Qued In

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Employment Law Update: Depressed Teacher Can Sue School District Seasonal Affective Disorder Accepted As Disability

By: Terrence Guolee – Chicago Office

The Seventh Circuit Court of Appeals recently restored a lawsuit filed by a Wisconsin teacher who claimed her district failed to accommodate her seasonal affective disorder by providing her a classroom with natural light. *Somerset v. School District of Sommerset,* No. 09-1853 (7th Cir. October 6, 2009).

First-grade teacher Renae Ekstrand sued the Somerset School District, claiming the district's refusal to place her in a new classroom violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112. She had worked for the district since 2000 but, after requesting an assignment change from kindergarten, she was placed in a new classroom without exterior windows at the start of the 2005-06 school year.

Her reaction appears to have been severe, despite other attempts by the district to remedy the issue. Plaintiff claimed that:

> By late September 2005 and through the time she began her medical leave on October 17, 2005, Ekstrand suffered from significant inability to concentrate, organize her thoughts, retrieve words, make decisions, and focus on the needs of her students. She also experienced hypersomnia, racing thoughts, panic attacks, uncontrollable crying, inability to eat, and thoughts of suicide.

Ekstrand never returned to work at the Somerset district after her medical leave. The district court granted the school district's motion for summary judgment, holding that the school district did not fail to accommodate Ekstrand's disability because it "engaged in the interactive process and addressed plaintiff's complaints by making changes aimed at reducing her stress"; and that the school district's conduct was "not severe enough to create the type of abusive environment that has been found to amount to a constructive discharge." The district court entered summary judgment in favor of the school district on March 3, 2009, and appeal followed.

Reviewing the case, the Seventh Circuit, per Judge Bauer, revived the claim that the district failed to provide her proper accommodations under the ADA.

First, the court noted that to survive the school district's motion for summary judgment on her failure-to-accommodate claim, Ekstrand needed to present evidence that, if believed by a trier of fact, would show that (1) she is a qualified individual with a disability; (2) the school district was aware of her disability; and (3) the school district failed to reasonably accommodate that disability.

The court deemed that she had satisfied this burden by, among other items, presenting evidence that she was "disabled" and "qualified" under the ADA from late September 2005 to at least somewhere between November 30, 2005 and January 3, 2006. In particular, the court took note that evidence from Ekstrand's doctors and other witnesses and documents showed that Ekstrand was disabled beginning in late September, when her mental health condition became sufficiently serious to substantially limit her teaching ability.

Next, the court noted that Ekstrand presented evidence that the school district was aware of her disability from late September onward, noting that the evidence was "so compelling" that the district court found "no real dispute."

The court then considered whether Ekstrand presented evidence that the school district failed to reasonably accommodate her. To establish this element, the court noted that Ekstrand was required to present evidence showing not only her attempt to engage in an interactive communication process with the school district to determine a reasonable accommodation, but

also that the school district was responsible for any breakdown that occurred in that process.

In this respect, the court reviewed the evidence and noted that as of November 2005, there was enough communication from plaintiff regarding her condition, understanding by the school district of the plaintiff's condition and, in particular, communications from the plaintiff's psychologist of the benefits of natural light therapy, such that a point had been reached that the school district's future failure to accommodate her by placing her in school rooms with access to natural light was a violation of the ADA. The court also noted that the costs of such a move would not to impose an "undue hardship" on the school district and its operations that would have provided the school district a defense to the claim.

Finally, the court considered whether the facts of the case supported plaintiff's constructive discharge claim, but found that there would be no such claim as the evidence before it would not present a situation that was "intolerable." Nevertheless, the court's decision reversed the grant of summary judgment on the failure to accommodate claim under the ADA.

CASE SUCCESSES

Jillian Taylor Obtains Not Guilty Verdict – Even After Admitting Negligence!

Wheaton office associate **Jillian Taylor** (f/k/a Jillian Book) obtained a not guilty verdict in DuPage County, even after admitting negligence. Plaintiff claimed to have suffered a low back strain but credibility was the significant issue in the case. To begin, plaintiff had her adult son testify about her condition and his observations while living with her following the accident. This was in direct conflict with plaintiff's prior deposition testimony in which she testified that none of her adult children resided with her at the time of, or following the accident. Plaintiff's case continued to present as exaggerated, and to make matters worse, Jillian impeached the plaintiff numerous more times on cross-examination and presented an independent witness (the plaintiff's roommate at the time) who testified that the plaintiff only limped when people were around or when they went to doctors visits. This independent witness gave further conflicting testimony to the plaintiff's account. Plaintiff asked the jury for $35,000, based on $9,505 in medical specials, but the jury returned with a defense verdict.

