ADA UPDATE: INDIVIDUALIZED ASSESSMENT AND INTERACTIVE PROCESS UNDER THE ADA AMENDMENTS ACT

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May 30, 2013

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by
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The ADA Amendments Act ("ADAAA") has been in effect now for over four years. For another day we will defer addressing the question whether the amendments have lived up to the ambitious purposes expressed by Congress, including broader coverage of physical and mental impairments. Without a doubt, however, Congress intended for case-by-case analysis and a dialogic process between employer and employee, "individualized assessment" and "interactive process," respectively. We will focus today on a brace of cases treating those issues in the context of manifest handicaps.

Two steps forward for individualized assessment under the ADA is the case of *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013). Plaintiff was a deaf applicant for a lifeguard position. He could only communicate through American Sign Language. All applicants were required to submit to a medical examination. The doctor who conducted plaintiff's medical examination refused to clear him for duty after discovering he was deaf. Employer next contacted a safety and risk management consultant who made recommendations without examining plaintiff in person. The Sixth Circuit held that the employer failed to make an individualized assessment of plaintiff's fitness to work as a lifeguard because neither the doctor nor the consultants made an effort to determine if plaintiff could serve as a lifeguard despite his deafness. A genuine issue of fact for trial was whether plaintiff was qualified for the position based on expert testimony that lifeguards did not use their hearing to detect danger but rely on physical gestures (presumably also a whistle) to communicate.

Judge for yourself whether the case of *Wilson v. Dollar General Corporation*, No. 12-1573, Slip op. (4th Cir. May 17, 2013), is the proverbial one step back, however, for the interactive process. The plaintiff, Mr. Wilson, was blind in his right eye. Within five months of employment with Dollar General, he developed a serious inflammatory condition in his left eye, which threatened total loss of sight. He was accommodated by Dollar General with eight weeks of medical leave, not FMLA by the way. The treating physician cleared the plaintiff for return to work on April 6, 2010. However, on that date his vision remained blurred. He called Dollar General's human resource officer, explained his continuing problems, and was granted an additional day of leave, with a return-to-work date of April 7th.

However, his condition worsened. On April 7th he was treated in the emergency room, but his problems persisted. He notified the human resource officer again and provided her with a doctor's note to the effect that he could return to work on April 9, 2010. This time the human resource officer issued an ultimatum, return to work on April 7th or be terminated albeit without prejudice to reapplication for employment after his condition improved. Unable to return to work on April 7th, the Plaintiff was effectively terminated then and there. Note: That was the job action that precipitated the lawsuit.

The difficulty with decision-making in the here and now is the lack of a crystal ball. However, the second-guessing inherent in litigation is based on more perfect knowledge. In the *Wilson* case, it was a matter of record that the plaintiff's vision did not improve following his termination, and several months later he suffered a detached retina in his left eye that required surgery in November of 2010. The surgery left him blind for several weeks and required months of convalescence. In March of 2011, he began looking for employment again.

Nevertheless, the plaintiff made a charge of discrimination to the EEOC and eventually filed a lawsuit against Dollar General alleging violation of the Americans with Disabilities Act. The gravamen of his complaint was that Dollar General unlawfully discriminated against him by failing to provide a reasonable accommodation for his disability, more particularly, by failing to engage in the interactive process at the point in time when he was terminated.

Monday morning quarterbacks that we all tend to be, we might ask, where is the case or controversy? Events overtook the plaintiff's last request for accommodation. It was moot. He would not have returned to work (again) even if a wait-and-see approach had been adopted by the human resource officer. In a sense, the human resource officer just got lucky.

However, the opinion places blinders on the hindsight that may be applied, stating that it is improper to consider evidence of the individual's abilities beyond his or her proposed return-to-work date. Slip op. at 14 n. 8. In leave cases, the accommodation must be for a *finite* period of leave. *Id.* Evidence indicating that weeks or even months after the individual's proposed return date, the individual became able or unable to work, is too remote to the initial request. *Id.* Accordingly, evidence that the plaintiff later suffered an additional medical setback and could not return to work until a year later, is irrelevant to the question whether he could have performed the essential functions of his position if given the two days of additional leave from April 7 to April 9th. *See id.* at 15.

The court approvingly cited authorities, one from pre-ADAAA days, for the proposition that a leave request will not be unreasonable on its face so long as it (1) is for a limited finite period of time, (2) consists of accrued paid leave or unpaid leave,[1] and (3) is shown to be likely to achieve a level of success that will enable the individual to perform the essential functions of the job in question. Slip. op. at 14 n. 7. The court then stated that a two-day leave request was not per se unreasonable on its face. Slip. op. at 14. In light of all that, we might say with some trepidation, so far so good for Mr. Wilson.

The relevant slice of hindsight then is April 7 to April 9th, the span of time from request to the projected return-to-work date. However, the court then places a burden on the employee that is not in the statute. According to the court, the plaintiff on April 7th did not provide any evidence that on April 9th he would be able to lift and load objects of various weights as would have been required by his position at Dollar General. Slip op. at 15. With no evidence to conclude that had the plaintiff been accommodated with his two-day leave request, he would have been able to perform the essential functions of his job at the conclusion of the leave period, *id.*, his claim was deficient.

[1]Surely that clause does not mean that to get the time off it would already have to be due and owing to the employee. Giving the employee his or her due is hardly an accommodation.

What about the interactive process? On April 7th, the plaintiff's request for the two-day leave extension was summarily denied, the antithesis of interaction we might say. Quoting the ADA regulations, the court does recognize that to determine the appropriate reasonable accommodation it may be necessary for the employer to initiate an informal, *interactive process* with the individual in need of the accommodation. Slip op. at 16. According to the regulations, this process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. *Id.* There is no prescribed protocol, however.

Nevertheless, the court then appears to create yet another burden for the employee. Apparently gesturing back to pre-ADAAA cases, the court states that the disabled plaintiff alleging that an employer failed to properly engage in the interactive process must also establish that the interactive process would have "likely" produced a reasonable accommodation. Slip op. at 17.[2] In other words, the employee must show that had he been granted leave, at the point at which he would have returned from leave, he could have performed the essential functions of his job. The lynchpin of the interactive process then appears to be a crystal ball forecast that the requested accommodation would permit return-to-work.

We may agree with the outcome in *Wilson*. What we may question is the means of reaching it. In a case that common sense would dictate the same result, the court reached it with a point of law that can be used to deter if not limit the rights of the disabled.

CONCLUSION

The *Keith* case is an object lesson. It cautions against stereotypes and presuppositions about the capabilities of people with physical impairments. The *Wilson* case, on the other hand, appears to draw from not only the pre-ADAAA spirit but also the reported cases from that era. Gratuitously, in this author's view, it creates a burden on the disabled person that is not supported by the text of the ADAAA and seems to be out of step with its statutory rules of construction, findings, and purposes.

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[2] Note that the doctor's return-to-work chit on April 7th was an unqualified, "He/she may return to work on 04/09/10," with no mention of restrictions. Slip op. at 5.