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REASONABLE ACCOMMODATION

EEOC targets Kaiser for disability discrimination

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Kaiser Permanente recently paid \$75,000 to a disabled former food service worker as the result of a lawsuit prosecuted on his behalf by the Equal Employment Opportunity Commission (EEOC). The lawsuit alleged that Kaiser failed to engage in the interactive process with the employee, failed to grant reasonable accommodations, and ultimately fired him in violation of the Americans with Disabilities Act (ADA).

Termination sparks EEOC lawsuit

In 2008, Kaiser Permanente, the largest managed healthcare organization in the country, hired David Grandin to stock supplies and assemble and deliver food to patients in its San Diego Medical Center. Grandin suffers from a medical condition known as hydrocephalus, a buildup of brain fluid that causes dizziness and difficulty with memory and concentration. Hydrocephalus slowed Grandin's ability to perform his job because he lost his way in the hospital.

In response to supervisor complaints that he was not meeting performance expectations, Grandin requested an accommodation for his disability in the form of additional training time

and the assistance of a temporary job coach. A local nonprofit organization specializing in assisting people with disabilities was able to provide such services for free. Nevertheless, Kaiser allegedly refused to explore this option with Grandin. He claimed the company denied his requests for accommodation and placed him on administrative leave before eventually firing him.

Grandin filed a discrimination charge with the EEOC, which investigated his complaints and attempted to negotiate a resolution with Kaiser. The settlement attempts proved unsuccessful, and in September 2013, the EEOC sued Kaiser, alleging that the company violated the ADA when:

- (1) It failed to provide effective training that addressed Grandin's disability;
- (2) It refused to engage in the interactive process or provide him with his requested reasonable accommodation; and
- (3) It terminated his employment.

The EEOC's lawsuit sought back pay, compensatory and punitive damages, and injunctive relief to prevent further discrimination at the hospital.

Kaiser pays \$75,000 to settle lawsuit

The EEOC administers, interprets, and enforces federal laws prohibiting

employment discrimination, including the ADA. If an employee believes he has been discriminated against in violation of federal law, he may file a discrimination charge with the agency. The EEOC will investigate seemingly valid charges, and if a violation is found, it will attempt to reach a settlement with the employer on the employee's behalf.

In the absence of a settlement, the EEOC's legal staff and/or the U.S. Department of Justice decides whether the agency should file a lawsuit. Recent lawsuits filed and settled by the EEOC nationwide illustrate that the agency has been focused on discrimination allegedly committed by hospitals and other healthcare providers.

After filing the lawsuit, the EEOC and Kaiser agreed to a consent decree in October 2014. Kaiser agreed to pay \$75,000 to compensate Grandin for back wages and emotional distress in exchange for a dismissal of the EEOC's lawsuit. It also agreed to implement sweeping remedial measures requiring that the company appoint an equal employment opportunity coordinator to review, revise, reaffirm, and disseminate its existing antidiscrimination and job accommodation policies and procedures, increase employee ADA compliance training, and monitor and track requests to Kaiser for accommodations and terminations involving persons with disabilities.

How should Kaiser have handled the situation?

Businesses employing 15 or more workers are required to comply with the ADA, which makes it unlawful for an employer to discriminate against a job applicant or employee because of a disability. The ADA's California equivalent—the Fair Employment and Housing Act (FEHA)—applies to employers doing business in California that have five or more workers. When an employer learns an employee suffers from a disability, it is required to engage in the “interactive process” with her to determine whether there is a reasonable accommodation that would make it possible for her to keep working.

An employer must make reasonable accommodations for any employee's known disability unless doing so would create an undue hardship for it. The EEOC says that a finding of undue hardship will be based on an assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense. Some of the factors it considers in this assessment include:

- (1) The nature and cost of the necessary accommodation;
- (2) The overall size, type of operation, and financial resources of the employer; and
- (3) The impact the accommodation will have on the employer's business.

In this case, the EEOC alleged that the requested job coach would have had the training and experience to understand Grandin's learning style and ability and would have been able to design a program effective in teaching him how to perform his job duties in light of his mental disability. And the job coach would have been free of charge to Kaiser and thus not financially burdensome.

For those reasons, the EEOC asserted that Grandin was a qualified individual able to perform the essential functions of his job as a food service worker with or without a reasonable accommodation, and thus, Kaiser's treatment of him was unlawful. *U.S. Equal Employment Opportunity Commission v. Kaiser Foundation Hospitals, et al.* (United States District Court for the Southern District of California, 10/7/14).

continued on pg. 4

continued from pg. 2

Bottom line

When it comes to disability claims under the ADA or the FEHA, “process” is king. Upon learning of a disabled worker’s need for a reasonable accommodation, you must engage in an interactive process with the worker to determine whether he can perform the essential functions of the job with or without a reasonable accommodation. And it is important for you to create a written record of the process.

In this case, Kaiser was allegedly unable to prove that it had met those requirements, and given that the proposed accommodations were free, it certainly had difficulty proving undue hardship. Thus, its failure to follow a good process created an otherwise avoidable legal risk.

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