

## Employment / ADA Access Law Alert!

Updates you need to know but in a millisecond...

Vol. II

June 2005

### HIGHLIGHTS

#### ADA News

Disabled Plaintiff Jarek Molski declared a vexatious litigant.

Attorney's Fees Denied.

ADA Required on Foreign Cruise Ships?

#### Employment News

Do you send your employees on errands?

What is your obligation to employees with disabilities?

Employment updates.

#### Office News

Corfee Stone welcomes Conor McElroy and Ashley Patterson!

5 year long case won on appeal.

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### ADA ACCESS NEWS



#### THE VERDICT IS IN !

After prevailing in federal court, in state court and just recently winning an appeal, Corfee Stone successfully defended a long time client. - Case is closed.

#### FEDERAL COURT SLAMS DISABLED PLAINTIFF MOLSKI AND HIS ATTORNEYS

By Catherine Corfee, Esq.

As most of you have heard by now, US District Court Judge Edward Rafeedie filed an order finding disabled Plaintiff Jarek Molski a vexatious litigant. Molski is now required to seek leave of court before filing any future ADA claims in the Central District of Federal Court. The court went one step further finding his attorneys, The Frankovich Group, guilty of engaging in predatory litigation practices "bordering on extortionate shysterism." That firm is required to seek leave of the court before filing future ADA claims. Judge Rafeedie requested the state bar to investigate the matter and consider disciplinary actions as the record was "sufficiently egregious to justify the suspension, or even disbarment." In a March, 30, 2005 decision, the higher Court of Appeals (Ninth Circuit) refused to intervene with the trial court's decision by means of extraordinary remedy of mandamus, which was a petition filed by Frankovich and Molski.

Judge Rafeedie held that the basis for his decision was the court's inherent power to protect the judicial system and the public from abusive and predatory litigation practices. The court found that since 1998 Molski has filed 400 ADA suits most of which were filed in 2001. As to Frankovich, he had filed 223 law suits in 2004 in the Northern Central District. Frankovich targeted Asian and Mexican restaurants that the court found were "perhaps" . . . "easy prey for coercive

settlement." 70% of those claims were filed on behalf of Mr. Molski. The Court concluded that most of the complaints were boiler plate naming the same claims and alleging the same physical injury to the same area of the body. The court found that Molski and his attorney filed 16 lawsuits in 4 days, and filed 26 lawsuits from May 16 to May 23.

The court ridiculed Frankovich's "astonishing letter" that he sends to most defendant's along with the summons and complaint. The court admonished Frankovich for counseling unrepresented defendant's telling them that the vast majority of defense attorneys will "embark" on a "billing expedition." Frankovich advised on getting insurance and told businesses that they did not have a bonafide defense. The court found this practice of counseling unrepresented defendants he was suing totally unethical.

The court questioned the physical injuries to the plaintiff because of the 223 complaints. It looked like it was "contrived to implicate defendants insurance policies." This is because 80% of the claims alleged upper extremity problems in the same area and the court noted that common sense dictates that as an individual who has encountered as many architectural barriers as Mr. Molski, would know what barriers should be avoided and which ones are unlikely to result in re-injury. Because he had so many injuries in the same place, the court doubted that they were accidental but sustained intentionally to make a subsequent lawsuit. The court noted that reasonable people once injured tend to take affirmative steps to avoid similar physical injuries rather than repeat them 4 or 5 times on the same day.

The court questioned why the plaintiff would wait one year and file his lawsuit just before the statue of limitation ran and then ask for daily damages for each day he was denied access for 1 year plus. The court found plaintiff Molski did not mitigate his damages. The court said it had an obligation to protect the public from unscrupulous practitioners who have established unethical conduct designed to extort a gregarious settlement.



## ADA ACCESS LAW APPLIES TO FOREIGN CRUISE SHIPS

By Catherine Corfee, Esq.

