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LABOR RELATIONS NEWS

◆ Navigating the Shoals of ADA Accommodation

Litigation under the American with Disabilities Act (ADA) has increased over the past few years as employees have become more aware of the employer's duty to provide reasonable accommodations to qualified individuals with disabilities. EEOC statistics indicate that disability related charges of workplace discrimination were included in 30.7% of all claims in the agency's most recent fiscal year (2016), surpassed only by claims of retaliation (included in 45.9% in charges filed).

While most employers are aware of their obligations under the ADA, they may struggle with the specifics of the process.

A recent issue of the *Maine Employment Law Letter* offers a list of the five most common pitfalls employers encounter when dealing with the ADA's reasonable accommodation requirements.

1. *Failing to recognize a reasonable accommodation request.* The 2008 ADA Amendments Act (ADAAA) greatly expanded the universe of disability, resulting in more physical and mental conditions that now qualify as legally protected disabilities.

So, how do you know if an employee is asking you to provide an accommodation? As a general rule, any time an employee tells you that he/she needs a change for a reason that is related to a medical condition, he/she is asking for a reasonable accommodation. He/she does not have to mention the ADA, the request does not necessarily have to come directly from the employee, and the request does not have to be in writing. To protect the school unit, it's good practice to train personnel who deal with issues such as employee attendance, scheduling, and work conditions on how to spot a reasonable accommodation request and when to get HR or other appropriate central office staff involved. It's also helpful to have an accommodation protocol that tells employees how to submit an accommodation request, perhaps in the employee handbook. Noncompliance with the protocol would help show that the employee did not effectively communicate his/her need for an accommodation.

2. *Failing to consider leave as an accommodation.* Most employers are aware that leave can be required as a reasonable accommodation, even if the leave is above and beyond the requirements of the Family and Medical Leave Act (FMLA). However, problems can arise when an employer fails to anticipate a request for extended leave. For instance, an employer may have policies or rules that restrict the availability of leave and apply the rules to deny leave. Or an employer may require an employee to be free of medical restrictions before returning to work after an injury. The ADA may require a bending of your own policies or rules if an employee can return to work with a reasonable accommodation, even if not 100% recovered.

In May 2016, the EEOC issued guidance on providing leave as an accommodation under the ADA. It includes examples of when leave may be required. The guidance is available at www.eeoc.gov/eeoc/publications/ada-leave.cfm.

3. *Failing to recognize mental disabilities.* According to the Substance Abuse and Mental Health Services Administration, a branch of the U.S. Department of Health and Human Services, more than 41 million Americans experience some type of mental illness in any given year.

Employees don't often initially disclose mental illnesses to their employer. Employees are afraid of discussing it with co-workers and supervisors. They don't want to lose their jobs, damage relationships, or risk future employers learning of illnesses and judging them. They are conscious of the stigma of mental illness.

Once the employment relationship begins, an employer can ask about a mental disability only if there is objective evidence that an employee has a condition that could interfere with his/her work or present a threat. Mental disabilities often affect life activities such as concentration and sleep, which are much less obvious than physical disabilities, making it hard to determine that an employee may have a mental disability.

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Navigating the Shoals of ADA
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It can be hard for an employer to recognize when an employee with a mental disability is requesting an accommodation. To make a legally valid request for an accommodation, an employee has to do little more than state a need for a change to his/her work environment for a reason related to a disability. An employee who complains of stress or irritability or has poor attendance and asks for a modification to his/her work environment may seem to just be complaining about run-of-the-mill issues. However, he/she may actually be requesting an accommodation.

Employers must be aware of employees' mental disabilities and accommodate them in the same way they accommodate physical disabilities. If an employee has a known disability, you must be sensitive to accommodation requests that might otherwise seem unreasonable. If you suspect that an employee's performance issues are related to a mental disability, be certain to document the performance problems before asking questions about the disability.

4. *Failing to engage in and document the interactive process.* The goal of the ADA's requirement that the employer and employee engage in the interactive process is a discussion of what accommodations would allow a disabled employee to perform the essential functions of his/her job. There are no definitive guidelines for the process, but the idea is that the employer and employee will exchange proposals for reasonable accommodations.

There is no downside to engaging in the interactive process. If in meeting with an employee who is not meeting his/her job responsibilities you learn that he/she is struggling with a medical condition or mental illness, you may have to discuss accommodations and continue the interactive process. If the employee's problems are unrelated to a physical or mental condition, you can turn the matter to a disciplinary meeting.

