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LEGAL NEWSLETTER

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“MENTAL DISABILITY” LAWS DO NOT PROTECT INCOMPETENT WORKERS

Employers Are Not Required to Lower Objective Standards of Performance to Accommodate Claimed Emotional Barriers to Competence

Business owners and personnel managers are occasionally faced with an employee who claims his or her lack of performance stems from a mental disorder listed in psychiatry's roster of afflictions, the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (American Psychiatric Association, 1994) (DSM IV). This article addresses common misconceptions as well as the proper approach to handling such complaints.

In 1986, Estella Lucero was hired as a typist by the County of Sacramento, based on a certificate from a local college that she met the employer's minimum proficiency requirement of 45 words per minute. Shortly after beginning her work, the County determined a one word scoring error brought Ms. Lucero's demonstrated competence to 44

The outcome of the Lucero v. Hart case illustrates a basic principle of disability discrimination law that is lost on a surprising number of employers.

words per minute. The County had Ms. Lucero retake the typing test. This time she scored only 19 words per minute.

A few weeks later, Ms. Lucero notified the County she labored under an “emotional handicap,” a severe stress reaction created by the pressure of taking examinations. While providing a lower

paying clerk position, the employer told Ms. Lucero it would place her as a typist so long as she scored the minimum 45 words on a second retesting. The County allowed her to take the test again at a time of her choice within the next six weeks. Ms. Lucero never returned to work, instead suing the County and several supervisors for alleged mental disability discrimination under federal law.

The outcome of the *Lucero v. Hart* case illustrates a basic principle of disability discrimination law that is lost on a surprising number of employers. Many companies are apparently convinced that once a worker as Ms. Lucero raises a diagnosed mental or emotional disorder as the supposed reason for her subpar performance or disruption in the workplace, the employer must lower its performance or behavior standards for that employee.

FEDERAL AND CALIFORNIA LAW PROHIBIT DISCRIMINATION AGAINST THE PHYSICALLY OR MENTALLY DISABLED:

Employers with 15 or more employees cannot discriminate against applicants or employees with physical or mental disabilities under the Americans with Disabilities Act (ADA), a federal law administered by the Equal Employment Opportunity Commission (EEOC). California companies with five or more employees are prohibited from discriminating against the physically or mentally disabled under the Fair Employment and Housing Act (FEHA), a law

monitored by the California Department of Fair Employment and Housing (DFEH).

Since these protections were created some ten years ago, the federal and California courts have processed a remarkable number of cases testing the limits of the law, including all aspects

The courts have processed a remarkable number of cases over the past decade testing the limits of the law, including all aspects of the definition of “disabled.” Of course, if a person is not legally disabled, he cannot extend these laws to an employer.

of the definition of “disabled.” Of course, if a person is not legally disabled, he cannot extend these laws to an employer.

A person is legally “disabled” under the ADA and FEHA if he or she has (a) “a physical or mental impairment that substantially limits one or more major life activities of such individual (emphasis supplied); (b) a record of such impairment; or (c) being regarded as having such an impairment.” Thus, an individual claiming to be afflicted with a mental disorder must show that this is a

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MEDICARE/MEDICAID FRAUD EXPOSES OFFENDING MENTAL HEALTH PROVIDERS TO BOTH CRIMINAL AND CIVIL LIABILITY

Utah Psychologist Fails to Convince Federal Court that Civil Fraud Action Was “Double Jeopardy” Due to Earlier Criminal Guilty Plea

Individuals seeking and receiving health care – and their insurers – rightly expect integrity, responsible attention, and competence from their providers. The licenses and certifications for doctors and hospitals to practice and operate signify to the public that able and trustworthy help is available. Mental health practitioners and organizations who target patients and insurers for deceptively promoted services and unnecessary and harmful treatments have deliberately abused that public trust. Their lawless acts are perhaps the worst kind of treachery: betrayal in the name of help. And yet, despite publicized settlements of well into the hundreds of millions paid by past perpetrators, the

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The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.

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“mental impairment” and that it “substantially limits one or more major life activities” in order to establish he is actually disabled under the federal law.

MENTAL IMPAIRMENTS ARE NOT NECESSARILY MENTAL DISORDERS PROTECTED BY LAW

The ADA definition of mental impairment includes “[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” Commonly, courts have recognized that a diagnosed condition included in *DSM IV*'s catalog of mental disorders is such an impairment.

It is another question whether that supposed impairment amounts to legal “mental disability” under the ADA. This issue turns on whether the mental condition “substantially limits” the employee (or job applicant) in “one or more major life activities.”

The phrase “major life activities” means “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” “Substantially limited” means that the person's ability to perform a major life activity is significantly lower than *most people in the population*.

