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Nonprofit Alert®

Alerting nonprofit leaders to key legal developments and responsive risk management steps.

Inside This Issue:

To claim protection under the Americans With Disabilities Act (ADA), the Supreme Court says an employee must show that his or her impairment "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

That language significantly tightens previous court interpretations of the ADA, and will likely limit employee demands for disability accommodations—a change employers will welcome.

Significant Impairment

The Court's unanimous ruling came in a case involving carpal tunnel syndrome, a controversial injury that has prompted increasing litigation during the past decade.

Here, an auto assembly line worker claimed her injury would not permit her to perform various manual tasks associated with her job. The lower court granted her relief under the ADA because she was unable to perform certain manual tasks. But the Supreme Court ruled that the lower court's analysis was flawed atthe outset: the manual tasksin question were not ones central to the employee's daily life, and were, there fore, not covered by the ADA.

New Standard

"When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job," Justice O'Connor wrote. Furthermore, the Court said the impairment must also be "permanent or long-term."

Carpal tunnel syndrome, on its own, does not indicate whether an individual is disabled within the meaning of the ADA, the Court said. Instead, the Court recognized the need for an "individualized assessment" of every impairment, and said carpal tunnel syndrome is one of those conditions that will require just such an assessment because the symptoms vary widely from person to person.

Broad Implications

This new standard will have broad implications for disability cases now brought under the ADA.

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>
> *— Justice Sandra Day O'Connor, writing for the majority in Toyota v. Williams.*

"It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment," the Court said. Instead, they must also offer "evidence that the extent ofthe limitation caused by their impairment in terms of their own experience is substantial," the Court concluded. *Toyota v. Williams*, No. 00-1089 (1/8/02).

➤ **Read more about this ruling and how it affects your organization in Nonprofit Alert® Memo, *ADA: Basic Requirements for Nonprofits.* All Memos noted in Nonprofit Alert® are available from Gammon & Grange, P.C. See back page to order.**

Telemarketers Produce Disappointing Returns

A new report by the New York Attorney General's office shows that charities retained only 31.5% of the funds raised by professional telemarketers working on their behalf during 2000. All the charities surveyed conducted telemarketing in New York, but the solicitations were not limited to New Yorker's contributions. Based on the report, the Attorney General plans to draft new rules covering charitable telemarketing. Access the report at http://www.oag.state.ny.us/charities/pennies01/penintro.html.

Liability & Risk Management

Mother May I? Not If Conflict of Interest Appears

"Love, but recuse." That seems to be the lesson a son learned when he lost his job because he was recommended for the position by a board on which his mother served. His mother's board controlled the hiring decisions for a subsidiary organization, to which the son had applied for a job. The mother resigned her position before the son was selected as interim director of the subsidiary, but that was not enough. A state agency that maintained a contract with the subsidiary objected to the appointment, citing a conflict of interest contrary to certain terms of the contract. After being dismissed, the son sued the commissioner of the state agency for tortious interference with a contract and for violation of his First Amendment rights, but a federal district court in New York found that the commissioner was protected by qualified immunity as a governmental official. *Jenkins v. Tyler,* S.D.N.Y., No. 00 Civ. 8980 VM (2001).

A prudent conflict of interest policy and board education could have addressed this issue before adverse consequences resulted. However, government contracts may impose even higher conflicts prohibitions than state law or board policy demand. Carefully review your conflicts policy to ensure it conforms to state law. Conflict provisions in any contract—especially one for grants or government funding— should also undergo close review. For an overview of applicable law and policy, review Nonprofit *Alert*® Memo, *Conflicts of Interest Policy.*

Connection Must Be Shown for Retaliation Claim

A supervisor for Texas A&M University can't claim retaliatory discharge without showing "a causal connection between her protected activities and her discharge from employment," the Fifth Circuit Court of Appeals has ruled. The supervisor filed suit against the university after she wasn't hired for a new job when her old job was eliminated in a reorganization. The new job of curator was created during the reorganization and required a PhD with a research background to fill the position. The supervisor did not have these qualifications, but she applied for the job anyway and was rejected. She then brought suit, claiming the university retaliated against her for previously helping several female employees file sexual harassment complaints against staff members. A lower court sided with the supervisor, but the Fifth Circuit reversed the ruling because there was no evidence the university intended her discharge as retaliation. In fact, the director who made the decision to reorganize and who later rejected the supervisor for the curator's position didn't even know she had helped file harassment complaints. That activity had taken place long before he became director, and he was unaware of her involvement. The court found the director's decisions were all based on sound business judgement, motivated by the university's need to cut its budget and improve operations. *Mato v. Baldauf,* No. 00_50522, 2001 WL 1117321 (5th Cir., 10/9/01).

