

Law Report

LEGAL NEWSLETTER

VOLUME 7, ISSUE 4

CYBERSEX 'ADDICTION' *Brave New World Workplace Disability for the 21st Century*

"It's no wonder that truth is stranger than fiction. Fiction has to make sense." —Mark Twain.

It has become perhaps too easy to poke fun at psychiatry. There is absurdity in Mental Health's straight-faced labeling of common behaviors as mental illness. The most recent revision of the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV)* has designated as diagnosable mental "disease" everyday activities such as coffee drinking ("caffeine intoxication," no. 305.90), snoring ("breathing-related sleep disorder," no. 780.59), low scores in addition, subtraction, multiplication ("mathematics disorder," no. 315.1), and childhood fidgeting ("attention deficit/hyperactivity disorder," no. 314.01). See, "Is Psychiatry Junk Science?" *Bowles Law Report*, volume 6, issue 3 (August, 2005). Now some psychological pioneers have embarked on a quest to establish "compulsive Internet overuse" as the newest emotional impairment worthy of protection by the Americans with

Disabilities Act. See Holohan, Catherine, "Virtually Addicted," *BusinessWeek.com* (December 14, 2006).

Fired "Internet Sex Addict" Sues IBM for Disability Discrimination: James Pacenza is currently suing his former employer IBM over alleged workplace mistreatment. His court papers tell an interesting story.

Pacenza, a Vietnam War veteran, says he "self-medicated" his post traumatic stress disorder with Internet chat rooms

Mr. Pacenza worked at IBM's Fishkill, New York, manufacturing facility for over 19 years. He operated one of IBM's calibration machines that measured thickness and detected irregularities of silicon wafers used to make computer chips. Periodically, Mr. Pacenza's machine performed brief automated tasks, leaving him idle.

On May 28, 2003, while the machine was automat-

ing, Pacenza used the IBM-issued computer at his workstation to enter an online chat room. After viewing graphic conversation about various sex acts, he left his workstation to relieve another employee for lunch, forgetting to exit the website.

Shortly thereafter, one of Pacenza's co-workers used the same computer, observed the extremely graphic chat room dialogue, logged out of the website and reported the incident to Pacenza's manager. That complaining employee described the chat session as "pornographic," "offensive," and "sexual in nature." The manager met with Pacenza later that night and informed him that his co-worker saw pornography on Pacenza's computer monitor. Although he admitted he had accessed the chat room, Pacenza argued that the chat room dialogue was not pornography because it did not contain pictures or photographs.

Despite Pacenza's protests, IBM fired him the next morning. In response, Pacenza requested an inter-

Please see "CYBERSEX" page 2

SEXUAL HARASSMENT SEMINARS

Sexual Harassment Seminars Available for All Employers

Visit our website at www.tbowleslaw.com to find times and schedules of our current seminars. We have tentatively scheduled another sexual harassment seminar for May 18, 2007, in Pasadena, California. Please contact our office soon if you are interested in attending this seminar; act now before we sell out. Alternatively, we will travel to your company to conduct in-house seminars at your convenience. Please call for a reasonably priced quote.

All supervisors in companies with 50 or more employees or independent contractors must receive this mandatory sexual harassment training every other year. For any person hired as or

Please see "HARASSMENT" page 4

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.

LAW OFFICES OF TIMOTHY BOWLES, P.C.

ONE SOUTH FAIR OAKS AVE., SUITE 301, PASADENA, CA 91105 • TELEPHONE: (626) 583-6600 • FAX: (626) 583-6605
tbowles@tbowleslaw.com • www.tbowleslaw.com

“CYBERSEX”

Continued from page 1

nal company appeal of his termination. He asserted he was addicted to Internet chat rooms and, if he had been an alcoholic or drug addict, IBM would have given him help instead of firing him. Pacenza also stated he was a cybersex addict because, as a Vietnam War veteran, he suffered from post-traumatic stress disorder recently triggered by the Iraq war, for which he needed psychotherapy and psychiatric medication. He described himself as “self-medicating” his “survivor’s guilt” with alcohol and Internet chat rooms. IBM denied Pacenza’s request for a company appeal.

