EMPLOYER'S EDGE

HEYL ROYSTER

A Newsletter for Employers and Claims Professionals *Spring 2018*

A WORD FROM THE PRACTICE CHAIR

We are pleased to present our Spring edition of the *Employer's Edge*. In this issue, Doug Heise authored an article on post-traumatic stress disorder in the workplace and whether the courts have concluded this type of medical condition qualifies as a disability under the Americans with Disabilities Act. In his article, Brett Siegel analyzed whether an employer is justified in terminating an employee despite that employee's later decision to take leave under the Family and Medical Leave Act. Finally, Brian Vayr contributed to the newsletter by analyzing the qualified individual standard under the Americans with Disabilities Act and discussed whether a disability claim may be pled under a different cause of action.

Did you know that Heyl Royster provides interactive in-house sexual harassment training? In January, the Society for Human Resource Management released the findings of its 2017 survey on sexual harassment. According to that survey, 94% of employers have some form of sexual harassment policy, but 22% of non-management employees didn't know for sure whether or not the policies existed or what was in them. Additionally, 11% of non-management employees stated that they had experienced some form of sexual harassment in the past 12 months. 76% of those employees did not report the harassment out of fear of retaliation. Sexual harassment training is proven effective and promotes efficiency and morale in the workplace. If you are interested in this on-site interactive training, please contact Anthony Ashenhurst or Emily Perkins. Training is provided for a flat fee during hours that are most convenient for the client. A review of the current policies is included in the training.

If you have any questions about the content of this newsletter or any employment law questions, please feel free to contact me or any of the attorneys in our Employment & Labor Practice.

Bradford B. Ingram
Chair, Employment Law Practice

POST-TRAUMATIC STRESS DISORDER AND THE ADA

By: Doug Heise, dheise@heylroyster.com

Descriptions of Posttraumatic Stress Disorder (PTSD) appear in literature going back to Homer (*The Iliad*, 9th Century B.C.), Shakespeare (*Henry IV*, 1597) and Dickens (*A Tale of Two Cities*, 1859). Each wrote of traumatic experiences to the characters and the symptoms that followed those events.

Over the years PTSD has been described as shell shock, War neuroses (WW I), battle fatigue, Combat Stress Reaction or CSR (WW II). In 1952, the American Psychiatric Association (APA) produced the first

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Diagnostic and Statistical Manual of Mental Disorders (DSM-I) which included "gross stress reaction." The diagnosis was proposed for individuals who were psychologically normal in general terms, but had symptoms from traumatic events such as disaster or combat. The diagnosis assumed that the reactions to the trauma would resolve relatively quickly, 6 months, and if present after that time, another diagnosis was to be made. In 1968, despite growing evidence that that exposure to trauma was associated with a constellation of psychiatric problems, the diagnosis was eliminated in the DSM-II. It included a section on "adjustment reaction to adult life" which was limited to three examples of trauma, unwanted pregnancy with suicidal thoughts, fears linked to military combat, and a particular syndrome associated with prisoners who faced a death sentence. This diagnosis was clearly insufficient.

Prior to publishing the DSM-III in 1980, the APA reviewed and gave credence to research involving Vietnam Veterans, Holocaust survivors, sexual trauma victims, and others that had suffered severe traumatic events. Links between the trauma of war, post-military civilian life, and the non-war related traumatic events experienced in life where PTSD has affected civilians. DSM-6.2, released in October of 2017, reflects the continued research and evolution of knowledge about the causes and effects of PTSD. One major finding throughout the years has been that PTSD is relatively common. According to research cited by the Job Accommodations Network, exposure to a traumatic event is not uncommon, some 7-8% of the American population will develop PTSD at some point in their lives. About 8 million adults have PTSD during a given year. This is only a small portion of those who have gone through trauma. Nearly 10 out of every 100 (10%) of women develop PTSD sometime in their lives compared to about 4 of every 100 (4%) of men. In adding PTSD to the DSM, the APA merely coined a new term for an age old ailment. While often considered a wartime disorder, it has also afflicted civilians who have been involved in natural disasters, mass catastrophes or serious accidents— events that we see in the news on an increasingly regular basis, but that have been around as long as humans.

