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A New Frontier: Accommodating Employees' Temporary Disabilities

**Commentary by
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More and more employers are confronting and seeking guidance in responding to requests from employees for accommodations to address temporary health conditions.



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Recent appellate case decisions, the interpretation of the U.S. Equal Employment Opportunity Commission of its regulations, and an expansive view of the requirement to provide such accommodations, signal that a practical approach for employers faced with such a request from employees who have suffered a temporary injury or illness is not to reject an accommodation request out-of-hand, but to find temporary arrangements to allow the employee to keep working during the duration of the transitory recovery period or at least during the time while the request is being evaluated.

Employers who take a more draconian approach run the risk of failing to accommodate an actual disability albeit a temporary one, or potentially finding themselves facing a retaliation claim, even if the employee is adjudged not to have a disability requiring the accommodation sought.

In 2008, Congress amended the Americans with Disabilities Act in response to a series of U.S. Supreme Court decisions that had narrowly interpreted the reach of the ADA provisions. In

particular, the ADA Amendments Act of 2008, or ADAAA, was intended to address the Toyota Motors Corp. decision in which the Supreme Court inferred that a temporary condition might not be covered as a disability under the ADA.

As a result of the ADAAA, the EEOC undertook a revision to its regulations, including the term "disability" and determined that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" to qualify for coverage as an actual disability "if sufficiently severe." At the time, the EEOC indicated that the expansive definition was intended to achieve the ADAAA's goal of putting people back to work.

At the same time, the ADAAA indicated in other sections that an employee with a "transitory and minor" condition might not come under the protection of the ADA if they were simply "regarded as" being disabled.

DEFINITION OF DISABILITY

Last year, the U.S. Court of Appeals for the Fourth Circuit, the first circuit to address the expanded definition of a disability, determined that employers are required to provide accommodations to workers suffering a temporary impairment, even those caused by an injury or illness.

The court found that "nothing about the ADAAA or its regulations suggests a distinction between impairments caused by temporary injuries and impairments

caused by permanent conditions." Both are to be treated as a disability to the extent that a temporary or permanent condition substantially limits a major life activity, and both situations were deserving of an accommodation. In the Fourth Circuit case of Carl Summers, the long-term rehabilitation from fracturing both legs required his employer to make a reasonable accommodation — in this case agreeing to telecommuting — and its failure to do so left it vulnerable to a wrongful discharge claim.

An employer who receives a request from an employee alleging the need for an accommodation to address a temporary condition would be sensible to take reasonable steps to research the request and provide an interim accommodation while undergoing an interactive evaluation process, rather than reject the request out of hand. In doing so, the employer may just save itself from having a court determine that its actions were unreasonable. At the same time, the employee should be informed that any accommodation is itself temporary.

Moreover, even if an employer believes that the employee's temporary condition is not severe enough to warrant an accommodation, the failure to make a temporary arrangement while investigating the request or engaging in a constructive dialogue may expose the employer to liability. Recently, the Sixth Circuit determined that a former employee was en-

titled to pursue a retaliation claim even though it did not reach the question as to whether his temporary condition would have qualified him as being disabled so as to obtain protection under the ADA. In Robert Hurtt's, the employee provided his employer with a doctor's note detailing, among other things, hypertension, chronic cough and dizziness with a recommendation for additional sleep and modification of travel schedule, which the employee requested.

The employer rejected the request, apparently deeming the condition not to be severe, and ultimately terminated the employee. In reversing the grant of summary judgment, the Sixth Circuit explained that the good faith request for an accommodation, even for albeit a temporary condition, was a protected act and that the employee had adduced sufficient evidence that he was retaliated against for making the request so as to withstand summary judgment.

While each situation must be judged individually, as more employees seek to return to work earlier following surgery or health conditions than in years past, employers should have a prudent policy when receiving a request for temporary accommodations that treat those requests seriously with an eye toward reaching an appropriate resolution that is best for the organization and the employee.

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