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Jury awards $24M to employee who made 'difficult decision'

Response to mental health issue found discriminatory

■ **Kris Olsen**

A federal jury's award of more than $24 million to a company executive who made the "difficult decision" to tell her employer about her mental health disability offers a stark reminder how employers should — and should not — respond to such disclosures, attorneys say.

The plaintiff had been told in late 2017 that her role was about to become more visible. She would be visiting with clients more, making additional presentations, and otherwise interacting socially more often.

The prospect of those increased social interactions triggered her anxiety disorder, which caused her distress that manifested in physical symptoms.

When she notified her employer about her disability, the company embarked on the type of "interactive process" the Americans with Disabilities Act requires, U.S. District Court Judge Leo T. Sorokin found in a decision on the defendant's motion for summary judgment on March 22, 2022.

But Sorokin allowed the case to proceed on the theory that the defendant had otherwise failed to reasonably accommodate her disability, noting that a jury would need to resolve whether the plaintiff could perform the essential functions of her job with accommodations.

Sorokin determined that a reasonable jury could find that the plaintiff suffered a materially adverse employment action when her employer responded to the disclosure of her disability with an email containing five categories of expectations incorporating increased public speaking and client interactions.

A reasonable jury could also find that the plaintiff had been subjected to retaliation when the defendant tried to coerce her to quit, excluded her from hiring and recruiting decisions, and conducted a "sham" investigation into her HR complaint, as the plaintiff had alleged, and then offered pretextual reasons for their actions, the judge added.

The jury in *Menninger v. PPD Development, L.P.* recently rendered just such a verdict, finding that the defendant had unlawfully discriminated against the plaintiff by failing to provide her with a reasonable accommodation, discriminated against her by taking an adverse employment action against her, and unlawfully retaliated against her under both federal and state law.

'RECIPE FOR DISASTER'

The plaintiff's attorney, Patrick J. Hannon of Boston, noted that mental health disabilities can be particularly challenging for employees due to the stigma that remains around mental health.

Patrick J. Hannon

"It's the kind of disability that can prompt a lot of fear both on the part of the individual trying to make the disclosure and sometimes also on the part of the employer who's faced with dealing with that disclosure," he said.

The baseline understanding and personal prejudices jurors might have about mental disabilities is also a concern, Hannon said.

"One of the first things that I told the jury in this trial was that this was a case about fear," he said.

A spokesperson for the defendant said the company strongly disagreed with the verdict and planned to appeal.

"We remain committed to creating a work environment with a diverse range of perspectives, backgrounds, experiences and viewpoints

to enhance the colleague experience and positively impact the [c]ompany's long-term success," the emailed statement concluded.

If there is a lesson for employers in the wake of the verdict, Hannon suggested it is that they need to realize they have to get beyond their own prejudices, fears and ignorance of mental health issues in order to comply with the law.

"If someone raises their hand and they say they have a disability and you don't understand that disability, you should educate yourself on what that disability is. You shouldn't simply make assumptions about what the person can or can't do," he said.

Management-side employment attorney Michelle M. De Oliveira of Southborough agreed.

"Employers cannot play doctor and should refrain, at all costs, from taking employment actions that derive from the employer's preconceived beliefs about a disability," she said.

Michelle M De Oliveira

She said *Menninger* offers a reminder that an employer is heading down a risky path if its proposed accommodations do not include allowing an employee to remain in her position. In this case, "it was a recipe for disaster," she said.

De Oliveira said she always tells her clients to refrain from changing the way they treat an employee once that person discloses a disability.

"The rule of thumb is: Keep things business as usual, although employees can still be held to the same performance standards," she said.

When conducting management training, De Oliveira said she reminds her clients that employees are watching and are paying attention to whether how they are treated changes after they disclose a disability.

"When there are palpable differences in treatment, it creates ammunition for employment-related claims," she said.

Plaintiff-side employment attorney Gavriela M. Bogin-Farber of Boston said the *Menninger* case should also serve as a reminder to employers that they do not get to decide unilaterally what an employee's essential functions are as they are discussing accommodations.

Mark C. Preiss, a management-side attorney, said the verdict highlights the need for employers to be precise and detailed when defining a position's "essential functions."

"The days of the broad job description are long gone," the Boston lawyer said.

The verdict also shows that, as part of the interactive process the ADA requires, employers are generally well served by bringing an open mind to their employee's suggested accommodations, Priess added.

"They have 50 percent of the knowledge," he said.

