

DISABILITY DISCRIMINATION

Probationary employee won't get months of leave as reasonable accommodation

by Robin E. Weideman

A probationary employee who worked only four weeks before sustaining a medical injury that left him unable to work for at least three months was terminated for excessive absences and failure to successfully complete probation. The California Court of Appeal held that the termination wasn't unlawful disability discrimination and that the employer didn't fail to reasonably accommodate the employee.

Failure to communicate leads to termination

David Gutierrez worked as a cement truck driver for Nor-Cal Ready Mix. He was a union employee and subject to a 45-workday probationary period. Under the terms of the applicable collective bargaining agreement, an employee could be terminated during the probationary period for any reason, without recourse.

After working only four weeks, Gutierrez was injured while cleaning out the chute of a cement truck. He didn't immediately feel any pain, but he woke up the next day with stomach pain. He didn't believe it was work-related but instead thought he had a bladder infection. He went to the doctor and obtained a note excusing him from work for about 10 days. However, he didn't provide the doctor's note to Nor-Cal, and contrary to company policy, he didn't notify his direct supervisor that he wouldn't be reporting to work as scheduled. Although he didn't notify his direct supervisor of his condition or his absences, he did notify an HR employee as well as the company's safety manager at the company headquarters in Woodland. Gutierrez worked at the company's Antioch facility, however, not at company headquarters.

Over the next three days, Gutierrez had several conversations with HR and the safety manager, updating them on his condition with varying reports that he may have gallstones or possibly an abdominal or lower back injury. He indicated that he expected to return to work the following week but still didn't provide any doctor's note excusing his absence.

After three consecutive days of Gutierrez failing to report to work and failing to notify his direct supervisor of the absences, his direct supervisor and the Antioch operations manager decided to terminate his employment. Neither the direct supervisor nor the operations manager was aware of his communications with HR or with the safety manager. For some reason, he wasn't notified that his employment had been terminated until approximately two weeks later.

In the meantime, Gutierrez continued to communicate with HR and the safety manager regarding his condition and his absence, including providing a doctor's note (the same afternoon the decision was made to terminate his employment) excusing his absence for 10 days. He later provided additional doctor's notes extending his absence indefinitely.

Gutierrez remained under a doctor's care for three months for what was ultimately diagnosed as a muscle strain. He couldn't have performed his job duties as a cement truck driver until four or five months after he last reported to work at Nor-Cal.

Disability discrimination and failure to accommodate

Following his termination from Nor-Cal, Gutierrez filed a lawsuit alleging that his termination was discriminatory because of his disability and that Nor-Cal had unlawfully failed to reasonably accommodate his disability or engage in the interactive process. The trial court denied all of his claims and dismissed the case, finding that the decisionmakers who terminated his employment had no knowledge of his disability and therefore couldn't have discriminated against him because of it. The trial court also ruled that he couldn't perform the essential functions of his position with or without reasonable accommodation.

Gutierrez appealed the trial court's decision, and the appellate court affirmed the trial court's ruling.

Court's decision

Disability discrimination can't be proven if the decisionmakers didn't know about the employee's disability. In holding that Gutierrez couldn't succeed on his disability discrimination claim, the appellate court explained that there must be evidence that the actual individuals who made the adverse employment decision knew about the disability when they made the decision. In this case, the management employees who decided to terminate Gutierrez's employment had no knowledge that he had a disability. Even though there was evidence that other management and HR employees knew he had a medical problem, that knowledge couldn't be imputed to the actual decisionmakers.

The employee must be able to perform the essential job duties with or without reasonable accommodation. The appellate court also held that Gutierrez couldn't prevail on his failure to accommodate claim because he couldn't establish that he could perform his essential job duties as a cement truck driver with or without reasonable accommodation. He indisputably was unable to perform his regular job duties for several months, and he didn't request any type of accommodation. The court held that an employee can't expect the employer to be clairvoyant and must request a reasonable accommodation to trigger the employer's duty to provide one.

The court rejected Gutierrez's argument that Nor-Cal should have "created" some type of modified-duty assignment for him, explaining that the law doesn't require the employer to create a new job for the employee. It also rejected his argument that Nor-Cal should have provided him with a three- or four-month leave of absence as a reasonable accommodation. First, he didn't actually request that accommodation, and second, it wouldn't have been a "reasonable" accommodation even if it had been requested because Gutierrez was a probationary employee who had worked only for about four weeks. The court stated that "where the leave amounts to three times the duration of the employment that preceded it, a three-month leave of absence for an undiagnosed condition is not a reasonable accommodation."

The duty to engage in the interactive process arises only when a disability is known and the employee requests an accommodation. The court also rejected Gutierrez's claim that Nor-Cal failed to engage in the interactive process to determine a reasonable accommodation for

his disability. The court again reasoned that the company didn't know he had a specific disability before deciding to terminate his employment because he didn't provide it with sufficient information to suggest he was disabled. The court also reiterated that he never requested any reasonable accommodation. As a result, the court held that Nor-Cal didn't have a duty to engage in the interactive process. *Gutierrez v. Nor-Cal Ready Mix, Inc.* (California Court of Appeal, First Appellate District, 5/15/09, unpublished).

Bottom line

This case is a good reminder of the litigation that often ensues when an employee with an injury or medical condition is terminated. Although this case was a victory for the employer, it should nonetheless serve as a reminder of your general duty to engage in the interactive process and reasonably accommodate an employee's known disability.

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