PTSD is quite common among veterans due to the risk of exposure to traumatic events on a daily basis. Data from the National Center for PTSD, (2015) suggests that approximately 11-20% of service members who return home from deployment in Afghanistan and Iraq have symptoms of PTSD. Statistics show that PTSD occurs in about 15% of Vietnam veterans and 12% of Gulf War veterans. Looking at these statistics, an employer must realize that employees, or potential employees, with PTSD, veterans and non-veterans alike, are in the workforce and may need accommodations in the workplace.

PTSD and the ADA

Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits private employers with 15 or more employees, State and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. (42 U.S.C.)

The ADA is not limited to a list of medical conditions that constitute disabilities, rather, it contains a general definition of disability that each person must meet on a case by case basis. A person has a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or is regarded as having an impairment. (EEOC Regulations, 2011). According to the EEOC, the individualized assessment of virtually all people with PTSD will result in a determination of disability under the ADA given its inherent nature. The major life activities of learning, reading, concentrating and thinking, as well as the major bodily functions of the brain and neurological function are included in its definitions. Indeed, PTSD is specifically included in the

definitions of the implementing regulations to the ADA as substantially limiting brain function.

PTSD in the Workplace

Unless a job applicant needs an accommodation to assist them in the application or interview process, they do not have to disclose a disability on a job application. An employee need only disclose their disability if or when they need an accommodation to perform an essential function of their job. Otherwise an employer may not know that an employee has PTSD unless the employee reveals or makes information available that they have been diagnosed with post-traumatic stress. Applicants with PTSD (or any disability), do not have to submit to a medical exam or answer any medical questions until they are conditionally offered a job. If the need for a medical examination is job-related and consistent with business necessity, an employer can ask for the examination. This can occur when an employee with PTSD has an incident on the job that would lead the employer to believe that the employee is unable to perform the job, or to determine if the employee can safely return to work, and if an accommodation will be needed on the job.

The National Center for PTSD list four types of symptoms that a sufferer may feel:

- Reliving the evet through nightmares, flashbacks or "triggers" which can be sights, sounds or smells that bring the event back.
- Avoidance - The individual may avoid people or places that trigger the memories. This can include avoiding crowds because they feel dangerous, avoiding news or entertainment programs that depict the traumatic event. The individual may become hyper-busy to avoid having to think about the event.
- Negative changes in beliefs and feelings such as avoiding relationships with others or simply feeling that no one can be trusted.
- Feeling keyed up (hyperarousal) – The individual may be feeling tense, have excessive anxiety, cannot concentrate or is easily startled. This demonstrates a heightened state of alert.

Symptoms of PTSD can manifest itself with an individual in the workplace in various ways. Memory problems, lack of concentration or poor interactions with coworkers, and absenteeism are a few examples.

Accommodations

The ADA requires an employer to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Reasonable accommodations vary depending on the needs of the individual. They are adjustments or modifications provided by an employer to enable individuals with disabilities to enjoy equal employment opportunities. An accommodation is not an abdication of an essential function of the job. Accommodations for individuals with PTSD can take many forms, depending on the needs of the individual. Accommodation ideas from the Job Accommodations Network include:

- For those with concentration issues, reduce distractions with white noise or environmental sound devices, noise cancelling headsets, modifications in lighting, allow for a flexible work environment or schedule.
- For those with memory issues, provide written as well as verbal instructions, checklists, wall calendars, electronic organizers or apps, additional training time or refreshers.
- For those with organization issues, provide daily, weekly and monthly tasks lists, assign a mentor or coach, use of electronic organizers or apps.
- For those with time management issues, daily To Do lists and check items completed, electronic assists previously noted, regular meetings with

supervisors or mentors to determine if goals are being met.

- For those with stress or emotional issues, emphasize stress management techniques, allow a support animal, use of a mentor to alert the employee if behavior is becoming unprofessional, EAP assistance and or allow a flexible work environment.
- For those with coworker interaction issues, encourage the employee to walk away from frustrating situations and confrontations, allow part time work from home, allow for greater privacy while at work, and provide disability awareness training to supervisors and coworkers.

This is not an exhaustive list of potential issues and accommodations. The Jobs Accommodations Network can provide assistance in suggesting accommodations for employees in need same due to PTSD.

