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Inside this Issue

Tips from *Clipse*: When Side Effects are a "Disability"

The Washington Court of Appeals, Division One (Division II), recently decided *Clipse v. Commercial Drivers Services, Inc.*, No. 45407 - 6-II (2015). This case is an important one, and relates to a person not being hired because he used prescription drugs; this case also answered the elusive question of whether a person who uses prescription drugs may be disabled or "perceived as" disabled under RCW 49.60, the Washington Law Against Discrimination (WLAD).

Clipse arose out of the following facts: Commercial Drivers Services (CDS)—a private-sector employer—offered Ronald Clipse (Clipse) a job as a driving instructor. The owner of CDS said "welcome aboard" to Clipse, who understood that he would essentially be an at-will employee. Just prior to Clipse's start date, CDS asked him to undergo a physical examination, to determine whether he could get a medical examiner's certificate, thus qualifying him to drive a commercial vehicle. Clipse's physical exam revealed that he took methadone for chronic shoulder pain. His physician gave him a medical examiner's certificate, had prescribed the methadone, and informed him that methadone would not affect his ability to drive safely. But after reviewing the findings of his physical exam, the owner of CDS told him

to "clean up," and that CDS could not employ him. According to Clipse, the owner informed him he was afraid Clipse would "relapse." CDS claimed that it had a no tolerance drug policy.

Most importantly, however, is that CDS's drug policies prohibited the "use or possession of alcohol or controlled substances" on CDS's grounds, and prohibited employees from reporting to work "while under the influence of alcohol or any *unlawful* controlled substance." (emphasis added). But this drug policy made no mention of prescription drugs. Clipse understood that methadone could slow a driver's reflexes. Clipse acknowledged that federal law generally prohibits driving commercial vehicles while using drugs. However, federal law contains an exception for drugs prescribed by a physician (who also advised the driver that the prescription drugs will not affect his or her safety.)

Clipse sued CDS under the WLAD, on two bases: First, that he was discriminated against because he had a disability, and second, that he was discriminated against because he was "perceived as" being disabled by CDS.[1] CDS argued not only that Clipse failed to show he had a disability, but also failed to show that he was qualified for the position or that he was entitled to accommodation. The trial court disagreed. CDS appealed. Division I affirmed the trial court. The court began by reminding us that the WLAD forbids discrimination on the basis of disability.[2] Under the WLAD, a "disability" is "the presence of a sensory, mental, or physical impairment[3] that i) is medically cognizable or diagnosable; or ii) exists as a record or history; or iii) is perceived to exist whether or not it exists in fact." RCW 49.60.040 (7)(a). As it says in the statute, a disability need not be an actual one: The employer need only perceive that the disability exists.

First, the court considered whether Clipse had an actual, or "medically cognizable or diagnosable" disability. Interestingly, the court found that "under the plain language of the statute, any mental or physical condition may be a disability," citing RCW 49.60.040 (7). The court also reminded us that the WLAD is construed liberally to effectuate its purpose. In other words, the statute is construed in favor of the allegedly disabled worker, to discourage and forbid unlawful discrimination when it occurs. Ultimately, the court held that "the side effects of a prescription drug may constitute a disability, so long as those side effects meet the statutory definition." This is important: Prior to *Clipse*, no Washington court has explicitly ruled on whether taking a drug (or its side effects) may be deemed a "disability" under the WLAD, as that definition is currently written.

The *Clipse* court illustrated that many Washington courts have assumed, without deciding, that taking drugs or being a drug

[1] Clipse also asked the court for double damages under RCW 49.52.070, but the court did not grant them, so we will not discuss that here.

[2] *See* RCW 49.60.180(1): "It is an unfair practice for any employer...To refuse to hire any person because of... the presence of any sensory, mental, or physical disability… unless based upon a *bona fide occupational qualification*." (emphasis added).

[3] "Impairment" is defined broadly as any "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss" affecting the body' s systems, or any " mental, developmental, traumatic, or psychological disorder." RCW 49. 60. 040(7)(c).

addict is a disability. But all of these cases arose before the legislature defined "disability" in 2007. Of particular note was a 1999 case, *Rhodes v. URM* Stores, Inc., 95 Wn. App. 794, 800, in which the Court of Appeals held that drug abuse might be a disability, but that any discrimination was justified in that case by an employee handbook prohibiting drugs. Under the facts here, Clipse had alleged that taking methadone resulted in "impairing physical side effects." The court found this was sufficient to survive judgment as a matter of law: Clipse had adequately claimed that he had a disability.

