Disability Discrimination: Failure to Accommodate or Disparate Treatment. Arthur R. Fairbault, Jr., 223 N.J.L.J. 61 (2003).

Case Notes

Under the New Jersey Law Against Discrimination (LAD), an employer was not obligated to accommodate a commuting problem of an employee with epilepsy; a change to day shift sought by the employee was not an "accommodation," that the employer was legally obligated to provide, but was simply a request for an easier, more convenient commute. Laresca v. American Tel. & Tel., D.N.J. 2001, 161 F.Supp.2d 323.

Neither employee's computer illiteracy or difficulty nor his requested transfer suggested to employer that employee was unable to perform his job duties because of dyslexia and absent knowledge of employee's dyslexia disability, employer did not violate New Jersey Law Against Discrimination. Illingworth v. Nestle U.S.A., Inc., D.N.J. 1996, 926 F.Supp. 482.

Federal regulations did not preempt former employee's handicap discrimination and workers' compensation retaliation claims under New Jersey law. Kube v. New Penn Motor Exp., Inc., D.N.J.1994, 865 F.Supp. 221.

Accommodations listed under the ADA and Law Against Discrimination (LAD) are designed to make certain changes in the work environment or structuring of employees' time that will allow disabled employees to remain at work without their physical handicaps impeding their job performance. Jones v. Aluminum Shapes & Frank Wimmersberger, 772 A.2d 34 (2001).

"Reasonable accommodation" under the ADA and Law Against Discrimination (LAD) refers to the duty of an employer to attempt to accommodate the physical disability of the employee, not to a duty on the part of the employer to acquiesce to the disabled employee's requests for certain benefits or remuneration. Jones v. Aluminum Shapes & Frank Wimmersberger, 772 A.2d 34 (2001).

Employee failed to show that city should have allowed her to work at home in her court clerk position in order to accommodate her epilepsy disability as would show that employer's proffered reason for terminating employee was pretext for discrimination under Law Against Discrimination. Melick v. Township of Oxford, 294 N.J.Super. 386, 683 A.2d 584 (A.D.1996).

Municipality was not required to provide second opportunity for rehabilitation to firefighter who tested positive for cocaine and whose reinstatement after first testing positive was conditioned upon abstaining from use of drugs. Matter of Jackson, 294 N.J.Super 233, 683 A.2d 203 (A.D.1996).

Terminated police officer's handicap discrimination suit was precluded by adverse decision of Merit System Board. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

No reasonable accommodation would permit officer to perform essential functions of job; no violation of Law Against Discrimination. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Adequate consideration given provisions of Law Against Discrimination. Ensslin v. Township of North Bergen, 275 N.J.Super. 352, 646 A.2d 452 (A.D.1994), certification denied 142 N.J. 446, 663 A.2d 1354.

Fire fighter who was an alcoholic and drug addict was a "handicapped person" under Law Against Discrimination. Matter of Cahill, 245 N.J.Super. 397, 585 A.2d 977 (A.D.1991).

School board failed to meet its obligation to reasonably accommodate high school teacher's mental disability (depression and anxiety) and specifically failed to engage in an interactive process with teacher to explore the feasibility of providing reasonable accommodations that would have permitted teacher to return to work (adopting as modified Initial Decision, 2008 N.J. AGEN LEXIS 187). Ponsi v. Cliffside Park Bd. of Educ., OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

Jurisdiction of boards of education under N.J.S.A. 18A:16-4, to determine whether an employee who has previously been deemed ineligible for services based on "mental abnormality" has provided sufficient "proof of recovery" to warrant return to work, does not deprive the employee of the right to reasonable accommodations under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Ponsi v. Cliffside Park Bd. of Educ., OAL Dkt. No. CRT 10536-06, 2008 N.J. AGEN LEXIS 1237, Final Decision (September 1, 2008).

In a case where respondent technical school failed to appear, the ALJ found that a student had sustained the burden of proving that the school failed to accommodate her dyslexia. Guy v. Southern N.J. Tech. School, OAL Dkt. No. CRT 10486-07, 2008 N.J. AGEN LEXIS 313, Initial Decision (April 28, 2008).

Employer's behavior did not rise to the level of denial of reasonable accommodation for employee's carpel tunnel syndrome, where employee's own recitation of the events demonstrated that employer promptly provided the first set of equipment employee requested, and while the ergonomic keyboard and wrist rest proved to be an ineffective accommodation, employer provided precisely the equipment employee believed would solve the problem. Although the delay in providing the subsequently requested keyboard tray was unfortunate, the record reflected that employer made sufficient efforts to provide the accommodation to meet its obligations and that it acted in good faith (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 796). Moebis v. Hartford Life Private Placement et al, OAL Dkt. No. CRT 6322-06, 2008 N.J. AGEN LEXIS 135, Final Decision (February 6, 2008).

