



No Longer in the Dark: Ninth Circuit Sheds Light on Employers' Duty to Accommodate

By Jennifer A Parda

The ADA imposes a continuing duty upon employers to reasonably accommodate employees for ADA-recognized disabilities, which may leave employers wondering: For how long does this continuing duty extend? In addressing this question in *Dark v. Curry County*, 451 F.3d 1078 (2006), the Ninth Circuit Court of Appeals highlights and expands upon the "continuing" duty to accommodate, suggesting that only a jury can say when the duty has been met. The *Dark* opinion also holds that misconduct resulting from an employee's disability is likely to be considered a *part* of that disability under the ADA. As a result, the *Dark* opinion serves as a reminder that employers must act cautiously and consistently when disciplining disabled employees.

What happened. In *Dark*, the employee had suffered from epileptic seizures since he was 16 years old. The employer offered him a maintenance position that required him to operate heavy equipment, including driving trucks. After performing his job without incident for 16 years, the employee suffered a seizure while driving an employer-owned truck. Earlier that same day, he had suffered an "aura," a physical reaction akin to a nervous jerk, which signals the potential for a seizure within a short period of time-usually within one hour. After he recovered from the seizure, the employer required the employee to undergo a medical examination. Based on the examination results, the physician concluded that: (1) the employee could not perform the essential functions of his job because he could not remain "seizure free" while operating the employer-owned road equipment; and (2) the employee's condition imposed a threat to his co-workers and to the general public.

The employer terminated the employee and cited these reasons in its termination letter to him. The employee filed an administrative appeal to the county's board of commissioners. The employer responded that it had terminated the employee for *misconduct*, namely, because he had knowingly put himself, his co-workers and the general public at risk by driving when he knew his aura signaled the likelihood of a seizure. The board upheld the termination on these grounds. After filing an unsuccessful claim with the Equal Employment Opportunity Commission ("EEOC"), the employee filed a lawsuit in federal court claiming that the employer had violated the ADA by refusing to reasonably accommodate his disability and by terminating his employment. The district court granted summary judgment for the employer and the employee appealed.

On appeal, the Ninth Circuit found that the employer had given contradictory answers for terminating the employee, which it said created an issue of fact for trial. According to the Court, the second reason given for termination - misconduct - "cannot wipe away the original discriminatory justification for an employee's termination." The Court also found that, even if it were to accept the employer's story, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. In other words, the employee's failure to stop driving after suffering from his aura was part of his disability, according to the Court, and not an instance of misconduct justifying termination.

The Court also reversed the district court's grant of summary judgment on the plaintiff's failure to accommodate claim after considering whether the employer could have reasonably reassigned the employee to a position that did not require him to operate heavy machinery. The Court rejected the employer's argument that no vacant positions were available *at the time of the termination*. Instead, it relied on evidence suggesting that the employer had failed to offer the employee one of these positions when it became available *after* his termination. In so finding, the Court reiterated that "the duty to accommodate is a continuing duty that is not exhausted by one effort." The Court then announced a new rule for employers evaluating a request for reasonable accommodation: "[I]n considering reassignment as a reasonable accommodation, an employer must consider not only those contemporaneously available positions but also those that will become available within a reasonable period." Although the Court did not define "a reasonable period," it indirectly suggested that two years was not unreasonable.

What it means to employers. *Dark* is significant for several reasons. It highlights the importance for employers to exercise caution when determining whether a disabled employee's questionable conduct is part of a disability rather than merely an instance of potential misconduct. It also is a strong reminder that employers who change or finesse justifications for personnel actions increase their exposure to potential discrimination actions. As a result of the new rule announced in *Dark*, and consistent with an employer's obligation under the Washington Law Against Discrimination, employers now must continually re-evaluate requests for accommodation *even after the end of the employment relationship*. Finally, *Dark* seems to signal that courts will likely allow a jury to decide whether an employer reasonably accommodated an individual with a disability under the ADA, making summary judgments a rarity.

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