Client Advisory

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Are Employers Now Expected to "Read the Minds" of Disabled Employees?

The Second Circuit just issued a decision affirming an award of $900,000 in damages and $644,000 in attorneys' fees to a 19-year-old plaintiff who brought a suit against Wal-Mart for disability discrimination under the Americans with Disabilities Act (ADA) and the New York State Human Rights Law. *Brady v. Wal-Mart Stores, Inc.*, --- F.3d ---, 2008 WL 2597936 (2d Cir. July 2, 2008). *The plaintiff had worked part-time at Wal-Mart for less than one month*. In addition to the size of the award, there are aspects of the court's ruling that are potentially very troubling to employers, such as the court's holding that an employer may have an obligation to accommodate an "obviously" disabled employee—*even if the employee does not ask for an accommodation or even advise the employer that he or she has a disability*.

Does the court expect employers to read the minds of their disabled employees? The answer is—possibly yes.

THE BRADY CASE

The plaintiff, Patrick Brady, has cerebral palsy, which causes him to have some difficulty walking and with other motor tasks. He was hired by Wal-Mart as a "Salesfloor Associate" in the pharmacy department, where his job duties included stocking shelves and dispensing prescriptions. After Brady worked only *three shifts*, his supervisor transferred him because she found him to be too slow and to have difficulty matching customers' names with their prescriptions. She did not provide Brady with training or coaching, in violation of Wal-Mart's policies. Brady was transferred to a job collecting shopping carts and garbage in the parking lot, which he considered to be a demotion (even though his pay was the same). After Brady complained, he was given a position in the food department, stocking shelves. Brady also considered this to be a demotion. Frustrated, and after **less than one month** of part-time work, Brady quit. Brady became depressed and sued Wal-Mart for disability discrimination.

After trial, the jury severely punished Wal-Mart for what it perceived to be poor treatment of a disabled employee. It awarded Brady $2.5 million in compensatory damages, $5 million in punitive damages and $9,100 in lost wages. The district court reduced the damage awards on statutory and procedural grounds, but let stand the jury's findings of unlawful conduct by Wal-Mart. The Second Circuit affirmed.

THE SECOND CIRCUIT RULING

The Second Circuit's decision has two significant components that New York employers need to be aware of. First, the ADA and state law generally prohibit any "adverse action" against an employee because of a disability. Wal-Mart claimed that it had only laterally transferred Brady to the parking lot assignment for a few days, without reducing his pay, and that this was not an "adverse action." The court held that, "[a]lthough [the] transfer did not affect [Brady's] wages or benefits, it resulted in a 'less distinguished title' and 'significantly diminished material responsibilities' and therefore constituted an adverse employment action."

Second, although the ADA does require accommodation of disabilities, Wal-Mart, relying on established precedent, argued that it was not required to accommodate Brady because he did not disclose that he had a disability or request any job accommodation. The Second Circuit disagreed with Wal-Mart and held that the ADA requires an employer to accommodate any "known disability," "not just disabilities for which an accommodation has been requested."

The court explained, "[w]e therefore hold that an employer has a duty to reasonably accommodate an

employee's disability, if the disability is obvious – which is to say if the employer knew or reasonably should have known that the employee was disabled." This is a departure from previous precedent, which had long recognized that employers are only required to accommodate once an accommodation is requested.

WHAT DOES BRADY MEAN FOR EMPLOYERS?

As happens all too often, this is a situation where bad facts spawned bad law. Wal-Mart was perceived to have treated Brady poorly and was punished, both by the jury and the appellate court. However, in so doing, the Court of Appeals potentially punished other New York employers. Given the court's instructions, now employers who are aware or should be aware of a disability have an added burden. Once an employer is aware of a disability, it is now arguably required to consider whether the employee with this "known" disability needs some accommodation, *even if he or she never requested it*. This is a change from prior advice and practice, as the rule generally was to wait for the employee to come forward to make the request.

PRACTICAL ADVICE

The laws which protect the disabled have always been a challenge for employers.

- Make sure Human Resources staff at New York locations are aware of those employees with "known" or "obvious" disabilities. (Practice note – Do not keep lists or records of such information, as this would be unlawful.)
- If an employee with a "known disability" is having performance issues or other difficulties on the job, HR should consider whether the disability is or may be the cause of the problem.
- Before discipline, demotion or transfer, there should be some dialogue with the disabled employee:
  - HR or management should consider whether the employee needs some accommodation or job modification. HR may want to discuss this directly with the employee.
  - Do not discipline, transfer or demote employees without some advance warning or coaching.
  - There should be good documentation of every step you take.

Brady may make it more challenging to deal with disabled employees. However, there are steps you can take to minimize exposure.

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