

JOB OFFER RESCINDED FOR HEARING-IMPAIRED LIFEGUARD

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In the case of *Keith v. Oakland County*, No. 10-12026, 2011 U.S. Dist. LEXIS 98498 (E.D. Mich. 9/1/2011), Defendant Oakland County Parks and Recreation (Oakland County) denied Plaintiff Nicolas Keith employment as a lifeguard. In his complaint, Keith alleged he was discriminated against on the basis of disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (Throughout this opinion, the federal district court referred to Keith being “deaf,” as opposed to “hearing impaired” which many consider a more appropriate term.)

FACTS OF THE CASE

Keith is deaf in both ears and has a surgically installed cochlear implant. As described by Keith, a cochlear implant was unlike a hearing aid because it required an additional external sound transmitter, which detects sound and transmits it to the brain. As a result, Keith claimed he could “hear noises such as people calling for him, alarms, and whistles with the implant and external sound transmitter.” Keith has limited ability to speak verbally and communicates with sign language and non-verbal gestures.

In 2006, Keith had enrolled a junior lifeguard training class offered by Oakland County. The class introduced participants to performing the basic duties of a lifeguard. The County provided Keith with an interpreter/signer. According to Keith, the interpreter/signer did not assist him in completing the life-saving tasks, but instead only communicated the words that were spoken in the class.

After completing the junior lifeguard training, the Oakland County was aware of Keith’s interest in lifeguard training and employment as a lifeguard. Oakland’s recreation specialist contacted an aquatics safety and operations consulting firm regarding any modifications or requirements that a facility must have to train an individual with a hearing impairment as a lifeguard.

In February of 2007, Keith enrolled in Oakland’s lifeguard training course to become a certified lifeguard. During the process, Keith applied for a position as a lifeguard at the Oakland’s Waterford Oaks Water Park. Oakland hired an interpreter/signer for Keith during his lifeguard training. In May of 2007, Keith completed the nine-day training with the provided interpreter/signer. Keith was issued a license by Oakland’s instructor which entitled him to perform lifeguarding services at Oakland’s wave pool facility.

After successfully completing his training, Keith requested the accommodation of an interpreter/signer's presence for further classroom instruction and staff meetings to work as a lifeguard at Oakland’s wave pool. Oakland’s recreation specialist then notified Keith by e-mail of the decision to extend an offer of part-time employment as a lifeguard. Keith’s employment, however, was conditioned on passing a pre-employment physical arranged by Oakland.

The doctor who conducted the pre-employment physical for Oakland (Dr. W.) found Keith was

deaf and incapable of hearing. The doctor, however, found Keith could be employed if "constantly accommodated." In so doing, the doctor found Keith could not function as a lifeguard without assistance. In approving Keith's employment with communications accommodations, the doctor expressed some doubt whether communications accommodations would always be adequate. Despite his doubts, the doctor approved Keith's employment, assuming necessary accommodations.

After receiving the doctor's report, Oakland discussed the qualifications required to be a lifeguard with Keith, including the implications to safety of employing Keith. Oakland again contacted the aquatics safety and operations consulting firm regarding any modifications or requirements that a facility must have to train an individual with a hearing impairment as a lifeguard. Based on the information in the pre-employment physical, the doctor's statements, statements from the aquatics safety consulting firm, and information from Oakland personnel, Oakland wrote Keith on July 3, 2007 rescinding the conditional offer of employment.

In February of 2008, Keith applied for an open lifeguard position with Oakland County. Oakland did not hire Keith for the lifeguard position. In so doing, Oakland relied on their 2007 assessment of Keith and determined his deafness prohibited him from performing the essential functions of a wave-pool lifeguard.

DISABILITY DISCRIMINATION?

In his complaint, Keith alleged Oakland was aware of his disability and rescinded their employment offer due to his disability without assessing whether he could "perform the essential job functions of a lifeguard with or without reasonable accommodations."

As cited by the federal district court, the ADA mandates that "no covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. § 12112(a). Further, the court noted that a plaintiff seeking relief under the ADA must establish the following:

- (1) he is a disabled person within the meaning of the ADA;
- (2) he is otherwise qualified to perform the essential functions of his job with or without reasonable accommodation; and
- (3) he suffered an adverse employment action because of his disability.

The federal district court also provided the following description of the burden of proof between the plaintiff and employer in establishing or refuting a discrimination claim under the ADA:

Once the plaintiff establishes a *prima facie* [i.e., on its face the complaint alleges sufficient facts to support a] case of discrimination, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for its action. If the employer provides a legitimate, nondiscriminatory reason, the burden shifts back to the employee to show that the employer's proffered reason is pretextual. An employee can demonstrate pretext by showing that the stated reasons have no basis in fact, were not the actual reasons, or that they were insufficient to explain the employer's actions.