Terminations can be troublesome, but need not be paralyzing. This case shows how truth (here, the absence of any proof of actual retaliation) and good practice (being able to prove there were sound, non_discriminatory reasons for termination) will support employment decisions, even in sensitive cases. Read Nonprofit Alert® Memo, *Hiring & Supervision*, for an overview of how a reasonable, documented and fair practice of employee evaluation helps employees reach their potential and improve performance, while at the same time providing a reasonable basis for recognizing and taking appropriate action for employees who consistently fail in the performance of their job responsibilities. See also Nonprofit Alert® Memo, *Terminations: Wisely Managing Troublesome Employees,* to understand how to proceed in difficult employment scenarios. To order, see back page.

Church Insurance Doesn't Cover Odd Bus Injury

An accident that involved a church bus was not covered by the church's insurance policy, an Indiana court has ruled. The accident occurred during a recreational "bus-pull," which involved four teams of church members racing to push and pull a bus across a finish line. Teams consisted of adults and children. During the event, a thirteen year old boy fell under one of the buses and was permanently injured. He later brought suit to collect against the church's insurance company, but the policy excluded all injuries caused by use of the church bus. A trial court sided with the insurance company, and a state court of appeals upheld the ruling, saying the church's use of the bus for a "bus-pull" contest was completely outside the policy's coverage. *Franz v. State Farm Fire & Cas. Co.,* 754 N.E.2d 978 (Ind.Ct.App. 2001).

"Outside the box" thinking is essential for vibrant programming, but prudent risk managers evaluate whether new risks should be undertaken, and if so, whether they require broader insurance coverage. Also check insurance policy exclusions, since many deny coverage for certain types of acts and certain job-related claims such as sexual harassment.

Employees & Volunteers

EEOC May Sue, Despite Employee Arbitration

The Equal Employment Opportunity Commission (EEOC) may sue employers for financial or other damages in employee discrimination lawsuits, even when the employee has agreed to arbitrate a case and precluded his or her right to sue, the Supreme Court ruled last month. The ruling permitted the

Nonprofit *Alert*®
8280 Greensboro Drive, 7th Floor, McLean, VA 22102-3807
(703) 761-5000 Facsimile: (703) 761-5023
E-mail: npa@gandglaw.com
Editor-in-Chief . . . . . *George R. Grange, II*
Editor . . . . . *Sarah J. Schmidt*
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EEOC to bring suit against Waffle House for discriminatory employment practices stemming from the termination of a short order cook who suffered seizures at work. The cook had signed a hiring agreement that required him to arbitrate any employment disputes, which effectively prevented him from filing his own disability discrimination claim against Waffle House. The agreement did not bind the EEOC, however. The Supreme Court ruled that because the EEOC was not a party to the cook's arbitration agreement, the EEOC was free to bring lawsuits in the public's interest. Despite the government's policy favoring arbitration, nothing in federal law enforces arbitration clauses against public agencies that are not a party to an arbitration agreement, the Court wrote. *EEOC v. Waffle House*, No. 99-1823 (Sup.Ct. 1/15/02).

Understand the pros and cons of arbitration agreements with Nonprofit Alert® Memo, *ADR: Arbitrate, Don't Litigate!* See back page to order.

Cell Phone Distraction Prompts $16 M. Settlement

A Miami jury awarded a 78-year old woman $20.98 million for damages she suffered in a car accident blamed on a cell phone call made by a lumber salesman. The accident occurred as the car in which the woman was riding was broadsided by the salesman's vehicle as he ran a red light. The salesman admitted he had a cell phone but said he only used it to make an emergency call to 911 after the accident. Phone records introduced at trial indicated he had been on a sales call just seconds before he called 911. Plaintiff's attorneys argued the salesman's distraction from doing business on the phone led to the crash. Shortly after the jury returned the multi-million dollar verdict against the salesman and the lumber company, the parties settled the case for $16.1 million to avoid an appeal. *Bustos v. Leiva*, No. 01-13370 (Cir.Ct. Fla. 2001).

Let this case stand as a warning: employers face liability when their employees do business via cell phones while driving. Employers should adopt appropriate policies for cell phone use, especially if they anticipate employees using cell phones in performance of job responsibilities.

Educational Assistance Now Permanent Exclusion

Effective last month, the tax exclusion for employer-provided educational assistance programs is now a permanent exclusion under the tax code. The law allows employers to provide up to $5,250 per year in tax free tuition assistance to employees. The exclusion also covers graduate level education benefits. The provision was first enacted in 1978 but only with a conditional expiration date.

NPA Highlight of the Month

State Funding to Religious Group Ruled Unconstitutional

In what is being reported as the first legal challenge to the White House faith-based initiative, a federal judge has stopped state funding to the Faith Works substance abuse treatment program because of the program's indoctrination of Christian spirituality. Faith Works had received about $880,000 in unrestricted, direct funding from the state of Wisconsin, but the judge said that money represented government sponsorship of religion in violation of the First Amendment.

