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Employer Hit With \$1 Million Plus Verdict For Failure To Accommodate

In *Kevin Tobin v. Liberty Mutual Insurance Company*, plaintiff was terminated from his position as a sales representative at a nationally recognized insurance company after having been employed by it for more than 37 years.

Following termination, the employee filed an action against his employer alleging disability discrimination, including a failure to accommodate. In response to the complaint, his employer asserted that the employee *did* receive certain accommodations and was not entitled to others, and was terminated from his position due to poor job performance. The District Court granted summary judgment in favor of the employer on all claims and the employee appealed.

The United States Court Appeal agreed with the District Court on the employee's pretext claim, and found that the employee had failed to adduce evidence showing that the employer's proffered reason for discharge was pretextual. It noted the employer had provided a well-documented account of the employee's longstanding performance deficiencies which included a failure to meet minimum quotas and standards and not showing up for meetings with supervisors.

With regard to question of reasonable accommodation, however, the U.S. Court of Appeal remanded that claim back to the District Court for further proceeding.

In reaching its decision, the Court of Appeal looked at the employee's long history of work problems and requests for accommodation; and noted that his disability (bipolar disorder) negatively affected his ability to perform his job in a variety of ways. For example, his focus and concentration were impaired, he had difficulty prioritizing and completing work, most tasks took longer than in the past to accomplish, stress tended to worsen his problems, and his limitations made it difficult to find prospective customers in sufficient numbers to meet the employer's sales goals. Although the employee had accumulated a large book of business over the years - and insurance policies that repeatedly renewed continued to bring significant profits in annual premiums - by the early 1990s the employee had begun to routinely fall short of annual quotas for new policy sales.

Evidence indicated that in the mid-1990s, the employee received a written warning stating a failure to meet sales requirements and the possibility of termination. The employer implemented a nine-week warning period requiring that the employee improve his performance by increasing sales and participating in sales initiatives.

Two weeks into that period, the employee took a short-term disability leave of absence. Then, a few months after returning to work, he took a

second disability leave. Each time he returned to work, the employee was placed on a reduced schedule before resuming full-time duties. Also, during the re-entry periods, he received additional training and met with his supervisor regularly to review performance and discuss ways he could increase sales.

After the employee returned to work after the second disability leave of absence, the employer hired a nurse to assist him in transitioning back into full-time work. Although he was initially able to sell enough policies to avoid a threatened probation, his performance continued to deteriorate and he was eventually given another warning, placed on probation, and subsequently terminated for poor performance.

It was undisputed that the employee had repeatedly asked his employer to help him achieve his performance goals by providing him with increased support staff and by assigning him to manage a "Mass Marketing" account ("MM") - which is a group insurance program offered to businesses in which employees can purchase insurance at a discounted rate. At trial, the employee sought to prove that he would have been able to overcome the difficulties caused by his disability, and could have met the quotas, if his employer had given these two accommodations which he believed to be reasonable.

In response to these contentions, his employer testified that the employee was provided with the support staff he needed and that he was not qualified to handle a MM account - which are distributed solely on the basis of merit to those sales representatives who are actively pursuing other such accounts and have otherwise met their sales quotas. In addition, representatives for the employer testified that managing an MM account requires strong organization and time-management skills and makes sales encounters particularly stressful. In effect, the employer attempted to show

that the employee could not have done the job even with the two accommodations requested.

In the end, the Jury found in favor of the employee and awarded more than \$800,000 in economic damages and \$500,000 for emotional distress. In reaching its decision, it found the accommodations requested by the employee had been reasonable, would not have changed the essential functions of his job, and that one or both of the accommodations requested would have enabled him to perform the job despite his disability.

Hidden Camera Not An Invasion Of Employee Privacy

In *Abigail Hernandez, et al. v. Hillsides, Inc., et al.*, the California Supreme Court recently determined placing a hidden camera at the work site may not constitute an invasion of the employee's privacy.

In this case, defendants Hillsides, Inc., and Hillsides Children Center, Inc., operated a private nonprofit residential facility for neglected and abused children, including the victims of sexual abuse. Plaintiffs Abigail Hernandez and Maria-Jose Lopez were employed by Hillsides and shared an enclosed office where they performed clerical work during daytime business hours. The director of the facility, defendant John Hitchcock, learned that late at night, after the two plaintiff employees had left the premises, an unknown person had repeatedly used a computer in their office to access the internet and view pornographic websites. Such use conflicted with company policy and with Hillsides' aim of providing a safe haven for children.

