

**Fall 2006  
Employment Law Update**

# The Fall 2006 Landscape...

- Major Developments
- Reaffirmation of Key Principles
- Issues on the Horizon



# Major Developments: Disability Law



- ***Who is impacted:***  
Employers with 8 or more employees
- ***What the law prohibits:***  
Employment discrimination “because of . . . the presence of ***any sensory, mental, or physical disability*** or the use of a trained dog guide or service animal ***by a disabled person***” prohibited (RCW 49.60.180)

# "Disability": The Old Standard

- A condition is a “sensory, mental or physical handicap” if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question . . . .
- “[A] person will be considered to be handicapped . . . if he or she is discriminated against because of the condition, and the condition is abnormal.” (WAC 162-22-020 (1975))

# "Disability": The New Standard

- "Disability" means an individual has
  - (1) a physical or mental impairment that substantially limits one or more of his major life activities,
  - (2) a record of such an impairment, or
  - (3) is regarded as having such an impairment.

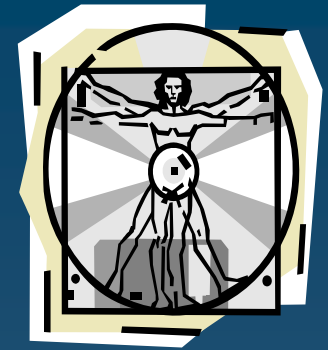
*(McClarty v. Totem Electric (2006))*

# Three Key Elements

"physical or mental **impairment** that **substantially limits** one or more of his **major life activities**"

- "Impairment"
- "Substantially limits"
- "Major life activity"

# Physiological "Impairments"

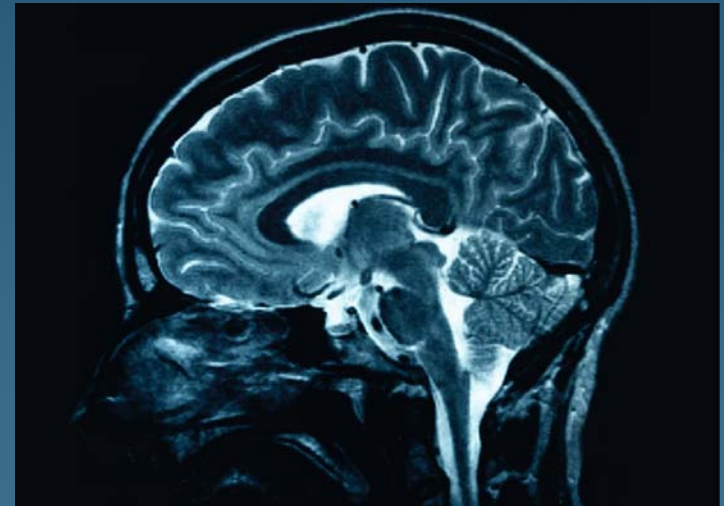


- "Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine[.]" (29 C.F.R. § 1630.2(h)(1)).

# Mental/Psychological "Impairments"

- "Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

(29 C.F.R. § 1630.2(h)(2)).



# "Major Life Activities"

- "Tasks that are central to a person's everyday activities" (*McClarty*)
- "Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" (EEOC)



# "Substantially Limited"

- “[A]n impairment that prevents or severely restricts the individual from doing” a major life activity (*Toyota Motor Mfg., Ky., Inc. v. Williams* (U.S. 2002))

# "Substantially Limited"

- EEOC
  - (i) Unable to perform a major life activity that the average person in the general population can perform; or
  - (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population . . ."

# "Substantially Limited"

- Consider
  - Nature and severity of impairment;
  - Duration or expected duration of impairment
  - Actual or expected permanent or long term impact of or resulting from impairment

# Consider Mitigating Measures

- *Sutton v. United Air Lines, Inc.*, (U.S. 1999):
  - “[D]isability under the [ADA] is to be determined with reference to corrective measures”
  - “[T]he effects of those measures—both positive and negative—must be taken into account”

# Major Developments: Retaliation



- ***Who is Impacted:***  
Employers with 15 or more employees
- ***What the Law Prohibits:***  
Retaliation because employee "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."  
(42 U.S.C. 2000e-3(a))

# Could It Be Retaliation???

- Termination of employment?
- Moving employee's locker?
- Demotion to lesser paying position?
- Reassignment to more physically demanding work assignment?
- Suspension without pay for 37 days?
- Suspension without pay, then repayment?