Be sure to document the interactive process – it will help you, as an employer, in the event of a discrimination claim. Making a note of an employee's reasons for failing to perform his/her job duties and that no accommodation was requested will deflect a claim that you had notice but failed to discuss accommodations. On the other hand, if you know about the employee's need for an accommodation, you should document the accommodations requested and the alternative that you offered.

5. *Failing to consider alternatives*. If an employee has a disability and asks for an accommodation, you must provide a reasonable accommodation absent an undue hardship – and proving an "undue hardship" may be difficult. The EEOC requires an employer to consider three factors: 1) the nature and cost of the accommodation; 2) the employer's resources and the effect of the expenses of accommodation on these resources; and 3) the overall impact on the employer. Increased costs alone are not likely to be sufficient in showing an undue hardship. The cost of a proposed accommodation should be researched, not just assumed. And just because one accommodation would result in an undue hardship, there may be alternative accommodation solutions that won't. Similarly, if one accommodation proves unworkable, it doesn't mean that that there aren't other reasonable accommodations that may be available.

Not on the list, but a reminder that it may be helpful to contact your school attorney should a complex or contentious issues arise.

-Adapted from *Maine Employment Law Letter*, August 2017

◆ Jury to decide whether firing SRO for speaking to media violated First Amendment

The success of an employee's First Amendment retaliation claim often turns on whether he/she was speaking as an employee or as a citizen on a matter of public concern. The U.S. District Court, Eastern District of Pennsylvania recently denied summary judgment motions filed by both a school district and a school resource officer. Because there were disputed factual issues surrounding whether the SRO was speaking as an employee when he spoke to a reporter, the court concluded that a jury would have to hear his First Amendment retaliation claims.

The facts: A local sporting goods store contacted police regarding an attempted break-in. Based on surveillance videos, a detective determined that the perpetrator was a boy roughly 13 years of age. He contacted a high school resource officer for help in identifying the boy. The SRO was able to identify the middle school student in the surveillance video. School personnel did not find any of the stolen items in the teen's possessions.

Based on false information that there might be guns, ammunition, and an active shooter at the school, a local news crew parked a van outside the police station. The SRO told the reporter, "I think you should kill the story. There's nothing there." Believing that the SRO was the source of the false information initially given to the reporter, the school district terminated the SRO's employment.

The SRO sued, alleging violations of his First Amendment rights. Both the SRO and the district sought summary judgment.

The District Court explained that to establish his claim for First Amendment retaliation, the SRO needed to show that his speech was protected by the First Amendment, and that it was a substantial or motivating factor in the alleged retaliatory action.

The court pointed out that if the SRO spoke as an employee, his speech would not be protected by the First Amendment. If he was speaking out as a citizen on a matter of public concern, however, his speech could enjoy such protection.

Viewing the "big picture" from two different perspectives, the court concluded that "a reasonable jury could find for either side, as the SRO's precise job duties were not well defined. As to whether the school district had adequate justification for terminating the SRO's contract, the court noted that the SRO's conversation with the reporter may have eliminated the disruption that could have resulted from the false news story.

Nevertheless, the court said, "a school superintendent might not want his chief security officer to place calls to the media about matters of school security without first having authorization to do so."

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Jury to decide
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As this case illustrates, when an employee's position is new or the job duties are not clearly defined, determining whether speech is employment-related can be problematic. Having a well-constructed job description and a list of work-related duties might have helped this school district demonstrate that the SRO's conversation with the news media was within the scope of his duties and therefore outside the First Amendment's protection.

The case is *Latorre v. Downington Area Sch. Dist*, E.D. Pa (2017)

-*School Law Briefings,* August, 2017

◆ A HOSTILE WORK ENVIRONMENT: HOW BAD DOES IT HAVE TO BE?

A Minnesota school district hired an employee to run its student and family engagement program. The employee, who was African-American, was allegedly subjected to inappropriate sexual remarks and jokes by her supervisor. She asserted that her supervisor responded to her complaint by "brow-beating [her] repeatedly and scripting all conversations she had with school principals."

Although the employee addressed her concerns to the superintendent, she contended that the superintendent yelled at her, intimidated her, and told her that no one liked her or wanted to work with her.