Pacenza Seeks \$5 Million in Damages from IBM: On July 27, 2004, Pacenza filed a lawsuit against IBM in federal court in New York, alleging (i) disability discrimination in violation of the Americans with Disabilities Act; (ii) age discrimination and (iii) violation of New York anti-discrimination law.

IBM claims Pacenza never asked for a reasonable accommodation for any of his claimed disorders or addictions

Pacenza alleged IBM gave other employees with drug or alcohol problems access to treatment programs and a “second chance.” He stated that IBM did not terminate an intoxicated IBM employee who killed someone in a car accident, nor did IBM terminate another IBM employee who entered

Alcoholics Anonymous after receiving several DUIs. He also claimed that IBM transferred, rather than fired, two IBM employees who had sex on an IBM desk. He reasoned that IBM fired him instead of reprimanding him because of his age and his perceived war-related disability and that if he had been younger and disability-free, IBM would not have terminated him.

He alleged that at most IBM should have reprimanded him for taking an unauthorized work break, but IBM fired him due to his undesirable psychological disability. Pacenza requested damages in excess of \$5 million. He requested at least \$3 million for lost wages and at least \$2 million for mental and emotional distress. He also requested punitive damages, liquidated damages on his age discrimination claim, injunctive relief, attorneys’ fees and court costs.

IBM Urges Court to Throw Out Pacenza’s Lawsuit: In December, 2006, IBM filed a motion to throw out Pacenza’s lawsuit for failing to make an adequate case on disability or age-based discrimination.

IBM argues that Pacenza’s post-traumatic stress disorder was not a disability under the Americans with Disability Act (ADA), a federal law administered by the Equal Employment Opportunity Commission (EEOC), because it did not substantially impair a major life activity (such as walking, seeing or breathing). Under the ADA, employers with 15 or more employees cannot discriminate against applicants or employees with physical or mental dis-

abilities. A person is legally “disabled” under the ADA 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 under the ADA must show that this is a “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.

Moreover, even if Pacenza’s so-called post-traumatic stress disorder met the ADA definition, IBM believes it did not discriminate against him because of this so-called disability. Similarly, IBM argues Pacenza could not show his age was a factor in IBM’s decision to terminate him, as the company did not replace him with a younger employee and as Pacenza admitted that no IBM executive made any age-related comments that could lead him to conclude IBM terminated him because of his age.

IBM’s motion papers describe three of its relevant company policies prohibiting employees from visiting sexually explicit Internet websites: its computer usage, anti-harassment and business conduct guidelines policies. The computer usage policy prohibited “the use of IBM assets to access sites others are likely to find offensive such as Web sites with sexually explicit content or that encourage intolerance for others.” The anti-harassment policy stated that a “hostile work environment can be created by

such things as...offensive material” and the policy “prohibits in its work environment not only harassment but also inappropriate conduct.” IBM’s business conduct guidelines stated that “IBM will not tolerate sexual advances, actions or comments or racial or religious slurs, jokes or any other comments or conduct in the workplace that creates, encourages or permits an offensive, intimidating or inappropriate work environment” and that it is “inappropriate to use IBM systems to visit Internet sites that feature sexual content, gambling, or that advocate intolerance of others. It is also inappropriate to use them in a manner that interferes with your productivity or the productivity of others.”

IBM provides its employees with annual sexual harassment training.

Pacenza admitted he understood visiting sexually based Internet chat rooms violated IBM policies

Pacenza received in-person sexual harassment training ten months prior to the May, 2003 incident. Four months prior to the incident, he certified he reviewed IBM’s business conduct guidelines. He also admitted in his deposition that he understood visiting Internet chat rooms and turning them into sexually themed conversations violated IBM policies, including the above-mentioned harassment and Internet usage policies.

