on a substantial limitation in working, [which forbid disability claims based solely upon the inability to perform one specific job], will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a ‘class’ of tasks associated with that specific job.”

The Supreme Court also rejected the Sixth Circuit’s attempt to limit the disability analysis to the effects of the plaintiff’s impairment in the workplace, chiding the court for deliberately disregarding the very evidence upon which it should have focused: the plaintiff’s ability to tend to her personal hygiene and carry out personal and household chores. “[H]ousehold chores, bathing, and brushing one’s teeth are among the types of manual tasks of central importance to people’s daily lives, and should have been part of the assessment of whether [the plaintiff] was substantially limited in performing manual tasks.” Focusing on those activities, the Supreme Court held that the limitations expressed on the record did not establish, as a matter of law, that the plaintiff was substantially limited in performing manual tasks. Thus, the Supreme Court reversed the Sixth Circuit’s grant of partial summary judgment to the plaintiff and remanded the case for further proceedings.

As we examine the potential effects of this decision, it is helpful first to remember what this case is *not* about. It is not about the major life activity of working, as the Court expressly declined to consider that issue. The unanimous opinion does, however, indicate that the Court may be prepared to eliminate working from the realm of major

life activities, if forced to make the choice. The case also is not about whether the plaintiff’s reasonable accommodation claim should have been dismissed. Toyota did not seek *certiorari* on the question of whether summary judgment in its favor should have been affirmed. Thus, the only question before the Supreme Court was whether partial summary judgment properly had been granted to the plaintiff (proving the reverse of the old adage: if ye don’t ask, ye shan’t receive).

Toyota Motors does, however, stand as a strong and unqualified reinforcement of the general notion (established by prior decisions of the Supreme Court) that, to be disabled under the ADA, an individual must establish that he or she is *significantly* impacted in his or her day-to-day life, as compared to others in the population, by a permanent or long-term impairment. It is not enough to have minor limitations, and it is not enough that the individual is unable to work in a few select jobs (or to perform the manual tasks associated with such jobs).

More specifically, following *Toyota Motors* it will be much harder for a plaintiff to establish the existence of a covered disability based upon carpal tunnel syndrome and similar

see [Definition of Disability Under ADA on page 10](#)

www.dorseylaw.com

Learn about our . . .

- ◆ Practice Groups
- ◆ Attorneys
- ◆ 23 Global Offices
- ◆ Firm Information



U S A E u r o p e A s i a C a n a d a

Definition of Disability Under ADA from page 9

work-related conditions. The Supreme Court clearly has stated that, although work-related restrictions may be considered, courts must assess the alleged impairment's impact on the type of day-to-day activities (like bathing, grooming, and caring for oneself) that are of "central importance" to most people. Thus, to survive summary judgment, a plaintiff must go beyond an alleged inability to perform functions of a job and put forth specific evidence demonstrating a significant impact upon activities that are of "central importance" to most people.

Although it is clear that this new decision will make it harder for many plaintiffs to survive through summary judgment to trial, this is not to suggest that there is nothing in the opinion for plaintiffs. Indeed, the Supreme Court's opinion reiterates the established notion that disability determinations must be made on an individualized, case-by-case basis, taking into account the actual effects of an impairment on the individual. There simply are no *per se* disabilities under the ADA. Thus, we can expect that the plaintiff's bar likely will use this case as further support for the argument that summary judgment generally is inappropriate in an ADA case due

to the fact-driven assessment required. It is not likely, however, that this argument will meet with any more success than it has in the past.

It also should be noted that the direct impact of *Toyota Motors* likely will be limited primarily to cases brought under the ADA and under state disability discrimination statutes which, like the federal statute, define "disability" to require a substantial limitation on a major life activity. The decision likely will not directly or significantly impact claims brought under state statutes (such as those in California, Minnesota and Washington) which utilize different definitions. In Minnesota, which defines "disability" to require only a "material" limitation on a major life activity, we likely can expect to see a growing divide (at least in state court decisions) between the state and federal case law defining the term "disability."

Erik Nelson is an Associate in the Labor and Employment Law Practice Group. Eric works in the firm's Minneapolis office.

Court Rejects Public Policy Limitation on Whistleblower Claims

By: James D. Kremer

Resolving a split within the state court of appeals, the Minnesota Supreme Court has held that an employee need not establish that a suspected violation of law reported by the employee implicates public policy in order to invoke the protections of the State's whistleblower statute. In *Marguerite Anderson-Johanningmeier et al. v. Mid-Minnesota Women's Center, Inc. et al.*, No. CO-00-164 (January 3, 2002), a unanimous court concluded that the plain language of the statute "clearly and unambiguously protects reports made of a violation of any federal or state law," regardless of whether the alleged violation reported affects the rights of only one or a few employees or has broader implications.

Statutory and Judicial Background

Enacted into law in May 1987, the Minnesota whistleblower statute provides, in part:

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or

penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because ... (a) the employee, or a person acting on behalf of the employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.

Minn. Stat. § 181.932, subd. 1(a). On its face, the statute does not suggest a public policy limitation on its reach. Indeed, the language of the statute – proscribing retaliation against an employee who "reports a violation or suspected violation of any federal or state law" – would seem to bely the notion that its applicability depends on the nature of the violation reported. Notwithstanding the apparent clarity of the statute, however, its application by the courts has been anything but clear and consistent.

see Whistleblower Claims on page 11

Whistleblower Claims from page 10

Concerned that the whistleblower statute (if not limited in some respect) could become a vehicle for eroding or evading the at-will employment doctrine, courts in several cases have suggested that the statute should be applied only to instances involving violations of law implicating public rather than purely private concerns. In *Vonch v. Carlson Companies*, 439 N.W.2d 406 (Minn. App.), *rev. denied* (Minn. 1989), the court of appeals cited the statute in addressing the public policy exception to the at-will employment doctrine, stating that “[t]he public does not have an interest in a business’s internal management problems.”

Similar sentiments were expressed by the Minnesota Supreme Court in *Williams v. St Paul Ramsey Medical Center, Inc.*, 551 N.W.2d 483 (Minn. 1996), a case involving claims under the whistleblower statute and the Minnesota Human Rights Act. Although the court did not address whether the whistleblower statute only applies when the reported violation implicates public policy – concluding instead that the plaintiff’s whistleblower claims were barred by the exclusivity provision of the Human Rights Act – it stated that the very nature of whistleblower statutes “connotes an action by a neutral – one who is not personally and uniquely affronted by the employer’s unlawful conduct but rather one who ‘blows the whistle’ for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower. Were it otherwise, every allegedly wrongful termination of employment could, with a bit of ingenuity, be cast as a claim pursuant to [the whistleblower statute].” 551 N.W.2d at 484 n. 1.

