Employment Newsletter

Melvin & Melvin PLLC

January 2018

The Duty of New York Employers to Provide Reasonable Accommodations Under the Americans with Disabilities Act

Special points of interest:

- Employers may be required to offer reasonable accommodations even where an employee has not requested them
- New York employers must be aware of a subtle but significant distinction between the ADA and the NYSHRL
- More clarity concerning an employer's duty to reasonably accommodate disabled employees in the absence of an affirmative request for accommodation may soon be forthcoming from the Second Circuit.

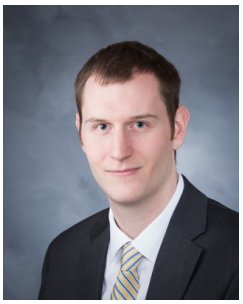
Melvin & Melvin, PLLC

217 South Salina Street
7th Floor
Syracuse, NY 13202
Phone: 315-422-1311
Fax: 315-479-7612
E-mail:
njacobson@melvinlaw.com

Most New York employers are aware that they are required by the Americans with Disabilities Act ("ADA") and the New York State Human Rights Law ("NYSHRL") to provide reasonable accommodations to disabled employees, upon request, to allow them to perform the essential functions of their employment. "[G]enerally it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed"; however, in some situations, employers may be required to offer reasonable accommodations even where an employee has not requested them.

The Second Circuit has recognized an exception to the general rule requiring employees to request accommodations where the employer knows or should reasonably know that the employee was disabled. In *Brady v. Wal-Mart Stores, Inc.*, the employee, a pharmacy assistant, suffered from cerebral palsy. Due to his disability, the employee walked slowly with a shuffle and limp, spoke slowly and quietly while not looking directly at the listener, and had weak vision and a poor sense of direction. The employee never made a request for accommodation and did not believe any accommodations were needed. A witness testified that the employee's disability was apparent just by looking at him. The employee claimed that his supervisor was frustrated by his performance and told him to work more quickly, and the supervisor admitted that she "knew there was something wrong." Eventually, the employee was reassigned to jobs outside the pharmacy department that had substantially different responsibilities without the employer providing available job coaching to him. The employee ultimately quit and brought a discrimination suit against the employer, which included a claim for failing to accommodate his disability.

A jury found for the employee on numerous claims at trial, including the claim for failure to accommodate, and the employer appealed. One of the employer's arguments on appeal was that it was not required to provide any accommodations because the employee did not make a request for accommodation. The Second Circuit held that employers have "a duty to reasonably accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled." The Court went on to hold that if an obviously disabled employee does not request specific accommodations, the employer must engage in an "interactive process" with the employee to determine whether his or her disability can be reasonably accommodated. Therefore, because the evidence indicated that the employee's disability was or should have reasonably been known to the employer, the employer was required to have engaged in the interactive process to determine what accommodations, if any should have been made available to the employee. The employer failed to engage in the required interactive process and the employee was entitled to recover on his failure to accommodate claim.



Nicholas P. Jacobson
Melvin & Melvin
Employment Law
Attorney

Despite the recognition of a duty on employers to provide reasonable accommodations absent an affirmative request in certain situations, in some other cases employers have been successful in demonstrating that they could not reasonably have known about an employee's disability. In *Wega v. Center for Disability Rights*, the employee never

The Duty of New York Employers to Provide Reasonable Accommodations Under the Americans with Disabilities Act (Continued)

made a request for an accommodation and testified that he himself was not sure what accommodations he might need at the time he was hired. The employee also never informed the employer of his communicative and cognitive limitations, and failed to allege that they were obvious to the employer in any way. He also failed to utilize the assistance of a job coach that was available to him. Accordingly, the court found that his employer could not reasonably have known that he was disabled and was not required to offer accommodations.

New York employers must also be aware of a subtle but significant distinction between the ADA and the NYSHRL. Although the ADA and the NYSHRL impose similar duties on employers to provide reasonable accommodations to disabled employees, the NYSHRL's definition of disability is broader than the ADA's definition. For individuals to be disabled under the ADA, they must suffer from "a physical or mental impairment ***that substantially limits one or more of the major life activities of such individual.***" Under the NYSHRL, individuals are considered disabled when they demonstrate an impairment by medically accepted techniques, even if the impairment does not substantially limit a major life activity.

For New York employers this means that whenever they have reason to know that an employee suffers from a medical impairment, even if it doesn't appear to limit their work or other daily activities, they should engage in the interactive process set forth in *Brady* to determine if accommodations are necessary. For example, if an employer learns that an employee sustained an injury, either at work or outside the scope of his or her employment, or if an employee is returning from FMLA leave, the employer should begin a dialogue with the employee to discuss what accommodations, if any, are required, and to document the nature and extent of its efforts to do so.

More clarity concerning an employer's duty to reasonably accommodate disabled employees in the absence of an affirmative request for accommodation may soon be forthcoming from the Second Circuit. In *Alejandro v. New York City Dep't. of Educ.*, the employee has appealed from a decision in the Southern District of New York finding that the employer could not reasonably have known of her disability due to her requests for FMLA leave, which did not expressly notify her employer of the exact nature of her condition. It is worth monitoring whether the Second Circuit agrees with the District Court that the FMLA requests were insufficient, or whether it determines that the requests were sufficient to put the employer on notice of a potential disability requiring it to engage in the interactive process set forth in *Brady*. It would seem that a finding for the employee would impose a duty on employers to investigate employees' possible disabilities beyond what is contemplated by the ADA, which could conceivably give rise to an appeal to the United States Supreme Court. It is also possible that the Second Circuit would certify a question to the New York State Court of Appeals to determine whether the NYSHRL imposes a duty on employers to investigate whether an employee is disabled beyond what is required by the ADA.

Melvin & Melvin , PLLC is a law firm located in the heart of downtown Syracuse , NY. Melvin & Melvin has represented Syracuse individuals & businesses since 1921