According to IBM, it had reprimanded Pacenza

Please see “CYBERSPACE” page 3

"CYBERSPACE"

Continued from page 2

in January, 2003 for the same offense. At that time, one of his co-workers observed him visiting graphic and pornographic Internet sites while operating the calibrating machine. Pacenza's supervisor confronted him and Pacenza admitted he had accessed the websites in question and stated he had a problem with pornography and adult chat rooms. Pacenza stated he did not need any help with this problem and he acknowledged that if he did this again he could lose his job. IBM argues it could rely on Pacenza's statements that he understood he should not visit adult chat rooms at the workplace.

IBM's papers also point out it has fired other employees who had engaged in similar misconduct, including four who had sent an inappropriate sexual message on IBM's computer system. Pacenza's supervisor stated that to his knowledge IBM fired every employee at the Fishkill facility who was found to have visited inappropriate websites.

IBM acknowledges Pacenza had appealed his termination utilizing IBM's internal appeals process. However, IBM determined there was no basis for an appeal because Pacenza admittedly violated company Internet use policy, which was the reason for his discharge.

IBM points out that at no time prior to the May, 2003 incident did Pacenza inform his supervisor that he suffered from post-traumatic stress disorder or that he "self-medicated" this disorder by visiting Internet chat rooms for sexual experiences.

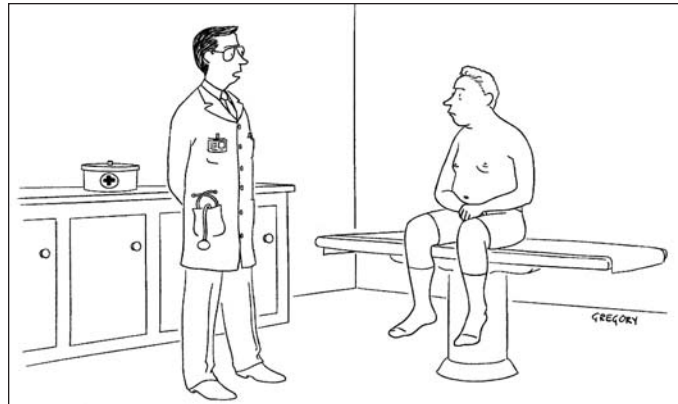
Pacenza never asked for a reasonable accommodation or for any help in dealing with any of his disorders or addictions.

IBM argues that Pacenza cannot establish a case of disability discrimination because: (a) he was not disabled within the ADA's interpretation; and (b) he cannot provide any evidence of discriminatory conduct. IBM cites cases establishing that people suffering from post-traumatic stress disorder are not necessarily disabled under the ADA if such disorder does not impact a major life activity. Here, Pacenza alleged his disorder negatively affected his ability to socialize, which the ADA does not define as a major life activity. Pacenza also alleged difficulty sleeping occasionally. Although sleeping is a major life activity, IBM argues occasional trouble getting to sleep or sleeping fitfully is not tantamount to being substantially limited in this activity. IBM also points out that the ADA explicitly excludes sexual disorders from its protection.

Pacenza alleges IBM fabricated pretextual reasons for terminating him

IBM also challenges Pacenza's allegations of discriminatory intent. Mr. Pacenza testified in deposition he did not believe his supervisor had discriminated against him because of his so-called disability. IBM points out there was nothing in the record to even suggest disability discrimination against Pacenza.

IBM's papers also elaborate on its legitimate,



"Your infection may be antibiotic-resistant, but let's see how it responds to intensive litigation."

© 2007 The New Yorker Collection from cartoonbank.com. All Rights Reserved.

non-discriminatory reason for terminating Pacenza, citing cases confirming that violating company policy is a bona fide, non-discriminatory reason for discharging an employee. IBM also cites cases that establish violating a company's computer use policy is likewise a legitimate, non-discriminatory reason to terminate an employee.

