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EMPLOYMENT LAW

Employer Not Required to Provide ADA Accommodation of Choice to Employee

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Special to the Legal

While the Americans with Disabilities Act requires that an employer provide a disabled employee a “reasonable accommodation,” it is important to keep in mind that an accommodation need only be “reasonable”—and need not be the one preferred by the employee in question. This is the principal message of the recent decision in *Keyhani v. The Trustees of the University of Pennsylvania*, No. 17-3092 (E.D. Pa., June 21, 2019).

PROJECT MANAGER INJURED AT WORK

Tanya Keyhani is a project manager in the University of Pennsylvania’s Design and Construction Department of Facilities and Real Estate Services. In this role, Keyhani serves as, essentially, a general contractor for building projects at Penn. This required, in part, inspecting project construction sites and participating in various staff and project meetings, according to the opinion.

In early December 2015, Keyhani tripped on a sidewalk at work and fell to the ground. After a short



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absence from work, she was cleared to return without limitations. In early January, however, Keyhani reported concussion-like symptoms

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and received the first of a succession of physician notes recommending that she could work two to three days per week at Penn and could work the remaining days

from home. While Keyhani worked this schedule for a couple of weeks while awaiting final approval from Penn, she was eventually informed that, while she could limit her work week to three days per week, she would not be permitted to work from home on those days when she was not physically at work. Penn contemporaneously provided Keyhani with Family and Medical Leave Act forms and explained that any FMLA leave “would need to run concurrent with any workers’ compensation [for which she had applied].” Keyhani was also told that “she would need to exhaust all available paid time off and sick leave prior to taking unpaid FMLA leave.”

Over the next six months, Keyhani received a succession of notes that permitted her to work at Penn three days per week, while working from home the other two days per week. Penn maintained its position that Keyhani would not be permitted to work from home—although she was permitted to wear sunglasses and noise-cancelling headphones while at work. Her FMLA leave was approved and Keyhani used her allotted sick leave, paid time off and, ultimately, FMLA unpaid

leave to cover the two days off per week.

PART-TIME WORK NO LONGER FEASIBLE

After 10 months of this arrangement, Penn advised Keyhani that it could no longer permit her to work this reduced schedule. That same day, Keyhani provided a note that she was capable of working five days per week for six hours per day—which Penn accommodated. Ten months later, in August 2017, Keyhani returned to a full-time schedule, with only the headphones and sunglasses as accommodations.

Keyhani filed suit, attempting to state various claims based primarily upon Penn's refusal to allow her to work two days per week as prescribed by her physicians. Following the close of discovery, Penn moved for summary judgment on all claims.

The court began its discussion by noting that “the law is clear that plaintiff was entitled to reasonable accommodations, but not the accommodation of her choice.” It is upon this foundation that the entire decision is built.

NO ADVERSE EMPLOYMENT ACTION

The court initially found that in order to establish a *prima facie* case of disability discrimination, an employee must show, in part, that “she has suffered an adverse employment decision because of discrimination.” In this circumstance, where the alleged adverse employment action is the failure to accommodate a disability, Keyhani was required to establish both that Penn “did not make a good faith effort to assist her in seeking accommodations; and that she could have been

reasonably accommodated but for Penn's lack of good faith.” (Citing the seminal decision of *Taylor v. Phoenixville School District*, 174 F.3d 296, 319-20 (3d Cir. 1999).) The court found that Penn engaged in a good-faith and reasonable attempt to accommodate Keyhani by providing her “all recommended accommodations except for working from home two days per week.” Under these circumstances, the court found that “a reduced work schedule ... is a reasonable accommodation.” In this light, the court found that “no rational jury could conclude that, by providing the accommodations suggested by [Keyhani's] physicians, which allowed her to eventually return to full-time work, [Penn] did not act reasonably.” As such, the court rejected Keyhani's claim based upon Penn's alleged failure to provide a reasonable accommodation, finding that she failed to establish an “adverse employment action.”

RETALIATION CLAIMS ALSO FAIL

The court also rejected Keyhani's allegations that Penn retaliated against her under the ADA, Pennsylvania Human Relations Act, FMLA and Pennsylvania's Workers' Compensation Act, by (a) refusing to provide her preferred accommodation—working from home two days per week—and (b) requiring her to exhaust her paid time off and sick leave before allowing her to use unpaid FMLA leave. The court found that because Penn's refusal to permit her to work from home two days per week was not an “adverse employment action,” Keyhani could not state a viable retaliation claim. As for the requirement that Keyhani exhaust her paid time off and sick

leave before being permitted to use her unpaid FMLA leave, the court found that this sequence is “contemplated under the regulations and is considered a reasonable accommodation under the law.”

Finally, while Keyhani claimed to have suffered various slights in the workplace following her injury and accommodation request, including having been yelled at on a single occasion and being removed from several projects, the court found that these actions “are not adverse since they did not affect plaintiff's compensation or the terms and conditions of her employment.”

Accommodation issues are among the most difficult faced by both employers and their counsel. This is particularly the case where the accommodation request includes working from home, which has become increasingly both possible and utilized for nondisabled employees. There remain, of course, many jobs that require attendance in the workplace and, when an employee is unable to fulfill that obligation, the refusal to permit an employee to work from home will be permissible under the various applicable anti-discrimination laws. •