James Jendryk Obtains a Not Guilty Decision through Binding Arbitration

Jim Jendryk continued his recent case successes with a not guilty verdict through a binding arbitration. Plaintiff was an elderly man who was directed to sit in an atrium area while his wife was undergoing a medical procedure. He pulled out a chair to sit on, and in the process of lowering himself onto the chair, he fell to the ground. At binding arbitration, plaintiff testified through his deposition that the chair slipped out from under him and was unstable. However, he was unable to identify the exact chair that was involved in the incident. Plaintiff argued that the chair was unreasonably dangerous and unsafe because it wobbled, causing the plaintiff to fall. It was further argued that given the fact that the medical building had many elderly patients, a chair of this variety used in the waiting area was inappropriate.

Plaintiff sustained a spiral fracture of his femur and incurred over $100,000 in medical expenses, as well as lost income as an insurance salesman. The arbitrator found in favor of the defendant since the plaintiff could not prove a defective condition of the chair which proximately caused his injury.

Even though the ruling means that Ekstrand's case can now be heard in district court, one of the judges involved in the appellate court's decision raised questions in his concurring opinion about whether Ekstrand could be considered qualified for her job. In this respect, Judge Terrence Evans wrote:

> While I can imagine an employer like UPS might be able to accommodate a delivery person with these kind of issues, I have a hard time understanding how a school district could do the same for a first-grade teacher.

Nevertheless, despite his reservations, Judge Evans concurred in the opinion in allowing the case to be tried before the district court.

Obviously, with the winter darkness hitting most of our readership, the potential of employees claiming seasonal affective disorder should be considered as a potential claim under the ADA. The decision also seems to signal a greater acceptance of psychological disorders as potentially being actionable by the court, so long as there are available accommodations.

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Terrence Guolee, a shareholder in our Chicago office and an Editor of this newletter, has successfully represented defendants, plaintiffs and carriers in dozens of complex, multimillion dollar claims covering a wide area of facts and law, in both state and federal court.

Mr. Guolee represents several municipalities, elected governmental officials and their employees in very complicated civil rights class actions and claims brought under state and federal whistleblower laws. Mr. Guolee also represents several businesses in defense of statutory consumer rights class action clams and has a long record of successful representation of property owners, utilities and contractors in high-exposure construction and electrocution cases and other catastrophic injury and loss claims.

Questions regarding this article can be directed to Terrence via tguolee@querrey.com, or via 312-540-7544.

CASE SUCCESSES

Q&H Defeats Civil Rights Claim Alleging Illegal DUI Traffic Stop

Congratulations to **Dan Gallagher**, **Larry Kowalczyk** and **Dominick Lanzito** on obtaining summary judgment on behalf of a Chicago Police Department officer in a civil rights case where the plaintiff claimed he was falsely arrested for DUI.

Despite plaintiff's attempt to inject hundreds of other DUI reports/videos by the same officer into the litigation, the court held that probable cause existed for the traffic stop in question. In addition, plaintiff was found guilty on one of the underlying traffic citations, and was prevented from collaterally attacking the same via a civil rights case. Finally, the court found that qualified immunity precluded liability under the facts of this arrest.

The court's language will be useful persuasive authority in many other similar false arrest cases.

Liability Update: As Matter of First Impression, 1st District Appellate Court Addresses Issue Of Home Exercise Equipment As "Open & Obvious" Danger

By: Brian Begley – Joliet Office

A matter of first impression in Illinois, the 1st District Appellate Court recently addressed whether a piece of home exercise equipment poses an open and obvious danger to a child in *Qureshi v. Ahmed*, No. 01-08-0795 (1st Dist., Sept. 20, 2009).

In the case, plaintiff filed a negligence action in Cook County for injuries sustained by his 10-year-old daughter following a slip and fall on defendants' treadmill located inside their home. Defendants moved for summary judgment, contending they owed no duty to plaintiff because the treadmill posed an "open and obvious" danger. The circuit court entered an order granting defendants' motion.