Two years later, the supreme court characterized its cautionary words in *Williams* as dictum and concluded that the language of the whistleblower statute “clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law.” *Hedglin v. City of Willmar*, 582 N.W.2d 897, 901-02 (Minn. 1998). However, the *Hedglin* court stopped short of definitively deciding whether any public policy requirement applied to the whistleblower statute, because the reported violations in that case did, in fact, implicate public policy.

Following the lead of *Hedglin*, the court of appeals held in *Bertagnoli v. Carlson Marketing Group, Inc.*, 1998 WL 665085 (Minn. App. 1998), that the whistleblower statute does not contain a public policy requirement. But just three months later, a different panel of the court of appeals reached the opposite conclusion: “Because

interpreting the whistleblower statute to include a public policy requirement supports Minnesota’s careful limitation of at-will employment exceptions to further public interest, we also must conclude [the employee’s] failure to report a practice that implicates public policy leaves her unprotected by the whistleblower statute.” *Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A.*, 586 N.W.2d 811, 814 (Minn. App. 1999), *rev. denied* (Minn. 1999). The *Donahue* court believed that without a public policy limitation the whistleblower statute would “obliterate employment at-will,” and held that the statute should only protect employees who “expose violations of law designed to promote the public’s morals, health, safety and welfare.” *Id.*

***Anderson-Johanningmeier v.
Mid-Minnesota Women’s Center***

The opportunity for the Minnesota Supreme Court to squarely address and resolve this dispute finally presented itself in *Mid-Minnesota Women’s Center*. Plaintiffs were the assistant director (Kathy Delaney) and secretary/bookkeeper (Barb Morrell) for Mid-Minnesota Women’s Center (MMWC), a shelter for abused women and children in Brainerd, Minnesota. Both were terminated as part of a reorganization that resulted in the elimination of their positions. They brought suit for violation of the whistleblower statute, alleging that they were terminated for reporting what they felt was a violation of law relating to MMWC’s vacation pay practices.

In 1995, Delaney approved a vacation time request submitted by another employee, Jennifer Cline. After the approval, Cline submitted her resignation then took the approved vacation, returning to work for a few days thereafter before her employment ended. The director of MMWC (Louise Seliski) told Morrell that Cline was not entitled to vacation pay under MMWC’s policies, and directed Morrell not to pay Cline’s vacation time. Morrell told Delaney that she felt she was being asked to do something illegal to keep her job. With Delaney’s support, Morrell called the Minnesota Department of Labor and Industry, identified herself and her employer (including Seliski), and described the circumstances regarding Cline’s vacation pay. The labor department employee told Morrell that MMWC needed to pay Cline the vacation time. Morrell then informed Seliski of her call to the department and of the fact that MMWC

see Whistleblower Claims on page 12

Whistleblower Claims from page 11

needed to pay Cline. Delaney also told Seliski that it would be illegal not to do so.

After these events in July 1995, Morrell and Delaney alleged that their work atmosphere became “very hostile.” In November 1995, Seliski discussed restructuring the MMWC staff as a means of getting rid of the “trouble-makers.” After both Delaney and Morrell submitted letters to Seliski in December complaining about their work conditions and the events surrounding Cline’s vacation pay, their positions with MMWC were eliminated and they were terminated.

Delaney and Morrell asserted whistleblower claims against MMWC and Seliski. At trial, the jury found in favor of Delaney and Morrell on the claim against Seliski, awarding damages totaling \$88,000. However, the district court granted the defendants’ motion for judgment notwithstanding the verdict, concluding that the vacation pay practices underlying plaintiffs’ whistleblower claims did not implicate public policy. “Like the payroll practices in *Donahue* the vacation pay practices in this case only affect the employees of the entities involved in the case. Under the standards enunciated in *Donahue*, such internal practices, even if illegal, do not implicate public policy and as a matter of law Plaintiffs’ whistleblower claims must fail.” The court of appeals affirmed the district court.

The Supreme Court reversed, rejecting *Donahue* and holding that a suspected violation of law reported by an employee need not implicate public policy to fall within the scope of the whistleblower statute. Writing for a unanimous court, Justice Lancaster began and ended the analysis of the issue with the plain language of the statute, reiterating what the court had said previously in *Hedglin* – the statute “clearly and unambiguously protects reports made of a violation of any federal or state law.”

MMWC argued that *Donahue* properly recognized the intent of the Legislature to incorporate a public policy requirement, relying on the fact that the Legislature amended the statute in 1999 five months *after* the court of appeals decided *Donahue*, without changing the operative provision. MMWC invoked Minn. Stat. § 645.17(4), which provides that “[w]hen a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.”

The supreme court rejected this argument, noting that the court of appeals is not the court of last resort with respect to a statute’s construction – that final authority rests with the supreme court. The court also noted that, if anything, its prior decision in *Hedglin* would have alerted the Legislature that it would be unlikely to view *Donahue* as persuasive, prompting the Legislature to act to clarify the statute if it disagreed with *Hedglin* – something it did not do.

MMWC also argued that failing to recognize a public policy requirement for whistleblower claims would open the floodgates to such claims, turning virtually every employment termination into a potential whistleblower claim. Indeed, in her concurring opinion, Chief Justice Blatz acknowledged the “risk” that the court’s decision could thrust the courts into the role of “super-personnel departments,” addressing mere internal disputes over matters of office and personnel management recast as whistleblower claims. The court noted, however, that the whistleblower statute contains a “good faith requirement which serves to limit the nature of actionable claims,” citing precedent under the federal whistleblower law where claims were dismissed based on the trivial nature of the alleged violation.

Conclusion

Mid-Minnesota Women’s Center is almost certain to have a significant impact on the nature and number of whistleblower claims brought to the courts. Enterprising plaintiffs lawyers will undoubtedly scour their clients’ employment histories for complaints or other conduct that might be characterized as reports of suspected violations of the law. Employers contemplating disciplinary action against or the termination of an employee would be wise to do the same in assessing their risk of litigation exposure. Employers should also take steps to ensure that reports that might trigger whistleblower protection are properly documented and promptly addressed. Taking contemporaneous, thorough action to investigate such a report will enhance the development of a factual record that will be crucial to the defense of any whistleblower claim.

Jim Kremer is a Partner in the Labor and Employment Law Practice Group. Jim works in the firm’s Minneapolis office.

Immigration Alert: New Laws Impact Spousal Employment, Blanket Transfers

By: Elaine M. Kumpula

On January 16, 2002, President Bush signed into law new legislation that provides significant benefits to the spouses of nonimmigrant L (intracompany transferees) and E (treaty traders or treaty investors) visa holders, and reduces the amount of overseas employment time needed to qualify for an intracompany transfer under an employer's Blanket L program.

