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Labor and Employment Law

Courts Clarify Reasonable-Accommodation Standards

The extent of an employer's duty to reasonably accommodate an employee with a disability under the Americans with Disabilities Act (ADA) is not always clear. Indeed, when the requested accommodation involves a leave of absence or the transfer to a different position, employers are often unsure what the law requires of them. A series of recent decisions from the Seventh and Tenth Circuits, however, have addressed the limitations and obligations facing employers presented with such requests for accommodation.

Leaves of Absence as a Reasonable Accommodation

Few questions vex employers more than what length of time is reasonable when a disabled employee requests a leave of absence. The United States Court of Appeals for the Tenth Circuit (Colorado, Kansas, Oklahoma), in *Robert v. Board of County Commissioners of Brown County*, 691 F. 3d 1211 (10th Cir. 2012), has shed some light on this issue that should help employers in deciding how to respond to employee leave requests under the ADA. The plaintiff, Ms. Robert, worked for Brown County supervising felony offenders. The essential functions of her job required that she perform many duties outside of her office such as performing drug screenings, ensuring compliance with court orders, testifying in court, and other "considerable fieldwork" including site visits under potentially dangerous circumstances. Robert was diagnosed with sacroiliac joint dysfunction, and because of severe pain in her back and hips eventually she could work only from home. Thus, she was unable to visit offenders, supervise drug and alcohol screenings or testify in court.

Following a surgery to treat her joint dysfunction, Robert exhausted her FMLA and sick and vacation leaves, but she still could not return to work. Neither she nor her doctor informed her employer as to when she could resume her job duties. Since she could not perform her job duties, the County terminated Robert's employment. Among other claims, Robert alleged that her termination constituted discrimination under the ADA. The court disagreed. The court accepted that site visits and other out-of-office work were essential functions of Robert's employment, but it stated that she would still be qualified to perform her job if she could have performed those duties with reasonable accommodation. The only possible reasonable accommodation in this case, however, would have been a leave of absence.

The court noted that there are two limits on the bounds of reasonableness for a leave of absence: (1) the employee must provide the employer an estimated date for when she can resume her essential duties, and (2) the leave request must assure the employer that the employee can perform the essential functions of her position in the "near future." Though the court did not define "near future," it cited to a case stating that a six-month leave request was too long to constitute reasonable accommodation. Here, Robert never provided any estimate as to when she could resume her fieldwork. Therefore, the only accommodation that would have allowed Robert to perform the essential functions of her position was an improper indefinite reprieve from her fieldwork functions. Thus, since Robert was not qualified to perform her duties, her discrimination claim failed.

In this issue...

Transfers to a Different Position as a Reasonable Accommodation

On September 7, 2012, the Seventh Circuit in *EEOC v. United Airlines* overruled two of its prior decisions (*EEOC v. Humiston-Keeling* (2000) and *Mays v. Principi* (2002) that together stood for the principle that employers could hire the most qualified applicant for a position, even if that meant passing over a disabled employee seeking the position because his disability precluded him from performing the essential functions of his current position. Going forward, employers in the Seventh Circuit will now be required to offer that vacant position to the disabled employee, unless it can show that doing so creates an undue hardship that renders mandatory reassignment unreasonable.

The dispute in *United Airlines* centered around a set of "reasonable accommodation" guidelines that the company used when evaluating transfer requests involving disabled employees. United's guidelines provided that the transfer process was a competitive one, and that employees requesting a transfer as an accommodation would not automatically be placed into qualifying vacant positions. Instead, the disabled employee would receive preferential treatment, which included a "guaranteed" interview for the position and priority over *similarly qualified* applicants. Under these guidelines, however, a non-disabled applicant would receive the job if he or she was more qualified than a disabled employee seeking the accommodation.

In abandoning the standard it had followed since 2000, the Seventh Circuit concluded that the "ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer." While the existence of a seniority rule mandated by a collective bargaining agreement will likely satisfy the undue-hardship requirement, not all such provisions are created equal, and their language should be parsed before rejecting a transfer request out of hand in such a setting. In the future, employers in the Seventh (and Tenth or Washington, DC) Circuits may no longer rely on a "best applicant" policy when making decisions about transferring disabled employees to vacant positions.

