Employer Update

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Reasonable Accommodations For Employees Suffering From Depression

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In This Issue

The toxic brew of increasingly long hours and high stress should be prompting more conversations in the workplace about mental illness. A 2016 study by the American Bar Association found that, within our own profession, 28% of lawyers struggle with depression. Sadly, it is the recent high profile suicides of public figures, including Kate Spade and Anthony Bourdain, which have catapulted this topic to a more prominent positon in discussions of employee wellness and corporate culture.

Tragically, as in those cases, a person suffering from depression sometimes will fail to share his\her problems with others. In other cases, however, people suffering from depression do seek help. And in a subset of those cases, they will tell their employer in order to receive a reasonable accommodation under the Americans with Disabilities Act (ADA). Employers, therefore, must be educated on this topic and prepared to appropriately accommodate their employees suffering from depression in order to meet their obligations under the ADA.

In this article, we examine the federal law governing how employers must address such accommodation requests, and offer some suggestions as to how employers might approach such situations.

Background

In 1990, Congress passed the Americans with Disabilities Act (ADA) to outlaw employment discrimination against individuals with disabilities. 42 U.S.C. § 12112(a). Later, Congress expanded the ADA with the ADA Amendments Act of 2008 (ADAAA), which broadened the ADA's scope and reinforced Congress's "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1).

The failure to provide a reasonable accommodation to a disabled, but otherwise qualified, person in the workplace is one of the forms of unlawful employment discrimination encompassed by the ADA. *Id.* § 12112(b)(5)(A). In order to establish a claim for failure to reasonably accommodate, a plaintiff must show: (1) she is disabled under the ADA; (2) she could perform the essential functions of the job with or without a reasonable accommodation (*i.e.*, she was "otherwise qualified"); and (3) the employer, despite knowing of her disability, did not reasonably accommodate it. *Id.*

The Equal Employment Opportunity Commission has stated that the passage of the ADAAA shifted the focus of the disability discrimination inquiry from

whether the employee has a "disability" within the meaning of the statute, to whether the employer lived up to its obligation to reasonably accommodate her. *See* 29 C.F.R. § 1630.2(j)(1)(i)-(iii). Indeed, the definition of "disability" is "construed broadly in favor of expansive coverage . . . ." *Id.* § 1630.1(c)(4). Consequently, following the passage of the ADAAA, many courts have concluded, even on limited records, that depression can constitute a disability. *See, e.g.*, *Rubano v. Farrell Area Sch. Dist.*, 991 F. Supp. 2d 678, 692 (W.D. Pa. 2014).

Time-and-Presence Requirements

Is the ability to work full-time an essential function of an employee's job? In *Hostettler v. Coll. of Wooster*, 895 F.3d 844 (6th Cir. 2018), the Sixth Circuit held that this was not a legal issue, but rather a question of fact for a jury. Plaintiff Heidi Hostettler was an HR Generalist for the College of Wooster who experienced severe postpartum depression and separation anxiety following her pregnancy. In addition to 12 weeks of FMLA leave, her supervisor granted her three extra weeks of leave and, per the recommendation of Hostettler's doctor, thereafter allowed her to return on a part-time basis of five half-time days per week.

During this time, Hostettler claimed she could perform the essential functions of her position with a modified work schedule by handling issues that arose after her stop-time either from home or the next morning at work. She received a positive evaluation during this period from her supervisor, and a colleague testified that Hostettler was effective on a modified work schedule. Still, Wooster presented evidence that Hostettler did not perform critical functions of her job, such as filling job openings or leading trainings and lunch programs, which inevitably put a strain on the HR department.

When Hostettler's part-time accommodation was set to expire, her doctor submitted a medical certification explaining that she should continue working half-time for three more months. Wooster disagreed, and, a month after her accommodation expired, fired her for being "unable to return to [her] assigned position of HR Generalist in a full time capacity." *Id.* at 851.

Hostettler subsequently filed suit, arguing that Wooster violated the ADA. The district court granted Wooster's motion for summary judgment, holding that full-time work was an essential function of Hostettler's job, and therefore she was unable to state a claim because she was not "otherwise qualified" under the ADA.

Hostettler appealed, and the Sixth Circuit reversed. The Court first noted that essential functions are those that would fundamentally alter a job if eliminated. It observed that, in determining whether something is an essential function, courts should consider the amount of time spent on that function, the employer's judgment, written job descriptions prepared before the job was posted, and the consequences to the employer of the employee not performing the function. The Court also said that "[r]egular, in-person attendance is an essential function' of most jobs." *Id.* at 854 (alteration in original) (quoting *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762–63 (6th Cir. 2015)).