Spousal Work Authorization

Under prior law, spouses of nonimmigrant, international workers generally could not work in the U.S. during the international assignment, unless and until they obtained working status independently. Through passage of the new law, the U.S. joins a number of countries (including the United Kingdom, Canada, and Australia) in allowing for some form of employment authorization for spouses. Because this makes an international transfer more attractive to employees, it will ease the burden on international employers that need to assign key personnel to U.S. offices.

The Immigration and Naturalization Service (INS) has indicated that the spouses of L and E visa holders will need to apply for a formal employment authorization document (EAD) prior to starting work; however, the agency has not yet issued any guidance on how, when or where to apply. Because formal documentation will be required, it is important that the spouse of a current L or E visa holder refrains from working in the U.S. until the INS has issued its guidelines, and the spouse has, in fact, applied for and obtained an EAD.

New Qualifying Times For Blanket L Programs

The new law also impacts Blanket L programs. A Blanket L involves continuing INS approval of the "qualifying" relationships between a group of international organizations, including certain parent/subsidiary relationships, affiliates, branch offices, and joint ventures. Once the INS has issued its approval, the organizations included in a Blanket L may follow a fast-track procedure to obtain L visas for qualified international employees who seek to enter the U.S. as executives, managers, or specialized knowledge professionals.

Organizations seeking to qualify for their own Blanket L program must meet the following requirements:

- The petitioning organization and each related entity to be included in the Blanket L (parent, subsidiary, branch office, etc.) must be engaged in commercial trade or services.
- The petitioning organization must have an office in the U.S. that has been doing business for at least one year.
- The petitioning organization must have three or more domestic and foreign branches, subsidiaries or affiliates.
- The petitioning organization and other qualifying organizations must have obtained approval of petitions for at least 10 L managers, executives or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million; or have a U.S. workforce of at least 1,000 employees.

The overseas employment requirement previously provided that the proposed intracompany transferee must be employed abroad full-time for at least one continuous year during the three year period immediately prior to the application for entry to the U.S. (by a qualifying organization) in a capacity that is executive, managerial or involves specialized knowledge. The new law reduces the overseas employment requirement from one year to six months, benefiting employers with Blanket L programs and the need to assign key international personnel to U.S. offices. The reduction of this requirement to six months will allow companies to use their Blanket L programs more frequently, and should reduce the need to petition for H-1B visa status (a temporary, professional nonimmigrant worker status which does not have an overseas employment requirement but does have other significant limitations). Together with the new spousal work authorization law, this will make an overseas U.S. assignment more attractive to key international personnel. Employers should be aware, however, that the reduction in time for the L visa category applies only to organizations with approved Blanket L programs; individual beneficiaries of L petitions must still be employed for one year by a qualifying overseas employer.

Dorsey & Whitney's immigration attorneys have successfully petitioned for Blanket Ls for numerous qualifying employers and would be pleased to discuss the benefits of this program with interested organizations.

Elaine Kumpula is an attorney in the Labor and Employment Law Practice Group. Elaine works in the firm's Minneapolis office.

Goins v. West Group: The Minnesota Supreme Court Locks the Restroom Door

By: Eric C. Sjoding

The Minnesota Supreme Court has delivered an important decision for employers under the Minnesota Human Rights Act (MHRA) in the case of *Goins v. West Group*. Overturning a decision by the court of appeals, the supreme court held last November that an employer may require its transgendered employees to use the restroom appropriate to their biological gender. The court also refused to find a hostile work environment, despite allegations that the employee bringing the case was the subject of scrutiny, gossip, stares, glares and restrictions on the use of the restroom near her workstation, due to her sexual orientation.

The case was brought by Julianne Goins, who was born biologically male. The court described her as having a difficult childhood and adolescence, filled with confusion regarding sexual identity. Goins began taking female hormones in 1994 and has presented herself publicly as a female since 1995. In October 1995, a Texas court granted Goins' petition for a name change as well as a request for a gender change "from genetic male to reasigned female." Goins identified herself as transgendered, a description given to people who seek to live as a gender other than that attributed to them at birth, but without having gone through surgery.

The facts giving rise to Goins' claims of discrimination and hostile work environment were these: Goins transferred to West Group's Minnesota facility in Eagan in 1997 from Rochester, New York. Prior to her transfer, Goins visited the facility and used one of the women's restrooms. A few of West's other female employees observed Goins' use of the restroom and complained to West supervisors about the prospect of having to share the restroom with a biological male. West's human resources director, fearing a hostile work environment claim by the complaining female employees, decided to enforce a policy of restroom use based on biological gender. The director also decided to offer Goins the use of either a single-occupancy restroom on another floor in the building where she worked, or a single-occupancy restroom in a different building at the facility.

Upon arriving for her first day of work, Goins was informed of the policy. She objected, proposing instead that West educate and train employees regarding transgendered individuals in an effort to dispel the concern of

female coworkers. According to the record, the HR director rejected this proposal. In the subsequent months Goins refused to comply with the restroom-use policy, instead using the restroom located most conveniently to her workstation. Goins was threatened with discipline but was not disciplined. Moreover, West later offered her a promotion and a substantial salary increase. Goins instead tendered her resignation and later brought suit in district court, alleging West discriminated against her based on sexual orientation and that the company created a hostile work environment. The district court granted summary judgment to West, but the court of appeals reversed, finding that Goins had established a *prima facie* case with regard to both claims.

The MHRA prohibits discrimination in the workplace based on sexual orientation. Under the statute, "sexual orientation" includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363.01, subd. 41a. For the purposes of her discrimination claims, the Minnesota Supreme Court agreed that Goins' self-image is inconsistent with her biological gender, but concluded that West's policy of restroom designation was based not on sexual orientation, but rather on gender. Goins was excluded from the women's restroom not because she was transgendered, the court found, but rather because she was not biologically female.

Goins claimed that West discriminated against her by denying her access to a restroom consistent with her self-image of gender. The court refused to interpret the MHRA so broadly, however, and instead accepted the district court's opinion that the traditional and accepted practice is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. To conclude otherwise, the court worried, would likely lead to restraints on employer discretion in the gender designation of workplace shower and locker room facilities, a result the court felt was not intended by the Legislature. Thus, the court concluded that an employer's restroom designation based on biological gender does not constitute sexual orientation discrimination in violation of the MHRA.

The supreme court also rejected Goins' hostile work environment claim. The court noted that harassment must be

[see Restroom Door on page 15](#)

Restroom Door from page 14

“severe and pervasive” before it is actionable. Further, the environment must be both objectively and subjectively offensive, “one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so.” Goins alleged that she was the subject of scrutiny, gossip, stares, glares, and restrictions on the use of the restroom near her workstation, due to her sexual orientation. But, the court concluded that however inappropriate the conduct of her coworkers may have been, it was not the type of severe or pervasive harassment required to sustain an actionable claim of a hostile work environment.