Pacenza Says IBM Singled Him Out Due to His Perceived Mental Health Condition: In Pacenza's opposition to IBM's motion, he elaborates on his alleged post-traumatic stress disorder to show it indeed limits his major life activities. He states that he suffers from severe psychological disabilities arising from childhood sexual abuse and that he is thus addicted to "alcohol, food, sex and the Internet." He claims recurring sexual impotence, difficulty interacting with others, and suicidal tendencies.

Pacenza argues IBM had not actually fired any other employee for similar Internet usage. He asserts that only after reviewing his confidential medical health information, which included approved leave for two separate psychiatric

hospitalizations, did IBM decide to fire him due to his perceived mental health condition. Pacenza claims IBM's citation to his violation of IBM's computer use and harassment policies is to conceal its unlawful intent and fabricated pretextual reasons to terminate him. Pacenza asserts he "had a record of disability with IBM, informed his manager of his [post-traumatic stress disorder-caused] addictive limitation (being a recovering Internet sex addict) and as a result, when 'caught' in a minor rules violation (if a violation at all), [Pacenza] was given an immediate termination, singling out [Pacenza] for punishment of unprecedented harshness, for lawful Internet use (no civil or criminal law was violated), and then denied the right to an internal appeal (including an impartial 'panel review') purportedly enjoyed by all IBM employees."

Pacenza also claims he did nothing unlawful by visiting a chat room as he did not personally write or engage in graphic chat conversations that happened to be streaming in from the website, and the co-worker who discovered

LAW OFFICES OF TIMOTHY BOWLES, P.C.

ONE SOUTH FAIR OAKS AVE., SUITE 301
PASADENA, CA 91105

ADDRESS SERVICE REQUESTED

Prsrt. Std
U.S. Postage
PAID
Glendale, CA
Permit No. 61

IN THIS ISSUE

Cybersex "Addiction"

*Sexual Harassment
Seminars*

"CYBERSEX"

Continued from page 3
the chat conversations should not have been read- ing material on Pacenza's computer monitor, thus violating Pacenza's privacy. Pacenza believes the reporting coworker, who was 25 years younger than Pacenza, reported him due to a personal age-based animus against Pacenza, and that IBM was happy to terminate Pacenza and distribute his duties to his much younger co-workers.

Pacenza asserts that IBM had a legal obliga- tion to provide a special accommodation for his impairment (i.e., his per- ceived Internet addiction), such as (i) forgiveness regarding his Internet use; (ii) implementing some form of progressive disci- pline or (iii) removing or limiting his Internet access

as his job description did not require him to access the Internet. Pacenza includes as an exhibit an article on "Internet addic- tion" and asserts that IBM knew about this "growing workplace phenomenon."

Employers can and should take common-sense steps to head off disability claims

Conclusion: The judge will not rule until this sum- mer whether IBM failed to take steps to accommodate "Internet misuse" as a legiti- mate addiction, akin to drug or alcohol dependency. Regardless of the outcome, employers can and should take common-sense steps to head-off such claims:

- Limit workplace Internet access to business purposes only and install on-line filters to block employee access to adults- only websites;
 - Implement and update sound written policies on computer usage and anti- harassment and have employees acknowledge receipt and understanding of these policies in writing;
 - Enforce company poli- cy on Internet access and usage uniformly among all employees; and
 - Encourage open dia- logue between manage- ment and workers on workplace conditions, with managers aware of com- pany obligations to receive, understand and seek reasonable accommoda- tions to any employee dis- ability-related concerns.
- When in doubt over dis-

ability and accommoda- tion issues or when encountering an employee complaint raising un- precedented views, an employer should consult with legal counsel for further guidance. ■

"HARASSMENT"

Continued from page 1
promoted to supervisor, the employer must provide training within six months of the hire or promotion. Fair Employment and Housing Act (FEHA), California Government Code section 12950.1. For those of you coming up on your two-year retraining requirement, please con- tact our office for preferred scheduling of your next training seminar, which will include updated case law, as well as new quizzes and practical scenarios. ■