The Employee's Role in Requesting a Reasonable Accommodation

In yet another noteworthy decision, the Seventh Circuit held that a university was not liable for failing to accommodate a professor's mental disorder, where the university reasonably tried to fulfill a request for office reassignment but the employee did not cooperate. In *Hoppe v. Lewis University*, 692 F.3d 833 (7th Cir. 2012), Elizabeth Hoppe requested that her office be relocated to accommodate her adjustment disorder. Both the initial letter that Hoppe presented from her doctor and a follow-up letter failed to specify a suitable campus location for Hoppe or the particular stressors that necessitated Hoppe's relocation. Nevertheless, the university offered Hoppe four different office options, one of which she accepted but never used; she refused the remaining offices because they were in the same building as individuals whom she alleged heightened her anxiety, but her physician never specified a change of buildings or any location information at all. The court emphasized:

> An employer can take no solace in its failure to engage in this process in good faith if what results is an unreasonable or inappropriate accommodation offer. And an employee who fails to uphold her end of the bargain – for example, by not "clarifying the extent of her medical restrictions" – cannot impose liability on the employer for its failure to provide a reasonable accommodation.[1]

In finding in favor of the university, the Seventh Circuit noted that the university offered Hoppe several options to change offices, despite having no specific details from her doctor about what steps were necessary to reasonably accommodate her disability. Further, the university had asked Hoppe's doctor for specific information several times, to no avail. Therefore, the university did its part to participate in good faith in the ADA-required interactive process, and there was no evidence it did not offer Hoppe a reasonable accommodation.

Lessons for Employers

First, these cases emphasize that an employer need not shoulder the entire burden when trying to reasonably accommodate an employee with a disability; the employee has responsibilities as well. As noted in *Hoppe*, an employer need not offer an employee the precise accommodation he or she requests, if the employee does not clarify the extent of his or her medical restrictions. The employer must participate in good faith in an interactive process under the ADA to find a reasonable accommodation, but the employer's obligation runs only so far. If an employee's physician does not specify the employee's restrictions or what type of accommodation is necessary, following up with

[1] Id. at 840 (citations omitted)

the physician and working with the employee to find alternative options should protect an employer from liability if the employee later argues that the offered accommodations were unreasonable.

Second, an employer is not required to provide an open-ended leave of absence if an employee requests such an absence as an accommodation. Under *Robert*'s analysis, an indefinite absence, especially when there is no assurance that the employee will be able to perform the essential functions of his or her position, is unreasonable as a matter of law. Under these circumstances, once an employee has exhausted other types of leave, if she cannot provide an estimate of when she can resume the essential duties of her position, a court is likely to uphold an employer's decision to terminate her. The employee does not need to return to work at full capacity, but the employee must be able to perform the duties of her position with reasonable accommodation under the ADA.

Third, employers in the Seventh Circuit must now reassign qualified disabled employees who can no longer perform their original jobs to vacant positions, unless the employer can establish the existence of special circumstances that demonstrate undue hardship. While the seniority provisions of a collective bargaining agreement should satisfy this requirement, it remains to be seen what other special circumstances will suffice going forward. Employers should vigorously explore the possibility of reassignment with disabled employees and be sure that any positions discussed with and/or offered to the employee are documented.

Finally, these cases further emphasize the importance of detailed job descriptions. With or without accommodation, an employee must be able to perform the essential functions of his or her job. If the employer can pinpoint the essential functions of a job, both the employer and the employee will have an easier time engaging in the required interactive process for establishing reasonable accommodations. Further, in the event an employee cannot perform the essential functions of a job, an employer is further protected in a lawsuit if it has articulated the essential functions of a position ahead of time.

If you have any questions about this article or the ADA in general, please contact **Alan Koral** at +1 (212) 407 7750, **Andrea Lewis** at +1 (312) 609 7739, or any other Vedder Price attorney with whom you have worked. ■

Updated Notice of Rights Form Required for Employers Who Conduct and Use Background Checks

By January 13, 2013, employers who obtain consumer reports (i.e., background reports) from consumer reporting agencies must replace the Summary of Rights form they provide to applicants/employees with a new version of the form.

The Fair Credit Reporting Act requires employers who request a consumer report to do the following:

- Disclose to the applicant/employee that such a report may be obtained.
- Receive written permission to obtain the report. The consent must be a stand-alone document, not merely a paragraph at the bottom of an application or other document.
- If the employer is considering taking on adverse action against the applicant/employee based on the report, it must provide the individual with a "pre-adverse action" notice, a copy of the consumer report(s) and a copy of the FCRA Summary of Rights. It is this Summary of Rights that must be updated by January 13, 2013.
- If the employer decides to take the adverse action, it must provide the individual with a formal "adverse action" notice.

