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EXPERT ANALYSIS

Delayed Action on Accommodation May Create Liability for Constructive Discharge, Even for Joint Employers

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By virtue of their relationship with their federal clients — and relationships formed to service them — government contractors may find themselves deemed "joint employers" that are potentially liable for the discriminatory acts of other entities. Steps can be taken, however, to avoid joint employer status and/or a finding of liability.

This commentary discusses a recent federal court decision that addressed a flawed response by joint employers to a worker's request for disability accommodation. It also more generally discusses joint employer liability under the Americans with Disabilities Act and the Rehabilitation Act of 1973.

CONSTRUCTIVE DISCHARGE UNDER FEDERAL DISABILITY LAW

When it amended the ADA in 2008, Congress made it clear that employers should focus less on whether an individual has a covered disability and more on the interactive process of providing reasonable accommodations. A recent opinion from the U.S. District Court for the Eastern District of Virginia, which denied a defendant's motion to dismiss a constructive-discharge claim based on an alleged failure to accommodate, highlights the potential liability for failing to promptly engage in the interactive process. This is an informal, collaborative process in which the employer and the employee requesting an accommodation discuss the employee's limitations and potential reasonable accommodations.

In *Crump v. TCoombs & Associates LLC*, No. 2:13-cv-00707, 2014 WL 4748520, at *1 (E.D. Va. Sept. 23, 2014), plaintiff Summer Crump claimed she was jointly employed by the government contractor that hired her and the U.S. Department of the Navy. She claimed that she was constructively discharged under the ADA and the Rehabilitation Act.[1] Her case underscores the challenges that government contractors face when an employee requests an accommodation while working on a federal contract.

Crump, who is nearly deaf, was employed by TCoombs & Associates and TCMP Health Services as a physician assistant at Sewell's Point Branch Medical Clinic in Norfolk, Va. She claimed that her work at the Navy facility created a joint employer relationship among TCA, TCMP and the Navy.[2] Crump took a leave of absence in April 2011 to undergo cochlear implant surgery. Three days before she was scheduled to return to work in June 2011, she submitted a request to TCA and TCMP for an ADA accommodation that she claimed was needed. She specifically sought the elimination of unnecessary excessive noise in the clinical environment and an effective alternative form of telecommunication.

In late July 2011, Crump withdrew the request to eliminate noise but maintained her request for an alternative form of telecommunication. She also provided information as to options, such as a sign-language interpreter or video relay service on a video phone or iPad 2. A month and a half later, TCA

and TCMP responded by offering her a telephone headset attachment and a non-signing staff person to paraphrase communications by phone. Crump said the proposed accommodations were insufficient because the headset attachment would only amplify sound and the non-signing staff person might improperly relay patient communications. In August 2011, TCA and TCMP told Crump they had approved her accommodation request and she would be allowed to return to work once they resolved the details.

Despite these apparent ongoing efforts to accommodate, on Oct. 12, 2011, the Navy sent Crump a written "request for accommodation" form. Crump completed the form and submitted it five days later. The plaintiff claims TCA, TCMP and the Navy agreed to meet with her to discuss accommodations, but she said the conference had not occurred by February 2012. Having received no response from the Navy, she notified it by letter Feb. 21, 2012, that she would take legal action if it did not respond within 10 days. The Navy did not respond until June 2012, after Crump had filed claims against it under the Rehabilitation Act.

In its response, the Navy proposed accommodations but failed to ensure that they would be approved. It also did not offer information as to when the accommodations would become operational. By July 27, 2012 — more than a year after Crump first requested the accommodation — none of the defendants had instituted any accommodations enabling her to return to work. Crump remained on unpaid leave for a year, and she eventually claimed that she was constructively discharged.

To prove constructive discharge in the 4th Circuit, a plaintiff must prove that the working conditions were intolerable and that the employer's actions were deliberate and intended to induce the employee to resign.

Crump filed suit in December 2013. The constructive-discharge claim survived the Navy's motion to dismiss. To prove constructive discharge in the 4th Circuit, a plaintiff must prove that the working conditions were intolerable and that the employer's actions were deliberate and intended to induce him to resign.[3]

The court found Crump sufficiently alleged deliberateness because she claimed the Navy falsely led her to believe it was interested in engaging in the interactive process but then failed to identify an appropriate accommodation for nearly nine months. It further found that Crump met the "intolerable working conditions" standard by alleging that the Navy's failure to accommodate prevented her from earning a livelihood.

In *Johnson v. Shalala*, 991 F.2d 126, 132 (4th Cir. 1993), the 4th U.S. Circuit Court of Appeals decided that a failure to accommodate can constitute constructive discharge. After leaving her employment with the National Institutes of Health, the plaintiff in *Johnson* claimed she was constructively discharged under the Rehabilitation Act because the agency failed to provide her with a requested accommodation for narcolepsy. The plaintiff first requested flexible work hours or a car pool arrangement so she would not be responsible for driving to or from work. Although the NIH agreed to the car pool arrangement, the accommodation proved to be inadequate. The plaintiff later requested leaves of absence, which the NIH granted. The NIH even offered her a different position, but she declined the reassignment because it was to a lower pay grade. Ultimately, the plaintiff resigned and received disability retirement benefits.

