

ADA CLAIM AFTER RECREATION CENTER ASSAULT

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In the case of *Foster v. City of Oakland* (N.D. Calif. 8/11/2009), plaintiff Michael Foster alleged that his former employer, defendant City of Oakland violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA") when he was terminated from his recreation director position.

FACTS

On June 3, 2006, Foster had been hired by the City's Office of Parks and Recreation as a part time Recreation Specialist I at the Allendale Recreation Center. On August 7, 2006, Foster was promoted to the position of acting Program Director at Allendale.

On November 14, 2006, Foster was attacked with a metal chair and a wrench at Allendale by a young person and her family. He was treated at the emergency room, where he was assessed with a closed head injury with loss of consciousness and multiple lacerations, and was released.

After the attack, Foster alleged that he suffered severe cognitive impairment, was unable to return to work for five weeks, felt more irritable and emotional when he returned to work, and suffered bouts of anger and sadness. He also claims to have experienced a total memory loss initially, followed by a partial memory loss that persists.

On January 5, 2007, Foster returned to his regular work. After that date, the director of a local children's group advised him that the group would no longer be participating in after-school programs at Allendale because of multiple errors in transporting children.

On January 27, 2007, Foster was formally appointed recreation program director at Allendale. At that time, Foster did not communicate to his supervisor (Koney) that he had any limitations that were caused by lingering effects of the assault. Koney observed that Foster needed a lot of coaching, especially on organizational skills, meeting deadlines, preparing paperwork and developing programs.

Koney did not recall any conversations with Foster from January through March 2007 in which he stated that he was having memory issues, any problems with concentration, difficulty articulating or remembering words, or other difficulties that were caused by the assault.

On February 14, 2007, Foster met with Koney to discuss his concerns about Allendale, including safety in the aftermath of the assault and asbestos. The notes of that meeting do not mention any cognitive impairment that Foster experienced as a result of his injuries.

On March 26, 2007, Foster was assigned to be the Director at Brookdale Recreation Center. During a transition period, Foster was scheduled to continue to work three days as the Recreation Program Director at Allendale as well as two days as the Director at Brookdale.

JULY 2010 LAW REVIEW

Foster states that when he was assigned to both Allendale and Brookdale, he told the parks and recreation director (Jones-Taylor) that his mental condition and the aftermath of the assault would make it difficult for him to run two centers at once. Foster testified that he told Koney that running two centers would be difficult for him. But he agreed to the assignment, although he states that he did not think he had the option of turning it down because he was on probation. Foster found it difficult to focus on all of the specific assignments because of the need to resolve basic issues at each center.

During this time, Foster believed his job performance was adequate. From April 9 through May 21, 2007, Koney met with Foster regularly to provide support and assistance. One of Foster's main shortcomings was his inability to master RecWare (the City's program to track attendance at and participation in recreation programs), which was a critical part of his job, and Koney brought in a part-time staff person to help with the RecWare issues. On May 21, 2007, Foster was assigned solely to Brookdale.

In May 2007, when Foster was assigned to Brookdale full-time, until his termination date of August 17, 2007, Koney met with Foster on at least six different occasions for progress meetings. Foster stated that he told Koney that he needed help with the budget, which he received, but he did not tell her that the budget problems were a result of any cognitive issues. Foster failed to meet job expectations when he was over budget on at least two occasions.

On August 7, 2007, Jones-Taylor recommended Foster's dismissal to the city administrator. On August 17, 2007, Foster met with Koney and Jones-Taylor, who informed him that he was being released. Foster protested his termination.

On October 2, 2007, Foster emailed a note to the City's Office of Parks and Recreation further explaining his circumstances. On October 13, 2007, Foster wrote another letter to Jones-Taylor claiming that he had issues related to the ongoing recovery from his head injury. On April 11, 2008, Foster filed his ADA lawsuit.

DISABLED PERSON?

As noted by the federal district court, to establish his claim of disability discrimination under the ADA, Foster had to allege and ultimately prove the following:

(1) he is a disabled person within the meaning of the ADA; (2) he is a qualified individual, meaning he can perform the essential functions of his job; and (3) the City terminated him because of his disability.

