BusinessManagement DAILY

SEPTEMBER 4, 2018

When discussing ADA accommodations, track every offer and counter-offer

The ADA requires employers to provide reasonable accommodations for disabilities if a worker requests one. The process is supposed to be an interactive one, in which the employer and the worker discuss the disability, the essential functions the worker needs to perform and what accommodations may fit the definition of reasonable.

The goal is to reach a consensus on an accommodation that will work.

That isn't always possible. And if the worker refuses to accept an offered accommodation, the employer is free to end the accommodations process—which may even mean the employee loses her job.

Recent case: Andrea worked as an HR information systems coordinator for the University of Pennsylvania. Her supervisor rated her work as satisfactory in her first annual review.

Then Andrea's mother became ill and eventually died. Andrea took bereavement leave and returned to work. She claimed her supervisor then began a campaign to belittle her, including allegedly rolling her eyes, raising her voice and unfairly criticizing her work.

Around the same time, Andrea began to suffer from physical symptoms such as memory loss and high blood pressure, on which she blamed work mistakes. She claimed her supervisor made the situation worse by appearing dismissive and unsympathetic.

The supervisor called Andrea into a meeting and presented her with a "coaching record" to sign. It detailed Andrea's work mistakes and what she could do to improve. Andrea became agitated and upset.

She left the meeting to apply for FMLA leave, which Penn approved. She took a total of 24 weeks of combined FMLA and other leave.

Then, on doctor's advice, Andrea requested reasonable accommodations in the form of "part-time hours to

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002

transition back to work," a "different department, office, supervisor" and work in a "lower-stress department."

Penn scheduled a meeting with Andrea and her supervisor to discuss possible reasonable accommodations. She was offered a part-time schedule, but with the same supervisor. Andrea turned down the offer, preferring different hours and a different supervisor. Penn then terminated Andrea.

She sued, alleging failure to accommodate her disability.

The 3rd Circuit Court of Appeals explained that employers must act in good faith when considering reasonable accommodations. They can show good faith in various ways:

- Meeting with the employee
- Requesting information about the employee's claimed disability, such as her condition and workplace limitations
- Asking what the employee wants in an accommodation
- Showing signs of having considered the employee's preferences
- Offering or discussing available alternatives when the request is too burdensome.

However, the court also pointed out that when the employee is requesting a transfer, then he or she must show that there is an equivalent level and vacant position available that the employee is otherwise qualified to fill.

The court determined that Penn had demonstrated the required good faith while negotiating with Andrea. It met with her, discussed her requests and offered a part-time schedule. Since Andrea couldn't show a different position was available, her alternative was the accommodation Penn suggested. Since she turned it down, the court dismissed her lawsuit. (*Sessoms v. Trustees of the University of Pennsylvania, et al.*, 3rd Cir., 2018)

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002