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Disability disputes can be workplace landmines

By Steven L. Herrick

Conventional wisdom has it that English is one of the hardest languages to learn, in part because there are so many ways to say the same thing and one phrase can have so many different meanings. Congress found itself ensnared in such a linguistic quagmire, watching with dismay as the U.S. Supreme Court took the language of the Americans with Disabilities Act (ADA) in a direction neither intended nor foreseen.

The ADA declares that it is unlawful to discriminate against an individual based on disability. As it applies to the workplace, one of the principal impacts of the ADA is its requirement that, generally, an employee who requires "reasonable accommodation" to do his job because of a disability is entitled to such accommodation unless doing so would impose undue hardship on the employer.

An employee is covered by the ADA if he has a physical or mental impairment that "substantially limits a major life activity." At the same time, the employee must still be able to perform the essential functions of his position, either with or without reasonable accommodation. Plainly, Congress envisioned that there would be a broad area of protection for employees who had impairments that substantially limited major life activities but nonetheless could perform the essential functions of their positions.

The Supreme Court didn't quite see it that way. In a series of decisions ending in 2002, the Court interpreted the key language of the ADA quite narrowly, finding that the ADA required a "demanding standard" to establish coverage and that when Congress said "substantially limits" a major life activity it meant that the impairment must "severely restrict" a major life activity. As a result of this one-two punch, many employees who sought to invoke the protections of the ADA were found not sufficiently disabled to satisfy the "demanding standard" for relief under the Act imposed by the Supreme Court. Many of those who did meet the "demanding standard" were found to be so disabled that they were unable to perform the essential functions of their positions and, therefore, still not entitled to the protections of the ADA. This double whammy so

narrowed the pool of employees qualifying for relief that the reasonable accommodation provision of the ADA was all but reduced to a pile of rubble.

Although it took a while, Congress did pass an ADA Amendments Act that became effective Jan. 1. In an impressive display of bipartisanship, Congress told the Justices of the Supreme Court, or at least those who had voted with the majority in the decisions narrowing the reach of the ADA, that they had gotten it wrong.

Per the Amendments Act, the term “disability” is to be construed broadly. The Amendment Act also rejects both the “demanding standard” for coverage under the ADA and the interpretation that “substantially limits” means “severely restricts.” Congress also took a crack at enumerating “major life activities” and, although the list is not intended to be inclusive, you’d be hard pressed to find a major life activity that isn’t on it. Expressly included are caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Also on the list is “operation of a major bodily function.” As a (reasonable) accommodation to those who might be eating while reading this column, these will not be listed but, here again, it would be a challenge to find a non-trivial bodily function that is not expressly identified.

So how is “reasonable accommodation” now intended to function in the workplace? Typically, the issue arises when the employee requests reasonable accommodation. However, what happens if an employee, due to ignorance of the law, reticence or the like, does not come forward but the employer observes a possible disability and need for workplace accommodation? There is some debate as to the scope of the employer’s legal obligation under such circumstances. Plainly, an employer is not required to conduct an investigation to see if any of its employees might require reasonable accommodation.

At the same time, an employer accused of disability discrimination probably doesn’t want to defend on the ground that the employee, even though obviously having a disability and requiring reasonable accommodation, didn’t say anything. The advice here is to be guided by reason. If it looks like there’s an issue, ask the employee. If the answer is “no, I don’t need any help,” document the conversation and that will end the matter. Obviously, an employee who declines an offer of reasonable accommodation cannot later complain that it wasn’t afforded to him.

Even if the employee says he needs accommodation, the employer still wins on multiple fronts. Any issue of future liability for failure to reasonably accommodate is likely avoided, the productivity of the accommodated employee is probably increased and, perhaps, an employee who appreciates the fact that his employer went out of his way to help is a more loyal and dedicated employee.

Of course, just because an employee asks for accommodation doesn’t mean he’s entitled to it. The first question that must be answered is whether the employee has a disability. Obviously, under the Amendments Act, the answer to this question will be

“yes” much more frequently than has been the case in the past. However, it still remains the case that the disability must have a physical or mental basis. Personality quirks, idiosyncrasies and general incompetence don’t count.

The next question is whether there is a plausible and reasonable accommodation that would allow the employee to perform the essential functions of his position. The employee does not get to choose from the universe of such accommodations. This is solely the employer’s choice and, so long as the choice is reasonable, it will be immune from attack by the employee. It is noteworthy in this context that, in general, an employee is not considered entitled to a change of supervisor as a reasonable accommodation.

Moreover, if the employee could not perform the essential functions of his position even if reasonable accommodation were to be extended, the employer has no obligation to do so. The law does not impose a futile burden on an employer.

Lastly, it must be determined if providing a reasonable accommodation will impose an undue hardship on the employer. Cost is one factor to be considered but it is usually not determinative. More likely to be helpful is a reasoned analysis showing that accommodation would have an impact on the operations of the workplace that is disproportionately negative when compared to the benefit that would be achieved by extending the accommodation to a single employee.

It takes no great amount of insight to realize that disputes over disability and accommodation are potential landmines in the workplace. An employer should resist an impulsive negative reaction to a request for accommodation, even if the request seems absurd on its face. An even-handed, transparent procedure, uniformly applied in all cases and providing objectively satisfactory opportunity for employee input into the process, is the key to successfully navigating the shoals of the revitalized ADA.

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