

PELA POINTERS – July 2008
Plaintiff Employment Lawyers Association
Colorado Chapter of the National Employment Lawyers Association
with Case Summary

Laura Schwartz, President (303) 298-9878
Rhonda Rhodes, Vice-President (303) 220-0303

Rosemary Orsini, Treasurer (303) 792-5595
Sara Rich, Secretary (303) 571-1000

This edition of PELA Pointers was compiled and edited by Sara J. Rich at srich@killmerlane.com with case summaries provided by Paul Mollica: <http://www.mmmglawblog.com/tp-080318194957/post-080319061646.shtml>.

ANNOUNCEMENTS

Annual Retreat

The 2008 Annual PELA Retreat is scheduled for August 1, 2008 at the Pines at Genesee. Please save the date!! The Retreat Committee has put together a great program this year which includes presenters Dennis Egan, from Kansas City, Missouri, Professor Eric Schnapper from Seattle, Washington and both Magistrate Judges Kristin Mix and Kathleen Tafoya. Some of the topics that will be covered include Getting into Evidence, Comments on *Mendelsohn* and *Ledbetter*, the EEOC and the CCRD, and the Annual Caselaw Update. All of this plus breakfast and lunch for only \$95.

Link Your Firm's Website

PELA members can include a link to their individual firm's website in their member profile on the PELA website. **Follow these instructions to add a link to your firm's website address to your member profile:**

- Go to <http://www.colopela.org/>
- Click on "Members' Log In (Update Your Profile)" on the left of the screen
- Your "Username" is the email address on file with PELA
- Your "Password" can be reset by you. If you do not know your password, click on "Forgot Password"
- When prompted for "Username" enter the email address on file with PELA and then click on "Reset Password"

- Once you click on "Reset Password" a new password will be emailed to you
- After receiving the new password, return to the website and enter your Username (email address) and Password correctly. You will then be taken to the Membership Directory page. Scroll down to find your name
- By clicking on your name you can view your current information
- Next to each category there is a checkbox with the word "show" next to it
- The last category is "Website." Type in your firm's website address and then click the box next to it with the word "show." When someone views your member profile, your website address will be included

CASE SUMMARIES

(provided by Paul Mollica:

<http://www.mmmglawblog.com/tp-080318194957/post-080319061646.shtml>)

Trujillo v. PacifiCorp, 524 F.3d 1149 (10th Cir. 2008). Panel: SEYMOUR, Tacha, Holmes. Claims on Appeal: ADA association claim, 42 U.S.C. § 12112(b)(4). ERISA claim (not discussed here). Disposition Below: Summary judgment [defendant]. Outcome on Appeal: Reversed [plaintiff]. Grounds: Employees with sick child (named Charlie) fired for some 34 unaccounted-for hours between them, in spite of evidence that other employees who were investigated for the same

violations got off with warnings. According to the summary judgment record, “PacifiCorp designated claims of over \$50,000 as high-dollar ones. Charlie’s medical expenses during his relapse exceeded that figure by at least \$12,000. On June 10, 2003, just eleven days after Charlie’s relapse, the company began an investigation into suspected time theft by plaintiffs. Plaintiffs presented enough circumstantial evidence that the company was motivated by the high costs of their son’s medical treatment to present a genuine issue of material fact about motive: “Evidencing that management knew about the cost of Charlie’s healthcare, the Trujillos offer an email regarding Mrs. Trujillo’s personal leave related to Charlie’s illness in which the company stated it monitored both health and welfare benefits in conjunction with an employee’s personal leave. From the evidence the Trujillos presented - concerns about rising healthcare costs, numerous efforts to cut those costs, corporate monitoring of general healthcare costs and of Charlie’s claims specifically - a jury could reasonably infer that PacifiCorp terminated the Trujillos because they were expensive employees.”

Tademy v. Union Pacific Corp., 520 F.3d 1149 (10th Cir. 2008). Panel: HENRY, Baldock, Marten. Claims on Appeal: Title VII/§ 1981 harassment. Disposition Below: Summary judgment [defendant]. Outcome on Appeal: Reversed [plaintiff]. Grounds: Employee presented genuine issue of material fact whether he was subjected to a racially hostile work environment by co-workers (eight years of racial slurs, culminating in display of noose after employee filed a charge of discrimination). Although random drug tests were not part of pattern of harassment, display of noose was part of harassment; fact-finder not required to credit co-worker’s assertion that he was taking rope home to use as a tow-rope. Although one 1995 incident did not link to the harassment (did not involve epithets), other comments, racial graffiti, vandalism of locker, racist cartoons and use of word “boy” were part of same pattern. Record could show that plaintiff suffered racial incidents every day, all

in the same unit, directed at him. Incidents do not have to be perpetrated by same individuals. Both employee and black co-worker had reported incidents to the employer, and employer received reports of racial incidents in other facilities. That some incidents were anonymous did not excuse employer’s failure to take steps to prevent it or (in the event of the graffiti) to clean it up and search for perpetrators. Employer’s response to noose incident (locating and firing offender) shows that it would have been feasible for employer to take further measures against other anonymous events. Even though employee did not bring action on prior right-to-sue on earlier harassment charge, that does not render such events non-actionable in a subsequent action, where employee resolved prior charge informally with employer. On section 1981 claim, Morgan continuing violation rule applies and allows employee to reach back beyond four-year period. Same standard of liability applies under § 1981 as with Title VII.