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WHEN ONE PERSON'S SCENT IS ANOTHER PERSON'S DISABILITY

By Amber Shubin

A California jury recently awarded a $3.3 million verdict to a California Department of Transportation ("CALTRANS") employee who alleged a variety of disability-related claims involving CALTRANS's failure to properly accommodate his allergy to certain scents and his supervisor's and co-workers' retaliatory actions in light of his requests for accommodation. The basis of the award was failure to accommodate the plaintiff's disability – his allergic reaction to certain scents – and retaliation under the Americans with Disabilities Act ("ADA") and a similar state law. While it may be easy to dismiss such claims as insignificant or overwrought, the jury awards and settlements described below make clear that these claims can be serious and must be addressed.

THE LAWSUIT … AND OTHERS

According to his Complaint, plaintiff John Barrie began working for CALTRANS in Nevada City, California, in August 2005. Upon starting with CALTRANS, he informed his supervisor about and supplied medical records documenting a condition from which he suffered, allergic rhinitis. For the first five years

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of Barrie's employment, CALTRANS informally accommodated Barrie's condition, even placing him in charge of ordering cleaning agents for use by the department's custodians. Barrie claimed that things changed when Donna Jones became his supervisor in March 2010. Jones "demonstrated a blatant disregard for [Barrie's] disability, denigrated his sensitivity to chemicals, and repeatedly failed to enforce the policy regarding use of non-reactive cleaning agents" that Barrie's former supervisor had put in place. (Complaint, ¶ 10.)

To make matters worse, Jones told Barrie he was not permitted to file official injury reports or official complaints. He eventually complained to his District Manager, who instructed Barrie to apply for a "reasonable accommodation." He did so, and his accommodation was documented in his personnel file in February 2011. According to Barrie, however, CALTRANS continued to permit him to be exposed to allergy-triggering chemicals and scents. When he continued to complain, he was transferred to a new – and newly painted – location, which caused a major reaction that led to a Workers' Compensation claim. Upon his return, Barrie was ordered to return to a new location. Further complaints led to him losing certain job duties and the associated loss of overtime income. While he was eventually moved to another location, his new workspace was located in the lobby of his workplace and brought with it a hostile coworker, who would complain to Barrie about how he had turned "the whole office upside down." (Complaint, ¶ 31.) The co-worker called Barrie names and allegedly doused his work space in perfume. Barrie continued to file complaints and also requested several transfers, all of which were denied. All of these occurrences eventually led him to file suit in March 2013 resulting in the multi-million dollar verdict earlier this month.

Many employers reading Barrie's story likely think this scenario could not happen at their workplace. But Barrie's story, and even the large verdict he was awarded, is not an anomaly. In May 2005, a jury awarded a deejay who complained about her employer's failure to accommodate her allergy to a co-worker's perfume an award of $10.6 million. (*See Weber v. Infinity Broad. Corp.*, No. 02-74602, 2005 WL 3726303 (E.D. Mich. Dec. 14, 2005).) The award was eventually reduced to $1.25 million, along with attorneys' fees of approximately $424,000 – while much less than the original verdict, still not a negligible amount. In 2010, the City of Detroit agreed to pay a city employee who had complained of fragrance sensitivity but not received accommodation or assistance $100,000 to settle a lawsuit that survived both a motion to dismiss and summary judgment. The City also agreed to enact several new policies surrounding workplace scents and institute a new training program. (*See* http://www.onpointnews.com/docs/mcbride_settlement.pdf.) And in 2012 a county worker in Ohio survived a renewed motion for judgment on the pleadings on her claim that her co-worker's Japanese Cherry Blossom perfume would trigger an allergic reaction and cause her to have breathing difficulties. (*See Core v. Champaign Cty. Bd. of Cty. Comm'rs*, No. 3:11-CV-166, 2012 WL 3073418 (S.D. Ohio July 30, 2012).) While the case was eventually dismissed on summary judgment, that happened only after several additional months of litigation, including full discovery.

