Alert

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COZEN O'CONNOR

Tenth Circuit: ADA Rights and Obligations Can Be Triggered in Subtle Ways

The U.S. Tenth Circuit Court of Appeals recently issued an opinion in *Mestas v. Town of Evansville*, reversing summary judgment on an employee's ADA hostile work environment and retaliation claims — finding the employee's comments and requests could be construed as protected activity, thus triggering the employer's duty to explore a reasonable accommodation. The case serves to remind employers that employee protections and employer duties under the ADA can be triggered in unexpected ways.

Mestas, a municipal sanitation worker for the Town of Evansville, suffered an on-the-job back injury during his probationary period that put him out on medical leave for about three months. When he returned to work, Mestas encountered hostility from his superiors in the form of an extension of his probationary period and instructions that Mestas not seek assistance from his co-workers. Mestas subsequently re-injured his back and — without disclosing the re-injury — sought additional time off for treatment, which was granted. Mestas then asked his bosses if he could use his own snow blower in lieu of shoveling snow, specifically because of his back pain. The employer declined the request. After later informing his bosses that he had, in fact, reinjured his back and asking to be excused from shoveling snow, Mestas' employer told him that he did not "want to hear [his] sh**," and terminated Mestas the following day — noting "take care of your back and whatever."

Mestas filed suit against the employer for, among other things, ADA hostile work environment and retaliation. The employer moved for summary judgment, and the trial court opined that Mestas had failed to establish a "record of disability" or that he had engaged in protected activity under the ADA (pre-requisites for succeeding on his ADA claims).

The Tenth Circuit disagreed, finding that Mestas' numerous requests and treatment could be interpreted by a jury as establishing a "record of disability" and/or as a protected activity under the ADA. If the jury were to side with Mestas on these issues, the employer would have had an obligation to — at the very least — explore a potential reasonable accommodation, and would be precluded from taking adverse action against Mestas for requesting an accommodation.

The *Mestas* opinion demonstrates that employers cannot sit back and wait for an employee to say, "I'd like a reasonable accommodation." While the employee certainly needs to "make clear," in a "sufficiently direct and specific" way, that they require assistance for their disability, this opinion serves to remind employers that they should be careful not to inadvertently (and certainly not deliberately) brush aside comments that could serve as a request for an accommodation under the ADA.

The court's opinion can be read here.

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