Disability and ADA

Personnel Issues Break Out Session

Workplace Disability Discrimination Claims Hit **Record High**

- By SHAUN HEASLEY January 29, 2013

More complaints of disability-related job discrimination were filed last year than ever before, new statistics show.

The U.S. Equal Employment Opportunity Commission received 26,379 claims of job bias citing disability issues in fiscal year 2012. That's up slightly from 25,742 filed the prior year.

Wal-Mart Settles Employee's EEOC Disability Discrimination Lawsuit for $50,000

Wal-Mart Stores Inc. and one of its units has reached a $50,000 settlement of a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission in which the retailer was charged with failing to accommodate a 22-year employee who suffers from cerebral palsy.

The EEOC said Wal-Mart fired Marcia Arney, a part-time clerk, from her position in its Carlsbad, New Mexico, store rather than trying to return her to her job after a medical leave related to her cerebral palsy. Arney had shown the store manager a note from her doctor requesting an accommodation involving periodic breaks off her feet, but the manager refused to return her to her job and instead demanded that she obtain a medical release with no restrictions, according to the EEOC's statement.

America's Largest Drug Store Chain to Pay $180,000 to Settle EEOC Disability Discrimination Suit.

Cashier Josefina Hernandez, who has Type II Diabetes, was fired by a South San Francisco Walgreens because of her disability after she ate a $1.39 bag of chips during a hypoglycemic attack in order to stabilize her blood sugar level. Hernandez had worked for Walgreens for almost 18 years with no disciplinary record, and Walgreens knew of her diabetes. Yet the company security officer testified that he did not understand nor did he seek clarification when Hernandez wrote, "My sugar low. Not have time," in reply to his request for an explanation of why she took the chips before paying.

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

Who is classified as disabled the Act?

An individual with a disability is a person who has:

…..Physical or mental impairment that substantially limits one or more major life activities

…..Having a record of such an impairment

…..Being regarded as having an impairment

Who is a qualified employee with a disability?

- A person who, with or without a reasonable accommodation, can perform the essential functions of the job.
  - Applicant
  - Employee
- An employer's acknowledgement the employee performed the job satisfactorily is good evidence they are qualified.
- Evidence in a doctor's note that employee can not return to work can demonstrate the employee is no longer qualified.
- Usually, evidence of an inability to work such as an SSDI application, leads to a rebuttable presumption of total disability.

The EEOC has stated that ability to perform the job must be based on the person's ability to currently perform the job, not whether the person might be unable to perform the job at some point in the future. 29 CFR §1630.2(m)

What are the essential functions?

- Functions may be essential, rather than marginal, because the position exists to perform the function;
- There are a limited number of persons who could perform the function; or
- The function is highly specialized.
  - Generally, courts look to the job description to determine what a position requires.

Functions that courts generally consider essential:

- "Ability to get along with others"
  - Lolyd v. Swifty Transportation, Inc. 552 F. 3d 594 (7th Cir. 2009)
- "Ability to work independently"
  - Webster v. Methodist Occupational Health Centers, Inc. 141 F. 3d 1236 (7th Cir. 1998)
- Physical attendance at the workplace

  Valdez v. Brent Mc Gill and Mueller Supply Co., 2012 US app. Lexis 2783 (10th Cir. 2012)

  Robert v. Board of County Commissioners of Brown County, 691 F. 3d 1211 (10th Cir 2012)
- "Ability to stay awake"
  - Flight instructor must be conscious and alert; Grubb v. Southwest Airlines, 2008 US App. Lexis 21412 (5th Cir 2008)
- Ability to rotate through various functions
  - Lord v. Arizona Dept of Corrections, 2008 US App. Lexis 14432 (9th Cir 2008)

Functions that courts have yet to determine:

Attendance and Punctuality

See EEOC Guidance which indicates punctual attendance is not an essential function because only job duties can be essential functions.

Ability to work a specific shift

- EEOC Guidance indicates that for certain positions, the time during which a function is performed may be essential. Also see Kallail v. Alliant Energy Corp Services, 691 F.3d 925 (8th Cir. 2012) upholding a rotating shift as an essential function. Contrast with *Preston v. Potter (USPS),* 2007 EEOPUB Lexis 3356 (EEOC 2007) split shift not an essential function.

When you receive a request from a qualified individual what is the employer required to do?

- An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an undue hardship on the operations of the employer.

An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. See Davoll v. Webb, 194 F. 3d 1116 (10th Cir 1999).

What types of accommodations are considered reasonable?

- Making the facility more accessible to the disabled person,
- Job restructuring, modifying work schedules, reassignment to a vacant position,
- Acquiring or modifying equipment or devices used in the workplace,
- Modifying training materials,
- Providing readers or interpreters.

What types of accommodations are unreasonable?

- In determining what types of accommodation are unreasonable your Focus should be on the removal of workplace barriers.
- Courts have affirmatively stated that it is acceptable to grant the disabled employee a preference.
- However, accommodations requiring other employees to work harder is unreasonable. Mason v. Avaya Communications, 357 F.3d 1114 (10th Cir 2004).

The Tenth Circuit has previously held that "[w]hile specific stressors in a work environment may in some cases be legitimate targets of accommodation, it is unreasonable to require an employer to create a work environment free of stress and criticism." *Gonzagowski v. Widnall,* 115 F.3d 744, 747–48 (10th Cir.1997)

What constitutes an undue hardship?

The following factors are relevant to the undue hardship determination:

- The nature and net cost of the accommodation;
- The financial resources of the facility, the number of employees at the facility, the effect on expenses and resources, or other impact on the operation of the facility;
- The overall financial resources, the size of the business with respect to the number of employees, the number, type and location of facilities; and
- The type of operations of the entity, including composition, structure, and functions, the geographical separateness and administrative or fiscal relationship of the facility in question to the covered entity.

What do you do if the employee fails to make a request?

If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation. Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

Changes made to ADA by the amendments:

- Changes the way that the statutory terms should be interpreted.
- Directs EEOC to revise that portion of its regulations defining the term "substantially limits"; expands the definition of "major life activities" by including two non-exhaustive lists:
  - The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
  - The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

Changes made to ADA by the amendments: (continued)

- States that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;
- Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

Applying the ADA to workplace situations?

- When a supervisor or manager perceives they have an ADA issue, they should inquire further. If your agency uses a form, this is a good time to offer the form.
- If the employee opts not to complete the form, you may treat the employee as if they are not requiring an accommodation.
- If the employee makes a request either oral or in writing, the employer is obligated to initiate the interactive process.
- Even ambiguous information sufficient to notify the employer that the employee may have a disability requires accommodation. *EEOC v. Sears,* 417 F. 3d 789 (7th Cir. 2005).
- These steps should be documented in some manner.

THE INTERACTIVE PROCESS

- The interactive process must be engaged in good faith. See *Donahue v. Consolidated Rail Corp.*, 2124 F. 3d 226 (3rd Cir 2000).
- Both the employer and employee should be prepared to discuss optional ways to perform the essential functions of the job.
- Too often the focus is on removing job duties. The actual focus should be removal of barriers that prevent performance of the essential functions.
- It is acceptable to discuss removal or elimination of marginal functions.

THE INTERACTIVE PROCESS

- If alternative positions are considered during the interactive process, the employer should not require the employee to compete for a vacancy. 29 CFR 1630.2(o)
- Documentation of the interactive process is essential.

Resources

- EEOC Guidance
- Job Accommodation Network
- Sample County ADA Forms