

Management Alert

Courts Expand California Employer Obligations to Disabled Workers

Two recent court decisions expand the scope of the employer duty to provide reasonable accommodations to disabled employees under the Americans with Disabilities Act (ADA) and its California state law counterpart, the Fair Employment and Housing Act (FEHA). On July 6, 2006, the Ninth Circuit Court of Appeals expanded the scope of positions that must be considered in evaluating reassignment of the employee as a reasonable accommodation under the ADA. In another recent decision, the California Court of Appeal clarified that the duty to accommodate applies to those non-disabled employees whom the employer “regards as” disabled. The two decisions, read together, require California employers to continue to be diligent in engaging in the interactive process and accommodation of disabled and potentially disabled employees.

A “Dark” Day For Employer Certainty and the Direct Threat Defense

Dark v. Curry County (9th Cir., No. 04-36087) addresses the “reassignment of an employee” as an accommodation issue. Robert Dark was a heavy equipment operator for the Curry County Road Department who knew he suffered from epilepsy, yet concealed it from his employer for 16 years. The condition

surfaced when he suffered an epileptic seizure on the job while driving a County pickup truck. Following the incident, a medical examination of Dark concluded that because of his epilepsy, he should not work around moving machinery where sudden loss of consciousness would endanger himself or others. After receiving the medical report, the Road Department terminated Dark’s employment, communicating its decision in a letter that concluded that Dark could not perform the essential functions and duties of his position and that his continued employment posed a threat to the safety of others.

Dark appealed to the Curry County Board of Commissioners, arguing that his seizure was a result of a change in medication, and seeking accommodation in the form of either: 1) a temporary change in his duties; 2) reassignment to a new position; or 3) the use of accumulated sick leave or medical leave without pay until his condition stabilized. The appeal failed, and Dark sued claiming that the County violated the ADA by discharging him. The trial court granted the County’s motion for summary judgment and dismissed Dark’s lawsuit. The Ninth Circuit overturned the trial court’s ruling.

Ongoing Obligation to Reassign to Future Openings

Under the ADA and FEHA, an employer can prevail if it can show that the plaintiff was not qualified for his/her position. For the purposes of the ADA, a qualified individual is one who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or another available position. Dark was not qualified to perform the essential functions of his position without a reasonable accommodation, bringing to the forefront the question of what constitutes a “reasonable” accommodation. The Ninth Circuit focused on Dark’s proposal that he be reassigned. The court found that Dark was a qualified individual if he could “perform the essential functions of a reassignment position, even if he could not perform the essential functions of the current position.”

Dark claimed he should have been offered positions for which he was qualified that became available after his termination. The County responded that these positions were not available at the time he sought the accommodation and was discharged. The Ninth Circuit found that, in considering reassignment as a reasonable accommodation, an employer must consider not only the open positions but also those that will become available within a “reasonable” period. The only guidance the court offered on the focal length of the crystal ball needed to look into the future was a quote from a Tenth Circuit opinion that vacant positions that must be considered include those “that the employer reasonably anticipates will become vacant in the fairly immediate future.”

This is a problematic ruling for employers. It expands employers’ obligations when faced with disabled employees, and does so by introducing an element of uncertainty. Must the employer have reason to believe that future positions will become available at the time of termination, or must the employer wait a reasonable amount of time to see if positions

become available? What is a reasonable amount of time? What must an employer do with the disabled employee in the meantime?

Direct Threat Defense

Just as problematic may be that the court seems to have significantly limited the direct threat defense. Under the ADA, an employer is entitled to defend an adverse employment action on the grounds that “an individual [poses] a direct threat to the health or safety of other individuals in the workplace.” While this defense would seem to be particularly applicable to an epileptic heavy equipment operator in Dark’s situation, the Ninth Circuit did not agree. The court stated that the direct threat defense does not apply until the duty of reasonable accommodation is exhausted. Since reasonable accommodation includes reassignment to jobs that may come open in the future, there is a way to read the decision as nearly eliminating the direct threat defense except in situations where the employer knows what positions will come open in the “fairly immediate future” and the employee is unqualified for any of them. The challenge is, among others, to reconcile the burden on the employer to grant a reasonable accommodation with a position posing a lesser threat in the future with a direct threat environment in the present.

The California Court of Appeal Requires Interactive Process Even For Employee Without Actual Disabilities

The *Dark* decision comes on the heels of a recent ruling by the California Court of Appeal decided pursuant to FEHA. In *Gelfo v. Lockheed Martin Corp.*, No. B178676 (June 2, 2006), the court ruled that employers must provide reasonable accommodations for employees “regarded as” disabled, even if they are not actually disabled. Gelfo allegedly injured his lower back at work, eventually leading to a qualified medical examination (QME) conducted in connection with his worker’s compensation claim. The medical report concluded that

Gelfo's injury was "permanent and stationary," and that Gelfo was "permanently disabled" and precluded from performing "heavy work." On a parallel track, Gelfo trained for and was offered a new position. However, the offer was revoked two days later, after a review of Gelfo's medical records determined that Gelfo's medical restrictions were incompatible with the physical demands of the new position.

The employer, through a review committee, considered whether an accommodation could enable Gelfo to perform the new position. Gelfo claimed he was no longer disabled. The committee relied on medical reports and testimony gathered for the purposes of Gelfo's worker's compensation claim and found that no reasonable accommodation could be made to satisfy all of Gelfo's physical limitations.

The trial court determined that Gelfo was not "actually" physically disabled, accepting Gelfo's testimony to that effect. The trial court then granted directed verdicts against Gelfo on his causes of action for "failure to accommodate," relying on federal cases interpreting the ADA to hold that the right to reasonable accommodation flows only to an employee who is "actually" disabled.

The court of appeals agreed that Gelfo was not "actually" physically disabled and shifted to whether a person who was perceived as disabled was entitled to accommodation. The court noted that this issue was novel to California. It also noted there was a split of authority among the federal courts, with the Ninth Circuit finding no duty of accommodation absent actual disability. The court of appeals, nonetheless, held that under FEHA employers must reasonably accommodate individuals falling within any of FEHA's definitions of "disabilities," including those "regarded as" disabled, and must engage in an interactive process to determine any effective accommodations.

What These Cases Mean for Employers

The accommodation duties of California employers have expanded and the scope of obligation in the interactive process has increased:

- ◆ When reassignment is a potential accommodation, employers must now look ahead and consider anticipated openings in determining whether reassignment is possible in the fairly immediate future.
- ◆ When the direct threat issue surfaces in the workplace, the employer should isolate, as nearly as possible, the risk associated with the threat but also begin evaluating the availability of alternate positions that would not pose the same threat and again consider those that are or will be available.
- ◆ Employers must be wary of relying on medical reports to determine disability when the employee disclaims the disability. If there is confusion about the medical report, or if it is outdated, an employer should seek clarification or another medical evaluation.

If you have any questions or need additional information, please contact the Seyfarth Shaw LLP attorney with whom you work or any California attorney listed on our website at www.seyfarth.com.

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