



# THE KZR QUARTERLY REPORT FROM COUNSEL ON LABOR & EMPLOYMENT LAW

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## PHYSICAL CAPACITY (FUNCTIONALITY) TESTS: ARE THEY MEDICAL EXAMS?

Many companies require that employees take functionality exams when returning to work after an illness or injury. These exams are in theory not medical exams but tests to determine whether the employee can perform the essential elements of his job. A recent decision by the Court of Appeals for the Ninth Circuit (which covers the entire West Coast) holds that a functionality test was in fact a medical exam and, therefore, had to be “job related and consistent with business necessity.” *Indergard v. Georgia-Pacific Corp.*, 2009 WL 3068162 (9<sup>th</sup> Cir. 2009).

The plaintiff, Kris Indergard, had been on medical leave for over two years following knee surgery. In response to her request to return to work, a physical therapist was retained to provide an evaluation of the physical requirements of her job and to test her physical ability to perform the essential functions of that job. The therapist then asked Indergard to perform various physical functions relating to lifting, gait, carrying weights, and ability to place nuts and bolts in a box while kneeling.

The issue in the case was whether the test given to Indergard was a medical examination or simply an inquiry to determine whether she was capable of performing the physical functions of her job. The distinction is important because, under the Americans with Disabilities Act (ADA), a medical exam must be “job related and consistent with business necessity” while a test of physical capacity is not subject to that requirement.

The court found that the test given to Indergard was a medical exam, not simply a test of physical agility, noting that Indergard was asked about her medical history, her height and weight were recorded, and her blood pressure was taken. When testing her ability to lift weights and following treadmill tests, the therapist measured her heart rate and oxygen intake. Citing an EEOC Guidance, the court found that these medical aspects of the tests were indicative of a medical exam, not just a physical ability test, because they measured physiological response, not just her physical capabilities. The court also relied on the fact that the therapist’s conclusions were reviewed by a medical doctor; the blood pressure, heart

rate and oxygen results were included in her report; and the medical tests were “capable of revealing impairments of physical and mental abilities.” The court did not rule that the test was unlawful but remanded the case for a determination as to whether the test was job related and consistent with business necessity.

There was a strong dissent in this case, and some would say that this is a “California” decision which might not be followed elsewhere. Nonetheless, this is the law in the ninth circuit and time will tell whether and to what extent this approach is followed in other circuits. Companies in the ninth circuit which conduct functionality exams should understand that if a “functionality” test strays beyond assessment of physical ability to perform a job and ventures into the realm of physiological response, that test may well be regarded as a medical exam. In that case, the company will have to establish that the test was “job related and consistent with business necessity.”

#### **THE “FAITHLESS SERVANT” DOCTRINE: CAN A COMPANY RECOVER WAGES AND BONUSES PAID TO A “DISLOYAL” EMPLOYEE?**

When an employee commits illegal acts, and the company is required to pay damages because of those acts, does the company have any basis for recovery against the employee who committed the underlying illegal acts? A recent decision of the Supreme Judicial Court of Massachusetts applying New York law holds that under New York’s “faithless servant” doctrine, a former CEO must pay back to the company more than \$5 million of salary and bonuses paid to the CEO during the period of his misconduct.

The CEO of Astra USA was accused and ultimately found to have committed a plethora of improper acts. The evidence showed that he had engaged in repeated acts of aggravated sexual harassment and financial irregularities such as charging the company for personal sailing trips, hiring and charging the company for “escorts” for himself and others, and directing Astra to reimburse him for \$16,000 of legal expenses incurred fighting a speeding ticket. In 1995, the CEO learned that *Business Week* was investigating allegations of sexual harassment at Astra, most of which centered on him. In response, he set up a “task force,” not to investigate the allegations, but to control and manage the *Business Week* investigation. He then told the parent company about the investigation, did not disclose that it centered on him, and stated that Astra was “positive there is no basis for such a story.” When asked for more details, he told the parent company that Astra had a very good record on sexual harassment, again failing to disclose that he was the focus of the investigation. Through outside counsel, Astra conducted its own investigation, and asked the CEO to cooperate and also not to discuss the investigation with any present or former Astra employees. The CEO did neither and actually spoke to former employees, asking that they deny that he committed any inappropriate conduct. Based on the investigation, the CEO was suspended and replaced.

Astra then sued the CEO in Massachusetts trying, among other things, to recover all salary and bonuses paid to the CEO during the period of his misconduct. The Supreme Judicial Court found that this issue had to be decided under the law of New York. The court then addressed New York’s “faithless servant” doctrine, under which an agent is held to “utmost fidelity” in his dealings with his principal, and if he acts adversely to his employer or omits to disclose any interest which would naturally influence his conduct, he has committed an effective fraud on the principal and forfeits any right to compensation for services. The court then found that “in the circumstances of this case,” the CEO was required to forfeit over \$5 million of wages and bonuses paid to him during the period of his misconduct. Reversing three findings made by the lower court, the court held that: 1) the New York forfeiture law is not limited to wages due but also requires forfeiture of wages and bonuses already paid; 2) that it applies to all employees, not just to low-level employees; and 3) that the agent must forfeit all wages and bonuses paid, not just wages and bonuses in excess of the value of his services.

