Your Monthly Legal Update – May 2009

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LEGISLATIVE UPDATE

For those of you who may not be aware, SB 20 was passed by the Wisconsin Senate last week and the Assembly passed the companion bill, AB31. These bills will make compensatory and punitive damages available as a remedy for claims of discrimination brought before the State of Wisconsin Equal Rights Division. This legislation covers all 13 protected category areas (age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the National Guard or military reserves, or use or non-use of lawful products off the employer's premises during nonworking hours).

If Governor Doyle signs this law this is how it will work:

1. The Department of Workforce Development's Equal Rights Division would still be the discrimination complaint investigator and administrative hearing avenue – if there is a finding of discrimination by both the ERD and LIRC then a claim for compensatory and/or punitive damages can be pursued by filing in a Wisconsin Circuit Court.

2. The Court will then determine whether compensatory and punitive damages should be awarded.

3. The following damage limits are put in place for an award of compensatory and punitive damages:

16 to 100 employees	$50,000
101 to 200	$100,000
201 to 500	$200,000
Over 500 employees	$300,000

It will be interesting to see how State Circuit Courts, who are unfamiliar for the most part with employment discrimination cases will handle this new power. It is clear that attorney fees could potentially increase with this new legal kick at the can.

Right now, plaintiff's attorneys have these same remedies available in federal court. More likely than not, federal law will be used as a guidance for State courts as to whether or not such damages should be awarded. The ability to get these damages in Federal Court is very difficult, if that provides any of us some reassurance. We are in the midst of rapid change and this is one more for us to be aware of.

DID YOU KNOW THAT DRIVING IS NOT A MAJOR LIFE ACTIVITY?

According to the Seventh Circuit Court of Appeals, yes our federal court of appeals, driving is not a major life activity under the Americans with Disabilities Act. *See Winsley vs. Cook County* (Case No. 08-2339). In this case, the Court quoted the EEOC regulations and their definition of "Major Life Activities" as including functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. sec. 1630.2(1). The Court admits that the list is not exclusive but opined that this list does not include driving. The Court interprets the statute as identifying activities that are so important to daily life that almost anyone would consider themselves limited if they were unable to perform them. The Court concluded that driving is not such an activity because many Americans choose not to drive and those that make this choice do not consider their lives diminished.

My first reaction to this point was, does it not matter where you live? Well, the court answers this question. The Court found that the list of activities does not vary based upon where the person lives. However, admittedly driving does, i.e. New Yorkers hardly drive but those who live in the country must drive to get around. Regardless, driving is not a major life activity where your location is because no one has the right to drive, driving is a privilege subject to revocation. It appears that a major life activity should not require a license from a state that would be revocable for a variety of reasons, including but not limited to, failure to insure.

Whether the Equal Rights Division would agree with this determination is an entirely different matter. Whether legislators will amend the ADA again to encompass driving will remain to be seen.

RACE DISCRIMINATION; DEFINITION OF "SIMILARLY SITUATED EMPLOYEE"

In this case, *Antonetti v. Abbott Laboratories* (Case No. 08-1647) the Seventh Circuit Court of Appeals, the Court had to grapple with whether a "similarly situated employee" relevant to an employment discrimination law analysis is limited to just a similar job description. In this case, four out of five employees lied during an initial investigation relevant to whether or not the employees had committed fraudulent entries on a time card.

The allegations involved in this case were that four techs employed for the company were terminated for taking a break that included an off-site meal and reported themselves as working for that time. One of the five employees in this tech group did not participate in this fraud because he never recorded "no lunch" on his time record and when he was wrongly paid for the hour, he reported the error to management. When this employee was further interviewed, he told the truth.

When the four who took the breakfast and reported no lunch taken on their time cards were confronted by management they either lied or did not recall going off site for any breakfast. One of these techs however, did change his story by the end of the day and told the truth, however, his initial lie still resulted in his termination also. The group of four, who were terminated in this action, may have had the same job classification, but they could not argue that they were similarly situated to the honest employee to support any claim of race discrimination.