



McKENNA
EMPLOYMENT BULLETIN
James P. DeNardo and Kristin D. Tauras

www.mckenna-law.com

**DISABILITY CLAIM DISMISSED WHERE
EMPLOYEE DID NOT PROFFER A
REASONABLE ACCOMMODATION**

A claim for disability discrimination under the ADA was properly dismissed where the claimant could not articulate a reasonable accommodation. In McBride v. BIC Consumer Products Mfg. Co., Inc., --- F.3d ----, 2009 WL 3163218 (2d Cir., Oct.5, 2009), the plaintiff was an employee of BIC Manufacturing Company. BIC produces lighters, pens and shavers.

The Plaintiff worked in the cartridge assembly area of BIC's ink systems department, where she was exposed to various chemical fumes. The plaintiff became ill, suffering from a respiratory ailment as well as panic and anxiety attacks. She began treatment under the care of a variety of medical and psychiatric practitioners, who recommended that she be placed on medical leave. After her leave of absence, the plaintiff's treating psychiatrist cleared the plaintiff to return to work, with the restriction of "complete avoidance of chemical, solvent or ink fumes, as well as any other hydrocarbon fumes," and avoidance of "any inappropriate hassles or threatening confrontations."

Before returning, the plaintiff met with a supervisor. During this meeting, the supervisor offered to provide the plaintiff with a respirator that would deliver breathable air in order to accommodate the avoidance-of-fumes requirement. The plaintiff rejected the offer and did not suggest any other possible accommodations. The plaintiff was ultimately terminated.

The plaintiff filed a claim for failure to accommodate under the ADA and the District Court granted summary judgment in favor of BIC. The Second District affirmed. Under the ADA, the plaintiff bears the burdens of both production and persuasion as to the existence of some

accommodation that would allow her to perform the essential functions of her employment. The Court held that the plaintiff failed to show that she could perform her job with accommodation because she rejected the employer's proffered accommodation and did not proffer a reasonable accommodation of her own.

**GENETIC INFORMATION
NONDISCRIMINATION ACT OF 2008**

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements. Title II takes effect on November 21, 2009.

Genetic tests now exist that can inform people whether they may be at risk for developing a specific disease or disorder. As these genetic tests increase, concerns arise about whether individuals may be at risk of losing access to health coverage or employment if insurers or employers have their genetic information.

Title II of GINA prohibits use of genetic information in making decisions related to any terms, conditions, or privileges of employment, prohibits covered entities from intentionally acquiring genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits retaliation.

The same remedies available under Title VII are available under Title II of GINA. An aggrieved individual may seek reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages (including compensatory and punitive damages) and attorneys' fees and costs. Title VII's cap on combined compensatory and punitive damages also applies to actions under Title II of GINA.

To obtain a copy of the required EEOC poster reflecting the GINA information go to the EEOC website, www.eeoc.gov and click on "EEOC Poster" at the bottom of the website.

PROMPT ACTION TRUMPS NOOSE HUNG IN WORK PLACE

In Porter v. Erie Foods Intern., Inc., 2009 WL 2431991 (7th Cir. 2009), a coworker hung a noose in the work area. The employer responded promptly to this racial harassment incident. Upon discovering the noose, the supervisor immediately directed a coworker to take it down and inquired as to whether that coworker was responsible for hanging the noose. When the employee who found the noose came to the supervisor, the supervisor asked the employee if that employee knew who was responsible for the noose. The supervisor reported the incident to other supervisors and human resources and on the same evening human resources held a meeting for all workers and spoke privately with more than half the workers. The Court ruled, therefore, there was no basis for the employer's liability in the employee's hostile work environment claim under Title VII.

OUTSOURCING INTERVIEWS DOES NOT PREVENT ADEA CLAIMS

In Halpert v. Manhattan Apartments, Inc., 2009 WL 2881388 (2nd Cir. 2009), an interviewer for the employer told the applicant he was too old for the position. There was an issue of fact as to whether the interviewer who interviewed the job applicant was acting as the hiring agent, or apparent hiring agent, for the employer. The

employer argued that the interviewer was simply hiring on his own account without acting for the employer and the employer, therefore, could not be responsible for the interviewer's comments. The Court in Halpert held that it makes no difference because the ADEA prohibition on refusing to hire someone because of age applies regardless of whether an employer uses its employees to interview applicants for open positions, or whether it uses intermediaries, such as independent contractors, to fill that role.

PRESENTATIONS AND TRAINING ON EMPLOYMENT SUBJECTS

We at McKenna Storer are available to make presentations at your company or organize meetings on a variety of employment topics such as tips on hiring and firing; Genetic Information Nondiscrimination Act of 2008; the erosion of the employment-at-will doctrine; defending sexual harassment claims; the applicability of the Americans With Disabilities Act to commercial facilities, employment and the workers compensation statute; the Age Discrimination in Employment Act; Title VII of the Federal Civil Rights Act; the Family Medical Leave Act; drug and alcohol policies; how to respond to an EEOC charge; and coverage provided by and how to assess risks under an Employment Practices Liability Insurance Policy.

Please contact James P. DeNardo at 312.558.3922 or Kristin Tauras at 312.558.3923 for more information or to arrange for a presentation at your site.

McKenna Storer has offices located at:

33 N. LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 558-3900

666 Russel Court
Suite 303
Woodstock, IL 60098
(815) 334-9690

This Employment Bulletin is intended to provide information of general interest and does not constitute legal advice. Readers should consult with their counsel before taking any action based on the information in this publication. All rights reserved. Copyright 2009, McKenna Storer. For information, contact James P. DeNardo at 312.558.3922 or Kristin Tauras at 312.558.3923.