Been on a cruise lately? The U.S. Supreme Court just held that Title III of the ADA, which prohibits public accommodations from discriminating against the disabled in fully and equally accessing their goods and services, applies to cruise ships doing business in the United States but “conveniently” flying foreign flags. In Spector, et al. v. Norwegian Cruise Line, Ltd., 545 U.S. (2005), a group of plaintiffs with disabilities sued the Bermuda based Norwegian Cruise Line, Ltd (NCL). NCL operates cruise ships registered in the Bahamas, but which depart from and return to Houston, Texas after a sunny Caribbean cruise. The plaintiffs alleged that NCL charged disabled passengers higher fares, required them to pay higher surcharges, maintained evacuation programs and equipment in locations not accessible to the disabled, and most of their cabins, particularly the most desirable ones in the most desirable locations, were not accessible. NCL argued that the ADA does not apply to their ships as they flew foreign flags and that Congress needed to clearly state that the ADA applied to those ships, which Congress did not state when they drafted the ADA.

The Court held acts such as charging higher fares and additional surcharges for the disabled were not part of a ship’s internal affairs. The ADA could therefore prohibit such acts on foreign flag cruise ships in American waters. The Court noted that these cruise ships were flying “foreign flags of convenience” because nearly all their business and advertising was in the U.S. and nearly all their passengers were American, whom the U.S. has a strong interest in protecting. However, if the ADA requires the ships to remove architectural barriers to the disabled, it may cause permanent and significant structural modifications relating to ship design and construction. This would likely involve a ship’s internal affairs, and also may not be “readily achievable,” (meaning without much difficulty or expense) which is a defense to the ADA. The Court went on to say that this exception could apply to American ships also. Furthermore, if making a structural access modification under the ADA conflicts with international legal obligations, the ADA will not require it. And finally, a rule that is important for all public accommodations, not just cruise ships, the Court held that a structural modification per the ADA will not be required if it poses a threat to the health and safety of others.

“prevails” and is therefore entitled to attorney’s fees unless the parties have settled the attorney’s fee issue. Parties can settle and then dispute the attorney’s fees and let the court decide. That is what happened in this case. Normally, the plaintiff is considered a prevailing party for achieving a settlement agreement requiring a business to provide ADA disabled access improvements for its property. Now, that may not be necessarily so with this new federal case.

Only reasonable attorney’s fees are recoverable. For instance, the fees must have been reasonably necessary to obtain the settlement, i.e., access improvements to the property. Any award of attorney’s fees must also be proportional to the plaintiff’s success. For example, if a plaintiff won \$50,000, they are unlikely to recover \$300,000 in attorney’s fees. A court will also review what the plaintiff did not achieve, what public purposes were served, how ubiquitous and wrongful the defendant’s conduct was, and the discriminating motive.

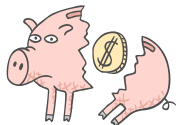
In this recent case, the court held that no public purpose is served if a disabled plaintiff fails to notify the business about access problems to allow them to be cured. If notice is given, and a defendant fails to respond, then there is strong evidence that a public purpose is served in bringing this lawsuit. If so then attorney’s fees will be awarded.

The court held that as a prerequisite to recovering attorney’s fees in ADA cases and parallel state cases, the defendant must first be warned and given a reasonable opportunity to cure the said violation. In this way, a court can determine if the lawsuit was really necessary. A wise business will comply once given fair warning.



The federal court denied attorney’s fees to the disabled plaintiff even though the plaintiff sent an unsigned and undated letter to the business about access problems. The court held that the letter was ambiguous. It simply stated that the sender “could not find handicapped parking” and the plaintiff had “serious problems trying to use your restroom,” and to “please take care of these problems at once.” The court criticized the letter as failing to provide anything specific. All fees of \$39,795 demanded by the plaintiff’s attorney, Lynn Hubbard, were denied.

For many of my clients who have and are dealing with Lynn Hubbard and other attorneys, you can take solace that other federal courts might follow suit.



## NOT SO FAST - ATTORNEY’S FEES DENIED TO DISABLED PLAINTIFF

By Catherine Corfee, Esq.

The courts are catching on to unscrupulous attorneys who use their same disabled client over and over again to file ADA Access lawsuits to extort significant attorney’s fees. Since the Molski decision, described above, another federal court has completely denied attorney’s fees even though the disabled plaintiff technically prevailed.

