Lister, Martin, Thompson & Secia's

WORKERS' COMPENSATION COMMENTARY

June 2000 Volume 7 Issue 5

9th CIRCUIT RULING "DIRECTLY THREATENS" CALIFORNIA EMPLOYERS

By: John C. Martin, Esq.

In our last regular issue, we promised an article about lien claims this month. The decision of the federal appellate court outlined in this letter, however, is of immediate concern to employers and we thought that it would be better to send this alert to you immediately and delay the lien article one month.

On May 23, 2000, a federal appellate court handed down a decision that a statute that is very clear should be both read and enforced as it is written. That sounds pretty harmless but, if that decision is not overturned by the US Supreme Court, it will substantially impact an employer's ability to protect employees from danger on the job and will undoubtedly cost employers a tremendous amount of money over time in workers' compensation benefits, both indemnity and medical treatment. [*Echazabal v. Chevron USA, Inc., 2000 Daily Journal D.A.R. 5407*]

Ever since the Americans with Disabilities Act was enacted, one of the defenses that could always be asserted by the employer was that an employee could be either removed from or excluded from a particular job if the disability afflicting that individual caused a "direct threat" of injury to co-workers or the disabled individual. That was the case in spite of the fact that the statute itself contains only the words: "...an individual shall not pose a direct threat to the health or safety of other individuals in the work place."

That was based upon an interpretation of the Americans with Disabilities Act, contained within the regulations promulgated by the Equal Employment Opportunity Commission. In this case, the EEOC set forth a regulation indicating that an employer could assert the "direct threat" defense with respect to individuals who threaten their own health or safety in addition to others.

The principle that an individual should not be placed in a position of danger (that the term "direct threat" would certainly require) has pervaded all state workers' compensation laws and every other federal disability protection law along with being a well recognized and long accepted principle of tort law. The Ninth Circuit now is indicating that any such law smacks of "paternalism", labeling that as the most pervasive form of discrimination that a disabled individual faces in the work place.

If an employer were excluding a disabled individual from a particular job because there just was a possibility of injury or it might prove uncomfortable or inconvenient for that individual to do the job or even because it would be more difficult for that individual to do the job than for anyone else to do it, then certainly that charge of "paternalism" would be valid and such prohibitions should be immediately eliminated.

The statute, however, requires a showing of a "direct threat". A direct threat is a danger and it means that injury is expectable or probable. If an employer were to place an employee in such a position on the job and that employee were to be injured here in California, that employer might face charges of serious and willful misconduct. In this case, however, the Ninth Circuit is indicating that the disabled individual has the right to place him or herself in danger and assume that risk.

Why did the Ninth Circuit Court of Appeals come to this conclusion? Well, there are two basic reasons that I can see. In the first place, it is quite true that the statute is very explicit and therefore it was very easy for them from a logical standpoint to overturn the expanded interpretation by the EEOC. More importantly, however, is that, once again, a case with a bad set of facts for the employer proceeded all the way to the Court of Appeals. This resulted in providing the Appellate Court with the ability to make bad law out of a bad set of facts.

(Continued from page 1)

In this case the employee was working for a contractor at a refinery doing a job that involved contact with chemicals. When a job opened up with the refinery itself working in the same area, he applied for the position. He was given the job subject to passing a physical exam. When he had his physical it turned out that he had liver abnormalities ultimately diagnosed as hepatitis C. Because of the exposure to liver-toxic chemicals on the job, the offer was rescinded. Now, here is where it gets bad for the employer: **The employee continued to work in the exact same area for the contractor for a period of several years thereafter with no objection from the refinery or the individual's employer**.

Several years later, another job opened up, once again working in the same area with those same chemicals, directly for the refinery. The employee applied for the position, got it, and once again was required to have a physical examination. The physical examination showed the liver disease and once again the job offer was rescinded. This time, however, the refinery told the contractor to take the employee off the job and it was at that point that he sued both the refinery and the contractor for whom he had worked alleging an ADA violation.

That just isn't the set of facts to take to a Federal judge! Since there now have been two contrary decisions issued by Circuit Courts of Appeal, the US Supreme Court may intervene to issue a definitive ruling on this issue.

I think that the opinion expressed by the Ninth Circuit is a little too "cavalier" when it comes to the protection of employees' health and the obliteration of the historical tendency of good employers to look out for the welfare of their employees. It also is very naïve with regard to the economic burden that their interpretation of this law places upon employers in this country. If the court deems an individual capable of choosing to place him or herself in danger in the work place then that individual should be held to have waived their rights to the employer's assistance if the anticipated danger causes injury to them. Yeah, that's likely! Just like in a teenager's dream, the Ninth Circuit wants the disabled worker to have the freedom but have someone else, in this case, the employer, pay for the consequences.

What does this mean for employers right now? Of all the questions that I deal with regarding the ADA, week in and week out, the most prominent is whether an individual may properly be excluded from a particular employment based upon one of the defenses available to the employer. The "direct threat" to the individual often plays a prominent part in this determination. This decision of the Ninth Circuit will be the law as it will be enforced in California until modified by another panel of the circuit court or by the US Supreme Court. It will require a different perspective in these cases. There will have to be more emphasis on the dealings of the disabled individual with others and danger presented to co-employees or the public. There will also be more scrutiny regarding the issue of basic qualification for a given position.

My prediction is that the Supreme Court will be interpreting this provision at some point but this case may not be the case that they choose to utilize for this purpose because of the bad factual situation in this case. (Incidentally, the Ninth is the most reversed Circuit Court in the nation by the US Supreme Court). I do think that when the US Supreme Court does deal with this issue that they will accept the principle that an individual should not be placed in a position of danger. I believe, however, that they will be much more stringent with the requirement that the employer show a "direct threat" and prove that it is a position of imminent danger that must be avoided.

As always, we would be pleased to answer any additional questions concerning this or any of the other ADA issues with which you are dealing.

Next Month: That long awaited article on liens.

The firm of Lister, Martin, Thompson & Secia consults with and represents both public and private entities regarding ADA issues. Our philosophy is that intervention in a potential ADA issue at the very earliest stages by practitioners familiar with both Federal and State discriminatory regulations, workers' compensation law and medical issues including work restrictions, provides the employer with the best opportunity to avoid costly formal litigation or, if that is unavoidable, provides the greatest chance of success in litigation.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.