Jardine, Logan & O'Brien, P.L.L.P.

JLO legal • ease

Summer 2009

Qualified Litigation Attorneys

2009 Legislative Update

by Matt P. Bandt

The 2009 legislative session ended on May 18 without the Legislature and the Governor agreeing on a balanced budget - leaving a three billion dollar deficit. Governor Tim Pawlenty stole the headlines when he announced he was not calling the Legislature back for a special session, and instead, intended to use his veto and un-allotment powers to bridge the gap. Despite differences between the two sides, the session did end with some significant changes for the insurance industry.

Filing Fees

Most state agencies and branches, including the courts, sustained budget cuts due to the state deficit. To off-set some of those cuts the Legislature amended Minn. Stat. § 357.021 increasing various court filing fees. For example, civil filing fees increased from $270 to $340, jury trial requests increased from $75 to $100, subpoenas increased from $12 to $16, and motion fees increased from $55 to $100.

Ten Percent Prejudgment Interest

The Legislature amended Minn. Stat. § 549.09 increasing prejudgment interest to 10% for judgments over $50,000.00. The increase applies to judgments entered on or after August 1, 2009. Typically, interest begins to run from the commencement of the action, demand for arbitration, or the date of written notice of the claim, whichever occurs first. The legislation does not clarify whether the increase only applies to the portion of the judgment that exceeds $50,000 or whether it applies to the entire judgment. The interest rate for judgments less than $50,000 remains the secondary market yield of a one year United States Treasury bill. Since the mid 90's, the applicable rate has typically been four or five percent, so an increase to 10% is significant.

Ten Percent Interest on Judgments for Breach of Insurance Policy

The Legislature passed Minn. Stat. § 60A.0811 allowing an insured to recover 10% interest against an insurer that breaches its duty to provide services or make payments. The interest begins to run from the date the request for payment was made. This law applies to any cause of action arising on or after August 1, 2009. The interest is not intended to be cumulative. Also, it does not apply to workers' compensation, health insurance, life insurance, disability insurance, or a policy issued by a township mutual fire insurance company or farmers mutual fire insurance company operating under chapter 65A or 67A. Initially, this legislation also allowed the insured to recover monetary damages flowing from the breach and attorney fees and costs. Those provisions passed in the House, but were defeated in the Senate.

Criminal Records / Employer Liability

The Legislature passed Minn. Stat. § 181.98, which limits the admission of evidence of an employee's criminal record in civil actions against an employer based on the employee's conduct. The evidence will be excluded if any of the following apply: 1) the duties of the position did not expose others to a greater degree of risk than that created by the employee interacting with the public outside of the duties of the position or that might be created by being employed in general; 2) a court order sealed any record of the criminal case; or 3) the record did not result in a criminal conviction. The law applies to all cases commenced on or after August 1, 2009. It also prohibits employers from asking about criminal records or conducting a criminal background check before

Updates *continued on Page 3*

IN THIS *issue*

Subscription Information

A *referral* is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please complete the section below and return it via fax to 651-223-5070. You may also use the section below for a change of address, etc. Alternatively, you may e-mail the information to us at jlolaw@jlolaw.com.

Name:
Company:
Address:
City:
State/Zip:
Phone:
E-mail:

Comments or inquiries may be directed to Shannon Banaszewski.

Litigation Under the ADA in 2009 - A Look Ahead

by Jessica E. Schwie

Effective January 1, 2009, the Americans with Disabilities Act (ADA) was amended by the ADA Amendments Act (ADAAA). *See* Pub L. No. 110-325, 122 Stat. 3553 (2008). The purpose of this article is to briefly inform employers and claims handlers of what to expect in employment litigation cases in the wake of the ADAAA.

Why was the act amended?