In disability discrimination case, employer failed to demonstrate that accommodating employee's need for a smoke-free work environment in 2003 would have been an undue hardship, where (1) the ALJ found insufficient company president's testimony that banning smoking from the office area would impair productivity, and noted that president dismissed other possible accommodations out of hand after merely discussing them with his partner; and (2) Director found insufficient president's contention that employee could not be trusted to work in a secluded area. If employee had performance deficiencies, employer was free to address them independently, but an employee cannot be denied reasonable accommodations as a form of discipline for failure to comply with an employer's work rules (adopting as modified Initial Decision, 2007 N.J. AGEN LEXIS 430). Lampley et al. v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

In disability discrimination case, the fact that employer had now, in response to the Legislature's 2006 mandate, banned smoking from the same office area in which employee previously worked was sufficient to demonstrate that employee could have been accommodated without undue hardship in 2003 if employer had engaged in a good faith interactive process. Lampley v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Once an employee has requested assistance due to a disability, it is the employer's obligation to initiate the process of working with the employee to determine the appropriate accommodations, and this interactive process is crucial. Lampley v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Emotional distress damages of $50,000 to compensate employee for her pain and humiliation was appropriate; especially in light of the testimony regarding the physical and emotional symptoms employee suffered as a result of employer's refusal to provide reasonable accommodations (smoke-free work environment) and unlawful termination of her employment when she was recuperating from cardiac surgical procedures, there was no merit in employer's contention that the amount of

the award was punitive. Lampley v. Astral Air Parts, Inc., OAL Dkt. No. CRT 1307-06, 2007 N.J. AGEN LEXIS 857, Final Decision (August 17, 2007).

Employer did not attempt to accommodate driver's disability where record reflected no evidence that employer considered modifying its scheduling procedures to provide driver with assignments or otherwise explored alternative assignments that would address limitations presented by driver's disability (AIDS diagnosis limiting him to part-time work). By conditioning driver's return to work on being able to perform functions his physician had not cleared him to perform, employer denied, or, at best, ignored driver's medical limitations instead of trying to accommodate them. Williams v. State Shuttle/Top Ten Leasing, Inc., OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Employer's assertion that there were no bus driver positions available, plus its failure to inform driver that it considered driver's medical clearance deficient, supported the conclusion that employer did not consider reasonable accommodation before deciding to deny re-employment to driver due to his disability. Williams v. State Shuttle/Top Ten Leasing, Inc., OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Collection of disability compensation by an employee does not necessarily render a disability-based discrimination claim invalid, and the employee must be given the opportunity to explain the inconsistency; driver's application for disability benefits presented no bar to driver's failure to hire/denial of reasonable accommodation claim. Williams v. State Shuttle/Top Ten Leasing, Inc., OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 2006).

Where city employer considered possible accommodations, offered the accommodation of resignation and re-enrollment, and reasonably arrived at the conclusion that employee's injuries precluded job performance as a police officer, dismissal of employee's complaint was appropriate. Employee rejected the accommodation offered by city, and requested a different accommodation—permission to complete the non-physical components of the academy and return to the academy to complete the physical training once her injury healed but reasonable accommodation provisions do not mandate that an employer provide the specific accommodation requested by an employee. Hidalgo v. Camden City Police Dep't, OAL Dkt. No. CRT 02913-01, 2006 N.J. AGEN LEXIS 558, Final Decision (June 5, 2006).

Reasonable accommodation requires the employer and the employee to work together in good faith to assess the employee's abilities and limitations and the range of available accommodations that would not impose an undue burden on the employer's operations. Hidalgo v. Camden City Police Dep't, OAL Dkt. No. CRT 02913-01, 2006 N.J. AGEN LEXIS 558, Final Decision (June 5, 2006).

Dismissal of youth worker for mental incapacity was improper absent attempt to reasonably accommodate. Roberts v. Division of Youth and Family Services, 97 N.J.A.R.2d (CSV) 9.

Employer took reasonable steps to accommodate handicapped computer operator before firing her. O'Hara v. Department of the Treasury, 96 N.J.A.R.2d (CSV) 273.

Alcoholism which initially led to excessive absenteeism did not warrant tenured teacher's removal once she successfully completed school district's rehabilitation program. Jersey City School District v. Howard, 95 N.J.A.R.2d (EDU) 301.

