Acronyms That Can Cost You Money: A Defense Lawyer's Primer On Employment Law - Persons With Disabilities Civil Rights Act

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PART 2

In our last newsletter we reviewed the Elliott-Larsen Civil Rights Act (ELCRA). This month, we discuss the Persons With Disabilities Civil Rights Act ("PDCRA"). Next month we end the series with a review of the Whistleblower Protection Act ("WPA").

PDCRA

The Persons With Disabilities Civil Rights Act protects against disability discrimination in the workplace. The Act prohibits, among other things, an employer from discriminating in hiring, recruiting, promoting, discharging, or unfairly impacting the terms, conditions, or privileges of employment on the basis of a person's disability.[1] Claims under the PDCRA raise a host of issues that are difficult to spot, address, and avoid. For example, what does "disability" mean? What if the disability is related to the individual's ability to perform the job? Does the employer have an obligation to accommodate the employee? If so, how far does that go? How does a disability claim overlap with other health-related laws, such as the Workers' Compensation Act and the Family Medical Leave Act? How do provisions of a collective-bargaining agreement change the analysis? The answers are by no means easy.

Is the individual "disabled" within the meaning of the Act?

The definition of disability under the PDCRA is broad. It includes both physical and mental characteristics that result from disease, injury, congenital conditions of birth, and functional disorders. A protected disability also includes the employee "being regarded as" having one of those characteristics. Those characteristics, however, are disabilities under the Act only if they also substantially limit one or more of the major life activities of the individual and are unrelated to the individual's ability to perform the job. An example would be a person

who is wheelchair-bound because he is paralyzed from the waist down. He plainly has a physical condition that substantially limits major life activities. But to constitute a disability protected under the Act, the condition also must be unrelated to his ability to perform the job.

Is the disability unrelated to the employee's ability to perform the job?

Very generally speaking, if the claimed disability is related to the employee's ability to do the job, then it is not protected under the Act. For example, using the same scenario as above, assume the person worked for the public works department of a municipality. While employed (although not on the job) the employee is involved in a car accident that leaves him paralyzed. Prior to the accident, his job required him to drive heavy machinery and perform significant manual labor, requiring him to lift heavy objects and climb into trenches for sewer and water work, etc. That would suggest that his current disability is related to his ability to perform his job, so not protected by the Act. But note that the courts will strictly scrutinize the specific job requirements—"essential job functions"—of the position. Also important is whether the employee could perform those essential functions if, notwithstanding the paralysis, a reasonable accommodation is available.

When must an employer provide an accommodation?

The employee/potential plaintiff has the obligation to request an accommodation. But that obligation is waived if the employer has not provided sufficient notice to its employees of a procedure for notifying the employer of the need for an accommodation. Even where an accommodation is requested, the employee is not entitled to every accommodation that may be possible. For example, employers have no obligation to modify essential job functions or place the employee in a new job. On the other hand, reasonable accommodations may include purchasing equipment and devices, hiring readers or interpreters, and restructuring jobs or altering schedules in some circumstances.

Defenses to disability discrimination claims

The employer has no obligation to undertake an accommodation that would result in an "undue hardship". Thus the employer can defend against the claim by showing that the cost of the accommodation is not reasonable. But be prepared to disclose financial data if you rely on this defense. Another defense arises when the employer can show that the employee poses a direct threat to himself or to others if allowed to work notwithstanding the disability. Last, as in other discrimination cases, the employer may have legitimate non-discriminatory reasons for its employment action.

RETALIATION

Employers must be careful when taking some adverse employment action against an employee who has previously filed a claim under employment statutes or helped someone else pursue such a claim. These statutes universally make it unlawful for an employer to retaliate against an employee in those circumstances. The conundrum is plain: Must the employer give that employee—who had no sustainable claim to begin with—essentially preferential treatment in order to avoid a retaliation lawsuit?

EXPOSURE

Defense attorneys, insurance adjustors, and business owners must assess the exposure faced by the employer should plaintiff win. The exposure must be assessed in both economic and noneconomic terms.

The economic damages alone can be staggering. Plaintiffs are usually able to "blackboard" large damages claims by simply advising a jury that, for example, the employee is only 40 years old and but for the employer's violation of the law he would have continued to earn his annual salary of at least $50,000 for the next 20 or 30 years. So a starting point for damages could be $1 million - $1.5 million.

Even employees who can blackboard only small amounts, such as a 60 year old part-time building inspector earning only $2,500 per year, can present a costly claim for a reason that motivates plaintiffs' attorneys in every claim brought under the statutes we have been reviewing: The attorney can recover his or her attorney fee from the defendant employer. It is too often the case that the dollar exposure of employment lawsuits is driven more by the potential attorney fee award then by the actual damages at issue.

CONCLUSION

As can be seen, disability discrimination claims raise many difficult issues that caution against an employer assuming that an employee is so disabled that he can no longer perform the job and must be replaced.

In our next newsletter we provide an overview of claims and defenses under the WPA (the Whistleblower Protection Act).

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[1] The Act also protects against discrimination in other contexts, such as access to public accommodations; but only employer prohibited conduct is addressed here.