The *Goins* case allows an employer to require that employee restroom use be based on biological gender. Employers should note, however, that the court specifically pointed out that while the MHRA does not require restroom designation according to self-image of gender, it

also *does not prohibit* such a designation. Further, the court observed that an employer may elect to offer education and training programs relating to sexual orientation, as proposed by Goins, instead of choosing to enforce a policy based on biological gender. Clearly, the situation posed by transgendered employees and restroom use can be a difficult one for both employer and employees. As more openly transgendered people enter the workforce, however, employers are more likely to face this dilemma and, consequently, should consider having a reasonable policy in place before any problems arise.

Eric Sjoding is an Associate in the Labor and Employment Law Practice Group. Eric works in the firm's Minneapolis office.

Guess Who is Suing You? Individual Supervisor Liability for Discrimination Under State Law

By: Vanessa S. Power

Your company has just been hit with a lawsuit by a former employee. The employee alleges that she was discriminated against by her supervisor. As the Vice President of Human Resources, you investigated this case – you’ve seen these types of claims before. You pick up the telephone to call outside counsel and notify them of the lawsuit. While the phone is ringing, you glance over the papers and notice something important. In addition to suing the company, the employee also named her supervisor as an individual defendant. She also has sued you personally! What does this mean for the company, the supervisor, and you?

“Individual supervisor liability,” a concept currently accepted in several states, means that a supervisor may be personally liable for his or her discriminatory or unlawful behavior in the workplace. The ramification is that employment discrimination is no longer just an employer’s responsibility. Now the individual supervisor who engages in discriminatory behavior can be held personally liable – *even* if the employer is absolved of responsibility for the supervisor’s actions. As legislatures have seen the behavior-modifying effects of the individual liability concept, many states have expanded the scope of personal exposure under discrimination, wage and hour, and other statutes.

see Who Is Suing You on page 16

**SHARE THE
INFORMATION!**

Do you know someone who would like to receive our newsletter, or would you like additional copies? If so, please contact ...

Sandra Klonc
at (612) 340-6333
or at klonc.sandra@dorseylaw.com

Who Is Suing You from page 15

Most federal circuit courts agree that supervisors cannot be held individually liable under federal anti-discrimination laws (Title VII, ADEA, or ADA). See *Miller v. Maxwell's Int'l*, 991 F.2d 583 (1993), and *Janken v. GM Hughes Electronics*, 46 Cal.App.4th 55 (1996). State courts, however, have struggled with determining whether supervisors can be held individually liable under their own state anti-discrimination laws. Anti-discrimination laws vary tremendously from state to state, and liability often turns upon the court's analysis of the term "employer."

Many states have established individual liability by interpreting the definition of "employer" or "agent of the employer" to include supervisors. Other states find that "aiding and abetting" discriminatory behavior may give rise to individual liability. States in which supervisors may currently be held individually liable for discrimination or harassment include: California (harassment only), Colorado (harassment only), Iowa, Maine, Massachusetts, New York, Ohio, Tennessee and Washington. This article focuses on supervisor liability for discrimination in three states: New York, California, and Washington.

New York

In *Tomka v. Seiler*, 66 F.3d 1295 (2d Cir. 1995), the Second Circuit Court of Appeals held that even though supervisors could not be held personally liable under federal law (Title VII), individual supervisors could be held liable under the New York Human Rights Law (HRL). Ms. Tomka alleged that two of her supervisors and a co-worker subjected her to sexual jokes, comments, and innuendos for more than 18 months. Tomka also alleged that the same three men sexually assaulted her following a business dinner at which the employees were intoxicated.

The court found that the three men aided and abetted in the acts constituting a hostile work environment. Under the HRL, an "employer" is defined in terms of the number of persons employed. While HRL does not specifically authorize claims against individual employees of a company, it does state that it is an unlawful discriminatory practice "for *any person* to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." N.Y. Exec. Law § 296(6) (emphasis added). Based on this aiding and abetting provision, the *Tomka* court held that each of the individual defendants could be held personally liable for their actions.

California

California courts have had some difficulty reaching consensus on the issue of individual liability. The California Supreme Court attempted to settle this debate in *Reno v. Baird*, 76 Cal.Rptr.2d 499 (1998). Reno was hired as a registered nurse. Her employment was later terminated, and she sued both her employer and supervisors under the Fair Employment and Housing Act (FEHA), alleging discrimination based on her medical condition (cancer). The court found that Reno's supervisor could not be held individually liable for *discrimination* under FEHA but could be held liable for *harassment*. A new statute, effective in 2001, codified the principle that supervisors and even co-workers *can* be held liable for harassment. Cal. Gov't Code § 12940(j)(3). Likewise, California recently established personal liability for failure to pay wages. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000).

FEHA is unique in that it differentiates between the definitions of "discrimination" and "harassment." FEHA § 12940, *et seq.* With regard to discrimination, the statute provides that it is "an unlawful employment practice for an employer to ... discriminate against a person in ... employment." An employer is defined as "any person employing five or more other persons, or *any person acting as an agent of an employer*." (Emphasis added). For harassment, however, the Act provides that it is "unlawful for an employer ... or any other person ... to harass an employee or applicant." An employer is defined as "any person regularly employing one or more other persons."

The *Reno* court concluded that supervisors cannot and should not be individually liable for discriminatory acts based upon "actions ... necessary to carry out the duties of business and personnel management." In reaching this conclusion, the court noted that if supervisors were concerned that they could be held individually liable for their personnel decisions, it "would coerce the supervisory employee not to make the optimum lawful decision for the employer. Instead, the supervisory employee would be pressed to make whatever decision was least likely to lead to a claim of discrimination against the supervisory employee personally ... The employee would thus be placed in a position of choosing between loyalty to the employer's lawful interests at severe risk to his or her own interests and family, versus abandoning the employer's lawful interests and protecting his or her own personal interests."

[see Who Is Suing You on page 17](#)

Who Is Suing You from page 16

The court reasoned that while discriminatory acts arise out of a supervisory employee's managerial duties, harassment is not "conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." It is important to note, however, that while supervisors may not be held individually liable for discriminatory acts, they may be held liable if such acts constitute unlawful retaliation. *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467 (1992).

Washington

The Washington Supreme Court recently determined that supervisors may be held personally liable. In *Brown v. Scott Paper Worldwide*, 143 Wn.2d. 349 (2001), the court held that the Washington Law Against Discrimination (WLAD) imposes personal, individual liability on supervisors and managers who engage in employment discrimination.

In *Brown*, an employee alleged discrimination against the company and several individual employees and managers. The individuals moved to dismiss themselves from the case, and the trial court agreed. At trial, the jury returned a verdict in favor of the company.

