Second Circuit Rules "Interacting With Others" is a Major Life Activity

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Recently, the United States Court of Appeals for the Second Circuit, in *Jacques v. DiMarzio, Inc*., held that "interacting with others" is a major life activity under the Americans with Disabilities Act (ADA).

Facts of the Case

Audrey Jacques worked for DiMarzio, Inc., an electric guitar manufacturer, as a packager and assembler of guitar components in DiMarzio's Staten Island, NY factory for seven years until she was terminated in 1996. Ms. Jacques suffered from psychiatric problems for over forty years, including a severe depression disorder for which she took medication. She first informed her employer of her condition in 1992. By early 1996, Ms. Jacques' working relationship with her superiors had become "poisonous" because she was prone to confrontations and intolerant of ethnic minorities in the workplace. As a result, Ms. Jacques' direct supervisor felt obliged to treat her "with kid gloves" so as not to upset her. DiMarzio ultimately terminated Ms. Jacques due to her ongoing conflicts with her supervisors and co-workers. Ms. Jacques filed a complaint against the company, claiming she had been discriminated against in violation of the ADA because DiMarzio "regarded" her as having a mental impairment that substantially limited her ability to interact with others.

Holding

The district court instructed the jury that an impairment causing "a perceived demeanor of hostility and social withdrawal" gave rise to protection under the ADA for employees "regarded as" disabled. The Second Circuit held, however, that the district court used the wrong legal standard in its jury instruction concerning the showing a plaintiff must make to be considered "substantially limited" in the "major life activity" of "interacting with others."

The Court first took up the issue of whether "interacting with others" is even a major life activity under the ADA. This issue has proven divisive as the First Circuit Court of Appeals has held that "getting along with others" *is not* a major life activity under the ADA, whereas the Ninth Circuit Court of Appeals has determined that "interacting with others" *is* a major life activity under the ADA. The Second Circuit agreed both with the First Circuit's finding that the ability to "get[] along with others" is an unworkably subjective definition of a major life activity, and with the Ninth Circuit's finding that "interacting with others" is an essential function that meets the definition of major life activity. However, the Second Circuit disagreed with the Ninth Circuit's test for determining when a limitation on the activity of interaction with others is "substantial" for ADA purposes. According to the Ninth Circuit, an impairment of the ability to interact with others is substantial when it is "characterized on a regular basis by severe problems" such as "consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." This test - the wording of which the district court's jury instruction tracked

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Employers May Not Refuse to Reinstate Sarbanes-Oxley Whistleblowers While Pursuing an Appeal

A Connecticut federal court recently held, in *Bechtel v. Competitive Techs., Inc*., that a Connecticut technology company must reinstate two whistleblowers while it appealed a decision of the Secretary of Labor under the Sarbanes-Oxley Act.

History

Scott Bechtel and Willie Jacques were vice presidents of Competitive Technologies, Inc. ("CTI") who, on three separate occasions, allegedly voiced concerns regarding the company's financial reporting practices. Specifically, Bechtel and Jacques allegedly questioned whether certain oral agreements entered into by CTI's CEO John Nano with consultants and Bechtel and Jacques should be disclosed to shareholders and included in SEC reports. Nano met with Bechtel and Jacques and assured them their concerns would be addressed. Following that meeting, Nano allegedly became hostile towards Bechtel and Jacques, openly criticizing and attempting to embarrass them. This hostility continued until Bechtel and Jacques were terminated. Following their termination, Bechtel and Jacques filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging retaliatory termination in violation of the Sarbanes-Oxley Act. OSHA, the agency responsible for adjudicating whistleblower claims arising under the Sarbanes-Oxley Act, found that CTI had unlawfully fired Bechtel and Jacques and ordered that they be reinstated to their former positions. CTI filed objections with the Secretary of Labor, requested a hearing, and filed a motion to stay the reinstatement order. An administrative law judge denied the motion, however, CTI refused to reinstate Bechtel and Jacques while an appeal was pending. Bechtel and Jacques then sought enforcement of the Secretary's order in federal court.