But for one critical factor that some companies may overlook, these definitions, strung together, could pose absurd results for employers. For example, a failing employee, in theory, could assert that his or her excessive coffee drinking is a psychiatric illness. *See, DSM IV*, disorder numbers 305.90 (Caffeine Intoxication); 292.89 (Caffeine-Induced Anxiety Disorder); 292.89 Caffeine-Induced Sleep Disorder); and 292.9 (Caffeine-Related Disorder Not Otherwise Specified). Further, the employee could claim that despite his inability to perform on the job, he absolutely cannot be discriminated against because the listed signs of these supposed disorders – including periods of in-exhaustibility, restlessness, nervousness, excitement, rambling flow of thought and speech, flushed face and increased urination –

are substantially limiting the major life activity of “working.”

Fortunately, the Supreme Court of the United States has recently affirmed two critical factors that prevent the workplace destruction that would result from such “logic.”

First, even if an individual is legally disabled, he or she must demonstrate that he is a “qualified individual with a disability.” The Supreme Court has reiterated that a disabled person is only qualified if he or she can perform the *essential functions* of the job with or without reasonable accommodation.

The EEOC considers essential functions to be the “fundamental job duties.” The ADA directs that the EEOC and courts give “consideration... to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for a job, this

While employers certainly must offer reasonable accommodations to any legally disabled worker, the law requires only that companies suggest cost-efficient adjustments that will enable the employee a fair opportunity to meet a defined level of proficiency.

description shall be considered evidence of the essential functions of the job.”

Thus, the Supreme Court has confirmed that if an individual is not otherwise qualified, including the “requisite skill, experience, education and other job-related requirements of the employment position” and who, cannot, “with or without reasonable accommodation... perform the essential functions of such position,” he or she is not protected by the ADA.

Second, in two 1999 decisions – *Sutton v. United Air Lines, Inc.* and *Murphy v. United Parcel Service* – the Supreme Court held that

determination of whether an individual is disabled should be made *with reference* to measures that mitigate the individual's impairment, for example eyeglasses (in the case of airline pilots claiming discrimination for poor eyesight) or stabilizing medication (in the case of truck drivers claiming discrimination for high blood pressure). The Court ruled “a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently ‘substantially limits’ a major life activity.” Such person is thus not disabled under the law and thus not protected against discrimination by the ADA.

Sutton and *Murphy* reversed a ten year trend in the law. Through its published guidelines, the EEOC has for years contended that determination of an individual's legal “disability” should not take corrective measures into account. The Supreme Court rejected that position, observing that the EEOC's standard required the issue to be decided on hypothetical propositions rather than an employee's actual demonstrated performance in the workplace.

COMPANY OBLIGATION TO OFFER REASONABLE ACCOMMODATIONS DOES NOT REQUIRE EMPLOYERS TO LOWER PERFORMANCE STANDARDS

While employers certainly must offer reasonable accommodations to any legally disabled worker – or applicant – who claims he or she requires such consideration to meet essential job requirements, the ADA and its California counterpart, FEHA, require only that companies suggest cost-efficient adjustments that will enable the employee a fair opportunity to meet a defined level of proficiency. Applicable regulations include examples such as “[j]ob restructuring [to eliminate marginal or non-essential duties], reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies... or other similar actions.”

Thus, while an employer might be required to provide a lower key board to accommodate a wheelchair-bound soft-

ware writer, it *need not* lower an objective standard of competence – the ability to meet a computer programming proficiency requirement for instance – to fulfill its duty to reconcile the claimed disability.

Accordingly, when the employer County gave Ms. Lucero a second and then third chance to take the test on a day of her choosing, with a transfer to a vacant position in the interim, it had taken good faith

An employer need not lower an objective standard of competence to fulfill its duty to reconcile the claimed disability.

actions to accommodate her claimed difficulty. The County won the *Lucero* case for its right to define performance standards, even though the worker originally fell short of the minimum per-minute typing requirement by only one word.

EMPLOYERS STILL HAVE DISCRETION TO MANAGE THEIR BUSINESSES

Continuing a 19th Century practice of labeling social and political phenomena in medical terms, the first *DSM*, published in 1952, carried 197 disorders. *DSM IV* specifies nearly 300 disorders. Instead of specifying any scientific means to confirm these named conditions are biologically based “diseases” – because there are no such means – *DSM IV* is merely descriptive of supposedly forbidden or unconventional behavior, no more than a majority vote reflection of what “expert” psychiatrists judge to be deviant, and therefore “pathological” behavior. For this phenomenon, Mark Twain's words were prophetic: “To the man who wants to use a hammer badly, a lot of things look like nails that need hammering.”

While such skepticism is of course no defense to non-compliance with the law, the ADA acknowledges the rights of employers to define the functions and performance standards for the workforce. Thus, the EEOC

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fraud seemingly ingrained in this field shows no sign of slowing.