The ADA was initially enacted in 1990 and prohibited discrimination against a person who: (A) has a physical or mental impairment which substantially limits one or more major life activities; (B) has a record of such impairment; or (C) is regarded as having such an impairment. Four cases issued by the United States Supreme Court, *Sutton v. United Airlines*, 521 U.S. 471 (1999), *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), *Murphy v. UPS*, 527 U.S. 516 (1999), and *Toyota Motor Mfg., Kentucky, Inc. v. Williams* 534 U.S. 184 (2002), dramatically narrowed the application of the ADA in a manner that was favorable to employers. The ADAAA was specifically enacted because Congress determined that the ADA had been too narrowly interpreted.

What is amended?

The statutory definition of disability as set forth above did not change, but how the specific terms are to be interpreted has. Each will be addressed in turn below.

1. "Physical or mental impairment"

Previously, case law held that a person was not disabled if corrective measures offset the effects of a physical or mental impairment. That law is overturned. The ADAAA's language includes a list of mitigating measures that cannot be considered when determining whether an impairment substantially limits a major life activity. For the list, readers are referred to the statute. In short, many more employees will now be considered "disabled" within the meaning of the ADA/ADAAA.

2. "Substantially Limits"

Previously, "substantially limits" was held to be the equivalent of "severely restricts" or "significantly restricts". Congress directed the EEOC to further define this term to explicitly reject the interpretation of "substantially limits" from *Toyota Motor Mfg.* The EEOC is now considering a proposed rule that will state explicitly that in order to be "substantially limiting" an impairment need not "severely restrict" or "significantly restrict" performance of a major life activity. *See* http://www.eeoc.gov/abouteeoc/meetings/6-17-09/kuczynski.html.

3. "Major Life Activity"

The ADAAA rejects the "major life activity" definition from *Toyota Motor Mfg.* which required an activity to be of central importance to most people's daily lives. Instead, the ADAAA expands the definition by creating a list of activities that constitute a major life activity. Readers are referred to the statute for the list, which is not intended to be exhaustive. The EEOC is proposing further rule changes and expansions. *See* http://www.eeoc.gov/abouteeoc/meetings/6-17-09/kuczynski.html.

4. "Regarded as"

The ADAAA now clarifies that there is no cause of action for a failure to accommodate a perceived disability, only a disparate impact action. *See Green v. CSX Hotels, Inc.*, 2009 WL 113856 (S.D.W.Va. Jan. 15, 2009)(confirming same). As to disparate impact claims, the ADAAA rejects the definition of "regarded as" in *Sutton* by reinstating *School Board of Nassau County v. Arline*, 475 U.S. 1118 (1986), which applied the broad view of the term "handicapped individual". This new definition not only broadens the number of covered employees, but also changes the focus of a court's inquiry to the employer's motivation for the adverse employment action.

Do the amendments apply retroactively?

It has been generally decided that the ADAAA shall not apply retroactively where the claimant is seeking only monetary damages. *See e.g. EEOC v. Argo Distribution LLC,* 555 F.3d 462, 469 n. 8 (5th Cir. Jan. 15, 2009); *Richardson v. Honda Mfg. of Ala.*, ___F.Supp.2d __, 2009 WL 2171113 (N.D.Ala. July 22, 2009); *Kirkeberg v. Canadian Pacific Railway*, 2009 WL 169403 (D. Minn. Jan. 26, 2009); *Edwards v. Marquis Companies I, Inc.*, 2009 WL 2424670 (D. Or. Aug. 6, 2009). The ADAAA, however, may be applied to claims arising before January 1, 2009 which seek injunctive relief (e.g. provision of certain accommodations to a person still employed) because such relief does not remedy past conduct, but addresses present and future conduct which is subject to the ADAAA. *Jenkins v. National Board of Medical Examiners*, 2009 WL 331638 (6th Cir. Feb. 11, 2009). In order to secure application of the ADAAA where injunctive relief is claimed, the claimant may not merely include a statement for "injunctive relief" in the Complaint. *Geiger v. Pfizer, Inc.*, 2009 WL 973545 (S.D. Ohio 2009). Rather, the claimant must actually seek an order compelling an employer to do, or not to do, something. *Id.*

Will summary judgment dismissal still be possible?

