Employment Law BRIEFING

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ADA accommodation

Court ruling helps at least one employee breathe easier

A recent Eighth Circuit Court of Appeals case considered whether a respiratory therapist had sufficiently informed her employer, a health care service provider, of her need for an accommodation. Under the Americans with Disabilities Act (ADA), notification triggers the employer's duty to engage in the interactive process with the employee. Did the employee in this case hold up her end?

JOB ON LIFE SUPPORT

The plaintiff started working for the defendant employer as a respiratory therapist in 2007. She then assumed duties as a lead technician in the blood gas laboratory. The employee suffered from cervical spinal stenosis and, in July 2010, she requested leave under the Family and Medical Leave Act (FMLA) to undergo corrective surgery. The employer approved this request and the employee used all of her available leave time under the FMLA.

Upon her return to work, the employee's physician provided her with a list of physical restrictions. These limited her to eight-hour shifts, instead of the typical 12-hour shifts, and prohibited her from pushing, pulling, carrying or lifting more than 10 pounds. The employer complied and assigned the employee to eight-hour shifts, but advised her that the accommodation wouldn't be indefinite.

The following month, the employer posted a departmentwide notice that all employees needed to provide updated copies of their basic life support certifications. If they weren't up to date, the employer instructed, employees had to provide a reason and a date for when they were scheduled to take the basic life support class. The respiratory therapist wasn't up to date. She had passed the written exam part of the certification, but, as she informed the employer in writing, she couldn't take the physical part until her doctor approved it.

Following the employee's next appointment, her doctor concluded she needed at least four more months of physical therapy before she could complete the physical part of the certification exam. The employee left a message informing her supervisor. The following day, she was terminated from employment because she was unable to perform basic life support, which the defendant claimed was an essential function of her job.

The issue was whether the employee had requested an accommodation, thus triggering the employer's duty to engage in an interactive process.

THE REAL ISSUE

The employee brought an action against her former employer, alleging violations of the ADA. The trial court granted summary judgment in favor of the employer, on the grounds that the plaintiff wasn't capable of performing the essential functions of her position and that the employer didn't have a duty to reassign her to another position because she hadn't asked it to. The employee appealed.

She argued that the employer could have accommodated her disability by giving her more time to become certified or by reassigning her to another position where the certification wasn't required. Neither party disagreed that performing basic life support was an essential function of the job. However, as the appeals court asserted, that wasn't the issue.

The issue was whether the employee had requested an accommodation, thus triggering the employer's duty to engage in an interactive process to find an accommodation. The court found that the employee's written notice that she couldn't complete the physical portion of the certification exam without her doctor's approval could have been considered a request for accommodation. As a result of that request, the employer would have had a duty to engage in the interactive process. But it didn't.

The court further decided that the employee had produced evidence that she could have performed the essential functions of her position with an accommodation. Therefore, the court reversed and remanded, holding that there was a genuine issue of material fact as to whether the employee had made a request for an accommodation sufficient to trigger the employer's duty to engage in an interactive process.

TRY AND TRY AGAIN

Employers that want to avoid litigation need to familiarize themselves with ADA accommodation rules. You can't terminate employees simply because they have a disability that prevents them from performing all of the essential functions of a job. First, you must take part in an interactive process to try to find an accommodation for employees. ■

WHO DROPPED THE BALL — EMPLOYER OR EMPLOYEE?

The Eighth Circuit Court of Appeals considered a similar accommodation case (see main article) in *E.E.O.C. v. Product Fabricators, Inc.* But in this instance, it was the employee who dropped the ball.

The Equal Employment Opportunity Commission (EEOC) brought an action on behalf of an employee against his former employer, asserting discrimination and retaliation under the Americans with Disabilities Act (ADA). The EEOC claimed that the employee was terminated a month after he had inquired about taking leave for surgery to repair a torn rotator cuff. The employer argued that the employee was terminated because he was an ineffective supervisor. The trial court granted summary judgment in favor of the employer.

The appeals court upheld the trial court's decision, finding that the employee had failed to prove that he'd specifically requested an accommodation that would trigger the employer's duty to take part in an interactive process. The employee had testified that he'd talked with his supervisor about feeling symptoms of rotator cuff issues in his left shoulder and told the supervisor that he was going to request surgery. (The employee had previously been accommodated by the employer when he had rotator cuff issues in his right shoulder.) The employee further testified that he may have discussed with his supervisor how much time he could take off from work.

However, the employee didn't discuss surgery with his doctor until *after* he had been terminated and he wasn't assessed for surgery until one month after his employment ended. Therefore, the court held that the employer may have been aware of the employee's shoulder issues but the employee didn't demonstrate that he'd requested time off for surgery as an accommodation. As such, the employer's duty to take part in the interactive process hadn't been triggered.

