TO ACCOMMODATE OR NOT TO ACCOMMODATE? THAT IS THE QUESTION.

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A valued and long-time employee has epilepsy. You know he has epilepsy, but you also know he's got it under control, and he's never had a seizure at work. His doctor says he's okay to work. And then one day he shows up to work and has a seizure, right in the middle of driving a company truck. Luckily, no one gets hurt. Later, you find out he knew he might have a seizure that day, but didn't bother to tell anyone, not his supervisor, not even the passenger in the truck he was driving.

You've done your homework, and you know the Americans With Disabilities Act and its Oregon counterpart require you to provide reasonable accommodation, unless the accommodation would create an "undue hardship."

Letting someone drive a truck while in danger of a seizure is clearly an "undue hardship," right?

You also know you don't have to employ someone who poses a "direct threat" to co-workers. It's obvious having a seizure poses a direct threat to others, isn't it?

So you fire him.

Not so fast, says the court. You may have violated the ADA.

This is a real case (*Dark v. Curry County*), and the outcome is still unknown. The court said only that summary judgment was inappropriate at this stage (meaning the parties should have an opportunity to argue their positions at trial). The case illustrates how complex the ADA can be, and how very difficult it can be to ensure compliance. The following are a few basic concepts that can be taken from this case and others.

1) **Talk to your employees.** It's called "engaging in the interactive process," but it doesn't have to be a formal discussion. If you become aware that employee has a medical condition that is affecting her work, talk to her. Under most situations, you are prohibited from asking an employee about medical conditions or disabilities, if she has not raised the issue. However, you may ask questions that are "job-related and consistent with business necessity," and there is no prohibition on noticing that her performance is sliding, and asking if there is anything you can do to assist her in getting her work done. The risk in not asking is too great. For instance, let's say you hear through the grapevine that an employee is suffering from anxiety attacks, and her manager mentions that she's no longer meeting department quotas. You are now aware the employee has a medical condition that may qualify as a disability, and you now know she may need an accommodation—that may be enough to trigger your obligation to provide an accommodation, and may make you vulnerable to a charge of disability discrimination if you fire her without analyzing whether an accommodation could allow her to do her job.

   In *Dark*, a little conversation with the employee would have revealed that the employee was adjusting to new medication, and the risk of seizure would pass in a short time.

2) **Explore the options.** There are many ways to provide accommodation. An obvious possibility is providing physical assistance (a wheelchair or voice-automated software, for instance). Job restructuring is another possibility (delegating non-essential, occasional functions to other employees). An option that doesn't spring immediately to mind is providing medical leave beyond that required by state and federal leave laws. Last but not least, reassignment (temporary or permanent) to another job that is available should be considered.

   Exploring *all* options is important, even in a situation that seems to fit the "direct threat" or "undue hardship" exceptions within the statutes. For instance, the "direct threat" exception to the obligation to accommodate excuses the obligation only if the risk cannot be eliminated or reduced by reasonable accommodation.

3) **Make a *real* attempt to accommodate.** You are required to engage in the interactive process "in good faith," not just make a show of discussing the options. If you sit down to have that talk referred to in #1, above, and together you come up with a few potential solutions, put sincere effort into ascertaining whether any of the proposals would be possible. In Dark, the court noted the County said reassignment was not a reasonable accommodation because there was no position open at the time, however the court rejected that argument because it was clear there might be an available position in the near future.

4) **Analyze the issues *before* taking action.** One of the issues in Dark was the fact that the initial termination letter told the employee he was being fired for safety reasons. Later, the County stated he was terminated because of misconduct (failing to notify anyone of the increased risk of seizures). From the record, it looks like the County terminated the employment relationship, evaluated the issues, and confirmed the termination decision on different grounds. Giving two different reasons for an employment action raises an implication of pretext. In a lawsuit claiming discrimination, if the plaintiff can show the stated reason for termination was "mere pretext," the implication is that the real reason was discriminatory.

The issues in *Dark* are not unique. Employers are often surprised to find accommodation decisions they thought were indisputable are in fact questionable. Yet another recent example is *Bates v. UPS*, where the Ninth Circuit found UPS may not strictly apply Department of Transportation hearing standards to reject applicants for *all* driver positions (in addition to those governed by DOT standards). Common sense supported the UPS policy, but the court stated UPS failed to demonstrate its facially discriminatory standard was "job related and consistent with business necessity." The court did not address the issue, but clearly, if UPS is unable to demonstrate such "business necessity" supports its

hiring policy, UPS will in the future need to follow the steps listed above, to determine on a case by case basis whether a hearing-impaired individual can perform the driver position safely, with some accommodation.

Ultimately, the question, "To accommodate or not to accommodate?" can only be answered after a careful and thorough analysis (you might say Hamlet had it easy, by comparison). With a little effort, however, you can find an answer that keeps you in compliance with the law and is consistent with the efficient operation your company.

If you have questions about this or any other issue of employment law, please feel free to contact us.

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