

Reasonable Accommodations for Employees with Multiple Sclerosis - What Does the Law Require?

5/9/2013

Practices: Employment, Labor & Benefits

With an estimated 400,000 people diagnosed with multiple sclerosis ("MS") in the United States, it is not surprising that legal issues have flared up in the workplace. The Seventh Circuit Court of Appeals in Chicago has recently decided two cases involving employees with MS, which provide employers with some guidance regarding the employer's duties under the Americans with Disabilities Act ("ADA") to accommodate employees with MS. In *Nancie J. Cloe v. City of Indianapolis*, decided on April 9, 2013, the Court reviewed the employee's claims that the City discriminated against her based on her disability, failed to reasonably accommodate her disability and retaliated against her for requesting accommodations. While ultimately affirming summary judgment in favor of the employer on the failure to accommodate claims, the Court's analysis is instructive for employers facing similar challenges. In its decision in *Terri Basden v. Professional Transportation, Inc.*, issued on May 8, 2013, the Court made clear that an employer can only be liable for a failure to accommodate if the employee is a "qualified individual" under the ADA.

In *Cloe*, the plaintiff was an Unsafe Building/Nuisance Abatement Project Manager for the City, whose duties included arranging sweeps of abandoned and unsafe properties. The job involved about 70% field work and 30% office work. In March 2008, she was diagnosed with MS. After taking some time off, she returned to work with restrictions that only allowed her to work 3 to 4 days a week of desk duty. Her doctor also asked that Cloe be provided with nearby parking and a personal printer because the MS made it difficult for her to walk. Based on her restrictions, Cloe's job became almost entirely desk-bound. Due to the MS, Cloe had difficulty walking, vision impairment, memory problems, difficulty concentrating and poor spelling and grammar.

Cloe was terminated on June 29, 2009 after receiving certain warnings that the City considered her work performance unacceptable. The decision includes a detailed discussion of the circumstances that led to her eventual termination. In reviewing Cloe's claims that the City failed to make reasonable accommodations for her MS, the Court reiterated that reasonable accommodation under the ADA is a process, not a one-off event. The process begins with the employee, who has the initial duty to inform the employer of the disability.

In response to Cloe's request for a nearby parking space, the City explored several options over a period of 5 months before a Cloe was given a permanent underground parking spot when another employee left his position. The Court disagreed with Cloe that the City violated the ADA because it should have immediately provided her with the permanent parking spot. The ADA does not require the employer to provide the exact

accommodation requested. Instead, the employer is obligated to engage in an interactive process with the employee, which the City, in fact, did. The Court refused to second guess the City by saying that in retrospect, the City should have given her the permanent parking spot in the first place.

Cloe also complained that after she requested a printer in her office to minimize the amount of walking, it took the City somewhere between 2 weeks and 1 month to provide her with one. The Court rejected the argument that the City's failure to immediately buy her a new printer or temporarily loan her one was unreasonable and noted that a responsible government is entitled to take time to evaluate alternatives before spending taxpayer money.

The Appellate Court did send the case back to the trial court to proceed with the retaliation and discrimination claims. Based on the facts presented, the Court found that the trial court erred in granting summary judgment for the City on those claims. While the EEOC's guidance on the ADA states that employers may hold disabled employees to the same quantitative and qualitative standards for performance of essential functions, this decision provides valuable insight as to how the words and actions of supervisors may be used to create "a convincing mosaic of circumstantial evidence" of discriminatory or retaliatory animus.

The Seventh Circuit affirmed the grant of summary judgment in favor of the employer in the *Basden* case, which presented a very different set of facts. Basden was terminated for violating the company's attendance policy, which provided for progressive corrective action after an employee accumulates a specified number of "incidents of absenteeism". The Court held that Basden could not proceed with her ADA claim because she failed to present sufficient evidence that she was qualified to perform the essential functions of her job, even with a reasonable accommodation. The key facts in this analysis were that while Basden had been told it was likely she had MS, she was not diagnosed and did not begin taking medication until after her termination. Moreover, she did not show that she would be able to attend work regularly after she received treatment.

Employers can consider regular attendance as an essential job requirement and are not required to accommodate erratic or unreliable attendance under the ADA. However, employers should remember that some employees may be entitled to take leave under the Family & Medical Leave Act. The plaintiff in Basden was ineligible for FMLA leave as she had worked at the company for less than one year. Coordinating the requirements of the various statutes and the needs of the company can be very challenging for many employers. One of the attorneys in the ELBG can assist you if you have any questions regarding reasonable accommodations.