Mold & Fragrance Sensitivities & the ADA

USA | March 8 2017

A recent decision by a federal court illustrates how employers may have obligations to accommodate employees who have sensitivities to mold or fragrances in the workplace. The employee – a therapist at a mental health center – suffered from an autoimmune disease and asthma. In 2010 and 2011, she advised her employer that she needed accommodations related to odors and chemicals in the air that could aggravate these conditions. The court noted that over the course of her employment she "routinely" made a variety of requests for accommodations, including: (1) remove all automatic air fresheners from the bathrooms and lobby; (2) remind employees to avoid using aerosol sprays, perfumes or scented lotions; (3) change the window cleaner to a non-ammonia based product; (4) rearrange pest control treatment to accommodate her schedule; (5) "air out" new office chairs before bringing them into the office; (6) use non-VOC paint for office painting projects; (7) clean duct work and vents; (8) advise staff not to burn candles and; (9) grant permission to leave for the day when the parking lot was repaved. The court observed that the employer generally complied with the requests, though sometimes "with frustration." The case is **Ready v. Southeast Kansas Mental Health Center (D. Kansas 2/27/17)**.

Complaints about mold. In October 2013, the employee notified the Executive Director that she and a number of coworkers had been experiencing symptoms that she attributed to mold in the building. He responded angrily, yelling "I don't have to accommodate you!" He subsequently inspected the building and found no evidence of mold, though he conceded to the court that he had no expertise in this area and would not have been able to identify the presence of mold. He subsequently hired a general contractor to perform a walk-through of the building and no mold was discovered, and, eventually, the employee's symptoms subsided.

Termination for performance issues/Pretext. At the end of November 2013, the employee was terminated because of concerns about her handling of one of her cases. Approximately three months after her employment was terminated, the Director of Clinical Services prepared an eight page "history" of the employee's performance problems ranging from the date she was hired in 1999 to her termination in 2013. The employee argued that these performance concerns were merely a pretext for unlawful disability discrimination. The court denied the employer's motion for summary judgment, concluding that there was sufficient evidence of the employer's frustration with and disapproval of her requests for ADA accommodations to warrant a jury trial. Among other things, the court pointed to the Executive Director's angry outburst when the employee reported concerns about mold. The court noted that it was "undisputed" that the Executive Director had reacted "in a similar fashion on several occasions to prior requests" by the employee for accommodations. The court also noted that there had been a 10 day delay between when the performance-related incident occurred and when the employer decided to terminate employment, "suggesting that the [performance] situation was not nearly as concerning to the defendant as it now contends." The court further emphasized that the employee was terminated less than one month after she raised concerns about mold in the office. The court also noted that in the memo that was prepared three months after termination outlining performance concerns, the Clinical Services Director had identified as a concern the employee's "repeated requests for accommodations."

Court rejects failure to accommodate claim. While the court denied the employer summary judgment on the disability discrimination claim, it granted the employer summary judgment on the failure to accommodate claim. The court reasoned that the employer had accommodated her disability in a number of ways. The employee argued that the employer had not acted promptly to remove automatic air fresheners but the court said that the employee presented no evidence that this delay prevented her from performing her job responsibilities. The court concluded that "as a matter of law" the delay was not a violation of the ADA. The court also rejected the employee's argument that the employer's failure to ever remove air fresheners from the lobby and lobby restrooms was actionable on the ground that the employee conceded that she never used the lobby restrooms and that her office was not located near the lobby. She also did not contend that the lobby air fresheners actually triggered her symptoms.

Lessons for employers? This case serves as a good reminder that employers should not become visibly angry or irritated with employees who seek accommodations, even if the employees make such requests frequently and the employer may perceive the requests to be trivial or unwarranted. The Executive Director's angry outbursts created a triable jury issue here. Without those, the employer would have been in a better position to argue that its nondiscriminatory reason for termination (i.e., a serious performance issue on one of the employee's cases) precluded a jury trial.

Employers should also be careful not to describe a request for an accommodation as a "performance concern" even if such requests are frequent and annoying. On a positive note, the court did grant summary judgment on the failure to accommodate claim even though some accommodations were granted late or not at all. The court appears to have been sympathetic to the employer on this claim because it had made many of the accommodations requested and demonstrated a good faith (if not perfect) attempt to comply with this ADA requirement.

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