The Decision

The Court enforced the Secretary's reinstatement order, and in doing so looked to two other federal statutory schemes upon which the Sarbanes-Oxley whistleblower provisions are modeled. Noting that the adjudication of complaints under Sarbanes-Oxley is governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), the Court began its opinion by rejecting CTI's contention that it lacked subject matter jurisdiction to enforce a preliminary reinstatement order under Sarbanes-Oxley. According to the Court, AIR21 specifically allows federal courts to enforce preliminary orders reinstating employees despite the filing of objections by employers, and hence so does Sarbanes-Oxley.

Having resolved the jurisdictional issue, the Court proceeded to consider the propriety of a request for injunctive relief in this context. As a matter of first impression, the Court held that the legal elements generally required for the issuance of a preliminary injunction were not applicable in a case where the Secretary of Labor has determined, pursuant to Sarbanes-Oxley, that reinstatement is warranted. Likening the statutory scheme of Sarbanes-Oxley to that of the Surface Transportation Assistance Act ("STAA"), the Court relied upon the Supreme Court's 1987 decision in *Brock v. Roadway Express, Inc*. for the proposition that Congress could grant the Secretary authority to order reinstatement on the basis of an investigation provided that the investigation met minimum due process requirements. Because CTI did not contend that OSHA failed to meet minimum due process standards in making its determination, the Court concluded that Bechtel and Jacques were entitled to a preliminary injunction enforcing the Secretary's determination, despite the fact that the traditional elements of injunctive relief had not been established. The Court ordered CTI to reinstate Bechtel and Jacques and pay them all salary and benefits they would have earned had CTI complied with the Secretary's original reinstatement order.

Ramifications for Employers

The *Bechtel* decision illustrates the significant protections afforded whistleblowers unlawfully terminated in violation of Sarbanes-Oxley. Although reinstatement is a traditional remedy for violations of federal employment laws, such as Title VII, as a practical matter it is rarely invoked because judges recognize litigation's inherent strain on the employer-employee relationship. Even when appropriate, moreover, reinstatement is ordinarily only required *after* the litigation has concluded. Under the whistleblower provisions of the Sarbanes-Oxley Act as interpreted by the *Bechtel* court, however, reinstatement is an interim remedy that can be imposed based on a preliminary investigative finding of a violation. In other words, a terminated employee pursuing a Sarbanes-Oxley claim for retaliatory discharge may well have a right to remain on the job while his or her case is litigated through the administrative and judicial process. Needless to say, this remedial scheme has the propensity to create some rather awkward situations in the workplace.

New Rules for Qualified Plans Automatic Rollovers of Involuntary Cash-Outs

The Economic Growth and Tax Relief Reconciliation Act of 2001 added a new rollover requirement for tax-qualified retirement plans that make involuntary cash-outs of small benefits. The Internal Revenue Service recently issued guidance on how that requirement should be administered.

Background

In general, participants must consent to distribution of their retirement benefits, choosing when and in what form to receive their benefit. However, when the present value of a participant's benefit is $5,000 or less, a plan may pay out that small benefit in one lump sum payment, without the participant's consent. Under the old law, a plan paid the small benefit directly to the participant, unless the participant opted to have the money rolled over into another employer's qualified retirement plan or to an IRA the participant designated.

Under the new law, small benefits greater than $1,000 but no more than $5,000 must be automatically rolled into an IRA selected by the plan administrator, unless the participant affirmatively elects to receive the cash or selects another IRA or qualified plan to receive the rollover. The new law was apparently intended to help short term employees save for retirement by changing the default distribution option to make it just a little more difficult to get a cash distribution.

Compliance Options

Sponsors have 3 options for compliance, all of which require a plan amendment:

- Select an IRA provider and make automatic rollovers on and after March 28, 2005;
- Reduce the involuntary cash-out limit from $5,000 to $1,000, since only involuntary cash-outs of amounts greater than $1,000 trigger the automatic rollover requirements; or
- Eliminate involuntary cash-outs altogether.