ESSENTIAL JOB FUNCTIONS?

The issue before the federal district court was, therefore, whether Keith had alleged sufficient facts to establish a *prima facie* (i.e., on its face) case of discrimination with respect to employment as a wave-pool lifeguard. Specifically, the issue was whether Keith had alleged sufficient facts to suggest that he was “otherwise qualified to perform the essential functions of his job.” In other words, Keith had to allege sufficient facts that, if proven at trial, would establish his ADA claim. In the absence of sufficient alleged facts to establish an ADA claim, further proceedings would be unnecessary and Keith’s lawsuit would be dismissed prior to trial on a motion for summary judgment.

Under the circumstances of this case, the Oakland claimed Keith’s ADA claim should be dismissed because he had not shown that he could perform the essential functions of the job as a wave-pool lifeguard. In so doing, the County referenced its Waterpark Staff Manual to support its rationale for not hiring Keith:

[B]ecause a wave-pool lifeguard needs to communicate with other lifeguards, patrons, emergency personnel, and injured persons on a regular basis, Keith’s inability to hear and verbally speak means he cannot perform these essential functions... [Further] hiring an additional lifeguard who is an interpreter/signer is an unreasonable accommodation.

Moreover, to rebut Keith’s evidence that hearing-impaired individuals are capable of being lifeguards, the County maintained the essential functions of a wave-pool lifeguard position were not limited to only lifesaving duties. Nonetheless, Keith asserted that he was “qualified to perform the essential functions as a wave-pool lifeguard without accommodation, or if accommodated with an interpreter/signer during staff meetings or further classroom instruction.”

INDIVIDUALIZED INQUIRY?

Keith claimed the County’s reliance on the doctor’s pre-employment physical violated the ADA because the doctor had failed to “make an individualized inquiry” as to Keith’s disability. Similarly, Keith claimed the County had also “failed to engage in the mandatory individualized inquiry” with him as required by the ADA.

As noted by the federal district court, “[t]he ADA mandates an individualized inquiry in determining whether an employee’s disability or other condition disqualifies him from a particular position”:

In order to properly evaluate a job applicant on the basis of his personal characteristics, the employer must conduct an individualized inquiry into the individual’s actual medical condition, and the impact, if any, the condition might have on that individual’s ability to perform the job in question.

Applying these principles to the facts of the case, the federal district court found the written

report of the doctor's examination failed to indicate whether Keith's condition "actually impedes his ability to perform as a wave-pool lifeguard." On the contrary, the court noted that the doctor had simply found his examination of Keith "demonstrates a deaf young man who is physically sound except for his deafness." Based on this observation, the doctor had concluded: "I do not believe he can function independently as a lifeguard." Accordingly, in reviewing the record, the federal district court found the examining doctor had not based his conclusion "on any fact other than Keith's deafness."

As Keith's mother indicated in her affidavit while she was with Plaintiff during the pre-employment physical, Dr. W. merely entered the examination room, reviewed Plaintiff's medical file, and stated, "He's deaf; he can't be a lifeguard." Keith's mother then inquired whether Dr. W. was basing his decision solely on Plaintiff's deafness. Dr. W. stated that was the case.

Dr. W. apparently concluded his examination at that point and failed to determine if Plaintiff could perform the essential functions of the job, either with or without reasonable accommodation, due to his deafness. More significant to Dr. W.'s cursory examination is the fact that he has no education, training, or experience in assessing the ability of a deaf individual to work as a lifeguard.

As a result, the federal district court concluded the examining doctor had "failed to make an individualized inquiry as to whether Keith's disability disqualified him from being a wave-pool lifeguard." Although the doctor had failed to make an individualized inquiry in his cursory examination of Keith, the court rejected Keith's assertion that the County had also failed to produce any evidence of its own individualized inquiry.

Plaintiff's argument fails to take into account the 2006 junior lifeguard training and 2007 lifeguard training, in which Defendants were able to monitor and observe Plaintiff as a possible lifeguard. During both lifeguard trainings, Defendants accommodated Plaintiff with an interpreter/signer. After Plaintiff's completion of the 2007 lifeguard training, Defendants determined from Dr. Work's examination report, [the aquatics safety consultant] Ellis and Associates's advice, and Defendants' employees' combined knowledge that no offer of employment would be extended.

Based on this evidence, the federal district court, therefore, concluded that Oakland County had conducted an individual determination of whether Keith could perform the essential functions of a wave-pool lifeguard due to his disability.

OTHERWISE QUALIFIED?