Excessive absenteeism provided sufficient cause for school board to terminate employee from her position as a tenured secretary. Matter of Tenure Hearing of Jones, 95 N.J.A.R.2d (EDU) 285.

Use of illegal amphetamines in breach of drug rehabilitation contract with school board was unbecoming and warranted tenured teacher's dismissal. Matter of Yanniello Tenure Hearing, 95 N.J.A.R.2d (EDU) 262.

Inability to do assigned tasks of engineering technician warranted termination when psychological disability from which employee was suffering could not be accommodated. Sallie v. Department of Transportation, 95 N.J.A.R.2d (CSV) 100.

Board of education reasonably accommodated alcoholic teacher; dismissal. State Operated School District of Jersey City v. Howard. 93 N.J.A.R.2d (EDU) 556.

Turnpike Authority unlawfully discriminated against employee on basis of his handicap. Troxell v. New Jersey Turnpike Authority, 92 N.J.A.R.2d (CRT) 5.

13:13-2.6 Wages and fringe benefits

(a) An employer's wage scale must be unrelated to the disability of its employees, except where permitted by State or Federal law.

(b) Occupational training and retraining programs, including, but not limited to, guidance programs, apprentice training programs and executive training programs, shall not be conducted in such a manner as to discourage or otherwise discriminate against people with disabilities.

(c) It is an unlawful practice for any employer to discriminate against people with disabilities, with regard to fringe benefits provided either directly by an employer or through contracts with insurance carriers. Fringe benefits as used in this section include, but are not limited to, medical, hospital, accident and life insurance, retirement benefits, profit sharing and bonus plans, and leave. This subsection does not, for example, prohibit any employer from providing medical insurance which does not cover the cost of any medical condition arising out of preexisting illnesses, which costs are incurred following an employee's date of hire. Rather, whatever medical insurance is made available to non-disabled employees must be equally available to employees with disabilities.

(d) Regulations promulgated pursuant to the Law Against Discrimination shall supersede any inconsistent term of a collective bargaining agreement.

Amended by R.2000 d.273, effective July 3, 2000.
See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).
In (a), substituted "disability of its employees" for "existence of handicap"; in (b), substituted "people with disabilities" for "persons possessing handicaps"; and in (c), substituted "against people with disabilities" for "between persons who are handicapped and those who are not", substituted a reference to non-disabled employees for a reference to non-handicapped employees, and substituted a reference to employees with disabilities for a reference to handicapped employees.

13:13-2.7 Labor organizations

(a) It is unlawful for any labor organization to exclude or expel any individual from membership or from any apprenticeship program because that individual is a person with a disability.

(b) It is an unlawful employment practice for any labor organization to discriminate on the basis of disability with respect to hiring, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment, representation, grievances or any other matter directly or indirectly related to membership in or employment by such an organization.

(c) It is unlawful for a labor organization to cause or to attempt to cause an employer to discriminate against an individual because that individual is a person with a disability.

(d) It is unlawful to engage in any activity proscribed by (a), (b), or (c) above notwithstanding that activity is authorized or required by the constitution or by-laws of a labor organization or by a collective bargaining agreement or other contract to which the labor organization is a party.

Amended by R.1995 d.243, effective May 15, 1995.
See: 26 N.J.R. 1942(a), 27 N.J.R. 2005(a).
Amended by R.2000 d.273, effective July 3, 2000.
See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).
In (a), substituted "is a person with a disability" for "possesses a handicap" at the end; in (b), substituted "disability with" for "a person's handicap in" following "basis of"; and in (c), substituted "that individual is a person with a disability" for "of a handicap" at the end.

13:13-2.8 Exception

(a) It shall be lawful to take any action otherwise prohibited under this section where it can reasonably be determined that an applicant or employee, as a result of the individual's disability, cannot perform the essential functions of the job even with reasonable accommodation.

1. Refusal to refer, admit to membership, hire, or transfer a person with a disability may be lawful where the nature or extent of the individual's disability reasonably precludes the performance the essential functions of the particular employment. Such a decision, however, must be based upon an objective standard supported by factual evidence rather than on the basis of general assumptions that a particular disability would interfere with the individual's ability to perform the essential functions of the job.

2. Refusal to select a person with a disability may be lawful where it can be demonstrated that the employment of that individual in a particular position would be hazardous to the safety or health of such individual, other employees, clients or customers. Such a decision must be based upon an objective standard supported by factual or scientifically validated evidence, rather than on the basis of general assumptions that a particular disability would create a hazard to the safety or health of such individual, other employees, clients or customers. A "hazard" to the person with a disability is a materially enhanced risk of serious harm.