Faith Works uses a 12-step recovery method, similar to Alcoholics Anonymous, but with more direct Christian themes. Participants live at the Faith Works facility, where they receive therapy and job training. Bible studies, prayer groups and other religious gatherings are offered but not required of participants. Counselors assist participants in the recovery process, but the judge concluded that their efforts result primarily in religious indoctrination of participants. This, the judge wrote, blends religion with the program in ways that do not meet the requirements of federal law.

Faith Works argued the money was used only to support non-religious aspects of its program, a practice which is permissible under the 1996 federal law commonly known as "Charitable Choice." But the judge determined that religion is so integral to the Faith Works program that it is not possible to isolate secular activities from the program as a whole. The judge made clear, however, that her ruling did not address the constitutionality of the Charitable Choice law itself.

Because the state funding was direct and not linked to the number of individuals served, the judge said Faith Works must clearly segregate its secular and religious practices. If the funding was indirect, such as through vouchers or payments to participants who then choose which recovery programs to attend, then the religious aspects of the program would not be so problematic, she wrote. But the judge specifically reserved for further development at trial the important question whether funding from the state Department of Corrections for Faith Works' drug treatment programs for criminal offenders on probation or parole would constitute permissible "indirect" funding, if it could be shown that such offenders had a "genuinely independent and private choice" whether to enroll in such programs. *Freedom From Religion Foundation v. McCallum, et. al.,* No. 00-C-617-C, (W.Dist. WI, 1/7/02).

Brought by the Freedom From Religion Foundation in Madison, Wis., this case is one of several filed to date challenging the 1996 Charitable Choice law, but this is the first to reach trial. An appeal is likely forthcoming. Find a helpful summary of the 1996 legislation in Nonprofit Alert® Memo, *Charitable Choice & Faith-Based Initiatives: Government Funding to Religious Social Service Providers.* Look for ordering instructions on the back page.

Since then, Congress renewed it ten times, but the uncertainties of renewal created administrative nightmares for employers each time the provision expired. Finally, Sens. Charles Grassley (R-IO) and Max Baucus (D-MT) introduced a measure last year to make the exclusion permanent. (*NPA*, Mar.'01).

Nonprofit Alert® Memo, *Employee Educational Assistance Programs,* provides a primer on this valuable employment benefit. See back page to order.

Tax-Exempt Issues

Terrorism's Impact on Donor Advised Funds

Donor advised funds are coming under increasingly intense scrutiny as the government focuses on the possibility that nonprofit groups allegedly are helping or have helped finance worldwide terrorist operations. And donor advised funds are announcing their own precautions: Fidelity Investment Corporation, manager of the nation's largest donor advised fund, has announced it will not distribute charitable grants from any of its funds to groups the government identifies as suspects. Before the announcement, Fidelity's Charitable Gift Fund reportedly listed as grant recipients some of the groups already under investigation, including the Global Relief Foundation and the Benevolence International Foundation. Fidelity says it will now verify the charitable status of each proposed grant recipient and monitor U.S. government information regarding groups suspected of conducting terrorist activities or supporting terrorist groups. The announcement was unprecedented, but not surprising, given the potential for abuse of charitable giving tools like donor advised funds, particularly those that attract anonymous donors.

This likely marks the beginning of a new era in the level of due diligence expected from donor advised funds, with increased pressure for funds to monitor grantees. Whether this also means that donors and donor funds will be legally required to more closely scrutinize even 501(c)(3) grantees—normally presumed to be legitimate recipients in most cases—_ remains to be seen. Learn more about the structure and function of donor advised funds with Nonprofit *Alert*® Memo, *Donor Designated Gifts: Pitfalls & Provisos.*

Pet Cemetery Survives Scrutiny as Subsidiary

It could've been the sequel to a popular Stephen King novel, but the IRS eased all fears when it gave the green light to a nonprofit cemetery's plan to create a for-profit pet cemetery subsidiary. The pet cemetery planned to lease facility space from the nonprofit cemetery and receive contributions of land and cash in exchange for stock. Both entities would share the same CEO, but no more than two officers, directors, or employees of the nonprofit cemetery would be allowed to serve as directors for the pet cemetery. All day-to-day operations for the pet cemetery would be handled by its own staff, and it would maintain all its corporate books and records separate from the nonprofit cemetery. Dividends from the pet cemetery's stock would be paid directly to the nonprofit cemetery. The IRS approved the arrangement because it said the subsidiary pet cemetery was to be established for "a real and substantial business purpose" not as an "arm, agent, or integral part" of the nonprofit cemetery. IRS LTR 200152048.

Avoid the nightmares of IRS scrutiny when forming subsidiaries. Review Nonprofit *Alert*® Memo, *Subsidiaries & Nonprofit Affiliates,* for tips. See the box below for ordering instructions.

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