

**EMPLOYERS MUST REASONABLY ACCOMODATE DISABLED
EMPLOYEES IN FINDING A NEW POSITION**

Recently, the California Court of Appeal addressed the issue of what accommodations an employer must make when one of its employees becomes disabled.

In **Susan Spitzer v. The Good Guys, Inc.**, plaintiff began working for The Good Guys in 1991, and was promoted to store manager in 1993. In 1992, she was diagnosed with discogenic spondylosis, a degenerative disc disease, causing chronic back pain. Plaintiff's job responsibilities as manager included being a traffic cop, setting the pace, greeting customers, managing the sales process for the entire store, being on her feet "a lot of the day," and not leaving the floor.

In 1995, plaintiff began telling management she needed accommodations due to her back disability. She thereafter attempted to obtain several positions in the company that would have allowed her to get off of her feet, but was rejected for the positions. In 1996, she requested, and was given, a medical leave of absence. When she returned to work, her condition worsened, and she increased her efforts to obtain sedentary work. Her supervisor responded by letting her to do what was necessary to comply with her doctor's directive regarding her activities, and told her she could place a chair on the floor of the store to use throughout the day. However, plaintiff decided that sitting in a chair was not compatible with her job responsibilities.

Several months later, plaintiff's job performance classification was downgraded, and her supervisor noted that she "had personal issues that affected her performance at work" and questioned whether a store manager position was the right job for plaintiff given her personal situation. The lower evaluations resulted in a reduction of salary increases for plaintiff. In May 1997, plaintiff again took a medical leave of absence. Throughout this time, The Good Guys was accommodating plaintiff's requests to leave work for physical therapy and doctor's appointments.

In August 1997, plaintiff's attorney wrote a letter to The Good Guys regarding the unsuccessful attempts to

obtain an alternative position, and requested a financial settlement. Three months later, The Good Guys contacted plaintiff regarding a position as store manager trainee, a position plaintiff claimed was open eight months earlier. Plaintiff further claimed that she was not seriously considered for any of the open positions she could have filled, until after she retained an attorney and raised the prospect of litigation.

The Good Guys claimed that they reasonably accommodated plaintiff by structuring her job to allow her to sit, relieving her of some of her responsibilities as store manager, and allowing her medical leave and to leave work early for physical therapy. They also claimed plaintiff never explicitly stated she was physically unable to perform the essential functions of her job after it was restructured.

The Trial Court granted summary judgment for The Good Guys, holding that it had "reasonably accommodated" plaintiff. The Appellate Court reversed, holding there were triable issues of whether The Good Guys knew it had not reasonably accommodated plaintiff's limitations in restructuring her job, and if so, whether there were suitable positions to which she could have been reassigned, when they learned the restructuring did not reasonably accommodate.

Continued on page 2

IN THIS ISSUE

WESIERSKI & ZUREK IN TRIAL 2

EMPLOYEE ADDRESSES AND TELEPHONE NUMBERS ARE NOT NECESSARILY PROTECTED BY PRIVACY RIGHTS, AND PLAINTIFF'S COUNSEL MAY BE ALLOWED TO CONTACT EMPLOYEES DIRECTLY 3

PROPOSITION 213 APPLIES TO AN UNINSURED DRIVER EVEN IF SHE IS JUST HANDING OUT BALLOONS NEXT TO HER CAR WHEN SHE IS STRUCK 4

Continued from page 1

Fair Employment and Housing Act (FEHA) makes it unlawful for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" and for an employer "because of the . . . physical disability, mental disability, medical condition, . . . of any person, . . . to discharge the person from employment . . . or discriminate against the person in compensation or in terms, conditions or privileges of employment." "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.'" "Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as: (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; (2) Job restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions."

The Good Guys claimed that plaintiff never made known to it her continuing disability, despite the accommodations she received. The Good Guys further claimed that plaintiff's rejection of her restructured job relieved it of an obligation to provide further accommodations.

The Appellate Court noted that the Equal Employment Opportunity Commission (EEOC) "has declared that the responsibility to initiate the interactive process of fashioning an appropriate accommodation lies primarily with the employee." "If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Federal case law has held that "it is the employee's initial request for an accommodation which trigger's the employer's obligation to participate in the interactive process of determining one. If the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one." Furthermore, "an employee whose disability is not apparent is therefore obliged to tender a specific request for a necessary accommodation."