She filed a complaint with the Equal Employment Opportunity Commission, claiming discrimination on the basis of race and sex. Then, after being terminated from her job, she brought suit against the district in federal court.

The employee's lawsuit alleged that she was subjected to a hostile and abusive working environment under Title VII and state law. To show a hostile work environment under those laws, and employee has to establish: 1) that she was a member of a protected class; 2) the occurrence of unwelcome harassment; 3) a connection between the harassment and membership in the protected class; 4) that the harassment affected a term, condition, or privilege of her employment; and 5) that the employer knew or should have known of the harassment and failed to take action against it.

Additionally, courts will look to see whether the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

How did the court rule? The court dismissed the employee's claims, finding that she did not state a plausible case for a hostile work environment. It found that, even if taken as true, the employee's claims amounted to isolated incidents of being yelled at, ignored, and told inappropriate jokes. "Although unpleasant," the court reasoned, "this conduct is not so pervasive or severe as to give rise to a hostile work environment claim."

The court explained that the standards of a hostile environment claim are demanding – the conduct must be extreme and not merely rude or unpleasant to affect the terms and conditions of employment. Although the comments were unwelcome, they did not support the conclusion that the workplace was hostile toward the employee, nor did it meet the "high evidentiary showing" required to establish that the conduct was so severe and pervasive that it permeated the workplace.

The case is *Seabrook v. Independent School District #535*, D. Minn., 2017.

-*School Law Briefings*, July 2017

Note: This case should not be read as an invitation to employers to condone what most employees would view as unacceptable behavior in the workplace. However, it does shed light on what this one court regards as the standard for a successful hostile working environment claim.

Readers may want to look back at the article on the related topic of workplace bullying in the March 2017 issue of MSMA's *Labor Relations News*, available at www.msmaweb.com. -*cb*

◆ TIMING IS EVERYTHING: ADMINISTRATOR NOT ENTITLED TO REINSTATEMENT TO ELIMINATED POSITION

The U.S. District Court, Southern District of Texas granted summary judgment to a school district on an employee's claims under the FMLA. The court held that the employee's interference claim failed because her position had been eliminated and her retaliation claim failed because the decision to eliminate her position was made before she requested FMLA leave.

The facts: Irene Harper was the Assistant Director of At-Risk in the Fort Bend (Texas) Independent School District. The At-Risk Department provided student support services like pregnancy education, positive behavior support and summer school in this district with more than 75,000 students. In December 2014, the Director and the Executive Director of the Department presented a proposal to the District's Executive Leadership Team to restructure Harper's position into two coordinator positions.

In early January 2015, Harper told the Director that she might need to take leave under the Family and Medical Leave Act (FMLA) for foot surgery. In early February, the Director and Executive Director informed Harper that the District had accepted the restructure proposal to eliminate her position and replace it with the two coordinator positions. The change was scheduled for the end of the fiscal year, June 30, 2015.

Harper was offered a coordinator position, which had a lower salary than her current position. Harper was told to inform the District by March 4, 2015, whether she would accept the coordinator position. She did not respond to that offer.

On March 5, Harper began her FMLA leave. She was on leave until June 9, 2015. During that period, the coordinator position

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Timing is everything

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that Harper was offered but did not take, was posted on the District's employment website. Harper did not apply. When she returned to work on June 9, she was informed that because her position was being eliminated, and she had not taken the coordinator position, her last day of work would be June 30, 2015.

Harper filed suit alleging that the District had violated the FMLA by interfering with her FMLA leave and retaliating against her for taking FMLA leave. She contended that she should have been transferred to a position equivalent to the Assistant Director position she had held.

The District argued that when it terminated her after she returned from leave, it was following through on a plan that it had announced much earlier and that she had been offered another position.

Citing previous cases, the court stated that Harper was "not entitled to 'any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.'" The court further stated that an employee has no right to reinstatement if the employee's prior position has been eliminated, and that a plaintiff is not entitled to keep a job that no longer exists.

The court granted the District's motion for summary judgment. Siding with the District, the court observed that Harper was reinstated to her original position when she returned, at least for the three weeks until the end of the fiscal year, at which point the position was eliminated.

The case is *Harper v. Fort Bend Indep. Sch. Dist.*, S.D. Tex. (2017).