However, a recent federal district court decision in Utah illustrates that law enforcement, along with private whistle blowers, have powerful criminal and civil tools at their disposal which, if utilized effectively in tandem, may yet begin to turn the tide on the estimated billions of public and private insurance dollars stolen by dishonest practitioners each year.

PSYCHOLOGIST CLAIMS SUCCESSIVE CRIMINAL PROSECUTION AND CIVIL SUIT WERE UNCONSTITUTIONAL "DOUBLE JEOPARDY"

In September 1996, Utah psychologist Gary Sazama was indicted by a grand jury for submitting over 100 false and fraudulent claims to federally funded

Mental health practitioners and organizations who target patients and insurers for deceptively promoted services and unnecessary and harmful treatments represent perhaps the worst kind of treachery: betrayal in the name of help.

insurance programs, including Medicaid. In September, 1997, Dr. Sazama pled guilty to one such false Medicaid claim, agreeing to pay the government a total of \$10,802 in penalties and repayment on stolen funds.

In March, 1998, some six months after the guilty plea, the U.S. Government sued Dr. Sazama and his professional corporation civilly for the same illegal actions under the federal False Claims Act (FCA) and state fraud laws. This time, the government sought triple damages of \$34,137 on the monies stolen plus between \$550,000

and \$1,100,000 in civil penalties.

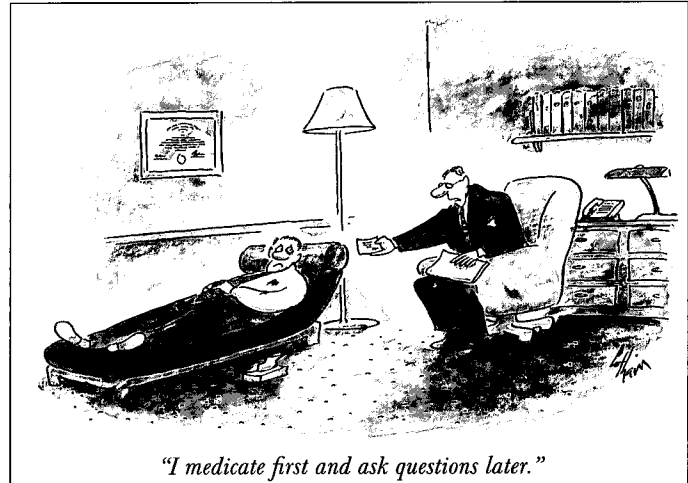
Dr. Sazama cried foul, asserting that the later civil action seeking greater damages amounted to a second, unconstitutional "set-penalty" prosecution for the actions on which he had already pled guilty. In ruling against Dr. Sazama, District Court Judge David Sam relied on the United States Supreme Court's recent direction that civil FCA suits and criminal prosecutions are distinct actions to which the Fifth Amendment protection against "double jeopardy" does not apply. *United States of America v. Sazama (D. Utah, 2000) 88 Federal Supplement, Second Series (F.Supp.2d) 1270, 1273-1274.*

U.S. SUPREME COURT REJECTED SUCH DOUBLE JEOPARDY CLAIM AFTER SAZAMA'S GUILTY PLEA

Interestingly, the Supreme Court decision Judge Sam cited was issued on December 10, 1997, some three months after Dr. Sazama pled guilty and some four months prior to the filing of the civil suit against him. At the time of his guilty plea, another U.S. Supreme Court decision, potentially favoring Dr. Sazama, was on the books.

In *United States v. Halper (1989) 490 United States Reports (U.S.) 435*, the Supreme Court considered the criminal prosecution and subsequent FCA civil suit brought against a New York medical laboratory manager for the same fraudulent claims he submitted to the federal Medicare program. Halper's improper conduct amounted to 65 fraudulent claims for \$12 each, when the actual services rendered should have been billed at \$3 per claim. For a total fraud of \$585, Halper was criminally fined \$5,000 and sentenced to two years in prison.

The government then sued Mr. Halper under the FCA, seeking civil penalties of \$130,000, or \$2,000 for each false claim. When the case reached the Supreme Court, it found the FCA suit amounted to a second "punishment," prohibited under the Double Jeopardy Clause of the Fifth Amendment to the federal Constitution. The Court cautioned that their finding was a "rare" exception, applicable only when a fixed



"I medicate first and ask questions later."

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penalty provision – such as the FCA's \$2,000 per false claim – "subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *490 U.S. at 449.*

Thus, Dr. Sazama, in defending against his post-conviction FCA suit, asserted that when he made his criminal guilty plea in 1997, the 1989 *Halper* decision directed that "the Government could not pursue civil penalties based on conduct for which [he] was punished in the criminal case."