On appeal to the state supreme court, the only issue was whether the case should be sent back to trial against the managers (not the employer) to determine if one of them might be liable for the discrimination on an individual basis, notwithstanding the verdict in favor of the corporate employer. The court said "yes," and sent the case back for trial against the managers and supervisors in their personal capacity.

The WLAD provides that it is an unfair labor practice for any "employer" to discriminate against a person in terms of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of a disability. The Act defines "employer" as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." The key issue turned on the effect of the phrase "who employs eight or more persons." The Washington Supreme Court held that this phrase includes individual managers and supervisors, stating that "[w]e read the phrase 'person acting in the interest of an employer, directly' standing alone, and the following clause 'who employ[s] eight or more persons' as referring to the term 'employer' and not to the whole

phrase." The court concluded, "a supervisor acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts." "The plain meaning of [the WLAD], by its very terms, encompasses individual supervisors and managers who discriminate in employment," the court stated.

Conclusion

What does individual supervisor liability mean for employers and their managers? Individual liability has a major impact on how certain workplace issues are handled, including the degree of attention given to employee performance evaluations, requests for accommodation, and hiring and firing decisions. In addition, these cases highlight two key points: (1) the importance of knowing the scope of your state's anti-discrimination statute; and (2) the importance of manager training to prevent your company and managers from additional exposure. Why? Because guess who may be suing you?

Vanessa Power is an Associate in the Labor and Employment Law Practice Group. Vanessa works in the firm's Seattle office.

New Minneapolis Office Address

Just a reminder of the new Minneapolis office address: Even though the street address has changed, the main telephone numbers and attorney telephone numbers remain the same.

DORSEY & WHITNEY LLP
Suite 1500
50 South Sixth Street
Minneapolis, Minnesota 55402-1498
Telephone: (612) 340-2600
Facsimile: (612) 340-2868
www.dorseylaw.com

Playing It Safe: Utilizing Alaska's Drug Testing Statute

By: William J. Evans

Imagine if you can an employment law that does not require a single thing of employers, provides very specific voluntary steps employers can take to protect themselves from litigation, and even addresses a vexing societal issue. Too good to be true? Perhaps, but Alaska's "Drug and Alcohol Testing by Employers" statute, AS 23.10.600 *et seq.*, comes very close.

Alaska's drug testing statute, enacted nearly five years ago, creates a comprehensive, yet completely optional, drug testing regime for employers. Employers choosing to follow its demanding strictures are rewarded with statutory protection from litigation. (A "win-win" situation for the Alaska Legislature, which was able to demonstrate a "tough-on-drugs" position without incurring any public cost.) By no means a panacea for all drug testing liabilities and concerns, the statute, however, provides a relatively safe harbor for Alaska employers engaged in workplace drug testing.

What Employers Must Do to Take Advantage of the Statute

To receive the protections afforded by the drug testing statute, employers must comply with two comprehensive requirements. They must develop and disseminate a written policy containing certain specific information, and they must utilize drug testing procedures conforming to the statute.

Written Policy Requirement

Consistent with the Alaska Supreme Court's ruling in *Luedtke v. Nabors Alaska Drilling, Inc.*, 786 P.2d 1123 (Alaska 1989), the drug testing statute places a premium on "notice" to affected employees. Accordingly, the statute requires employers to establish and distribute a written policy at least 30 days prior to the start of any drug testing program. The written policy must include the following:

- The employer's policy on employee drug and alcohol use;
- A description of those employees subject to testing;
- The circumstances under which testing will be required;
- The substances for which tests will be conducted;
- A description of the testing methods and procedures to be used;
- Adverse personnel action that may be taken based on the results of the testing;

- The employee's right to obtain written test results and the employer's obligation to provide those results within five working days, so long as the request is within six months of the testing date;
- The employee's right to explain, upon employee's request and in a confidential setting, a positive test result; and
- The employer's policy regarding the confidentiality of the test results.

Collection and Testing Requirements

In addition to creating and disseminating a written policy, the collection, processing and analysis of drug tests also must meet the very specific requirements set forth in the statute. These include:

- Drug testing must be scheduled during, immediately preceding, or immediately after a regular work period;
- Time taken for testing must be considered work time for the purposes of compensation and benefits;
- The employer must pay the entire cost of the drug test;
- The employer must ensure the sample is collected "in a manner that guarantees the individual's privacy to the maximum extent consistent with ensuring that the sample is not contaminated, adulterated, or misidentified";
- The test must be conducted at a laboratory approved or certified by the Substance Abuse and Mental Health Services Administration;
- The samples must be documented, collected, stored, and transferred in a manner reasonably designed to prevent misidentification, contamination or adulteration;
- The person tested must have an opportunity to provide medical information relevant to the test, including identification of prescription and non-prescription drugs that might affect the outcome of the test;
- Confirmation of a positive test result must be made by a different analytical process than that used in the first test (the confirmatory test must be a gas chromatography mass spectrometry);
- Positive confirmatory results must be reviewed by a Medical Review Officer (MRO);
- To aid in the determination of whether reasonable suspicion exists, the employer must train at least one employee for 60 minutes on alcohol misuse and 60 minutes on use of controlled substances; and

Playing It Safe from page 18

- If testing for drugs for which the U.S. Department of Health and Human Services has already established a cutoff level, the established cutoff level must be used to determine a positive test result (for other substances, the employer must inform the employees in the written policy of the cutoff level used).

What Do Employers Receive in Return?

Compliance with the drug testing statute does not provide an ironclad guarantee against all litigation stemming from testing; however, it significantly limits liability for the most common types of suits stemming from drug testing. Employers complying with the statute are protected when they take adverse employment actions based on “false positive” test results. The statute establishes an extremely high standard for imposing liability in such cases. The statute specifically provides that:

[a] person may not bring an action for damages based on test results . . . unless the employer’s action was based on a false positive test result and the employer knew or clearly should have known that the result was in error and ignored the true test result because of reckless or malicious disregard for the truth or willful intent to deceive or be deceived.

AS. 23.10.600(b).

Employees also are barred from bringing actions for defamation, libel, or slander based on the disclosure of drug test results. The only exception involves the “negligent” reporting of “false positive” results to an unauthorized person where all the other elements for the tort are met.

In addition to those major protections, complying employers also are afforded protection from damages for (1) failure to test for drug or alcohol impairment; (2) failure to test or detect a specific drug or other substance or medical condition (including mental and emotional disorders); and (3) termination or suspension of a drug testing policy.

Under What Circumstances Can Testing Be Conducted?

