Department of Budget and Management
Office of the Statewide Equal Employment Opportunity Coordinator

EEO Connection

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Issue 2

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Coordinator's Message

In 1963, President John F. Kennedy urged Congress to consider legislation that would address Civil Rights issues facing our nation. Despite President Kennedy's assassination in November 1963, his proposal gave rise to the Civil Rights Act of 1964. On July 2, 1964, President Lyndon B. Johnson signed into law, this act which prohibits not only discrimination in employment, but also in public places. This act also includes integration of schools and equal voter rights.

In February 2014, this Nation's leaders, heroes and activists of civil rights, gathered for a three day summit at LBJ's Presidential Library to celebrate the 50th anniversary of the signing of the Civil Rights Act of 1964. It is important to remember that this landmark legislation was the beginning of a long struggle towards achieving equity and equality for all Americans. The Summit allowed an opportunity to celebrate America's progress, but also to remind us that we haven't reached the "mountain top." Work still needs to be done and there is no room for complacency. Laws alone are not enough to take us to the "mountain top," but a change of hearts and minds can make a difference. We all need to do our part. This newsletter is a resource tool filled with information and knowledge to help you begin your journey of making a difference.

In this issue, our Spot Light section has the last of a three part series on the development of the EEOC. Also, read about the passing of Senate Bill 212 – The Fairness for All Marylanders Act of 2014, which adds "gender Identity" as a protected class to Maryland's anti-discrimination law. Check out the Noteworthy Ruling section and read why two companies shelled out hundreds of thousands of dollars to settle discrimination lawsuits. In our ADA Corner, learn how making temporary accommodations can lead to successful employment outcomes. Have you ever wondered, do I have to accommodate an employee's commute problem? Read what Job Accommodation Network and the EEOC had to say. Want to sharpen your EEO skills or learn more about it, our Training Corner has lots of opportunities for you to consider and let's not forget to check out the Diversity Corner.

Enjoy!

Glynis Watford
Statewide EEO Coordinator

NOTEWORTHY RULING

Upper Chesapeake Health System to Pay $180,000 to Settle EEOC Disability Discrimination Lawsuit

Upper Chesapeake Health System, Inc., a leading health care provider in northeastern Maryland, will pay $180,000 and furnish significant equitable relief to settle an EEOC disability discrimination and retaliation lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

According to the EEOC's suit, Deborah Ropiski consistently received good performance evaluations and positive patient feedback during her 19 years of employment with the Upper Chesapeake Health System. The EEOC charged that the health care system failed to reassign Ropiski as a reasonable accommodation after it removed her from her position as a pulmonary function technologist at its Bel Air, Md., medical center based on its perception that her disability, Usher's syndrome, interfered with her ability to do her job. Usher's syndrome is a genetic disorder characterized by varying levels of vision and hearing loss. According to the lawsuit, Upper Chesapeake Health System terminated Ropiski because of her disability and in retaliation for her requests for accommodations.

The EEOC also charged that the health care system later failed to rehire Ropiski into a vacant position for which she was qualified because of her disability and in retaliation for her filing a discrimination charge with the EEOC.

Such alleged conduct violates the Americans with Disabilities Act (ADA), which requires an employer to provide a reasonable accommodation, including reassignment to a vacant position, unless the employer can prove it would be an undue hardship. The ADA also prohibits employers from terminating or failing to hire an employee based on disability or retaliating against an employee because she requested a reasonable accommodation or filed a discrimination charge. The EEOC filed suit (*EEOC v. Upper Chesapeake Health System, Inc.*, Civil Action No. 13-cv-02846 (ELH)) in U.S. District Court for the District of Maryland, Baltimore Division, after first attempting to reach a voluntary pre-litigation settlement through its conciliation process.

In addition to the $180,000 in monetary relief to Ropiski, the three-year consent decree resolving the lawsuit enjoins Upper Chesapeake Health System from future discriminating on the basis of disability or engaging in retaliation in violation of the ADA. The health care system will implement and disseminate to all employees an ADA reasonable accommodation policy and will provide training on the ADA and its requirement to provide reasonable accommodations, including reassignment. Upper Chesapeake Health System will provide a positive letter of reference for Ropiski and post a remedial notice.

"This is yet another case we brought involving a claim that an employer in the health care field refused to provide a reasonable accommodation to an employee with a disability," said EEOC Philadelphia district director Spencer H. Lewis, Jr. "A health care provider should especially be sensitive to employees with disabilities and cognizant of their needs and rights. Fear and misconceptions about an employee's disability do not excuse any employer from providing a reasonable accommodation."

