

# COOK BROWN, LLP

Attorneys at Law

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Representing Management in Labor and Employment Law

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## Reading Determined to be a “Major Life Activity” under the ADA

By Kelley S. Kern

The Americans with Disabilities Act (“ADA”) provides generally that no covered entity may discriminate against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. The ADA defines a disabled employee as one who (1) has a physical or mental impairment that substantially limits one or more of his or her major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2).

It is often difficult for employers to know what are classified as “major life activities.” Federal regulations describe major life activities under the ADA as including functions such as “caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working.” 1 C.F.R. 4.57.103. To be a major life activity, the activity need not be essential to survival, but rather “of central importance to most people’s daily lives.”

In a recent case decided by the 9<sup>th</sup> Circuit Court of Appeals, a plaintiff brought a disability discrimination action against

his former employer, claiming that he suffered from depression and bipolar disorder. In connection with his claim, the plaintiff indicated that he had trouble reading. Specifically he stated that he could not read for more than three to five minutes at a time, and that if he looked at written material for too long, things got “jumbled in [his] mind.” The court found that since sleeping, interacting with others and thinking are major life activities, reading should fall into that category. The court stated, “the ability to read is necessary in many instances to perform major life activities such as caring for oneself, learning, and working. As such, it is of central importance to most people’s daily lives. To be sure, a person will not die merely because he or she cannot read, but that is not the standard. The fact that reading is of comparative importance, and that it is central to most people’s daily lives, establishes that reading is a major life activity.” Head v. Glacier Northwest Inc. 413 F.3d 1053, 1062 (9<sup>th</sup> Cir., 2005).

Although the ADA requires that a physical or mental impairment substantially limit a major life activity, California’s Fair Employment and Housing Act (“FEHA”), requires only that a physical or mental disability ‘limit’ a major life activity. Therefore it can be easier for an individual

“Reading” Continued from Page 1...

seeking protection under FEHA to qualify as having a



disability than it is under the ADA. To date, California courts have not expressed an opinion under FEHA as

## Heat Illness Regulations

By *Lisa V. Ryan*

In response to recent workplace deaths caused by heat-related illnesses, the California Occupational Safety and Health Standards Board promulgated regulations last summer applying to all work outdoors where environmental risk factors for heat illness are present. On December 20, 2005 the emergency regulations were readopted for a second 120-day period with the stated objective to “significantly reduce both the frequency and the severity of occupational heat-related illness in all outdoor places of employment.”

Employers are now required to provide employees access to shade and sufficient quantities of drinking water. Additionally, the regulations require employers to train supervisors and foremen to recognize heat stress disorders and encourage workers to wear appropriate clothing and to use sunscreen, hats and sunglasses. These standards apply in all outdoor places of employment at those times when the environmental risk factors for heat illness are present.

For example, each construction employee working in the heat must have a minimum of one quart of drinking water per hour available to them, e.g., two gallons per employee for an eight-hour shift, to replace water lost by sweating. This means there must always be a sufficient quantity of water present and readily accessible to allow every employee to consume at least one quart of water per hour. Any water supply procedure that depends on replenishment during the work shift will be out of

to whether “reading” qualifies as a major life activity. However, given that it is easier to meet the disability standard under California law than it is to meet the “substantially limits” standard under federal law, it is likely that a California court would also find that reading limits a major life activity.

Courts have the ability to interpret disability laws more broadly than expected, employers should avoid dismissing an employee’s condition as failing to satisfy the “major life activity” threshold without first consulting with legal counsel. If you have any question about this or other disability issues, call your attorney at Cook Brown, LLP to discuss the situation.

compliance if it is not reliable. Employers will also be out of compliance if, at any time, no drinking water is available to employees, or if their practice is to wait until the water vessel is empty to replenish it.

The employer is also required to provide access to shade for those employees who believe they need a preventive recovery period from the effects of the heat and any who actually exhibit indications of heat illness. Access to the shade must be permitted at all times, and the employee must be permitted to remain in the shade for a period of at least five minutes, for recovery purposes.

For more information about these emergency regulations, or other OSHA issues, please contact Cook Brown, LLP. ■



## Test for “Just Cause”

By Ronald W. Brown

Many employers have wisely adopted a written policy of “at-will” employment. Such a policy provides that either the employer or the employee may terminate the employment relationship at any time, for any reason or no reason. An effective at-will policy will foreclose any lawsuit for breach of an express or implied employment agreement. However, an “at-will” policy will not prevent a former employee from bringing an action against the employer for a wide host of other claims, such as unlawful discrimination, retaliation or termination in violation of public policy. In these types of claims, an employer will frequently be required to defend its termination or disciplinary action by demonstrating “just cause.”

