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Update on Federal Disability Discrimination Law

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Disability discrimination has been a fertile area of litigation for several years. The United States Equal Employment Opportunity Commission reports that in fiscal year 2016, it received more than 28,000 charges which included some allegation of discrimination on the basis of disability – roughly double the number reported in 2005. Although only a fraction of those administrative charges end up in court, the number of lawsuits filed is large, and likely has been fueled by the 2009 amendments to the Americans with Disabilities Act, which were enacted with the avowed purpose of lowering barriers to recovery.

The first half of this year has been no exception. In the past few months federal courts of appeals, where most disability discrimination law is made, have decided several cases touching on significant and frequently-litigated issues. The issue that has received perhaps the most attention is this: how do employers and courts identify a job's "essential functions"? The question is particularly important because the law is settled on one key point – no employer is required to "accommodate" a disabled employee by relieving her of the need to perform a job's essential functions. Stated another way, an accommodation that involves changing a job's essential functions is, per se, not "reasonable." Therefore, if an employer can persuade a court that the function its employee asks to have modified is "essential," it will be entitled to judgment as a matter of law and able to avoid a trial. It is no surprise, then, that this is an issue that gets aggressively litigated.

This article first summarizes the recent "essential function" cases that have been decided in the courts of appeals. Next, it discusses a new First Circuit decision dealing with the question of when a lengthy period of leave is a "reasonable accommodation." Finally, it describes a new federal district court decision that may open the door to expanding employment protections to some transgender individuals under the ADA.

1. **"Essential Function" Cases**

In *Mason v. United Parcel Service Co.*, 674 Fed. Appx. 943 (6th Cir., Jan. 10, 2017), the plaintiff had lifting restrictions as the result of an injury she sustained while working for UPS. Because the restrictions were permanent, she requested accommodations which would have relieved her of the need to lift "heavy" packages, as well as the need to lift any packages above her shoulders or lower them to foot level. All those tasks were identified as essential parts of her position in the company's job description. The court rejected the argument that the plaintiff should be relieved of the various lifting requirements because, it said, "that would essentially transform the position into another one by eliminating essential functions of the job as it exists." The *Mason* court then analyzed and rejected the plaintiff's contention that she should be allowed to rely on her co-employees to assist with the lifting she could not do herself. Because the package center where she worked was "leanly staffed" and "require[d] all employees to perform their functions," the court concluded that shifting Mason's duties to others would "significantly disrupt" operations.

Later the same month the Sixth Circuit decided another case, *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6th Cir. 2017), where it again considered the effect that a requested accommodation might have on a disabled employee's co-workers. The plaintiff was a Customer Sales Representative (CSR) who suffered from depression and anxiety. CSRs worked eight-hour shifts, typically handling 40 to 50 calls per shift. The plaintiff sometimes needed to

"log out" and take time to compose herself after very stressful calls. To deal with that stress she requested accommodation in the form of leave from work for treatment, flexible scheduling, and additional breaks during her shifts. The evidence established, though, that "[i]f a CSR is not logged in to her workstation, any calls that would have otherwise gone to her are rerouted to another CSR," and that the consequences of her unscheduled absences included "potential increases in customer wait times and decreases in the quality and speed of customer service," as well as "increased workplace tensions and decreased morale among the CSRs." Because, the court reasoned, "[r]egular, in-person attendance is an essential function . . . of most jobs, especially the interactive ones," the accommodations the plaintiff had requested were not reasonable.

Stevens v. Rite Aid Corporation, 851 F.3d 224 (2d Cir. 2017), involved a pharmacist who asked to be accommodated because of his "needle phobia." Rite Aid had made a business decision in 2011 to start requiring pharmacists to perform immunizations. Stevens argued that he could be accommodated by either hiring a nurse or assigning him to a "dual pharmacist" store, so that all immunizations could be performed by a colleague. The court reasoned, however, that "[t]hose steps would be exemptions that would have involved other employees performing Stevens' essential immunization duties." Because "[a] reasonable accommodation can never involve the elimination of an essential function of a job," the court of appeals held that Rite Aid was not required to grant the plaintiff those exemptions.