The 4th Circuit reversed the District Court's ruling that the NIH constructively discharged the plaintiff. It found the NIH's actions were not deliberate because the agency responded to the requests for accommodation. The plaintiff's dissatisfaction with the responses was insufficient to prove that the agency deliberately intended to force her from the job, the court decided.

The court recognized, however, that a plaintiff might succeed in proving deliberateness where an employer completely fails to accommodate an employee who makes repeated requests for accommodation. The appeals court was clear, however, that refusal to provide the accommodation to which the employee is entitled is by itself insufficient to constitute constructive discharge. Instead, it said, there must be evidence that the "employer intentionally sought to drive [the employee] from her position."

Notably, not all circuits require a showing of deliberateness to prove constructive discharge. A number of circuits apply a more lenient standard that requires the employee to prove only that a reasonable person would have felt compelled to resign as a result of the workplace conditions.[4]

This standard is significantly less onerous than the deliberateness standard articulated in *Johnson*.

In *Lowe v. Independent School District No. 1*, 363 Fed. Appx. 548, 549 (10th Cir. 2010), the 10th Circuit applied the "reasonable person" test in reversing the lower court's award of summary judgment to a school district that allegedly constructively discharged a teacher by failing to accommodate her post-polio condition. The court determined that a question of fact existed regarding whether a reasonable person would have felt compelled to resign if, like the plaintiff, her teaching assignment would require enough standing and movement to hasten her muscular degeneration and need for a wheelchair.[5]

THE JOINT EMPLOYER RELATIONSHIP

Engaging in the interactive process presents unique challenges when, as in *Crump*, an employee has joint employers. An employee may be considered jointly employed by the government if the United States exerts significant control over the terms and conditions of the employment relationship.[6] In determining whether a joint employer relationship exists, courts may consider whether the government entity:

- Has the ability to hire, fire, reinstate, evaluate, discipline or compensate the individual; exerts budgetary authority to influence hiring and firing.
- Informs individuals that they are subject to hire, termination and/or reinstatement by the government entity (assuming de facto responsibility).
- Determines the qualifications of the position; is contractually entitled to determine the suitability of an individual to serve in the position.
- Determines tasks and responsibilities by directing the course of daily duties, providing equipment and periodically testing abilities.

Not all circuits require a showing of deliberateness to prove constructive discharge.

In *Vann v. White*, 2003 WL 21715328, at *4 (D. Kan. July 21, 2003), the U.S. District Court for the District of Kansas determined the U.S. Army was *not* a joint employer of the plaintiffs, who worked for an aerospace company as heavy equipment operators and automotive workers. Therefore, the Army was not liable under Title VII.[7] In reaching this conclusion, the court considered that the company's contract with the Army explicitly provided that contractor personnel were employees of the company and that the Army would not exercise any supervision or control over them. It also noted that the company hired the plaintiffs, they reported to a company supervisor, the company set their wages and paid their salaries, and the company maintained independent budget authority over its employees. .

In contrast, in *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004), the U.S. District Court for the District of Wyoming found that the U.S. Marshals Service *was* a joint employer of the plaintiff. A security company employed the plaintiff as a court security officer working on a contract with the USMS. Unlike in *Vann*, the USMS reserved the right to determine the suitability of court security officers who were working on the contract.. It also helped select the plaintiff for the position, conducted his background check, helped determine and direct some of his tasks and responsibilities, provided him with law enforcement equipment and periodically tested his ability to perform his job functions.

After learning that the plaintiff used medication for depression, insomnia and sleep deprivation, the USMS told the company to replace him because it believed he was not medically qualified for the job. The USMS denied requests by the company and the plaintiff to reconsider its decision, and the company terminated his employment.

The court found sufficient evidence that the USMS exercised enough control over the essential terms and conditions of the plaintiff's employment to qualify as a joint employer. The court ultimately found that the plaintiff failed to establish he was disabled or regarded as disabled under the ADA or Rehabilitation Act. But if the court had found otherwise, both the company and USMS may have been liable.

These decisions make it clear that where the United States exercises significant control over a contractor's employee, both the contracting entity and the government may be liable as joint employers for a failure to accommodate a worker's disability.

JOINT EMPLOYERS' RESPONSIBILITIES FOR ACCOMMODATIONS

Equal Employment Opportunity Commission guidance requires direct employers and joint employers to engage in the interactive process with employees and provide reasonable accommodations to them absent undue hardship.[8]

These obligations may seem arduous when an employee works on location for a government client that has ultimate control of the work environment. However, by providing thorough training to managers and human resources professionals and by working closely with government clients when necessary to engage in the interactive process and implement reasonable accommodations, contractors can help ensure compliance and reduce the risk of liability.