Similarly, employers who seek "investigative consumer reports" must do the above, but they must also enclose the Summary of Rights form with the standard disclosures and inform the applicant/employee of his or her right to request additional information about the "nature and scope" of the investigation.

Employers may obtain copies of the new Summary of Rights form at http://www.employeescreen.com/university/wp-content/uploads/Summary-of-Your-Rights-20130101.pdf

If you have any questions about the forms required to conduct background checks or what steps you must follow before taking an adverse action against an applicant or employee, please contact **Jonathan Wexler** at +1 (212) 407 7732, **Emily Fess** at +1 (312) 609 7572, or any other Vedder Price attorney with whom you have worked. ■

NLRB Issues First Rulings on Social Media Policies

This fall, the National Labor Relations Board (NLRB or the Board) issued its first rulings interpreting the application of the National Labor Relations Act (the Act) to an employee's posting of derogatory statements concerning his employer on social media. In short, under Section 7 of the Act, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .," and, under Section 8(a)(1) of the Act, employers are prohibited from interfering with or restraining employees from exercising those rights. As more and more people express their views about their employers and the jobs they perform using one or more of the many social media sites, employers must be careful to avoid violating the Act when: (i) attempting to regulate their employees' speech; and (ii) disciplining employees for sharing their opinions on social media.

In both decisions, the NLRB has struck down policies which the Board viewed as illegal attempts to restrict employees from publishing negative statements about their employer.

First, in *Costco Wholesale Corporation*, 358 NLRB No. 106 (NLRB 2012), the NLRB held that Costco violated Section 8(a)(1) of the Act "by maintaining a rule prohibiting employees from electronically posting statements that 'damage the Company . . . or damage any person's reputation.'" The NLRB based its decision on its finding that employees would reasonably construe this rule as one that prohibits Section 7 activity.

Since Costco's policy broadly prohibited any statements that would "damage the Company, defame any individual or damage any person's reputation," the NLRB held that the policy would encompass concerted actions by its employees to protest Costco's treatment of its employees; such communications are protected under Section 7. Specifically, the NLRB was troubled by the fact that the policy did not include a carve-out for concerted activities protected by Section 7. Thus, the NLRB held that the blanket prohibition on any communication that damages the Company violates Section 8(a)(1) of the Act because employees must be able to engage in concerted activities that are critical of their employers or the agents of their employers.

Similarly, in *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012), the NLRB held that the employer's "Courtesy" policy violated Section 8(a)(1) of the Act. In this case, the employer, a BMW dealership, maintained a rule in its handbook stating:

> Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

Relying upon its recent decision in *Costco*, the NLRB held that the policy was impermissibly overbroad because there is "nothing . . . that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the policy's reach." Thus, a seemingly innocuous policy espousing basic levels of courtesy and common sense may be viewed as violative of the Act if it broadly prohibits any language that would injure the image or reputation of the employer.

In addition to striking down the dealership's policy, the NLRB upheld the decision of the Administrative Law Judge (ALJ) who concluded that the dealership's decision to discharge a salesperson for an inappropriate Facebook posting did not violate the Act. While the NLRB did not address the underlying facts in its decision—thus providing no explicit guidance—the ALJ's decision remains instructive. In his decision, the ALJ focused primarily on two postings by former employee Becker: a complaint about the food the dealership provided to customers at a sales event and a sarcastic message making light of damage to a vehicle that occurred after a salesperson allowed the son of a customer to get behind the wheel in the car lot. The ALJ found that the posting about food provided to customers constituted protected, concerted activity because the post was the "logical outgrowth" of discussions the salesperson and a coworker had concerning the impact of the sales event on their ability to earn money.

Ultimately, the ALJ held that the post about the accident was not protected, concerted activity because "it was posted solely by [the salesperson] . . . without any discussion with any other employee of [Karl Knauz], and had no connection to the any of the employees' terms and conditions of employment." Based on testimony given at the hearing, the ALJ was convinced that the salesperson was fired because of his Facebook posting concerning the accident, and he upheld the discharge.

The most significant lesson to be learned from *Costco* and *Karl Knauz* is that the NLRB, as it is currently constructed, will continue to view policies which broadly

prohibit employee statements that damage the company to be a violation of Section 8(a)(1) of the Act–no matter how innocuous or sensible those policies may be. Thus, it is imperative for companies that promulgate and enforce policies related to statements outside of work and non-disparagement to review those policies to ensure compliance with the NLRA and the NLRB's recent cases.