EEOC Regional Attorney Debra M. Lawrence added, "This is a meaningful settlement because in addition to providing just compensation to Ms. Ropiski, the decree contains significant injunctive relief and other remedial measures designed to ensure that no one at this health care system will be discriminated against or denied a reasonable accommodation in the future."

The Philadelphia District Office of the EEOC oversees Pennsylvania, Maryland, Delaware, West Virginia and parts of New Jersey and Ohio.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the Commission is available at its website, www.eeoc.gov.

Equal Employment Opportunity Commission

"If man is to survive, he will have learned to take a delight in the essential differences between men and between cultures. He will learn that differences in ideas and attitudes are a delight, part of life's exciting variety, not something to fear."
— *Gene Roddenberry*

NOTEWORTHY RULING

Pitre Car Dealership to Pay over $2 Million to Resolve EEOC Same-Sex Sexual Harassment Suit

An Albuquerque car dealership has agreed to settle a same-sex sexual harassment and retaliation lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) for over $2 million and a very strong consent decree.

In its lawsuit, the EEOC charged a former lot manager, James Gallegos, under the direction of Charles Ratliff, Jr., then general manager, with subjecting a class of men to egregious forms of sexual harassment, including shocking sexual comments, frequent solicitations for oral sex, and regular touching, grabbing, and biting of male workers on their buttocks and genitals. The EEOC also alleged that Pitre retaliated against male employees who objected to the sexually hostile work environment. During the pendency of the lawsuit, the retaliatory actions of Pitre raised such concern that a U.S. District Court judge granted a preliminary injunction against Pitre, prohibiting the dealership and all of its agents from threatening or engaging in retaliatory actions against case participants [Docket No. 46].

Such alleged conduct violates Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, which includes harassment of individuals of the same sex. When an employer disciplines, terminates, or takes other punitive measures against an employee for objecting to workplace discrimination, the employer further violates Title VII's anti-retaliation provision. The EEOC filed suit, *EEOC v. Pitre Inc. d.b.a. Pitre Buick/ Pontiac*, CIV No. 11-00875 BB/CG, in U.S. District Court for the District of New Mexico after first attempting to reach a pre-litigation settlement through its conciliation process.

This case represents the largest litigation settlement in the history of the EEOC's Albuquerque Area Office. Over 50 men are expected to receive relief through the decree. In addition to the substantial monetary relief, the decree prohibits Pitre from discriminating or retaliating against its employees, and requires Pitre to have policies and practices that will provide its employees with a work environment free of sexual harassment and retaliation, evaluate their managers on their compliance with anti-discrimination laws, and hire a monitor to oversee its efforts to provide a harassment-free workplace. Pitre must also provide regular anti-discrimination training to its employees and managers, and report other discrimination complaints to the EEOC for the duration of the decree.

"This settlement serves to remedy the egregious sexual harassment that the EEOC alleged the men were subjected to by Pitre," said EEOC General Counsel David Lopez. "It also raises awareness that all employees, male and female, are entitled to work in an environment free of sexual harassment and retaliation."

Regional Attorney Mary Jo O'Neill of the EEOC's Phoenix District Office said, "Managers cannot promote and encourage illegal sexual harassment or retaliation in workplaces. Where managers fail to maintain an environment free of discrimination, it is the employer's responsibility to correct the violations and prevent other violations from occurring. As emphasized by the preliminary injunction, men who have the courage to complain must not suffer retaliation for their efforts to prevent further harassment."

EEOC Senior Trial Attorney Christina Vigil added, "It is shocking that such egregious harassment could have continued under the nose of management for over ten years. The debilitating stigma that is still attached to male sexual harassment cases made it difficult for men to come forward to report. However, a couple of brave men did come forward, which is what has helped resolve the issues in this workplace."

Albuquerque Area Director Derick Newton said, "Unfortunately, in New Mexico, we continue to see many serious cases of sexual harassment and retaliation. Employers have a legal duty to stop all sexual harassment and they must never retaliate against the brave employees who speak up and report this sort of misconduct."