Concerned that the culprit might be a staff member who worked with the children, Hitchcock

set up a hidden camera in the office without notifying plaintiffs Hernandez and Lopez. The camera could be made operable from a remote location, at any time of day or night, to permit either live viewing or videotaping of activities around the workstation. It is undisputed that the camera was not operated for either of these purposes during normal business hours and, as a consequence, plaintiffs' activities in the office were **not** viewed or recorded by means of the surveillance system at any time. Further, Hitchcock did not expect or intend to catch plaintiffs on tape as they worked during daytime hours, while the porno websites (and surveillance monitoring) was happening at night.

Nonetheless, after discovering the hidden camera in their office, plaintiffs filed this tort action alleging, among other things, that defendants intruded into a protected place, interest, or matter, and violated their right to privacy.

The Trial Court granted defendants' Motion for Summary Judgment and dismissed the case. However, the Court of Appeal reversed the Trial Court's decision as to the invasion of privacy count. Critical to its analysis on appeal was the placement in plaintiffs' office of a functioning hidden camera, capable of transmitting images that could be viewed or recorded by anyone who had access to the storage room where the monitor and accessory surveillance equipment was kept. In its decision, the Appellate Court opined that plaintiffs had a reasonable expectation to be free from this kind of intrusion in the workplace, notwithstanding evidence that they were never viewed or recorded. For similar reasons, and even assuming defendants were merely trying to stop an intruder's inappropriate use of the computers within that office at night, the Court of Appeal concluded defendants' conduct was highly offensive. However, for reasons not challenged or relevant here, the Court of Appeal agreed with the Trial Court's separate decision that plaintiffs had not presented triable claims for intentional and

negligent infliction of emotional distress, and that such counts should be dismissed.

Defendants petitioned the California Supreme Court for review on the ground that the Court of Appeal erred in not affirming the Trial Court's judgment in its entirety and in reversing its dismissal of the invasion-of-privacy count.

The California Supreme Court looked at general privacy principals, the alleged intrusion upon reasonable privacy expectations, Penal and Civil Code Sections relating to physical or constructive invasion of privacy, the offensiveness/seriousness of the alleged privacy intrusion, the degree and setting of such intrusion, and the defendants' motives and justifications in setting up the surveillance system without notification to plaintiffs who customarily occupied the room.

In the end, the Supreme Court found in favor of the employer and reversed the judgment of the Court of Appeal insofar as it had reversed and vacated the Trial Court's order granting defendants' Motion for Summary Judgment on all counts. In reaching its opinion, the California Supreme Court noted its appreciation of plaintiffs' dismay over the discovery of video equipment, which had been hidden in their office among their personal effects, and advised that its decision should not encourage such surveillance, particularly in the absence of adequate notice to persons within camera range. It determined, however, that nevertheless, in this particular case, considering all relevant circumstances, plaintiffs did not establish, and could not reasonably expect to establish, that the conduct of defendants was highly offensive and constituted an egregious violation of prevailing social norms. In reaching this conclusion, the Court noted the standpoint of a reasonable person based on defendants' vigorous efforts to avoid intruding on plaintiffs' visual privacy altogether; and that activation of the surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns. It also noted

plaintiffs were not at risk of being monitored and recorded during regular work hours and were never actually caught on camera or videotape.

Misconduct During FLMA Leave May Support Termination

In *Michael Daugherty v. Wabash Center, Inc.*, et al., plaintiff filed suit against his employer claiming he had been fired in violation of the Family and Medical Leave Act.

Evidence presented in this action indicates plaintiff Daugherty had began working for defendant Wabash in May of 1999. Between 1999 and 2006, Daugherty compiled an impressive employment record - was promoted from a maintenance assistant to director, and then to vice-president of information technology. The plaintiff had always received very good or excellent performance reviews, and was given a bonus for his leadership in relation to a particular project. Additionally, he was vice-president and chief information officer of Rest Assured, LLC, a joint venture between Wabash and ResCare, Inc., that had capitalized on his idea to monitor patients via webcam.

During the Spring of 2006, plaintiff Daugherty's work-related troubles began when he got involved in email wars with several Wabash fellow employees, and when the Rest Assured staff complained about his management approach. Shortly thereafter, plaintiff Daugherty's direct supervisor gave him a written reprimand for sending abusive emails and for his management style. Daugherty acknowledged his professional shortcomings and, although he thought the written reprimand was unwarranted, he agreed with the substance of the complaints and even drafted his

own corrective action plan. Permission for a month-long vacation Daugherty had been scheduled to take that month was also revoked, because of pressing company business.

Before the corrective action plan was discussed, plaintiff Daugherty left the meeting to visit his doctor. He returned to Wabash to request leave under the FMLA, and presented a note from his doctor which stated "off work 2 weeks due to medical illness." Daugherty's application for FMLA leave did not mention a particular health condition, but instead described personnel conflicts within the company, concluding "I have been placed under a tremendous amount of stress with [Rest Assured] & [Wabash Center]. I have requested from Jeff [Darling] & Steve [McAninch] reorganization that would alleviate this stress. It was declined. My much needed vacation has been cancelled by Jeff Darling on 6-16-06."

