

Lawyer Insights

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ADA Insights From 2nd Circ. ‘Needle-Phobia’ Decision

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It happens countless times each day — an employee brings in a doctor’s note that restricts his or her ability to work. Employers often struggle to identify exactly how they should respond. The passage of the Americans with Disabilities Amendments Act in 2008 brought more visibility to companies’ obligation to accommodate disabled workers and engage in an interactive process to evaluate accommodations. However, companies still grapple with the bounds of their obligations and how to evaluate possible accommodations.

A recent Second Circuit opinion provides helpful reminders regarding various aspects of Americans with Disabilities Act compliance. In the case, Rite Aid fired a long-tenured pharmacist after he refused to comply with the company’s new mandate that pharmacists administer immunizations. The former pharmacist claimed Rite Aid illegally discharged and retaliated against him, and refused to accommodate his disability — trypanophobia, or needle phobia — under the ADA and similar state law. The Second Circuit found that Rite Aid lawfully discharged the pharmacist,¹ and the opinion highlights several key ADA compliance points.

First, determine whether the function at issue is essential to the job. This was a key issue in the Second Circuit decision. The Second Circuit considered whether the administration of immunizations truly was an “essential” job duty.

This may seem like an obvious point but, it is often overlooked. Instead, it should be one of the first issues addressed. An essential function is a fundamental job duty. In other words, the position exists to perform the function, a limited number of employees can perform the function, or the function is highly specialized and requires expertise.

The employer bears the burden of proving the essential job functions. While the realities of the job — not job descriptions — are the final arbiters of whether a function is essential, the job description and other business conduct can go a long way to supporting the function’s essential nature. Other evidence of whether a function is essential includes: the amount of time spent on the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experience of past incumbents; and the current work experience of incumbents in similar jobs.

In the Rite Aid case, the Second Circuit based its finding that administering immunizations was an essential job function on several facts:

- Rite Aid personnel testified without contradiction that the company made a business decision to require pharmacists to perform immunizations;
- Rite Aid carried out that policy by revising the job description to list performing immunizations as an essential duty and responsibility, and requiring that pharmacists obtain immunization certification and licensure (depending on state requirements); and
- Rite Aid terminated another pharmacist with trypanophobia for failing to undergo Rite Aid's immunization training program.

This leads to the second key compliance point: ensure that job descriptions and business conduct support a finding that job functions are essential.

Evaluate the paper trail for the position, such as job postings, job descriptions, key responsibility guides, performance evaluations and the company's policies with respect to the job's functions. It is likely worth finding out how the employee's supervisors describe the job, and how other people in the job describe its functions. These individuals can provide persuasive evidence of a job's functions.

Third, if a function is essential, employers are not required to reallocate or eliminate it.

Increasingly, employers go to great lengths to accommodate disabled workers. While this is in line with the spirit of the ADA, it is not always legally required. Reallocating or eliminating an essential job function is not a reasonable accommodation. This means that employers are not required to shift essential functions to other workers or hire someone else to perform those functions.

Fourth, consider accommodations that are reasonable.

Accommodations that may be reasonable include job restructuring (again, this does not include reallocating essential job functions), part-time or modified schedules, reassignment to a vacant position for which the worker can perform essential job functions, acquiring or modifying equipment or devices, and the provision of qualified readers or interpreters. Whether these, or other, accommodations are reasonable depends on the specific circumstances at issue.

When bringing a failure-to-accommodate claim, it is the employee's burden to prove that a reasonable accommodation existed or that he or she would have accepted an identified accommodation if it had been offered. However, when an employee presents work restrictions, employers should initiate the conversation regarding possible accommodations if the employee does not do so. Then, the parties should work together to review restrictions and accommodations and identify a workable solution. This is referred to as the "interactive process."

Often, the interactive process includes providing the employee with a copy of the relevant job description and a request that the employee's physician review the description and identify: (1) those functions that the employee is unable to perform; and (2) whether — and what — accommodation(s) would permit the employee to perform those functions.

That being said, legally speaking, unless the employee identifies a reasonable accommodation, the employer has no affirmative duty to engage in an "interactive process" or to show undue hardship. The Second Circuit reiterated this point when it found that, because the pharmacist failed to present any evidence suggesting a reasonable accommodation existed at the time of his termination, "he could not recover based on Rite Aid's failure to engage in the interactive process, even if such failure occurred."

In finding that no reasonable accommodation existed at the time of the pharmacist's termination, the Second Circuit found that the company:

- Had requested that the pharmacist's physician provide information about his phobia, including whether there were any accommodations that would enable him to perform injections, and the physician said that there were not;
- Had offered the pharmacist another position that would not require him to administer immunizations;
- Was not obligated to offer medical treatment as an accommodation;
- Was not obligated to hire a nurse to give immunizations;
- Was not obligated to assign the pharmacist to a location with two pharmacists on staff, the second of which could perform immunizations (and, in any event, he had not shown that such a position was vacant at the time of his termination).

It is worth remembering that a worker is not entitled to the accommodation of his or her choice, or even his or her preferred accommodation. Rather, an employer has met its obligations if the offered accommodation is effective, meaning it permits the worker to perform the essential job functions.

Last but not least, ensure that the company's steps to evaluate an employee's work restrictions and consider accommodations are documented.

Even if the company does everything right, it is all for naught unless it can prove that it did so. For that reason, it is often helpful to have checklists and standard form documents for use in evaluating potential accommodations. Not only will such documentation help ensure the proper procedures are followed, but they will assist the company in defending later claims to the contrary. Strong documentation is especially helpful when, as is often the case in litigation, memories have faded and the relevant company personnel has turned over.

NOTE

¹ The pharmacist has since filed a rehearing request.

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