LEGAL UPDATES

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Wisconsin Jury Returns $125 Million Verdict in EEOC Disability Discrimination Case

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An eight-person jury returned a $125 million verdict against a major retailer in favor of a Down syndrome woman claiming disability discrimination. The case, *EEOC v. Walmart Stores East LP*, U.S. District Court for the Eastern District of Wisconsin, Case No. 17-cv-70, produced a plaintiff's award consisting of $150,000 in compensatory damages and an additional $125,000,000 in punitive damages following a four-day trial.

An interesting fact set for employers to consider

Given the magnitude of the verdict, the facts in this litigation are worth pondering. The plaintiff sued when the retailer-defendant terminated the plaintiff's employment after a series of warnings and spotty job attendance. These measures followed a change in the plaintiff's work hours, which were adjusted by the defendant based on business need after an analysis of customer traffic revealed the need to have employees present when the store was busiest. This shift change affected numerous employees.

The defendant sought summary judgment, which was denied by Judge William Griesbach, who concluded that the plaintiff, despite her disability, could perform the essential functions of the job, having satisfactorily performed those activities for the better part of 15 years. It was only after her schedule was changed that the plaintiff experienced significant problems with attendance, which she attributed to her Down syndrome. Further, Judge Griesbach found contested evidence as to whether the defendant could reasonably accommodate the plaintiff by allowing her to maintain her previous schedule or at least engage in other efforts to help her adjust to the change.

The court rejected the argument that plaintiff's failure to conform to the attendance requirements justified a non-discriminatory termination and held that the employer had a duty to review whether flexing the attendance requirements was in the nature of a reasonable accommodation for a person with Down syndrome. Also, the court declined to consider whether the plaintiff's regular action of leaving early was based on her desire or the product of her Down syndrome.

Finally, the employer had argued in its summary judgment motion that punitive damages should not be considered at trial—if a trial was to be held—as the plaintiff would have to show that the employer engaged in intentional discrimination with "malice or with reckless indifference to the federally protected rights of an agreed individual" [*EEOC v. Auto Zone*, 707 F3rd 824, 835 (7 Cir. 2013)]. The court rejected this request. According to Judge Griesbach, the fact that Walmart supervisors undergo training on issues relating to the Americans with Disabilities Act (ADA) and that it has an entire department dedicated to addressing reasonable accommodations could serve as evidence that its failure to comply with the ADA was malicious or in reckless indifference to the plaintiff's federal rights.

What this means to you

While many cases that result in extreme jury verdicts are appealed by unsuccessful defendants—and the final outcome of this case is yet to be decided—a few lessons seem clear. Courts and juries will hold large and sophisticated businesses to a high standard when reviewing an employer's duty to reasonably accommodate a disabled employee. Further, the mere fact that an employee's actions violate a clear and otherwise routinely enforced policy does not end the analysis. If the employee's failure to comply with the policy can be related in some reasonable manner with the disabling condition, the duty to accommodate that disability will be significant.

Finally, the amount of the verdict emphasizes that juries can and will use dollars, even enormous dollars, to right what they perceive as a wrong. The employer and its counsel had fair warning from the summary judgment decision that punitive damages were at play but were undoubtedly shocked with the nine-digit award.

There are statutory limitations on the amount of punitive damage that can be awarded under the ADA. For large employers, that cap is $300,000. Almost certainly, the defendant will argue on appeal to limit the punitive damage award to no more than the damage cap, while alternatively arguing that punitive damages were improperly awarded. Nevertheless, the reality that a jury would choose to use such a substantial award to punish a large employer (or perhaps any employer engaged in conduct similar to that which the jury perceived in this case) forces employers to look carefully at employment circumstances effecting disabled employees, and particularly those with a long-term track record of meeting performance expectations, before demanding changes in that employee's performance.

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The Husch Blackwell labor and employment team has helped clients in all industries address issues arising under the equal employment opportunity laws. If you have questions or need assistance with policies, plans, forms, or training issues, contact Tom Godar or your Husch Blackwell attorney.