

LABOR & EMPLOYMENT REPORT

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Supreme Court Narrows Reach of ADA

In a decision handed down on January 8, 2002, the United States Supreme Court put the brakes on the Americans with Disabilities Act (ADA) by narrowing the types of impairments that can constitute a "disability." The unanimous decision in [Toyota Motor Manufacturing, Kentucky, Inc. v. Williams](#), requires courts to consider how an impairment affects activities that are important to most people in their daily lives rather than only focusing on the activities that are needed to do a particular job. This decision continues a trend toward limiting the vast number of conditions to which the ADA had been applied.

Facts of the Case

The case was brought by auto worker Ms. Williams who suffered from carpal tunnel

syndrome and other repetitive stress injuries. In response to work restrictions issued by Williams' physician, Toyota assigned Williams to work on the Quality Control Inspection Operations (QCIO) team. QCIO performed four different functions: assembly paint, paint second inspection, shell body audit and ED surface repair. Williams was initially responsible for performing only the assembly paint and paint second inspection functions. She was fully capable of performing those duties.

After almost three years, Toyota decided that it wanted the QCIO employees to perform all four functions and added the shell body audit position which required employees to hold their hands and arms at around shoulder level for several hours at a time. After assuming the shell body audit duties, Williams began experiencing pain in her neck and shoulders. She was diagnosed with myotendinitis periscapular (inflammation of the muscles and tendons around both

shoulder blades), myotendinitis and myositis bilateral forearms with nerve compression, causing median nerve irritation, and thoracic outlet compression (which caused pain in the nerves that lead to the upper extremities).

As a result of her impairment, Williams requested that she be assigned only to perform the original two jobs in QCIO. Although there was some dispute about what happened next, it is clear that Williams was placed under a no-work-of-any-kind restriction by her physician, and then was fired less than two months later for failing to meet Toyota's attendance expectations.

The Lawsuit

Williams sued, claiming disability discrimination under the ADA because Toyota failed to reasonably accommodate her disability and fired her. She also claimed violation of the Family and Medical Leave Act (FMLA). Williams claim of disability was based on her claim that she was substantially limited in: (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working. She claimed that each of these activities constituted a "major life activity" under the ADA.

Toyota got the case thrown out on the grounds that Williams had not proven that she was substantially limited in a major life activity. First, the court rejected her claim that gardening, housework and playing with her children were major life activities. Second, the court found that there was not sufficient evidence to establish that Williams

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was substantially limited in her ability to lift or work. Third, the court held that she was not substantially limited in the ability to perform manual tasks because she continued to insist that she was able to perform the manual tasks required of her previous position in QCIO without difficulty. The court also dismissed Williams' claim that she was terminated because of her disability and her FMLA claims.

The Appeal

The Sixth Circuit Court of Appeals reversed the decision and let Williams proceed with her lawsuit. They found that Williams was disabled because her ailments 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.). These jobs require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time. This was enough to constitute the necessary limitation on a major life activity.

Appealing the Appeal

Toyota appealed this time, and found a sympathetic ear (nine pairs of them, in fact). The U.S. Supreme Court ruled that the Sixth Circuit applied the wrong standard and reversed the decision. They noted that the terms "disability," "substantially limited," and "major life activities" must be strictly interpreted in order to keep the ADA

within the scope intended by Congress. Noting Congressional findings had set the number of disabled Americans at "some 43,000,000," the court reasoned that a less restrictive standard would likely apply the label of "disabled" on vastly more Americans. The court stated, "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."

The judges reasoned that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." They then ruled that the Sixth Circuit's examination of the "class" of manual activities that were affected by the impairment was improper because it focused on manual tasks required in Williams' job rather than those associated with her normal home life. They explained that "occupation-specific tasks may have only limited relevance to the manual task inquiry." Therefore, the inability to perform repetitive work with hands and arms extended at or above shoulder levels for extended periods was not an important part of Williams' life, and the Sixth Circuit was wrong when it failed to consider that Williams could perform manual tasks incidental to daily life such as personal hygiene and household chores.

What Does This Mean?

It means that just being unable to do the duties of a specific job doesn't make a person disabled. In order to determine whether someone is disabled, you look not at how their impairment affects their ability to work, but how it affects their ability to do the ordinary tasks that are important to most people for daily living. Regardless of how limited a person is at work, the required analysis is whether the individual can wash the dishes, change the light bulbs, brush her hair, and do most of the other myriad manual activities central to one's daily life.

This unanimous decision may be the harbinger of more changes to come. Later this year, the Supreme Court will address whether working is a major life activity, an issue on which they have already expressed much doubt. Should the court rule that working is not a major life activity, the scope of the ADA will be narrowed even further.



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Felhaber In The News

- William Ecklund, Felhaber's Chairman of the Board, has been named a delegate to the Second National Summit on Retirement Savings. The Summit will be convened by President George W. Bush, and co-hosted by majority and minority leaders of The U.S. Congress. The goal of the 2002 Summit is to develop detailed action plans that will encourage retirement savings.
- Richard A. Beens, Attorney, has been appointed to the Lawyers Professional Responsibility Board. The Supreme Court of Minnesota, lead by Chief Kathleen A. Blatz, appointed Mr. Beens to the board.
- Robert Fenlon, one of our firms' founders, celebrates 50 years practicing law. We are proud of his 50 year legacy and the strong values he instilled within our firm.

