MASSACHUSETTS REHABILITATION COMMISSION HIT WITH SUBSTANTIAL DISABILITY DISCRIMINATION AWARD

By Barry J. Waters


The case illustrates the difficulty that even a governmental entity whose mission it is to service the disabled has in balancing the need to have employees perform the essential functions of their jobs and the legal requirement that employers must make reasonable accommodations. In striking the wrong balance, according to this Hearing Officer, the Massachusetts Rehabilitation Commission subjected Complainant to a hostile work environment, failed to accommodate him, and terminated his employment “under circumstances that give rise to the inference of discrimination.” As a consequence, the Hearing Officer ordered the Rehabilitation Commission to pay the Complainant: $113,305.41 in back pay, $100,000 in emotional distress damages, interest and attorney’s fees.

This case also illustrates the substantial risk employers take in defending cases all the way to a Public Hearing -- even when you believe that you are in the right; because it has been taking the MCAD four to six years to process a case from beginning to end, and because statutory interest is pegged at an almost-usurious 12%, even modest awards can carry a hefty interest component. Here, Complainant filed his charge of discrimination on August 31, 2010. The interest at 12% accrues from the date of the charge and continues until paid, here, a period of almost six years -- and running. Therefore, interest alone is well over $150,000. Even if the Rehabilitation Commission strongly believes that the Hearing Officer’s decision is misguided, does it run the risk of 12% interest continuing to accrue during the pendency of an appeal? Or does it pay the award, interest and Complainant’s attorney’s fees, an amount undoubtedly north of $500,000 at this stage, not including the amount it pays its own attorney? You don’t want to find yourself faced with this Hobbesian choice.

**Awareness of Complainant’s Impairments**

Savage suffers from Dyslexia, an impairment which affects his rate of learning, ability to process information and writing ability. He also suffers from Attention Deficit Disorder, which is manifested by symptoms such as distractibility and difficulty maintaining focus on a particular subject. The Rehabilitation Commission claimed that Savage’s disabilities were not obvious, that his impairments “were hidden and not discernible,” and therefore, the Rehabilitation Commission argued, Savage “was under a more stringent obligation to be forthcoming with information about his limitations.” However, the Hearing Officer found that:

1. When, at age 51, Savage applied for the position of Vocational Disability Examiner in July 2009, he checked a box on the application, and later disclosed in a form disclosure to the Director of Diversity, indicating that he chose to self-identify as a person with a disability;
2. “It was apparent, even to the most casual observer, that Complainant has learning disabilities”;

Continued on page 2
3. Savage notified the Rehabilitation Commission’s Training Director, and her assistant, and also its Director of Diversity/ADA Coordinator/Human Resources Liaison, that he suffered from Dyslexia and ADD, was easily distracted, and reads and writes more slowly because of these impairments; and

4. Savage notified the assistant Training Director in writing that he might need an accommodation for his learning disability and ADD.

Essential Functions, Job Description, Training and Probationary Period

The Vocational Disability Examiner’s job is to determine initial and continued eligibility of Massachusetts applicants for Federal SSI and SSDI public benefits. Neither the job description nor the class specification listed the use or operations of the agency’s IBM AS 400 computer system for tracking and processing development of a disability case as an essential job function. However, when Savage started his training on October 13, 2009, the majority of the training focused on adjudicating claims in a computer lab environment. Savage claimed that the Training Director was “curt and rude and upset him” and that, although he had no trouble processing the substantive material, “due to the rapid pace of instruction, his keyboarding and computer skills, his Dyslexia and ADD, and the noise level in the training room,” he was unable to accurately enter information into the computer system “at the same speed as the instructor spoke. Savage claimed that the Training Director alternated between berating him in class in front of his peers for making so many errors, and ignoring him. The Hearing Officer concluded that the Training Director had treated Savage “as if he were a disobedient child.”

The union contract provides that employees are on probation for six months before receiving “just cause” protection from termination. Following the training, in late January 2010, Savage was assigned a caseload but quickly fell behind because he had not mastered the use of the AS 400. Concluding that he could not perform the essential functions of his job after training, the Rehabilitation Commission terminated Savage’s employment on February 25, 2010, four and one-half months into his probationary period.

Failure to Accommodate

While the Rehabilitation Commission felt that it had bent over backwards to accommodate Savage, the Hearing Officer concluded that the Commission had failed “to engage in any meaningful communication with Complainant to determine the precise nature of the problems he was encountering to fashion some meaningful accommodation focused on his difficulty learning the computer system.”

The Rehabilitation Commission asserted that it had accommodated Savage when it provided him with individual tutoring outside the classroom and that any further attempt at accommodation would have been “futile” since Savage could not perform the essential functions of the job. However, the Hearing Officer concluded that the Rehabilitation Commission could have: provided Savage re-training on the computer system “while reducing his caseload”; made videos of the training sessions available to him; and/or extended his probationary period “to allow him more time to learn and acclimate to the job, an option that is available in consultation with the union.”

Take-Aways

1. Make sure your job descriptions, job postings and advertisements truly state the essential functions of the job.
2. Remain very patient in the “interactive process,” ask lots of questions, and explore all reasonable alternatives. This requires educating your managers on what the law requires of them.
3. Focus on the functions that are truly “essential” in determining whether any particular accommodation is reasonable.
4. Recognize that the “undue hardship” defense is a difficult one to prove.
5. Consult with an expert on the particular impairment(s) identified by the job applicant or employee. One possible source of information is The Job Accommodation Network, a source of free, expert guidance on workplace accommodations and disability employment issues. JAN’s mission is to work toward practical solutions that benefit both employer and employee. https://askjan.org, 800-526-7234.
6. In a union environment, where “just cause for termination” protection kicks in after an initial probationary period, recognize that terminating an employee within the probationary period does not insulate you from discrimination claims.
7. In a contested case, recognize that your defense is likely only as good as your weakest witness, come to terms with that fact as early in the process as possible, and determine your strategy accordingly.

Here, the Training Director was that weak link. There was even testimony that during training she “wrote a fake email purportedly from Complainant stating that he wanted to resign from DDS, and she replied to him in a fake email that she was sorry he wanted to resign and would pass his email on to HR.” At the hearing, the Training Director testified that “this was all a joke and something she often did to remind trainees of the importance of locking their computers…."

If you have any questions on Labor and Employment issues, please contact:
Barry J. Waters at (203) 772-7719 or bwaters@murthalaw.com