How reimbursement policies can get employers into hot water

Many employers pay their "road warriors" a per diem to cover meal expenses. But as the employer in *Sharp v. CGG Land (U.S.) Inc.* learned, this practice can raise certain compensation questions that need to be decided in court. Recently, the Tenth Circuit Court of Appeals considered whether an employer violated the Fair Labor Standards Act (FLSA) by failing to include reimbursement payments in regular rate of pay calculations.

ON THE ROAD

The defendant employer provided seismic-mapping services at remote locations. To reach these locations, employees were required to travel and stay in hotels near remote job sites for four- to eight-week intervals. The employees then returned home for two to four weeks before traveling to the next location. Employees working away from home were provided with $35 per day for meals. This included days spent traveling to and from remote job locations. Employees weren't provided with $35 if they were working from home or if food was provided at the remote locations.

The employees brought a collective action against the employer, alleging violations of the FLSA, which requires that employers compensate overtime hours at one and one-half times the employee's regular pay rate. The employees alleged that the employer violated the FLSA by not including their reimbursement payments for daily meal expenses while working away from home in the regular rate calculation. As such, the employer had been undervaluing their regular rate of pay and paying less than it should for overtime hours.

The trial court granted summary judgment in favor of the employer. The appeals court affirmed.

DEFINING EXPENSES

The Tenth Circuit found that the meal reimbursements were travel expenses and, therefore, were exempt from employees' regular rate of pay. The FLSA provides that the regular rate "shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee" subject to some exceptions. One exempts "reasonable payments" that aren't considered employment compensation, but are made to cover traveling and other expenses incurred by employees when working for their employer. This exception includes an amount for "living expenses away from home."

The employees had conceded that living expenses were exempt from the regular pay rate calculation. However, they argued that the cost of food didn't constitute living expenses. The court disagreed, relying upon the Department of Labor's (DOL's) opinion that living expenses included the cost of food because the necessity of eating meals away from home was an additional expense that an employee incurred for the employer's benefit.

The employees also argued that they were no longer traveling when they reached a remote job site. Therefore, the $35 per day couldn't be excluded. The court again disagreed, finding that "traveling" should be interpreted in a broader sense to include time "away from home," not just time in transit.

The employees further claimed that the $35 per day payment was a scheme by the employer to keep regular rates — and therefore, overtime pay — lower. The court determined that this argument was unfounded because the employees had stipulated that the $35 per day

payment was a reasonable meal allowance. As such, the stipulation overcame the employees' argument.

Finally, the employees cited a 2014 case, *Newman v. Advanced Technology Innovation Corp.*, where the First Circuit Court of Appeals found that per diem payments couldn't be excluded from the employees' regular rates where such payments depended on the number of hours worked. But payment to the *Sharp* employees wasn't tied to the number of hours worked. The employees *always* received $35 per day. They didn't receive higher meal reimbursement payments if they worked more hours or lower payments if they worked fewer hours.

STRENGTHEN YOUR POLICY

The employer in this case prevailed. Nevertheless, *Sharp* serves as a good reminder that all employers should review their compensation pay policy for traveling workers. Payments must be reasonable in value and reflect expenses incurred while employees worked on your organization's behalf and at its convenience. If payments don't, they may be factored into an employee's regular rate of pay, resulting in a higher overtime rate. Also note that such payments shouldn't fluctuate based on the number of hours employees work. ■

Highlighting the difference between FMLA leave and vacation

When an employee was discharged after taking time off from work, he sued his former employer. It was up to the Fourth Circuit Court of Appeals to decide whether the employer in *Sharif v. United Airlines, Inc.* retaliated against the employee, violating the Family and Medical Leave Act (FMLA).

SUSPICIOUS LEAVE

The employee and his wife had planned a 20-day vacation from March 16 to April 4 to South Africa. However, the plaintiff was scheduled to work from March 30 to 31. He arranged for a co-worker to cover his March 31 shift but couldn't find a co-worker to cover him on March 30. He left for vacation anyway without purchasing return flights in advance.

On March 30, the employee left a phone message for his employer stating that he would be taking medical leave under the FMLA that day. He suffered from panic attacks and had previously been granted intermittent leave under the FMLA. The following day, the employee flew to Milan to visit his niece and then on April 3 he returned home.

The employer noted that the employee had taken just one day of FMLA leave during his long vacation. When it was discovered that he had done the same thing in September 2013, a supervisor was informed. The supervisor conducted an investigation and gave the employee a chance to explain himself. Initially, the employee told the supervisor that he hadn't been scheduled to work on March 30. He then said that he

didn't remember calling out sick. He later changed this story and claimed that he had looked for a flight home on March 28 so he could work on March 30, but he couldn't find one. At that point, he had a panic attack and called his employer to take leave.

