SEBRIS BUSTO JAMES Employment Law Note April 2011

Reasonable Accommodation: How Far Must a Washington Employer Go?

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Washington's Law Against Discrimination ("WLAD"), RCW 49.60, prohibits discrimination against people for a variety of reasons, including physical and mental disability. Under the WLAD, an employee qualifies for reasonable accommodation if the employee's impairment is known by the employer or shown through an interactive process to exist *and*, (a) he or she has an impairment that substantially limits his or her ability to perform the job; or (b) the employer has notice of the impairment and medical documentation establishes a likelihood that engaging in work without an accommodation would aggravate the impairment so that it would create a substantially limiting effect. In *Frisino v. Seattle School District*, No. 63994-3-I, 2011 Wash. App. LEXIS 686 (Div. I March 21, 2011), the Washington Court of Appeals addressed how far a Washington employer must go in an attempt to achieve a reasonable accommodation.

***Frisino* Clarifies Employer Obligations to Achieve a "Reasonable" Accommodation.** Denise Frisino, an employee of Hamilton International Middle School, reportedly began to experience respiratory problems during the 1999-2000 school year. Frisino asserted that her problems were due to chemical toxins, dust and mold in the school and complained to the Seattle School District ("District"). The District attempted multiple accommodations, including providing an air filter, assigning custodians to mop her classroom floor, and moving her to a different classroom. Unfortunately, Frisino's symptoms did not improve. In 2004, Frisino was diagnosed with respiratory sensitivity. Upon her doctor's recommendation that she be placed in a "clean environment," Frisino was transferred to Nathan Hale High School ("Hale"). Unfortunately, Frisino found that her new classroom had visible mold and blackened ceiling tiles. Frisino's principal recommended that she move to a portable classroom, but she declined.

In an effort to accommodate Frisino, the District hired a private environmental firm to conduct an air quality survey. Both the private firm and the Seattle/King County Department of Health investigated and found that the mold concentrations inside Hale were lower than those found outdoors. Even so, the District "encapsulated" areas where visible mold was detected and remediated those areas. Meanwhile, Frisino requested an accommodation in the form of a move to another classroom, but she rejected the two options offered by the District. Instead, she requested that she be allowed to take time off until the "conditions" at the school were corrected.

The District then hired an industrial hygiene and toxicology consultant to investigate the school environment. In accordance with the consultant's recommendations, the District completed additional remediation. The District notified Frisino that she could return to work, but she refused. It was unclear whether she visited the school after the additional remediation took place. Further, upon undergoing an independent medical examination, she was diagnosed with a mental illness that causes fixation on dust, chemical exposure, and/or fumes and odors in the workplace. Over the next several months, the parties proposed and rejected various accommodations. Finally, the District terminated Frisino because it would not transfer her from Hale, nor had she accepted any accommodation offered by the District.

Frisino sued the District alleging that it had violated the WLAD by failing to provide her with a reasonable accommodation and by retaliating against her for seeking an accommodation. In reversing summary judgment in favor of the District, the Washington Court of Appeals stated that to effectively accommodate, an employer must take affirmative steps to help the employee continue working at the existing position or attempt to find a position compatible with his/her limitations. In doing so, an employer is not required to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions.

The court recognized that the District attempted to remediate Hale and remove the cause of Frisino's symptoms. The court stated that if the cleanup reasonably accommodated Frisino, the District was entitled to "stand" on that mode of accommodation. However, if the cleanup did not accommodate Frisino, the District was obligated under the WLAD to suggest alternative modes of accommodation. Unfortunately, after the District's remediation efforts were completed, the parties suffered a breakdown in communications. It was also unclear whether Frisino even visited Hale after the final remediation took place. As such, the Court could not determine: (a) whether Frisino had returned to the work site and experienced substantially limiting symptoms and, if so, (b) whether she told the District that the accommodation was ineffective. The issue of whether the District reasonably accommodated Frisino therefore could not be decided, so the case was remanded to the trial court to resolve these factual questions.

Separately, the Court remanded the retaliation claim. The Court held that due to the unresolved issues of fact, it could not determine whether the District's explanation that Frisino was terminated due to her failure to return to work was a non-discriminatory justification, or whether Frisino was constructively discharged due to the alleged failure to accommodate. Of concern to employers is the Court's arguable implicit embrace of the theory that the discharge of an employee who cannot be adequately accommodated and fails to return to work can support a retaliation claim.

Practical Guidance for Employers. The facts of *Frisino* beg the question: how far must a Washington employer go to meet its obligation to provide a reasonable accommodation? The *Frisino* court answers that an employer must offer an accommodation that effectively removes the barrier preventing the employee from returning to work, unless there is undue hardship. In exchange, an employee has a duty to communicate with his/her employer in the good faith interactive process as to whether an accommodation is effective. In cases where an objective standard is not available to measure whether an accommodation is effective, the interactive process may be extensive. However, an employer must, in good faith, test one mode of accommodation and then test another, until an effective accommodation is achieved or a determination can be made that the available accommodation would be an undue hardship. Finally, a string of unsuccessful attempts at accommodation does not give rise to liability if an employer ultimately provides a reasonable accommodation.