Recognizing the needs of our returning veterans and those among us that have suffered trauma due to the acts of others or of nature is the right thing to do. If the trauma results in PTSD, the Americans with Disabilities requires that those employees needs be recognized and accommodated. Supporting an individual with PTSD should be a common goal for management and coworkers alike. Each employee can be a valuable asset to the work environment with a little help and understanding.

EMPLOYER JUSTIFIED IN TERMINATING EMPLOYEE DESPITE EMPLOYEE'S LATER DECISION TO TAKE FMLA LEAVE

By: Brett Siegel, bsiegel@heylroyster.com

In *Ennin v. CNH Industrial America, LLC*, 878 F.3d 590 (7th Cir. 2017), the Seventh Circuit upheld the district court's grant of summary judgment to the employer, holding that the employee failed to present any admissible evidence that CNH Industrial America's (CNH) terminated him on account of his race, national origin, disability, or his decision to take leave under the Family and Medical Leave Act of 1993 (FMLA).

The plaintiff, Abdullah Ennin (Ennin), was born in Ghana and is a naturalized American Citizen. Ennin began working for CNH on January 3, 2012, as a supervisor with dozens of hourly workers reporting to him. Ennin was the only black supervisor at his facility in Lebanon, Indiana. Ennin went two years working without incident when he received a written warning for misconduct in May 2014. Ennin's supervisor cited him for inappropriate behavior related to a verbal altercation he had with another supervisor over the volume of a radio playing in the break room.

On November 17, 2014, Ennin's car broke down on his way to work and his next actions ultimately led to his termination. After notifying his supervisor that he would be late for work due to his car trouble, Ennin called an hourly employee, who was already clocked in and working, to come assist him. Upon their return to CNH that morning, Ennin allowed his hourly employee to follow him through the supervisor's entrance after Ennin had swiped only his badge, in violation of company

policy. Ennin also failed to adjust the employee's time sheet in the CNH timekeeping system to reflect that he had been off premises for 46 minutes while he was clocked in.

On November 19, two days later, Ennin was called into a meeting with his two supervisors and CNH's Human Resources Manager. At the conclusion of the meeting, the HR Manager and his supervisors told Ennin that his actions were unacceptable, but they did not inform him of a final decision at that time. Ennin's supervisors and the HR Manager maintained that they met separately on November 19, after the meeting with Ennin, and determined that Ennin should be fired for his multiple violations of company policy. According to the HR Manager and supervisors, they decided they would let Ennin know of his termination the next day, on November 20. Before they had the opportunity to inform him of the decision, Ennin informed his supervisor later on November 19 that he had to go home because of his hemorrhoids acting up. Ennin did not return to work on November 20 and instead scheduled a previously planned hemorrhoidectomy for November 21.

Ennin requested and received leave directly from CNH's third-party administrator and Ennin reported to the administrator that he would return by January 1, 2015. On November 20, 2014, CNH's HR Manager learned that Ennin had requested leave and that she would not be able to inform him of his termination at work that day. On December 1, 2014, after learning that Ennin had been approved for short-term leave through December 14, the HR Manager sent Ennin a letter informing him that his employment had been terminated. The letter indicated that the decision to terminate him was made on November 19 and that he was fired because of the November 17 incident.

Ennin sued CNH and alleged that he was fired because of his race, national origin, disability (related to the hemorrhoidectomy), and decision to take FMLA leave. CNH filed a motion for summary judgment. In response to the motion for summary judgment, Ennin attempted to introduce evidence, including emails and text messages involving the decision makers at CNH, to show that CNH did not decide to terminate his employment until December 1. CNH argued in its reply brief that Ennin's evidence was hearsay and unauthenticated. Ennin did not file a surreply brief even though the local rules of the Southern District of Indiana permitted him to do so as of right to respond to evidentiary objections. As a result, the district court held Ennin had waived his evidentiary argument and it did not consider Ennin's evidence that CNH did not decide to terminate him until December 1. As a result, Ennin could not provide evidence that CNH knew when they fired him that he had surgery and that he had taken FMLA leave. Thus, the district court granted CNH's motion for summary judgment.

In upholding the district court's ruling, the Seventh Circuit Court of Appeals agreed that Ennin waived the ability to submit evidence that CNH decided to terminate him on December 1, and not November 19. The Seventh Circuit held that where a brief is permitted as a matter of right, a party must file it or risk waiver of any arguments it has neglected to raise. Since Ennin did not present his arguments to the district court, he let CNH's objections to his evidence stand unopposed. The Seventh Circuit would not permit him to raise this evidence for the first time on appeal.

