REASONABLE, NOT PERFECT, EFFORTS REQUIRED TO AVOID HAVING CONSTRUCTIVE KNOWLEDGE OF AN EMPLOYEE'S DISABILITY

Date: 22 April 2015

Labor, Employment and Workplace Safety Alert

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WHAT HAPPENED?

Under the Equality Act 2010, employers are required to make reasonable adjustments where they know, or "ought reasonably to know", that an employee has a disability. This is commonly referred to as actual or constructive knowledge.

The Employment Appeal Tribunal ("**EAT**") has ruled that employers are not required to take every step possible to ascertain whether an employee is disabled to avoid having constructive knowledge of the disability.

This case related to a claim brought by an employee who was dismissed as a result of her frequent short term absences from work and a failure to follow absence procedures. The employee's reasons for her absences ranged widely and she was reluctant to assist her employer with its investigations into her health status. However, the employee argued that her employer had constructive knowledge of her disability and had therefore failed to make reasonable adjustments to accommodate that disability. The main question considered by the EAT was whether the employer had taken sufficient steps to avoid having constructive knowledge of the disability.

Previous cases have established that an employer cannot rely solely on the view given by its occupational health service and must demonstrate that it has come to its own conclusions about whether an employee is disabled. In this case, the employee was referred to the employer's occupational health service but the employer failed to investigate certain discrepancies in the occupational health report (which concluded that the employee was not disabled) and, therefore, did not explore every possible avenue to ascertain whether the employee had a disability. Nevertheless, the EAT held that the employer had taken all measures that it could reasonably be expected to in the circumstances, as it had also held back to work meetings and discussions with the employee and reviewed correspondence with her GP.

WHAT DOES THIS MEAN?

This decision favours employers who are dealing with persistent short term absences and difficult employees. Employers do not have to take every step possible to determine if an employee has a disability in order to avoid having constructive knowledge. Whether an employer does have constructive knowledge of a disability will be decided on all the facts of the case, including the information that was known to the employer and the efforts that it used to ascertain the health status of the relevant employee.

WHAT SHOULD WE DO?

Employers should always bear in mind that, where an employee has short term persistent absences for a variety of reasons, the employee may have an underlying medical condition which could amount to a disability, even where the reasons provided might appear to be unconnected.

Employers should utilise occupational health reports but they must be aware of the need to critically evaluate them in order to make their own decision as to whether an employee is disabled. Given that the EAT has emphasised that each individual case is decided on its own facts, employers should err on the side of caution. In addition to referring employees to their occupational health services, employers are also advised to consider the use of other measures in order to carry out further investigations into the health status of the relevant employee.

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