

In a June, 2007 press release, the Federal Equal Employment Opportunity Commission (EEOC) reported that in its fiscal year 2006 it had received almost 17,000 complaints of employment discrimination “on the basis of race, color, sex, national origin, disability and reprisal.” The law requires that employment discrimination complaints be filed with the EEOC before filing in court. During its investigation of each complaint the EEOC requires a response from the employer and requests copies of a wide variety of documents. This results in a substantial commitment of time and money. If court proceedings follow, the additional time and money expended can seriously detract from attention to the employer’s primary mission. Thus it is prudent to put into place a well thought out risk management program to reduce the risk of employment practices litigation. A good program also has the benefit of boosting employee morale because it should include a process to enhance the quality of communication between management and employees.

This article describes an example case of alleged discrimination in violation of the Americans with Disabilities Act (ADA) and contains risk management suggestions. Although all the facts described are a matter public record, changes have been made to protect the identity of the persons involved.

A case example: alleged violations of the ADA

Sally was a long time nurse practitioner for a large, rural community mental health center. She worked for the Center her entire career over 20 years. Her performance evaluations were uniformly glowing. Her supervisors described her as a “self starter” who frequently did more than was asked of her. She was responsible for directing the Center’s in patient crisis stabilization unit. Her co-workers liked and respected her and she had formed many long friendships with them. The Center’s management had changed during the last 3 years of her tenure following the CEO’s departure to different employment.

Unfortunately Sally became ill with leukemia at about the same time management changed. She had to take leave from the Center for treatment which included chemotherapy. She returned to her job after 5 months and again received a good performance evaluation. However, within a year her condition deteriorated and she had to take another leave of absence. Her recovery from a second round of chemotherapy was slower but her doctors were encouraging that she would live a normal life expectancy. Her doctors cleared her to return to work but she was restricted to part time. Although she could care for herself, feed herself and drive, she had low energy and difficulty walking and lifting. It was difficult for her to stand for extended periods. She became tired easily after work activities requiring more than mild exertion.

The crisis unit had a rotation schedule for night duty which her doctors advised her not to do. Thus Sally told the CEO that she was disabled and asked the Center to accommodate her disability by allowing her to return to full time work gradually. She also asked to be taken off the night duty rotation until she was able to work full time.

Sally did return to work part time, but heard rumors that the CEO was going to “force her out.” She became upset and shared some of her frustration with coworkers telling them that she thought the CEO was not willing to accommodate her. The CEO heard that she was talking to coworkers and sent her a memo ordering her not to talk about her accommodation requests and to say only that her continued employment depended on her doctors’ recommendations. Sally responded with a memo agreeing to say that her continued employment depended on her doctors. However she also asserted that she felt she had a right to express her opinion that management was not willing to accommodate her. When the CEO received her memo Sally was fired for “insubordination.” Sally filed a complaint with the EEOC alleging that she had been fired in violation of the ADA.

Legal principles applied to facts

In order to state a claim for violation of the ADA a plaintiff must demonstrate that he or she is a “qualified individual with a disability.” A “disability” is a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” In order to be “qualified,” the employee must be able to perform the “essential functions” of the job with or without a “reasonable accommodation.” An employer is not required to make accommodations which impose an “undue hardship” taking into account, among other things, the cost of the accommodation, the employer’s financial resources and size and the employer’s type of business. A reasonable accommodation may include “job restructuring, [and] part time or modified work schedules.”

Possible damages awardable in an ADA claim include lost wages with the cost of benefits and mental anguish. Lost wages include both past and future lost wages. Depending on the circumstances lost wage claims can amount to very large sums, sometimes over a million dollars. Compensation for mental anguish, non-economic damage, is limited depending on the size of the employer. If an employer acts with “malice” or with “reckless disregard” of the employee’s ADA rights, punitive damages meant to punish the employer may be awarded. Further, the party who loses the case must pay the other’s costs and attorney fees which can sometimes be \$50,000 or more.

In our case, the Center did not contest Sally’s claim that she had a “disability,” because of the difficulties she had with walking, lifting, standing and fatigue. However, the Center did assert that she could not perform the “essential functions” of her job because her doctors ordered her not to do night duty. The Center claimed that it was an undue hardship to remove Sally from the night duty rotation because there were very few nurses on the schedule. Further since the center was in a rural area where there were few qualified nurses available it would be expensive to replace her on the rotation.