# "Retaliation" Defined

- A plaintiff must show that "a reasonable employee would have found the challenged action materially adverse";
- Otherwise stated, the challenged action "might well have dissuaded a reasonable worker" from engaging in protected conduct.

*(Burlington Northern & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006))*

# "Retaliation"

- Things that may constitute retaliation under *Burlington Northern*:
  - **Reassignment:**
    - to less prestigious job
    - to job requiring more arduous work
    - need not be a demotion
  - **Suspension:**
    - length of suspension
    - whether with or without pay
  - **Retaliation away from the workplace**

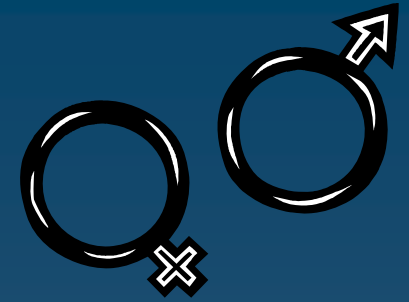
# Reaffirmation of Key Principles

- Gender Discrimination
- Employee Rights and Religion

# A Little Gender Discrimination Quiz

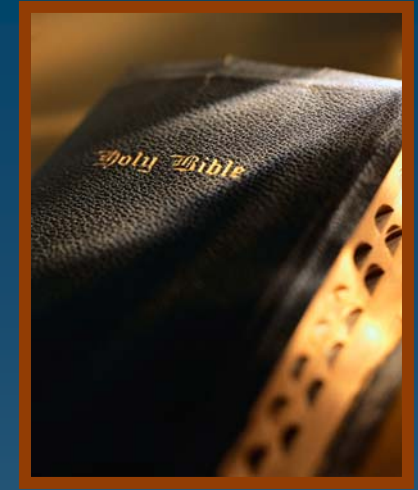
- (1) Is an employer obligated to hire a pregnant job applicant to do a job that involves significant lifting?
- (2) Can an employer adopt workplace rules requiring female employees to wear makeup or particular uniforms?
- (3) Is an employer liable for harassment by non-employees in the workplace? What if those non-employees are prison inmates?

# Key Principles: Gender Discrimination



- (1) Pregnancy is protected under the Washington Law Against Discrimination
- (2) Employer rules imposing gender-specific appearance standards may be permissible
- (3) Employers may be liable for harassment by non-employees in the workplace

# Key Principles: Religious Expression in the Workplace



- Employees' Religious Expression May Be Protected in Two Ways:
  - (1) First Amendment (Public Employers Only)
  - (2) Title VII (Public and Private Employers)

# Religious Expression and the First Amendment



- The First Amendment protects public employees' religious speech
- Courts balance the employee's right to engage in religious speech, against the employer's general interests in an efficient workplace  
(*Pickering v. Board of Education* (U.S.))

# Religious Expression and Title VII

- *Who Is Impacted:*  
Employers with 15 or more employees
- *What the law prohibits:*
  - (1) Discrimination in terms or conditions of employment based on religious beliefs
  - (2) Failure to accommodate employee's religious beliefs

# Religious Expression and Title VII: Failure to Accommodate

- To establish a claim for failure to accommodate religious beliefs, an employee must show:
  - (1) A bona fide religious belief, the practice of which conflicts with an employment duty;
  - (2) That he or she informed the employer of the belief and conflict; and
  - (3) The employer discharged, threatened, or otherwise subjected him to an adverse employment action.

# Religious Expression and Title VII: Failure to Accommodate

- If the employee establishes the three elements of his or her prima facie case, the employer must either:
  - (1) show that it initiated **good faith efforts** to accommodate reasonably the employee's religious practices; or
  - (2) show that it could not reasonably accommodate the employee without **undue hardship**

# Issues on the Horizon

- Websites and Public Accommodations
- Employee Blogging In, Around, and About the Workplace



## ***National Federation of the Blind v. Target Corporation***

- Target Corporation operates retail stores nationwide
- Target also maintains a website, Target.com, on which customers can perform functions related to Target stores
- Plaintiffs claimed that Target.com lacked features on website to accommodate blind customers

# Can a Website Be Subject to Public Accommodation Requirements?

- Although a website is not itself a place of public accommodation, where there is a "nexus" between the website and a place of public accommodation (such as a store), the website itself may be subject to the requirements of Title III of the ADA

# Steps to Make a Website Accessible to the Blind

- (1) Ensure that all graphics are properly tagged;
- (2) Ensure that organization and headings are accessible to the reader;
- (3) Make the website keyboard accessible; and
- (4) Adequately label the website's forms.

# On the Horizon: Issues Surrounding Employee Blogging