The court in **Spitzer** noted in citing federal case law that "the responsibility to reassign a disabled employee who cannot be otherwise accommodated does not 'require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement' & but it

WESIERSKI & ZUREK LLP IN TRIAL

Since January 1, 2000, in the new millennium, the firm of Wesierski & Zurek has tried 30 cases to verdict in front of a jury. Twenty-eight of those verdicts have resulted in an award of defense or below the offer, with demands ranging from \$8 million down to \$10,000.

We recently settled a very dangerous premises liability case involving a brutal rape and battery for approximately 8 cents on the dollar. The mediator said liability was very questionable, but the main plaintiff would be so sympathetic before a jury that a seven-figure verdict was possible.

We recently obtained a defense verdict as to all clients in an uninsured motorist case in a binding arbitration before Judge Reese at JAMS. There were no independent witnesses. Mark Winter was the defense accident reconstruction expert and Dr. Veseley their medical expert.

Sr. Partner, Thomas Wianecki, recently tried two cases in Orange County Superior Court. *Keshishian v. Center for Advanced Dentistry* was a dental malpractice claim involving root canal therapy on multiple teeth. Allegations of altered records and improper care were made. A 9-3 defense verdict was achieved despite critical testimony from two subsequent treating dentists.

Sandoval v. Waldron was a dart-out case involving significant injury to a woman running to catch a bus. The defendant was driving towards "an unmarked crosswalk" when the pedestrian ran in front of him. Perception-reaction time was crucial in the analysis as well as the skid marks left at the scene. A 12-0 defense verdict was rendered.

nevertheless does entail affirmative action. Courts have made it clear that "an employer has a duty to reassign a disabled employee if an already funded, vacant position at the same level exists.'" "Under FEHA (and the ADA) an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified."

--Ronald F. Templer

**EMPLOYEE ADDRESSES AND TELEPHONE NUMBERS ARE NOT
NECESSARILY PROTECTED BY PRIVACY RIGHTS, AND PLAINTIFF'S COUNSEL
MAY BE ALLOWED TO CONTACT EMPLOYEES DIRECTLY**

Is an opposing party entitled to your employees' addresses and telephone numbers if the employees are identified as potential witnesses? Yes, according to the Fourth Division of the Second Appellate District in *Valley Presbyterian Hospital v. Superior Court* - which was subsequently depublished (ie., is not citable one way or the other). An even newer case, *Planned Parenthood v. Foti*, which is citable, holds that at least in some circumstances (danger to abortion clinic workers) employees do have a right of privacy in their addresses and telephone numbers which justifies the employers in refusing to divulge them in discovery.

In *Valley Presbyterian*, a wrongful death medical malpractice case, plaintiff served the defendant hospital with interrogatories asking them to identify by name, address and telephone number all persons whose names were mentioned in any of the plaintiff's decedent's medical records. The hospital responded by identifying the names (not addresses and phone numbers) of various employee witnesses.

Plaintiff asked for addresses and telephone numbers of these persons so that they could be interviewed. The hospital refused. Judge Ricardo A. Torres tried to compromise by ruling that in lieu of providing the addresses and telephone numbers, the hospital was required to produce the individuals for interviews with the plaintiff's attorney **outside of the presence of the hospital's lawyer**. If the hospital would not agree to these terms, then they were ordered to immediately turn over the addresses and telephone numbers so that plaintiff's counsel could make direct contact with the potential witnesses. The hospital appealed.

The reviewing court found that providing a person's address and telephone number is not such an invasion of that privacy right so as to require a complete preclusion of disclosure of that information. Home addresses and telephone numbers are commonly found in telephone directories and, even more frequently, on the internet.

The hospital continued to argue against production of this information on the grounds that the plaintiff could simply issue subpoenas for these employees and the hospital's attorney would accept service of the subpoenas on the employees' behalf. Again, the higher court disagreed. It upheld the plaintiff's attorney's right to make direct contact with the individuals, conduct an

interview, and then make an informed decision as to whether or not to go forward with the time and expense of a deposition. This interview process does not preclude the hospital from conducting its own interviews or discussing potential interviews with its own employees on any given day or at any given time. The court also noted that the employee was free to choose to not cooperate with the plaintiff's attorney's inquiries. If there was going to be some problem with opposing counsel interfering with these employees, the hospital still could seek a protective order for any abuses by the opposing attorney.

COMMENTS

A. Shortly after *Valley Presbyterian* was published, the Supreme Court ordered it depublished, which means that lawyers cannot refer either to the opinion or the depublication order. Depublication is not the same as reversal or overruling. Officially, it is not a comment on the correctness of the decision. We can speculate, however, that the Supreme Court felt that *Valley Presbyterian* would be unnecessarily controversial and may have been ill-conceived on some points.