In assessing whether Keith was "otherwise qualified" within the meaning of the ADA, the federal district court noted that it "must analyze whether Plaintiff was capable of working as a wave-pool lifeguard with or without a reasonable accommodation." In the opinion of the court, Keith had failed to show he was "otherwise qualified" without any accommodation. The issue before the court was, therefore, whether Keith was "otherwise qualified" with reasonable

accommodations.

As cited by the court, the ADA provides “a covered entity must make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A). Further, the court noted that it is plaintiff’s burden to first show that a proposed accommodation is objectively reasonable. If so, the burden then shifts to defendant to show that the accommodation would “impose an undue hardship.” 42 U.S.C. § 12112(b)(5)(A).

In this case, Keith had only requested the accommodation of an interpreter during staff meetings and further classroom instruction. According to Keith, his cochlear implant would “allow him to hear people yell, whistles, and other emergency sounds.” Further, Keith asserted he would have been able to inform Oakland County of his cochlear implant had the County notified him of any concerns regarding his ability to fulfill the communication duties of a wave-pool lifeguard.

As noted by the court, Keith did not challenge “the essential functions of a wave-pool lifeguard as delineated in the Water Park Staff Manual.” As described by the court, these essential job functions required Oakland’s wave-pool lifeguards to “perform life-saving duties, as well as communicate with other lifeguards, patrons, emergency personnel, and injured persons.”

After examining the evidence in the record in light of the legal requirements of the ADA, the federal district court concluded Keith had “presented insufficient evidence that would allow a reasonable jury to conclude that Plaintiff may be reasonably accommodated to perform the essential duties of a wave-pool lifeguard at Defendants’ facility.”

According to the court, it appeared that Keith was “otherwise qualified” to complete the life-saving duties of a lifeguard, having completed lifeguard training and earned his license from Oakland. Nonetheless, with regard to an Oakland wave-pool lifeguard, the federal court found Keith had failed to show that he was “capable of the essential functions that pertain to communicating with patrons, emergency personnel, and other lifeguards with reasonable accommodations”:

While Plaintiff’s passing of the 2006 junior lifeguard training and 2007 lifeguard training exemplify his ability to perform life-saving functions, he completed this program with an interpreter/signer. The interpreter/signer’s responsibility was to communicate any spoken words to Plaintiff during the training.

Although Plaintiff only requested an interpreter/signer during staff meetings and further classroom instruction once employed by Defendants, Plaintiff has provided insufficient evidence that he would be able to perform the communication duties of a wave-pool lifeguard without the accommodation of an interpreter/signer during his entire shift.

Further, the federal district court found Keith had failed to show that providing him “an interpreter/signer during only classroom instruction and staff meetings is objectively reasonable.” In so doing, the court cited case law precedent which had held it was “unreasonable

to accommodate an individual by requiring an employer to hire an additional person to assist the individual in his or her job duties.” In this particular instance, the court found numerous unreasonable modifications would be required, “shifting communication functions to other lifeguards or staff members on duty.” As noted by the federal district court, “Courts have continuously found that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee’s job which the employee cannot perform by virtue of his disability.”

As a result, the court held “as a matter of law that Plaintiff is not ‘otherwise qualified’ within the meaning of the ADA and has failed to prove a *prima facie* case of discrimination with respect to Defendants’ wave-pool lifeguard position.”

INTERACTIVE PROCESS?

Keith had also argued that Oakland had failed to engage him in an interactive process to determine an appropriate accommodation. Citing ADA regulations, the court noted “the interactive process is mandatory and requires a good faith effort by both parties” wherein the employer does “initiate an informal, interactive process with the qualified individual” in order to determine an appropriate accommodation. 29 C.F.R. § 1630.2(o)(3). On the other hand, the court acknowledged precedent which had held “a failure to engage in the interactive process is not an independent violation of the ADA.” Rather, in the absence of an interactive process, the court found “Plaintiff still must show that a reasonable accommodation was possible in order to hold Defendant liable for a violation of the ADA.”

In this particular instance, as described above, the court had already determined that Keith had failed to show that his “cochlear implant, an interpreter/signer during only classroom instruction and staff meetings and the suggested modifications” are reasonable accommodations. As a result, the federal district court held Oakland’s “failure to engage in the interactive process with Plaintiff is not a violation of the ADA.”

CONCLUSION

Having found that Keith was “not a qualified individual that can perform the duties of a wave-pool lifeguard” at Oakland’s facility, the federal district court granted summary judgment to Defendant Oakland County. In so doing, the court dismissed Keith’s claim that he was discriminated against on the basis of disability in violation of the ADA because Oakland had denied him employment as a wave-pool lifeguard in 2007 and 2008.

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