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The Chronicle

A Newsletter by Landrum & Shouse LLP

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Special Points of Interest

- Offices in Lexington and Louisville
- Statewide coverage
- 30 Attorneys
- 16 Partners
- 18 AV-rated lawyers

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Kentucky Workers' Compensation Credit for Company Sponsored Disability Plan

By: Mark J. Hinkel

KRS 342.730(6) grants the employer an offset against income benefits for benefits paid under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by workers' compensation law - - except where the employer-funded plan contains an internal offset provision for workers' compensation benefits, which is inconsistent with the statute.

The Kentucky Supreme Court has recently construed this statute in *UPS Airlines v. West*, 366 S.W.3d 472 (Ky. 2012), to apply even if the benefit plan was the product of a collective bargaining agreement.

Previously, the Kentucky Supreme Court had construed a similar statute in *GAF Corporation v. Barnes*, 906 S.W.2d 353 (Ky. 1995) as holding that when a disability benefit is the product of a collective bargaining process, it is not entirely company-sponsored and therefore, a credit for disability benefits is not given against workers' compensation benefits. However, the Court determined that the present version of KRS 342.730(6) was enacted in an apparent response to the Court's holding in *GAF v. Barnes*, and therefore, even in light of a collectively bargained benefit, the employer is entitled to the offset.

In the *UPS* claim, the employer paid the entire premium for the disability plan which entitled its pilots to receive 66 2/3% of the member's pay for up to 20 pay periods if the member was unable to qualify for work. This particular plan contained no internal offset that required a pilot who received workers' compensation benefits to reimburse UPS for the loss of the ability to fly.

In construing the present statute, the Court held its purpose is to avoid a duplication of income replacement benefits with respect to injuries that occur after the enactment of KRS 342.730(6) and permit private contractual benefits that duplicate the benefits awarded under the Workers' Compensation Act to offset.

The Court ruled that income benefits paid under a private plan duplicate income benefits awarded for the same disability under the workers' compensation statute only to the extent that they overlap the statutory benefit, i.e., only to the extent they are less than or equal to the workers' compensation benefit; cover the same period of time; and are not themselves offset by the receipt of benefits under the workers' compensation law.

Thus, where a company-sponsored plan pays weekly benefits greater than the maximum workers' compensation benefit, the employer does not get a credit for that excess payment against its workers' compensation liability.

The Court also held that consistent with the statute, all income benefits otherwise payable includes a credit against future, as well as past due income benefits, due to an overlap with private benefits. However, it does not allow an overpayment of voluntary TTD benefits to offset the worker's future income benefits. In other words, if the employer has paid excessive TTD benefits, it cannot get a credit against future income benefits.

Stated plainly, KRS 342.730 (6) entitles an employer to credit disability or sickness and accident benefits that it funds exclusively against its liability under KRS 342.730(1) for overlapping past due or future income benefits that are based on the same disability. It does not entitle an employer to credit the overpayment of voluntary income benefits [TTD] against future income benefits.

Caution should be exercised in this area. Employers should consult their short-term and long-term disability benefit policies to be sure that they set themselves up to get this credit. Most such policies exclude work-related injuries. Yet, many "injuries" are alleged to be work-related but contested or denied. Thereafter, short-term and long-term disability benefits are often paid and yet later, an Administrative Law Judge may determine that the injury actually was work-related. If your plan says you do not get a credit for work-related injuries, you may set yourself up not to get a credit when the Judge finally determines that the injury actually was work-related. **Employers should be certain to get a pay back agreement from any claimant indicating that if their claim is determined to be work-related and they receive workers' compensation benefits, they agree to pay back the short-term or long-term benefits from any workers' compensation benefits paid or payable.**

Landlord Liability for Tenant's Dog

By Hilary M. Jarvis

Recently in Benningfield v. Zinsmeister, 367 S.W.3d 561 (Ky. 2012), the Kentucky Supreme Court held that a landlord can be considered an "owner" of, and thus subject to strict liability for, a tenant's dog that causes injury while on or about the leased property.

Prior to the Court's ruling, there was conflicting law on the issue. The argument in favor of liability rested on the statutory language of KRS 258.235(4) and KRS 258.095(5). KRS 258.235(4) applies strict liability on the dog's owner for any damage caused by the dog. The term "owner" is defined in KRS 258.095(5) as "every person having a right of property in the dog and every person who keeps or harbors the dog, or has it in his care, or *permits it to remain on or about premises owned or occupied by him."* KRS 258.095(5)(emphasis added). Under the statutory language, a landlord could be included in the definition of "owner" for permitting the dog to stay on the premises.

However, the Court in prior cases did not interpret KRS 258.095(5) to include landlords. In McDonald v. Talbott, 447 S.W.2d 84 (Ky. 1969), the Court stated that a landlord is not liable for damages caused by a tenant's dog. However, the Benningfield Court noted that the McDonald Court was not examining the question of ownership of the dog. Although KRS 258.095(5) was in effect at the time of the McDonald decision, the opinion did not discuss it or its application on landlords. Instead, the McDonald opinion was based on general propositions regarding landlord liability. Therefore, the Benningfield Court did not feel bound by the holding in McDonald. See 367 S.W.3d at 566.

Instead, the Court focused on the statutory language to determine whether a landlord is considered the dog's owner for purposes of liability. The court reasoned that "the statute is clearly part of a scheme to displace or abrogate the common law rule on dog-bite liability in part to expand liability, presumably to create incentives for various actors to take steps to reduce the chances of dog bites." 367 S.W.3d at 566. Since landlords "who are more likely to be responsible and to foresee future problems than many tenants," the Court found including landlords in the definition of "owner" was consistent with the statute. Id.

