

PHARMACIST WITH FEAR OF NEEDLES IS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY

In *Stevens v. Rite Aid Corporation*, 2017 WL 1055566 (2d Cir. 2017), the United States Court of Appeals for the Second Circuit held that a pharmacist who was unable to give immunization shots because of a fear of needles was not a qualified individual with a disability.

Key Facts

- Christopher Stevens had worked as a full-time pharmacist for Rite Aid and its predecessor pharmacies for 34 years. He was responsible for handling medications and counseling customers regarding their medications.
- Stevens suffers from trypanophobia—a fear of needles.
- In 2011, Rite Aid, and other large pharmacy chains, started requiring pharmacists to perform immunizations in order to fill an unmet need for vaccinations in the health care market.
- In April 2011, Rite Aid revised its job description to require pharmacists to hold a valid immunization certificate and included a reference to immunizations in the list of “essential duties and responsibilities” for pharmacists.
- In March 2011, Stevens received an e-mail from his district manager, William Spink, informing him that Rite Aid was going to require all pharmacists to give immunization injections to customers.
- Stevens obtained a note from his treating physician stating that Stevens is “needle phobic and cannot administer immunization by injection.”
- Stevens wrote a letter to Spink explaining that his trypanophobia causes him to experience lightheadedness, paleness, and a feeling he may faint, and that, as a result, he “would never even consider trying to become an immunizing pharmacist.” Stevens also stated that he believed his condition was a covered disability under the ADA, and requested that Rite Aid provide him with a reasonable accommodation.
- In August 2011, Rite Aid officials told Stevens that the ADA did not apply to trypanophobia, that Rite Aid was not required to accommodate Stevens, and that Stevens would lose his job unless he successfully completed immunization training.
- Stevens later told Spink that he would not be able to complete the training.
- In August 2011, a Rite Aid official gave Stevens a termination letter, informing him that he was being terminated for refusing to perform customer immunizations, which were an essential function of his job.

Stevens brought suit under the ADA. A jury awarded Stevens back pay damages of \$485,633, front pay damages of \$1,227,188 to cover a period of 4.75 years, and nonpecuniary damages of \$900,000, later reduced to \$125,000 when Stevens agreed to a remittitur. Rite Aid appealed to the Second Circuit.

Second Circuit's Analysis

The Second Circuit started its analysis by setting forth the following principles under the ADA:

- • The ADA prohibits discrimination in employment against “a qualified individual on the basis of disability.”
- • A “qualified individual” is defined as one who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”
- • Accordingly, one of the elements of a claim under the ADA is that an employee was qualified to perform the essential functions of his job, with or without reasonable accommodation. *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 17 A.D. Cas. (BNA) 1453, 11 Wage & Hour Cas. 2d (BNA) 647, 152 Lab. Cas. (CCH) P 35143 (2d Cir. 2006).
- • In evaluating whether a particular job function is “essential,” courts consider the employer’s judgment, written job descriptions, the amount of time spent on the job performing the function, the mention of the function in a collective bargaining agreement, the work experience of past employees in the position, and the work experience of current employees in similar positions. *McMillan v. City of New York*, 711 F.3d 120, 27 A.D. Cas. (BNA) 929 (2d Cir. 2013).
- • Courts must give considerable deference to an employer’s judgment regarding what functions are essential for service in a particular position, but no one factor will be dispositive.
- • Courts must conduct a fact-specific inquiry into both the employer’s description of a job and how the job is actually performed in practice.

Applying the foregoing to the record in this case, the Second Circuit concluded that it was compelled to find that immunization injections were an essential job requirement for Rite Aid pharmacists at the time of Stevens’ termination. The court noted that Rite Aid personnel testified, without contradiction, that the company made a business decision to start requiring pharmacists to perform immunizations in 2011. It further noted that the evidence established that the company carried out this policy by revising its job description for pharmacists to require immunization certification and licensure, as necessary depending on the state where the pharmacy is located, and including immunizations in the list of “essential duties and responsibilities” for Rite Aid pharmacists. Moreover, Rite Aid’s in-house counsel testified that Rite Aid terminated another pharmacist with needle phobia because, like Stevens, he failed to undergo Rite Aid’s immunization training program, further demonstrating that the company deemed administering immunizations to be an essential function of its pharmacists. In the Second Circuit’s view, none of Stevens’ arguments undermined the conclusion that immunization injections were an essential function of his job.

NOTE:

The Second Circuit noted that it was understandable that the jury had sympathy for Stevens. Nevertheless, his inability to perform an essential function of his job as a pharmacist was the only reasonable conclusion that could be drawn from the evidence.

