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Accommodation Discussions Need Clear Guidelines

LAW: Recent case tests limits of the obligation of employers to meet mandate of disability laws.

EMPLOYMENT LAW

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Workplace anti-discrimination laws generally mandate treating similarly situated individuals in a like manner. However, if an employee (or job applicant) discloses a physical or mental disability, the law requires much more. At a minimum, employers must meet with the employee to ferret out whether adjustments to the working conditions would enable the employee to do the job. This so-called "interactive dialog" is an essential element of the "reasonable accommodation" process mandated by the federal and state disability bias laws. And, if the employer fails to fulfill this obligation, the employee can sue for damages even if the discussion(s) would have been fruitless.

A recent case involving the City of Holtville tested the limits of this obligation. The City was sued by a former employee for its failure to initiate the interactive dialog. Employing the labor law equivalent of a "Don't Ask, Don't Tell" defense, the City persuaded a California Court of Appeal that an employer has no duty to engage in the interactive dialog until the employee raises the issue. Here is what happened and what you can take from the ruling.

Tanya Milan was employed by the City of Holtville as a water treatment plant operator. In September 2002, she injured herself at work and was off work on disability for nearly 18 months.

Milan immediately applied for and was granted workers' compensation benefits. About nine months after her injury, a company doctor determined that Milan was unable to return to work. Based upon that opinion, the administrator of the City's self-funded workers' compensation program sent Milan a letter which summarized the doctor's assessment and offered Milan rehabilitation and retraining benefits, which she accepted.

No contact

Milan claimed that although she accepted the retraining, she always wished to return to her former position. However, by her own admission, she did not contact anyone at the City about her condition or her plans to return to work.

Nearly 18 months after the injury, the City sent Milan a letter terminating her employment since she could not return to her customary position and there was no job which she could reasonably perform.

Milan sued, alleging that the City violated the law by failing to contact her to discuss potential accommodation upon receipt of the medical report from its doctor. The trial agreed with Milan, ruled in her favor and awarded damages of almost $150,000 plus an additional $87,000 in attorneys' fees and court costs.

Fortunately for employers statewide, the Court of Appeal took an entirely different tack on the issue of who was responsible for initiating the dialog. First, the Court of Appeal noted the absence of any evidence whatsoever that Milan had requested accommodation or even expressed her apparent desire to return to her former position to anyone in the City's management. Then, the Court closely examined the wording of the statute. The Court of Appeal concluded that when the legislature wrote the law, it intended that the employee initiate the dialog, and not the other way around, as the trial court had ruled. In light of this ruling, the Court of Appeal overturned Milan's damage award.

Although the City won its case on appeal, its behavior is not a blue print for employer action. Rather. employers seeking to minimize the likelihood of an employee claim should embrace the law's interactive dialogue requirements with vigor.

California law

The rule to follow is found in the California Fair Employment and Housing Act. That law imposes an affirmative duty on employers with 5 or more employees to "engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodation, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition". The failure to meet this obligation is an independent violation of the law.

Court cases in this area explain what is expected of an employer. The interactive dialog, said one court, "is at the heart of the law's process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments which enable disabled employees to continue working without placing an undue burden on employers."

Another court added that "the focus of the interactive process centers employee-employer relationships so that capable employees can remain employed if their medical problems can be accommodated".

Importantly, although the law requires that the employee initiate the process, court cases have made clear that no magic words are necessary to do so. Rather, the obligation arises as soon as the employer becomes aware of the need to consider an accommodation.

Here lies a huge trap for the unwary employer. By law, every supervisor's knowledge is imputed to the company. In other words, the company is deemed to know whatever the supervisor knows. Thus, a supervisor's discussion with an employee about a disability matter carries the potential of putting the company on official notice of the need for an accommodation. Therefore, it is vitally important that a company's supervisors be trained to immediately report information about an employee's disability and/or need for accommodation to human resources and/or senior management.

Also, the supervisor must be trained not to promise that information shared by an employee will be kept "in confidence".The law does not recognize an exception simply because the employee asked the supervisor not to reveal the information.

Legal obligation

There is no litmus test for determining when the legal obligation has been satisfied. Each circumstance will be evaluated to determine if the parties acted in "good faith" as the law requires. At a minimum, this obligation of good faith requires that the company enter the discussion with an open mind, a sincere desire to explore available solutions, and a willingness to give fair consideration to suggestions made by the employee.

One court succinctly described the rules this way: "To meet this obligation, each party to the discussion must participate in good faith, undertake reasonable efforts to communicate its concerns and make available to the other information which is available or more accessible, to one party. Liability hinges upon the objective circumstances surrounding the parties' breakdown in the communications, and responsibility for the breakdown lies with the party that fails to participate in good faith."

It pays to be very thorough when conversing with an employee about accommodation matters. A federal judge presiding over a case under the federal disability law said it this way: "Properly participating in the interactive process means that an employer cannot expect the employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation'. The employer has to meet the employee half way, and if it appears that the employee is in need of an accommodation, but does not know how to ask for it, the employer should do what it can to help. The employer must make a reasonable effort to determine the appropriate accommodation. The appropriate accommodation is best determined through a flexible, interactive process that involves both the employer and the employee with a disability."

Companies wishing to prevent these problems should have a clear set of guidelines to capture disability communications and deal with them. At a minimum, this means setting policy and training all of the company's supervisors on how to report such information upon receipt. It also means that those likely to be involved in the discussions should be trained about the legal nuances inherent in the interactive dialog process.

It is a very good idea to carefully document these efforts every step of the way and to have at least one management person sit in as a witness to these discussions.

At its core, legal risk management is all about anticipating a legal problem and its solution before incurring liability. It's often said that while winning a case is certainly a victory, the real victory is not having a case in the first place.

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