

## **First Circuit Affirms Large Jury Award to Employee Denied Accommodation for His Disability**

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A recent decision of the Court of Appeals for the First Circuit highlights that employers must carefully consider a disabled employee's request for an accommodation under the Americans with Disabilities Act and Chapter 151B, the Massachusetts anti-discrimination statute. In *Tobin v. Liberty Mutual Insurance Company*, the First Circuit upheld a verdict of \$1.3 million for plaintiff Kevin Tobin, who claimed that Liberty Mutual had failed to accommodate his disability.

Tobin was an insurance sales representative who suffered from bipolar disorder. As a result of his condition, he was consistently deficient in meeting sales quotas. Tobin requested as a reasonable accommodation that he be assigned lucrative "Mass Market" accounts. Liberty Mutual denied that request because its policy was to award those accounts on the basis of merit and Tobin's poor sales performance rendered him ineligible. Ultimately Tobin was terminated for his poor sales performance.

Tobin sued Liberty Mutual, claiming that it failed to provide him with a reasonable accommodation to help him meet his sales quotas. In 2005, the district court granted summary judgment to Liberty Mutual on the grounds that assigning Mass Marketing accounts to Tobin would have altered the nature of his job. However, the First Circuit reversed that decision, holding that it was up to a jury to decide whether Tobin would have been able to perform the essential functions of the job if he had been provided the requested accommodation. In a stunning reversal of fortune, a jury ultimately found that Tobin's requested accommodation was reasonable and awarded him more than \$1.3 million in damages.

On appeal, the First Circuit acknowledged that the evidence in support of the jury verdict was "thin" on some essential points, but it ultimately affirmed the decision. First, Liberty Mutual argued that the entire claim was untimely because Tobin first requested the accommodation in 1997, long before he brought suit. However, the Court explained that Tobin had repeated his request for Mass Marketing accounts thereafter and held that each denial by Liberty Mutual was a discrete act of discrimination which restarted the statute of limitations. While characterizing the evidence as weak, the Court nonetheless concluded that the jury was permitted to find that the claim was timely.

Second, Liberty Mutual argued that the requested accommodation was unreasonable because its policy was to award Mass Marketing accounts on the basis of merit. The Court of Appeals quickly rejected this argument. It held that an employer cannot reject an accommodation because a disabled employee failed to meet the standard eligibility requirements, especially where granting the accommodation would not displace employees with superior rights. In addition, Tobin had presented evidence that the assignment of Mass Marketing accounts was discretionary and that they were sometimes given to new representatives to jump-start their business.

Liberty Mutual also argued that Tobin's disability would have prevented him from handling Mass Marketing accounts because they were demanding and fast-paced. While acknowledging that this might have been a valid reason for denying the request, the Court concluded that those concerns played virtually no role in the decision to deny the accommodation. Liberty Mutual had relied on its policy of assigning accounts on the basis of merit, not any concern about Tobin's capabilities.

With respect to damages, the jury found that, while Tobin could have performed his job with a reasonable accommodation, Liberty Mutual's final denial of his request exacerbated Tobin's condition and caused him to become completely disabled. Therefore, it awarded him front and back pay to cover the period between his termination and the date of his anticipated retirement. While noting that there were other stressors in Tobin's life which might have contributed to his total disability, the Court of Appeals nonetheless found that the jury was permitted to award damages through Tobin's expected date of retirement.

The one bright spot for employers is that the First Circuit rejected Tobin's cross-appeal that he should have been awarded punitive

damages. The Court explained that the reasonableness of the requested accommodation was a close question. The Court found that Liberty Mutual had not acted intentionally or with reckless indifference to the law when it denied the request.

While many employers routinely deny requests for accommodation that are not consistent with a customary policy or practice, *Tobin* illustrates that more thought should be given to those requests. Employers must consider whether they have made exceptions to the policy or practice in the past and, if so, be able to distinguish those exceptions. Further, employers must determine whether the employee would be able to perform the functions of the job with the requested accommodation. *Tobin* demonstrates that these issues must be addressed at the time the request for an accommodation is made, not after the initiation of litigation. Finally, the \$1.3 million verdict in *Tobin* is reminder that, even in the absence of punitive damages, the stakes in a weak case can be high if the case goes to the jury.

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