EEOC Holds that Employees Cannot Be Discriminated Against Due to Perceived Limitations of a Disability

In Reid v. Eric K. Shinseki, Secretary, Department of Veterans Affairs, EEOC Appeal No. 0720070077 (November 13, 2009), the U.S. Equal Employment Opportunity Commission (EEOC) reinforced the notion that federal agencies cannot discriminate against disabled employees based on subjective opinions of their limitations and abilities. Federal Employers need clear evidence, in the form of an individualized assessment, that a disabled employee cannot meet specific job requirements due to said disability.

In this case, the EEOC denied the Department of Veterans Affairs' (VA) request to affirm its rejection of an Administrative Judge's (AJ) finding of discrimination in violation of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The EEOC reversed the VA's final order, agreeing with the AJ that the VA was liable for disability discrimination, and instructed the VA to provide the complainant with relief.

As the result of a disability, complainant was limited to lifting 10 pounds or less, and was granted reasonable accommodations in line with this restriction. The complainant alleged the VA discriminated against her on the basis of this disability when it failed to select her for three different R.N. positions. The complainant worked as a Licensed Practical Nurse (L.P.N.), GS-6, at a VA Medical Center facility, however, she possessed a Registered Nurse (R.N.) license at the time she applied for the positions at issue.

When the agency failed to complete the investigation within the required 180 days as per 29 C.F.R. § 1614.108(e), complainant requested a hearing.

At the hearing, a letter from the Nurse Recruiter notifying complainant that she did not meet the minimum requirements for an R.N. position because she did not have three years of practice in the specialized areas to which she had applied was introduced into evidence. The Nurse Recruiter also noted complainant's reasonable accommodations, stating that it not appear she was capable of performing the essential functions of the R.N. positions.

The Associate Chief of Staff for Nursing (Associate Chief) testified that the minimal qualifications standards such as years of experience could be amended, and admitted that R.N.s had been hired without those years of experience. The Associate Chief also conceded that the VA did not conduct an individualized assessment of complainant's disability, but stated:

We wouldn't hire someone to be a nurse that had such severe physical limitations because—for two reasons. One, I have to make sure the patients are put in the hands of safe caregivers because if the patient needs assistance in transferring and turning, if the patient starts to fall, that the nurse assigned to them can appropriately intervene. Then the second thing I always have to look at is if an employee . . . has any kind of physical limitations . . . are

they severe enough that we couldn't reasonably accommodate them . . . I have to assure that I'm not putting a potential employee at risk to further exacerbate their existing condition or reinjure themselves.

The AJ found that the VA's claim that "years of experience" was a prerequisite for the position was "unworthy of credence" because of evidence that R.N.s without those years of experience had been assigned to specialized areas at the facility. With respect to complainant's possible risk of injury to herself and patients, the VA bore the burden of showing that a "significant risk or high probability of substantial harm" existed. See Selix v. United States Postal Service, EEOC Appeal No. 01970153 (March 16, 2000). To determine that a significant risk exists, the VA had to conduct an individualized assessment of the complainant, and not rely on its own subjective evaluation.

The individualized assessment must take into account:

the duration of the risk;

the nature and severity of the potential harm;

the likelihood that the potential harm will occur; and

the imminence of the potential harm. See Appendix to 29 C.F.R. Part 1630, § 1630.2(r).

The Associate Chief, however, admitted that the VA had not conducted this individualized assessment of complainant's medical restrictions and any reasonable accommodations that it could offer. Thus, the AJ found that the VA had violated the Rehabilitation Act.

On appeal, the EEOC held that the VA failed to provide any specific evidence to rebut the AJ's factual finding that its reason for the non-selection, i.e., lack of qualifications, was unworthy of credence. Additionally, the EEOC concluded that the VA "made assumptions" regarding complainant's inability to perform the functions of the R.N. positions and cannot show that its concerns regarding complainant's disability were supported by the facts. As relief, the EEOC ordered the VA to:

offer complainant a R.N. position with back pay and benefits and determine what reasonable accommodations may be necessary and effective;

pay complainant $20,000 in compensatory damages and $16,634 in attorney's fees;

provide training to management officials regarding their responsibilities under EEO laws, with a special emphasis on the Rehabilitation Act;

consider taking appropriate disciplinary action against the responsible management officials;

post a notice that the VA was found liable for discrimination.

Thus, if you feel that you are being unfairly discriminated against due to a preexisting disability, you may be unfairly judged due to an agency's subjective opinion that you cannot "handle" specific job requirements due to said disability. Always ask for an individual assessment of your abilities to prevent further issue.