As these cases represent the NLRB's initial foray into interpreting the Act with respect to social media, we expect that this line of precedent will be refined and clarified in the near future. We will continue to update you on this evolving area of the law as events unfold.

If you have any questions at all concerning these issues, or would like to discuss creating or modifying a current policy in light of these rulings, please do not hesitate to contact **Amy Bess** at +1 (202) 312 3361, **Roy Salins** at +1 (212) 407 6965, or your Vedder Price relationship attorney. ■

Watch What They Say and What They Do: The Seventh Circuit Examines What Constitutes Notice of Employee Eligibility for FMLA Leave

Employers often find that administering Family and Medical Leave Act (FMLA) policies can prove to be one of the more challenging aspects of personnel management, particularly because employees are required to place their employer on notice of only the *probable* basis for FMLA leave to qualify for it. Employees do not need to specifically refer to the FMLA, as long as they have alerted their employer to the seriousness of the health condition. A general reference to being "sick" is not enough, but providing specifics about more serious medical concerns is often sufficient to warn the employer that the employee may qualify for FMLA leave. In two companion cases, the Seventh Circuit considered whether employees provided sufficient notice to their respective employers of their need for FMLA leave.

In *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. 2012), the court held that casual comments made to a supervisor about a parent's poor health did not constitute adequate notice of FMLA leave. In December 2008, Nicholson informed her supervisor that she might need time off in the first quarter of 2009 depending on the *possibility* that her father would need chemotherapy. In the same month, she had a casual conversation with another supervisor and other employees about the challenges of dealing with aging parents in which she alluded to her father's illness. In April 2009, Nicholson requested one day off to attend a doctor's appointment with her father, which she was allowed. After the appointment, she told her supervisor that her father's condition had worsened and that he was diagnosed with stage III cancer.

During the same time period, Nicholson also mentioned to her supervisor that her mother had experienced significant weight loss and that Nicholson spent time on her days off driving her mother to medical appointments and could not stay to work after normal business hours because of her obligations to provide care for her mother. In June 2009, Nicholson advised her supervisor that she needed to take her mother to the emergency room and would not be in that day. The following day, she asked to leave early to visit her mother in the hospital. Nicholson's mother was ultimately diagnosed with kidney disease, but Nicholson did not provide her supervisors with those details.

With respect to her father's condition, the court held that Nicholson had alerted her employer of the seriousness of his condition—stage III cancer—but did not convey that she needed time off to care for him. She had simply indicated that she *might* need time off in the future *if* her father needed chemotherapy, leaving the issue open-ended. Although she later requested, and was granted, a single day off to attend a doctor's appointment with him, she did not indicate any additional need for time off. The court determined that her communications with her supervisors about the need to care for her father were too indefinite to put her employer on notice that she might qualify for FMLA leave.

With respect to her mother's condition, the court determined that (i) Nicholson had never described the seriousness of her mother's condition to her employer, and (ii) her communications that she drove her mother to medical appointments on her days off and could not work outside her normal business hours because of her responsibilities to care for her mother were not enough to put her employer on notice that she would need time off work.

However, the Seventh Circuit came to a different conclusion in *Pagel v. TIN Inc.*, 2012 U.S. App. LEXIS 16548 (7th Cir. 2012), a case involving the employer's knowledge of an employee's own health condition. In the summer of 2006, Pagel experienced chest pain and labored breathing, which prompted him to visit two physicians. During his second appointment, he was ordered to undergo a two-day stress test that revealed a blockage in a portion of his heart. Pagel was ultimately

admitted to the hospital for an angioplasty and stent placement, released the following day, and advised to rest for several days. He returned to the hospital the following week for additional tests and then returned to work. His supervisor admitted that he was aware of Pagel's chest pain and that Pagel was admitted to the hospital. When it came to the employee's own health condition, the court concluded, "it is difficult for us to imagine a scenario where Pagel's notice of hospitalization did not include an implicit demand for leave."

These two cases highlight a company's obligations to evaluate an employee's eligibility for FMLA leave after learning about a serious health condition of either the employee or the employee's family member. In *Nicholson*, the court concluded that because the leave was needed to care for a family member, there is an onus on the employee to advise her employer that she would need to take time off work to act as a caregiver. On the other hand, in *Pagel*, the court held that where the employee requires hospitalization for his or her own medical condition, notice of hospitalization is sufficient to warn the employer of the employee's eligibility for FMLA leave. In light of the court's analysis in these two decisions, employers should ensure that their supervisors are trained (or retrained) to offer information on FMLA leave to employees who reveal either the employee's or a family member's serious medical condition and that employees are not required to refer specifically to the FMLA to qualify for leave under the law.