The EEOC was represented by EEOC trial attorneys Christina Vigil and William Moench.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

Equal Employment Opportunity Commission

1965 - 1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public

Part Three of Three

Although lacking the enforcement power necessary to motivate employer compliance with Title VII, EEOC made progress in eliminating discriminatory barriers and opening job opportunities in its early years. During its first year, EEOC obtained conciliation agreements with 111 employers. Many early conciliation agreements desegregated employer facilities, such as restrooms, washrooms and cafeterias. The most far-reaching and publicized agreement, negotiated in cooperation with the Departments of Justice, Labor and Defense, affected 5,000 black employees of the Newport News Shipbuilding and Drydock Company. The agreement desegregated company facilities, obtained equal pay for black workers performing the same jobs as white workers, and provided black workers with equal opportunity to participate in apprenticeship programs and compete for supervisory and craft jobs.

Discrimination charges continued to rise every year between 1965 and 1971. Faced with a continuously growing caseload and limited resources, the Commission soon recognized a need for a more wholesale assault on discriminatory practices. A strategy was developed to seek the broadest possible impact on employment systems through a combination of public hearings and technical assistance.

The Commission utilized its authority under section 709(c) of Title VII to require records and reports on the employment status of minorities and women in private employment. In 1966, EEOC began requiring companies with 100 or more employees to submit EEO-1 reports, which showed the representation of men and women of five racial/ethnic groups in nine basic job categories. The job categories reflected different levels of job opportunity, such as laborers, craft workers, technicians, professionals, and managers.

The EEO-1 reports and studies, other labor force data, and charge information turned out to be an invaluable tool to pinpoint possible zones of employment discrimination, and to identify major patterns of exclusion and discriminatory practices in select industries, job categories, and geographic areas. After the first EEO-1 reports were submitted by employers, EEOC sponsored a series of public hearings between 1967 and 1971. These hearings focused on the textile industry in the South; white collar employment in major New York corporations; aerospace, entertainment, banking, insurance, and other industries in Los Angeles; discriminatory practices preventing minorities and women from participating in Houston's expanding economy; and nationwide practices of the pharmaceutical and utility industries. The hearings documented widespread discriminatory employment patterns. For example:

- Although minorities constituted more than 30 percent of the population in South Carolina and 22 percent in North Carolina, African Americans were only 8.4 percent of textile industry employees. Moreover, 99 percent of African Americans were in the lowest-paid job categories, and only 2.3 percent of African Americans were in craftsman or foreman positions.

- Of 4,278 New York City companies submitting EEO-1 reports in 1967, about 1,827 did not employ a single black worker in a white collar job, and 1,936 did not employ a single Puerto Rican or other Spanish-surnamed individual in such jobs.

- Concentrations of minorities and women were found in Houston's unskilled, lowest-paying jobs in the lowest-paying industries despite generally rising employment opportunities.

- Discriminatory employment patterns existed in the nation's 32 largest pharmaceutical firms.

The utility industry ranked last in employment of black workers among the 23 largest U.S. industries and had fewer women and Spanish-surnamed employees than most other industries.

Educating the Public about Employment Discrimination

Both to prevent discrimination and to encourage voluntary compliance by employers, the Commission always has emphasized education, outreach, and technical assistance as mechanisms to provide information about Title VII. Early educational programs included a 1965 White House Conference on Equal Employment Opportunity, attended by 600 representatives of business, labor, government, and civil rights groups. Input from Conference workshops helped to shape early Commission guidelines and reporting requirements.

During EEOC's first year of operation, commissioners and EEOC staff made nearly 600 speeches and other public presentations in 43 states. Indeed, during the next several years, EEOC continued to educate the public about the new law by providing thousands of presentations to civil rights and employer groups.

Education and outreach efforts during this time period included print and video media. For example, more than 100,000 copies of a pamphlet entitled "Equal Employment Opportunity is Good Business" were distributed to the public in 1966. Later, in 1971, an EEOC-sponsored film, "Voice of La Raza," narrated by film star Anthony Quinn, was made available and widely shown to the employer community, labor unions, and civil rights groups. The film dealt with unique job discrimination problems faced by 10 million Spanish-speaking Americans.

