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A SILENT CRY FOR HELP: RELIANCE ON A THIRD-PARTY EVALUATOR COULD RESULT IN LIABILITY UNDER THE ADA

By Phillip C. Bauknight, Esq.

Recently, the Sixth Circuit rendered a decision in *Keith v. County of Oakland, No. 11-2276* (6th Cir. 2013) holding that the ability to hear may not be an "essential function" of a lifeguard's job duties. In *Keith*, the Sixth Circuit also suggested that, should an employer rely on the opinion of a third-party evaluator to determine whether a disabled person can be accommodated, it would be wise to use an evaluator who has experience with the specific disability at issue as it relates to the job in question. Reliance on generalized conclusions, absent consideration of the actual disability and job at issue, leaves employers unguarded against potential liability under the American with Disabilities Act, 42 U.S.C. § 12101.

FACTS

Plaintiff Nicholas Keith was born deaf in 1980. Throughout his life, his primary form of communication was sign language. He was also fitted with a cochlear implant that allowed him to detect noises while wearing an external sound transmitter. In 2006, Plaintiff completed a junior lifeguard training course conducted by Defendant Oakland County (the "County.") When completing the course, Plaintiff used a sign language interpreter provided by the County to relay verbal instructions to him. In 2007, Plaintiff enrolled in and completed the County's lifeguard training program. Although Plaintiff again used an interpreter for the communication of verbal instructions, he performed all of the lifesaving tasks and training techniques without assistance.

After receiving his lifeguard certification from the County, Plaintiff applied for a lifeguard position at the County's wave pool. The job required applicants to be at least 16 years old, pass the County's lifeguard training program, and pass a medical examination from the County's appointed doctor. When submitting his application, Plaintiff asked only that an interpreter be present at staff meetings and during classroom instruction. Upon receipt of Plaintiff's application, the County's recreation specialist offered Plaintiff the lifeguard position contingent upon the successful completion of a pre-employment physical. At the physical examination, the County's doctor briefly reviewed Plaintiff's medical history and stated bluntly: "He's deaf; he can't be a lifeguard." The County's doctor never made an effort to determine whether Plaintiff could perform the essential functions of the position, with or without reasonable accommodation, despite Plaintiff's deafness. The County's doctor further added that he had to fail Plaintiff because "[i]f something happens, they're not going to sue you, they're going to sue the County, they're going to come after me." In his report, the County's doctor described Plaintiff as "physically sound except for his deafness."

Based on the County's doctor's opinion, the recreation specialist placed Plaintiff's offer on hold and contacted the County's aquatic safety risk management consultants, Ellis & Associates ("Ellis"). The County's recreation specialist discussed how to accommodate Plaintiff with both Ellis' client manager and vice president. Neither Ellis' client manager nor vice president had any experience, education or training regarding the ability of deaf people to work as lifeguards. Additionally, neither the County's doctor nor Ellis researched the issue, communicated with Plaintiff, or observed Plaintiff performing any lifeguarding functions.

Although the County's recreation specialist prepared a six-page outline identifying accommodations she believed could allow Plaintiff to work as a lifeguard successfully, the consultants remained hesitant to hire Plaintiff and stated that "without 100 percent certainty that "[the proposed accommodations] would always be effective, I don't think you

could safely have [Plaintiff] on the stand by himself." Ultimately, based on these responses, Plaintiff's employment offer was revoked.

PLAINTIFF FILES SUIT

Plaintiff filed a lawsuit alleging violations of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973. Plaintiff also claimed that the County failed to make an individualized inquiry regarding his ability to perform the job or engage in an interactive process to determine whether he could be reasonably accommodated. The County swiftly moved for summary judgment, arguing that Plaintiff was not "otherwise qualified" to be a lifeguard because he could not effectively communicate with other lifeguards, patrons, emergency personnel and injured persons.

In response, Plaintiff argued that he was "otherwise qualified" and that the County revoked his offer of employment based on unfounded fear and speculation. In support of his position, Plaintiff provided testimony of several experts with significant experience working with deaf people in the area of lifeguarding and aquatics. For example, Plaintiff presented one expert who worked extensively with hearing impaired individuals in the field of lifeguarding and had certified over 1,000 deaf lifeguards through the American Red Cross programs.

Nonetheless, the District Court granted the County's motion for summary judgment finding that, while the County's doctor did not make an individualized inquiry into whether Plaintiff's disability disqualified him from working as a lifeguard, the ultimate decision maker, the County, made such an individualized inquiry through its observations of Plaintiff during his lifeguard training and when preparing the six-page outline of potential accommodations. Additionally, the District Court determined that Plaintiff failed to show that he could perform the essential communication functions of a lifeguard with or without reasonable accommodation.

SIXTH CIRCUIT APPEAL

On appeal, the Sixth Circuit reversed the District Court's decision granting summary judgment in favor of the County and remanded the case to the District Court for further proceedings.