Nevertheless, the Court held that whether full-time work was an essential function of Hostettler's job was a question of fact for the jury. The Court explained, "[o]n its own . . . full-time presence at work is not an essential function. An employer must tie time-and-presence requirements to some other job requirement." *Id.* at 856. Hostettler presented evidence that she could perform her other job requirements without working full-time. Accordingly, Wooster could not prove as a matter of law that full-time work was an essential job requirement, and the district court's grant of summary judgment was improper.

Accommodation Request

Still, another court rejected a failure to accommodate claim on different facts. In *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017), plaintiff Taymari Delgado Echevarría ("Delgado") was a Hospital Specialist for AstraZeneca diagnosed with severe depression and extreme anxiety. She requested paid leave under the company's short-term disability policy, which was initially granted for a month.

AstraZeneca then periodically granted extensions for Delgado's leave based on treatment records submitted by her doctor. After AstraZeneca had extended her leave for five months, it sent Delgado a letter stating that, if she did not return to work, it would presume she resigned. In response, her doctor faxed a form requesting another year of leave. AstraZeneca determined that the form did not support reinstating Delgado's leave, and told Delgado to return to work. Two months later, and without any word from Delgado, AstraZeneca terminated her employment.

Thereafter, Delgado filed suit against AstraZeneca alleging that AstraZeneca violated the ADA by failing to grant the additional year of leave. AstraZeneca then moved for summary judgment, which the district court granted. On appeal, the First Circuit began by observing that, to be "otherwise qualified" under the ADA, Delgado would have to show that her proposed accommodation would both enable her to perform the essential functions of her job and be feasible for AstraZeneca.

On the first score, the Court highlighted that Delgado failed to effectively communicate to AstraZeneca the reasons why an additional year of leave would have enabled her to return to work and perform the essential functions of her job. Delgado never submitted any supporting medical documentation beyond a form from her doctor requesting more leave that would have shown AstraZeneca why additional leave was necessary and how it would have been effective. Next, the Court dealt with the "even larger flaw in Delgado's case," that "the sheer length of the delay, when coupled with her prior five-month leave . . . jump[ed] off the page." *Id.* at 130. Noting the burdens of such an extended leave on AstraZeneca, including "somehow covering the absent employee's job responsibilities during the employee's extended leave," the Court held that extending her leave another year would have been facially unreasonable. *Id.* at 131. Consequently, the Court affirmed the district court's grant of summary judgment.

Practice Suggestions

Depressed employees often seek flexible work arrangements or time off. *Hostettler* shows that employers cannot claim that full-time presence at work is an essential function unless they tie time-and-presence requirements to other job requirements. However, *Echevarria* instructs that employees can only ask for facially reasonable accommodations and must provide evidence showing how such accommodations would enable them to perform the other essential functions of their jobs. Notwithstanding these general observations, employers should consider the following measures to increase the likelihood that courts will condone their actions.

Job Descriptions. Where appropriate and justified, employers should include regular attendance as an essential job function in written job descriptions, and explain why it is essential (for example, because employees work as part of a team, meet with customers, or use on-site equipment). Indeed, the *Hostettler* Court favorably referenced employers that had done so in two other cases. In the first, a company's call center tied full-time work requirements to a business need because, without a strict attendance policy, customers had to wait longer and other employees became overwhelmed fielding calls. *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 387-88, 392 (6th Cir. 2017). In the second, the company specifically identified some of the plaintiff's main job responsibilities that she could not perform from home. *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 759 (6th Cir. 2015).

Telecommuting. Employers should be aware that if they allow "flextime" and telecommuting options for employees, employees may seek to use those employment arrangements as grounds to argue that on-site attendance is not an essential function of the job. This was the case in *Hostettler*, as the plaintiff was able to show full-time work was not essential by proving she could capably perform her other job responsibilities on a half-time schedule. *See also Breen v. Department of Transportation*, 282 F.3d 839 (D.C. Cir. 2002).

Be Proactive. Under the ADA, employers must provide qualified employees with reasonable accommodations, but not all accommodation requests are necessarily reasonable. Therefore, employers often must engage in the interactive process to

determine the appropriate accommodation. *See* 29 C.F.R. § 1630.2(o)(3). In order to avoid liability for failure to engage in the interactive process, employers should proactively discuss accommodation requests with employees, suggest alternatives, and document their efforts. A court will look more favorably upon the employer that does so than the employer that rejects the employee's proposals outright.