A very frequent question asked by employers is, “When and under what circumstances can I test my employees?” The drug testing statute does not dictate the circumstances under which drug testing can occur. “[A]ny job-related purpose consistent with business necessity and the employer’s policy” can form the basis for testing. Accordingly, pre-employment, reasonable suspicion, and even random testing are conceivably appropriate under the statute. The statute specifies several broad, non-exclusive

bases for testing which can comfortably encompass nearly any drug testing requirement: (1) investigation of individual impairment; (2) investigation of accidents; (3) maintenance of safety for employees, customers, clients or the public at large; (4) maintenance of productivity, quality of products or services, or security; or (5) reasonable suspicion that an employee is using drugs and that such use adversely affects job performance or the work environment.

Despite this seemingly broad grant of discretion, employers should still proceed cautiously, at least as far as “random” testing is concerned. Random testing is not prohibited in any manner by the statute; however, the Alaska Supreme Court recently expressed a very unfavorable view of random testing in *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001) (random testing for police officers and fire department personnel violates Alaska Constitution). While the holding of *Anchorage Police Department Employees Association* does not directly impact private-sector employers, the court’s evident disfavor for “random testing” should give pause to private-sector employers who may need to establish the “business necessity” of their random testing program.

Playing It Safe

Except for those employers who are required by Department of Transportation regulations or other similar requirements to conduct drug testing, testing is a matter of choice for Alaska employers. While several factors should be weighed in the decision of whether or not to test, including safety aspects of the workplace, employee morale, obvious drug or alcohol problems, etc., once the decision is made to test, there is scant reason not to adopt the standards set forth in the drug testing statute. The statutory requirements are admittedly extensive and entail a significant administrative expense. Yet, any lawful drug testing regimen will necessarily involve many of the same attributes and costs. The actual cost differential between a complying drug testing policy and a lawful, yet non-compliant policy is likely to be minimal.

If you are currently engaged in drug testing in Alaska you should contact your employment lawyer to ensure your existing policy and procedures conform to the statute. If you are not currently testing but are contemplating doing so, you should analyze the testing regime provided in the statute to determine the likely constraints and costs of such a program.

Bill Evans is an Associate in the Labor and Employment Law Practice Group. Bill works in the firm’s Anchorage office.

SEMINARS

May – June 2002

During May and June, members of Dorsey's Labor & Employment Law Practice Group spoke on a variety of topics at the following seminars. If you would like the written materials from any of these seminars, please contact Sandra Klonecz at (612) 340-6333 or at klonecz.sandra@dorseylaw.com.

May 7: EMPLOYMENT LAW UPDATE, [Industrial Relations Utility Roundtable](#) sponsored by the Montana North Dakota Utilities (Bismarck, North Dakota)

May 30-31: Upper Midwest Employment Law Institute, [Minnesota CLE](#) (Saint Paul, Minnesota)

- THE EMPLOYERS' GUIDE TO HIPPA: NAVIGATING THE NEW FEDERAL PRIVACY RULES, [Robert Hobbins and Matthew Klein](#)
- TOP 10 WAYS TO A SUCCESSFUL MEDIATION, [Robert Reinhart](#)
- EMPLOYMENT LAW AND ROCK & ROLL, REVIEWING THE BASICS, [Roy A. Ginsburg](#)
- EMPLOYMENT ARBITRATION, PROS AND CONS, JOSEPH HAMMELL, [Joseph Hammell](#)

May 30-31: Upper Midwest Employment Law Institute (cont'd)

- FLAWED INVESTIGATIONS, LESSONS LEARNED FROM LITIGATED CASES, [Melissa Raphan](#)
- 2 KEYS TO WINNING CASES YOUR COMPANY CAN'T AFFORD TO LOSE, [Robert Reinhart](#),

June 14: THE GOLDEN TICKET – NATURALIZATION AND CITIZENSHIP, [Kathleen Moccio](#), American Immigration Lawyers' Annual Meeting (San Francisco, California)

June 24: THE ELECTRONIC WORKPLACE: ESTABLISHING POLICIES AND PRACTICES FOR SUCCESSFULLY MANAGING EMPLOYEES AND PROTECTING PRIVACY RIGHTS, [William Evans](#), Personnel Law Update 2002 sponsored by the Council on Education in Management (Anchorage, Alaska)

Dorsey & Whitney LLP is pleased to announce. . .

Dorsey & Whitney LLP is pleased to announce the expansion of its capabilities into Northern California by joining with Flehr Hohbach Test Albritton & Herbert LLP. This move not only broadens Dorsey's global office network with locations in the key commercial and technology centers of San Francisco and Palo Alto, but it also greatly enhances the firm's overall intellectual property capabilities.

See DORSEY NEWS for more information.

DORSEY & WHITNEY LLP

San Francisco

Four Embarcadero Center, Suite 3400
San Francisco, California 94111-4187
Phone: 415.781.1989
Facsimile: 415.398.3249
sanfran@dorseylaw.com

Palo Alto

850 Hansen Way, Suite 200
Palo Alto, California 94304-1017
Phone: 650.494.8700
Facsimile: 650.494.8771
paloalto@dorseylaw.com

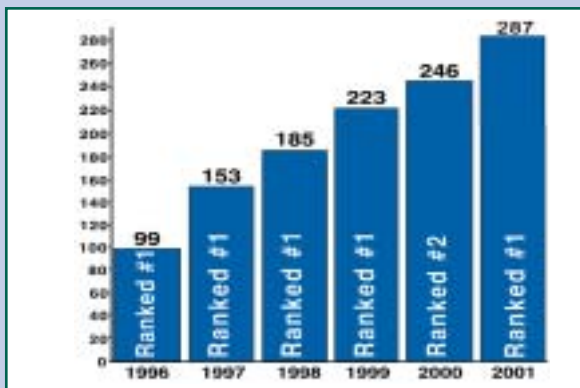
DORSEY NEWS

Dorsey Expands in Northern California: Dorsey & Whitney expanded its capabilities into Northern California by joining with Flehr Hobbach Test Albritton & Herbert LLP. The move broadened Dorsey's global office network with locations in the key commercial and technology centers of San Francisco and Palo Alto. It also greatly enhanced the firm's overall intellectual property capabilities.

Dorsey welcomed more than 30 attorneys, patent agents and technical advisors from Flehr. The premier technical expertise offered by Flehr combined with Dorsey's broad IP capabilities form an even deeper Technology practice available wherever clients need us. Dorsey now has more than 150 attorneys poised to serve clients in a wide range of IP services, including IP litigation, patent, trademark, copyright and technology transfer. Please see the announcement on the preceding page for office addresses and telephone numbers.

Dorsey Tops in M&A: Dorsey's Mergers & Acquisitions Group regained the top ranking among legal advisors for the number of domestic mergers, sales and purchases of businesses completed in 2001, according to Thomson Financial, a Newark-based provider of financial information and services, including merger and financing rankings and information.