In its opinion, the Sixth Circuit noted that "the ADA mandates an individualized inquiry in determining whether an applicant's disability or other condition disqualifies him from a particular position." The Court explained that "[a] proper evaluation involves consideration of the applicant's personal characteristics, his actual medical condition, and the effect, if any, the condition may have on his ability to perform the job in question." The Court further noted that "[t]he purpose of this process is to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Importantly, the duty to engage in an interactive process "is mandatory and requires communications and good faith exploration of possible accommodations."

Based on the above law, the Sixth Circuit determined that, although the County initially participated in the "interactive process," it was unclear if the County fulfilled its obligations to engage in the interactive process as it withdrew the employment offer after it consulted with the County's doctor and Ellis, who both based their advice on non-specific assumptions and generalizations of deaf individuals. The Court stated that "[b]ecause it strikes us as incongruent with the underlying objective of the ADA for an employer to make an individual inquiry only to defer to the opinions and advice of those who have not, we direct the district court to consider these questions on remand." Stated another way, the County's reliance on the opinions of third-party evaluators who made no effort to engage in the interactive process, but instead relied on stereotypes and generalizations to determine how Plaintiff could be accommodated, if at all, nullified the County's attempted compliance with the ADA. Additionally, the Sixth Circuit found that genuine issues of material fact existed as it was unclear, when considering the particularized testimony of Plaintiff's experts, whether hearing was an "essential" job function necessary to perform as a lifeguard and whether Plaintiff was otherwise qualified for the job with or without reasonable accommodation.

BOTTOM LINE

An employer risks liability under the ADA if it does not base an accommodation decision on conclusions obtained from the interactive process. *Keith* suggests that reliance on the opinions of third-party

evaluators should also be accompanied by an understanding of the evaluator's background and experience with the disability at issue in relation to the specific job position. *Keith* also suggests that, if an employer wants to rely on an evaluator's opinion, it needs to confirm that the evaluator engaged in the interactive process and made a diligent and personalized effort to observe the disabled individual and explore possible accommodations. Importantly, such efforts must be calibrated to the applicant's disability with consideration of the effect, if any, the disability may have on his ability to perform the job in question. Additionally, reliance on an evaluator's opinion is no excuse for the employer not to be involved in the interactive process as well. Thus, if an employer wants to obtain opinions from a third-party evaluator when determining accommodation options, we would recommend that the employer work in conjunction with the third-party evaluator to engage in the interactive process.

U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT SAYS NO THANKS TO NLRB POSTER RULE
By Phillip C. Bauknight, Esq.

Earlier this month, in *Nat'l Ass'n of Mfrs. v. Nat'l Labor Relations Bd.,* No. 12-5068 (D.C. Cir. 2013) the United States Court of Appeals for the D.C. Circuit struck down a National Labor Relations Board Rule that required all employers covered by the National Labor Relations Act ("NLRA") to post on their properties and website a notice informing employees of their rights under the NLRA to unionize, picket, and engage in collective bargaining (the "Rule"). Importantly, the Rule declared that (i) an employer's failure to post the notice was an unfair labor practice and (ii) the Board could consider an employer's failure to comply with the Rule as evidence of unlawful motive in a case in which motive was an issue. The Rule also allowed an employee to toll the accrual of the six-month statute of limitations period for an unfair labor practice claim if the employer failed to post the notice.

The Court began its evaluation by analyzing the controlling provision of the NLRA, Section 8(c). The Court explained that Section 8(c) protects the expression "of any views, argument or opinion, or dissemination thereof, whether in written, printed, graphic, or visual form" from being an unfair labor practice or being evidence of an unfair labor practice as long as the speech "contain[ed] no threat of reprisal or force or promise of benefit." Additionally, the Court explained that Section 8(c) "expressly precludes regulation of speech about unionization so long as the communications do not contain a threat of reprisal or force or promise of benefit." In essence, Section 8(c) "not only protects the right of free speech under the First Amendment, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present."

After reviewing the purpose of Section 8(c), the Court determined that because the Rule attempted to regulate non-coercive speech about unionization, and classified an employer's failure to post the pro-union notice as an unfair labor practice and potential evidence of an unlawful anti-union animus, the Rule violated Section 8(c) and could not stand. Additionally, the Court held that the portion of the Rule tolling the statute of limitations when an employer did not post the notice was beyond the NLRB's authority and was also prohibited.

While this decision was rendered in the District of Columbia, it is significant for employers as it evidences the federal court's willingness to push back on the scope of the NLRB's authority and rule making powers. Similarly, the Court's invalidation of the Rule's statute of limitation tolling provision may prove useful in other forums as it provides a platform to suggest that tolling of an employee's claims is not automatic. Although this decision is a positive development for employers, this area of law is still in flux. It is unclear whether the NLRB may seek appeal before the United States Supreme Court and this issue has not yet reached a New Jersey federal or state court. We would recommend that you continue to monitor this issue closely with your counsel as the law develops.