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Briefly

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SIXTH CIRCUIT REVERSES SUMMARY JUDGMENT IN ADA CASE

Mary C. Moffatt

"The facts of the case reflect a series of cross-communications between Charter, [its third-party administrator], and the employee, which led to miscommunications and ultimately Charter's termination of the employee."

A recent decision from the Sixth Circuit Court of Appeals reminds employers of the need to communicate directly with an employee who makes a request for an accommodation under the Americans with Disabilities Act (ADA).

On March 8, 2022, the Sixth Circuit Court of Appeals reversed a summary judgment which had been granted in favor of the defendant employer on claims under the ADA. As a result of the reversal, the case will proceed before the District Court in the *Eastern District of Kentucky. Blanchet v. Charter Communications, LLC* (2:18-cv-000188).

In the case, the employer, Charter, hired the employee as a direct sales representative. During her employment, she became pregnant and received maternity leave, short-term disability benefits, and FMLA. Afterwards, the employee developed postpartum depression and requested an accommodation of additional leave, which was granted.

As a matter of its policies, Charter engaged its third-party administrator, Sedgwick, to handle disability leave applications and Charter directed its employees to speak directly and only with Sedgwick regarding disability leave issues and requests for leave.

Shortly before the expiration of the accommodation leave extension, on February 3, Sedgwick received a letter from the employee's doctor indicating her return-to-work date was "unknown at this time" but that the employer should "expect (the month of) April" as a time frame for her return to work. The letter also indicated that the employee "would not be capable of working from home or in any other setting due to her severe depression." The employee requested an additional 60-days to accommodate the additional time.

When the employee contacted Sedgwick concerning the extension, she was assured that "all was okay" and there was no reason why the request for an extension would not be approved. However, on March 9, the employee received a letter from Charter stating that she was separated from the company "effective January 10." Prior to receiving the termination letter, no one from Charter had contacted the plaintiff directly to discuss her request for accommodation or to explain why her request was not reasonable.

The facts of the case reflect a series of cross-communications between Charter, Sedgwick and the employee which led to miscommunications and ultimately Charter's termination of the employee. In fact, the Court notes "Charter's fatal administrative mistakes and lack of clarity regarding Blanchet's termination date thus raise genuine disputes of material fact as to whether a 'reasonable accommodation' was possible."

What is instructive about the case is that the Sixth Circuit Court of Appeal's decision emphasizes the need for employers to speak directly with an employee regarding the interactive process. Specifically, the Court notes that once an employee requests an accommodation, the employer has a duty to engage in an interactive process and that both parties have a duty to participate in good faith. The Court specifically notes in its decision that "an employer is not participating in good faith if it determines what accommodation it is willing to offer before ever speaking with the employee."

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., in Atlanta GA; Wimberly, Lawson & Avakian, in Washington D.C.; and M. Lee Daniels Jr., P.C., in Greeneville SC.

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A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

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OSHA CONDUCTING FOCUSED INSPECTIONS ON HEALTHCARE

Mary C. Moffatt

"Facilities … may be selected for inspections under the Initiative if they meet one of the [listed] criteria."

On March 2, 2022, the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) issued a Memorandum for a *COVID-19 Focused Inspection Initiative in Healthcare*. The Initiative is intended to supplement OSHA's targeted enforcement under the COVID-19 national emphasis program and is directed at hospitals and skilled nursing care facilities that OSHA had previously inspected or investigated. In the Memorandum, OSHA notes that the intent is to "encourage employers in these industry sectors to take the necessary steps to protect their workers against the hazards of COVID-19."

The partial-scope inspections called for in the Initiative are to be conducted at establishments covered by NAICS codes for (1) general medical and surgical hospitals; (2) psychiatric and substance abuse hospitals; (3) nursing care facility/skilled nursing facilities; and (4) assisted living facilities for the elderly.

Facilities within these codes listed above may be selected for inspections under the Initiative if they meet one of the following criteria:

1. Follow-up inspection of any prior inspection where COVID-19 related citation or hazard alert letter was issued;

2. Follow-up or monitoring inspections for randomly selected closed COVID-19 unprogrammed activity to include COVID-19 complaints and rapid response investigations; or

3. Monitoring inspections for randomly selected, remote only COVID-19 inspections where COVID-19 related citations were previously issued.

The time period for the Initiative is to take place over a three-month period from March 9, 2022 to June 9, 2022.

The Memorandum provides procedures for inspectors and directs that the healthcare inspections should be limited to the following assessments:

- Determine whether previously cited COVID-19-related violations have been corrected or are still in the process of being corrected.
- Determine whether the employer has implemented a COVID-19 plan that includes preparedness, response, and control measures.
- Verify the existence and effectiveness of all control measures, including procedures for determining vaccination status by reviewing relevant records. OSHA will refer any vaccination-related deficiencies to the Centers for Medicare and Medicaid Services (CMS).
- Request and evaluate the establishment's COVID-19 log, OSHA 300 Logs, OSHA 300A Summary, and any applicable OSHA 301 Incident Reports for calendar years 2020, 2021, and 2022 (if available) to identify work-related cases of COVID-19.
- Review the facility's procedures for conducting hazard assessments and protocols for personal protective equipment (PPE) use.
- Conduct a limited records review of the employer's respiratory protection program. The records reviewed may be limited to the written respiratory protection program and fit tests, medical evaluations, and training records for the interviewed employees.
- Perform a limited, focused walkaround of areas designated for COVID-19 patient treatment or handling (common areas, walkways, and vacant treatment areas where patients have been or will be treated), including performing employee interviews to determine compliance.

The "walkaround" portion of the inspection is to be limited but may be expanded where the walkaround indicates deficiencies in such areas as (1) compliance with the Respiratory Protection Standard, fit testing, medical evaluations, training, and proper use of respirators; (2) implementing procedures for screening workers; (3) measures to facilitate physical distancing; (4) implementing procedures to obtain and provide appropriate supplies of PPE; and (5) the use of face coverings in accordance with the Centers for Disease Control and Prevention's (CDC) guidance.

The Memorandum concludes by noting that where violations of OSHA standards, regulations, or the general duty clause are not observed or documented, (inspectors) should close the inspection and mark it as "in compliance."

The OSHA Memorandum may be accessed at https://www.osha.gov/laws-regs/standardinterpretations/2022-03-02