



BNA's Health Law Reporter™

VOL. 25, NO. 44

NOVEMBER 10, 2016

Employment Issues

Sharp Healthcare's Disability Discrimination Deal a Warning to Others, Lawyers Say

Sharp Healthcare's recent \$90,000 disability discrimination settlement could be a sign that more plaintiff's attorneys are utilizing the "perceived disability" prong of the Americans with Disabilities Act (ADA) to bring employment discrimination claims, labor and employment lawyers told Bloomberg BNA (*EEOC v. Sharp Healthcare*, S.D. Cal., No. 3:15-cv-1936, consent decree filed 10/31/16).

Mark S. Spring, a labor and employment partner with Carothers DiSante & Freudenberger LLP in Northern California, said Sharp's settlement with the U.S. Equal Employment Opportunity Commission (EEOC) could be part of a larger shift. Sharp agreed to pay \$90,000 to resolve the lawsuit over Sandra Juarez, who applied for a surgical scrub technician position but was ultimately rejected due to a minor ankle issue.

"I believe that the 'perceived disability' prong of the ADA and related state statutes, like the California Fair Employment and Housing Act, is just being recognized as a weapon by plaintiff's attorneys," Spring told Bloomberg BNA.

"The Sharp Healthcare EEOC settlement may signal a rise in these types of claims, particularly from applicants and employees who have medical conditions that may not rise to the level of an 'actual disability' and had adverse action taken against them by their employer."

Under the terms of the EEOC settlement, Sharp will pay \$90,000 to Juarez, retain an external equal employment monitor and review and revise disability accommodation policies and practices to comply with the ADA. Sharp is one of the largest private employers in San Diego County.

'Increase' in ADA Noncompliance. Anna Y. Park, regional attorney for EEOC's Los Angeles District, pointed out that the Sharp settlement is part of an ongoing trend to address noncompliance.

"We have seen an increase in employers failing to comply with the Americans with Disabilities Act," Park wrote in a statement. "We encourage employers to ensure proper training regarding the hiring process to prevent disability discrimination and possible legal liability."

Janette Levey Frisch, founder of the EmpLAWyerologist Firm LLC, in New Brunswick, N.J., said fixing the problem won't be easy. Policies and training are a good start, she said, but "some type of ongoing effort to monitor employment practices and updated training are probably in order."

"This case appears to be another example of employers who are making decisions and engaging in practices without having sufficient understanding of their legal implications," Frisch told Bloomberg BNA.

"The Americans with Disabilities Act not only prohibits discrimination based on a disability but also prohibits discrimination against an applicant/employee that the employer regards as disabled."

"This case appears to be another example of employers who are making decisions and engaging in practices without having sufficient understanding of their legal implications."

JANETTE LEVEY FRISCH,
EMPLOYEROLOGIST FIRM LLC,
NEW BRUNSWICK, N.J.

In other words, she added, "even if the employee is not actually disabled, but the employer treats him or her as such and then discriminates, the employer may be in violation of the ADA."

'Wake-up Call.' Frisch further noted that the \$90,000 Sharp settlement is "a wake-up call" to employers who use "any type of medical examination in its hiring process."

"It appears that this employer subjected the plaintiff to a test that went beyond determining whether she could actually perform the essential functions of the job in question," Frisch told Bloomberg BNA. "Under the Americans with Disabilities Act, even if the limitations with her ankle would have impacted her ability to perform her job, the hospital would have needed to engage in the interactive process to discuss whether there were any reasonable accommodations it could have made so she could perform the essential functions of the job. It does not appear that the hospital did that here."

Catalina M. Avalos, director of Tripp Scott PA in Fort Lauderdale, FL, said the settlement should remind corporations to better understand employment laws.

“A lesson to be learned from the Sharp case is that companies need to ensure that individuals making hiring determinations are well versed in employment practices and understand when certain laws, such as the Americans with Disabilities Act, are implicated,” Avalos told Bloomberg BNA.

Other Remedies Included. Avalos also pointed out that the EEOC’s remedies in the Sharp settlement include the ability to obtain injunctive relief that extends to the company’s officers, managers and other employees.

“As a result of the injunction, the company along with the individuals will be under the watchful eye of the EEOC and have a heightened obligation to ensure that no further violations occur or risk possible contempt of court proceedings,” Avalos said.

BY DAVID MCAFEE

To contact the reporter on this story: David McAfee in Los Angeles at dMcAfee@bna.com

To contact the editor responsible for this story: Brian Broderick at bbroderick@bna.com

The settlement is at <http://src.bna.com/jSg>. The complaint is at <http://src.bna.com/jSf>.