SPOT LIGHT—cont'd

1965 - 1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public

Part Three of Three

EEOC also conducted outreach and provided technical assistance to civil rights and employer groups by hosting seminars and conferences. In 1969, for example, EEOC hosted a conference on affirmative action techniques that was attended by more than 40 trade association representatives. A similar conference was held in 1971 that attracted 70 trade associations and professional organizations from a majority of the country's major industries. In 1970, in cooperation with the National Association of Manufacturers, EEOC held a nationwide closed circuit teleconference in which 2,800 employers received information on their legal obligations under Title VII. Finally, as one other means of providing technical assistance to employers to encourage voluntary compliance, EEOC instituted a "new plants program" and a follow up "area impact program." Together, these programs identified companies that were building or opening new facilities in communities of high minority population. In addition, they put their personnel staff in contact with local community groups that could refer job applicants for employment, including the NAACP, the Urban League, and the League of United Latin American Citizens.

For more information visit www.eeoc.gov/eeoc/history

GENDER IDENTITY PROTECTIONS ADDED TO STATE'S ANTI-DISCRIMINATION LAW

On March 28, 2014, the Maryland General Assembly passed Senate Bill 212 – *The Fairness for All Marylanders Act of 2014*, which adds "gender identity" as a protected class to Maryland's laws against discrimination in employment, housing, and public accommodations. The Maryland Commission on Civil Rights (MCCR) celebrates the passage of this legislation. As the primary civil rights enforcement agency in the State of Maryland, MCCR will continue to work to ensure civil rights protections to all Marylanders.

"Simply speaking, this is the right thing to do," states Cleveland L. Horton II, MCCR Acting Executive Director.

"While work remains to be done to advance and promote civil rights in Maryland, codifying gender identity protections affords equality and opportunity to more than 30,000 Marylanders who were previously not protected under our law."

Glendora C. Hughes, MCCR General Counsel, notes, "This has been a long time coming. A bill to include 'gender identity' as a protected class under our statute was first introduced in 1996; reintroduced in 2007, 2008, 2009, 2011, 2013 and 2014. This was a struggle, not an overnight achievement. MCCR has been there every step of the way to see this bill become law."

Senate Bill 212 is scheduled to take effect on October 1, 2014. MCCR is currently working with strategic partners and other advocacy groups to identify methods and programs to educate communities on this new legislation and its impact on individuals, communities and businesses.

MCCR represents the interest of the State to ensure equal opportunity for all through enforcement of Title 20 of the State Government Article and Title 19 of the State Finance & Procurement Article, Annotated Code of Maryland. MCCR investigates complaints of discrimination in employment, housing, public accommodations and state contracts filed by members of protected classes under federal and state law.

Maryland Commission on Civil Rights - Press Release

SPOT LIGHT—cont'd

Supervisor Training and Employment Law

Supervisor training is viewed by many employers as an expendable expense and a waste of money. Human resources professionals know, though, that training for new supervisors and experienced supervisors is essential because well-trained supervisors will lower an employer's chances of being caught in a lawsuit.

There also is a direct correlation between well-trained supervisors and employees who are motivated, engaged, and productive. Supervisors and managers should be trained on a number of legal issues, including: harassment; discrimination; military service; leave retaliation; safety; wage and hour issues; and employee privacy.

Supervisor training should include a general overview of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). It's also a good idea to give supervisors some basic training on the Family and Medical Leave Act (FMLA) as the FMLA is one of the few federal laws under which supervisors can be held liable in an employment lawsuit.

With the proper training, supervisors will become familiar with those laws and the general principles essential to maintaining a workplace free of discrimination, harassment, and retaliation. One note: If an employee proves in court that a supervisor or manager did discriminate, harass, or retaliate against him, an employer can protect itself by showing that it provided that supervisor with the proper training so that he knew his actions were in direct violation of company policy. New supervisor training is critical but with changes in employment law and court decisions, it's imperative for supervisors to be trained regularly to keep up with employment laws and regulations.

Documentation and performance evaluations: Essential training for supervisors

Employers should teach supervisors and managers about proper documentation of employee misconduct and performance problems. Documentation is important for employers to be able to make good business decisions and can be persuasive evidence if an employee sues the company.

If supervisors and managers aren't trained to evaluate employees carefully and accurately the performance evaluations and reviews they give employees can make a discrimination or wrongful discharge case even more difficult to defend. On the other hand, if supervisors are trained properly and follow through with what they have learned, the performance evaluations and reviews they give employees can be most valuable, not only in defending a lawsuit, but in maintaining employee efficiency as well.

Handbooks and policies

Finally, supervisors and managers should be trained on the content of their employers' employee handbook. Supervisors and managers are the ones who will be enforcing the rules and policies, such as dress codes, contained in the handbook and most likely will be the ones who employees come to with questions and who must enforce the policies.