In facilitating these processes, it is important to note that even if a joint employer relationship is deemed to exist, it is not necessarily the case that both employers will be found liable for failing to make a reasonable accommodation. This is especially true if the ability to take corrective measures or make accommodations was out of the contractor's control by virtue of its government client's requirements, actions or management of the work site.[9] In other words, the conduct of one joint employer will not always — and should not always — be imputed to the other.

Engaging in the interactive process presents unique challenges when an employee has joint employers.

With respect to disability accommodations, joint employers are not obligated to provide the accommodation if doing so would impose an undue hardship. An undue hardship may exist for joint employers where the accommodation would involve a significant expense for both, even with combined resources.[10] Moreover, a joint employer may establish undue hardship where it lacks sufficient resources to provide the accommodation and its good-faith efforts to obtain contributions from the other entity are unsuccessful.

PRACTICAL POINTERS

- Train managers and human resources professionals to recognize and promptly respond to requests for disability-related accommodations.
- When appropriate, coordinate and engage in good-faith best efforts to participate in the interactive process with the other joint employer entity and to ensure all parties are working on a cohesive and responsive strategy.
- Remain actively involved in the interactive process and ensure that any necessary reasonable accommodations are implemented promptly, even for employees who work on location for a government client.
- Continue to communicate with employees throughout the interactive process, regularly updating them on the status of their accommodation requests and, when applicable, notifying them of the expected dates for implementation of any accommodations.
- Thoroughly document the interactive process, including the employer's efforts to engage in the process, communications with the employees and any communications with the government client or other joint employer entity regarding its efforts and, if applicable, their refusal to engage.
- Consider contract provisions that allocate responsibility for providing reasonable accommodations.
- Consider contract indemnification provisions that hold your company harmless for the actions of the other employer with respect to employees.
- Be aware of and responsive to allegations of potentially discriminatory actions of any sort with respect to your government client or business partner and your employees, and engage in (and document) your good-faith meaningful efforts to address, resolve and remediate.

CONCLUSION

By taking the above-outlined steps, government contractors can reduce their risk of being held liable for the discriminatory actions of another entity while meeting their obligations to provide reasonable accommodations for their employees' disabilities.

NOTES

[1] 29 U.S.C. § 701. Using the same standards for determining employment discrimination as the ADA, the Rehabilitation Act of 1973 prohibits discrimination based on disability by the federal government, certain federal contractors and programs receiving federal funding.

[2] The factual allegations are as described in the opinion and asserted by the plaintiff.

[3] *Crump v. TCoombs & Assocs. LLC*, No. 2:13-cv-00707, 2014 WL 4748520, at *6 (E.D. Va. Sept. 23, 2014) (citing *Whitten v. Fred's Inc.*, 601 F.3d 231, 248 (4th Cir. 2010) (quoting *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353-54 (4th Cir. 1995)) (both sexual harassment and constructive discharge case).

[4] *See Cham v. Station Operators Inc.*, 685 F.3d 87, 95 (1st Cir. 2012); *Campbell v. Obayashi Corp.*, 424 Fed. Appx. 657, 658 (9th Cir. 2011); *Lanza v. Postmaster Gen. of the United States,* 570 Fed. Appx. 236, 240 (3d Cir. 2014); *Siudock v. Volusia County Sch. Bd.*, 568 Fed. Appx. 659, 664 (11th Cir. 2014).

[5] *See also Hurley-Bardige v. Brown*, 900 F. Supp. 567, 574, n.7 (D. Mass. 1995) (refusing to make a wheelchair-bound employee's workplace wheelchair accessible, or refusing to relocate an employee with a respiratory condition to a smoke-free work area, may by itself create a working environment so hostile that a reasonable person would resign their position and therefor possess a claim for constructive discharge).

[6] *See Bristol v. Bd. of County Comm'rs of the County of Clear Creek,* 312 F.3d 1213, 1218 (10th Cir. 2002).

[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, prohibits discrimination by employers based on race, color, religion, sex or national origin. In *Vann v. White*, the court determined that the U.S. Army was not a joint employer of the plaintiff and therefore could not be liable as an employer under Title VII.

[8] U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (Dec. 22, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-contingent.html.

[9] *See Sosa v. Medstaff Inc.*, 2013 WL 6569913, at *3 (S.D.N.Y. Dec. 13, 2013) (citing *Lima v. Addeco*, 634 F. Supp. 2d 394, 400 (S.D.N.Y. 2009) (for a joint employer to be liable for the other's actions, it must be found that the joint employer knew or should have known of the discriminatory conduct and failed to take corrective measures within its control)); *see also Watson v. Adecco Employment Servs.*, 252 F. Supp. 2d 1347, 1356-57 (M. D. Fla. 2003) (same); *Takacs v. Fiore*, 473 F. Supp. 2d 647, 657 (D. Md. 2007); *Signore v. Bank of Am.*, 2013 WL 6622905, at *6 (E.D. Va. Dec. 13, 2013).

[10] *See* Enforcement Guidance, *supra* note 8.



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