Are You Sure You Can't Accommodate? Time As A Potential Determining Factor In ADA Accommodations

Labor & Employment Law Update

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The Seventh Circuit Appellate Court's decision last week in *Kauffman v. Petersen Health Care VII, LLC*, makes clear that the time an employee spends on a given job duty is critically important when it comes to reasonable accommodation requests under the Americans with Disabilities Act (ADA). The *Kauffman* case also reinforces an important lesson on a reasonable accommodation pitfall that employers must absolutely avoid.

The employee, Debra Kauffman, was a hairdresser at a nursing home, and one of her duties in that role was to push wheelchair-bound residents to and from the home's beauty parlor. After undergoing a surgical procedure, and on her doctor's orders, Kauffman asked her employer for an accommodation in the form of being excused from pushing residents in wheelchairs.

The employer's response was "no," essentially because the home did not allow people with medical restrictions to continue working for the home.

Lesson one: don't do that. The law on reasonable accommodations is substantially well-developed on certain points, which is why we can advise employers, without hesitation, that a blanket policy (sometimes called a "100% healed" policy) that bars all employees with medical restrictions from returning to work, without any individualized inquiry as to the nature of the medical restrictions at issue and the employer's capability to provide some accommodation, is extremely risky in terms of exposing employers to potential legal liability and the costs and uncertainty of litigation.

So, as an initial matter, the home's reliance on the blanket policy (and failure to consider what could be done to allow Kauffman to continue working) was unlawful. The proper response is to engage in an individualized, interactive inquiry into what is being requested and what the employer is able to provide.

Lesson two: when an employee asks to be excused from certain duties, the employer must realistically assess how much of the employee's working time the duties at issue consume. The employer must also realistically assess what the

potential burden—financial and otherwise—of eliminating or re-allocating the job duties will be for the employer. And the employer must be absolutely certain to document these various assessments in writing so that if an employee ever files an EEOC or state agency charge or a lawsuit, the employer will be in a strong position to defend itself.

The key to ADA accommodations is, of course, individualized inquiries into what the employee needs and what the employer can provide. That said, in light of the *Kauffman* decision, employers in Illinois, Indiana, and Wisconsin are likely to face considerable difficulty in establishing that a hardship prevents granting a reasonable accommodation in situations in which an employee asks to be excused from a duty that consumes only a small portion of her workday.

If employers refuse to consider the amount of working time at issue in an accommodation request, the *Kauffman* decision makes clear that the consequences may include a jury trial in federal court—and the considerable expense and risk that accompany such a trial—plus the costs and potential embarrassment of a jury verdict against the employer.

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