HR Hero

"Wide differences of opinion in matters of religious, political, and social belief must exist if conscience and intellect alike are not to be stunted, if there is to be room for healthy growth."

— Theodore Roosevelt,

ADA CORNER

Providing Temporary Accommodation Solutions

Employers are encouraged to engage in an interactive process to gather information and identify and implement reasonable accommodation solutions that will enable a qualified employee with a disability to successfully perform job functions. While many accommodations are provided long-term, some accommodations may only be needed temporarily. The Americans with Disabilities Act (ADA) does not set a timeframe for the duration of accommodations, whether they be long or short-term so employers are not precluded from implementing trial or short-term solutions as part of the accommodation process. There are many situations where implementing temporary accommodation solutions can lead to successful employment outcomes. After an employee's limitations have been identified and job functions are understood, this is the time to consider what accommodations *might* work – even without absolute certainty regarding effectiveness. From a practical standpoint, employers should try to make temporary accommodations, even beyond the requirements of the ADA, because doing so demonstrates an employer's good faith effort to accommodate. Situations that may warrant provision of a temporary accommodation may include, *but are not limited to*:

- While an employer is researching a permanent accommodation solution;
- As a way of testing an accommodation when the employee/employer isn't sure it's going to work;
- When the medical impairment is temporary, but sufficiently severe to entitle the employee to an accommodation; or
- When an accommodation can be provided at this time, but the employer knows it will eventually pose an undue hardship.

a. Temporary Accommodations While Researching a Permanent Solution

At the beginning stage of the interactive process, it may be necessary to research accommodation solutions, including products or services that may be needed to enable the employee with the disability to perform job functions. Sometimes the solution is not readily available, a piece of equipment needs to be purchased, a service must be arranged, or a vacant position is not available. In these kinds of situations, a temporary solution may need to be implemented until the long-term solution is identified or becomes available. For example, if an employee cannot perform an essential function of a job and requests an accommodation that requires some research, the employer can consider temporarily removing the essential function until a permanent accommodation can be made. If an employer chooses to do this, the employer should make clear to the employee that the interim accommodation is temporary and for what duration the accommodation is feasible. Under the ADA, essential functions are never required to be removed permanently.

b. Temporary Accommodations To Check For Effectiveness

Sometimes employers, and employees alike, are apprehensive about the effectiveness of an accommodation. This apprehension may affect the decision to implement an accommodation. Job Accommodation Network (JAN) Consultants talk to employers who are afraid to try an accommodation because they think that if they try it out they will be locked into the situation forever. However, this isn't the case – employers are free to try accommodations and stop them if they do not work. When testing accommodations, make a written agreement with the employee that the accommodation is being tested, how long the test will be, and what will happen if the accommodation doesn't work. That way, no one is surprised when the accommodation is revisited down the road.

c. Temporary Accommodations

At JAN, we often hear from employers wondering if employees with temporary impairments are entitled to reasonable accommodation under the ADA. The answer to this question is not necessarily clear-cut. Per the ADA Amendments Act (ADAAA) of 2008, the definition of disability is now interpreted differently than under the original ADA. Whereas a temporary impairment was generally not considered a disability in the past, now it is made clear that the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of the ADAAA. Thus, employees with temporary impairments can be eligible to receive accommodation in some cases. The key is whether the impairment is sufficiently severe. For more information, see JAN's Accommodation and Compliance Series: The ADA Amendments Act of 2008.

In the case of a temporary impairment, clearly the accommodation will be temporary as well. For example, there are many situations where temporary light duty may need to be considered due to significant limitations in lifting.

One of the more frequent examples of this is in the case of pregnancy. It is common to have a 20-30 lb. lifting restriction due to pregnancy. In high-risk situations, the restriction can be even greater. Assuming a temporary arrangement is available and does not pose a hardship, employers can consider restructuring job duties or providing light duty to an employee who is pregnant and unable to lift for a temporary period. After recovering from child birth, the employee can be expected to return to her normal duties. In this type of situation, a temporary accommodation allows an employee to continue working while managing limitations, and enables the employer to retain a worker, avoiding the expense of hiring a new employee. While an average pregnancy is typically not considered a disability under the ADA, impairments arising out of, or impairments exacerbated by pregnancy, can rise to the level of a disability – warranting accommodation under the ADA. Also, some state laws require covered employers to accommodate pregnant workers.

d. Temporary Accommodations That Will Cause Undue Hardship in the Future

Another situation when a temporary accommodation may make sense is when an

Providing Temporary Accommodation Solutions

accommodation can be provided now, but the employer knows it will eventually pose an undue hardship. For example, a part-time or flexible schedule may be reasonable now, but as business and staffing needs change this accommodation could become something that is no longer reasonable to allow. It is alright to provide an accommodation now knowing that it cannot be a long-term solution due to the likelihood of undue hardship. An individual receiving an accommodation is not necessarily entitled to receive it forever. However, it is important to document and communicate to the employee that the accommodation is intended as a short-term solution, and that alternative effective solutions may need to be explored if/when undue hardship results.