Are You Doing All You Can To Prevent Harassment Claims?



It's no secret that harassment and discrimination complaints are on the rise in America's workplaces. It's also no secret that employers are spending more than ever on legal fees, settlements, and jury verdicts for these complaints. According to Jury Verdict Research, which tracks verdicts in employment cases, the average jury verdict tripled from \$236,232 in 1994 to \$783,926 in 2000.

Not surprisingly, increasing numbers of employers are buying Employment Practices Liability (EPL) insurance to help cover these costs. In 1991, only five insurers sold EPL coverage, compared to roughly 60 last year. Unfortunately, recent developments make employers more vulnerable than ever to large claims.

First, claims of harassment based on national origin, race, and religion have increased dramatically since the events of September 11th, and are expected to continue to rise. At the same time, insurers are tightening the underwriting requirements for EPL coverage, and raising premiums and deductibles as some insurers leave the market. Finally, employers should expect more claims as layoffs continue. Experience teaches that layoffs often lead unhappy employees to pursue claims of harassment and discrimination, even if the employer has handled the layoff carefully.

There are three things that any employer can do to minimize its risk of harassment and discrimination claims:

1. Update Your Policy

An anti-harassment policy helps minimize risks and losses by achieving compliance. After the U.S. Supreme Court's 1998 decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, no employer can afford to be without a comprehensive anti-harassment policy. Policies which do no more than

state that sexual harassment is prohibited are no longer sufficient.

While the law does not require "zero tolerance" for harassment, some employers prefer to adopt that approach. Others prefer policies that mirror the law. Whichever approach you choose, make sure of the following:

- The policy addresses all forms of harassment—sexual harassment to be sure, but also harassment based on race, religion, national origin, disability, age, and gender (both the same and opposite sexes). Minnesota employers also need to state that harassment based on sexual orientation is prohibited.
- The policy contains explicit examples of behavior that is and is not acceptable, rather than broad generalizations.
- The policy clearly explains how a complaint may be lodged internally, and identifies several individuals to whom a complaint may be made.

2. Train, Train and Train Some More

Of course, anti-harassment policies are only as effective as the supervisors and managers who implement them. Ironically, having a policy which is not followed can be worse than having no policy at all. The lawyer for a disgruntled employee will be only too eager to point out to a court that while the policy looked good on paper, it was ignored in practice.

Effective training bolsters an employer's defenses by letting managers and employees know what is expected of them and to whom they can complain. Although some employers still resist training because "it will encourage

people to file claims," the Supreme Court has told us that an employer may avoid the large punitive damage awards by taking steps to assure good faith compliance with harassment and discrimination laws. The clearest way to do so is by providing meaningful training to your workforce.

Training comes in many shapes and sizes: corporate trainers, outside experts, video presentations, and more recently, computer-based learning. Each of these offers its own advantages and disadvantages. For example, videotapes ensure that everyone receives identical information, but they lose effectiveness by not being interactive. Corporate trainers know the culture of their organization, but sometimes lack the expertise, or the appearance of expertise, to convince the audience of the seriousness of their message. Some outside experts are good presenters; others are not. Because even good trainers can have bad days, there is no assurance that all employees receive identical training.

The newest wave of training is e-learning - computer based training that participants can access from their desks, laptops, or home computers. Its advantages generally include cost-effectiveness, ongoing availability, and consistency. Some programs, however, are little more than screens on a page - once again, passive learning. Others may not reference the employer's policy or keep a record of participants' mastery of the subject matter.

Whatever type of training you choose, it should assure that supervisors and managers know how to recognize and respond effectively to harassment, and that everyone in the workplace has a good understanding of behaviors to avoid and how to deal with them if they do occur. The goal of training is to avoid claims entirely. Even if that goal is not achieved, training will help the employer successfully defend claims and avoid punitive damages.

3. Conduct Timely and Thorough Investigations

Investigations are the fact-gathering processes that help an employer determine if its anti-harassment policy has been violated, and if so, what action it should take. While not mandated by law, a well-conducted investigation can provide a defense by showing that the claim was unfounded or that the employer acted quickly to rectify the problem. Either way, the employer's liability is minimized. Properly conducted investigations also show employees that their concerns are taken seriously, making them less likely to seek the assistance of the EEOC, the Minnesota Human Rights Department, or an attorney.

Like training, investigations can be conducted in a number of ways. Some

circumstances are best handled internally, while others are better suited to outside investigators. Either way, the investigator must have the requisite skills and knowledge to perform a thorough investigation, and must be seen by employees as both impartial and knowledgeable. The investigator should also be able to clearly and explain the investigative process and the basis for his or her conclusions in the event of litigation. Choosing the right investigator can also help avoid related claims, such as defamation, wrongful termination, or retaliation.