For Boston employee-side attorney David I. Brody, the *Menninger* verdict indicates the value of engaging legal counsel as soon as possible. By doing so, the plaintiff developed a powerful record to present to the jury, he said.

For example, he said, the plaintiff did not merely express her discomfort at performing certain tasks but provided support for her claim, requested specific accommodations, and then continued to engage in the dialogue constructively.

Absent counsel, "that is not easy for the average person to do, even a senior executive," Brody said.

UNPRODUCTIVE DIALOGUE

On Aug. 31, 2015, PPD Development hired Dr. Lisa Menninger as the executive director of its Kentucky-based Global Central Labs. Her job description specified the "essential functions" of her role, including operational leadership of its laboratory services and support of its business development efforts.

In her first review in 2016, her supervisor, Hacene Mekerri, rated her performance "highly effective."

After she began to work remotely from the East Coast due to family circumstances, Menninger told Mekerri in November 2017 that she was "overwhelmed." Around the same time, Me-

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– Michelle M. De Oliveira, Southborough

kerri began fielding some mixed reviews about Menninger's performance.

Mekerri met with Menninger on Dec. 20, 2017, to discuss the feedback on her performance. Mekerri also noted that Menninger's role would soon become more visible, involving increased client visits, social interactions and presentations to boost the company's bottom line.

In 2017, Mekerri lowered Menninger's performance rating to "fully effective."

According to Menninger, the prospect that she would be more visible caused her great distress, resulting in "increased anxiety with somatic symptoms, including diarrhea, heart racing, sweatiness, and increased respiratory rate."

On Jan. 11, 2018, she disclosed for the first time that she suffered from "generalized anxiety disorder," which included social anxiety disorder and panic attacks.

At the end of the month, Menninger submitted an accommodation form to the company's HR department along with a form from her psychiatrist. The psychiatrist noted that changes to her role would increase her anxiety and make it "substantially more difficult, if not impossible," for her to perform her job.

Menninger then asked Mekerri to provide additional detail on her expanded role. On Feb. 6, 2018, Mekerri responded, grouping the expectations into five categories. Going forward, Menninger would be expected to do things like make presentations to the senior leadership team and at employee "town halls," attend in-person client meetings, make internal and external technical sales presentations, dine and otherwise interact socially with clients, and travel.

On Feb. 14, Menninger's psychiatrist sent the HR department her specific accommodation requests in response to Mekerri's email, which tracked Mekerri's five categories. Suggested accommodations included pre-recording some of her presentations and having a "surrogate" perform some of the duties, while Menninger would make herself available to respond to questions.

The PPD HR department emailed Menninger to tell her that it would provide accommodations for two of the five categories but could not grant the proposed accommodations for three of the categories because they involved functions PPD considered central to Menninger's role and its needs.

At a meeting on Feb. 28, the HR official discussed the possibility of Menninger taking an exit package or transitioning to a consultant role.

Menninger responded that she was not interested in those options and asked for "additional detail" regarding the categories for which PPD had rejected the proposed accommodations.

PPD responded by referring Menninger to her job description and stating that it did not believe her accommodations requests were reasonable.

Menninger then suggested they could "table this discussion until a particular task arises" implicating her disability, as there seemed to be no such events or activities on the horizon.

On April 17, Menninger reported to HR that she felt Mekerri was starting to target her because of her disability. PPD performed an investigation, which concluded that Mekerri was not targeting Menninger.

On June 2, Menninger informed PPD that her doctor advised her to take medical leave immediately. She remained on medical leave for the next eight months, six of which were paid. On Feb. 1, 2019, PPD terminated Menninger's employment.

Menninger filed her complaint alleging knowing and intentional violations of state and federal anti-discrimination laws on June 28, 2019.

After a two-week trial, the jury reached its verdict on March 31, awarding Menninger $1.565 million in back pay, $5.465 million in "front pay," $5 million for past emotional distress, $2 million for future emotional distress, and $10 million in punitive damages.

FEARS OF STINGY JURIES ALLAYED

Both Bogin-Farber and Brody said a theory that had been making the rounds in employment circles is that juries were less inclined to give big awards after the COVID-19 pandemic, given that job losses had become far more routine.

But *Menninger* now stands as another example that that is not happening.

Brody said he has heard of about a half-dozen post-COVID verdicts of more than $1 million.

"We are seeing juries step up and be generous and make a statement that employers cannot get away with bad behavior," Bogin-Farber agreed.

To the extent that the defendant in *Menninger* seeks remittitur, its task may be made tougher by the fact that the punitive damages the jury awarded are not disproportionate to the compensatory damages, Bogin-Farber noted.