Documenting Temporary Accommodations

Documenting accommodation efforts is always an essential part of the interactive process. When a temporary solution is implemented, it should be documented just as any other accommodation. If the employer uses a reasonable accommodation approval form, the form might include information regarding temporary accommodations. For example, the form might include the following types of questions:

- Is the accommodation being provided on a trial/temporary basis? If yes, why?
- When will the trial/temporary period end?
- What action will be taken at the end of the trial/temporary period?

JAN offers an example of this type of form.

Conclusion

Overall, temporary accommodations can be beneficial for employers and employees alike. Temporary accommodations can offer an employer time to research other accommodations, can provide an opportunity to test the effectiveness of an accommodation, and can keep workers productive instead of out on a leave of absence – which is good for an employer's bottom-line. Employers are not penalized for going beyond the requirements of the ADA, and by providing temporary accommodations can demonstrate good faith in the interactive process.

Tracie DeFreitas, M.S., Lead Consultant, ADA Specialist, JAN

"Recognize yourself in he and she who are not like you and me."
— Carlos Fuentes

Accommodations Related to Commuting To and From Work

One of the questions JAN frequently gets is whether the ADA requires employers to provide accommodations for an employee with a disability who has trouble getting to and from work because of his disability. A related question is whether it makes any difference if the employee's only disability-related problem is his commute to work; he does not have any problem performing his job once he gets to work.

The answer to the first question is yes, there are some accommodations that employers must consider related to commuting problems and the answer to the second question is no, it does not matter that the employee is able to fully perform his job without the need for accommodations once he gets to work.

According to informal guidance from the ADA Policy Division of the Equal Employment Opportunity Commission, while employers do not have to actually transport an employee with a disability to and from work (unless the employer provides employee transportation to and from work as a perk of employment), employers may have to provide other accommodations such as changing an employee's schedule so he can access available transportation, reassigning an employee to a location closer to his home when the length of the commute is the problem, or allowing an employee to telecommute.

The underlying reason why employers may have to provide such accommodations is that the employer typically controls employee schedules and work locations so when a schedule or work location poses a barrier to an employee with a disability, the employer must consider a reasonable accommodation to overcome the barrier. As with any accommodation under the ADA, when considering accommodations related to commuting to and from work, employers can choose among effective accommodation options and do not have to provide an accommodation that poses an undue hardship.

Linda Carter Batiste, J.D. ~JAN

EEO CASE REVIEW

Jones v. Social Security Administration EEOC Appeal No. 0720070002 (2013)

Issues:

1) Whether the AJ's finding that Complainant was denied a reasonable accommodation during an interview was supported by the evidence in the record?

2) Whether the AJ's remedial award was appropriate?

Facts:

The Complainant is a person with a disability and suffers from a "slow rate of processing more than one thing at a time...[b]elow average free recall of new information," and "[p]oor verbal fluency" on the "most challenging verbal fluency tasks" as a result of a traumatic brain injury in 1996.

In 2004, the Complainant applied for the position of Contact Representative (CR) at Agency's Auburn Teleservice Center. The Vacancy Announcement stated that a CR would "interview beneficiaries and the general public by telephone to determine the nature of their problem, explain technical information, gather facts and resolve problems relating to Social Security programs."

The Complainant was invited to undergo the Agency's "Meet and Deal Assessment," which involved an interview with "situational questions" and a telephone role-play where the applicant would receive mock calls from the interviewer. Prior to the interview, the Complainant emailed the Agency's local HR department to notify the Agency of his need for accommodation. In response, he was given a description of a CR's duties and a factsheet that he could refer to during the telephone role-play.

The Complainant had difficulty with the first question posed during the interview and, after informing the interviewer of his brain injury, requested the questions in writing. The request was denied and he received a failing score on the assessment. The Complainant was not offered a position as a CR.

He filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability when it denied his request for accommodations for the interview (questions in writing). The AJ found that the Complainant was capable of performing the essential functions of the job and was an otherwise qualified person with a disability. The AJ also found that the Agency should have accommodated the Complainant during the Meet and Deal Assessment to evaluate whether he was capable of doing the job with accommodations, not without, and that providing the questions in writing would not constitute an undue hardship. The AJ ordered the agency to offer the Complainant retroactive appointment to the CR position with back pay, compensatory damages, attorney's fees, and costs.

Procedural History:

The Agency issued a final order rejecting the AJ's finding that Complainant was subjected to discrimination and appealed the decision to the Commission.

Decision

Holding:

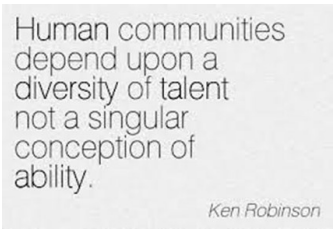
The Commission reversed the Agency's final order and remanded the matter to the Agency to take remedial actions, including providing the Complainant the opportunity to take the Meet and Deal Assessment with his requested accommodation (simultaneously provided written/oral questions) and a position as CR if he passed the assessment.

Analysis:

The Commission determined that the Agency had failed to prove that the use of the Meet and Deal Assessment, without accommodation, was job-related and consistent with business necessity such that it was not required to modify the test under the ADA. The Commission found that there was not enough evidence to support the Agency's contention that "the provision of questions in both written and oral form was unreasonable or would undermine or change the nature of the task being assessed." The Commission disagreed with the Agency that auditory processing alone was an essential function of the job, as there were several other ways the Complainant could communicate with the public.

The Commission further determined that the AJ's assumption that the Complainant would have been hired as a CR but for the discrimination he faced during the interview was incorrect. Of the 57 applicants for the position, only 42 were rated "acceptable" on the Meet and Deal Assessment, and of those, only 29 were ultimately hired by the Agency. The Commission determined that the Complainant should be permitted to undergo the assessment under non-discriminatory conditions rather than receiving an automatic retroactive position as a CR, as there was a possibility that he would not have been hired even if he had been provided appropriate accommodations.

Federal Employment Law Training Group



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TRAININGS & MEETINGS

June

06/10/2014
ADA Coordinators Meeting
No Visual Access to Documents and Internet/201 West Preston Street/Lobby Conference Room L-1/9:30 a.m.—11:30 p.m.

06/22-25/2014
SHRM Conference/Orange County Convention Center, Orlando FL/Please visit http://annual.shrm.org/

06/25-06/27/2014
The Center for Alternative Dispute Resolution/2014 Annual Conference/Greenbelt, MD
Please visit www.natlctr4adr.org

July

07/10/2014
2014 Statewide EEO Conference "Equal Employment Opportunity in the 21st Centaury Workplace"/Baltimore City Community College (BCCC) Campus,/2901 Liberty Heights Avenue/Baltimore, MD 21215/8:00 a.m. –4:00 p.m.

August

08/05-08/08/2014
ILG National Conference
& Exposition/Woodman Park Marriott/2660 Woodland Park Road, NW/Washington, DC/8:00 a.m.—4:00 p.m.

September

09/17 & 09/19/2014
Mid Atlantic ADA Update, BWI Airport Marriott Hotel, http://www.ADAUpdate.org

09/24/2014
EEOC Refresher Training, Washington D.C.

DIVERSITY CORNER

May
Asian-American Pacific Islander Heritage Month

Older Americans Month

May 21st
World Day for Cultural Diversity

May 25th
Lailat al Mairaj

June
LGBT Pride Month

June 14th
Flag Day

June 16th
Observance of Martyrdom of Guru Arjan Dev

June 19th
Juneteenth (Freedom Day or Emancipation Day)

June 29th
Ramadan Begins

July

July 11th
World Population Day

July13th
Asala–Dharma Day

July 27th
Disability Independence Day

July 29th
Ramadan Ends

August 4th (sunset) - August 5th (sunset)
Tisha B' Av

August 9th
International Day of World's Indigenous Peoples

August 12th
Pioneer Day

August 26th
Women's Equality Day

August 28th
Janmashtami

September 11th
Ethiopian New Year

September 15th—October 15th
Hispanic Heritage Month

September 24th (sunset) - September 26th (nightfall)
Rosh Hashanah

equality diversity inclusion