We should note that the precedential effect of this case may well be limited by several factors, including the egregious nature of the CEO’s misconduct and the fact that the decision was not rendered by a New York court. Nonetheless, the case does illustrate that there are circumstances in which companies may be able to recover damages against employees if they act as “faithless servants.”

**WITHDRAWAL LIABILITY: A RISK FOR COMPANIES WHICH “LEASE” EMPLOYEES?**

Multi-employer pension plans have suffered serious declines in assets during the current recession, which has resulted in withdrawal liability claims by pension plans against many employers. The theory of withdrawal liability is that when a company ceases making contributions to a multi-employer pension plan, it should be responsible for paying its share of the unfunded vested liabilities of the plan. A recent decision by the sixth circuit court of appeals addresses a question that will be of great interest to companies that “lease” employees from “leasing” companies—namely, can the company that obtains leased employees be liable for withdrawal liability because the leasing company has a union contract obligating it to make contributions to a multi-employer pension plan. The sixth circuit, disagreeing with several other circuit courts, found that the company that obtained leased employees might itself be liable for withdrawal liability. *Central States Pension Plan v. Int’l Comfort Products, LLC*, 585 F.3d 281 (6<sup>th</sup> Cir. 2009).

The company, Int’l Comfort Products (“ICP”), a manufacturer of heating and cooling products had a contract with a trucking company, Tops, which supplied the drivers to deliver those products. Tops had a collective bargaining agreement with the Teamsters and an obligation under that agreement to make pension contributions for the drivers to the Teamsters’ Central States Pension Plan. ICP had no agreement with the Teamsters or with the Pension Plan but did have a contract with Tops which required ICP to reimburse Tops for various costs including the wages and benefits paid by Tops to the leased drivers.

Similar cases have arisen in other circuits and in deciding those cases, the courts focused on whether the company being charged with withdrawal liability was an “employer” under the Multiemployer Pension Plan Amendments Act (“MPPAA”). The sixth circuit court discussed four circuit court decisions which held or suggested that companies like ICP were not “employers” because they, unlike the leasing company which had signed the Teamster contract, had no contract obligation to make pension contributions for the drivers. The court disagreed with this approach and relied on statutory provisions which had not been discussed in the other circuit court cases, which stated that an obligation to contribute to a pension plan arises not only from a contract obligation but also “as a result of a duty under applicable labor-management law.” The court remanded the case to the district court for a finding as to whether ICP had an obligation to contribute to the Teamster plan under labor-management law even if it had no contract obligation to make pension contributions.

This case has significant implications for companies that obtain workers from leasing companies. If the leasing company has a union contract requiring it to contribute to a multi-employer pension plan, this case suggests that both the leasing company and its customer may be liable for withdrawal liability when contributions for the leased employees terminates.

The court did not spell out the circumstances or legal theories that might make the customer responsible for withdrawal liability. The court may have been suggesting that if employment responsibilities were shared by the leasing company and its customer—for example, the leasing company determined and paid the drivers’ wages and benefits but the customer supervised them on the job—the customer might then be responsible for withdrawal liability as a “joint employer.” Whether there is a legal basis for finding the customer liable is the issue yet to be decided.

Given the potential magnitude of withdrawal liability, this is an issue that needs to be carefully reviewed by companies who lease or are thinking of leasing employees from leasing companies which are obligated to contribute to multi-employer pension plans.

**ADA: CAN EMPLOYEES BE AUTOMATICALLY TERMINATED WHEN WORKER'S COMP LEAVE ENDS?**

Sears Roebuck recently settled a class action lawsuit instituted by EEOC. The lawsuit challenged Sears' policy under which employees were automatically terminated when their worker's compensation leaves ended. The class action claim stemmed from a charge filed by an individual worker who claimed that when his worker's comp leave ended, Sears was required to explore reasonable accommodations with him before considering termination. Daily Labor Report, 9/30/09.

When employees are on leave for sickness or disability, questions frequently arise as to how long the company must wait before terminating the employee and whether some accommodation short of termination is required. The problem with Sears' policy is that it inflexibly required termination when the employee's leave expired, thereby foreclosing consideration of possible reasonable accommodations that might have obviated the termination. Under the settlement, Sears will revise its return to work policies to require 45 days' notice to the employee before his leave expires. The notice will also advise the employee about the kinds of accommodations that might be available such as light duty, part-time work, assignment to a different job or additional leave.

The terms of the settlement essentially reflect the ADA requirements. The lesson here is that companies cannot automatically terminate employees when sick or disability leave ends but must engage in an interactive process with the employee to determine whether a reasonable accommodation can be offered. There is no simple answer to the question of what is a reasonable accommodation. Each case is fact-specific depending on the needs of the company, the employee's ability to work in alternative capacities, and the prognosis for recovery.