Summary

In these days of escalating claims and expenses, the best defense is still a good offense. Preventing claims before

they arise by implementing a clear and comprehensive policy, making sure that managers and employees understand what is expected of them, and conducting prompt and thorough investigations is the best way to minimize risk and losses. Because even careful employers can face harassment claims, doing less means you aren't doing all you can.



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Prevent Harassment

A Computer Based Training Alternative

*F*elhaber, Larson, Fenlon, and Vogt, P.A. has been providing our clients with on-site harassment training for years. And we still do. We are proud of the attorneys in our firm who do this work, and believe their presentation skills and knowledge of the law make them some of the best trainers in the area.

We've recently added another dimension to our training resources: a computer based program. "Prevent Harassment: Promote Respect"SM was developed by one of our attorneys, Karen Schanfield, and a former Felhaber lawyer, Alice O'Brien Berquist, through their company Employer Training, LLC. We highly recommend both the manager and employee versions of this program because it is cost-effective, reliable, and comprehensive.

Unlike many training programs, "Prevent Harassment: Promote Respect"SM doesn't merely recite the law of sexual harassment. The program addresses all forms of workplace harassment—religion, race, national origin, disability, age, gender (same and opposite sex), as well as retaliation for complaining about harassment. While many employees and supervisors understand sexual harassment, few are adept at dealing with other forms of protected class harassment. They may fail to appreciate that comments based on an employee's accent, dress, religious practices, or birthplace can

be the basis of a harassment claim. This program helps them develop the skills they need.

We especially like the program's tracking component and the 20 question scored quiz. Records of the individuals who have taken the training, and proof that they have mastered the subject matter are valuable tools in defending harassment claims and minimizing damages.

We encourage you to consider using "Prevent Harassment: Promote Respect,"SM either as stand-alone training or in conjunction with in-person training. For more information, contact Joan Black at (612) 373-8415 or visit www.employertesting.com, where you can learn more about the program and watch a brief audio preview.

If you would be interested in attending a presentation of this important new training tool, including an opportunity to meet the authors, please let us know. Felhaber will be sponsoring breakfast sessions for all who are interested in learning more about this valuable program. Please call Joan, or email her at jblack@felhaber.com to get on the schedule.

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New Protection For Those Who Whistle While They Work

*S*f Snow White had suggested today that her seven little friends "whistle while you work," they probably would have filed claims against the diamond mine owner under OSHA, the ADA and the wage and hour laws. (We never saw them get paid, and they had to resort to stealing the diamonds!) Whistle blowing is a relatively recent phenomenon that has been granted significant protections by the judges and legislature in Minnesota.

After you read about the following decision of the Minnesota Supreme Court, you will understand why we are likely to see more such claims in the future. In fact, can't you just hear the dwarves singing "Heigh ho, heigh ho, it's off to court we go..."

To make a long story short, Bookkeeper Morrell and Assistant Director Delaney questioned the order of Executive Director Seleski to refrain from paying vacation pay to a departing employee. They sought the advice of the Minnesota Department of Labor and Industry, who informed

them that the employee should be paid and would have a good legal claim if the vacation pay was withheld. This information was conveyed to Seleski.

From that point on, Morrell and Delaney felt that their work environment was "hostile." A plan to restructure the workforce was advanced, and Seleski was heard to say that she would use this to terminate some "troublemakers." Delaney and Morrell both submitted letters to Seleski complaining about their work environment and about the vacation pay issue. Sure enough, Morrell and Delaney were informed that their jobs had been eliminated, leading them (among others) to sue the employer for a variety of claims, including claims under Minnesota's Whistle Blower statute.

Prior to the legislature passing the Whistleblower Act, Minnesota courts recognized an exception to employment at will that prohibited an employer from firing an employee for reasons that were contrary to public policy. Shortly after the Minnesota Court of Appeals recognized the public policy

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exception, the legislature passed the Whistleblower Act, which makes it illegal for an employer to fire, discipline or take other adverse action against an employee because the employee in good faith reports a violation or suspected violation of the law to the employer, a government body or law enforcement officials.

This occurrence raised the question of whether the enactment of the statute was meant to incorporate the requirement that there be a public policy at issue, or whether it extended protection for reporting any violation of the law. Different courts around the state came up with differing answers to this question. As this case worked its way up to the Minnesota Supreme Court, it looked like we would finally get an answer to this question.

The answer came but unfortunately, the high court ruled that the statute does not require that the legal violation complained of be one that implicates an important

public policy. It is enough that the violation or suspected violation of the law is reported in good faith. The Court examined the statute, which refers to reports of violations or suspected violations of "any" state or federal law, and concluded that there was no indication that the legislature intended to limit the law to public policy cases.

This case might not seem very important but it could raise the bar considerably for employers trying to discipline problem employees. If all it takes to be protected is a report of a suspected violation of law made in "good faith," an employee could avoid discipline or termination with just a single call to the government about virtually anything, and a clever story to support the good faith nature of the call. *Anderson-Johanningmeir, et al. v. Mid-Minnesota Women's Center, Inc., et al.*, (Minn. Sup. Ct. Jan. 3, 2002).

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The *Labor & Employment Report* is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

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