However, the Court limited the liability of a landlord to those injuries that occur on or about the leased property. The Court recognized that considering a landlord to be the statutory owner forever, regardless of where the dog roams, would give rise to "absurd consequences." Id. at 567. However, the Court was also uncomfortable with limiting liability at the property line, where injuries occur just inches outside the property line. Since KRS 258.095(5) includes the language "on or about the premises", the Court favored that interpretation of the limit to liability. The Court interpreted that language to mean "a landlord is only an owner when the dog is within the landlord's permission, that is, when it remains on or about the premises." Id. at 568. The Court then defined the phrase "on or about" to mean "on the property or so close to it as to be within immediate physical reach." Id.

The Court would not go as far as extending liability to the owner of property on which the dog is temporarily permitted. It used the example of a public park. The Court held that "where ownership is premised on permission for the dog to remain on property, there must be an element of tenancy, even for a short period of time, and not simply a passing use of the property." Id. at 569.

This decision will have a broad impact on landlords, tenants (their dogs), and property insurers. Even if the landlord has no knowledge of the condition or temperament of a tenant's dog, mere permission to keep the dog on the premises could give rise to potential strict liability on the landlord.

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A Glimpse into the ADAAA

By: Amber K. Knouff

In 2009, Amendments to the ADA were enacted to overrule the Supreme Court precedent that held (1) the ADA must be "interpreted strictly to create a demanding standard for qualifying as disabled," (2) an impairment is not substantially limiting unless it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives," and (3) an impairment that is corrected by mitigating measures is not one that "substantially limits" a major life activity. *See Toyota Motor Manufacturing, Kentucky Inc. v. Williams, 534 U.S. 184, 197-98 (2002); Sutton v. United Air Lines Inc.*, 527 U.S. 471, 482-83 (1999). However, it was not until March 25th, 2011 that the EEOC published final regulations implementing these amendments. As a result, we are just now starting to see how Courts will interpret the ADAAA and just how much this standard has been broadened.

Under the ADAAA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Although this definition does not differ significantly from the original Act's language, the scope of these protections has been notably altered and expanded. Through the Amendments, Congress has stated that "the definition of disability in this chapter shall be construed in favor of broad coverage of individuals" and "the term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments." 42 U.S.C. § 12102 (4)(A) and (B). A few of the most significant changes evidenced by the ADAAA include the following: (1) a person may have a disability even if he or she has an impairment that substantially limits only one major life activity; (2) a person may satisfy the "regarded as" prong even if the impairment doesn't limit or isn't perceived to limit a major life activity; (3) impairments need not have an expected duration longer than six months to constitute a disability; and finally (4) the determination of whether an impairment substantially limits major life activity is to be made without regard to the ameliorative effects of mitigating measures. Therefore, the question for employers is how these Amendments have altered its obligations in handling accommodations requests from employees who claim to have a disability covered under this Act. The short answer is employers should proceed more cautiously in dealing with these requests than they may have before these Amendments were enacted.

The ADAAA has essentially shifted the primary focus of ADA cases from whether an individual's impairment substantially limits a major life activity to whether the covered entities have complied with their obligations and whether discrimination has in fact occurred. This shift is evidenced by recent case law although courts have differed in the extent to which they will swing the pendulum in favor of employees. On one side, as evidenced by *Gesegnet v. J.B. Hunt Transport, Inc*, 2011 WL 2119248 (W.D. Ky. May 26, 2011), the Court held that although it had significant doubts about whether the claimant could establish a disability by normal standards, given Congress' intended broad definition of disability, the Court would *assume* he had a disability under the ADAAA.

Several months later, however, the same Court found in *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653 (W.D. Ky. 2012), that even under the considerably broadened standards of the ADAAA, an employee still must show his or her impairment substantially limits his or her ability to perform a class of jobs as compared to most people having comparable training, skills, and abilities. Therefore, because the nurse in the *Azzam* case could not show her overtime restrictions prohibited her from finding a comparable nurse position at an institution that did not require such on call commitments, she did not have a disability afforded protection under the Act.

As the scope of these Amendments has yet to come to complete fruition, it is uncertain just how Courts will interpret these Congressional changes to the ADA. However, one thing for certain is that Congress has cast a larger net allowing this Act's protection to encompass individuals who were previously not afforded its protection. Therefore, employers are wise to proceed cautiously in handling accommodation requests from employees who claim to suffer from a disability, as just how broadly courts will construe these Amendments has yet to be seen.

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Let us ring the bell for your success.

Welcome to The Chronicle, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

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Congratulations and Upcoming Events

Congratulations to Pierce W. Hamblin on being recently named one of the Top 10 Attorneys in Kentucky for 2012 by Super Lawyers.

Congratulations to Larry C. Deener on his recent naming as Best Lawyers' 2013 Lexington Personal Injury Litigation—Defense "Lawyer of the Year" (Copyright 2012 by Woodward/White, Inc., of Aiken, SC).

Eight lawyers from Landrum & Shouse LLP were recently selected by their peers for inclusion in The Best Lawyers in America® 2013 (Copyright 2012 by Woodward/White, Inc., of Aiken, SC). They are Pierce W. Hamblin, R. Kent Westberry, Leslie P. Vose, Larry C. Deener, John R. Martin, Jr., John G. McNeill, Mark J. Hinkel, and Douglas L. Hoots.

Lexington partner Douglas Hoots will be presenting a seminar on Insurance Fraud sponsored by Insurance Institute of Kentucky and Eastern Kentucky University Risk Management and Insurance Program on November 1, 2012 (Lexington) and November 2, 2012 (Louisville). please feel free to contact Mark Treesh of IIK at mark@iiky.org or (859) 543-9759 or Ed Duett of EKU Risk Management and Insurance Program at Ed.Duett@eku.edu or (859) 622-1580 for registration.