The employer suspended the employee without pay for dishonesty and for fraudulently taking FMLA leave. The employee, fearing termination, retired from his job and brought a lawsuit claiming retaliation under the FMLA. The trial court granted the employer's motion for summary judgment, and the employee appealed.

MAKING A CASE FOR RETALIATION

To prove an employer's action is retaliatory, an employee must show that:

1. He or she engaged in a protected activity,
2. The employer took an adverse action against the employee, and
3. A causal connection existed between the protected activity and the adverse action.

If the employee makes a prima facie showing of retaliation, the employer must show a nondiscriminatory reason for the adverse action. Then the employee has the opportunity to argue that the employer's reason is pretextual by showing it either isn't credible or the action was more likely than not retaliatory.

The employee insisted that the employer's reasons for taking the adverse action — to discipline the employee for dishonesty and fraudulently taking FMLA leave — were pretextual. He claimed that his last statement of the panic attack and inability to find a flight was accurate and that he had given inconsistent accounts of his actions to the investigating supervisor because he had another panic attack during that interview.

The court wasn't persuaded, because the employee had flown to Milan the following day and then returned home a few days after that. Accordingly, it was reasonable for the employer to conclude that the employee didn't want to return home from his vacation on March 30. Moreover, the employer had approved every other FMLA leave request the employee had submitted in the past two years. So there was no prior history of retaliation. The court affirmed in favor of the employer, finding that its proffered reasons for terminating the employee weren't pretextual.

MEDICALLY NECESSARY ONLY

The FMLA's purpose is to provide job security to employees with serious health conditions who need to take leave from work. However, employers are allowed to require employees to provide documentation of their condition and to take leave only when it's medically necessary. In other words, FMLA leave can't be used to extend a vacation. ■

Does USERRA protect employees from compelled arbitration?

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is intended to protect members of the military from losing their civilian jobs and employment benefits when they return from active duty. But rights under USERRA are limited. In *Ziober v. BLB Resources, Inc.*, the Ninth Circuit Court of Appeals determined whether the act prohibits compelled arbitration of claims arising under its provisions.

ACTIVE DUTY INACTIVATES STATESIDE JOB

The employee, a member of the U.S. Navy Reserve, worked as an operations director for the employer. He signed an agreement with his employer requiring the arbitration of legal disputes. Under the agreement, the employer agreed to pay all arbitration costs. The agreement further specified that the scope of discovery and available remedies

would be the same in arbitration as they would be in court.

When the Navy recalled the employee to active duty in Afghanistan, he notified the employer of his deployment. On his last scheduled day of work, the employee was informed by the employer that he wouldn't have a job when he returned. When he did return home, the employee filed suit against the employer, claiming he was fired from his job, in violation of USERRA, after providing notice of deployment. The employer moved to compel arbitration pursuant to the agreement the employee had signed. The trial court granted the employer's motion compelling arbitration of the claim, and the employee appealed.

ARBITRATION AGREEMENT CAUSES CONFUSION

The employee had argued that Section 4323(b) of USERRA prohibited compelled arbitration by mandating "the establishment of additional prerequisites" to vindicate substantive rights. But the appeals court said that this language related only to union contracts that required an employee to take an additional step or exhaust certain remedies before filing suit.

However, an arbitration agreement between an employer and employee, like the one this employee had executed, was a forum selection clause. This type of agreement didn't prevent an employee from immediately seeking the vindication of his rights in an arbitral forum. The employee hadn't been required to take additional steps or exhaust other remedies before seeking vindication in arbitration. The court noted that this conclusion was in line with other circuits that had previously ruled on the matter.

The employee argued that USERRA prohibited compelled arbitration by mandating "the establishment of additional prerequisites" to vindicate substantive rights.

The employee also pointed to the clause in USERRA that prohibited the waiver of any right the employee might have under the statute. However, the court stated that the U.S. Supreme Court had addressed essentially the same clause in the Credit Repair Organizations Act in *CompuCredit Corp. v. Greenwood*, and in that case the Court held that the Federal Arbitration Act merely provided a different forum. It didn't waive any right to pursue a claim.

The court further held that, even if the text of USERRA was found to be ambiguous regarding compelled arbitration, the employee had failed to show that Congress' intention was to prohibit arbitration. The court stated that, if Congress had erred in construing the language of USERRA, the legislative body could easily fix the issue by amending the statute to make it clear. Yet Congress had not yet done so. The Ninth Circuit affirmed the trial court's ruling, finding that USERRA contained no prohibition on mandatory arbitration.

RESTRICTIONS APPLY

To avoid costly lawsuits, many employers require their workers to sign agreements mandating arbitration of any claims. If your organization follows this practice, just keep in mind that there may be restrictions. ■

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

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