Dorsey saw a significant increase in M&A volume – more than 17 percent – while volume for the top 25 M&A firms dropped nearly 33 percent compared with 2000. Dorsey was one of just four firms in the top 25 to see an increase in deals completed over last year. Thomson Financial reports that Dorsey & Whitney completed 287 deals, up from 246 in 2000.



Dorsey & Whitney is one of the only firms consistently at the top of Thomson Financial's mergers and acquisitions rankings for the past five years.

Dorsey & Whitney Trust Company: For years, Dorsey's estate planning clients have asked us to work with them in the management of their assets and to provide them with trust services. We have responded to these inquiries by establishing the Dorsey & Whitney Trust Company. Its goal is to provide trust and other fiduciary services to those clients who prefer to work directly with their legal advisors in the management of their assets. For more information on services offered through the Trust Company, please contact the Trust Company directly at (605) 336-6832.

Dorsey's Tokyo Office: Our Tokyo office has moved into its new location. The Tokyo address is now:

Shiroyama MT Building, 9th Floor
4-1-17 Toranomom
Minato-ku, Tokyo 105-0001
JAPAN
Telephone: ++81 3 5473-5150
Facsimile: ++81 3 5473-3880
Email: tokyo@dorseylaw.com

We are also pleased to announce the expansion of the office's capabilities with the addition of five Japanese licensed lawyers (*Bengoshi*) through its joint enterprise with Kyo Sogo Law Offices. Together we offer clients comprehensive, sophisticated and multi-jurisdictional legal services in Japan and around the world.

Our attorneys provide clients the depth and breadth of law experience and services required in international business and corporate finance transactions, corporate counsel, business restructurings, mergers and acquisitions, e-commerce, intellectual property, telecommunications and litigation – as well as a variety of other legal services.

Nancy Sullivan Joins Dorsey & Whitney: Nancy Sullivan has joined Dorsey's Employee Benefits practice group in Minneapolis. Nancy has more than 15 years of experience in all aspects of employee benefits law. Prior to joining Dorsey, her practice focused on employee benefits involving representation of large publicly and privately held companies. She has presented legal education seminars on employee benefits issues to PaineWebber, American Express Financial Advisors, the Minnesota State Bar Association and Minnesota Institute of Legal Education.

Nancy has very strong experience both in retirement matters and in the health and welfare side of employee benefits practice. She will complement our already strong and comprehensive practice and contribute to our continuing growth on the health and welfare side.

CASES TO WATCH

Morgan v. National Railroad Passenger Corp., 232 F.3d 1008 (9th Cir. 2000), *cert. granted*, *National Railroad Passenger Corp. v. Morgan*, 121 S. Ct. 2547 (June 25, 2001) (No. 00-1614)

The Supreme Court is reassessing the application of the “continuing violation” theory in the context of Title VII claims, including the issue of when tolling of the limitations period under a continuing violation theory begins and, more fundamentally, whether the 300-day charge filing requirement is a statute of limitations for purposes of liability under Title VII.

Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, *Chevron USA, Inc. v. Echazabal*, 122 S. Ct. 456 (Oct. 29, 2001) (No. 00-1406)

Under the ADA, employers are not required to accommodate a disabled person by placing such person in a position if doing so poses a “direct threat to the health or safety of other individuals in the workplace.” In *Echazabal*, the Supreme Court will address whether an employer can invoke the “direct threat” defense where a particular job poses a threat to the health or life of the disabled person rather than such person’s co-workers. The Ninth Circuit held that the “direct threat” exclusion only applies to hazards to other employees, not the disabled person.

Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001), *cert. granted*, *Barnes v. Gorman*, 122 S. Ct. 865 (Jan. 11, 2002) (No. 01-682)

Although not an employment case, the Supreme Court will resolve a split among the circuit courts over whether punitive damages may be awarded under both Section 504 of the Rehabilitation Act and Title II of the ADA, which prohibit discrimination on the basis of disability in public programs or services.

Kolton v. County of Anoka, 628 N.W.2d 643 (Minn. App. 2001), *review granted*, (Minn. Sept. 25, 2001)

The Minnesota Supreme Court will address whether an employer violates the Minnesota Human Rights Act by providing a shorter period of long-term disability insurance benefits for the mentally disabled than for the physically disabled.

UPDATE

Edelman v. Lynchburg College, 122 S. Ct. 1145 (March 19, 2002)

The Supreme Court held that a letter submitted to the EEOC within the 300-day charge filing period satisfies the plaintiff’s charge-filing requirement where the plaintiff subsequently filed a verified charge of discrimination with the EEOC, although outside of the 300-day charge filing period. The Court upheld an EEOC regulation providing that amendments to charges to cure technical defects, including the failure to verify the charge, relate back to the date the charge was first received.

Ragsdale v. Wolverine Worldwide, Inc., 122 S. Ct. 1155 (March 19, 2002)

The Supreme Court addressed Department of Labor regulations under the Family and Medical Leave Act providing that, with certain exceptions, employer-provided leave does not count against the Act’s 12-week entitlement unless the employer gives the employee advance notice that the leave will be considered FMLA leave. The Court held that the regulation is contrary to the FMLA and therefore invalid.

Hoffman Plastic Compounds v. NLRB, 122 S. Ct. 1275 (March 27, 2002)

The Supreme Court addressed whether undocumented aliens can recover backpay damages for violations of the NLRA. The Court held that federal immigration policy, as embodied by the Immigration Reform and Control Act of 1986 (which makes it illegal to employ undocumented aliens), precludes the NLRA from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States.

Look for more detailed discussion of these recent decisions in the next edition of the Employment Law Update.

Attorney Profile: Leslie J. Anderson



As a partner in Dorsey's Employee Benefits Group, Leslie Anderson concentrates her practice on the growing area of employer-provided ERISA welfare benefits, such as health, disability, life insurance and severance. Leslie has been at Dorsey for more than 18 years and has been a partner since 1991. Before joining Employee

Benefits, she was a partner in the Trial Group.

Leslie has recently worked with many employers on their health plans, due to significant development in the federal law governing this area. While employer-provided health plans, like other ERISA welfare plans, have traditionally been subject to far less federal regulation than retirement plans, this has changed over the past decade. In 1996, Congress passed the "Health Insurance Portability and Accountability Act," which limited health plans' ability to exclude pre-existing conditions, provided guaranteed access to coverage under certain circumstances and, on a limited basis, prohibited discrimination based on health status. More recently, the Department of Labor issued extensive new regulations that primarily apply to ERISA health claims, and sweeping medical data-privacy regulations ("HIPAA Primary Regulation") that will require employer-sponsored health plans to change substantially their use and dissemination of patient medical data. While Congress has been unable to legislate substantial health care regulation, the regulations passed by federal agencies impose substantial new requirements.