On appeal, plaintiff contended that the trial court erred in granting summary judgment because the evidence presented created a question of fact for the jury whether the defendants owed a duty to protect plaintiff's child from the danger of the treadmill. The appellate court ultimately reversed the decision of the trial court and remanded the matter for further proceedings.

In *Qureshi*, the Plaintiff, a 10-year-old minor, was friends with defendants' daughter and was playing with her on a treadmill located in defendants' home. While engaged in a racing game on the treadmill, plaintiff tripped and caught her hand in the track, sustaining significant injuries to her hand.

Addressing whether a treadmill poses an open and obvious risk of danger, the appellate court noted that, first: "…the precise nature of the risk posed by a treadmill must be articulated." Next, for the risk of danger to be considered obvious to a child, the defendant must satisfy an objective standard in establishing that it is reasonably foreseeable that a typical child, old enough to be at large, would understand and appreciate the risk involved. In other words, it is not whether the child does in fact understand, but rather what the possessor may reasonably expect of the child.

Unlike the traditional "open and obvious" nature of cases involving fire, water and heights, dangers generally appreciable by even very young children, the appellate court could not determine from its review of limited case law whether the danger posed was one of speed, instrumentality or otherwise. Here, as the court noted, "neither the defendants nor the trial court expressly describes the risk of harm posed by a treadmill, they simply conclude that the risk is obvious."

Prior Successful Verdicts to Stand in the Suburbs

Jim Jendryk and **Jillian Taylor** both had post-trial motions brought on the case successes reported for them in last month's issue of *"Qued In"*.

Jim successfully defended plaintiff's motion for a new trial in McHenry County, which was based upon the use of photographs at trial, the disparity in the racial make-up of the venire and that the verdict was against the manifest weight of the evidence. The court denied the motion and found that there was no basis upon the issues presented to grant plaintiff a new trial.

Jillian also successfully defended her plaintiff's motion which was for judgment notwithstanding the verdict. Plaintiff was seeking the court to award the full medical bills presented, including the cost of the epidural steroid injections omitted by the jury. The court denied the motion and allowed the DuPage County jury's verdict to stand.

Further, the appellate court noted that the parties in *Qureshi* mistakenly focused on the subjective understanding of the plaintiff, instead of what a possessor may reasonably expect a typical 10-year-old to understand and appreciate.

Recognizing the significance of the issue at hand, the appellate court acknowledged that "with the proliferation of home exercise equipment …[u]ndoubtedly, the number of injuries will increase proportionately to the number of treadmills in homes." Admittedly a matter of first impression, this case has the potential to establish significant precedent in shaping the way future litigants define the risk and potential liability associated with home exercise equipment.

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Brian Begley, an associate in our Joliet, Illinois office, concentrates his practice in municipal and premises liability. Mr. Begley previously served as an Assistant State's Attorney in the Cook County State's Attorney's Office, where he tried numerous cases in the traffic and narcotics divisions. Mr. Begley also served in the Civil Actions Bureau, representing Cook County in complex building and zoning matters.

Prior to joining Querrey & Harrow, Ltd., Mr. Begley also served as an Associate at another local law firm where his concentration included representation of municipal entities and local school districts. Mr. Begley has also served as an Administrative Hearing Officer where he adjudicated local municipal code violations. If you have any questions regarding this article, please contact Brian via bbegley@querrey.com, or via (815) 726-8153.

School Law Update: Paying for Higher Education

By: Anton J. Marqui – Chicago Office

For a majority of college students and their parents, higher education is made possible by financing. With ever increasing rates for tuition and room and board, the student loan industry has become a $100 billion a year business. In September of 2009, the U.S. House of Representatives passed H.R. 3221 which proposes to eliminate private banks and lenders from the federal student loan business. The Senate is in the process of drafting a similar bill. Supporters argue that "eliminating the middleman" will make college more affordable. However, there are a couple of important points for the borrower to consider.

Currently, student loans are funded through private lenders or through the federal government. The private sector is regulated by the Federal Family Education Loan Program (FFELP) and from year to year approximately 75% of all colleges and universities participate in FFELP. The remaining 25% of schools participate in Direct Lending, the program in which students receive funding directly from the federal government. In theory, the end loan product should be the same whether you attend a FFELP or Direct Lending school. The private and public sectors offer identical federal loan products and all interest rates are set by the government. However, for more than three years, certain students and parents have been burdened with higher interest rates despite equal standing.