In federal court, if the parties settle an ADA lawsuit via a written enforceable settlement agreement, the plaintiff

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## EMPLOYMENT NEWS

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### 8 QUICK EMPLOYMENT UPDATES YOU NEED TO KNOW

By Catherine Corfee, Esq.

#### Too Busy to Read? Then Don’t Read But...

Did you know that:

1. If your employees work 5 or more hours they must have an unpaid duty free 30 minute meal period, and if you require them to work during that period you must pay for it. Duty free means they are able to leave the premises,

go wherever they want and not have to perform any duties.

2. For every four hours an employee works s/he is entitled to a 10 minute break. This is the most difficult obligation to prove because many employees are suing over this issue and they can go back and claim no breaks for three years. The penalties are: for each day a meal period or 10 minute rest break is not provided (going back 3 years) the employer must pay that employee 1 additional hour of work at that employee's regular rate of pay.
3. If you do not have a good "harassment" (not just "sexual" harassment) policy, you will not be entitled to the defense of limiting an employee's emotional distress claim. For those employers who have very good and detailed harassment policies, any employee claiming harassment because of sex, sexual orientation, race, religion, etc. has a duty to avoid the consequences of their harm to report it to management and if not management the owners. This allows them to investigate, potentially remediate if such occurred, and to end it so plaintiff no longer suffers emotional distress ***Dept. of Health Services v. Superior Court*** (2003) 31 Cal.4th 1026, 1044. If so, an employee is only entitled to emotional distress from when the harassment occurred to when the employee knew or should have known to report it.
4. Arbitration agreements are a great way to reduce litigation expenses for employee related disputes and they are enforceable with applicants, but must be optional with existing employees. However, there are several factors that are required to ensure they are enforceable. When was the last time you reviewed your arbitration policy and/or have you ever considered one?
5. In California an employee does not have to file with the labor commissioner anymore to file a wage and hour claim. They can file a civil suit in court. Now they can recover attorney's fees.
6. When an employee is injured on the job, you might have legal exposure to disability or perceived disability discrimination which worker's compensation does not cover as an employee may sue in civil court. If you have 50 or more employees you may also have to consider federal and state family leave act policies.
7. Did you know, that you must provide a reasonable accommodation for pregnant employees with the assistance of their health care provider.
8. Did you know that damages and fines have increased if you try an employment case before the Fair Employment and Housing Commission, instead of opting for civil court -the amount has increased from \$50,000 to \$150,000 per aggrieved person per respondent. Govt. Code Section 12970(a)(3).

## WHAT IS A DISABILITY?

By Catherine M. Corfee, Esq.

So many times do you feel like you have to play doctor when an employee requests an accommodation? California and Federal law have dramatically different definitions of what constitutes a "disability" to trigger your obligations under anti-disability discrimination law.

- Federal vs. State Court Definition

The federal ADA's definition is one who has a physical or mental disability that "substantially" limits a major life activity. California does not require a "substantial" limitation - just a limitation regarding a major life activity. A physical disability can include chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorders, diabetes, multiple sclerosis, and a heart condition. It also includes mental disabilities that are long term such as depression, anxiety, post traumatic stress disorder, etc. However, the disability must be one that limits a person's major life activity. What is a major life activity? Case law provides some guidance, including but not limited to, walking, seeing, hearing, working, and caring for oneself in daily life activities.

For example, a woman who had to be constantly aware of her blood sugar levels with diabetes was held to be disabled. Her major life activity of eating was limited. The key distinction is that the limitation is not a disability in and of itself, rather a person claiming ADA protection must prove the disability limited a major daily life activity as compared to a normal person. In one case, the fact that a person could not fly because of his obesity was not held to be a major life activity because not everyone flies. In another case, a student who was held to not have a disability under the ADA with respect to learning. Despite the student's alleged learning disability, he achieved considerable academic success beyond the attainment of most people of the average age. Wong v. Regions of the University of California, (2005) 2005 DJDAR 6620.

The Supreme Court has defined "major life activities" as activities that are of central importance to daily life. If an employee cannot do certain manual tests, like lifting and bending on a job, that will not qualify as a life activity in most people's daily lives. The focus is not whether a claimant is unable to perform tasks associated with a specific job. This is because manual tasks are unique to any particular job and are not necessarily important parts of most people's lives. The focus is whether there is a limitation in doing major life activities such as household chores, bathing, brushing teeth, etc.

