New Jersey Law Journal

A Primer on Employer’s Duty to Accommodate Employees Injured in the Workplace

Are employers required to provide light-duty work for an injured employee? Must they keep an injured employee's job open for more than 12 weeks? Can they retaliate against an employee for filing a workers’ compensation claim?

By Andrew M. Moskowitz | November 06, 2017

Credit: ESB Professional/Shutterstock.com

Bill Malarkey works as a driver for United Transportation Service (UTS). His duties include pickup and delivery of packages. While delivering a package to Google's headquarters, Bill slipped and fell, herniating the L4 and L5 discs in his lower back. Bill has retained you to bring a claim against Google and also to file a workers' compensation claim on Bill's behalf.

As a result of the accident, his doctor told Bill that, for the next six months, he should not lift more than 20 pounds. After six months, the doctor intends to reevaluate Bill to determine if his condition has improved. UTS's written job description for the driver position states that drivers must be able to lift parcels weighing up to 70 pounds. Bill has acknowledged to you that this is in fact an essential requirement of his position. UTS has told Bill that he may not return to work while under a lifting restriction.

UTS has further stated that Bill may take up to 12 weeks of leave under the Family and Medical Leave Act (FMLA). However, UTS has further stated that, at the conclusion of 12 weeks, he must return to work without restrictions, failing which it will terminate his employment. Bill tells you that UTS routinely permits drivers to take longer medical leaves and that he believes the company is angry that he filed a workers' compensation claim.

Bill asks you what his rights are. Specifically, he wants to know if UTS is required to provide him with light-duty work; if it must keep his job open for greater than 12 weeks; and if it can retaliate against him for filing a workers' compensation claim.

Background on the NJLAD

The New Jersey Law Against Discrimination (LAD) prohibits disability discrimination in employment. New Jersey enacted the LAD to further the state's public policy "to eradicate invidious discrimination from the workplace." *Carmona v. Resorts Int'l Hotel,* 189 N.J. 354, 363 (2007). The NJLAD defines disability broadly to include any "physical disability [or] infirmity … which is caused by bodily injury … or illness." N.J.S.A. 10:5-5(q).

Although the NJLAD does not explicitly address reasonable accommodation, New Jersey courts have uniformly held that the law requires employers to reasonably accommodate employees' disabilities. In addition, Department of Law and Public Safety regulations require employers to "make a reasonable accommodation to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. §13:13-2.5(b). Examples of a reasonable accommodation may include job restructuring, part-time or modified work schedules and/or leaves of absence. These regulations further provide that "[a]n employer shall consider the possibility of reasonable accommodation before firing, demoting or refusing to hire or promote a person with a disability on the grounds that his or her disability precludes job performance." *Id.* (b)(2).

"To determine what appropriate accommodation is necessary, the employer must initiate an informal interactive process with the employee." *Tynan v. Vicinage 13*, 351 N.J. Super. 385, 400 (App. Div. 2002) (citing 29 C.F.R. §1630.2(0)(3)). "Once the [employer] kn[o]w[s] of the handicap and [the employee]'s desire for assistance, the burden [i]s on the [employer] to implement the interactive process." *Id.* at 402 (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 315 (1999)).

Duty to Provide Light-Duty Work

Although an employer may not discriminate against a disabled individual, an exception is where "the nature and extent of the disability reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1. In addition, employers are not required "to create a permanent part-time position for a disabled employee if no suitable full-time position exists … [or to] create a permanent light-duty position to replace a medium-duty one." *Muller v. Exxon Research and Eng'g Co.*, 345 N.J. Super. 595, 608 (App. Div. 2001), *certif. denied*, 172 N.J. 355 (2002).

In *Raspa v. Office of Sheriff of County of Gloucester*, 191 N.J. 323 (2007), the plaintiff was a corrections officer who, after 13 years of employment, was diagnosed with a hyperactive thyroid. His treating physician provided the plaintiff with a note requesting that he not supervise inmates. Although his employer initially placed the plaintiff on "restricted duty status" and assigned him to a series of light-duty positions, it eventually determined that these limitations prevented the plaintiff from performing the essential functions of the corrections officer position. Accordingly, defendant filed an involuntary application for disability retirement on plaintiff's behalf. In response, plaintiff filed suit and alleged that the defendant had violated the LAD by failing to reasonably accommodate his disability.

Although the jury had found in favor of the plaintiff and the Appellate Division had affirmed, the Supreme Court reversed and directed the trial court to enter judgment in favor of defendant. In so holding, the Supreme Court held that "an employee must possess the bona fide occupational qualifications for the job position that employee seeks to occupy in order to trigger an employer's obligation to reasonably accommodate the employee to the extent required by the LAD." The court further held that "an employer may reasonably limit light-duty assignments to those employees whose disabilities are temporary," and that "the availability of light-duty assignments for temporarily disabled employees does not give rise to any additional duty on the part of the employer to assign a permanently disabled employee indefinitely to an otherwise restricted light-duty assignment."

In Bill's case, UTS has a strong argument that the ability to lift parcels weighing up to 70 pounds is an essential function of the position. Accordingly, if Bill is *permanently* restricted from lifting more than 20 pounds, he would appear to be unable to satisfy the positon's qualifications.

As to whether UTS is *temporarily* required to provide Bill with light-duty work, this inquiry would depend on whether such an "accommodation would impose an undue hardship on the operation of its business." N.J.A.C. §13:13-2.5 (b). Clearly, one issue would be whether UTS had provided other employees with such an accommodation. In addition, other important factors would include the total number of UTS employees and facilities; the size of UTS's budget; the nature and cost of the requested accommodation; and the extent to which it "would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement."

Requirement that Medical Leave Be Extended Beyond 12 Weeks

New Jersey Courts have recognized that temporary leaves of absence — even those of a long duration — may constitute a reasonable accommodation under the NJLAD. For example, where the defendant terminated the plaintiff after an 11-month leave, the Appellate Division held that a factual dispute existed as to whether it reasonably accommodated her disability. *Tynan,* 353 N.J. Super. at 389-90. *See also Soules v. Mt. Holiness Memorial Park*, 354 N.J. Super. 569, 573 (App. Div. 2002) (holding that it was a jury question as to whether an eight-month recuperative leave of absence was a reasonable accommodation).

In light of the above, UTS's blanket statement that Bill must return to work after 12 weeks without restrictions would appear to be in violation of the NJLAD. Rather, UPS would have to demonstrate that extending Bill's leave beyond 12 weeks would impose an undue hardship on the operation of its business. Given that, according to Bill, UTS routinely permits drivers to take longer medical leaves, it would appear difficult for UTS to make this showing.

Retaliation for Filing a Workers' Comp Claim

New Jersey recognizes a common law cause of action for wrongful discharge based upon retaliation for the filing of a workers' compensation claim. This claim requires plaintiff to demonstrate "'(1) that he made or attempted to make a claim for workers' compensation; and (2) that he was discharged in retaliation for making that claim.'" *Cerracchio v. Alden Leeds*, 223 N.J. Super. 435, 442-43 (App. Div. 1988) (quoting *Galante v. Sandoz*, 192 N.J. Super. 403, 407 (Law Div. 1983), *aff'd*, 196 N.J. Super. 568 (App. Div. 1984)).

If Bill can demonstrate that UTS is in fact retaliating against him for filing a workers' compensation claim, he will be able to assert a claim against the company pursuant to the above precedent.

Moskowitz is of counsel with Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins in Springfield. He focuses his employment law practice on disability, discrimination, harassment and whistleblower claims, as well as cases involving the Family and Medical Leave Act.