After ruling that it would not consider Ennin's evidence that CNH decided to terminate him on December 1, the Seventh Circuit addressed the ultimate question of whether the evidence in the record would permit a reasonable factfinder to conclude that Ennin's race or national origin caused CNH to terminate his employment. Since CNH had proffered a legitimate, nondiscriminatory reason for filing Ennin, he had to produce evidence that those reasons were actually pretext for discrimination. In finding that Ennin failed to do so, the Seventh Circuit held that "pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer." *Ennin*, 878 F.3d at 596. Ennin's only admissible evidence established that CNH terminated him from employment on November 19,

before he became disabled and before CNH knew that he had requested FMLA leave. Thus, the Seventh Circuit found that it would have been impossible for CNH to have fired him because of disability or his decision to take FMLA leave.

Ennin argued that white employees that were similarly situation to him were not fired, however, the Seventh Circuit agreed with the district court that these employees were not similarly situated because they were hourly employees that had not been previously disciplined, unlike Ennin. The Seventh Circuit held that an employee who does not have a similar disciplinary history and performance record as the plaintiff is not similarly situated. In finding that Ennin did not present evidence of any appropriate comparators or other evidence of racial bias, the Seventh Circuit held Ennin only had mere conjecture and speculation to support his race and national origin discrimination claims. Therefore, he could not survive summary judgment.

The Seventh Circuit's findings in this case highlight the importance of preserving all arguments before the district court at the dismissive pleading stage and the significance for employers to establish evidence of why it terminated an employee and to document when that decision was made.

SEVENTH CIRCUIT DENIES ATTEMPT TO CIRCUMVENT "QUALIFIED PERSON" REQUIREMENT FOR ADA DISCRIMINATION CLAIMS

By: Bryan Vayr, bvayr@heylroyster.com

Employees who claim their employer's policies discriminate in violation of the Americans with Disabilities Act (ADA) *must* show that they are an otherwise "qualified individual" for the position in question. A creative plaintiff's attorney attempted to circumvent this basic requirement by challenging an employer's policies under an ADA retaliation claim, which has no "qualified individual" requirement. The argument was presented before the Seventh Circuit in January, 2018. Employers can be reassured by the circuit's conclusion — when it comes to enforcing its own job requirements and policies, a plaintiff cannot avoid the "qualified individual" element by simply claiming a different type of cause of action.

In *Rodrigo v. Carle Foundation Hospital*, 879 F.3d 236 (7th Cir. 2018) the plaintiff, Yasas Rodrigo, was a second-year medical resident for the defendant, Carle Foundation Hospital (Carle Hospital). To advance to the third year of his residency, Rodrigo was required to pass the "Step 3" portion of the United Sates Medical Licensing Examination. *Rodrigo*, 879 F.3d at 239. Although the State of Illinois allowed test-takers five attempts to pass the exam before imposing restrictions on test takers, Carle Hospital was more stringent — if a resident failed Step 3 three times, they were no longer permitted to participate in Carle Hospital's residency program. *Id*.

Rodrigo failed the test three times and was therefore excluded from Carle Hospital's residency program. *Id.* at 240. Only after his second failure did Rodrigo inform Carle that he was diagnosed with Restless Leg Syndrome, which interrupted his sleep and would cause

him to fall asleep during the exams. *Id.* at 239. After learning of Rodrigo's disability, Carle Hospital gave him three weeks to study for his third attempt even though Rodrigo never officially asked for any accommodation. *Id.* After failing to meet Carle Hospital's requirements, Rodrigo took and failed the Step 3 exam two more times with other employers before finally passing on his sixth try. *Id.* at 241.

When Rodrigo failed the fatal third time, he filed suit against Carle Hospital under the ADA. Since Rodrigo was challenging his employer's official policies, he first claimed Carle discriminated against him in violation of the ADA, because (1) he was an "otherwise qualified" employee and (2) Carle Hospital failed to "reasonably accommodate" when it held him to the same test-taking standards as his non-disabled peers. *Id.* at 242.