In December of 2005, Congress passed a massive budget reconciliation bill aimed at cutting approximately forty billion dollars from the federal government's mandatory spending programs and raising money to reduce the deficit. One of the proposed measures intended to raise the interest rate on Parent PLUS and Graduate PLUS loans from 7.9% to 8.5%. However, a clerical error by the bill's drafters created a rate disparity. The rate increase was applied to PLUS loan borrowers attending FFELP schools only, while PLUS borrowers at Direct Lending schools have continued to see a 7.9% interest rate.

Thus, as of July 1, 2006, a .6% differential in interest rates has existed among equal borrowers. This differential translates into millions of dollars in interest costs to those borrowers. In 2008 alone, Parent and Graduate PLUS loans totaled $9.2 billion. Using a conservative approximation that 60% of those loans were originated as FFELP loans, $5.5 billion would be subject to the increased interest rate of 8.5%. Under a standard ten year repayment plan, the interest costs resulting from that .6% differential would total over $200 million.

Although the increased rate is applicable to the privately funded loans, that $200 million is actually a windfall for the government. Pursuant to Federal guidelines, a private lender is allowed to keep a percentage of interest on its federal loans based on a fluctuating market rate. That percentage typically comes out to 2-3%. The remainder is paid to the federal government. University personnel and private lenders have continually brought this error to the attention of lawmakers on the simple premises of an unfair disparity. To date, no action has been taken. Obviously, lowering interest rates would make college more affordable but proposed legislation does nothing to address current interest rates.

When elimination of private banks and lenders was proposed earlier this year, it was argued that the government would save approximately $87 billion over ten years. Those savings would result by eliminating the guarantee on loans funded by the private sector which comes in the form of partial repayment when a borrower defaults. When default occurs, the federal government pays the lender 97% of the remaining principal balance on the loan. It was then planned that $40 billion of those savings would be used to fund Pell grants, which in turn would make college more affordable for those who qualify for such grants.

However, the $87 billion was based on a presumption that all loans over the next ten years would be repaid, market conditions would not change and no additional administrative costs would be required to take over the entire federal loan program. The Congressional Budget Office recently rescored the savings, taking into account market risks and administrative costs. The savings have been recalculated to approximately $47 billion. H.R. 3221 allocates $45 billion in mandatory spending to programs outside of college financial aid such as school construction and renovation, early childhood programs and K-12 education. That leaves a mere $2 billion for the Pell grants but funding for those grants would remain discretionary.

CASE SUCCESSES

Q&H Wins Copyright Case Connected to Popular Play


E. Leonard Rubin and **Beverly A. Berneman** recently obtained summary judgment on behalf of the defendant in *Maripat Donovan v. Victoria Quade*. The case involves a dispute between the co-writers of the popular play, "Late Nite Catechism". Donovan asserted that she owned exclusive rights to the character of "Sister" in the play and any derivative works based on the character. The court agreed with Quade that Donovan can prove no set of facts which would give her exclusive rights to the character of a strict nun. The only remaining counts are in Quade's counterclaim to adjudicate Donovan's alleged breach of the co-writer's agreement.

Opponents argue that eliminating the private sector adds to a massive national debt unnecessarily. Absorbing the entire burden of funding $100 billion a year in loans would create a significant increase in government spending. The government would be required to take on 100% of defaults and all administrative costs associated with servicing a loan. There is also good reason that 75% of colleges choose to have their students obtain funding through a private lender. Routinely, the servicing offered by the private sector is better than that offered by Direct Lending. Lastly, elimination of private banks and lenders would put a number of entities completely out of business and would effectively eliminate 35,000 jobs.

Whatever the outcome of the current legislation, borrowers need to be diligent throughout the loan process. If you are subject to a higher interest rate simply as a result of attending the "wrong" institution, questions need to be asked. Merely eliminating banks and lenders from the process fails to address high interest rates or the overall goal of making college more affordable.

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Anton Marqui, an associate in our Chicago office, concentrates his practice in medical malpractice, commercial litigation and transportation liability. Mr. Marqui has tried and assisted on multiple jury and bench trials and has handled numerous disputes through arbitration and mediation.