In another Sixth Circuit case, *Green v. BakeMark, USA, LLC* , 2017 WL 1147168 (6th Cir. March 27, 2017), the plaintiff was an "operations manager" with supervisory responsibilities, who historically had worked a minimum of 50 hours per week in that position. After suffering an on-the-job injury he asked to be accommodated with a part-time (20 hour a week) schedule. The trial court granted the employer summary judgment, and the court of appeals affirmed. After observing that "Green's own experience working long hours as an operations manager belies any claim that he could perform the essential functions of the position working four hours a day, five days a week," the court noted that "the written job description for operations manager emphasizes the position's full-time nature by stressing the 'supervisory responsibilities' inherent in the position, including 'closely interacting with department associates,'" and found it "difficult to fathom how Green could adequately fulfill his supervisory role if he were there to supervise and interact with the associates only part-time." At best, the court reasoned, "Green's proposed accommodation would have allowed him to perform only some functions of his position, some of the time." Because "the ADA requires more," the court affirmed the entry of summary judgment in the employer's favor.

2. The First Circuit Takes Up the Issue of Extended Leave

Although all federal appellate decisions interpreting the ADA are significant, cases decided by the Court of Appeals for the First Circuit, which includes Maine, directly control cases brought here. Most of the cases handed down by the First Circuit so far this year have broken little ground. One case, however, is worth noting because it deals with the recurring challenge employers face when they are asked to honor requests for extended leave from work.

In *Echevarria v. AstaZeneca Pharm*., LP, 856 F.3d 119 (1st Cir 2017), one of the questions presented was whether the plaintiff, who had taken a lengthy period of leave due to depression and anxiety, was entitled to another 12 months as an accommodation. The First Circuit held that the requested accommodation was not "facially reasonable." In its analysis of this issue the court quoted at length from a recent decision that had been authored by Justice Neil Gorsuch (the newest member of the Supreme Court) when he was sitting on the Tenth Circuit Court of Appeals, which the court said "nicely captured the dilemma that lengthy leave requests pose for employers." In that case Justice Gorsuch had explained that although leaves of absence can be "reasonable accommodations" in some circumstances, lengthy periods of leave typically do not qualify because "reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work" (and it was not at all clear that the leave requested in *Echevarria* would actually be "effective" to get the plaintiff back to work).

The First Circuit went on to observe in *Echevarria* that "[c]ompliance with a request for a lengthy period of leave imposes obvious burdens on an employer, not the least of which entails somehow covering the absent employee's job responsibilities during the employee's extended leave." The court said that an employee's "facial-reasonableness showing must take these obvious burdens into account." Because the plaintiff had not satisfactorily explained how her employer should be expected to deal with the burdens imposed by her extended absence, the summary judgment entered for her employer was affirmed.

3. New Development: Gender Dysphoria as a Protected Disability

Finally, in *Blatt v. Cabela's Retail, Inc.,* 2017 WL 2178123 (E.D. Pa. May 18, 2017), a court for the first time has ruled that a transgender employee may proceed with a discrimination claim under the ADA. Courts applying Title VII previously have said that sex discrimination laws prohibit anti-transgender discrimination in the workplace. *Blatt* is unique because it says that a transgender employee with gender dysphoria may also be protected by the ADA.

The *Blatt* decision is brief and to the point. Kate Lynn Blatt, a transgender woman, sued Cabela's, claiming that while working there she was subjected to discrimination – she was not permitted to wear a name tag with her female name, or use the women's restroom – and that she was harassed by co-workers. Cabela's moved to dismiss her ADA claims on the ground that Section 12211 of the ADA excludes from coverage "gender identity disorders not resulting from physical impairments." In response, Blatt argued that the ADA's exclusion of gender identity disorders violated her Constitutional right to equal protection of the laws. The judge ruled that the ADA can, in fact, cover gender dysphoria, a condition "which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." Because Blatt sufficiently alleged that gender dysphoria "substantially limited" her "major life activities" – including interacting with others, and social and occupational functioning – the court denied the employer's motion to dismiss and allowed the ADA claim to go forward.

Although *Blatt* has been described in the press as a "landmark" advance for transgender workers, it may not have very broad practical implications. The court did not question the assumption that the ADA protects only gender dysphoria, and not transgenderism generally. Furthermore, since transgender individuals have already found protection from employment discrimination under Title VII, the more limited safeguards recognized in *Blatt* may not add much. At the very least, though, the decision is yet another indication that the protections afforded by the ADA will continue to evolve, and that litigation under the Act will continue to grow.