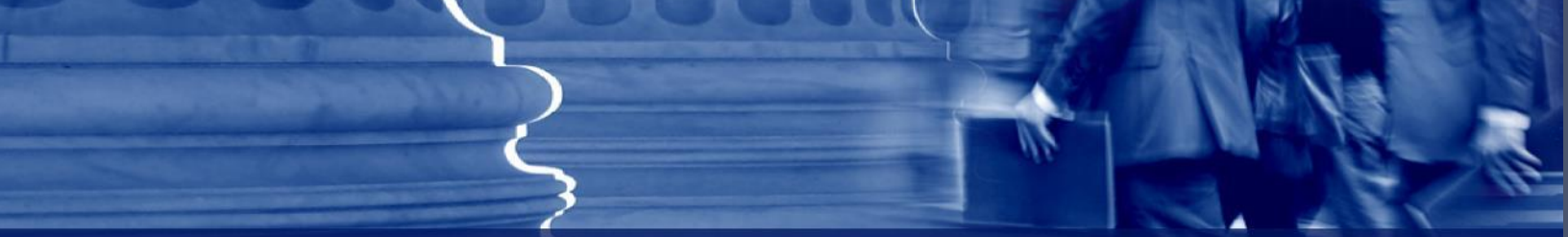

Managing Workplace Risk

Monthly Newsletter November 2015

I. Employer's Motion for Summary Judgment Denied in Disability Discrimination/Failure to Accommodate Case

In a recent decision, *Roberts v. Bayhealth Medical Center, Inc.*, the District Court for the District of Delaware denied an employer's motion for summary judgment to dismiss a terminated employee's claims under the Americans with Disabilities Act for disability discrimination resulting in her termination and failure to accommodate her disability. In *Roberts*, the plaintiff, a part-time nurse who suffered from a brain tumor, requested to keep her regular schedule of three 8-hour daytime shifts every week after the employer transitioned nurses from 8-hour shifts to 12-hour shifts. First, the court observed that whether the plaintiff was a "qualified individual" under the ADA hinged on whether the ability to work a 12-hour shift was an essential function of the position – a factual determination that must be made on a case-by-case basis. Such a determination requires the consideration of several factors, each of which the court noted presented genuine disputes of material fact. For example, although the employer claimed that the plaintiff's requested shift would have compromised patient safety, the court found that a reasonable jury could find that the employer's nurses could operate effectively as a team at all times, with a combination of 4-, 8-, and 12-hour shifts, as the employer had done prior to the transition. Second, the court found that a reasonable jury could find that the employer failed to provide a reasonable accommodation to plaintiff where: 1) there were internal emails expressing doubt as to the employer's efforts; 2) nursing schedules showed the continuing presence of 8-hour shifts; and, 3) the employer refused to re-offer the plaintiff a part-time accommodation when she sought to accept it eighteen days after initially rejecting it.

This decision serves as a reminder to employers of the importance of the interactive process required by the ADA. Employers should proceed with caution when rejecting an employer's requested accommodation, particularly where such accommodation has been provided previously to that employee or others.

II. An Applicant's Disability Must Pose More Than A Small Risk of Danger to Justify an Adverse Employment Action Based on the Applicant's Disability

An employer who withdraws an applicant's conditional offer of employment based on the applicant's medical condition, must demonstrate more than the possibility of a *de minimis* safety threat and the potential infeasibility of an accommodation, according to the Tenth Circuit Court of Appeals. *See Osborne v. Baxter Healthcare Corp.,* 2015 U.S. App. LEXIS 14903 (10th Cir. Aug. 24, 2015). In *Osborne*, the plaintiff, who is deaf, applied for a position as a plasma center technician ("PCT"). Among other duties, the PCT was required to monitor the area where donors give blood and to be aware of adverse reactions. Following several interviews, during which the plaintiff made clear she is deaf, a conditional offer of employment was made contingent upon successful completion of a background check, drug test and medical screening. Thereafter, the conditional offer of employment was withdrawn based on the employer's concern that the applicant's deafness posed a safety threat to donors insofar as the plaintiff could not hear the audible alarms on the plasmapheresis machines, which sounded when something goes wrong or needs attention.