Prior to joining Querrey & Harrow, Mr. Marqui worked for another Chicago-based firm in the above practice areas, and also gained experience in premises liability, construction injury and insurance coverage. If you have questions regarding this article, contact Anton via amarqui@querrey.com, or via 312-540-7584.

Constitutional Law Update: Political Patronage Issues

In an interesting case involving political patronage and allegations of conspiracy in Illinois, the 7th Circuit Court of Appeals in the case of *Gunville v. Walker, et al.*, 2009 WL 3232433 (C.A.7 (Ill.) affirmed a decision by the Central District of Illinois that granted summary judgment in favor of all named defendants and against two former Illinois Department of Corrections ("IDOC") employees on their First and Fourteenth Amendment claims.

The two employees involved were Robert Gunville ("Gunville") and Richard Oakley ("Oakley"). Gunville first started working for IDOC in 1985 and, in 2002, was assigned to oversee the construction of two new correctional facilities. During his tenure with IDOC, Gunville was an active member of the Illinois Republican party. Oakley also started working for IDOC in 1985 and, as of 2003, was the statewide commander of the Special Operations Response Team ("SORT") in charge of three regional commanders. Oakley, while not as active in the party as Gunville, had voted as a Republican in various primary elections.

Both Gunville and Oakley were laid off in May of 2003 following the election of Rod Blagojevich as governor and establishment of his administration in January of 2003. The 2002 election of Rod Blagojevich as governor ended a twenty-six year hold on the office by Illinois Republicans.

As part of an attempt to address the statewide budget crisis, the new administration halted the construction of the two correctional facilities which were being overseen by Gunville and reorganized the SORT command structure, effectively eliminating Oakley's position. Twenty other IDOC positions were also eliminated at the time Gunville and Oakley were laid off.

Under the personnel rules of the Illinois Administrative Code, both Gunville and Oakley

were eligible to be rehired by the State. However, under the new administration's stricter interpretation of the relevant provisions of the Code, neither Gunville nor Oakley were rehired.

Gunville and Oakley sued, claiming their First and Fourteenth Amendment rights had been violated. They alleged that they were targeted for layoffs and not rehired because of their political affiliation. However, the only evidence provided by Gunville and Oakley in support of their First Amendment free speech claims were a hearsay statement made by an assistant to the IDOC personnel manager regarding the use of voter records in determining who to lay off and an unsupported and undocumented allegation of an "implicit plan to eliminate longstanding employees of the former republican administration…in order to make room for democrats and supporters of the new Governor".

Additionally, Gunville and Oakley based their Fourteenth Amendment due process claims on the fact that the new Democratic administration interpreted portions of the Illinois Administrative Code governing the recall or rehiring of laid-off employees more strictly than the previous Republican administrations. Basically, they claimed that the rules should have stayed the same from administration to administration, and that the new administration was acting improperly in making their own, more strict, interpretation of the rules. However, like their First Amendment claims, neither Gunville nor Oakley was able to provide any evidence whatsoever that political affiliation played a role in the new administration's interpretation of the rules, nor that only Republican employees were singled out under the new interpretation.

In affirming the lower court's granting of summary judgment in favor of the defendants, the 7th Circuit noted that the "plaintiffs have literally no evidence that political affiliation played a role" in the decision to lay them off or not to rehire them and refused to "construct this unsupported conspiracy out of a void".

COMMUNITY INVOLVEMENT

Stohl Judges Law School Moot Court

Chicago associate **Joan Stohl** recently served as a judge for the DePaul University College of Law Intramural Moot Court competition.

Berneman Teaches Middle School IP Class

On October 15, 2009, Chicago shareholder **Beverly A. Berneman** spoke to 50 middle school children about Copyright Awareness. Using a quiz format, Beverly tested their knowledge of copyright law. The children had just concluded a two week session on Intellectual Property rights in their Technology Applied Arts course.

The teacher included some of the Copyright Awareness Quiz questions in the final. He was happy to report that 90% of the children got those questions right. As chair of the Midwest Chapter of the Copyright Society of the USA, Beverly has been actively involved in programs for middle and high school age students about copyright law for many years. If you are interested in having Beverly speak to middle school or high school students in your area, feel free to contact her at bberneman@querrey.com.