During his two week disability leave of absence, employer Wabash uncovered troubling information about Daugherty's work performance. For example, on June 18th, Daugherty had used Wabash's credit card without authorization to order a generator that was delivered to his home. Upon investigation, Wabash discovered at least five unauthorized purchases, including one other that had been shipped to "Daugherty's Computers" at his home address. Daugherty had been previously warned that he was required to seek authorization before making purchases, and had later acknowledged his violations of company purchasing protocol, but insisted that these purchases were above-board because he never kept the items for himself, and had them shipped to his home only because his employer could not easily accommodate some shipments.

Then, on June 30th, Daugherty's supervisor discovered his computer was missing emails that he had sent to and received from Daugherty. On that same day, two Wabash servers crashed. Outside experts brought in to restore the servers (because of

Daugherty's absence) observed he had failed to routinely back up the servers - which was one of his key responsibilities. Suspecting that Daugherty was remotely accessing (and potentially sabotaging) Wabash's network, the company asked these outside consultants to analyze the company's IT security and practices. The consultants' report in mid-July pointed out deficiencies in the company's IT infrastructure, and recommended numerous changes.

Because of the purchasing irregularities, employer Wabash presented a new corrective action plan to Daugherty on July 3rd, the day he was scheduled to return to work. At the end of the meeting, Daugherty refused to sign the plan, protesting that the act of signing would qualify as "work" - and he was not supposed to work during medical leave. Instead, he presented a new order from his doctor for continued medical leave, which his employer Wabash granted. Wabash requested that Daugherty refrain from accessing the company's network while he was on leave and asked him to turn over his keys and any passwords. Daugherty responded "I'd rather not." Although Wabash requested the passwords and keys again on July 19th and August 3rd - it was without success.

On July 31st, a forensic expert analyzed Daugherty's computer and discovered that more than 5,000 files had been deleted on June 19th - the day Daugherty was first disciplined and the day he invoked the FMLA leave. On August 9th, citing Daugherty's authoritarian management style, poor IT practices, failure to turn over keys, missing files, and violations of purchasing protocols, Wabash terminated the employment relationship.

Daugherty filed suit against his employer claiming he had been fired in violation of the Family and Medical Leave Act. Employer Wabash subsequently filed a Motion for Summary Judgment which was granted by the District Court. Plaintiff Daugherty appealed.

The Court of Appeal determined that **even if** plaintiff Daugherty had never taken the leave, he still would not have been entitled to keep his job. And because he did not show there was a genuine issue of material fact concerning his employer's reason for firing him, the District Court's ruling was affirmed.

indirectly in the interest of an employer in relation to an employee." And noted that because plaintiffs allege defendants had control over the employees during the time of their termination, and responsibility for cash management and other employment matters, a Jury must decide whether these individuals are responsible for violation of the wage and hour laws.

Managers Can Be Held Personally Liable For Unpaid Wages

On July 27, 2009, the United States Court of Appeals opined that managers can be held personally liable for unpaid wages under Federal law.

In *Thelma Boucher, et al. v. Dan Shaw, et al.*, employees of Castaways Hotel, Casino and Bowling Center (the Castaways) in Nevada lost their jobs when the Castaways filed for Chapter 7 liquidation bankruptcy. In their Complaint, the plaintiff employees allege they were not paid their final pay, or amounts due for unused vacation and holidays. They named three of Castaways' managers as defendants in the case: Dan Shaw who was the Chairman and Chief Executive Officer; Michael Vilamor how was responsible for labor and employment matters; and James Van Woerkom - the Chief Financial Officer. Evidence presented indicates Shaw had a 70 percent ownership in Castaways, while Villamor owned the remaining 30 percent.

Defendants filed a Motion to Dismiss claiming they could not be held personally liable for company failures under the FLSA. Plaintiffs appealed and the Ninth Circuit reversed. In reaching its decision, the Court of Appeal determined the term "employer" as set forth under the FLSA, is "any person acting directly or

Time Spent Commuting In Employer Provided Car Not Compensable

In the case of *Mike Rutti v. Lojack Corporation*, the United States Court of Appeals recently opined that time spent by an employee while commuting in an employer provided car is not compensable as a matter of law.

Evidence in this action indicates plaintiff Mike Rutti sought to bring a class action suit on behalf of all technicians employed by Lojack, Inc. ("Lojack") to install alarms in customers' cars. He sought compensation for the time spent commuting to worksites in Lojack vehicles and for time spent before and after work in performing duties at their homes.

