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The Accommodation of "Last Resort"

By Julie T. Bittner

The economic downturn over the past several years resulted in a commensurate increase in the number of claims filed by current and former employees against their employers in a number of areas, including disability discrimination claims. In the disability arena, in particular, employers have also been navigating the changed waters brought about by the ADA Amendments Act of 2008 ("ADAAA"), which significantly broadened the definition of "disability." And although case law interpreting the revised ADA is still developing, employers still must comply with the revised ADA and any accompanying request for accommodation.

The ADA forbids an employer from discriminating against qualified individuals because of a disability and requires employers to provide a reasonable accommodation to individuals with a disability if, among other things, they can do so without an undue hardship. Some of the most commonly requested accommodations include modification of the employee's work schedule, job restructuring, reassignment, or light-duty work. Beyond those possible accommodations, however, there is another possible accommodation that some employers may not be aware of: reassignment to a vacant position.

The United States Equal Employment Opportunity Commission ("EEOC") considers reassignment to a vacant position for which an employee is qualified to be an accommodation of "last resort" that is required only after an employer determines that there are no effective accommodation options that allow the employee to perform the essential functions of his/her current position and all other reasonable accommodations would impose an undue hardship on the employer.

By way of example, Jane is a picker in your warehouse. Her essential job functions require her to lift 50-pound boxes on a regular basis. Jane is diagnosed with a back impairment and, after being off work for a period of

time, comes to you with permanent restrictions from lifting more than 35 pounds. After engaging in the interactive process, you determine there is no effective accommodation that would allow Jane to perform this essential function of her current job. However, before considering termination, you should consider the EEOC's accommodation of "last resort" - reassignment.

The means of determining whether any vacant positions are even available will of course vary by company, but a possible start would be to consult with Human Resources to see what vacant positions already exist and have not been filled. Perhaps determine which positions the company knows will soon become vacant, as an employee may have submitted a letter of resignation or given notice of a pending move or return to school. For its part, the EEOC considers "vacant" positions to be those positions open at the time the employee requests a reasonable accommodation or those positions that the employer knows will become available within a reasonable amount of time.

Once you determine which positions are vacant, a determination should be made as to what positions, if any, Jane is qualified to hold. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position; and (2) can perform the essential functions of the new position, with or without reasonable accommodation. The EEOC stresses that the employee need not be the best qualified individual for the position in order to be reassigned into that position. There is no obligation for the employer to assist the individual to become qualified (such as by providing training for the employee to acquire the necessary skills for the job), but the employer is obligated to provide any training that is normally provided to anyone hired for the position.

When looking through the list of vacant positions, the employer must first attempt to reassign the employee to a vacant position that is equivalent in terms of pay, status and other relevant factors, such as benefits and geographical location. If there are no equivalent positions, then the employer should next consider reassignment to a vacant lower-level position for which the employee is qualified. The EEOC takes the position that if more than one lower-level position is vacant, then the employer should consult with the employee to determine the employee's preference. An employer is not obligated to reassign an employee to a higher-level position than the employee currently holds, and the employee would have to compete for any vacant position that would constitute a promotion.

While the EEOC may describe reassignment as the accommodation of "last resort," that does not lessen the need for employers to be aware of the need to go through the requisite analysis in appropriate circumstances.

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