**EEO: DOES AN EMPLOYEE GET A SECOND CHANCE WHEN HIS EEO LAWSUIT IS DISMISSED AS UNTIMELY?**

A recent decision by the Court of Appeals for the Third Circuit addresses the question of whether a plaintiff whose Title VII lawsuit was dismissed as untimely can sue again under a different statute and allegedly different facts. The court dismissed the second suit as well. *Elkadrawy v. The Vanguard Group, Inc.*, 584 F.2d 169 (3<sup>rd</sup> Cir. 2009).

The plaintiff, Emad Elkadrawy, a Muslim of Egyptian origin, sued the Vanguard Group claiming that he was terminated because of his race, religion, age and national origin. The case was dismissed as untimely because Elkadrawy did not file his suit within 90 days of receipt of the EEOC right to sue letter. Elkadrawy then filed a second suit under another federal discrimination statute (42 USC Sec 1981). The Vanguard Group moved to dismiss, relying on the doctrine of *res judicata*. Despite its esoteric name, this doctrine prevents a plaintiff whose lawsuit has been dismissed "on the merits" from having a second chance to litigate the same or a similar claim. The purpose of the rule is to prevent unsuccessful plaintiffs from having a second chance to litigate their claim.

Elkadrawy argued that the *res judicata* rule did not apply because his first lawsuit had been dismissed on "technical" statute of limitations grounds, not on the merits, and that the second suit was filed under a different statute and was based on an expanded and different version of the underlying facts. The court rejected these arguments, holding, first, that a dismissal on statute of limitations grounds was a dismissal on the merits. As to the claim that the second lawsuit was based on different facts and was filed under a different statute, the court held that the analysis of these arguments does not depend on the specific legal theory asserted in the second case but on whether the two lawsuits were grounded in essentially similar facts and underlying events. Alternatively, the court noted that the doctrine of *res judicata* prevented plaintiffs from asserting in a second suit claims that "could have been" brought in the first suit.

This decision is a common sense application in the discrimination context of the *res judicata* rule, which is intended to provide finality to successful defendants and preclude a second round of litigation over the same or similar claims.

**COBRA SUBSIDY UPDATE: PRESIDENT SIGNS LEGISLATION EXTENDING AND EXPANDING SUBSIDY**

As you know from our prior *KZR Alerts*, earlier this year Congress passed legislation providing a subsidy for employees losing medical coverage under qualifying conditions. With the subsidy, separated employees are only required to pay 35% of the cost of medical continuation coverage for a period of time, while the employer, or the insurance carrier, pays the balance and then recoups that payment through a payroll tax credit.

Eligibility for the subsidy was scheduled to expire on December 31, 2009. As a result, employees who lost their jobs earlier in December, but whose medical coverage continued through the end of the month, would not be eligible for the subsidy.

Legislation to extend the subsidy, which was previously approved by the House of Representatives, and passed by the Senate on December 19, was signed into legislation by the President last week. The legislation not only extends eligibility for the subsidy through February 28, 2010, but also extends the subsidy period from 9 months to 15 months both for those already on COBRA and those who are separated through February 28, 2010. Individuals whose subsidy ran out before the date of enactment and who failed to continue coverage at the full cost must be given an opportunity to retroactively reinstate coverage by making payment of the subsidized amount within 60 days of enactment of the legislation (or, if later, 30 days after the required notification is provided). Individuals who paid the full COBRA premium amount will be entitled to a credit. In addition, the legislation clarifies that a qualifying event giving rise to COBRA entitlement must occur within the prescribed period, but not the actual loss of coverage.

Employers should be prepared to notify individuals currently on COBRA of the extended coverage period. Notification of the changes must be given to anyone who was an assistance-eligible individual at any time on or after October 31, 2009, or who has a termination of employment on or after that date, within 60 days after the enactment or as otherwise required under the general notification provisions. In addition, individuals whose subsidy period ended before enactment of the extension and who did not timely pay, or who paid the full amount during that interim period, must be provided notice of the extension and the ability to make retroactive premium payments.

**FIRM NEWS**

LETTER TO THE EDITOR:

All of us at Klein Zelman Rothermel join in congratulating our friend and colleague – and newsletter editor, Andrew Zelman, for his selection as one of New York's Super Lawyers. Selected through a process that includes evaluation of professional achievements and peer review, Andy was named in the 2009 Metro Edition of *New York Super Lawyers* as one of the top labor and employment lawyers in the New York metropolitan area. We are extremely proud, and can think of no one who deserves it more. Congratulations Andy!

WELCOME TO JAMES LARocca:

We are pleased to welcome James LaRocca to our firm. James has been practicing in all facets of labor and employment law in New Jersey and will continue to do the same with our firm. We expect and hope that many of you will soon have the opportunity to meet and work with James.

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**Report From Counsel**

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