Other Laws. This article focuses on federal disability law, but employers should consider additional state and local disability laws, sick leave laws, and family medical leave laws. For example, many state and local disability laws do not track the ADA's requirement that an individual be "qualified" in order to make out a successful discrimination claim.

California Appeals Court Provides Much Needed Clarification on Enforceability of Employee Non-Solicit Provisions Post-*Edwards*

By Christopher J. Cox, Bambo Obaro, and Eric Rivas

On November 1, 2018, the California Court of Appeal for the Fourth Appellate District decided *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 239 Cal.Rptr.3d 577 (2018), affirming the trial court's holding that an employer's non-solicitation agreement – restricting former employees from recruiting the employer's existing employees – violated Cal. Bus. & Prof. Code Section 16600, which voids restraints on the ability of a person to engage in a trade, business, or profession. This decision is significant because it squarely addresses the impact of the 2008 *Edwards v. Arthur Andersen LLP* decision on employee non-solicitation agreements – an issue courts have previously avoided addressing directly.

Loral Corp. and the Judicially-Created Non-Solicit Exception to Section 16600

In *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 280 (1985), more than twenty years before the *Edwards* decision, the California Court of Appeal held that a termination agreement between a corporation against its former chief executive officer, which restrained the defendant from disrupting, damaging, impairing, or interfering with the plaintiff's business by "raiding" its employees, was not void on its face under section 16600.

In reaching this conclusion, the *Loral* court cited three Georgia state court opinions to support its holding that the potential impact on trade must be considered before invaliding a non-solicitation covenant, and that "enforceability depends upon [the covenant's] reasonableness, evaluated in terms of the employer, the employee, and the public." (*Loral*, 174 Cal. App. 3d at 278-279 (citing *Orkin Exterminating Co., Inc. v. Martin Co.*, 240 Ga. 662 (1978); *Harrison v. Sarah Coventry, Inc.*, 228 Ga. 169 (1971); and *Lane Co. v. Taylor*, 174 Ga. App. 356 (1985).) The *Loral* court further determined that the restraint at issue only

slightly affected the plaintiffs' employees as it did not completely prevent plaintiff's employees from working with a former employee at a different company. Instead, it only prohibited the prior employee from soliciting present employees. *Loral*, 174 Cal. App. 3d at 279.

After the ruling in *Loral*, a common perception was that provisions prohibiting an employee from soliciting other employees for a certain amount of time post-employment were enforceable under California law.

Edwards Changed Everything, or Did It?

In 2008, the California Supreme Court provided a bright line rule for how covenants that restrain trade should be treated under California law. The Court held that any restraint on trade – even if narrowly tailored – is void under Business & Professions Code Section 16600, which codifies California's strong public policy against restraints on trade, unless the restraint fell within one of three statutory exceptions.

In *Edwards v. Arthur Andersen LLP,* 44 Cal. 4th 937 (2008), Raymond Edwards II challenged the validity of a non-compete agreement he signed with Arthur Andersen which, among other things, (1) prohibited Edwards, for an 18–month period, from performing professional services of the type he had provided while at Andersen, for any client on whose account he had worked during 18 months prior to his termination; and (2) prohibited Edwards, for a year after termination, from performing professional services of the type he performed while at Anderson, for any client of Andersen's Los Angeles office.[1] In finding that the challenged non-compete agreement was invalid under California Business and Professions Code § 16600, the Court held that, under § 16600's plain meaning, an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule. The Court expressly rejected Andersen's argument that the term "restrain" under section 16600 should be interpreted to mean "prohibit," so that only contracts which prohibit an employee from engaging in his or her profession, trade, or business are illegal. *Edwards*, 44 Cal. 4th at 947.

Andersen also requested that the Court adopt the "limited or narrow-restraint" exception adopted by the Ninth Circuit in *Campbell v. Trustees of Leland Stanford Jr. Univ*. (9th Cir.1987) 817 F.2d 499 – which excepted application of § 16600 where an employee was barred from pursuing "only a small or limited part of the business, trade or profession." The Court again rejected this argument and instead held that "Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect." *Id*. at 950.

Because *Edwards* did not squarely address the validity of employee non-solicitation agreements, courts have been split on whether such provisions are still enforceable if they do not fall within one of the enumerated exceptions to § 16600. Some cases followed the reasoning in *Loral*:

- *Sunbelt Rentals, Inc. v. Victor*, No. C 13-4240 SBA, 2014 WL 492364, *9 (N.D. Cal. Feb. 5, 2014) (relying on *Loral* in finding that a non-solicitation provision restricting former employees from soliciting current Sunbelt employees for employment was not invalid);
- *Arthur J. Gallagher & Co. v. Lang*, No. C 14-0909 CW, 2014 WL 2195062 , *4 (N.D. Cal. May 23, 2014) (citing *Loral* for the proposition that "California courts recognize that an employer may not prohibit its former employees from hiring the employer's current employees, but an employer may lawfully prohibit its former employees from actively recruiting or soliciting its current employees").