Reversing the District Court's grant of summary judgment in favor of the defendant employer, the Court of Appeals for the Tenth Circuit concluded, "[t]he infinitesimal risk" of a significant adverse reaction occurring in a plasma donor "[did] not come anywhere close to constituting a 'direct threat'" to plasma donors, such that the threat could justify denying the plaintiff employment. Further, the Court concluded the plaintiff met her burden of identifying reasonable accommodations, which would permit her to perform the functions of the PCT position. Specifically, the plaintiff argued the defendant could have installed visual or vibrating alerts and provide donors with call buttons in case of emergency. In so holding, the Court rejected the defendant's contention that installing visual or vibrating alerts posed an undue hardship because the machine modifications would need to be performed by a vendor. According to the Court, "[m]erely noting that modifications would require [the defendant] to contact its vendor does not show an undue hardship and fails to satisfy [the defendant's] burden of showing it would be infeasible to implement [the plaintiff's] proposed accommodation." Therefore, "[b]ecause [the plaintiff's] ability to respond to donor reactions involve[d] disputes of material facts and [the defendant] [did] not illustrate[ ] that using call buttons is conjunction with visual and vibrating alerts would be unreasonable as a matter of law," the Tenth Circuit held summary judgment for the defendant was inappropriate. These accommodation obligations were neither minimal nor cost free – all were specific to this one worker. Nonetheless, none was considered unreasonable or likely to impose an undue hardship on the employer.

An employer's evaluation of reasonable accommodation requests and an applicant's ability to perform the essential functions of a position is a fact intensive inquiry requiring a detailed analysis of each specific situation. *Osborne* is an important reminder to employers to evaluate the feasibility of an employee's or applicant's requested accommodation prior to taking any adverse employment action.

III. Failure to Prove Receipt of Anti-Harassment Policy Results in Denial of Summary Judgment

In Jones v. Family Health Centers of Baltimore, Inc., a Maryland District Court recently reinforced the notion that proof of a well disseminated anti-harassment policy is critical where an employer seeks to rely upon the well-established Faragher-Ellerth defense. The Faragher-Ellerth defense generally allows employers to defeat claims for a hostile work environment when an employee fails to avail him or herself of the corrective measures included in the policy – but only if that policy is in fact disseminated. While

the employer sought to rely upon a general receipt of the Company's handbook, counsel never confirmed Plaintiff's receipt of the policy at deposition and it was not clear from the record that Plaintiff had read, received or understood the policy. For these reasons, the employer's motion for summary judgment was denied. For such policies to be effective in defending hostile work environment claims, there must be a clear acknowledgement of receipt. Maintaining a record of such receipts and a record as to training with respect to the policy itself is a best practice to defending against hostile work environment claims.

IV. EEOC Files Suit To Remedy Alleged National Origin Discrimination Based, In Large Part, Upon Purported English-Only Instruction

The EEOC increasingly has focused its attention on claims made by immigrant workers. Late last month, the EEOC filed a complaint against three Italian restaurants alleging they engaged in national origin discrimination against Hispanic employees. EEOC v. Antonella's Restaurant & Pizzeria Inc. et al., case number 7:15-cv-07666 (S.D.N.Y.) The Complaint alleges the employer's co-owner held out a dollar bill and told Hispanic employees "this is America, you must speak English"; the employer required Hispanic employees to speak English for no legitimate business reason; the co-owner referred to Hispanic employee as, among other things, "landscapers"; and did not allow Hispanic employees to take sick days. The owners of the restaurants deny the allegations.

Employers should be mindful to avoid English-only instructions absent legitimate business reasons that can be articulated in defense of such claims. The EEOC's filing further illustrates the importance of having a well disseminated anti-harassment policy to encourage such complaints to be resolved internally thereby avoiding litigation.

V. California Adopts Strong Equal Pay Protections for Employees

California soon will have one of the toughest equal pay protection laws in the country. In an effort to increase transparency and eliminate the wage disparity based upon gender, the Fair Pay Act requires employers to prove that any pay gap between workers is due to factors other than gender. It also allows workers to file a lawsuit if they are paid less than co-workers of a different gender with different job titles, but do "substantially similar work." As a result, employees are now permitted to bring an unequal pay claim based on disparate employee wage rates regardless of their work location or job category as long as the work is substantially similar. By enacting this statute, California has imposed standards far different and more onerous than those imposed by the Equal Pay Act. Not only does this new law make it easier for potential plaintiffs to bring a claim, it increases the burden of defense. To assert a successful defense, an employer must establish that the wage differential is based on factors other than sex such as a seniority system, merit system, or other *bona fide* factor. Finally, employers must maintain records regarding the wages, wage rates, and job classifications for a period of three years under the Fair Pay Act.

With the effective date approaching (January 1st), California employers should conduct a wage and hour review to determine compliance with the Act, as well as assess any potential liability risks. In doing so, these employers can determine the best way to remedy any shortcomings before the start of 2016.

Questions?

Jackson Lewis attorneys are available to answer questions about employers' compliance obligations. Please contact Paul J. Siegel, at siegelp@jacksonlewis.com, John Porta, at portaj@jacksonlewis.com, Ana Shields, at shieldsa@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work. Visit us at www.jacksonlewis.com.

Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.