Then the court considered whether Clipse had demonstrated that he was discriminated against based on a *perceived* disability. The court centered on the plain language of the statute: A disability need only be "perceived to exist whether or not it exists in fact." RCW 49.60.040 (7)(a) (iii). Clipse had accurately alleged that CDS perceived that he had a disability: The owner had concerns about Clipse getting "cleaned up," and "relapsing," and second, CDS offered conflicting reasons at trial for why it refused to employ Clipse. For those reasons, the court found that Clipse had alleged sufficient facts to show that CDS perceived him as having a disability.

As for the other arguments made by CDS, Clipse sufficiently demonstrated that he was qualified for the position because his physician gave him a medical certificate. Furthermore, Clipse proved that he was entitled to accommodation. Although CDS argued that it did not have to change its "no tolerance" drug policies to accommodate Clipse, there was conflicting evidence at trial as to whether CDS's drug policies even applied to prescription drugs. Because of this discrepancy, the *Clipse* court found that CDS had failed to accommodate Clipse.

So what tips may we draw from *Clipse*? First and foremost, we are not necessarily surprised that the court decided that the side effects from a prescription drug may be a disability, provided that the side effects meet the statutory definition. Admittedly, the court was the first to say so in Washington. We are surprised at how the court arrived at this decision. The court viewed the term "impairment" broadly. And Clipse's physician gave him a medical certificate to drive, without suggesting any limitations. This should veer toward a finding of no disability. But we digress. The second tip from *Clipse*: check your discriminatory language, if it rests upon your tongue, at the proverbial door. Otherwise, whether a person has a disability or not, the court may construe that you perceived the employee as having a disability. Do not inform an employee that uses prescription drugs that he or she had better "clean up." Do not discriminate against a prospective employee based on an actual or perceived disability, so long as employing that person would not cause an undue hardship. Err on the side of caution.

The third tip from *Clipse*: If a physician says that a person is qualified for the job, the courts will most likely find that they are. To refute the argument made by CDS that Clipse was not qualified for the job, the court referred to the medical certificate only. The court considered virtually no other evidence. And the fourth and final tip from *Clipse:* review your policies. The employer in *Clipse* did not address prescription drugs within its policies. This was fatal to their argument that they had no obligation to accommodate Clipse. Perhaps, if there had been a policy stating that if a particular prescription

drug may result in substantial impairment of a driver's cognitive function, that the employer may refuse to hire that driver, the outcome of *Clipse* would have been different. This brings us to a distinction between employment in the private sector versus employment with a fire department, a public employer.

We are speaking of conditional offers of employment, a common practice in the hiring process of the fire service. In cases of discrimination prior to employment, where there is no direct evidence of discrimination, Washington courts apply the test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this test, the plaintiff alleging discrimination must demonstrate that he or she was (1) within a protected class (disabled or other), (2) suffered adverse employment action, (3) replaced by a person outside the protected group, and (4) was qualified for the job. *See Davis v. Washington State Department of Corrections,* 39915-6-II (Div. II 2010) (holding, albeit in an unpublished opinion, that a prospective employee of the Washington DOC—a state agency—failed to demonstrate that he was qualified for the job because he failed to submit to a pre-employment psychological examination and physical, as part of a conditional offer of employment).

Conditional offers of employment are permitted under Washington law. Under the WLAD, an employer may refuse to hire any person based on that person's failure to fulfill a "bona fide occupational qualification" (BFOQ). *See* 49.60.180 (1).[4] Furthermore, the pre-employment inquiry regulations cite as a "fair" employment inquiry, whether a job applicant "is able to perform the essential functions of the job for which the applicant is applying, with or without reasonable accommodation." WAC 162-12-140 (3)(f). Surely, a BFOQ of firefighting is the ability to perform in situations of physical and mental stress.[5] And surely, if an employer may inquire into whether a firefighter may perform the essential functions of the job, doing so after a conditional offer of employment has been made is lawful, despite *Clipse.*

Additionally, and by analogy, we may consider the regulations applicable to state agencies, for the proposition that conditional offers of employment are indeed lawful. Under the authority of the director of the department of enterprise services, "general government employers may carry out the activities detailed in chapter 357-16 WAC including recruiting, creating and maintaining pools of eligible candidates, assessing candidates, and determining the certified pool" of job applicants. WAC 357-16-010. Furthermore, "[A]fter a conditional offer of employment is made, an eligible candidate may be required to pass a medical or psychological examination relevant to the demands of the work." WAC 357-16-195. Admittedly, "general government employers" are state agencies. *See* WAC 357-01-175. But these regulations are instructive.

