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No Good Deed: When Unnecessary ADA Accommodation May Become Required ADA Accommodation

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Managers who are trying to do employees a good turn may find themselves in an unwanted predicament, if the EEOC ever winds up getting involved.

Most of us know that disability claims are a primary focus for the Equal Employment Opportunity Commission. And with the ADA's 25th anniversary last month, the focus is even more heightened. But what may come as a surprise to some is the EEOC's highly aggressive stance when it comes to accommodating disabled employees.

Accommodations to disabled workers are offered in almost every company of every size from time to time, whether legally required or not. Employers sometimes do this even if the accommodation poses significant burden on business operations, and would not be legally required under applicable "reasonable accommodation" standards. There can be good reasons for doing so from a human resources perspective, which sometimes may include avoidance of immediate legal action by the employee. Often times, an employer just wants to offer a show of good faith to a valued employee who is going through hard times. Nonetheless, well-meaning employers, take note: the EEOC may deem it evidence of an ADA violation if the

employer ever wants to take that accommodation away, and you may find yourself scrambling in an EEOC investigation to explain why you cannot continue to provide that same accommodation indefinitely.

The ADA, as we know, requires employers to engaged in the interactive process and make reasonable accommodations for individuals with an ADA-covered disability. Employers, and most of us in the defense bar, struggle with concepts of what would be deemed "reasonable" by the courts, and what burdens might be deemed undue hardship under the law and excuse an employer from making a requested accommodation. These concepts are not easy, and often involve some uncertainty. But we can, at least, find guidance in that the law requires only reasonable accommodation. If an accommodation is not reasonable under the law, we can rest assured that an employer would not be obligated to provide it. Right?

Enter the EEOC. Recently, Schiff Hardin attorneys represented a client in an EEOC mediation in a charge filed by a former employee who had lifting restrictions. The essential functions of his position required regular lifting of weight that far exceeded his restrictions, and the company had no other available positions in which to place him. Nonetheless, the company chose to find work for this employee to do, and continued to employ him for about a year in a "make-work" capacity. When the company discontinued this arrangement and separated the employee, the employee filed an EEOC charge. At the mediation, the mediator called upon the company to explain why, if it had extended an accommodation for so long — albeit one that it likely did not have to in the first place — was it a hardship to continue doing so, arguably indefinitely? Schiff Hardin pointed out that, in the Seventh Circuit and many other jurisdictions, an employer is not required to "make work" for an employee whose restrictions prevent him from performing essential functions, and the mediator did not appear to disagree. Regardless, the mediator explained the edict of certain agency enforcement supervisors to their charge investigators. Some investigators are being instructed that if an employer does not have a satisfactory answer to why as previously granted accommodation was withdrawn, that may be evidence of an ADA violation — regardless of whether the law would have required the accommodation to have been given in the first place.

The EEOC's rationale appears to be that if an employer was able to provide the accommodation at all, it must not be that much of a hardship. Employers, on the other hand, may view it as no good deed going unpunished.

Either way, both employers and the EEOC likely can agree on this point: that the goal of accommodating disabled individuals in a way that makes sense for all is a commendable and worthwhile goal. Employers struggling with the right way to do so have a lot of company.