Yet, by the time the govern-

Law enforcement and private whistleblowers have powerful criminal and civil tools at their disposal which may yet begin to turn the tide on the estimated billions in annual insurance fraud.

ment filed that FCA suit in March, 1998, the decision in *Halper* had been largely overruled by the Supreme Court's decision in *Hudson v. United States (1997) 522 U.S. 93*, published on December 10, 1997.

In *Hudson*, three Oklahoma bank officials were sued civilly in 1989 for unlawfully causing financial institutions to provide them with the benefits of certain loans. The officials were fined up to \$100,000 each and later

agreed not to participate in any banking activity without government permission. In 1992, the government indicted these three for criminal violations of federal banking laws.

Raising the *Halper* case, the three individuals in *Hudson* asserted that the second, criminal action was barred as a "double jeopardy" proceeding. Examining the history of the Fifth Amendment's Double Jeopardy Clause, the Supreme Court discredited the *Halper* decision as an "ill considered" deviation and reaffirmed that the "Clause only protects against the imposition of multiple criminal punishments for the same offense." *522 U.S. at 98-99, 101-102.*

PSYCHOLOGIST'S GUILTY PLEA CONSTITUTED NEARLY AUTOMATIC CIVIL LIABILITY

Just as the government could sue civilly as well as prosecute criminally the three bankers in *Hudson*, Dr. Sazama exposed himself to successive criminal indictment and civil FCA litigation when he submitted phony claims to government-funded insurance programs. It also did not help his FCA defense that he had previously acknowledged in his criminal plea that the agreement did not bar any later civil claim.

Further, and however unknowingly, Dr. Sazama sealed his unequivocal liability to triple FCA damages when he pled guilty to criminal insurance fraud on the same conduct. A part of the FCA states that "a final judgment rendered in favor of the United States in any crim-

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recognizes that the law "is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, not to require employers to lower such standards."

The lesson of the *Lucero* decision is that companies need not get lost in the semantic bind between illegal disability discrimination and proper personnel management. Employers can reduce needless claims to a minimum (a) by articulating in writing and regularly updating the essential functions and the quantity and quality standards for each employment position; (b) by attaching such job descriptions to employment applications so that applicants, including future employees, are on notice of company standards from their first contact; and (c) by managing personnel through case-by-case application of those written functions and standards, not through the stereotyping of any and all persons by arbitrary psychiatric labels placed on their behavior. ■

FRAUD

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inal proceeding charging fraud or false statements... shall [bar] the defendant from denying the essential evidence of the offense in any action which involves the same transaction as the criminal proceeding..." 31 U.S. Code (U.S.C.) § 3731(d). As the government asked rhetorically in its papers to Judge Sam, "For what purpose did Congress write [section 3731(d)] if not to apply to subsequent civil prosecutions of those previously convicted?"

EFFECTIVE CRIMINAL AND CIVIL ACTIONS CAN DETER THE RISING TIDE OF MENTAL HEALTH FRAUD

Reports of rampant fraud in the mental health field continue at a steady pace. Among them was the late-1998 Office of the Inspector General (OIG) review of community mental health centers, finding that the facilities audited in five states submitted some \$229,000,000 in false claims – about 91% of the total; the worst fraud rate in Medicare

history – for so-called "partial hospitalization" services in one recent 12 month period, including billings for "therapy" consisting of watching television and playing bingo.

Simultaneously, successful criminal prosecutions of offending mental health practitioners are on the rise. In 1999, 160 psychiatrists and psychologists nationwide were convicted and jailed for crimes ranging from patient brokering, the illegal possession and selling of drugs to murder, with 66% of the crimes being for fraud and 24% for sex crimes committed against patients.

Sazama of course confirms that the same facts precipitating indictments of psychiatrists and psychologists are not merely grounds for initiating a civil FCA suit. Under the FCA's section 3731(d), those facts, when established in the criminal action, *virtually assure* government prosecutors and private whistle blowers – members of the public who are direct and independent witnesses to federally funded fraud – favorable triple damage judgments in a later civil suit.

With *Sazama* as a model, concerned individuals from the private and public sectors can bring effective, coordinated criminal and civil actions against offending mental health practitioners and their organizations on the orders of magnitude necessary to create a true deterrent and actual reform in this scandal-ridden corner of health care. ■

FIRM WEBSITE COMING SOON

We are looking forward to the firm's finally joining the latter part of the 20th Century with our upcoming website, currently under development with Martindale Hubbell's "lawyers.com." By July, 2000 latest, Internet users will be able to find us at www.lawyers.com/tbowles. We plan to regularly place articles and other useful information on the site regarding our concentrations in employment law and health care fraud. Your comments on review of the site will be appreciated. ■