If you have any questions about this article or the FMLA in general, please contact **Laura Sack** at +1 (212) 407 6960, **Aaron Gelb** at +1 (312) 609 7844, or any other Vedder Price attorney with whom you have worked. ■

We'd like your opinion!

Vedder Price's Labor and Employment practice area is excited to host our Annual Employment Law Updates in the Chicago and New York areas in May 2013. As a potential attendee, your input on the topics we present is very valuable.

Please visit https://www.surveymonkey.com/s/employmentupdatetopics to provide feedback regarding potential topics. We look forward to seeing you at one of our upcoming programs.

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- *Amy Bess and Sadina Montani achieved a complete victory following an arbitration in which they defended a large radiology practice against claims by a former physician of perceived disability discrimination, defamation, false light and tortious interference with a subsequent employment contract. The arbitrator assessed all arbitration fees and costs against the claimant.*
- *Mike Cleveland, Tom Wilde and Joe Mulherin defeated class certification on wage and hour claims asserted against a health care system under the Fair Labor Standards Act and the Illinois Minimum Wage Law. They also obtained summary judgment on related class action claims asserted under the Illinois Wage Payment and Collection Act and Illinois common law.*
- *Steve Hamann obtained summary judgment in the Western District of Louisiana in a race discrimination and retaliation case where an employee was terminated for referring to a customer as "fat" in violation of the Company's professional conduct policies.*
- *Tom Hancuch, Scot Hinshaw and Benjamin Hartsock recently secured the dismissal of a former employee's claim for severance pay based upon an erroneous benefit calculation mistakenly offered to and accepted by the employee before the employer realized the mistake. The ex-employee refused to sign a corrected severance agreement and sued. The court dismissed the claim, rejecting the argument that the employer was contractually bound by the erroneous severance agreement.*
- *Tom Hancuch recently obtained the EEOC's dismissal for lack of substantial evidence of a race discrimination charge challenging an employer's use of previous criminal convictions in hiring decisions. Evidence was presented to the EEOC showing that the policy had not, in fact, had a negative impact and also that the employer had appropriately considered the relevant facts and circumstances in evaluating the criminal records of job candidates.*
- *J. Kevin Hennessy and Cara Ottenweller obtained summary disposition in a private employment arbitration in Knoxville, Tennessee on behalf of a major food distributor where an employee argued that he was entitled to pay for break periods based on language in his employment handbook. Our client successfully avoided court litigation while obtaining a very favorable precedent.*
- *J. Kevin Hennessy, representing a Chicago area hospital, obtained a voluntary withdrawal of state court claims for retaliatory discharge, intentional infliction of emotional distress, negligent infliction of emotional distress and tortious interference with a contract after an effective deposition revealed weaknesses in the employee's case.*
- *Alan Koral and Michael Goettig recently obtained dismissal of a complaint filed in New York on behalf of a client who accepted employment with a competitor of his previous employer. His previous employer commenced the action seeking damages concerning an alleged breach of a post-employment restrictive covenant in the parties' employment agreement. In dismissing the case after oral argument, the court held that the complaint failed to allege the necessary elements of a breach-of-contract action.*
- *Laura Sack and Michael Goettig stayed a federal court action commenced by a client's former employee who alleged that she was sexually harassed. The former employee named the business entity, as well as her former direct supervisor as defendants in the action. The court dismissed the complaint and ordered arbitration in light of a provision in the employer's personnel manual calling for the arbitration of all employment-related disputes, and it further held that the claims against the plaintiff's direct supervisor were subject to arbitration as well.*
- *Tom Wilde and Libby Hall obtained a favorable ruling from the U.S. Court of Appeals for the Sixth Circuit affirming summary judgment in favor of an international food and nutrition company on age discrimination claims.*
- *Tom Wilde obtained summary judgment in the U.S. District Court for the Middle District of Pennsylvania on behalf of a manufacturing company on claims of retaliatory discharge and breach of contract.*
- *Tom Wilde obtained a favorable ruling in a labor arbitration in Memphis, Tennessee challenging a company's decision to eliminate a bargaining unit job classification.*

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Labor and Employment Law Group

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