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The ADA and the Danger of the Seemingly Obvious

By Jerilyn Jacobs, Esq.

Never assume the obvious is true. A recent appellate opinion discussing the Americans with Disabilities Act ("ADA") is notable for its rejection of what would seem to be an obvious common sense notion - a bridge worker with a fear of heights is not able to perform the essential functions of his job.

Two key facts led the court to reverse the summary judgment granted in the employer's favor: (1) the employer had in fact "informally accommodated" the condition for years; and (2) the employer's personnel manager allegedly responded to the bridge worker's formal request with the statement, "I'll tell you right now, we don't grant requests."

The employee, Darrell Miller, began working for the Illinois Department of Transportation ("IDOT") as a highway maintainer on a bridge crew in 2002. He worked with a bridge technician and a team of four other highway maintainers, who performed a wide variety of tasks. At the outset of his employment, he informed the team leader that he had a fear of heights and there were a few tasks he would not be able to do. IDOT allowed other members of the team to do those tasks. IDOT accommodated other team members' shortcomings as well, such as one member's inability to weld and another's allergies.

In 2006, however, Miller was unable to complete an assigned task because of a panic attack and was placed on sick leave. IDOT's examiner diagnosed Miller with acrophobia (fear of heights), and concluded he was unfit to work as a highway maintainer. Miller filed a grievance challenging that conclusion and also requested

that he not be required to work at heights greater than 25 feet. That was when the personnel manager made the fatal "we don't grant requests" comment. At the grievance hearing, a psychiatrist testified that Miller could continue to work if he was given the same accommodations he had been provided in the past.

Miller's accommodation request was ultimately denied, but he was ordered back to work. On his first day back, he said about the personnel manager, "Right there is Arch enemy Number 1. I have never hit a woman. Sometimes I would like to knock her teeth out." He was terminated for making that statement, although after filing another grievance, he was reinstated. Miller then filed suit in federal court under the ADA, alleging discrimination for failing to grant the accommodation and retaliation by terminating him for requesting the accommodation. He argued that his comment about the personnel manager was merely IDOT's pretext for terminating him.

The district court granted summary judgment in favor of IDOT, but the Seventh Circuit reversed on appeal. *Miller v. Illinois Dept. of Trans.*, 643 F.3d 190 (7th Cir. 2011). The court first held that the ability to work above 25 feet is not an essential function of members of the bridge crew. The court acknowledged that some high work is an essential function of the bridge crew "as a whole." But based on past practices of informally accommodating Miller's fear of heights, the court held that a reasonable jury could find that it was not an essential function for Miller "as an individual member of the bridge crew."

The court cited numerous cases in which it had held that an accommodation requesting delegation of a particular task was unreasonable because the accommodation would, in effect, require delegation of the job itself. But here, the Seventh Circuit found that the bridge crew's past practices indicated that working at heights was not an essential function of the job. "Miller's request for reasonable accommodation did not ask IDOT to do anything it was not already doing," the court found.

The court then held that a jury should consider whether Miller's termination was retaliation for requesting accommodation under the ADA. Miller presented evidence that another bridge worker had once had a violent workplace outburst but was not terminated. In addition, there was the comment that "we don't grant requests." The court found this could be construed as evidence of a general hostility to accommodation requests under the ADA and remanded the case for a jury trial.

The case holds lessons for all employers. IDOT's legal defense in this case can be summed up as the following, seemingly obvious, assumption: a bridge worker with a fear of heights is not a qualified employee. But that assumption turned out to be incorrect. And if a bridge worker with a fear of heights is not obviously unqualified, no employer can reflexively assume that any employee is obviously unqualified for a job because of a given disability.

Second, past informal accommodations can become present legal obligations. An actual practice of accommodation will trump a

policy of non-accommodation, however reasonable the policy may seem on the face of it.

Third, all personnel workers must treat all requests for accommodation with respect and channel them through formal channels. Comments such as "we don't grant requests" cannot be tolerated.

And finally, a practice of tolerating violent outbursts (or any other undesirable behavior) can come back to haunt an employer. Again, what seems obvious is not always so. The employee here said he'd like to knock the teeth out of a manager, and called her "Arch enemy Number 1." IDOT, no doubt, thought that this was a clear nondiscriminatory basis for termination. Nevertheless, it will have to stand trial on whether or not this was just a pretext and whether the real reason for Miller's termination was his request for accommodation.

In short, when it comes to the ADA, no employer can assume that anything it does is obviously lawful. Requests for accommodation, informal policies of accommodation, and any disciplinary actions against disabled employees require careful consideration and, oftentimes, consultation with legal counsel.

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