Following the Employee Doctor's Orders is not Always the Best Medicine

Williams Kastner Labor & Employment Advisor – Spring 2011

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The Americans With Disabilities Act ("ADA") and its state law equivalent prohibit employers from discriminating against individuals with disabilities or from creating a hostile work environment for them. Unlike any other employment law, disability laws also impose an affirmative duty to reasonably accommodate a disability in order to allow an individual to perform the essential functions of the job. Employers generally have no problem complying with non-discrimination or anti-harassment provisions. It is the affirmative duty to accommodate that causes problems and leads to expensive and time-consuming litigation. In *Johnson v. Chevron USA, Inc.*, 159 Wn. App. 18 (2010), Chevron discovered that doing only what the employee's doctor mandates is not the end of the accommodation process.

In *Johnson*, the employee was a fuel truck driver who had an on-the-job back injury which led to a year's leave, and when he returned, he suffered a second back injury. He had back surgery, and when he returned, his doctor prescribed air-ride seats. Chevron purchased those seats for him. When observed limping and complaining about his sore back, his supervisor placed him on light duty and required another evaluation. The driver passed the evaluation and responded with an internal complaint asserting unfair treatment. The HR Department investigated and found no merit. Shortly thereafter, the driver found a custom tool that would assist him in lifting hoses during the pumping of the gasoline and obtained a doctor's letter endorsing the lifting tool. Before the tool was approved, the driver reinjured his back a third time and left on medical leave for six months. Chevron evaluated the requested lifting tool, but found it posed greater risk of injuring healthy drivers and banned the use of the tool in the workplace.

The driver filed a disability discrimination charge for failure to reasonably accommodate him with that tool. Chevron refused to use the tool because it was unsafe. In the interim, his doctor certified that he could return to work without any accommodation. Chevron refused to reconsider its position on the lifting tool. The driver returned to work and suffered a fourth back injury resulting in him being placed on light duty. His physical capacity evaluation determined that he could no longer perform the duties of a driver. The driver sent an email to the HR department asking for any internal job opportunities, but there were no full-time positions available at that time. He left Chevron and applied for disability benefits. Later, the driver found a job with a competitor that used an ergonomic hand tool and experienced no further injuries. He then sued his former employer for disability and race discrimination, failure to accommodate, hostile work environment and retaliation. He also sued his supervisor individually. The trial judge dismissed the failure to accommodate claim, and the jury returned a verdict in favor of the defendants on the other claims.

The driver appealed the failure to reasonably accommodate claim, claiming the lifting tool should have been used or at least Chevron should have found some other job. Chevron responded that each time the driver was released to return to work, he did so without any medical restrictions, except for the air-ride seats which were provided. In other words, Chevron had implemented that which the driver's doctor had required and the requested hand tool was not medically necessary because he was released back to work without restrictions. The *Johnson* court rejected the argument, noting that limiting required accommodations to "medical necessity" was no longer the law. Instead, the *Johnson* court held that an employer has an obligation to accommodate a medical condition which is medically necessary ***or*** doing a job without accommodation was likely to aggravate the impairment such that it becomes

substantially limiting. Here, the driver argued that Chevron should have allowed him to use the lifting tool to avoid further injuring his back since his doctor had said that the tool "could" benefit him. Although recognizing that the doctor released the driver to work without use of the tool, the *Johnson* court emphasized that doctor only agreed to the release after learning that Chevron would not permit the use of the tool. And, the *Johnson* court noted, Chevron's tool evaluation was limited to healthy drivers and not to the driver's particular situation.

The takeaways from *Johnson* are that employers should be fully aware of the growing exposure to disability claims. These laws are expanding in near lockstep with the aging of the workforce. Although workers perform less and less physical labor, disability claims are mounting. In part, that is explained by the fact that the legal definition of a "disability" covers almost any medical or physical condition. Once an employee has a "disability," employers face a legal minefield – *i.e.*, Do I have to hire someone who cannot do the job? Can I demote or transfer the worker? Must I keep the position open for an extended period of time? How do I accommodate the condition but get the work done in a timely and cost-effective manner? In *Johnson*, the answer is that the interactive process is a long and arduous road. Even if a doctor releases the employee to work without any mandatory restrictions, the employee may still have a viable claim for the jury if he or she can show that doing a job without the requested accommodation will be likely to aggravate the impairment. Chevron failed to conduct an individualized assessment of the driver when evaluating the use of the lifting tool. Another takeaway from *Johnson* is that your former employees can sue you and their supervisors after leaving the job and finding new work. The exposure remains. With an aging workforce and baby boomers reaching their physical limitations, disability claims are the new horizon.