New Jersey Becomes More Accommodating For Discrimination Suits Based on Failure to Accommodate Disability

July 16, 2019

By: Vito Gagliardi, Jr.

***Employment Law Monthly* – July 2019**

Authored by: **Vito A. Gagliardi, Jr.**

Last month, a New Jersey Appellate Court reinstated a dismissed lawsuit brought under the Law Against Discrimination ("LAD"). The case had been dismissed because the plaintiff could not articulate an adverse employment action, which had been perceived as a prerequisite to pursuing such a claim. In stating that such adverse action was not a prerequisite, the appellate court seemed to create new law. Indeed, state and national media outlets boldly proclaimed that was the case. However, on closer examination, very little new ground was broken with this decision.

The case at issue is Richter vs. Oakland Board of Education, (Superior Court of New Jersey, Appellate Division, Docket No. A-0102-17T2). Ms. Richter, a teacher who suffered from diabetes, requested the accommodation of an earlier lunch period to avoid a negative effect on her blood sugar level. Her request was denied and, later in the school year, she suffered a hypoglycemic-related seizure in front of her students. She struck her head and face on a table and the floor, became unconscious, and bled extensively. She suffered several serious and permanent injuries and sued the Board of Education and her principal, alleging disability discrimination and violation of the LAD due to an alleged failure to accommodate her medical condition. After discovery, defendants moved for summary judgment, claiming that Ms. Richter failed to establish a prima facie claim of disability discrimination under the LAD, for failure to accommodate her disability because she suffered no adverse employment action.

Generally, being fired or reassigned is an adverse employment action. Here, there was no such action, and as a result the trial judge found that "even though plaintiff's injuries were unfortunate, they were not due to defendants' inactions…."

On appeal, the Appellate Division began its analysis with a Supreme Court case issued over ten years ago, Victor v. State, 203 N.J. 383 (2008), where a New Jersey state trooper had requested administrative duties because he claimed a back injury made it difficult for him to wear a required protective vest. While denying Mr. Victor relief on other grounds, the Supreme Court acknowledged that the LAD does not directly answer the question as to whether a disabled plaintiff must prove adverse employment action "because its reasonable accommodation protections are not explicit."

In Victor, the Supreme Court determined there was insufficient proof the state trooper actually sought a reasonable accommodation. Nonetheless, the Court recognized that, under the right set of facts, the LAD might cover a disability discrimination claim for failure to accommodate, absent adverse employment action:

Perhaps in those circumstances the employee could demonstrate that the failure to accommodate forced the employee to soldier on without a reasonable accommodation, making the circumstances so unbearable that it would constitute a hostile employment environment. But there also might be circumstances in which such an employee's proofs, while falling short of that standard, would cry out for a remedy. We cannot foresee all of the factual settings that might confront persons with disabilities and, although hard to envision, we therefore cannot entirely foreclose the possibility of circumstances that would give rise to a claim for failure to accommodate even without an identifiable adverse employment consequence.

Given the simple nature of Ms. Richter's request -- an earlier lunch hour -- and given the severity of her injuries, the Appellate Division clearly found that Ms. Richter's case was one that "would cry out for a remedy." However, this is not a retreat from the general rule that a discrimination claim must include some type of identifiable adverse employment action. The holding is specifically limited to failure-to-accommodate claims under the LAD which now require proof a plaintiff (1) qualifies as an individual with a disability or is perceived as having a disability, as defined by statute; (2) is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without reasonable accommodations; and (3) suffered from the defendant's failure to reasonably accommodate plaintiff's disabilities. Even the Appellate Division acknowledged that Ms. Richter's circumstances were "an unusual situation."

In short, the decision in Richter v. Oakland Board of Education did **not** open the floodgates to discrimination cases of all types being allowed to proceed even if a plaintiff cannot identify an adverse employment action. Instead, this is an unusual situation specifically involving an employee with a disability who sought and did not receive a reasonable accommodation. Prudent employers would be well served to revisit how requests for accommodations are received and assessed. The potential for liability under the state and federal law is vast, but not necessarily more so because of the holding in Richter.