Of course, we think it is very clear that a fire department hiring firefighters, EMTs, or paramedics cannot ask any medical questions or run any medical tests until you are ready to make a conditional offer of employment. Otherwise, your department may run the risk of being accused of disability discrimination under

[4] It should also be noted that employers need not comply with the pre-employment inquiry guide "when there is a 'bona fide occupational qualification'." WAC 162-12-140 (2)(a).

[5] *And See* WAC 296-305-01509 (7): "The employer shall assure that employees are physically capable of performing duties that may be assigned to them."

the WLAD, and the ADA, for that matter. Be sure your fire department maintains clear job descriptions that stress the physical and mental qualifications for a firefighter to serve.

Despite our discussion of conditional offers of employment in the public sector, we will keep an eye on *Clipse*, as it has not yet been decided by the Washington Supreme Court. Stay tuned.

Last Month's Municipal Roundtable: A Productive Discussion of the Disability Leave Supplement

Perhaps most of the fire departments across Washington are paying out the Disability Leave Supplement (DLS) based on gross, not net, salary, which we contend is wrong. The language of IRS Publication 15 (a) is clear: "Payments under a statute in the nature of a workers' compensation law are not sick pay and are not subject to employment taxes." *See* IRS Publication 15 (a), Employer's Supplemental Tax Guide, page 15.[6] As we have discussed, using our net-pay method of paying out the DLS, your fire department—and your employees—will save money that is not owed to the IRS.[7] But that does not end the inquiry.

Payment and receipt of the DLS poses issues with retirement service credits. This year, we reinstituted the practice of gathering for a free discussion of issues that are relevant to the fire service, and other governmental entities. We call this the Municipal Roundtable. In August, we discussed issues with RCW 41.04.500 et seq., the DLS. We decided that some legislative clarifications should be made, and were presented with some interesting questions. One particular question merits further discussion here: If the employer and employee agree to extend the six-month time during which the DLS is provided, under RCW 41.04.535, won't that affect the employee's service credits for retirement purposes? Unfortunately, we answer this question in the affirmative.

This question is answered by statute. Forgive us, but we must quote the LEOFF II statute at length here:

"[E]xcept as provided in RCW 41.26.530, a member of the [LEOFF II] retirement system shall receive a retirement allowance equal to two percent of such member's final average salary for each year of service." RCW 41.26.420 (emphasis added).

"'Final average salary' for plan 2 members, means the monthly average of the member's basic salary for the highest consecutive sixty service credit months of service prior to such member's retirement, termination, or death." RCW 41.26.030 (15)(b) (emphasis added).

"'Basic salary' for plan 2 members, means salaries or wages earned by a member during a payroll period for personal services, including overtime payments…but shall exclude lump sum payments for deferred annual sick leave, unused accumulated vacation, unused accumulated annual leave, or any form of severance pay." RCW 41.26.030 (4)(b) (emphasis added).

Of the most importance here are the words "salaries or wages" in the definition of "basic

[6] This publication may be located here: http://www.irs.gov/pub/irs-pdf/p15a.pdf

[7] See our 2007 article discussing this novel idea: http://www.firehouselawyer.com/Newsletters/v07n07jul2007.pdf

salary." As already established in IRS Publication 15 (a), payments under a statute in the nature of a worker's compensation act are not taxable wages, as far as the Internal Revenue Service is concerned. Furthermore, "[T]he disability leave supplement provided in RCW 41.04.510(3) [the employer portion] shall not be considered salary or wages for personal services." RCW 41.04.525. Based on the above law, payments of the DLS during the statutorily mandated six-month period are not salary or wages and therefore may not be included in the calculation of "basic salary." For that reason, these payments may not be considered part of an employee's "final average salary"—nor may these payments be taxed. By extension, if the employer and employee agreed to extend the timeline, the same rules would apply. Because the DLS is not salary or wages, and because neither the employer or employee-portion of the DLS are taxable, pursuant to Publication 15 (a) and RCW 41.04.505, DLS payments, for however long they are made, may not be included in the service-credit calculation.