Yes, but it will likely be more difficult and primarily result from evidence of a legitimate business reason for whatever adverse action was taken. Compare *Menchaca v. Maricopa Community College Dist*, 595 F.Supp.2d 1063, (D.Ariz. Jan. 26, 2009) (finding employee to be disabled where she was recovering from post traumatic brain injury and PTSD) with *Durham v. McDonald's Restaurants of Okla., Inc.*, 2009 WL 1132362 (10th Cir. April 28, 2009)(even if ADA claim was analyzed under ADAAA, dismissal of claim was appropriate because employer had legitimate business reason for adverse action), *Brown v. Board of Regents*, 2009 WL 467754 (W.D.Okla. Feb. 24, 2009)(same); *Braun v. Securitas Sec. Services USA, Inc.*, 2009 WL 150937 (E.D.N.Y. 2009)(same); and *Basso v. Potter*, 596 F.Supp.2d 324, (D.Conn. Jan. 9, 2009)("the amendments primarily relate to the elements of a plaintiff's prima facie case").

What court do you want to be in - State or Federal?

It is useful to note that a study released by The American Constitution Society for Law and Policy, https://secure.acslaw.org, to be published by the Harvard Law & Policy Review, http://www.hlpronline.com, shows that workers bringing employment discrimination lawsuits are less successful in federal court. •

Congratulations to Marlene S. Garvis who has recently been appointed to the following positions for 2009-2010: (1) Chair of the Board of Directors of the Battered Women's Legal Advocacy Project (MN); (2) Chair of the MSBA Diversity Implementation Project; and (3) Vice Chair of the Federal Bar Association Health Law Section.

Updates *continued from page 1*

the applicant has been selected for an interview, unless the position already requires a background check. This provision is called a "Ban the Box" law. Minnesota is the first state to adopt such a law statewide. It is intended to reduce discrimination, while still allowing employers access to this information when necessary.

Other Legislation

The new laws and amendments discussed above should all have a direct impact on the insurance industry. The Legislature also passed other significant legislation. The False Claims Act establishes civil liability and remedies for claims against individuals that make certain false or fraudulent claims against the state. Also, the Legislature passed a law making it a primary offense to not wear a seatbelt. As a primary offense, police officers can stop and ticket offenders without having another reason for the stop. Minnesota was the first state to pass legislation regulating dental therapists and advanced dental therapists. A person is deemed to be practicing dental therapy if they work under the supervision of a licensed dentist and practice in settings that serve low-income, uninsured and underserved patients or practice in dental health professional shortage areas.

The Legislature also debated numerous proposed bills that did not pass, but would have impacted the legal community and insurance industry. The House and Senate considered the following: a sales tax on legal services; limitations on contributions to judicial candidates; increasing no fault benefits for lost income and funeral expenses; lifting the cap on tort claims against the state; repealing the seatbelt gag rule; permitting cameras in the courtroom; and allowing a private action alleging unfair, discriminatory, or other unlawful practice in business, commerce, or trade. In addition, the Governor vetoed five bills intended to assist homeowners making warranty claims. The vetoed bills would have allowed homeowners to recover reasonable costs of short term housing and attorney fees. One of the bills would have extended the time frame for making a warranty claim from six months to one year. Another would have allowed homeowners to give actual notice, rather than requiring written notice. Lastly, the legislation intended to extend the ten year statute of repose, such that a homeowner would have a year from the date of discovery to initiate a lawsuit where the breach is discovered more than ten years after substantial completion of the home. •

"Constructive" Loan Receipt Agreements Under Cargill

By Darwin S. Williams

On May 26, 2009, the Minnesota Court of Appeals decided that where an insured refused in bad faith to enter into a loan receipt agreement, a District Court had the equitable authority to preserve the defending insurer's opportunity to obtain contribution from other primary insurers with a similar duty to defend. *See Cargill, Inc. v. Ace American Ins. Co.*, 766 N.W.2d 58, 62 (Minn. App. 2009).

