The Interactive Process Under The ADA – Are You Engaging In It?

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We've been seeing a lot of cases lately where employers are finding it difficult to dispose of ADA claims before trial. It's not what it used to be where you could often show an employee was not disabled under the ADA and likely prevail on summary judgment. With the broader scope (or interpretation of) a disability under the ADA, employers often find themselves arguing over whether an employee with a disability is qualified for a position, or whether an accommodation is truly reasonable. An employer's obligation to engage in the interactive process has not changed, but it sure seems more and more courts are finding the efforts made by an employer to be simply inadequate – or, at a minimum, creating an issue of fact as to whether the employer's efforts to engage in the interactive process were adequate. For instance, last Friday, a district court in Texas (*Cook v. Morgan Stanley Smith Barney*, S.D. Texas, Aug. 15, 2014) held that a jury would need to decide whether Morgan Stanley failed to reasonably accommodate an employee's disability. The court found that the parties told conflicting stories of what occurred during the interactive process and thus a jury would have to decide if the employer acted in good faith and who was responsible for the breakdown of the process. It's unclear whether in this case that conflict could have been avoided through better documentation by the employer, but as a general matter that is the case. In another recent case, *Baxter v. Spring Valley Hospital and Medical Center* (D. Nev. Aug. 13, 2014), a court held that a jury would need to decide who was responsible for the breakdown in the interactive process. There, an employee was granted a 12 weeks of leave for her major depressive disorder and PTSD. The employer informed the employee of her return to work date before she left, but during the actual leave the employer discovered it had miscalculated the 12 week period and the employee's leave would end 9 days earlier than she had been told. The employer traded voice mail messages with the employee and sent the employee a letter, and when the employee did not return on the correct return to work date (and instead returned on the previously provided return to work date) the employer terminated her. The employee claimed she never got the employer's letter and the employer had no proof that she had. Here, had the employer done a better job of communicating with the employee before terminating her (and documenting that communication) the court may have dismissed the failure to accommodate claim before trial. These cases show some of the challenges employer's face when an employee requests an accommodation. Communication and documentation are critically important.

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