As described by the federal district court, a "disability" under the ADA is defined as "a physical or mental impairment that substantially limits one or more major life activities, such as working, record of such an impairment or being regarded as having such an impairment." 42 U.S.C. §12102(1).

The extent to which a purported disability limits one or more of the major life activities is an "individualized inquiry," requiring consideration of "the nature and

severity of the impairment, the duration or expected duration of the impairment, as well as the permanent or long term impact of the impairment."

Applying this definition to the facts of the case, the federal court found the medical evidence indicated Foster's cognitive difficulties were only "mild," but sufficient to call into question whether Foster was disabled under the ADA's "substantially limits" standard:

Foster testified that his cognitive difficulties did not prevent him from doing his job, but the problems made his job more difficult. Foster told Koney that he had speech issues and memory issues, and informed her of his struggles with focus and retention of information. He also asked for help from time to time... Most importantly, while Foster was managing the Allendale and Brookdale centers, he told Koney that: "In view of the fact that I'm still, you know, dealing with post-concussion related issues, [managing both Allendale and Brookdale] might be too much. . . I'm thinking this might be too much."

QUALIFIED INDIVIDUAL?

Assuming Foster was "disabled person" within the meaning of the ADA, the subsequent issue was whether Foster was a "qualified individual" within the context of the ADA. As cited by the federal court, a "qualified individual" under the ADA is "one with a disability who, with or without reasonable accommodation, can perform the essential functions of the job the individual holds." Accordingly, to establish that he was "a qualified individual with a disability" under ADA, Foster had to demonstrate that he could "perform the essential functions of the job with or without reasonable accommodations."

Despite evidence that he failed to meet some of his job requirements (e.g., staying within his budget and entering programs on RecWare), the court found there was also evidence that Foster was meeting other expectations of his job. Specifically, in the opinion of the court, "the fact that his manager chose to give Foster the responsibility, even temporarily, for managing two centers supports an inference that he was capable of performing the essential elements of his job."

TERMINATION RELATED TO DISABILITY?

Assuming Foster was a "qualified individual with a disability" as defined by the ADA, the next issue was whether Foster was "terminated because of his disability." According to the court, to prove this aspect of the ADA claim, a plaintiff would have to "prove that the employer had knowledge of the employee's disability when the adverse employment decision was made."

Under the circumstances of this case, the federal court found "Foster's statements to his supervisors during the seven months between his return to work and his termination were sufficient to question whether Foster's supervisors and the City had knowledge of his disability when he was terminated":

[T]he employer had actual notice of the disability at the time it occurred because Foster was severely injured by an assault at work and did not return to full time

work for almost two months, and was terminated only approximately seven months later while his supervisors were still very much aware of the assault.

After Foster returned to work after the assault, he told Koney that he was having trouble focusing and verbalizing. Foster stated that in March 2007, when he was given management responsibility for both Allendale and Brookdale, he told Jones-Taylor that: "my mental condition and the aftermath of the concussion I suffered would make it difficult for me to run two centers at once."

LEGITIMATE BUSINESS REASONS?

Assuming Foster was a qualified individual with a disability and the City had knowledge of his disability when he was terminated, as noted by the court, "the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory or retaliatory conduct."

While "[a]n employer need not persuade the court that it had convincing objective reasons for the termination," the federal court found "undisputed evidence that Foster failed to fulfill many of the requirements for his job":

(1) he did not remain within budget; (2) he did not develop a projected budget; (3) he failed to establish a tennis program requested by the community; (4) he failed to complete Program Planners for Fall 2007 programs due in April 2007; (5) he failed to initiate a partnership with Laurel School; (6) he failed to initiate a landscaping care program; (7) he failed to market Brookdale as a rental facility; (8) he failed to develop tennis and swim teams for two centers; (9) he failed to provide participants in a track meet; (10) he failed to recruit and retain participants in the Allendale passport program; (11) he enrolled only forty-five participants in a summer camp program that had capacity of 135; (12) he initiated a partnership with California Arts and Development for a \$2,500 program without approval; (13) he had an unauthorized volunteer at Brookdale; (14) he failed to submit an incident report and failed to submit several key assignments and a business plan; and (15) he was late for meetings with Koney.