-*School Law Briefings*, August 2017

◆Body language bias: A silent legal risk

The following cautionary tale is taken from a recent issue of *HR Specialist: Employment Law*

Sometimes a boss can cause big legal trouble without even saying a word.

Recent case law shows that a sign or disappointed look can be enough if the worker on the receiving end perceives the behavior as disapproval. This can come into play when a supervisor sends such negative vibes in response to an employee's request for legal accommodations or leave.

Take the FMLA, for example. Any message employers send to discourage employees from taking FMLA leave may be considered interference with FMLA rights.

In a recent case, a Pittsburgh hospital was having financial trouble and needed to cut staff. It decided to eliminate the head of the neonatal nursing department, but didn't immediately announce the decision.

Meanwhile, the employee put in a request for intermittent FMLA leave to care for her father, who was recovering from surgery. Her request was approved.

After a few weeks, a supervisor asked the employee if she could try to schedule her father's doctor visits in the early morning or end of the day. The employee says this request was accompanied by sighs and body language indicating her boss disapproved of her taking leave.

Soon after, the employee was terminated as planned. She sued, alleging both FMLA interference and FMLA retaliation. She testified that she felt constrained against taking as much leave as her father needed because of the boss's demeanor and request to alter her leave schedule.

Although it dismissed the retaliation claim because the decision to eliminate her job occurred before she requested leave, the court said that the employee's interference claim could go forward.

The takeaway: handling FMLA leave in a positive, supportive way (while still following all of your FMLA procedures, of course) may reduce the risk of an interference claim from a disgruntled employee.

-*HR Specialist: Employment Law*, September 2017

◆ Rejection letters—Keep it simple

How an employer (including your school unit) handles turning down job candidates can mean the difference between a person being left with a positive impression of your school system and one whose feeling are hurt – and might decide to sue.

Sending a well-crafted rejection letter to candidates who were interviewed assures them that they were seriously considered and it keeps you from having to explain why you rejected them.

Here are seven tips for creating a polite and legally safe letter from a publication for human resources specialists:

1. Give a neutral, nonspecific reason for the rejection. No law requires you to tell applicants why they weren't hired.

2. Make the letter short and direct, gracious and polite. It's OK to use a form letter, but personalize it by using the applicant's name.

3. Thank the person for applying for the position. Then wish the candidate good luck in the future. Express thanks for their interest in the organization. Sign the letter "sincerely," "best wishes" or "best regards." Include your name and job title.

4. Don't say you decided to hire someone more qualified or that you received applications from several more-qualified candidates. Reason: an attorney for a rejected employee may ask to see the application of the person who was hired and other top candidates.

5. Don't promise further consideration. Don't say something like, "We will keep your application on file should a suitable opening occur in the future." Should you later hire someone else less qualified, you could be vulnerable to legal action. Don't suggest applying for future jobs. False hopes are often the precursor to a lawsuit.

6. Avoid phrases such as "I'm sorry" or "unfortunately." They feed the rejected candidate's negative feelings.

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Rejection letters
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7. Don't delay. Write the letter soon after a hiring decision is made. Dragging out the candidates' wait for weeks will only build resentment.

A sample letter:

Dear [candidate's name],

Thank you for taking the time to meet with us to discuss the [position title] at [employer]. I wanted to let you know that we have offered the position to a different candidate.

It was a pleasure meeting you and learning more about your accomplishments and skills. We wish you the best of luck in your job search.

Sincerely,

Name
Title

-*HR Specialist: Employment Law*, August 2017

CPI—August

CPI– W This index, which is commonly used to adjust wage contracts increased 0.3% from July 2017 to August 2017 and is 1.9% higher than in August 2016.

CPI– U This index for all urban consumers increased 0.3% from July 2017 to August 2017 and is 1.9% higher since August 2016.

2017-18 MAINE TEACHER SALARY SUMMARY

With 69 of 186 units reporting, the following averages reflect the local impact:

	Base	Top
Average for BA	$33,483	$54,770
Average for MA	$35,502	$56,099
Average of MA+30	$40,297	$64,445
Average of CAS	$38,726	$61,537

Average salary for 2017-18 for these units is $51,109.00
Average salary for 2016-17 for these units was $50,801.00
Average salary increase $308.00 or 0.61%

The average Board contribution for health insurance $18,191.00

If you have not done so already, please forward 2017-18 salary data to MSMA and an update will be provided in the next newsletter. Thank you.