Sixth Circuit Applies "Direct Evidence" Test to all "Failure to Accommodate" Claims Under the ADA

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Fisher v. *Nissan N. Am., Inc.*, —F.3d—; No. 18-5847 (CA6 Feb. 27, 2020).

Nissan terminated a worker for absenteeism after he had difficulty recovering from a kidney transplant; his antirejection medication caused side effects that made it difficult for him to work in the same physically demanding way that he had for the 14 years before the transplant. The worker proposed accommodations, and Nissan initially worked with him. When the initial accommodation proved unsuccessful, the worker proposed other ideas, but Nissan declined to try them. When the worker repeatedly missed work for doctor's appointments, Nissan eventually issued him a "final written warning." When he was told that no one had ever "come back" from a final written warning, he stopped coming to work. A week later, Nissan fired him. The worker sued, and the district court granted summary judgment to Nissan.

The parties disagreed over which legal test applies to failure-to-accommodate claims. ADA discrimination claims are analyzed under two different standards, depending on whether the worker relies upon direct or indirect evidence of discrimination. When the worker relies upon indirect evidence, the *McDonnell Douglas* burden-shifting approach applies, and the employer can use a legitimate, nondiscriminatory reason for the challenged decision as a shield against liability. But when the worker relies upon direct evidence, an employer cannot do so.

Nissan identified a line of Sixth Circuit authority (the "*Keogh* line") where the court analyzed failure-to-accommodate claims under the indirect test. The worker identified a different line of in-circuit cases (the "*Kleiber* line") where the court held that failure-to-accommodate claims premised upon an employer's offer to reasonable accommodation "necessarily involve direct evidence." Neither line of cases acknowledged the other.

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The court traced the two lines of cases back to single decision that analyzed a failure-to-accommodate claim under a different statute, not the ADA. Finding the *Kleiber* line to be the oldest authority interpreting the ADA, the court resolved the conflict and held that failure-to-accommodate claims under the ADA are analyzed under the direct-evidence test when a worker shows that he asked for an accommodation.

Applying the direct-evidence test, the court held that Nissan was not entitled to summary judgment because there was a fact question over whether Nissan failed to offer additional reasonable accommodations after the first accommodation failed.

Takeaway: Employers must be extra careful before terminating a disabled worker. Remember, the definition of "disability" is very broad under the ADA—any physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102. If an employee presents with a genuine medical impediment to work, err on the side of caution and assume the courts will treat it as a disability within the meaning of the statute. Engage in the interactive process required under the Act, and reach out to your attorney for guidance on what would be a reasonable accommodation under the circumstances.

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