In response to these shortcomings, the court noted that Foster offered "excuses or reasons for each of these job deficiencies," but he did "not dispute many of them." Accordingly, even examining the evidence in the light most favorable to Foster, the federal district court concluded "defendants have met their burden of showing legitimate non-discriminatory reasons for Foster's termination." As a result, the federal district court granted the City's motion for summary judgment "with respect to Foster's claim for disability discrimination based on his release from probation" and termination.

FAILURE TO ACCOMMODATE?

While legitimate business reasons may have existed for terminating Foster's employment, the court still had to determine whether Foster could "prevail on a failure to accommodate claim"

under the ADA. To do so, once again, Foster had to "establish that he suffers from a disability covered by the ADA, that he is a qualified individual," and there was a "failure to accommodate."

Under the ADA, discrimination on the basis of disability includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

Further, once an employer becomes aware of the need for accommodation, an employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.

Generally, the initial request for accommodations must be made by the employee. On the other hand, the federal court acknowledged that "the interactive process for finding a reasonable accommodation may be triggered by the employer's recognition of the need for such an accommodation, even if the employee does not specifically make the request." This exception to the general rule that an employee must make an initial request would, however, only apply when the employer "knows or has reason to know" the following:

- (1) the employee has a disability, (2) the employee is experiencing workplace problems because of the disability, and (3) the disability prevents the employee from requesting a reasonable accommodation.

Under the circumstances of this case, Foster had argued that the City had failed to accommodate him and had "failed to engage in the interactive process once they knew of his disability" when the City unilaterally assigned him to manage both the Allendale and Brookdale centers on a temporary basis. Specifically, Foster had told his supervisor Koney that it "might be too much" for him to manage two centers in view of the fact that "I'm still, you know, dealing with concussion-related issues." He had also told Koney at least once that managing two centers was a problem for him, and that the assignment was "extremely difficult," and that he did not know if he could do it. In response to Foster's claims that he felt that his workload was too heavy when he was managing two centers, Koney had told Foster the department was short-handed so there was no one else to assist him.

In March 2007, Foster also told the parks and recreation director, Jones-Taylor, that his "mental condition and the aftermath of the concussion I suffered would make it difficult for me to run two centers at once."

In light of such evidence, the federal district court found Foster had alleged sufficient facts to support his failure to accommodate claim.

Defendants' obligation to engage in the interactive process to find reasonable accommodations was triggered once Foster informed his supervisors that he was

concerned about handling the increased responsibility for two centers at once in relation to his injuries and resulting disability.

Foster informed Defendants that he was having difficulties related to the aftermath of his concussion heading both centers at the same time, in combination with Defendants' knowledge of the assault a few months before causing a closed head injury, creates a triable issue of fact as to whether Defendants failed to engage in the interactive process to accommodate Foster's alleged disability.

In the opinion of the court, Foster's statements to his supervisors that "running two centers simultaneously by himself posed special difficulties" could be "construed as a request that Defendants accommodate him by only assigning him to one center or by providing further assistance." Further, the court noted that supervisor Koney had testified that "there were other individuals who could have taken over Brookdale."

As noted by the court, there was some evidence of accommodation in that "Defendants offered assistance to Foster with budgeting issues, and that Radical Rovers, an organization that provides programs to hard-to-reach youth, was going to take over managing the Allendale center." On the other hand, the court found "Foster remained as the manager of the two centers for approximately eight weeks, from March 26, 2007 through May 21, 2007," despite statements to parks and recreation director Jones-Taylor in late March 2007 that managing two centers would be difficult for him in light of the "aftermath of the concussion."

In light of such conflicting evidence, the federal district court denied the City's motion for summary judgment which would have effectively dismissed Foster's ADA "failure to accommodate" claim. As a result, in a full trial, Foster would have an opportunity to prove his ADA claim that the City had failed to provide him with a "reasonable accommodation" for a known cognitive impairment which may have significantly limited his ability to work.

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