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Disability Discrimination Under New York Law And The Importance Of The Interactive Process

By: *Jed L. Marcus, Esq.*

A recent decision issued by the New York Court of Appeals underscores the critical importance of an employer's response to a disabled employee's request for a particular accommodation by engaging in a good faith interactive process regarding the feasibility of that accommodation. In *Jacobsen v. New York City Health & Hospital Corp.*, 2014 NY Slip Op. 02098 (Mar. 27, 2014), the Court of Appeals reversed summary judgment in favor of an employer on an employee's disability claim under New York state and city law because the employer failed to provide individualized consideration as to whether the employee's request for a respirator to accommodate his occupational lung disease, as well as a transfer back to the central office (where he had worked for decades in a position that required minimal time on construction sites with resulting dust exposure), was reasonable. Instead, the employer simply decided that the employee could not work safely in any position.

The employee in *Jacobsen* monitored construction projects, supervising construction, both in the field and in the office. After taking a medical leave of absence due to pneumoconiosis, an occupational lung disease, his doctor cleared him to return to work, but directed that he not visit construction sites. When the employer refused to return him to work, stating that the employee's duties required spending most of his time at construction sites, the employee asked that he be assigned only office work, but that too was refused. When the employee was subsequently cleared for field work, he asked to relocate to his former job in the central office and to be provided with a respirator to minimize dust exposure due to his condition. The employer

refused the transfer and placed him on medical leave for six months, explaining that a transfer was not a reasonable accommodation because the employee still had to visit construction sites. At the end of his six months of leave, he was terminated. The employee then sued for disability discrimination and retaliation under the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL), as well as gross negligence under New York law. The motion court granted summary judgment for the employer and the New York Appellate Division affirmed.

On appeal, the New York Court of Appeals reversed summary judgment on the disability discrimination claim because there were significant factual disputes as to whether the employer considered, in good faith, the employee's requests for accommodation. The Court emphasized an important distinction between the NYSHRL and the NYCHRL regarding who bears the burden of proof on the issue of reasonable accommodation. Under the NYSHRL, the Court explained, the employee bears the burden of proof on this issue at trial. However, because the NYCHRL definition of "disability" does not include "reasonable accommodation" but rather defines "disability" solely in terms of impairment, the employer has the burden of proof and must raise the inability of an employee to perform essential functions "with reasonable accommodation" as an affirmative defense.

Once an employee requests an accommodation, the Court observed, the employer has an obligation to engage in a good faith "interactive dialogue" with the employee to determine, based

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on a consideration of all the surrounding facts and circumstances, whether the employee can be accommodated. The Court stated that “an employee’s suggestion of a specific accommodation must prompt the employer to consider whether the burden thus imposed upon the employer’s business would be reasonable. In this way, the employer’s response . . . and any ensuing dialogue about the impact of the proposed accommodation on the employer’s business inform the determination of whether a reasonable accommodation exists.” As the Court saw it, “In light of the importance of the employer’s consideration of the employee’s proposed accommodation, the employer normally cannot obtain summary judgment on a claim unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation.”

The Bottom Line. *Jacobsen* has important lessons for employers. When an employee seeks an accommodation, the employer may not simply conclude that it can or cannot accommodate the employee. Rather, the employer must engage the employee in “interactive dialogue,” considering, in good faith, the employee’s particular requests. Moreover, while federal and New York state law place the burden on the employee to prove that a reasonable accommodation existed and that the employer refused to provide that accommodation, New York City law places that burden on the employer, as an affirmative defense. Therefore, the employer should ensure that its managers and supervisors understand that individualized consideration is required whenever a disabled employee approaches them with a request for an accommodation. Please call us if you have any questions. ■

For more information about any of the topics covered in this issue of the Labor & Employment Law Alert, please contact:

Jed L. Marcus, Esq.
jmarcus@bressler.com

Kenneth J. Cesta, Esq.
kcesta@bressler.com

Tracey Salmon-Smith, Esq.
tsmith@bressler.com

Emily J. Bordens, Esq.
ebordens@bressler.com

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