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E-NEWS & VIEWS

The Americans with Disabilities Act and the hiring process: Employer obligations to job applicants

By James H. Kizziar, Jr. and Amber K. Dodds

The Americans with Disabilities Act (ADA) protects qualified individuals—those individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position—from discrimination in all aspects of employment, including the employment application process. The ADA prohibits discrimination regarding "job application procedures . . . hiring . . . [and] job training." The ADA protects job applicants through two main avenues: requiring that employers provide reasonable accommodations to job applicants; and prohibiting the denial of employment to a qualified individual because of that individual's disability. A recent federal court case, *EEOC v. Creative Networks, L.L.C.*,[1] addressed these protections in the context of providing signing interpretive services during orientation and pre-employment training.

The facts of the case

Rochelle Duran, who is hearing impaired, applied for a Direct Support Professional position with Creative Networks. She requested a sign language interpreter for orientation and pre-employment training sessions which were a required portion of the application process. Creative Networks agreed to provide an interpreter, but only up to $200, and suggested that Duran find a friend or relative to interpret for any sessions over that cost. Unfortunately, $200 was insufficient to cover even one session of the orientation and training, and Duran was unable to provide another interpreter. Although Duran attended the orientation and training, the information was presented mostly verbally and she was unable to understand much of the material. Eventually Duran's application was deemed inactive and she was not hired.

Duran filed a disability discrimination charge with the Equal Employment Opportunity Commission (EEOC), which subsequently pursued Duran's charge in federal court as both failure to provide reasonable accommodation and failure to hire claims.

The obligation for reasonable accommodation

The ADA requires employers to make reasonable accommodations for job applicants. Reasonable accommodations may include a variety of measures, as determined through a good-faith dialogue between the employer and the applicant, including signing interpretive services. Employers have a mandatory obligation to provide reasonable accommodation unless they can show that it would result in an undue hardship. This obligation exists even if the applicant may not complete all of the steps of the application process, or accept a job offer, if the accommodation is provided by the employer.

The employer in the *Creative Networks* case conceded that providing a signing interpreter for the full orientation and training was a reasonable request, and the expense of providing the interpreter would not have resulted in an undue hardship. The court found that the employer's failure to provide reasonable accommodation violated the ADA.

Discriminatory failure to hire

Failing to provide reasonable accommodation in the application process can also result in an ADA failure to hire claim if the applicant is not offered the position. The ADA prohibits denying employment opportunities to a job applicant due to a failure to make reasonable accommodation. In the *Creative Networks* case, the court found that Creative Networks denied Duran an employment opportunity (a job offer) because she asked for the reasonable accommodation of interpreter services during orientation and training. Failure to hire claims encompass an employer's decision not to hire an otherwise-qualified, disabled applicant because the employer does not want to provide reasonable accommodation *either* before the applicant is offered the position or after the applicant accepts the job and becomes an employee.

The court rejected Creative Networks' argument that it did not discriminate against Duran because it never reached the stage of considering her application. It held that applicants do not need to "complete every step of the application process—or even apply—when discriminatory hiring procedures deter [them] from doing so." Without this protection, employers could deny reasonable accommodations early in the applicant selection process to escape liability for discriminatory hiring decisions.

Employers cannot avoid their obligation not to discriminate against otherwise-qualified, disabled applicants by arguing that the applicant would not have been hired anyway. Applicants are not required to show that they would have been hired, which would be extremely difficult, to prevail on a failure to hire claim.

The *Creative Networks* court found that Creative Networks' failure to provide reasonable accommodations to Duran foreclosed her opportunity for employment by preventing her from proceeding further in the application process. This denial of employment opportunities, based on her disability, was a discriminatory failure to hire.

Employer obligations during the hiring process

The ADA's obligation to provide reasonable accommodations to qualified individuals with disabilities applies equally to job applicants and employees. Unless a requested accommodation causes an undue hardship, employers must provide reasonable accommodations to applicants even if they will not complete all of the steps of the application process or accept a job offer. Further, employers may incur liability for failure to hire liability if their application procedures prevent disabled individuals from submitting applications or otherwise completing the application process.

Employers should carefully analyze their application processes for requirements that indirectly hinder disabled applicants from applying, and should have practical and reasonable accommodations available to suggest and provide to disabled applicants. Finally, employers should take care not to let disabled applicants' applications become inactive due to a lack of reasonable accommodation, because liability for disability discrimination can occur even if an applicant's application never reaches the level of being considered for a job offer.

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[1] 2:09-cv-02023-DAE, (D. Ariz. Sept. 20, 2012).