More recently, in *Planned Parenthood v. Foti*, the Court of Appeal held that an abortion clinic did not have to reveal the addresses and phone numbers of its workers, even though they were witnesses. In that case, the evidence (internet threats, etc.) showed that on balance, the privacy/safety concerns of the workers outweighed the need for disclosure, saying that it was enough that Planned Parenthood agreed to accept service on behalf of the workers, and produce them under pseudonyms.

B. California law is now in flux on the issue of an employer's right to withhold employee information in discovery. In extreme "safety concern" cases, involving abortion workers and the like, the courts will allow such information to be withheld on the employee's behalf, at least if the employer agrees to accept service on behalf of the employee and then produce them for deposition under pseudonyms. In less extreme cases, the court may order an "attorney's-eyes-only" framework for discovery so that the information is not part of a public record.

Continued on page 4

Continued from page 3

Also note that both cases found a way to avoid the issue of whether the plaintiff would be violating Rules of Professional Conduct 2-100 if they contacted the employee for an interview. Generally, a lawyer cannot contact a represented party.

However, it is unclear in California whether a low level employee is a “party” simply because the corporate employer is sued. *Planned Parenthood* noted that the defense attorney early on sent a letter to plaintiff’s counsel advising that “this office represents all Planned Parenthood past and present employees”. Such a letter of representation might be enough to make it unethical for plaintiff to contact the employees. However, if defense counsel is directed or authorized to send out such a letter, it is then likely that the court will then allow plaintiff to serve the employee with any subpoenas or service papers simply by serving the corporation. If present and past employees are claimed to be under the corporate umbrella in a representation letter for purposes of protecting them from the interviews, etc., the court may say that a simple deposition notice mailed to defense counsel is enough to require defense counsel to produce a past or present employee for deposition—even if a former employee cannot be found. Thus, on a case by case basis, an early decision should be made as to whether to shield employees from interviews by sending out a notice of representation letter, and as to whether counsel should represent past or present employees.

--Thomas E. Martin and Paul J. Lipman

PROPOSITION 213 APPLIES TO AN UNINSURED DRIVER EVEN IF SHE IS JUST HANDING OUT BALLOONS NEXT TO HER CAR WHEN SHE IS STRUCK

Wendi Harris and Lois Lammers were parked next to each other in a grocery store parking lot. Ms. Harris was standing at the hatchback of her vehicle handing balloons to her children who were seated in the vehicle. At the same times, Ms. Lammers had backed her vehicle out of her parking space, and had just begun moving forward when the front of the Lammers’ vehicle struck the hatchback door and pinned Ms. Harris against the back of her vehicle. Ms. Harris sued Ms. Lammers for personal injuries.

During the course of discovery, Ms. Harris admitted that the subject vehicle was not insured. the attorneys for Ms. Lammers file a Motion for Summary Adjudication

asking the court to determine that Ms. Harris would not be entitled to non-economic damages at the time of trial due to the lack of insurance at the time of the accident. In response to that motion, Ms. Harris did not dispute the fact that the vehicle was uninsured; rather, she claimed that she did not own the vehicle, and used the purported vehicle registration as evidence of this claim. The registration showed her husband to be the sole owner of the vehicle. Upon that basis, the court denied the motion. A subsequent writ was denied and the case went to trial.

The bench trial resulted in an award in favor of Harris that included both economic and non-economic damages. Both sides appealed. In **Harris v. Lammers**, the First Appellate District reviewed the questions of whether Ms. Harris suffered all of the injuries being claimed, and whether or not she should recover any non-economic damages because of the insurance issue. As it turns out, Ms. Harris had altered the vehicle registration to remove her name. Thus, the court expressly held that she was an owner of the vehicle. The remaining issue is whether or not she was considered an “operator of a vehicle” as is required by Civil Code Section 3333.4 before an uninsured motorist can be denied non-economic damages.

The Court of Appeals held that handing balloons to her children was something that “grows out of or flows from” the operation of a vehicle. There was no question that Harris had used her vehicle to transport her children and supplies to the parking lot. It was not necessary that Ms. Harris be actually driving the vehicle at the time of the accident. “Operation” includes stopping, parking on the highway and other acts regarded as necessary to the driving of the vehicle. This interpretation of “operation” burst Ms. Harris’ legal balloon and inflates hopes that courts will continue to define “operation” liberally so as to make Proposition 213 apply broadly.

--Thomas E. Martin

Editor

Paul J. Lipman