1. The basis for discipline does not violate any statute or public policy (federal, state or local).
2. Does the employee know and understand the rule and the possible disciplinary consequences of violating the rule?
3. Is the company’s rule necessary for the orderly, efficient and safe operation of the business?
4. Did the company investigate to determine whether the employee actually violated the rule? This includes investigating the employee’s statement of defense.
5. Was the company’s investigation conducted fairly and objectively?

Employers covered by collective bargaining agreements are also typically required to demonstrate “just cause” for any disciplinary action involving a covered employee. Accordingly, employers are cautioned against taking any type of disciplinary action until all the facts and evidence are considered. Before you administer disciplinary action, you should be able to receive a “yes” answer to each of the following questions. When the “yes” answers to some questions are strong, and the “no” answers are weak, a reduced form of disciplinary action may be justified. Employers who can answer “yes” to each of these questions should be able to successfully defend against any challenge to the propriety of disciplinary action.■

6. During the investigation, did the company obtain substantial evidence or proof that the employee was guilty?
7. Has the company applied its rules and discipline fairly and consistently to all employees?
8. Will the degree of discipline be reasonably related to the seriousness of the proven offense as well as the employee’s length of service and work record?
9. Has the employee been honestly informed of the reasons for discipline (applies to all termination decisions)?



*Save The Date • Save The Date • Save The Date*

**Construction Industry Labor and Employment Law Update Seminar**

**April 13, 2006  
8:30 a.m. to 12:30 p.m.  
Registration begins at 8:00 a.m.  
Hilton-Sacramento  
Arden West**

Cook Brown will be presenting its Construction Industry Labor & Employment Law Update seminar. Do not miss this comprehensive program oriented toward labor and employment issues effecting the construction and related fields!

For further information or registration, contact Tracy McCabe at 916-442-3100 or [tmccabe@cookbrown.com](mailto:tmccabe@cookbrown.com), or download the registration form from Cook Brown’s website at [www.cookbrown.com](http://www.cookbrown.com).

## Practical Tips for Smart Businesses

The California Labor Commissioner recently withdrew its proposed regulations regarding meal and rest periods leaving California employers in a quandary over what rules now apply regarding lunch periods. Employers are still required to follow the applicable sections of the IWC Wage Orders with regards to meal breaks. Non-exempt employees who are scheduled to work more than 5 hours in a day must be provided with at least one 30-minute unpaid meal break. The employer is held accountable to ensure the employee takes the meal break and that he/she documents the time of day the meal break was taken. Employers should not take it upon themselves to later alter an employee's time card to notate the meal period as that may create credibility issues with the Labor Commissioner. Employers cannot allow employees to "skip" lunch in order to leave early at the end of the day without the risk of penalty. Meal period waivers and on duty meal period agreements are narrow exceptions to this rule which are subject to strict legal guidelines. It is crucial that employers use a time clock or some form of rigid time manager to capture meal break time entry as the Labor Commissioner will impose a penalty of one additional hour of pay for each day an employee is denied a meal period in addition to any overtime liability. ■

## Calendar of Upcoming Events

### March 23, 2006 - Sacramento, CA

Breakfast Forum

Employment Recordkeeping and Retention Requirements

Presented by Carrie E. Bushman, Esq.

9:00 a.m. - 10:15 a.m. (Registration begins at 8:30 a.m.)

Location: Holiday Inn - Capitol Plaza

300 J Street, Sacramento CA.

For further information or registration, please contact

Tracy McCabe at 916-442-3100 or [tmccabe@cookbrown.com](mailto:tmccabe@cookbrown.com)

### April 13, 2006 - Sacramento, CA

Construction Industry Labor & Employment Law Update

Presented by Cook Brown, LLP

8:30 a.m. - 12:30 p.m. (Registration begins at 8:00 a.m.)

Location: Hilton - Sacramento Arden West

2200 Harvard Street, Sacramento, CA

For further information or registration, please contact

Tracy McCabe at 916-442-3100 or [tmccabe@cookbrown.com](mailto:tmccabe@cookbrown.com).

This Newsletter is designed to provide general information about the subjects discussed and should not be construed as legal or professional advice or opinion. Readers are urged to consult counsel regarding their own special legal questions or concerns.



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