
CLIENT EMPLOYMENT LAW ADVISORY

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EMERGING TREND MAY REQUIRE MODIFICATION OF COMMUTING TIME AS A REASONABLE ADA ACCOMMODATION

A body of case law under the Americans with Disabilities Act (ADA) has established a general rule that an employer's duty to accommodate does not extend to "commute-related limitations." However, in one recent case, a federal court of appeals upheld an employee's claim that her employer violated the ADA by refusing to change her work shift after she reported commuting difficulties based upon a visual impairment that made it difficult for her to drive at night. **Colwell v. Rite Aid Corp.**, 602 F.3d 495 (3d Cir. 2010). A second federal appeals court has now issued a similar ruling, permitting an ADA claim to go to trial on the issue of whether the employer failed to accommodate the employee's visual impairment by refusing to modify her work schedule to daylight hours only. **Livingston v. Fred Meyer Stores, Inc.**, 2010 WL 2853172 (9th Cir. July 21, 2010).

NO DUTY TO ACCOMMODATE "STRESSED AND ANXIOUS" EMPLOYEE WHO DOES NOT REVEAL CONDITION OR REQUEST ACCOMMODATION

In another recent ADA case arising in Minnesota, the plaintiff employee had been diagnosed with depression, but he never disclosed this condition to his supervisor. Plaintiff told the supervisor only that he suffered from "stress and anxiety." At one point plaintiff requested time off from work "to deal with his stress and anxiety because ... everything was piling up ..." and filed for a leave under the federal Family and Medical Leave Act (FMLA). When the employer informed plaintiff that he could apply for FMLA leave only if he had a serious medical condition, plaintiff responded that he did not need an FMLA leave.

Plaintiff was later written up for excessive absenteeism. When he requested a "mental health leave," his supervisor asked him if he wanted to apply for FMLA leave. Plaintiff asked what was involved and was told that he would "have to get a doctor to sign some piece of paper to apply for the leave." He replied, "I don't have a doctor. Is there any other way I can go?" The employer offered him a severance payment if he resigned. Plaintiff resigned, but later sued, alleging both that his "forced" resignation violated the FMLA and that the employer's failure to grant him time off violated the ADA. A federal appeals court affirmed the dismissal of plaintiff's case in **Kobus v. College of St. Scholastica, Inc.**, 608 F.3d 1034 (8th Cir. 2010).

The appeals court reiterated the longstanding rule that "[w]hen an employee is made aware of the procedures necessary to obtain FMLA leave and chooses not to seek FMLA protection, the employer does not violate the FMLA by terminating the employee for excessive absenteeism." The court rejected plaintiff's FMLA claim based on the finding that the employee "did not pursue FMLA leave and in fact expressly rejected it."

The court also rejected plaintiff's ADA claim. To establish an ADA violation, the court stated, the plaintiff have informed the employer that he or she needed an accommodation for a disability. Plaintiff's merely stating that he was "depressed" or "stressed" was "not sufficient to put the employer on notice that the employee [was] requesting [a] reasonable accommodation."

**TERMINATION BASED ON A FITNESS FOR DUTY EXAM
DOES NOT CONSTITUTE A "REGARDED AS" VIOLATION OF THE ADA**

It is a violation of the ADA for an employer to discriminate against an employee whom it "regards" as having a disability, even if the employee does not actually have an ADA-protected disability. In a Nebraska case decided this year, the plaintiff, who had been diagnosed with depression and anxiety, applied with a medical certification for an intermittent FMLA leave of "6 months or longer." In response, the employer required plaintiff to undergo a fitness-for-duty examination by a psychiatrist, who determined that plaintiff could not fulfill the essential duties of her job – meaning that she was not protected under the ADA – and the employer terminated her. Plaintiff sued, claiming that while she did not have an actual ADA-recognized disability, her termination nevertheless violated the ADA since the employer allegedly fired her because it *perceived* her as disabled. The trial court's summary dismissal of plaintiff's case was affirmed on appeal in Wisbey v. City of Lincoln, 2010 WL 2650720 (8th Cir. July 6, 2010). In its opinion, the court found that plaintiff's employment was terminated based on the psychiatrist's determination that plaintiff was not fit for duty. Hence, the employer did not "mistakenly" believe that plaintiff had a disability under the ADA, or "regard" her to be unable to perform her job – she was, according to the doctor, genuinely unable to perform her job, and therefore could lawfully be terminated.

INSUBORDINATION UNDERMINES EMPLOYEE'S DISCRIMINATION CASE

In a recent Indiana employment case, the 51-year old female plaintiff antagonized two of the company's biggest customers during the first few months of employment, and created conflicts with her co-workers. The employer moved plaintiff to another job, but she again provoked her co-workers. At that point, the company terminated plaintiff for insubordination. Plaintiff sued, alleging discrimination because of her age and gender. The lower court's dismissal of plaintiff's case was affirmed in Everroad v. Scott Truck Systems, Inc., 604 F.3d 471 (7th Cir. 2010).

The court pointed out that in a discrimination case, the standard for determining whether an employee has been insubordinate is not whether a jury would conclude that in its own opinion, the employee was insubordinate. Rather, the question is whether the employer, at the time of the termination, genuinely *believed* that plaintiff had been insubordinate and should be terminated for that reason. A finding that the employer believed the employee was guilty of insubordination undermined plaintiff's ability to make even a threshold showing of discrimination. Such insubordination, the court stated, both (1) precludes plaintiff from demonstrating that she has "met her employer's legitimate job expectations," which is a threshold requirement for making an initial or *prima facie* case of discrimination; and (2) constitutes a non-discriminatory reason for termination that prevents a plaintiff from showing that the company's actions were a pretext for discrimination.

Please note that the cases presented in this Advisory are drawn from courts located throughout the United States. They may or may not apply to a given employer based upon regional interpretations of federal law as well as any applicable state or local laws. If you have any questions concerning labor and employment law issues, please contact Robert I. Gosseen, Esq., who heads this practice area at Ganfer & Shore, LLP, or your contact at the firm.