While other cases rejected *Loral*'s reasoning as inconsistent with § 16600:

- *SriCom, Inc. v. EbisLogic, Inc.*, No. 12-CV-00904-LHK, 2012 WL 4051222, at *4-5 (N.D. Cal. Sept. 13, 2012) (holding non-solicitation clause was unenforceable under section 16600 and the reasoning in *Edwards*);
- *Fields v. QSP, Inc.*, No. CV 12-1238 CAS PJWX, 2012 WL 2049528, at *9 (C.D. Cal. June 4, 2012) (holding restriction prohibiting former employee

from soliciting former employer's customers and employees was "per se unlawful under California law regardless of the reasonableness of the covenant because 'an employer cannot by contract restrain a former employee from engaging in his or her profession.'").

Yet, despite the fact that these courts examined the validity of employee non-solicitation agreements post-*Edwards*, the California Supreme Court has not taken up the issue and the Court of Appeal decisions have not directly addressed the impact of *Edwards* on employee non-solicitation agreements – until now.

AMN Healthcare Appears to Resolve the Dispute and Finds Employee Non-Solicits Are Void in Light of *Edwards*

AMN and Aya are competitors in the business of providing temporary healthcare professionals, in particular "travel nurses," to medical care facilities throughout the country. After certain AMN travel nurse recruiters left AMN and joined Aya, AMN sued Aya and the departing employees alleging various causes of action including breach of contract and misappropriation of trade secrets under the California Uniform Trade Secrets Act (CUTSA) (Civil Code sections 3426 et seq.). Aya and the departing employees filed a cross-complaint for declaratory relief and unfair competition. Aya and the departing employees also challenged, under § 16600, the validity of an employee non-solicit provision, which prohibited the AMN departing employees from directly or indirectly soliciting or inducing, or causing others to solicit or induce, any employee to leave the service of AMN. Relying primarily on *Loral*, AMN argued that the employee non-solicitation provision was valid and enforceable because it merely prohibited the departing employees from soliciting current AMN employees. *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 239 Cal. Rptr. 3d 577, 588 (Ct. App. 2018).

In its analysis, the Court initially determined that the employee non-solicitation provision at issue "clearly restrained the [departing employees] from practicing their chosen profession of recruiting nurses on 13-week assignments with AMN." *Id*. at 588. The Court then expressly rejected AMN's contention that the employee non-solicitation provision is valid because it "merely applie[d] to prevent nonsolicitation of [AMN's] employees." *Id*. at 586. In rejecting AMN's argument, the Court examined the continuing viability of *Loral* post-*Edwards* and held that, even though *Edwards* did not address the validity of employee non-solicit agreements, *Edwards* rejected the argument that the Legislature meant the word "restrain" in section 16600 to mean "prohibit" – which would conflict with *Loral*'s use of a reasonableness standard in analyzing the employee non-solicitation provision at issue in that case. *Id*. at 589. The Court also highlighted the fact that the *Edwards* Court refused to adopt the *Campbell* "limited" or "narrow-restraint" exception to section 16600. *Id.* Based on these factors, the *AMN* court expressed doubt about the continuing viability of *Loral* post-*Edwards*. The Court also held that even if *Loral*'s use of the reasonableness standard survived post-*Edwards*, the *Loral* case was factual distinguishable from the *AMN* case, where the departing employees were in the business of recruiting and placing nurses in medical facilities throughout the country. *Id*. 590.

Non-Solicitation Clauses Post-*AMN Healthcare*

In California, Court of Appeal decisions must be certified for publication by the California Supreme Court, which strongly supports the argument that employee non-solicitation provisions – even if narrowly drafted – are not enforceable in California. Going forward, California employers should place little weight on employee non-solicitation provisions. Indeed, in light of this decision, the risk of including employee non-solicitation provisions in employee agreements likely outweighs the possible benefit from a court possibly enforcing it, because knowingly including an unenforceable provision in an employee agreement may expose a company to liability under California's unfair competition law. Tread carefully.

[1] Although the non-compete agreement at issue in *Edwards v. Anderson* also contained a provision prohibiting the solicitation of other Anderson employees for eighteen months post-employment, Edwards did not challenge the validity of the employee non-solicit provision.

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