Special considerations in selecting a compliance option:

- All sponsors should consider the additional administrative cost of retaining inactive participants who would otherwise have received a cash-out.
- Sponsors of defined benefit plans should consider, in particular, the costs of paying very small annuities and the Pension Benefit Guaranty Corporation (PBGC) premiums that will be due for participants who would otherwise have been cashed-out.
- Sponsors that decide to make automatic rollovers should consider the Department of Labor's safe harbor for selection of providers and investments.

Amendment Deadline

Plans must be amended to comply with the new rules no later than the end of the first plan year ending on or after March 28, 2005. Thus, sponsors of calendar year plans must adopt a plan amendment by December 31, 2005. We recommend that you adopt a plan amendment as soon as possible after determining which option best suits your needs.

Fiduciary Considerations; Safe Harbor

Selecting an IRA provider and making the initial investment choice for the rollover are fiduciary acts. The Department of Labor has issued safe harbor regulations that, if followed, will relieve fiduciaries of responsibility for involuntary cash-out amounts once they have been properly rolled over:

- The rollover must be made to an individual retirement account or an individual retirement annuity;
- Before any automatic rollover can be made, the plan sponsor must distribute an updated Summary Plan Description (SPD) or Summary of Material Modifications (SMM) to all participants; and
- The plan administrator must have a written agreement with the IRA provider that specifies:
- the initial investment option - typically a money market fund - offered by a state or federally regulated financial institution;
- that the fees and expenses charged by the provider cannot exceed the fees and expenses charged by the provider for IRAs that receive non-automatic rollovers; and
- that the participant has the right to enforce the agreement against the IRA provider.

Notice Requirements

If you amend your plan to reduce or eliminate involuntary cash-outs, you must distribute a revised SPD or an SMM to all participants no later than 210 days after the close of the plan year in which you adopt the amendment.

If you amend your plan to implement automatic rollovers, you must distribute two notices before any automatic rollovers are made:

- An SMM to all participants; and
- A notice to individual participants at the same time you distribute the Section 402(f) Special Tax Notice (either separately or incorporated into the Special Tax Notice).

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- was deemed unworkable by the Second Circuit because it frustrated the maintenance of a civil workplace environment. Rather, the Second Circuit held that an individual is substantially limited in the major life activity of interacting with others when a "mental or physical impairment severely limits the fundamental ability to communicate with others." This standard is met "when the impairment severely limits the [individual's] ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people." The Court made it a point to note that a substantial limitation does not exist where the employee is fully capable of communicating his or her thoughts but does so in a manner that is "inappropriate, ineffective, or unsuccessful."

What this Means for Employers

The Second Circuit's decision in *Jacques* means employers must learn to distinguish between employees whose highly irritable and disagreeable personalities make communication difficult or contentious and those who suffer from conditions, such as depression, autism, or agoraphobia (to list only a few), that hinder or prevent communication altogether. Although employers are not prevented from terminating employees who are hostile, confrontational or antagonistic, they must make reasonable accommodations for employees who are isolated by an inability to interact with others, but are otherwise able to perform the essential functions of a job.

New Rules for Qualified Plans Automatic Rollovers of Involuntary Cash-Outs

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In addition, information on automatic rollovers should be included in your next SPD revision.

Extra Time to Establish Adequate Procedures

If you implement automatic rollovers your plan may suspend processing of involuntary cash-outs until administrative procedures are in place and participant notices have been distributed. However, all suspended cash-outs must be made by December 31, 2005.

Next Steps

If you have a prototype plan, your prototype sponsor should already have provided you with amendment options and model notices to distribute to your plan participants. Make sure you have followed through with your prototype sponsor to properly amend your prototype plan for whichever option you choose.

If you have an individually designed plan, you'll need to decide on a compliance option, amend your plan accordingly, and communicate to plan participants. Please do not hesitate to contact us if you would like copies of our model amendments and participant notices, or if you have any questions regarding the new automatic rollover rules.

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