Upon receiving notice of multiple lawsuits against Cargill, one of its insurers - Liberty Mutual Insurance Company - offered to fund Cargill's defense. It then requested that Cargill execute a customary and neutral loan receipt agreement to allow Liberty Mutual to seek contribution from the more than 50 other non-participating insurers for the multi-million dollar litigation costs to defend against the lawsuits. None of the 50-plus insurers would agree to assume responsibility for defense costs without a loan receipt agreement (giving them the ability to seek contribution from the other insurers). Cargill refused to enter into the loan receipt agreement and argued to the District Court that Liberty Mutual must exclusively defend it without the right to seek contribution from the other insurers.

The Minnesota Court of Appeals held that under *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 150 N.W.2d 233, 236-37 (1967), each insurer does have separate and distinct obligation to defend, and that due to the lack of contractual privity between Liberty Mutual and its co-primary duty-to-defend insurers, Liberty Mutual had no right to contribution in the absence of a loan receipt agreement.

Next, the Court reasoned that "because an insured, as a part of its contractual duty to cooperate, has an affirmative obligation to preserve the [defending] insurer's opportunity to obtain contribution from other primary insurers with a similar duty to defend, and because a district court has the equitable authority to award such relief when an insured refuses to cooperate" a Court may order co-primary insurers to be equally liable for the costs of defense.

In this situation, where multiple primary insurers have offered to defend in exchange for an executed, neutral loan-receipt agreement, the principles of good faith and fair dealing imposed an affirmative obligation on the insured to cooperate by entering into a neutral loan receipt agreement that equitably apportions the defense costs between the numerous primary insurers. By refusing to enter into such agreement, Cargill had violated its duty to cooperate in its defense. The District Court then had inherent equitable authority to act in order to enforce Cargill's duty to cooperate and to preserve the defending insurer's ability to obtain an equitable apportionment of defense costs.

In short, under current Minnesota law, if an insured, in bad faith, refuses to enter into a neutral loan receipt agreement with its insurers, then, state courts, when timely asked, may protect the defending insurer by imposing a *constructive*[1] loan receipt obligation on the other liable primary insurers.

Cargill filed a petition for review to the Minnesota Supreme Court. Liberty Mutual petitioned for cross-review. On August 11, 2009 the Court granted further review. •

[1] "Constructive" means giving something an effect in law, even though it does not exist in fact.

JLO *legal • ease*

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

About The Authors

Matthew P. Bandt

mbandt@jlolaw.com
651-290-6579

Matt is a senior associate at Jardine, Logan and O'Brien, P.L.L.P., and focuses his practice on litigation, assisting clients in workers' compensation, personal injury matters, and defense of residential construction defect claims. Matt received his J.D. degree from the University of Wisconsin in 2000.

Jessica E. Schwie

jschwie@jlolaw.com
651-290-6591

Jessica is a senior associate with Jardine, Logan & O'Brien, P.L.L.P. As a litigation associate, Ms. Schwie practices in all areas of civil litigation with an emphasis in municipal law. Jessica graduated in 1999 from Hamline School of Law. For more information, please see her biography at www.jlolaw.com

Darwin S. Williams

dwilliams@jlolaw.com
651-290-6503

Darwin is a senior associate at Jardine, Logan & O'Brien, P.L.L.P., and practices primarily in civil litigation, including the areas of products liability, construction law, general liability/negligence, motor vehicle liability, and government liability. Darwin is a 2005 graduate of the University of St. Thomas School of Law.

Coming in the Fall 2009 Issue...

Spousal Privilege

Statements - Discoverability/Admissibility

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

JARDINE
LOGAN & O'BRIEN
ATTORNEYS AT LAW
P.L.L.P.
Suite 100
8519 Eagle Point Boulevard
Lake Elmo, MN 55042