- Tips

One helpful tip for employers is to verify the alleged disability by sending a form to the employee's healthcare giver. It is critical that the employer require that this form be returned to them within 15 days and if not, such could be insubordination. A good form to use is the Department of Labor form regarding Federal Medical Leave Act, which indicates serious health conditions. It is not necessarily a

disability. Alternatively you could draft your own form which says please identify whether this individual has a disability that limits a major life activity such as walking, seeing, breathing, caring for one self as compared to a normal person.

Our firm has developed these forms as well, so call us. Ask the doctor to identify what accommodations would be possible to help the individual perform the essential functions of his/her job. You should attach or describe the major functions of the job. For example, why does the job exist- list those critical job duties. Ask if less hours, etc. are necessary. Having to modify schedule is an accommodation.

Lastly, you do not have to play doctor, a doctor's certificate is very helpful and you can even get a second opinion by your company doctor if you have a reasonable suspicion and you must pay for it and the employee does not lose wages.

**U.S. GOVERNMENT NOT LIABLE WHEN SERVICEMAN  
ACTED OUTSIDE SCOPE OF EMPLOYMENT.**

By: Conor McElroy

Employers are strictly liable for a supervisors actions. In a recent Ninth Circuit decision, the Court seemed to create some breathing room for employers in defending against lawsuits by third parties resulting from their employees acts to non employees. In Nationwide Mutual Ins. Co. v. Liberatore (2005) 2005 DJDAR 5458, the Court found that an active duty member of the armed services of the United States was not acting within the scope of his employment when he negligently caused a vehicle accident, despite being on an authorized travel order. Of course the employer was sued for this employee's actions.

The employee, a Command Master Chief in the U.S. Navy, was in Los Angeles on military travel orders authorizing him to make several employment related trips. The travel orders implicitly contemplated that there would be free time. Using a prepaid rental car, the employee picked up a friend and decided to travel with her to State Line, Nevada to gamble and spend the night prior to making his scheduled trips. An accident followed shortly thereafter, in which the passenger was seriously injured and the employee was arrested for driving under the influence. The passenger brought tort claims against the employer for her injuries.

Employers are not responsible when an employee substantially deviates from the employment duties for personal purposes. The employee may have been authorized to enjoy some liberty while fulfilling his duties contemplated by his travel orders, but at the time of the accident he was on a frolic of his own in which he substantially deviated from the employer's purposes. Just because the Navy had no objection to the employee's use of his free time and the prepaid rental car for personal purposes did not render his conduct in this case within the scope of his government employment. Hopefully employers who previously worried about what their employees were really doing when not under the employer's watch can now

breath a sigh of relief when sending an employee on a task involving travel.



**CORFEE STONE WELCOMES**

**CONOR MCELROY**



Conor McElroy joined Corfee Stone & Associates as a Law Clerk in the summer of 2005. He is currently entering his final year as a student at the University of Pacific - McGeorge School of Law. Conor previously interned at the Juvenile Division of the Sacramento County Public Defender's Office where he represented Sacramento County juveniles accused of misdemeanors and felonies. Conor also has prior experience in the concrete and residential construction industry.

Conor earned a Bachelor of Science Degree from the University of Wisconsin - La Crosse in 2003 making the Dean's list as an out standing student. He did this prior to making the trip to Sacramento to attend Law School. Conor also has an extensive construction back ground making him very helpful to our ADA access cases. He was raised in Princeton, WI, a small town in central Wisconsin with a population of roughly 1,500.



**ASHLEY PATTERSON**

Ashley Patterson joins Corfee Stone as our new clerk. She does very many operational tasks here. Her previous law firm experience is well noted. Please welcome her. She may answer your call!

*Catherine M. Corfee is a principal owner of Corfee Stone & Associates, a firm which exclusively represents employers in all facets of employment matters, businesses regarding ADA access and housing discrimination defense.*

*For more information about any of the articles contained in this issue, you may contact Catherine M. Corfee at (916) 487-5441*