3. The burden of proof is upon the employer, employment agency or labor organization to demonstrate in each case that the exception relied upon is based upon an objective standard supported by factual evidence, but no exception shall be based on:

i. A refusal to select a person with a disability because of the preferences of co-workers, clients, customers or the employer.

ii. A refusal to select a person with a disability because of the increased cost of insurance whether actual or anticipated, under a group or employee insurance plan provided in accordance with the law or as a fringe benefit.

iii. A refusal to select a person with a disability because of an assumption not supported by factual documented proof that such individual will incur a high rate of absenteeism in the future.

Amended by R.1995 d.243, effective May 15, 1995.
See: 26 N.J.R. 1942(a), 27 N.J.R. 2005(a).
Amended by R.2000 d.273, effective July 3, 2000.
See: 32 N.J.R. 1155(a), 32 N.J.R. 2445(a).
Substituted references to persons with disabilities for references to handicapped individuals throughout.
Amended by R.2006 d.13, effective January 3, 2006.
See: 37 N.J.R. 2607(a), 38 N.J.R. 335(a).
In (a), deleted "presently" throughout; added "essential functions of the" to introductory paragraph (a) and (a)1; in (a)1, also substituted "essential functions" for "duties."

Case Notes

Temporary leave of absence did not have to be granted under New Jersey Law Against Discrimination (NJLAD) to reasonably accommodate handicapped employee's inability to presently perform essential functions of his job. Conoshenti v. Public Service Electric & Gas Company, 364 F.3d 135.

Municipality was not required to provide second opportunity for rehabilitation to firefighter who tested positive for cocaine and whose reinstatement after first testing positive was conditioned upon abstaining from use of drugs. Matter of Jackson, 294 N.J.Super. 233, 683 A.2d 203 (A.D.1996).

Employer may not base his decision to discharge a handicapped employee for safety reasons on subjective evaluations or conclusory medical reports. Greenwood v. State Police Training Center, 127 N.J. 500, 606 A.2d 336 (1992).

Employer does not have good cause to terminate a public employee on basis of a physical limitation unless limitation either prevents employee from adequately performing job or creates substantial risk of serious injury. Greenwood v. State Police Training Center, 127 N.J. 500, 606 A.2d 336 (1992).

Possible consequences of an injury to police trainee who had limited vision in his right eye did not constitute good cause for trainee's dismissal. Greenwood v. State Police Training Center, 127 N.J. 500, 606 A.2d 336 (1992).

Police Training Commission did not have good cause to dismiss trainee who had limited vision in his right eye from police training program. Greenwood v. State Police Training Center, 127 N.J. 500, 606 A.2d 336 (1992).

Alleged different treatment of information regarding condition of surgeon who was patient at his own hospital and was diagnosed as having acquired immunodeficiency syndrome (AIDS) would not support cause of action under the New Jersey law against discrimination. Estate of Behringer v. Medical Center at Princeton, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

In determining whether surgeon with AIDS may legitimately be restricted in his surgical privileges, test to be applied is whether continuation of surgical privileges causes reasonable probability of substantial harm to others, including co-workers and patients. Estate of Behringer v. Medical Center at Princeton, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

Where physician is being treated at his own hospital, it is imperative that hospital take reasonable steps to insure confidentiality not only of human immunodeficiency virus (HIV) test result, but also of disease diagnosis which is conclusive of acquired immunodeficiency syndrome (AIDS). Estate of Behringer v. Medical Center at Princeton, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

In context of informed consent, risk of surgical accident involving AIDS-positive surgeon would be legitimate concern to surgical patient, warranting disclosure of risk. Estate of Behringer v. Medical Center at Princeton, 249 N.J.Super. 597, 592 A.2d 1251 (L.1991).

In deciding whether nature and extent of employee's handicap reasonably precludes job performance, employer may consider whether handicapped person can do his or her work without posing serious threat of injury to health and safety of himself or herself or other employees. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 541 A.2d 682 (1988), on remand.

To invoke safety defense as justification for otherwise unlawful handicap discrimination employer must reasonably conclude that employee's handicap poses materially enhanced risk of serious injury. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 541 A.2d 682 (1988), on remand.

Employer's decision not to employ handicapped person must be justified by a "probability" rather than a "possibility" of injury to handicapped person or others. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 541 A.2d 682 (1988), on remand.

Opinion by employer's medical experts that epileptic employee employed as meatcutter would probably suffer another seizure at work did not support conclusion that such a seizure would probably result in harm to employee or others. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 541 A.2d 682 (1988), on remand.

Epileptic supermarket employee was reasonably precluded from performance of duties of meat cutter; decision of employer to terminate employee was reasonably arrived at and sufficiently supported by