

EMPLOYER VICTORIOUS IN RECENT FOURTH CIRCUIT ADA SUIT

Employers gained a victory in a recent decision from the Fourth Circuit Court of Appeals, *Shin v. University of Maryland Medical System Corporation*, Case No. 09-1126, 2010 WL 850176 (March 11, 2010). The case involved an employee's claims of discriminatory discharge and failure to provide reasonable accommodation under the Americans with Disabilities Act (ADA). The Court determined that both claims failed, as the employee was unable to perform the essential functions of his job with or without reasonable accommodation, and affirmed the lower court's grant of summary judgment to the employer.

The *Shin* Decision

Dr. Frank Shin was a medical intern at the University of Maryland Medical System Corporation (UMMSC) who had graduated from the Boston University School of Medicine. Although Shin's academic record seemed to establish his future success as an intern, his job performance soon proved otherwise. He ordered IVs for the wrong patients, once prescribed 10 times the appropriate amount of medication to a patient, misdiagnosed patients and erroneously identified one patient as deceased.

UMMSC engaged in extensive counseling with Shin in an attempt to assist him in improving his performance, and routinely documented his performance deficiencies in written reviews. UMMSC increased Shin's supervision, reduced his job requirements and assigned other faculty members and residents to assist him with his duties. It even created a group of residents overseen by a physician called the "Friends of Frank" in order to help Shin with his time management and performance issues.

Despite these generous accommodations, Shin's performance did not improve. As the result of a joint decision between Shin and UMMSC, he sought evaluation by a number of mental health professionals regarding the issues he was having. He was ultimately diagnosed with Attention Deficit Disorder, a working memory below expected levels and significant impairment in visual-spatial reasoning and visual memory. He was provided medication and directed to seek behavioral coaching, as well as the aid of a rehabilitation specialist. Even with medication, however, Shin showed no improvement. Ultimately, he was terminated by UMMSC after his physician determined he had reached maximum medical improvement and was unfit to return to work as a medical intern.

Shin filed a charge against UMMSC with the Equal Employment Opportunity Commission and ultimately filed suit against his former employer alleging discriminatory discharge and failure to provide him reasonable accommodation under the Americans with Disabilities Act. The ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the disability. Additionally, it provides a cause of action against employers who fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.

Prior to being terminated, Shin had requested that UMMSC accommodate him by assigning him fewer patients; providing him additional time to record and synthesize verbal information from UMMSC's night flow team; and providing a "more compassionate environment." UMMSC rejected the proposed accommodations, noting that Shin would not meet the requirements of the residency program if his patient load were further reduced. UMMSC also determined that providing Shin more time to synthesize information would not adequately train him with necessary physician skills. UMMSC also pointed out, with regard to Shin's request for a more compassionate environment, that many of his colleagues and coworkers had already come to his aid.

The Fourth Circuit sided with the employer. The Court noted that, for Shin's wrongful termination and accommodation claims, he was required to establish that he was a qualified individual with a disability under the ADA. In order to do so, Shin had to first prove that he was disabled or regarded as disabled and that he could, with or without reasonable accommodation, perform the essential functions of his job. Although the Court questioned whether Shin was in fact disabled or regarded as disabled by UMMSC, it based its rejection of this claim on his failure to successfully establish that he could perform the job's essential functions. This was, in large part, because of the thorough record of his poor performance created and maintained by UMMSC through its performance evaluations.

The Court also rejected Shin's argument that UMMSC failed to provide him with a reasonable accommodation that would have permitted him to perform the essential functions of his job, stating that Shin's request for a lighter patient load was unreasonable because the ADA does not require an employer to assign an employee to permanent light duty. Further, Shin did not provide any evidence that light duty was even an option for residents at UMMSC. Therefore, the Fourth Circuit determined that the lower court's grant of summary judgment in favor of the employer was appropriate.

Practical Effect of the *Shin* Decision for Employers

As many employers are by now well aware, the ADA Amendments Act (ADAAA) took effect in January 2009. Among other things, the ADAAA expands the ADA's definition of "disability" to make the term more expansive and prohibits employers from considering "mitigating measures" such as medication when evaluating whether an individual is disabled under the ADA. The ADAAA also effectively expands the list of activities and functions encompassed by the ADA's term "major life activity." To qualify as disabled under the ADA, an individual must show that an impairment substantially limits a major life activity.

Because the appeal in *Shin* was filed before the ADAAA's changes to the ADA took effect, the Fourth Circuit expressly declined to apply the ADAAA's provisions retroactively in reaching its decision. Nevertheless, the outcome of the case arguably would not have differed substantially had the Court done so. Although Shin may have established more easily that he was disabled or that his employer regarded him as disabled under the ADA, he would still carry the burden of establishing that he could perform the essential functions of his physician position with or without reasonable accommodation.

Because of the employer's thorough and consistent documentation of Shin's performance issues, as well as documentation of its many efforts to assist and coach him with these problems, UMMSC was able to present the Court with necessary evidence to decide in its favor. The Court reiterated that employers are not required to reallocate job duties in order to change the essential functions of a job or to require its other employees

to work harder or longer hours as reasonable accommodations to a disabled individual under the ADA. The value of documenting employee performance issues and what constitutes a reasonable accommodation under the ADA are aspects of the *Shin* decision that will likely remain key considerations in future court decisions, despite future application of the broad provisions of the ADAAA.

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