



Employment LAW BULLETIN

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COMPANION DOGS AS A REASONABLE ACCOMMODATION

The Auburn Woods Homeowners Association had a “no dogs” rule in its condominium covenants, conditions and restrictions. One owner requested that the Homeowners Association make an exception to the “no dogs” rule and requested permission to keep a small dog in their home as a “companion dog.” The owners’ written request to keep the dog was accompanied by notes from their doctor stating that the companion dog alleviated the homeowners’ symptoms of depression and physical and emotional illness. The Homeowners Association denied the request.

The homeowners filed a complaint with the Department of Fair Employment and Housing (“DFEH”) alleging that the Homeowners Association unlawfully discriminated against them by failing to provide them a reasonable accommodation for their disabilities. The DFEH ruled in favor of the homeowners and the Homeowners Association appealed. The Court of Appeals also ruled in favor of the homeowners: “[I]t is clear that, under the right circumstances, allowing a pet despite a no pets policy may constitute a reasonable accommodation... Here, the [homeowners] presented evidence that their disabilities substantially limited their use and enjoyment of their condominium, and having a companion dog improved the situation.” Under these circumstances, the Court ruled that the Homeowners Association “no dogs” rule must give way to the homeowners need to keep a companion dog on their premises.

This is the first published California case holding that a companion dog may constitute a reasonable accommodation if the companion dog provides individuals suffering from depression and other emotional illness with emotional support that may alleviate symptoms. What about the workplace? The legal principle of reasonable accommodation that applies in the housing context applies in the employment context. Employers’ “no dogs” rules in the workplace could be subject to challenge, depending upon the request and type of workplace.

INTERMITTENT BONDING LEAVE IN CALIFORNIA

Is the minimum duration of intermittent leave for "baby bonding" under the California Family Rights Act ("CFRA") the same as that for a leave taken for the serious health condition of an employee or the care of a family member with a serious health condition? No. California Regulations provide that "CFRA leave taken for reason of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or placement of the child with the employee in connection with the adoption or foster care of the child by the employee.

The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions." In contrast, the regulations pertaining to leave for a serious health condition provide: "Where CFRA leave is taken for a serious health condition of the employee's child, parent or spouse or of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. An employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave."

Thus, while a CFRA leave for a serious health condition is limited only to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, the minimum duration of a CFRA child bonding leave is two weeks (with the caveat that an employer shall grant a request for a CFRA leave of less than two weeks' duration on any "two occasions"). The CFRA regulations do not define what is meant by the term "two occasions." The Department of Fair Employment & Housing ("DFEH") has unofficially taken the position that an "occasion" is a "request." In other words, when a CFRA eligible employee comes to the employer and asks for bonding leave of less than two weeks' duration, s/he must be granted such leave, if s/he comes to the employer at a later date and asks for bonding of less than two weeks' duration, s/he must be granted such leave. If the employee then requests a third bonding leave of less than two weeks' duration, the employer does not have to grant the request.

Can an employee seeking bonding leave make one request for an ongoing reduced work schedule of partial workdays (claiming it was his/her first request for leave of less than two weeks' duration)? The answer is "no" because on-going reduced work schedules apply only to leaves for serious health conditions.

Does the Family and Medical Leave Act ("FMLA") provide any greater rights to employees for "baby bonding"? No. the FMLA provides even less flexibility than the CFRA regarding intermittent bonding leaves: "When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule **only if the employer agrees.**"

TEMPORARY EMPLOYEES: DO THEY BELONG TO YOU

Many companies use temporary employees through services to fill their short term staffing needs. Sometimes, these companies believe the temporary employees are the responsibility of the service. However, numerous laws impose some responsibility on the contracting company.

For example, the EEOC, in its enforcement guidance entitled *Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (1997), provides that a determination of who is the temporary employee's employer, depends on the "control test". This test is an inquiry into whether one or both of the business have the right to control the worker's employment. The enforcement

guidance provides that all “circumstances in the worker’s relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer. If either entity qualifies as the workers’ employer, and if that entity has the statutory minimum number of employees then it can be held liable for unlawful discriminatory conduct against the worker. If both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as ‘joint employers.’” The enforcement guidance goes on to state that “[a] **client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker.**”

The enforcement guidance sets forth scenarios where liability will be imposed on the employer who has engaged temporary/leased employees, one example is as follows:

“A temporary receptionist placed by a temporary employment agency is subjected to severe and pervasive unwelcome sexual comments and advances by her supervisor at the assigned work site. She complains to the agency, and the agency informs its client of the allegation. The client refuses to investigate the matter, and instead asks the agency to replace the worker with one who is not a ‘troublemaker.’ The agency tells the worker that it cannot force the client to take corrective action, finds the worker a different job assignment, and sends another worker to complete the original job assignment. The client is liable as an employer of the worker for harassment and for retaliatory discharge. The temporary employment agency also is liable for the harassment and retaliatory discharge because it knew of the misconduct and failed to undertake adequate corrective action. Informing the client of the harassment complaint was not sufficient - the agency should have insisted that the client investigate the allegation of harassment and take immediate and appropriate corrective action. The agency should also have asserted the right of its workers to be free from unlawful discrimination and harassment, and declined to assign other workers until the client undertook the necessary corrective and preventive measures. The agency unlawfully participated in its client’s discriminatory misconduct when it acceded to the client’s request to replace the worker with one who was not a ‘troublemaker.’ If the replacement worker is subjected to similar harassment, the agency and the client will be subject to additional liability.”

Thus, Companies should not quickly assume that they are not employers and are not responsible for temporary employees. This fact should be taken into account whenever negotiating a temporary services agreement.

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