

Supervisor comment, close timing keep claim alive

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The Americans with Disabilities Act (ADA) forbids discrimination in employment based on disability and requires employers to provide reasonable accommodations to their employees' disabilities. The ADA also prohibits retaliation against those who seek reasonable accommodations or protection under the Act. But does the ADA protect an employee without a disability who requests an accommodation? The short answer is yes. Although you may not be required to offer an accommodation to an employee who isn't disabled as defined by the Act, you must be careful when taking adverse employment actions after an employee has requested an accommodation, even though he isn't disabled.

Setting the scene

Column5 Consulting, an Arizona limited liability company, hired Yavapai County resident Jeffrey Stillman in August 2010 as an enterprise performance management curriculum developer and trainer. In early 2012, he was assigned to develop training materials for a customer. He presented these materials to the customer's Los Angeles office. He told his supervisor, Jennifer Harlan, that the presentation went well, and the instructor reviews showed an average rating of 4 out of 5. A customer attendee, however, complained to Column5 (but not to Harlan) that he had to effectively take over the presentation for Stillman.

Before another presentation in New York, Stillman provided the presentation deck to the customer for review. She had to "rework" the deck beforehand and handle the majority of the session. The customer didn't initially share her concerns about Stillman's performance with Harlan.

Panic attack and discharge

Three months later, Stillman had a panic attack—his first ever—while he was in the Philippines conducting training. He contacted his supervisor to tell her that he was suffering from anxiety and that he couldn't continue

to conduct the training. Harlan stated that she didn't know he suffered from depression when she hired him. Although he had suffered from depression or anxiety in the past, he was able to continue functioning in his life activities at that time.

Stillman completed the training abroad, returned to Arizona, and sought medical care on July 24. His doctor diagnosed him with depression, anxiety, and panic and recommended that he could return to work on July 30. After returning to work, he asked not to be required to travel for about a month as an accommodation. Harlan advised him that he would need a medical certification supporting the travel restriction. He eventually received the certification but never gave it to Harlan.

During this time, Harlan learned that the client thought Stillman's performance was "very poor." In light of this, she reviewed the attendee evaluations and found them to be inconsistent with the negative report from the client. Harlan believed that Stillman completed the evaluations himself. She terminated his employment on August 10 based on his failure to deliver during the trainings and purposefully withholding information from her in April, and her concern over fabricated attendee evaluations.

Stillman sued Column5, claiming a failure to accommodate, unlawful termination, and retaliation under the ADA. Column5 asked for dismissal without trial, arguing that he isn't disabled within the meaning of the ADA and that there was no causal link between his request for accommodation and his discharge.

Insufficient facts to establish disability

To determine whether an employee's condition constitutes a disability, the court must consider whether:

1. The employee has an ADA-recognized impairment;
2. The life activities from which the employee is impaired are major life activities; and
3. The employee's impairment substantially limits him from performing the identified major life activities.

The Arizona federal court acknowledged Column5's argument that temporary conditions generally are not considered disabilities. But the court noted that this argument ignores that depression is not a temporary but an episodic impairment and that episodic impairments can be considered disabilities if they substantially limit major life activities when active.

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Ultimately, the court ruled that Stillman failed to present sufficient evidence that his depressive episodes were severe enough to constitute a disability entitling him to protection under the ADA. In fact, the court reasoned, the evidence demonstrated the contrary. Not only did he testify that he was able to continue functioning in his life activities, but he was also able to complete the training in the Philippines. Plus, the doctor released him without restrictions only nine days after the panic attack.

Retaliation

The fact that Stillman wasn't disabled under the ADA didn't preclude his claim for retaliation. The question is whether there is a causal link between the request for accommodation and the discharge. Because of the timing—17 days between the request and his firing—there is at least a question as to whether the reason given was a pretext (an excuse) for retaliation.

In addition to the temporal proximity, the court noted that Stillman had other evidence of possible pretext in his supervisor's comment about depression and the class evaluations rating his performance to be acceptable. Although he lost on his underlying discrimination claim, the court declined to dismiss his retaliation claim, finding that he had presented sufficient evidence to go to trial on it.

Words of caution

You can't disregard an employee's request for accommodation, even if a doctor's note isn't immediately presented. The employee should be given the opportunity to engage in the interactive process to determine whether an accommodation is even necessary. When concerns about an employee's performance or conduct come to light, carefully and fully assess the situation before taking any adverse employment action. Take extra care when the decision maker is aware of the employee's accommodation request. Determine how you have handled similar concerns regarding other employees who haven't requested accommodations to provide support for the position that the reason for the decision is not pretextual.