As a result, Leslie notes, large employers with self-funded (non-insured) health plans have extensive compliance issues to contend with before 2003, when many of the Department of Labor regulations become effective. She adds that at the same time employers must comply with complex new federal regulations, many are struggling with the steeply rising costs of health care and the perpetual (but so far unrealized) possibility of more significant federal health legislation.

Perhaps because of her background as a trial lawyer, Leslie enjoys working in this dynamic and evolving area. Her work for clients includes assistance with plan design and documentation, compliance with new and existing

law, review of service agreements among employers, health claims administrators and network providers, and assistance with employee claims for benefits. "In the United States, most people who have health insurance obtain it through their employers," says Leslie. "It is the most expensive, and in many ways the most important, benefit provided by employers. Yet traditionally it has received a minimum of legal attention relative to retirement benefits. Factors such as cost, the anti-managed-care movement, increased patient litigiousness and new federal law now require employers to devote more attention to these plans."

Leslie also has assisted many clients with designing, documenting and administering severance plans, and handling claims disputes under these plans. Because employers often lack an understanding of ERISA's broad sweep, Leslie points out, they sometimes unwittingly create severance plans that are ERISA-covered benefits – yet are not in compliance with the Act. By working to develop ERISA-compliant plans, Leslie helps employers avoid penalties for non-compliance, and limit potential liability.

Leslie also works with clients on other benefits, such as disability, life insurance, cafeteria plans and qualified retirement plans. She also assists several clients with managing their ERISA plans' administrative claims processes.

Leslie is a contributing author to the Employee Benefit Institute of America's COBRA: The Developing Law, a leading national source for employers on the Consolidated Budget Reconciliation Act, and a contributor to the Employee Benefit Institute of America's "EBIA Weekly", a web-based update on employee benefits issues. She also speaks frequently on welfare plan issues at continuing legal education and employer programs. She graduated from the University of Michigan Law School, where she was the editor-in-chief of the Michigan Yearbook of International Legal Studies. Leslie also has had a long involvement with the group Minnesota Advocates for Human Rights, serving on its board for many years, and working on various projects including documenting and publishing an account of child labor in Haiti.

Labor and Employment Law Practice Group

Minneapolis, Minnesota

Robert R. Reinhart, Jr.(612) 340-7835
 Robert L. Hobbins(612) 340-2919
 J David Jackson.....(612) 340-2760
 Janice M. Symchych(612) 340-6336
 Roy A. Ginsburg(612) 340-8761
 Mark Ginder(612) 340-8780
 David J. Lauth(612) 343-7940
 Stephen P. Lucke(612) 343-7947
 Joseph W. Hammell(612) 340-7897
 Edward B. Magarian(612) 340-7873
 Douglas R. Christensen.....(612) 340-8875
 Melissa Raphan(612) 343-7907
 James D. Kremer.....(612) 340-7859
 Holly S. Eng(612) 343-2164
 David Y. Trevor(612) 340-8718
 Clifford Anderson(612) 340-2631
 Matthew E. Klein(612) 340-5666
 Julie Meany(612) 343-2175
 Todd W. Schnell(612) 343-2199
 Judith Williams-Killackey.....(612) 340-7950
 Michael Iwan(612) 340-5613
 Erik Nelson(612) 752-7317
 Ruon Sawyer(612) 343-7839
 Laura S. Ferster(612) 340-2785
 Eric C. Sjoding(612) 340-7881
 Jennifer Dellmuth(612) 343-8244

Immigration

Elaine M. Kumpula(612) 340-8890
 Saiko Y. McIvor.....(612) 340-8872
 Kathleen A. Moccio(612) 343-7975

Anchorage, Alaska

Susan Wright Mason.....(907) 257-7815
 John Treptow.....(907) 257-7820
 William J. Evans(907) 257-2871

Denver, Colorado

Steven J. Merker(303) 628-1514

Great Falls, Montana

Keith Strong(406) 771-6806

New York, New York

Richard H. Silberberg(212) 415-9231
 James M. Bergen.....(212) 415-9241
 David C. Singer(212) 415-9262
 Stewart D. Aaron(212) 415-9252
 Laura M. Lestrade(212) 415-9227
 Moon Sun Kim.....(212) 415-9296

Fargo, North Dakota

Sarah A. Herman(701) 271-8883
 Adele Hedley Page.....(701) 271-8885
 Kristy L. Albrecht(701) 271-8888
 Cheryl L. Eia.....(701) 271-8894
 Lynn Block(701) 271-8895

Seattle, Washington

Michael Droke(206) 903-8709
 Gwynne Skinner(206) 903-8783
 Gregory Hendershott(206) 903-8729
 Lisa S. Guterson.....(206) 903-5445
 Amy J. Friedland(206) 903-8802
 Vanessa Power(206) 903-5447

Southern California

Juan C. Basombrio(714) 662-1530

Employee Benefits

Minneapolis, Minnesota

Don D. Carlson(612) 340-2894
 Robert A. Burns(612) 340-8788
 Stephen E. Gottschalk.....(612) 340-2941
 Nancy A. Sullivan(612) 492-6071
 Bruce J. McNeil(612) 340-5640
 Leslie J. Anderson(612) 343-7960
 John W. Haine(612) 340-2786
 Katherine M. Mattson.....(612) 343-8219
 Melinda A. Maher.....(612) 340-2990
 Timothy Arends(612) 343-2165
 Kristyn M. W. Mullin(612) 343-8237
 Terry-Lynne Lastovich.....(612) 340-8778
 David J. Overstreet(612) 343-7928
 Michael J. Voves(612) 343-8266
 Timothy D. S. Goodman ..(612) 340-2825

Seattle, Washington

Marianne O'Bara(206) 903-8843
 Nancy L. Gallup(206) 903-8826
 Alan R. Ross.....(206) 903-5446

DORSEY & WHITNEY LLP

50 SOUTH SIXTH STREET, SUITE 1500
 MINNEAPOLIS, MINNESOTA 55402-1498

EDITORS

Roy A. Ginsburg
 Joseph W. Hammell
 James D. Kremer

DESKTOP PUBLISHER

Jeannie Smith
 Dorsey & Whitney LLP
 Graphics Department

© 2002 DORSEY & WHITNEY LLP. This newsletter is published for general information purposes only. Views herein are deemed of general interest and should not necessarily be attributed to Dorsey & Whitney LLP or its clients. The contents should not be construed as legal advice or opinion. If you have any questions, you are urged to contact a lawyer concerning your specific legal situation. For further information, please contact one of the lawyers listed here.

The Employment Law Update is ON THE WEB.
 Find it at www.dorseylaw.com/firm_news.asp.