Reasonable Accommodation

The Second Circuit then turned to the issue of whether there was a reasonable accommodation that would have enabled Stevens to perform the essential job function of administering immunization injections.

The Second Circuit set forth the following applicable legal principles:

- A reasonable accommodation can never involve the elimination of an essential function of a job.
- A reasonable accommodation may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C.A. § 12111(9).

Stevens first suggested that Rite Aid could have offered him desensitization therapy as a form of reasonable accommodation. In rejecting this contention, the court noted that Stevens pointed to no authority suggesting that employers are obligated to offer employees medical treatment as a reasonable accommodation and that indeed, that theory has been rejected by district courts in the Second Circuit. See, for example, *Emerllahu v. Pactiv, LLC*, 2013 WL 5876998 (W.D. N.Y. 2013); *Desmond v. Yale-New Haven Hosp., Inc.*, 738 F. Supp. 2d 331 (D. Conn. 2010). Furthermore, Stevens failed to show that he would have undergone desensitization therapy had it been made available to him.

Stevens next suggested that he could have been transferred to a pharmacy technician position. In rejecting that argument, the Second Circuit noted that Rite Aid's vice-president of labor relations and employment testified without contradiction that Rite Aid offered Stevens another position, such as a pharmacy technician position, that would not require administering immunizations, and Stevens offered no evidence that he requested, considered, or was open to a position as a pharmacy technician. Stevens also suggested that Rite Aid could have either hired a nurse to give immunization injections for him or assigned him to a dual-pharmacist location do not propose true accommodations. According to the court, those steps would be exemptions that would have involved other employees performing Stevens' essential immunization duties and that Rite Aid was not required to grant Stevens these exemptions. Moreover, Stevens failed to show that a vacant position at a dual-pharmacist store existed at the time of his termination.

Finally, Stevens argued that he was entitled to the jury's award because Rite Aid had failed to engage in the "interactive process." The court rejected that argument on the ground that an employee may not recover damages based on his employer's failure to engage in an interactive process if he cannot show that a reasonable accommodation existed at the time of his dismissal. *McElwee v. County of Orange*, 700 F.3d 635, 27 A.D. Cas. (BNA) 134, 116 Fair Empl. Prac. Cas. (BNA) 1064 (2d Cir. 2012). In this case, because Stevens failed to present any evidence suggesting the existence of a

reasonable accommodation at the time of his termination, the Second Circuit concluded that he could not recover damages based on Rite Aid's failure to engage in an interactive process, even if such a failure occurred.

Accordingly, the Second Circuit held that:

Because performing immunization injections was an essential job requirement and Stevens presented no evidence of a reasonable accommodation that would have allowed him to perform immunizations at the time of his dismissal, no juror could reasonably conclude that Stevens was "qualified to perform the essential functions of his job, with or without reasonable accommodation." ... We remand for entry of a revised judgment in favor of Rite Aid.

NOTE:

Among many interesting district court cases in the last month was *Boadi v. Center for Human Development, Inc.*, 2017 A.D. Cas. (BNA) 69095, 2017 WL 886972 (D. Mass. 2017). The plaintiff in that case was terminated while she was hospitalized for severe depression. Relying on *Bones v. Honeywell Intern., Inc.*, 366 F.3d 869, 15 A.D. Cas. (BNA) 808, 9 Wage & Hour Cas. 2d (BNA) 1022, 85 Empl. Prac. Dec. (CCH) P 41645 (10th Cir. 2004), and *Furtado v. Standard Parking Corp.*, 820 F. Supp. 2d 261 (D. Mass. 2011), the defendants contended that they were entitled to summary judgment because the plaintiff's employment was terminated for a reason unrelated to her request for FMLA leave: she failed to comply with the defendant's call-in policy that required an employee to give personal notice of her need for leave. The court recognized that the FMLA generally requires employees to comply with their employer's usual and customary policies. However, the court also noted that the FMLA does not authorize an employer to require its employees to comply with policies that are inconsistent with the rights granted to employees under the act. *Ortega v. San Juan Coal Company*, 2013 WL 12116377 (D.N.M. 2013); *Millea v. Metro-North R. Co.*, 658 F.3d 154, 161, 17 Wage & Hour Cas. 2d (BNA) 1825, 94 Empl. Prac. Dec. (CCH) P 44288 (2d Cir. 2011) (the regulation's requirement that employees comply with the employer's "usual and customary notice and procedural requirements for requesting leave" are "relaxed in 'unusual circumstances' or where the company policy conflicts with the law"). In this case, the court determined that, under the FMLA, the plaintiff was excused from compliance with her employer's personal notice requirement because of the nature of her medical condition. *Boadi* is also interesting because of its analysis of the circumstances under which a supervisor may be held personally liable for a FMLA violation.

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