An “essential function” is a “fundamental job duty necessary to accomplish the goals of the position.” In determining whether a function is essential a court will consider all of the unique circumstances. This includes the employer’s judgment as to what functions are essential and whether the employer has a written job description which was prepared before advertising or interviewing for the job. The courts will also consider the time spent

doing the function, the consequences of not performing the function and the work experience of other employees in similar jobs.

In our case the court ruled that the jury would decide whether being on night duty was essential because there were factors both for and against a finding that the function was “essential.” On the one hand there were only a few nurses on the rotation and taking one off the rotation added to the burden of the others. The employer did have a job description which designated night duty as essential. However all of the functions of the job were labeled essential. On the other hand Sally claimed that other nurses had been temporarily taken off the rotation. Also Sally’s coworker friends testified that her temporary removal from the rotation would not be a hardship on them and they were willing to provide coverage.

Sally also claimed that punitive damages should be awarded because the CEO had never in good faith considered her request for an accommodation of temporary part time work. The court ruled that issue would be left to the jury.

Risk management suggestions

1. Do what is fair. Simply because the world has more employees than managers, juries are likely to consist of more employees than managers. Many trial lawyers believe that juries often either do not understand or ignore some of the details of the law and just try to do what they think is fair. Of course “fair” is a relative term and what an employee considers fair may be different than what a supervisor thinks is fair.

In our case, an employee/juror would likely consider Sally’s long, exemplary work performance, the fact she was well liked and the supportive testimony of her coworkers. An employee/juror could identify with Sally and be concerned that if Sally could be fired when she was sick the same fate might befall the juror. A juror could also conclude that there was nothing wrong with Sally telling other coworkers that she was afraid she would lose her job because the new CEO did not want to accommodate her.

In trying to do what is fair and to prevent litigation in the first place, it could be helpful to consider an advisory opinion from a committee of employees when deciding on employee discipline and requests for accommodations. The committee might be structured with your center’s general counsel so that its deliberations could be considered privileged. At a minimum, supervisors should try to see an employee’s point of view before taking action.

2. Keep talking. Management sometimes takes disciplinary action and ends up in litigation when continued communication between all involved could have resulted in an entirely different outcome without a lawsuit. Our case is a good example. Communication broke down quickly. Sally heard rumors and did not go to the CEO to talk. Instead, in frustration she talked to her coworkers. Similarly, the CEO did not talk to Sally but decided to send a memorandum. Predictably Sally responded with another memo.

The issue in dispute, what Sally was going to tell her coworkers, was capable of negotiation and was not central to the material issues between the parties. The most important issues were Sally's ability to return to work and the center's ability to complete its mission of providing quality care. However, the parties stopped talking and made decisions on peripheral issues.

The law favors alternative dispute resolution programs. Mediation could be a required part of a grievance procedure. The employer could require mediation before filing a lawsuit in court. Mediation is a process during which a neutral third party assists the parties in talking about and reaching a settlement of matters in dispute. The whole process can be confidential. A good mediator will help both sides see the other's point of view and will increase the likelihood that the parties will talk instead of resorting to the courts.

3. Check your insurance. You may or may not be covered for employment related lawsuits like the one in our case. Ask your insurance agent. Some companies include employment practices liability insurance in directors and officers liability policies. However your policy might not provide coverage at all or only in a separate policy at an additional premium.

4. Review your job descriptions. Make sure you have adequate written descriptions for each job position. Only those functions which are truly essential should be so labeled. If a function is essential, do not act as if it is not. Act as if the function is essential when dealing with all employees performing the same function. In our case it was alleged that Sally was treated differently than other employees who wanted to be removed from the night duty rotation.

5. As appropriate to the importance of the matter, consult with legal professionals for employment decisions. Some liability insurance companies may offer risk management consultation. For example the Mental Health Risk Retention Group offers a risk management hot line free of charge for answers to its insureds' questions and provides direct consultation with its general counsel. Your center's general counsel may be consulted if experienced in employment law.