Plaintiff Rutti was employed by Lojack as one of its over 450 nationwide technicians who install and repair vehicle recovery systems in vehicles located at the clients' locations. Plaintiff Rutti was employed to install and repair vehicle recovery systems in Orange County, and was required to travel to the job sites in a company-owned car. Ruttie was paid by Lojack on an hourly basis for the time period beginning when he *arrived* at his first job location and ending when he *completed his final job* installation of the day.

In addition to the time spent commuting, Rutti sought compensation for other items including certain “off-the-clock” activities he performed before he left his home for the first job in the morning and after he returned to his home following the completion of his last job. Rutti asserted that Lojack required technicians to be “on call” from 8:00 a.m. until 6:00 p.m. Monday through Friday, and from 8:00 a.m. until 5:00 p.m. on Saturdays. During this time, the technicians were required to keep their mobile phones on and answer requests from dispatch to perform additional jobs.

Rutti also alleged he spent time in the morning receiving assignments for the day, mapping his routes to the assignments, and prioritizing the jobs. This included time spent logging onto a hand-held computer device provided by Lojack that informed him of his jobs for the day. In addition, it appears Rutti may have completed minimal paperwork at home before he left for his first job in the morning.

During the day, Rutti recorded information about the installations he performed on a portable data terminal (“PDT”) provided by Lojack. After he returned home in the evening, Rutti was required to upload data about his work to the company. This involved connecting the PDT to a modem, scrolling down a menu on the PDT until he encountered an option labeled “transmit,” and selecting this option to initiate the upload process. These transmissions had to be done at home because it required the use of the modem provided by Lojack. Rutti had to make sure the transmission was successful, and evidence indicated it often took more than one attempt to successfully complete a transmission. Further, Lojack’s Installer Training Manual instructed technicians not to transmit their PDT data ten minutes before or after the hour because the corporate computer system is automatically reset at those times; and further instructed technicians to wait an hour if they experienced technical difficulties and indicated that after two unsuccessful attempts they should call the host computer and document the date, time, PDT error message,

number called from, and any specific error message, dial tone, or busy signal heard over the phone line.

The District Court granted defendant Lojack’s Motion for Summary Judgment on all issues (holding plaintiff’s commute was not compensable and that his preliminary and postliminary activities were also not compensable because they were either not integral to his principal work activities or consumed a *de minimis* amount of time). Plaintiff appealed.

On appeal, the Appellate Court affirmed the District Court’s decision denying compensation for the commute and before work activities as they were not integral parts of his job. However, it determined that the technician’s PDT transmission to Lojack *after* work each day may in fact be found to be a part of the regular work required in the ordinary course of business, and therefore remanded that particular issue back to the District Court for further proceeding.

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**For further inquiry, please contact
Christopher Maile, Senior Partner in charge of
the Labor & Employment Law Department at
Tharpe & Howell’s Sherman Oaks Office:
Telephone Number: (818) 205-9955
E-mail: cmaile@tharpe-howell.com**

FOR MORE INFORMATION VISIT US AT
WWW.THARPE-HOWELL.COM
OR CONTACT US AT ONE OF OUR LOCATIONS

- 15250 VENTURA BOULEVARD, 9TH FLOOR
SHERMAN OAKS, CALIFORNIA 91403
(818) 205-9955
- 1226 STATE STREET, 2ND FLOOR
SANTA BARBARA, CALIFORNIA 93101
(805) 962-4000
- 600 W. SANTA ANA BLVD., SUITE 705
SANTA ANA, CALIFORNIA 92705
(714) 437-4900
- 516 WEST SHAW AVENUE
FRESNO, CALIFORNIA 93704
(559) 221-2670
- 2555 3RD STREET, SUITE 110
SACRAMENTO, CALIFORNIA 95818
(916) 475-1600
- 1001 BAYHILL DRIVE
SAN BRUNO, CALIFORNIA 94066
(650) 616-4402
- 11622 EL CAMINO REAL
SAN DIEGO, CALIFORNIA 92130
(858) 764-2577
- 3425 CLIFF SHADOW PARKWAY
LAS VEGAS, NEVADA 89129
(702) 562-3301
- 955 S. VIRGINIA STREET, SUITE 116
RENO, NEVADA 89502
(775) 786-6200
- 2198 EAST CAMELBACK ROAD, SUITE 325
PHOENIX, ARIZONA 85016
(602) 340-1234
- 2150 SOUTH 1300 EAST, SUITE 500
SALT LAKE CITY, UTAH 84106
(801) 337-3997

Newsletter Editorial Staff:
Christopher S. Maile
David Binder

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