Consequently, if the employer and employee wish to extend the time for providing the DLS, the employee should be made aware of that risk. Of course, utilizing our net-pay method will save the employer and employee money in the short term, despite the service-credit issue.

We have not decided the topic of our next Municipal Roundtable in November. Stay tuned.

A Clarification of Last Month's Article

Recently, one of our readers raised a concern about an article we released last month, on the imposition of benefit charges on religious organizations. Within that article, we stated that fire districts and RFAs may impose benefit charges on religious organizations that use their property for enterprise activities.[8] We did not state that religious organizations are not exempt from benefit charges. To be clear, the benefit charge statute clearly exempts religious organizations from the benefit charges, but contains an exception for religious organizations that use their property "for business operations, profit-making enterprises, or activities not including use of a sanctuary or related to kindergarten, primary, or secondary educational purposes or for institutions of higher education." RCW 52.18.010. We did not state that any of our readers should re-examine whether religious organizations should be exempt from benefit charges. Indeed, these organizations should be, and have been for many years. We only suggested that our readers should consider whether certain religious organizations are within the exception cited above. But we welcome the concerns of our readers, and are glad you are reading!

The Washington Supreme Court resolves *Nissen v. Pierce County*

Our Supreme Court also recently resolved the case of *Nissen v. Pierce County*, No. 90875-3 (2015), which we have written about extensively.[9] Essentially, the court upheld our thoughts on this issue, in the first paragraph of its opinion: "We hold that text messages sent and received by a public employee in the

[8] View the August 2015 article here: http://www.firehouselawyer.com/Newsletters/August_2015.pdf

[9] http://www.firehouselawyer.com/Newsletters/v12n03sep2014.pdf;

http://www.firehouselawyer.com/Newsletters/v12n04dec2014.pdf

employee's official capacity are public records of the employer, even if the employee uses a private cell phone." In other words, make sure your policies forbid or discourage sending text messages from personal electronic devices, when discussing government business, and take proper precautions to ensure that such texts may not be received. At the very least, inform all of your employees that any discussion of government business on their personal devices will subject those devices to scrutiny under the Public Records Act.

Ambulance Services and Community Assistance Referral and Education Services (CARES) Programs

Under RCW 35.21.930, any fire department may establish a CARES program, i.e. may provide community paramedicine. Interestingly, the term "fire department" includes "city and town fire departments, fire protection districts organized under Title 52 RCW, regional fire protection service authorities organized under chapter 52.26 RCW, providers of emergency medical services that levy a tax under RCW 84.52.069, and federally recognized Indian tribes." RCW 35.21.930 (5). This may be old news, but this statute seems to preclude private ambulance companies from establishing CARES programs, or at least prevents them from receiving the benefits and protections afforded by RCW 35.21.930, such as statutory immunity and grant and gift opportunities etc…

However, departments implementing a CARES program "may hire or contract with health care professionals as needed" to provide community paramedicine. RCW 35.21.930 (1). This may be old news, but this statute provides a mechanism by which fire districts and RFA's may further establish a collaborative relationship with private ambulance companies.

Admittedly, "emergency medical service" still means "medical treatment and care which may be rendered at the scene of any medical emergency or while transporting any patient in an ambulance to an appropriate medical facility, including ambulance transportation between medical facilities." RCW 18.71.030. However, the CARES statute permits EMT's, advanced EMT's and paramedics to practice community paramedicine under the supervision of a medical program director, although they may not "perform medical procedures they are not trained and certified to perform." RCW 35.21.930 (1).[10] This implies that under a CARES program, paramedics etc. may undertake any action they are certified or trained to perform, despite the existence or non-existence of an objective "emergency."

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[10] See Also the Bill Report to Senate Bill 5591, which amended portions of RCW 35.21.930: "EMTs, advanced EMTs, and paramedics may participate in a CARES program if supervised by a medical program director and the participation does not exceed the EMT's, advanced EMT's, or paramedic's training or certification."