WHAT EMPLOYERS SHOULD DO

So what can an employer do to avoid costly settlements and jury verdicts if approached by an employee complaining of scent sensitivities? First and foremost is to understand that scent and chemical sensitivities can indeed be considered a disability subject to the protections of the ADA, a point aptly demonstrated by the cases discussed above. Under the ADA, a disability is having "a physical or mental impairment that substantially limits one or more major life activities." (42 U.S.C.A. § 12102(1)(A) (West).) Major life activities include, among other things, breathing, concentrating, thinking, and working. (*Id.* at § 12102(2)(A).) All of these activities are ones that could be impacted by a severe allergic reaction.

Second, employers need to understand their obligations under the ADA to (1) engage in the interactive process; and (2) provide *reasonable* accommodations. Under the Code of Federal Regulations, employers may need to "initiate an informal, interactive process with the individual with a disability in need of the accommodation." (29 C.F.R. § 1630.2(o)(3).) Unless the employer can demonstrate an undue hardship, the employer "is required" to provide a reasonable accommodation to an employee with a physical or mental impairment "that substantially limits one or more of the major life activities" of the employee. (*Id.* at § 1630.2(o)(4); § 1630.2(g)(1)(i).) Whether an accommodation constitutes an undue hardship generally means that the employer will experience "significant difficulty and expense" in making the accommodation. (*Id.* at § 1630.2(p)(1).) But the accommodation must also be reasonable, meaning it must have as its goal allowing the employee to perform the essential duties of his or her job. The Second Circuit has observed that "reasonable accommodation may include, [among other things], modification of job duties and schedules, alteration of the facilities in which a job is performed, acquisition of devices to assist the performance of job duties, and, under certain circumstances, reassignment to a vacant position." (*McBride v. BIC Consumer Prod. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009).) Employers are also not required to give the employee the accommodation he or she requests; the employer must simply provide "an accommodation that effectively accommodates

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the disabled employee's limitations." (*E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 802 (7th Cir. 2005) *citing U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).)

In cases dealing with complaints about scents, this reasonableness consideration has generally been interpreted not to require employers to institute a total ban on fragrances in the workplace. According to the government organization Job Accommodation Network ("JAN"), there is inherent difficulty in enforcing a total ban, especially when there is public access to the workplace. (*See* http://askjan.org/media/downloads/FragranceA&CSeries.doc.) There can also be a concern about infringing too much on the rights of other employees. What *has* been considered reasonable is instituting voluntary fragrance-free workplace policies and providing education to employees about allergies to scents or other chemicals, as was required in the *McBride v. City of Detroit* settlement. It can be reasonable to ban chemicals that a workplace has more control over, such as scented cleaning products. (*Id.*)

Other examples of a reasonable accommodation can include relocating either the complaining employee or the employee wearing the offending scent or allowing the complaining employee to work from home (if his or her position and the company in general makes such an accommodation reasonable rather than burdensome). If the former option is taken, the employer should be careful not to relocate either employee in a way that can seem like punishment or retaliation for the scent sensitivity.

The employer should be careful not to take actions that would negatively impact the sensitive employee's job responsibilities (unless removal of those responsibilities is necessary to the accommodation) or his or her income potential. Very importantly, if an employee has requested and been granted a reasonable accommodation, the employer should ensure that that accommodation is followed and respected by the employee's supervisor(s) and co-workers. This again might call for the type of education already mentioned. People often dismiss or mock what they do not understand, so providing that understanding can go a long way to helping people understand why it would be beneficial for them to be scent-free in the workplace. Other options suggested by JAN include allowing for fresh air breaks or providing an air purification system designed to address the irritant at issue. (*See* https://askjan.org/media/fragrance.html.)

CONCLUSION

Scents are likely to continue to be an issue for employers. In order to avoid being on the wrong end of a multi-million dollar verdict, employers should familiarize themselves with the requirements for scents-related disabilities and how to deal with them.

Amber Shubin is an associate in our Northern Virginia office and can be reached at (703) 760-7772 or ashubin@mofo.com.

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