The Seventh Circuit found fault with both parts of Rodrigo's argument. Most fundamentally, the Court held, Rodrigo failed to show he was an "otherwise qualified individual." *Id.* at 241–42. Under the Act, an individual can only be "qualified" for a position if they satisfy the prerequisites for the position, *and* can perform the job's essential functions with, or without, reasonable accommodations. *Id.* at 242. In this case, passing Step 3 was clearly an essential function for a medical resident. *Id.* The purpose of Carle Hospital's residency program was to prepare residents for the practice of medicine, which was impossible to do if the resident does not pass Step 3. *Id.* Thus, Carle Hospital's Step 3 requirement was a prerequisite for an essential function that Rodrigo failed to satisfy. *Id.* Interestingly, the court also noted that being allowed to take the test a fourth time would have be a futile accommodation — Rodrigo would not pass the exam until his sixth try. *Id.* at 244. In sum, Rodrigo was not a "qualified individual" protected under the ADA, and any accommodation would not have made him qualified. *Id.*

Where *Rodrigo* sheds new light is in foreclosing a potential end-run of the above "discrimination" analysis. Rodrigo, seeing the writing on the wall, next tried to avoid the "qualified individual" analysis by asserting a retaliation claim under the ADA. Retaliation requires the plaintiff to engage in a protected activity, such as requesting an accommodation, which caused an employer to act adversely against him or her. *Id.* at 243. A retaliation claim does not require the plaintiff to show he or she is a qualified individual, or that the accommodation would even have made a difference—the request itself, Rodrigo claimed, could be sufficient. *Id.* Thus, Rodrigo argued that Carle Hospital violated the ADA because it retaliated against him by failing to renew his contract after he engaged in a protected activity (requesting to take the test again due to his Restless Leg Syndrome).

The Seventh Circuit quickly rejected Rodrigo's tactic. In effect, the court concluded, the alleged retaliation was really just Carle Hospital enforcing its Step 3 policy. *Id.* This was not an instance where an employee was fired contrary to a written policy. Since Rodrigo was not qualified to challenge the policy's enforcement under a discrimination claim, he was also not entitled to make a collateral attack on the legitimacy of Carle Hospital's Step 3 policy under the guise of a retaliation claim. *Id.*

In essence, *Rodrigo* forecloses a potential shortcut for ADA plaintiffs, ensuring they not only have to prove their case, but prove the *correct* type of case to be successful. As such, this case should be in any employer's litigation toolbox, particularly when the thrust of an employee's complaint is focused on the employer's job prerequisites or clearly stated policy.

Employment & Labor Contact Attorneys

Heyl, Royster, Voelker & Allen, P.C.

Peoria

Attorneys:
Anthony A. Ashenhurst - aashenhurst@heylroyster.com
Mitchell P. Hedrick - mhedrick@heylroyster.com
Bradford B. Ingram - bingram@heylroyster.com
Emily J. Perkins - eperkins@heylroyster.com
Debra L. Stegall - dstegall@heylroyster.com

Springfield

Attorney:
Theresa M. Powell - tpowell@heylroyster.com
Brett E. Siegel - bsiegel@heylroyster.com
Daniel S. Simmons - dsimmons@heylroyster.com

Champaign

Attorneys:
Keith E. Fruehling - kfruehling@heylroyster.com
Brian M. Smith - bsmith@heylroyster.com

Rockford & Chicago

Attorneys:
Jana L. Brady - jbrady@heylroyster.com
Lindsey M. D'Agnolo - ldagnolo@heylroyster.com
Jordan W. Emmert - jemmert@heylroyster.com
Patricia L. Hall - phall@heylroyster.com
Kevin J. Luther - kluther@heylroyster.com

Edwardsville

Attorneys:
Douglas R. Heise - dheise@heylroyster.com
Keith B. Hill - khill@heylroyster.com

Appellate:

Craig L. Unrath - cunrath@heylroyster.com

Peoria
300 Hamilton Blvd.
PO Box 6199
Peoria, IL 61601
309.676.0400

Champaign
301 N. Neil Street
Suite 505
PO Box 1190
Champaign, IL 61824
217.344.0060

Chicago
33 N. Dearborn Street
Seventh Floor
Chicago, IL 60602
312.853.8700

Edwardsville
105 W. Vandalia Street
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
120 W. State Street
PNC Bank Building
2nd Floor
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

www.heylroyster.com